Terms Implied by Law into Employment Contracts: Rethinking their Rationale

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ABSTRACT

Prompted by the Australian High Court’s 2014 decision in Commonwealth Bank of Australia v Barker, this thesis investigates the rationale adopted by courts when they imply terms by law into employment contracts. It is well accepted that courts can fill gaps that exist in all contracts of a particular type by implying terms as default rules. In the case of employment contracts, however, it is difficult to identify the circumstances in which this gap filling will occur. Following an introduction to the general law on implied terms, this thesis traces the origins and current status of various terms implied by law into employment contracts. It then investigates the idea of employment contracts as a class and assesses the courts’ haphazard approach to identifying when it is ‘necessary’ for a term to be implied by law. The thesis also considers the broader judicial law-making role in implying such terms. In order to generate future clarity, concluding suggestions are made with respect to how courts ought to rethink the rationale they adopt when implying terms by law into employment contracts.
DECLARATION

I, Gabrielle Golding, certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name, in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name, for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint-award of this degree.

Some of the arguments in this thesis have been developed through publication during the course of research and writing.

Parts of Chapters 6 and 8 concerning the necessity test for implying a term by law were first published in:


This article was based on a paper I presented at a national conference in November 2014:


The exploration of the role of judges in regulating employment contracts in Chapters 7 and 8 have been informed by the consideration of the judicial role in:


This article was based on a paper I presented at an international conference in June 2015:

The summary of the Australian High Court’s decision in *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 in Chapter 4 is derived from an article I published in the Law Society of South Australia’s monthly Bulletin:


A number of the ideas presented throughout this thesis were also explored and discussed at the presentation of unpublished papers:

Gabrielle Golding, Andrew Stewart and Chris Bleby SC, ‘Mutual Trust and Confidence in the Employment Relationship: The High Court Decides’ (Seminar presented on behalf of the Australian Labour Law Association and the Adelaide Law School’s Work and Employment Regulation Research Group, Adelaide, 16 September 2014);

Gabrielle Golding, ‘Terms Implied by Law into Employment Contracts: Are they Necessary?’ (Staff seminar presented at the University of Strathclyde Law School, Glasgow, 27 January 2016); and

Gabrielle Golding, ‘The Implied Term of Mutual Trust and Confidence in Employment Law: Time for a Rethink?’ (Seminar presented on behalf of the Edinburgh Centre for Commercial Law at the University of Edinburgh, Edinburgh, 11 February 2016).

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I acknowledge the support I have received for my research through the provision of an Australian Government Research Training Program Scholarship.

_______________________________
Signature: Gabrielle Golding
8 March 2017
_______________________________
Date
The idea for this doctoral thesis grew from my experience as an instructing solicitor acting for the Commonwealth Bank in the matter, *Commonwealth Bank of Australia v Barker*. The Australian High Court’s decision in that case not to imply a term of mutual trust and confidence into all Australian employment contracts fuelled my inspiration to analyse the legal test courts adopt when they are asked to imply terms by law into employment contracts. It has given ample opportunity for me to question the rationale that courts adopt when they are asked to imply terms by law into employment contracts; an opportunity that I have relished in and thoroughly enjoyed in writing this thesis. I have attempted to state the law as of 8 March 2017. The responsibility for all remaining errors is, of course, entirely mine.

The completion of this thesis gives me the opportunity to acknowledge the intellectual example, generosity, and kindness of my principal supervisor, Professor Andrew Stewart, without whose extensive knowledge and encouragement the project would not have been possible. I am equally indebted to the advice and mentorship I have received from my co-supervisor, Associate Professor Joanna Howe; it has opened my mind to the opportunities that are available to me not just during my thesis, but beyond its completion.

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1 INTRODUCTION

1.1 Why rethink the rationale for implying terms by law into employment contracts?

[T]erms “implied by law” provide a legal expression of elements of the structural principles that shape the normative core of the legal institution of the contract of employment.

Hugh Collins (2016)¹

The common law operates to regulate contracts through various means.² One of the most significant ways in which regulation can occur is through the implication of terms to fill gaps that may exist. Employment contracts, as much as any other kind of contract, are susceptible to the implication of terms.

This thesis critically analyses terms implied by law into Australian employment contracts by reference to the test courts adopt when asked to imply a term by law. It establishes a portrait of the current test for implying terms by law and why its rationale needs to be reconsidered for its application to fill gaps in employment contracts. Not only does the thesis focus on how courts imply terms by law into employment contracts that have not been implied before, but also how existing terms have been implied by law into those contracts in the past.

Embarking on a study of terms implied by law into employment contracts must be underpinned by the general understanding of implied terms as ‘gap fillers’.³ Where ‘gaps’ in contracts arise, implied terms operate to fill those gaps. Indeed, contracts

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² See, eg, the rules concerning formation, terms, performance and termination of contracts.
commonly do not deal with the full range of terms that may be necessary to make them function. For instance, gap filling may occur because parties cannot reach agreement on a contract’s terms, thus making it necessary for a court to step in and regulate the agreement by implying a term. Gap filling may also cover certain terms that are deemed ‘essential’ to the validity and workability of a particular type of contract. In the context of employment contracts, essential terms will be elaborated on in Chapter 6.

As expanded upon in Chapter 2, there are various types of terms that can be implied into contracts to fill gaps. Such terms may be implied:

1. in fact into the particular contract in question, based on the presumed intention of the parties;
2. by custom, based on a custom or usage in a particular industry; or
3. by law, either through the operation of the common law or through statute.

This thesis focuses on terms implied by law through the common law into employment contracts, specific examples of which will be elaborated on in detail across Chapters 3 and 4. As discussed further below at Part 1.3, it draws on principles from employment and contract law, as well as the intersection between those two areas.

At common law, a term may be implied by law as a necessary incident of a particular class or category of contract, such as employment contracts or a particular type of employment contract. The idea of employment contracts as a ‘class’ into which terms are implied by law will be considered in detail in Chapter 5. The court needs to identify the necessary incidents of contracts in the applicable class, rather than focussing on the particular contract as an individual contract within that class.⁴ The concept of necessity will be considered in Chapter 6. Terms implied by law are of significance in that they ‘effectively provide “default rules” to govern the [employment] contract’,⁵ functioning ‘as standardised terms’.⁶ The elements of the existing test for implying a term by law, and its application to employment contracts, will be summarised in Chapter 2 and explored in more detail throughout the remainder of the thesis.

⁴ The latter approach to implying terms applies when a term is implied in fact and will be considered further in Chapter 2.
Terms implied by law have become commonplace in regulating the employment relationship, so much so that Hugh Collins recognises them as intrinsic to employment, labelling them as responsible for ‘shaping’ the employment relationship.7 Ian Neil and David Chin illustrate this point in their text dedicated to modern Australian employment contracts, explaining that ‘[t]erms implied by law are … a more significant feature of contracts of employment than of many other classes of contract’.8 They say that ‘[c]ompared to many other types of contracts, the content of employment contracts depends to an unusual extent on implied terms’.9 Adrian Brooks similarly states that ‘[t]he common law of employment resides to a very large extent in the implied terms of the contract’.10 Each of these views demonstrates that Australian employment contract law assumes the steady continuation of existing terms implied by law into employment contracts. There also exists an assumption that courts will continue to recognise terms implied by law into employment agreements according to the existing test for implying a term by law. For example, the authors of Macken’s Law of Employment write that even though existing ‘terms implied by law are relatively settled, this does not prevent the courts from suggesting, from time-to-time, new implied terms’.11

Notwithstanding these assumptions, there have, for some time, been doubts as to the approach that courts ought to take with respect to implying new terms by law across all employment contracts. As this thesis will demonstrate, courts have not fully explored the idea of employment contracts as a class into which terms are implied by law. Nor have they clearly articulated when it is ‘necessary’ to imply such terms. The judicial law-making role with respect to when courts should make rules with respect to employment contracts has been left unclear. The matter of whether a duty of good faith ought to operate as a term by law either in employment contracts, or contracts generally, has also received haphazard judicial attention. As the discussion below

7 Hugh Collins, ‘Implied Terms in the Contract of Employment’ in Mark Freedland (ed), The Contract of Employment (Oxford University Press, 2016) 471, 472. See the further discussion concerning terms implied by law into employment contracts shaping the employment relationship in Chapter 5.


9 Ibid.


suggests, following the Australian High Court’s decision in *Commonwealth Bank of Australia v Barker*\(^{12}\) the role of implied terms in employment contract is now even more ambiguous than in the past. The decision in *Barker* – which is the most recent, leading Australian authority concerning terms implied by law – confirmed that the time is ripe for a reconsideration of the rationale for implying a term by law into employment contracts.

### 1.2 The ambiguities in *Barker*

Mr Barker, a former senior executive employed by the Commonwealth Bank of Australia, was made redundant in 2009. He contended that the Bank had failed to properly conduct his termination process in accordance with its Redeployment Policy. That policy was not incorporated into Mr Barker’s employment contract. Indeed, it contained an express provision excluding it from forming part of any employee’s employment contract. Mr Barker claimed that the Bank’s failure to follow its Redeployment Policy seriously damaged the relationship of trust and confidence between him and the Bank. As a result, the Bank had breached an implied term of mutual trust and confidence that he said existed in his employment contract with the Bank – a duty which requires that an employer must not without reasonable and proper cause conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between itself and an employee.\(^{13}\)

In deciding the case, the High Court refused to imply a term of mutual trust and confidence as a matter of law into Australian employment contracts. That ruling was controversial. It was contrary to the position in the United Kingdom (as well as a number of other common law jurisdictions), where the judicial implication of the term is widely accepted.\(^{14}\) The High Court’s reasons for not implying the mutual trust and confidence term included that it was not necessary,\(^{15}\) and that its implication was a matter better left to parliament to decide upon.\(^{16}\) Given the significance of the decision,

\(^{12}\)(2014) 253 CLR 169.

\(^{13}\) *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20, 34.

\(^{14}\) See the further discussion on the term’s acceptance in the United Kingdom, as well as a number of other common law jurisdictions, in Chapter 4.

\(^{15}\)(2014) 253 CLR 169, [36]-[37].

\(^{16}\) Ibid, [1], [15], [20] and [29].
its content is discussed in further detail later in Chapter 4. For now, it is worth mentioning that the High Court’s reasoning generated doubt over the applicable legal test for implying a term by law in relation to all types of contract, and especially so in relation to employment contracts. It was also unclear as to how existing terms implied by law would be affected by the decision.

This thesis focuses on the following five matters left open by the High Court’s decision:

1. how to identify the so-called ‘class’ of employment contracts when a court is asked to imply a term by law into that class of contract;

2. what the judicial approach to the necessity test for implying a term by law ought to be in the future;

3. how the necessity test for implying a term by law can explain existing terms implied by law;

4. the broader law-making implications of the High Court’s reasoning in *Barker*, specifically in relation to whether or not courts should maintain a rule-making power with respect to Australian employment contracts by continuing to imply terms by law into those agreements; and

5. whether there ought to be duty of good faith implied by law into Australian employment contracts.

Other incidental matters were also left open by the High Court in *Barker*. These will be referred to briefly throughout the thesis, but not considered in any significant detail, which would be beyond the scope of the present exercise. These matters include whether internal policy documents ought to be incorporated into employment contracts, and the relationship between construction and implication of terms.

Overall, by leaving so many questions unanswered, *Barker* demonstrates that the existing test for implying terms by law may have evolved into an inappropriate mechanism by which to regulate modern employment relationships. Taking this into account, there is scope for further investigation into the way in which Australian courts ought to now imply terms by law into employment contracts. There is also reason to consider how existing terms implied by law into employment contracts will be affected by *Barker*. Indeed, in discussing the implied duties of mutual trust and confidence and
good faith, Joellen Riley has expressed a hope for ‘[t]he articulation of clear and bounded principles’ to encourage ‘[g]reater certainty in employment contract law’. This thesis’ deeper exploration of the rationale for implying terms by law into employment contracts is a step in the direction of generating greater certainty.

1.3 The goal of the thesis: clarifying the future rationale for implying terms by law into employment contracts

The main objective of this thesis is to explore ways in which the rationale for implying terms by law into employment contracts needs to be reconsidered. In doing so, the thesis critically addresses each of the five main matters left open following the High Court’s decision in Barker. To date, there has been no comprehensive analysis of this kind conducted in the Australian context, and particularly with reference to employment contracts. There is relatively little written that outlines the basis for implying terms by law into employment contracts, especially in light of the tests to be applied and the assessment of each of the factors involved. While particular attention has been paid to the implied term of mutual trust and confidence, very few scholars have considered the broader range of terms implied as a matter of law into Australian employment contracts. None have dealt with the question of whether the rationale for the continued implication of terms by law in employment contracts ought to be refashioned in the future.

Importantly, this thesis is not just concerned with employment law. As detailed below at Part 1.4, it draws on and makes unique contributions to employment law and contract law, as well as the intersection between those two areas. Indeed, as highlighted earlier in this introduction, in the context of terms implied by law, the test for implication should be a general one that applies to all contracts, including employment contracts. Moreover, the majority of the leading decisions concerning terms implied by law happen to involve a dispute over whether a term ought to be implied into an employment contract. It is therefore not surprising that, as suggested at the beginning

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18 See, eg, the extensive commentary on the mutual trust and confidence term discussed in Chapter 4.

of this chapter and for reasons explained further in Chapter 5, terms implied by law arguably play a greater role in respect of employment contracts than for most other types of contracts.

1.4 Methodology and structure

This section of the introduction details the methodology through which the arguments advanced in this thesis have been developed and tested. It also explains how the findings of the thesis will be developed in the following chapters.

The thesis adopts a triangulation of research methodologies, all of which are well-known to legal scholars. Each chapter is informed by the doctrinal research undertaken in Chapter 2, which is used to explain the general law governing express and implied terms. This is a research method that has been described as one which ‘provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments’.20 Questions around the historical development of select terms implied by law into employment contracts in Chapters 3 and 4 are informed by traditional historical and comparative research methodologies;21 understanding the legal framework in which each of these implied terms now operates is achieved through doctrinal research.

Chapters 5, 6 and 7 build on the earlier analyses in Chapters 2, 3 and 4, generating a more contextual analysis in respect of analysing the legal test for implying a term by law into employment contracts; that is, the legal test for implying a term by law into employment contracts will be discussed from a broader socio-legal perspective,22 rather than solely concentrating on a doctrinal analysis of what is commonly referred to as ‘black-letter’ law (ie the legal rules themselves). In considering the overarching research question of this thesis – specifically, how the rationale for implying terms by


law ought to be reconsidered – it is important to analyse the broader socio-legal consequences of applying the test beyond a strict application of the law alone. The discussion and analysis of the law in Chapters 5 to 7 encapsulates and demonstrates the extent of research that has taken place and on which the key arguments made in this thesis are based.

The majority of the research undertaken in this thesis draws on Australian-based sources across the areas of both employment and contract law, as well sources derived from the intersection between the two areas. This research material includes a combination of primary (ie case law and legislation) and secondary (or literary) sources, including books, academic journal articles and conference papers. Where appropriate, the thesis also considers relevant material from other common law jurisdictions, particularly the United Kingdom in respect of the comparative analyses undertaken in Chapters 3 and 4.

This thesis relies upon case law as the main source of primary evidence. In relying predominantly on primary sources, the aim is to avoid the errors of law that can be contained in secondary materials, which Alan Watson observes as one of the perils of comparative legal studies. However, some secondary sources are relied on, as it is recognised that to provide a closely grained analysis of the subject, and not a broad-brush account, a multiplicity of sources is needed. Commenting on the importance of ‘comprehensiveness’ for the legal scholar, Konrad Zweigert and Hein Kotz note that ‘the basic principle … is to avoid all limitations and restraints. This applies particularly to the question of “sources of law”’. This approach rejects a static conception of labour law and is mindful of Bob Hepple’s warning to avoid becoming ‘immersed in the ephemeral details of the present’ in favour of studying the evolution of labour law across jurisdictions over time.

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24 See, eg, Alan Watson, Legal Transplants (Scottish Academic Press, 1974) 6-7.


Chapters 2, 3 and 4 provide a comparative, historical and legal overview of terms implied by law into employment contracts. **Chapter 2** surveys the law associated with express and implied terms, as well as the relationship between implication and construction of contractual terms. It is a brief summary, reflective of the fact that many of the legal propositions in this area are relatively straightforward. This general analysis serves as an informative background and functions as a lens through which to view the remaining content of the thesis.

**Chapter 3** engages in an historical and comparative analysis of a selection of well-recognised terms implied by law into employment contracts. It traces the origins of each select term from the United Kingdom through to the term’s present status in Australia. The selection of terms for analysis has occurred on the basis that they are commonly referred to in employment law textbooks as well-established terms implied by law into employment contracts. It does not appear that a similar exercise has been undertaken in respect of these terms before. Hence, this chapter offers a new and original analysis of the origins of the particular terms that are analysed.

What the chapter demonstrates is that most terms implied by law into Australian employment contracts have their origins in English employment law. In most cases, while many of those terms now operate as terms implied by law into all employment contracts, that is not how they typically originated. The majority have developed from equity, tort and the former master and servant regime. Only later did they become accepted as terms implied by law. The problem with this historical path is that it avoids any adequate consideration of why the terms are necessary incidents of employment. Their application to some or all instances of employment is simply presumed.

**Chapter 4** concentrates specifically on the implied duties of mutual trust and confidence and good faith. Given the controversy surrounding both of these duties in Australian employment contract law, it makes sense to consider them separately in this chapter. As with Chapter 3, the chapter traces the historical origins and current status of both duties in Australian employment contract law. It makes clear that while the mutual trust and confidence duty has been clearly rejected in Australia, the status of a good faith duty in contracts generally and employment contracts specifically remains uncertain.
Chapters 5, 6 and 7 address the more specific issues associated with implying terms by law into employment contracts. **Chapter 5** considers the first element of the test for implying a term by law as a necessary incident of employment contracts: that the term must be necessary in that ‘class’ of contract. It undertakes a comprehensive analysis of employment contracts as a ‘class’ into which terms are implied by law.

What the discussion in this chapter demonstrates is that, in the context of implying terms by law, the class of employment contracts is not easily identifiable. In fact, the so-called ‘class’ is an overly generalised and inconsistently defined category into which terms have been and are implied by law. In that sense, the employment contract does not necessarily confine itself to an entirely unique definition or understanding. It retains a whole range of characteristics that are also present in other types of contract. The courts have paid sparse attention to identifying and understanding employment contracts as a class of contract when they imply terms by law. As such, there is scope for the courts to develop their understanding of the employment contract as a class. Generating this further understanding will assist courts in developing the common law that regulates employment contracts. It will also allow for more accurate predictions of how the common law is likely to develop in respect of those agreements. Given it does not appear that the status of employment contracts has been analysed or questioned in this way before, this chapter offers a unique and original analysis that contributes to the fields of both employment and contract law.

In **Chapter 6** the focus is on the second element of the test for implying a term by law into a particular class of contract: that the term must be ‘necessary’. It assesses both the narrow and wide interpretations of the necessity test for implying a term by law that have emerged, and the confusion caused in relation to which understanding of the test should be adopted following the High Court’s decision in *Barker*. On a narrow interpretation, the implication of the term will be necessary to ensure that the enjoyment of the rights conferred by the contract will not be ‘rendered nugatory, worthless, or … seriously undermined’. 27 Quite differently, on the wider interpretation, the test allows the court to consider matters of ‘justice and policy’ 28 in deciding whether a term is necessary to imply by law. This chapter also highlights that while certain terms are

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28 See, eg, *University of Western Australia v Gray* (2009) 179 FCR 346, [141]-[147].
necessary to the functionality of an employment agreement, others are not, and therefore, they ought to be capable of exclusion or modification. The analysis offers a new and original insight into the understanding of the necessity test when courts are asked to imply a term by law, both into contracts generally, and into employment contracts specifically.

Chapter 7 is an assessment of the broader judicial role in implying terms by law into employment contracts. In light of the High Court’s comments made in Barker that the implication of the mutual trust and confidence term is a matter best left to parliament (rather than the courts), it questions the future judicial role in making law with respect to employment contracts. It considers the general debate as to whether the courts or parliament should make laws with respect to employment contracts, and then offers a view as to how this debate ought to be resolved in respect of allowing for the regulation of employment contracts through terms implied by law in the future. Specifically, it makes an argument for greater coherence between statute and the common law to ensure the continuation of a judicial law-making role, even where there are defensible policy positions on both sides of an argument. It does not appear that the courts’ law-making power with respect to implying terms by law into employment contracts has been considered in this light before. Therefore, this chapter offers an original contribution to the fields of employment and contract law.

Chapter 8 draws conclusions in relation to how the courts might rethink their rationale for implying terms by law into employment contracts. Following upon the analyses of previous chapters, it suggests four options for reform. These include, firstly, that there is a need for the courts to reclassify employment contracts as a class of contract into which terms are implied by law. Secondly, courts must clarify when it is ‘necessary’ to imply a term by law into the class of employment contracts. Thirdly, the judicial role must be clarified in relation to the regulation of employment contracts through terms implied by law. Lastly, there ought to be greater clarity around whether or not a good faith duty exists in employment contracts and, if it does, whether it operates as a term implied by law, or through some other means. Each of these claims is expanded on in Chapter 8.

Overall, this thesis argues for reform in relation to the legal test for implying terms by law: a test which the courts have haphazardly applied, both in the lead up to the Barker
decision, as well as in the Barker decision itself. The main proposal put forward in Chapter 8 is for parliament to intervene, and also for the High Court to reform and clarify the common law in respect of terms implied by law into employment contracts and into contracts more broadly. In recognition of the need for greater coherence between statute and the common law, these legislative and judicial reforms ought to coincide. This thesis will offer insight into the ways in which the legal test for implying terms by law could be refined, both in respect of employment contracts and contracts more generally.
2 BACKGROUND TO IMPLIED TERMS IN CONTRACTS GENERALLY

2.1 Introduction

This chapter introduces implied terms, as distinct from express terms. Its focus is on the general law of contract as it applies to all contracts, including employment contracts. The overarching purpose is to set up a legal framework for the remainder of the thesis, which focuses specifically on terms implied by law into employment contracts. The broad overview in this chapter is reflective of the fact that the general law on express and implied terms is relatively straightforward. As will be borne out in later chapters, however, ambiguities exist in respect of terms implied by law into employment contracts, which warrant separate discussion. This chapter is a precursor to the discussion of those more specific issues.

Given the primacy of express terms over implied terms, it is logical to consider them first in Part 2.2. This discussion is also important in the greater context of this thesis: to fully understand whether or not it is appropriate to imply any term into any contract, one must first look to its express terms. The chapter then moves to a consideration of the separate legal tests for the three main categories of implied terms in Part 2.3: those implied in fact, by custom and usage, and by law. Part 2.4 addresses the relationship between implication of terms and construction, which is a distinction that will be briefly returned to in later parts of the thesis. Part 2.5 makes concluding comments about the current state of the law concerning express and implied terms in contracts generally. It leads into the more specific historical analysis of terms implied by law into employment contracts in Chapter 3.

2.2 Express terms

As the introduction to this chapter suggests, the rights and obligations of parties to a contract are determined, at least in the first instance, by the contract’s express terms, which are those explicitly agreed upon by the parties. Apart from the operation of any

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1 As discussed in Chapter 5, there is an ongoing debate as to the extent to which general contract principles should apply to employment contracts in particular.
relevant statutory implied terms;\(^2\) courts will only ever imply terms to the extent that they are not inconsistent with the existing express terms of the contract in question.\(^3\) Any implied term must also operate to give effect to the express terms of the contract.\(^4\) Express terms can be oral, written, or a combination of both. Unless required by statute,\(^5\) express terms need not be recorded in a formal written document.\(^6\) They can be found in any communication relating to the making of the contract, such as ‘email correspondence, letters or telephone conversations’.\(^7\) Express written terms might be specifically negotiated between the parties, or perhaps set out in a standard form document prepared by one party and presented to the other, often on a take-it-or-leave-it basis. In relation to employment contracts, Hugh Collins notes that because we are now in an ‘era of extensive written contracts of employment’,\(^8\) this is generally how employers will present their contracts to employees. He suggests that ‘[t]he terms of the [employment] contract will normally have been drafted by the employer or its lawyers’,\(^9\) leaving little room for negotiation between the parties. That said, this format is not necessarily the case for all employment contracts, or even for any other type of contract. It is still possible that oral terms might be verbally agreed between the parties.

\(^2\) See the below discussion concerning statutory implied terms at Part 2.3.3.


\(^4\) See, eg, Ian Neil and and David Chin, The Modern Contract of Employment (Lawbook Co, 2012) 101. See also Vodafone Pacific Ltd v Mobile Innovations Ltd [2004] NSWCA 15, [201]. As mentioned below in Part 2.3, this is one of the criteria for implying a term in fact mentioned in BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266, 283.

\(^5\) See, eg, National Consumer Credit Protection Act 2009 (Cth) sch 1, s 55, which requires that contracts supplying credit or consumer mortgages must be in writing; Building Work Contractors Act 1995 (SA) s 28, which requires that contracts for the performance of domestic building work to the value of $12,000 or more must be in writing; Second-hand Vehicle Dealers Act 1995 (SA) s 17, which requires that contracts for the sale of second-hand motor vehicles by dealers must be in writing; Law of Property Act 1936 (SA) s 26, which provides that contracts for the sale of land, or any interest concerning land, must be in writing; Competition and Consumer Act 2010 (Cth) sch 2, ss 78-79, which provides that unsolicited consumer agreements (eg door-to-door and telephone sales) must be in writing. There is no such general requirement for employment contracts.


\(^7\) Ibid, 290.


\(^9\) Ibid.
either in combination with written contractual terms, or as an entirely verbal agreement. The following discussion briefly considers, first, how express terms can be incorporated as part of a contract depending on whether they are oral or in writing, and, second, how express written terms are interpreted when they become part of contract.

Provided there are no issues with the parol evidence rule, a party who wants to incorporate an oral statement made during negotiations will need to establish that the statement has contractual force as a ‘warranty’, rather than being a ‘mere representation’. For an oral statement to constitute a warranty, the statement must have been intended by the parties to have contractual force. The court will need to objectively assess whether a person in the parties’ position would reasonably have considered the statement to be contractually binding. The more significant an oral statement, the more likely it will be regarded as a warranty. A statement is also more likely to carry contractual force if it uses words that suggest a promise. ‘The relative knowledge or expertise of the parties may be relevant in assessing whether a statement was made as a promise or as a mere representation. A statement made by a party with expertise to a person who is inexperienced is more likely to be promissory than a statement made by a party known to be inexperienced.’

Separate from express oral statements, written terms may be incorporated into a contract in one of three main ways. The first is by signature. According to the rule in

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10 This rule limits the extrinsic evidence that may be used to vary or add to the terms of a written contract. See, eg, the explanation of the rule in Goss v Lord Nugent (1833) 5 B & Ad 58, 64-65; Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337, 347.

11 As to the difficulties that may be encountered in establishing the terms of a purely oral contract, see, eg, Connelly v Wells (1994) 55 IR 73 and Cuthbert v Impulse Airlines Pty Ltd [2004] TASSC 19, where the plaintiff could not prove that she had received and accepted an oral offer of employment, as cited in Andrew Stewart et al, Creighton and Stewart’s Labour Law (6th ed, Federation Press, 2016) 277.

12 See, eg, Oscar Chess Ltd v Williams [1957] 1 WLR 370, 375; Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 41, 61.


14 Eg ‘promise,’ ‘agree,’ ‘guarantee,’ ‘warrant’ etc. Cf JJ Savage & Sons Pty Ltd v Blakney (1970) 119 CLR 435, where the words used suggested an expression of opinion only.

A party is taken to be ‘bound by any document that they sign, even if they have not read or understood it, so long as they have not been misled as to the content or effect of the document’. Second, reasonable notice through display or delivery of terms might also mean that the terms become contractually binding, provided that the notice is given before the contract is entered into. Third, where parties have contracted via a series of agreements, terms might be incorporated by way of reasonable notice through a prior course of dealings, and it will not matter if the notice of the terms is given after each individual contract is formed. In each of these situations, the document containing the terms must be intended to have contractual force.

If a dispute arises about the meaning of an express term, it may be necessary for the court to interpret it. This process involves the court objectively determining what a reasonable person would have intended the words to mean, rather than subjectively asking what the parties actually intended their words to mean. If an agreement is purely in writing, the court’s focus will be on the words actually used by the parties to describe their obligations. The bigger issue associated with the interpretation of

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16 [1934] 2 KB 394, 404, affirmed by the High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, [42]-[48].


19 See, eg, *Oceanic Sunline Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 206-207, 228-228, 256 and 261. If the term is particularly onerous or unusual, then special notice is required: see, eg, *Interfoto Picture Library v Stiletto Visual Programs Ltd* [1989] 2 QB 433, 445.


21 See, eg, *La Rosa v Nudrill Pty Ltd* [2013] WASCA 18, [81]-[90].

22 Whether or not the document is contractual will be easier to ascertain in some situations than others: see, eg, the further discussion in Andrew Stewart et al, *Creighton and Stewart’s Labour Law* (6th ed, Federation Press, 2016) 277.

23 Ibid, 279.


written terms will be where there is extrinsic evidence.\textsuperscript{26} Andrew Stewart and others provide a useful summary of the complicated state of the law in this area.\textsuperscript{27} They suggest that where an obvious ambiguity arises, the court may look to what the parties have said or done before entering into their contract.\textsuperscript{28} Courts may also have regard to the general context or circumstances in which the contract is made, in order to determine its meaning.\textsuperscript{29} Notwithstanding a series of conflicting High Court authorities, Stewart and others suggest that ‘the better view would seem to be that such contextual evidence is always admissible (in the sense of being available for a court to consider) even if the written terms are not ambiguous on their face’.\textsuperscript{30} However, it cannot be used to ‘contradict the language of the contract when it has a plain meaning’.\textsuperscript{31} It is also not permissible to take account of what parties have said or done after making their contract, at least in respect of interpreting agreed terms.\textsuperscript{32} However, the courts’ use of such information may be allowable where the parties’ subsequent conduct helps establish the subject-matter of an agreement (eg the scope of an employee’s duties).\textsuperscript{33}

\subsection*{2.3 Implied terms}

As suggested in Chapter 1, in any contractual agreement it is not always possible for parties to foresee every matter that ought to be expressly agreed upon in the contract between them, even where their agreement is governed by a detailed written agreement.
Parties may also fail to, or find themselves unable to, agree on certain terms. Particular terms might also be seen as essential to the functionality of a specific type of contract. In each of these instances, there is a gap in the contractual agreement and implied terms may operate to fill those gaps. The notion of implied terms as ‘gap fillers’ has already been touched on in Chapter 1. As also mentioned in that chapter, employment contracts, as much as any other kind of contract, are susceptible to the implication of terms.

There are three main categories of terms that can be implied into any type of contract, each of which has its own rules that will be discussed below in this part: terms implied in fact, terms implied by custom and usage, and terms implied by law. As already emphasised in Chapter 1, it is those implied by law that are the primary focus of this thesis. While they can come into operation through the common law or statute, the central concern of this thesis are the terms implied at common law into the class of employment contracts.

2.3.1 Terms implied in fact

Terms implied in fact are implied into the particular contract in question, based on the presumed intention of the parties. They are ‘tailored’ and ‘unique to the particular contract in question’. As summarised below, the applicable legal test for implying a term in fact will differ depending on whether the contract is in writing or not.

Where a term is sought to be implied in fact into a contract in writing, the five cumulative tests in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* will need to be satisfied. For a term to be implied:

1. it must be reasonable and equitable;
2. it must be necessary to give business efficacy so the contract is effective without it;
3. it must be so obvious that “it goes without saying”;
4. it

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34 Cf the suggestion that there are two additional categories of implication by way of a ‘course of dealing’ and ‘construction’ in John Carter et al, ‘Terms Implied in Law: “Trust and Confidence” in the High Court of Australia’ (2015) 32 *Journal of Contract Law* 203, 207. While the potential for these additional categories is noted, this thesis concentrates on the widely accepted categories of implication as discussed in this chapter.


37 (1977) 180 CLR 266.
must be capable of clear expression; (5) it must not contradict any express term of the contract.\(^38\)

The combination of these individual tests sets a high threshold for the implication of a term in fact: all five must be satisfied for the implication to occur.\(^39\) As Stewart and others note, ‘[i]f applied rigorously, this is a very difficult set of conditions to fulfil’.\(^40\) Jeff Goldsworthy has argued that this strict application of the tests is necessary because of the very rationalisation that terms implied in fact are based on the explicit intentions of the parties.\(^41\) As Jeannie Paterson and others note, the application of the tests has ‘also been criticised’.\(^42\) In particular, it has been argued that because ‘terms implied in fact are premised on giving effect to the presumed intentions of the parties, the focus of inquiry in implying a term should be those intentions or expectations, not compliance with a set of formal criteria’.\(^43\)

Separately, it has been suggested that when seeking to imply a term in fact there are actually just two separate tests, either of which may be satisfied to justify the implication: one of ‘business efficacy’, or alternatively that the term to be implied must be ‘so obvious that it goes without saying’.\(^44\) In particular, some English decisions support this twofold classification.\(^45\) Despite this view, however, Australian law


\(^{39}\) For a more detailed consideration of each of these five tests, see, eg, Jeannie Paterson, Andrew Robertson and Arlen Duke, Principles of Contract Law (5th ed, Lawbook Co, 2016) 339-342.


continues to rely on the application of the five cumulative tests from *BP Refinery*, though there is one major exception.

The exception is that if a term is sought to be implied in fact where there is no formal written agreement, the single, and seemingly more flexible, test espoused by Deane J in *Hawkins v Clayton* must be satisfied:

In a case where it is apparent that the parties have not attempted to spell out the full terms of their contract, the court should imply a term by reference to the imputed intention of the parties if, but only if, it can be seen that the implication of the particular term is necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case.

Paterson and others have noted that this statement from *Hawkins* specifically identifies ‘reasonableness or efficacy each as a sufficient ground for implying a term in fact’. Accordingly, it seems ‘surprising in the face of authority that reasonableness alone is not a sufficient basis for implying terms in fact’. Perhaps then, the ‘better view’, as expressed by Greg Tolhurst and John Carter, is that “efficacy” is the overriding concern, and a term will not be implied into a contract effective without it even if it would lead to a more reasonable operation. Even so, in *Byrne v Australian Airlines Ltd*, a case that will be returned to throughout this thesis (particularly in Chapter 6), McHugh and Gummow JJ suggested ‘that obviousness also remains an important

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47 Specifically, ‘in cases where the parties have clearly reached an agreement, but have not attempted to spell out the terms of their contract in full’: see, eg, Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (5th ed, Lawbook Co, 2016) 344.

48 As Stewart and others note, in practice, it is debatable whether this test is any easier to satisfy than the five *BP Refinery* tests: Andrew Stewart et al, *Creighton and Stewart’s Labour Law* (6th ed, Federation Press, 2016) 281, citing *Griggs v Noris Group of Companies* (2006) 94 SASR 126 as an illustration of this point.


52 Ibid.


element in implying a term [in fact] in an informal contract’.\(^{55}\) The application of this
test will be returned to in Chapter 4 in respect of potential arguments that could have
been raised by the parties in *Commonwealth Bank of Australia v Barker*.\(^{56}\) As has been
noted in Chapter 1, most employment contracts will not be fully expressed in writing,\(^{57}\)
so this test for implication in fact carries some significance in respect of those
agreements.

### 2.3.2 Terms implied by custom and usage

For terms implied by custom and usage, their implication is based on a custom or usage
in a particular industry. Such terms will be implied in situations where their generic
usage is ‘well known or acquiesced in’ and ‘everyone making a contract in that
situation can reasonably be presumed to have imported that term into the contract’.\(^ {58}\)

Four guiding principles for ascertaining whether a term ought to be implied by custom
and usage have been outlined by the High Court in *Con-Stan Industries of Australia Pty
Ltd v Norwich Wintehur Insurance (Australia) Ltd*\(^ {59}\) as follows:

1. ‘The existence of a custom or usage that will justify the implication of a term
   into a contract is a question of fact’.\(^ {60}\)

2. While it need not be universally accepted, ‘there must be evidence that the
custom relied on is so well known and acquiesced in that everyone making a

\(^{55}\) Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (5\(^{th}\) ed, Lawbook

\(^{56}\) (2014) 253 CLR 169.

\(^{57}\) See, eg, Andrew Stewart et al, *Creighton and Stewart’s Labour Law* (6\(^{th}\) ed, Federation Press, 2016)
281.

\(^{58}\) *Con-Stan Industries of Australia Pty Ltd v Norwich Wintehur Insurance (Australia) Ltd* (1986) 160
CLR 226, 236, which was endorsed in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 423-424 and
440 and *Breen v Williams* (1996) 186 CLR 72, 123.

\(^{59}\) (1986) 160 CLR 226.

\(^{60}\) Ibid, 236. A custom must be strictly proved: see, eg, *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd*
(1973) 129 CLR 48, 52 and 60-61; *Nelson v Dahl* (1879) 12 Ch D 568, 575; *Rickless v United Artists
Corporation* [1988] QB 40. There is an argument that a custom may become so well-known that the
courts could simply take judicial notice of it, rather than require formal proof through evidence: see, eg,
*Moul v Halliday* [1897] 1 QB 125, 130; *George v Davies* [1911] 2 KB 445. When a custom reaches this
level of acceptance, it may even be best described as a term implied by law: see, eg, Mark Irving, *The
contract in that situation can reasonably be presumed to have imported that term into the contract’. It must be ‘uniform, notorious, reasonable and certain’.

3. ‘A term is not implied on the basis of custom and usage if it is contrary to the express [and perhaps implied] terms of the contract’ and applicable statutes.

4. ‘A person may be bound by a custom notwithstanding the fact that he [or she] had no knowledge of it’.

Paterson and others inform us that the courts have tended to strictly apply these requirements, which means that there are not many examples of terms implied by

61 (1986) 160 CLR 226, 236, endorsed by the High Court in Byrne v Australian Airlines Ltd (1995) 185 CLR 410, 423 and 440 and Breen v Williams (1996) 186 CLR 71, 123. The trade or profession in which the custom is applied may be defined broadly or narrowly: see, eg, Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd (1973) 129 CLR 48 (warehousemen); Abernathy v Mott, Hay and Anderson [1974] ICR 323 (civil engineers); Evans Deakin v Allen [1946] St R Qd 187 (apprentices in the metal industry); Sagar v Ridehagh & Sons Ltd [1931] 1 Ch 310 (weavers in Lancashire); Danowski v Henry Moore Foundation (1996) 140 SJLB 101 (proof that the custom applies in one part of the trade will not support an inference that it applies to all employees across the whole trade).

62 (1986) 160 CLR 226, 236. See also AssetInsure Pty Ltd v New Cap Reinsurance Corp Ltd (In Liq) (2006) 225 CLR 331, 353 [60]. As to ‘notoriety’ see, eg, Summers v The Commonwealth (1918) 25 CLR 144, 148; Ryan v Textile Clothing and Footwear Union of Australia (1996) 130 FLR 313, 340; Bond v Cav Ltd [1983] IRLR 360. As to ‘reasonableness’ see, eg, Thornley v Tilley (1925) 36 CLR 1, 8; Nelson v Dahl (1879) 12 Ch D 568, 575; Evans Deakin v Allen [1946] St R Qd 187, 19; Moult v Halliday [1897] 1 QB 125, 128 and 130; GKN (Cwmbran) Ltd v Lloyd [1972] ICR 214, 219-220. As to ‘certainty’ see, eg, Devonald v Rosser & Sons [1906] 2 KB 278, 741; Thornley v Tilley (1925) 36 CLR 1, 8, both approved by the High Court in Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd (1986) 160 CLR 226, 236.

63 (1986) 160 CLR 226, 236-237. See also Summers v The Commonwealth (1918) 25 CLR 144, 148 (later affirmed on appeal in (1919) 26 CLR 180); Uszok v Henley Properties (NSW) Pty Ltd [2007] NSWCA 31, [23]; Sutcliffe v Hawker Siddley Aviation Ltd [1973] ICR 560, 567 (express power to transfer and employee was inconsistent with the alleged custom that the transferred employee was made redundant); Solectron Scotland Ltd v Roper [2004] IRLR 4 (irregular practice of the employer in renegotiating redundancy agreements did not establish a custom that the expressly agreed redundancy policy was not enforceable); French v Barclays Bank PLC [1998] IRLR 646 (express term reserving the employer a discretion as to whether a benefit was to be conferred excluded an alleged custom about the terms on which the benefit was to be conferred).


66 (1986) 160 CLR 226, 236-237. These four principles were also summarised in Goodman Fielder Consumer Foods Ltd v Cospak International Pty Ltd [2004] NSWSC 704, [64].
In the context of employment, the implication terms based on custom and usage is also a rarity. ‘A century ago, such terms were a significant source of employment obligations, but are now in practice almost a dead letter.’ The current reluctance to imply a term by reason of custom and usage into an employment contract is evidenced by *Ryan v Textile Clothing and Footwear Union of Australia*, where it was held that past conduct that was exceptional, infrequent or otherwise equivocal, or had not occurred at the time the contract of employment was made, was unlikely to establish a relevant custom or usage. Courts have also tended to refuse to imply a term based on custom or usage into the employment contract of an employee who is entering a particular custom or trade for the first time.

### 2.3.3 Terms implied by law

As already mentioned at the beginning of this part, terms can be implied by law either through the common law or by operation of statute. Both possibilities are considered here in turn. At common law, terms may be implied by law as necessary incidents of a particular class or set category of contract. When performing the task of implying a

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71 See, eg, *Turner v Australasian Coal and Shale Employee Federation* (1984) 6 FCR 177, 182-183, where a custom did not bind a trainee entering the industry; *Evans Deakin v Allen* [1946] St R Qd 187, 199, where a custom did not bind an apprentice entering the industry; *Mackie v Wienholt* (1880) 5 QSCR 211, 212-213, where a custom did not bind a cook engaged in London to perform work in Goomburra, Queensland; *Greene v Moss* (1995) 14 WAR 333, where a custom did bind an employee who had been working for a few months in the industry; *Fielder v Christofani* (1901) 20 NZLR 491, where an Australian custom did not bind a New Zealand employer who engaged an Australian worker to travel from Australia to perform work in New Zealand.

72 These categories are not closed: see, eg, *Castlemaine Tooheys v Carlton & United Breweries* (1987) 10 NSWLR 468, 487.
term by law, the court is not directly giving effect to the parties’ intentions. The focus is on the particular class or category of contract into which the term is to be implied, rather than the particular contract as an individual contract within that class (as it would be for a term implied in fact). Despite the clearly separate legal tests to be applied, courts have been known to confuse the implication of terms in fact and by law, and have applied the wrong test for implication. This confusion will be discussed further in Chapter 6.

In terms of the legal test for implying a term by law through the common law, first, the term must be applicable to a recognised ‘class’ of contract. Relevantly, courts query whether the contract in question belongs to a class ‘[w]hose inherent nature require[s], as a matter of law, inclusion of an obligation in the terms’ advanced. Employment contracts as an apparent ‘class’ into which terms are implied by law are considered further in Chapter 5. Second, the term must be ‘necessary’. The concept of necessity will be explored in further detail in Chapter 6.

Terms implied by law at common law are significant, in that they will be implied into all contracts within the identified class where they are deemed necessary, unless they have been expressly excluded from a contract, inconsistent with its express terms, or the exclusion is otherwise indicated by the circumstances of the making of

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74 See, eg _Byrne v Australian Airlines Ltd_ (1995) 185 CLR 410, 448-453; _Breen v Williams_ (1996) 186 CLR 72, 103, in a passage that was adopted by the New South Wales Court of Appeal in _Australis Media Holdings Pty Ltd v Telstra Corporation Ltd_ (1998) 43 NSWLR 104, 122-123.


77 As Chapter 6 will make clear, there are competing narrow and wide approaches to the necessity test for implying a term by law. That chapter also discusses the ambiguity surrounding the future application of the necessity test, following the High Court’s decision in _Commonwealth Bank of Australia v Barker_ (2014) 253 CLR 169.


the contract. As will be discussed later in Chapters 5 and 6, however, there are some existing terms implied by law into the class of employment contracts, which function as ‘defining’ features of employment and should arguably be incapable of exclusion.

Separate from terms implied by law through the common law, terms implied by law through the operation of statute come into effect through parliament’s passing of relevant legislation. The most obvious examples exist in respect of contracts for the sale of goods, whereby the Sales of Goods Acts that operate in each Australian state/territory imply terms by law directly into those contracts. In relation to Australian employment contracts, however, there are relatively few statutory implied terms. The situation is similar in other common law jurisdictions. Statutory rules and statutory-based regulations that regulate employment are far more common. These rules and regulations impose obligations outside of, and in addition to, the contractual relationship. They typically establish minimum entitlements in employment, with the primary example being the National Employment Standards contained in Part 2-2 of the *Fair Work Act 2009* (Cth). They operate alongside employment contracts as a form of

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83 Statutory implied terms in the employment contract are also rare in England and New Zealand. Principal examples of terms implied by statute in England include: *Sale of Goods Act 1979* (UK); *Supply of Goods and Services Act 1982* (UK); *Supply of Goods (Implied Terms) Act 1973* (UK); *Marine Insurance Act 1906* (UK). These are discussed in Richard Austen-Baker, *Implied Terms in English Contract Law* (Edward Elgar, 2011) ch 6. One limited example in employment is conferred by the *Equal Pay Act 1970* (UK) s 1(2), in the form of an ‘equality clause’, which is deemed to be a term of all personal work or employment contracts. In New Zealand, as in England and Australia, employment statutes similarly provide for various minimum entitlements, but contain very few implied terms. A significant exception is New Zealand’s statutory implied term of good faith in relation to individual employees’ terms and conditions of employment: see *Employment Relations Act 2000* (NZ) ss 3 and 4, as discussed in Gordon Anderson, ‘Good Faith in the Individual Employment Relationship in New Zealand’ (2011) 32 *Comparative Labour Law and Policy Journal* 685, 711-717, and mentioned again in Chapter 8.
legislative regulation of the employment arrangement. The notion of statutory rules operating to regulate employment contracts will be returned to in Chapter 8.

2.4 Implication and construction

‘Construction is the process through which courts determine the meaning and legal effect of terms of a contract.’ The orthodox legal approach has been to treat construction and implication as separate applications of contract doctrine. Nevertheless, there are some implied terms that have the potential to be implied into a very large number of contracts, if not all contracts. One obvious example is an implied term of cooperation, the content of which is discussed in Chapter 3. On the one hand, such a term may be viewed as one implied by law into all classes of contract. On the other hand, it can be argued that by definition, such a term does not form part of ‘a coherent category, with dedicated implication criteria’ and therefore arises as a matter of construction of the contract. Indeed, while a universal term of this kind might state a default rule, that is not because its implication is referrable to a particular class of contract. As John Carter and others suggest, ‘whether such implications actually exist as implied terms, rather than as common law duties or rules which are applied in construction, is open to debate’.

87 It has also been suggested that a duty of good faith could be construed as a rule of construction: see generally, Elisabeth Peden, Good Faith in the Performance of Contracts (LexisNexis Butterworths, 2003) ch 6 and the further discussion on good faith in Chapter 4 of this thesis.
This debate was touched on by the Australian High Court in *Barker*, the facts of which will be discussed in Chapter 4. The joint judgment of French CJ, Bell and Keane JJ referred to a ‘duty to cooperate’ as illustrating a category of ‘universal implication’. The court conceded that such a duty could ‘arguably be characterised as a rule of construction’, and, more generally, that prior decisions of the High Court support the view that such ‘universal implications’ may also be ‘characterised as rules of construction’. At another point, the joint judgment agreed that this alternative characterisation of the implied duty could well be correct. Nevertheless, French CJ, Bell and Keane JJ concluded that the debate reflects ‘taxonomical distinctions which do not necessarily yield practical differences’. As such, the relationship between implication and construction in Australian contract law remains unclear.

In the United Kingdom the Privy Council challenged the distinction between implication and construction in *Attorney General of Belize v Belize Telecom Ltd*, ‘if not generally, then at least in relation to terms implied in fact’. Curiously, the joint

where it is suggested that in order to constrain the power exercised by the employer over the employee, the implication of terms ought to be approached as a matter of construction.

92 (2014) 253 CLR 169, [29].

93 Ibid, [37]. As discussed later in Chapter 4, this terminology is separate from classifying the duty as a principle of construction. It refers to the classification of the duty as one implied by law into all classes of contract.

94 (2014) 253 CLR 169, [25].

95 Ibid, [29] (‘whether or not such implications are characterised as rules of construction’).

96 (2014) 253 CLR 169, [24].


judgment of the High Court in Barker cited Belize,¹⁰⁰ but this reference was later labelled as ‘quite perplexing’, given that Barker contains ‘no clear statement … about the role of construction in implication’.¹⁰¹

In Belize, Lord Hoffman held that ‘the implication of the term [in question was] … not an addition to the instrument. It only spells out what the instrument means’.¹⁰² He went on to find that the ‘proposition that the implication of a term is an exercise in … construction’ was a ‘matter of logic (since a court has no power to alter what the instrument means)’.¹⁰³ In his view, it was ‘also well supported by authority’.¹⁰⁴ For Lord Hoffman, this understanding meant that:

[In every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean.¹⁰⁵

Under this ‘Belize approach’,¹⁰⁶ the rules governing the implication of terms are those which regulate construction of contracts. Therefore, the implication of a term (or at least one implied in fact), of itself, is an exercise of construction.

While support for Belize in the United Kingdom initially appeared to be growing,¹⁰⁷ this soon changed as a consequence of the United Kingdom Supreme Court’s 2015 decision in Marks & Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd.¹⁰⁸ As a consequence of that decision, whether this Belize approach remains a statement of English law (as Lord Hoffman obviously thought) is now doubtful. In

¹⁰⁰ (2014) 253 CLR 169, [22].
¹⁰³ Ibid.
¹⁰⁴ Ibid.
¹⁰⁶ This terminology is adopted by the authors throughout Wayne Courtney and John Carter, ‘Implied Terms: What is the Role of Construction?’ (2014) 31 Journal of Contract Law 151.
¹⁰⁷ The proposition ‘that the implication of a term is an exercise in … construction of the instrument as a whole’ was adopted in Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn) [2009] 2 Lloyd’s Rep 639, 641. See also Fortis Bank SA/NV v Indian Overseas Bank [2010] Bus LR 835; Crema v Cenkos Securities Plc [2011] 1 WLR 2066; Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd [2011] Pens LR 233, [36] and [44].
Marks & Spencer – a case concerning the question of whether a tenant could, on the exercise of a break clause, recover rent paid in advance for the period after the break date – Lord Neuberger conducted an analysis of the state of the law on implied terms. His Lordship held that, prior to Belize, a ‘clear, consistent and principled approach’ existed with respect to implied terms. In Lord Neuberger view Belize was not to be treated as having changed the law on implied terms, and should be treated as ‘a typically inspired discussion rather than authoritative guidance’. Clearly his judgment signifies a reassertion of the traditional approach to implied terms; it reaffirmed the test for implying a term as a matter of fact and re-established implication of a term as a matter of fact, separate from construction.

The only question mark arising from Marks & Spencer stems from the separate judgments of Lords Carnwath and Clarke, both of whom were more tolerant of Belize. Whilst this permits some degree of academic debate as to the future application of Belize, the vital point is that neither judge was prepared to fully accept a broad reading of Belize. Therefore, in practice, both Lords Carnwath and Clarke ended up with much the same conclusion as Lord Neuberger. Overall, in the words of Lord Carnwath, Belize ‘is not to be read as involving any relaxation of the traditional, highly restrictive approach to implication of terms’. According to Lord Clarke, ‘the critical point is that in Belize the Judicial Committee was not watering down the traditional test of necessity’.

While the Belize approach has been accepted in New Zealand, it ‘does not [appear to] represent the law in Australia’, and, as already suggested, remains in doubt, even after the High Court’s decision in Barker. Therefore, this thesis will proceed on the

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109 Ibid, [21].
110 Ibid, [24].
111 Ibid, [31].
112 Ibid, [57]-[74].
113 Ibid, [75]-[77].
114 Ibid, [66].
115 Ibid, [77].
basis that notwithstanding the possibility of certain implied terms being categorised as arising by reason of construction (rather than implication), the implication of terms remains a separate and valid means through which gaps in contracts can be filled.

2.5 Conclusion

This chapter has set up an understanding of the general legal rules that are relevant to the remainder of this thesis. To begin, Part 2.2 discussed express contractual terms, which take primacy over any implied terms. The chapter then moved in Part 2.3 to consider the legal tests for implying terms in fact, by custom and usage and by law. Part 2.4 also addressed the concept of implying terms as it relates to construction. Considering each of these matters presents a foundation for exploring the central question of this thesis: how should we rethink the rationale for implying terms by law into employment contracts? Chapter 3 will now present a detailed historical analysis of select key terms that are routinely implied by law into the class of employment contracts.
3 KEY TERMS IMPLIED BY LAW INTO EMPLOYMENT CONTRACTS

3.1 Introduction

Following the exploration of implied terms in contracts generally in Chapter 2, this chapter considers terms implied by law into employment contracts specifically. It begins with an overview of the historical background of terms implied by law into the employment contract at Part 3.2. This discussion canvasses the initial recognition of employment as a contractual relationship and the unitary notion of employment (as distinct from other types of work), which will be returned to briefly in Chapter 5. It then acknowledges the later and more modern development of implication of terms by law into contracts generally, which eventually gave rise to the implication of terms by law into employment contracts specifically.

Next in Parts 3.3 to 3.5 this chapter traces the origins and current status of a selection of key terms implied as a matter of law into the class of employment contracts. It divides these key terms into three broad categories: the duties owed by employers in Part 3.3, by employees in Part 3.4 and mutually in Part 3.5. For the purposes of brevity and relevance to the greater context of this thesis, this analysis is not conducted for every term implied by law into the class of employment contracts. As just mentioned, it is conducted in relation to a selection of key terms. The suggested duties of mutual trust and confidence and good faith will be discussed in Chapter 4. Given the ongoing controversy surrounding the implication of both of those terms (particularly in the Australian context), it is more appropriate to consider them separately.

There are four reasons for analysing the ‘origins’ followed by the ‘current status’ of the selected terms. First, this analysis gives an historical context for the present terms. It is a significant exercise because it does not appear to have been undertaken before, at least not in the context of terms implied by law into employment contracts. The exercise is not only beneficial for the greater context of this thesis, but also for employment contract law as a field of study. Second, it traces the origins of the terms up to a case (or cases) cited in recent times, ignoring incidental decisions in between. Third, the analysis highlights tensions between certain current terms implied by law into
employment contracts and existing employment legislation (eg in respect of a term implied by law requiring reasonable notice on termination and the apparently equivalent statutory provision under s 117 of the Fair Work Act 2009 (Cth)). Fourth, and perhaps most significantly, it shows that in each instance of implication, there is a somewhat arbitrary judicial decision classifying the particular term as one implied by law, or at least one in which the legal logic for that implication is not adequately spelled out. This process makes it seem that the terms lack proper justification as terms implied by law into the class of employment contracts.

What the discussion that follows will show is that while many terms are now said to operate as terms implied by law into all employment contracts, this is not generally how they originated. Most have been derived from a combination of equity, tort, and the former master and servant statutory regime. In particular, at their inception in English employment law, the majority of terms were recognised as norms in the master and servant regime. Only at some later point after the employment relationship was accepted as being contractual did these norms become accepted as terms implied by law. Overall, these shifts in status occurred without proper justification as to why the terms had become characterised in a new way. This re-characterisation is problematic: it avoids any consideration of whether such terms are truly ‘necessary’ in all modern employment situations, and presumes a blanket application of each term to all employment contracts.

Each of the key terms analysed in this chapter will be returned to in Chapter 5 in the context of rationalising whether they ought to be considered as inextricably linked to the class of employment contracts, and indeed, whether employment contracts ought to be treated as a separate class of contracts in their own right. In Chapter 6, the terms will be discussed again in relation to whether or not they ought to be considered as necessary incidents of all employment contracts.

3.2 Historical background

Before engaging in an historical analysis of each select key term implied by law into employment contracts, it is useful to briefly consider: first, how employment came to be recognised as a contractual relationship and how the unitary notion of employment
itself was developed; and, second, how terms implied by law were initially recognised in contracts generally and employment contracts specifically. This will provide necessary context to the selection of key terms implied by law discussed in Parts 3.3 to 3.5.

3.2.1 Recognition of employment as a contractual relationship and as a unitary notion

Two related ideas are discussed here: first, the development of employment as a contractual relationship, and, second, the development of a unitary notion of employment between employer and employee. As stated in the introduction, the latter will be returned to in Chapter 5 in the context of determining what makes employment distinct from other types of contract.

3.2.1.1 Contractual relationship

The concept of employment as a contractual relationship has only developed over the last hundred years, both in the United Kingdom and Australia. What is now commonly referred to as the ‘employment contract’ was virtually ‘unheard of prior to 1850’ in both jurisdictions. Employment as a contractual relationship only emerged in the 20th


century, although this idea was subsequently described by Sir Otto Kahn-Freund as the ‘cornerstone’ of modern labour law. Prior to this emergence, it was not possible to speak of an employment contract applying to all categories of wage-dependent labour in either jurisdiction. Instead, there were separate categories of ‘service’ and ‘employment’, with the notion of service developing during the 18th century under the English Master and Servant Acts.

Supported by the Poor Laws, the Master and Servant Acts established a statutory framework governing the status-based relations that existed between masters and their inferior servants, which included ‘servants in husbandry, domestic servants, apprentices, journeymen, labourers and most artisans’. With this statutory regime developed a presumption of yearly hiring of those inferior servants. More is said about this presumption below at Part 3.5.2.1 in the context of an implied duty to provide reasonable notice of termination.

Superior servants remained outside of the scope of the Master and Servant Acts. These workers were ‘the professional, managerial and clerical class and included some superior members of a master’s house’. They included stewards, factors, clerks, coachmen, governesses and lady’s maids. Engagement of a superior servant was

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7 These Acts were enacted in 1747, significantly amended in 1758, 1777, 1823 and 1867 and replaced in 1875 (at least in the United Kingdom) by the Employer and Workmen Act.

8 As opposed to ‘consent-based’ relations: see, eg, Joellen Riley, Employee Protection at Common Law (Federation Press, 2005) 41.


10 For an explanation of these different types of servants, see, eg, Mark Irving, The Contract of Employment (LexisNexis Butterworths, 2012) 19-21.


12 Ibid.
clearly contractual for many centuries. For inferior servants, however, the situation was more complex, due to the range of statutory and common law regulation impacting on their freedom. The early 19th century saw the development of a distinction between inferior servants and what are now called ‘independent contractors’. This distinction was largely derived from the notion of exclusive service. From the mid- to late 19th century, the notion of exclusive service developed into the concept of control. That concept came to be recognised as one of the features distinguishing servants from other categories of worker (including independent contractors and superior servants). Today it remains one of the identifying features that distinguish an independent contractor from an employee – a distinction that will be returned to in detail in Chapter 5.

When the Australian colonies were established in the 18th and 19th centuries, they inherited the English common law and a number of early statutes, including the Master and Servant Acts. Those Acts then continued in force until the 1970s in most Australian states. This adoption of the Master and Servant Acts meant that Australia inherited a substantially similar system of regulating work as in the United Kingdom, albeit with some differences. In particular, as John Howe and Richard Mitchell observe, ‘the Australian [version of the] legislation appears to have been far more extensive than the British regulation’. When the Master and Servant Acts were repealed in 1875 in the United Kingdom, the master and servant relationship became re-categorised as one of employment between

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14 For a discussion on these limitations see, eg, Mark Irving, The Contract of Employment (LexisNexis Butterworths, 2012) 23.

15 See, eg, Lancaster v Greaves (1829) 109 ER 233, 234-235; Lawrence v Todd (1863) 143 ER 562.


employer and employee, both in England and Australia.\(^{20}\) Only a few years before this more formal statutory shift, one of the first key decisions where a contractual analysis of the employment relationship was adopted was *Emmens v Elderton*\(^{21}\) – an English case concerning a company solicitor’s action for wrongful dismissal. ‘The basis for the action was the employer’s duty to find work for the employee for the duration of the contract, in default of which the employee would be entitled to receive damages for breach of contract’.\(^{22}\) It was one of the first instances in which the phrases ‘contract of employment’ and ‘employer and employee’ were mentioned judicially.\(^{23}\) Separately, and many years later, the Australian High Court identified that same earlier transition from a status-based master and servant relationship to a contractual-based employer and employee relationship.\(^{24}\) This shift in perception across both jurisdictions meant an acceptance that employment relationships were regulated by the general law of contract. It meant that the idea of employment started to become ‘less about the nature of the relationship between the parties [(ie as master and servant)] and more about the rules of contract’.\(^{25}\) The application of general contract principles to employment contracts will be discussed further in Chapter 5.

By way of example, from 1875 in the United Kingdom, the principal remedy of the employer was no longer an application to have an inferior servant whipped and imprisoned; instead, they had a contractual right to dismiss them and sue for damages for breach of contract.\(^{26}\) Likewise, conduct that was previously the subject of abatement of wages (eg failure to commence work, absconding from employment, misconduct, damage to property) was able to be litigated civilly as a breach of contract.\(^{27}\)


\(^{21}\) (1853) 13 CB 495.


\(^{24}\) See, eg, the first occasion in *Attorney-General (NSW) v The Perpetual Trustee Company (Ltd)* (1952) 85 CLR 237, 245-248 and on appeal in (1955) 82 CLR 237, 122-123. See also *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 439.


\(^{27}\) Ibid.
Eventually, the ability for terms to be implied by law into employment contracts came to be realised, and more is said about that development below at Part 3.2.2 and in Chapter 6 in the context of distinguishing implication in fact and by law. In tracing the presence of implied terms in the modern employment contract back to the Master and Servant Acts, Adrian Merritt observed that:

[T]he status-based incidents of the old master-servant relationship, appropriate to domestic and agricultural service, were grafted on to the relationship of principal and independent contractor, producing, by the end of the nineteenth century, the concepts of employer and employee.28

James Atleson has similarly written that implied terms have come to epitomise the merging of contract and status within the employment contract: ‘to the employee, the arrangement is much more like an all-encompassing status agreement than the express limited regime of contract’.29

It was not until well into the 20th century that employment relationships became fully accepted as contractual in Australia and the United Kingdom.30 The reason for this delay is that it took time for the courts to adequately develop their understanding of employment, both as a contractual relationship, and separately, as a unitary concept, such that employees were no longer referred to as servants at all.

3.2.1.2 Unitary notion

The unitary notion of employment (ie a ‘classless’ concept common to all classes of wage-earner) really only emerged in the 20th century in both jurisdictions.32 As will be explained below, this development actually occurred earlier in that century in Australia than in the United Kingdom.33 But in each country it was a drawn-out process, and the


33 See, eg, ibid, 119.
idea of a unitary employment relationship did not meet general acceptance in the courts until well into the 20th century.\textsuperscript{34}

As the above discussion in Part 3.2.1.1 makes clear, in earlier times, the common law and statute combined to create different classes of workers. According to Simon Deakin, the position in the United Kingdom during the early 19th century was a ‘principal division in the law of employment … not between dependent and autonomous workers, but between different groups of wage or salary earners according to their social rank and status’.\textsuperscript{35} According to Howe and Mitchell, around that same time Australian courts and legislatures continued to countenance different classes of workers, described by the terms ‘servant’, ‘worker’, ‘employee’ and ‘independent contractor’.\textsuperscript{36} Despite the presence of these distinctions in both jurisdictions, the categorisation of many workers remained in a state of flux, with courts continuing to regulate the employment relationship, in large part, according to notions of status, rather than contract.\textsuperscript{37}

From the late 19th century, however, parliaments in the United Kingdom and Australia began enacting a series of laws which granted protections to what are now called ‘employees’. The legislatures either directly, or indirectly through arbitral awards, conferred on employees the right to minimum wages, workers’ compensation entitlements, the right to be paid in money and a range of other work-related benefits.\textsuperscript{38} Generally speaking, these protective laws were to apply to parties to a ‘contract for service’, or to ‘employees’.\textsuperscript{39}

\textsuperscript{34} Ibid, 116.


\textsuperscript{38} Mark Irving, \textit{The Contract of Employment} (LexisNexis Butterworths, 2012) 33.

\textsuperscript{39} Ibid.
In the first half of the 20th century courts in both the United Kingdom and Australia were concerned with developing criteria to determine to whom the protective legislation should apply. This process was stalled in both jurisdictions as a consequence of the courts resorting to the historical distinctions between superior and inferior servants. Eventually, however, both the United Kingdom and Australia developed expanded statutory definitions ‘setting aside distinctions between manual and non-manual work, service and apprenticeship, superior and other types of service’.

In Australia, courts initially applied the ‘control test’ and determined that ‘only servants who were subject to the command of their master were to be covered by the legislation. This excluded many skilled workers, including lecturers, chemists, nurses and doctors from legislative protection. In many ways, this idea that skilled workers were not in an ‘industrial’ relationship, and were therefore excluded from federal award coverage, was akin to the ‘lingering effect’ of the inferior/superior servant distinction. The consequence of these limitations was that only certain restricted classes of workers were entitled to the protection of the minimum wage and had access to bringing particular industrial disputes. It also meant that while the Australian state and federal parliaments had begun endorsing the concept of an employment relationship between ‘employer and employee’, the exact meaning of that expression was uncertain in the minds of the legal profession.

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43 Ibid.

44 Ibid.

Gradually, this uncertainty was eroded in Australia by legislative and judicial activity to create a clearer understanding of employment, expanding it to include many of the skilled workers who were originally refused legislative protection. By the mid-20th century the categories of inferior and superior servant ‘became merged into one common law category of employment’. Having said that, there were still certain types of workers who remained excluded from legislative protection. Even today, there are some select types of workers who are not deemed ‘employees’ for the purpose of equivalent statutory protections. By the mid-20th century the binary divide between employee and independent contractor had also been established.

In the United Kingdom, the emergence of the unitary model of employment common to the bulk of the English workforce was actually more straightforward and, as mentioned above, developed later in the 20th century than in Australia. The reason this development came later was because it only solidified when the English legislature decided to extend the reach of its protective legislation to all classes of the wage-earning workforce, rather than to select classes. In fact, the earlier Australian approach of excluding skilled workers from legislative protection was specifically rejected by the English courts in the mid-20th century. ‘As such, uniformity and homogeneity were introduced across the entire range of workers irrespective of the class of work they performed.’

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47 To take just one example, armed forces personnel were regarded as being engaged under the Crown prerogative, rather than employment contracts: *Commonwealth v Quince* (1944) 68 CLR 227; *Coutts v Commonwealth* (1985) 157 CLR 91. This view has since been reaffirmed by regulation: *Defence (Personnel) Regulations 2002* (Cth) reg 117. See further, the discussion in Andrew Stewart et al, *Creighton and Stewart’s Labour Law* (6th ed, Federation Press, 2016) 271-272.


49 Mark Irving, *The Contract of Employment* (LexisNexis Butterworths, 2012) 34. As mentioned, that distinction will be explored further in Chapter 5.

50 See, eg, the *Contracts of Employment Act 1963* (UK) under which workers gained a growing list of minimum statutory rights, such as the right to reasonable notice before a fair dismissal and a redundancy payment. See also the *Redundancy Payments Act 1965* (UK); *Employment Protection (Consolidation) Act 1978* (UK).


3.2.2 Modern implication of terms by law

Following the recognition of employment as a contractual relationship and as a unitary concept, terms implied by law came to form a part of contracts generally, as well as employment contracts specifically. In her historical account of the development of implied terms, Elisabeth Peden explains that the community and its regulatory bodies (e.g., the church and trade organisations) engaged in the earliest form of contractual regulation.\(^{53}\) For example, ‘[t]he church had strong views about the sale of goods and markets, the natural home of rules which developed into what we now call “contract”... Individuals were encouraged out of moral and religious conviction, to behave ethically’.\(^{54}\) At that early stage, certain obligations were also recognised as attaching to certain types of commercial relationships. Through recognition of custom and trade usage, these obligations became the very first ‘implied terms’.\(^{55}\) Some of the earliest examples include implied warranties in the sale of goods.\(^{56}\) These evolved as a “natural part” of the relationship between purchaser and seller,\(^{57}\) and are now regulated by legislation derived from the *Sale of Goods Act 1893* (UK).\(^{58}\)

By the 19\(^{\text{th}}\) century, the notion of the parties’ intentions came to dominate all areas of contract law, including in respect of the implication of terms.\(^{59}\) The focus was then placed on the parties’ ‘presumed intentions’ – a concept that was often viewed as


\(^{54}\) Ibid, 202.

\(^{55}\) Ibid, 210-217.

\(^{56}\) Ibid, 205. See especially, *Morley v Attenborough* (1849) 3 Exch 499, concerning an implied warranty of title; *Eichholz v Bannister* (1864) 17 CB(NS) 708, concerning an implied warranty of title; *Parkinson v Lee* (1802) 2 East 314, concerning an implied warranty as to fitness for purpose; *Gardiner v Gray* (1815) 4 Camp 144, concerning an implied warranty to inspect goods; *Jones v Just* (1868) LR 3 QB 197, concerning an implied warranty of merchantable quality.


\(^{58}\) See, eg, *Sale of Goods Act 1979* (UK). In Australia, see, eg, the Sale of Goods legislation referred to in Chapter 2 at Part 2.3.

‘fictitious’, although that view was not universally accepted. On the one hand, implied terms were seen to represent what the parties must have ‘actually’ agreed, and according to ‘will theory’, the obligations placed on the parties were what they ‘willed’ them to be. On the other hand, objective theorists argued that the parties could not will legal consequences since they did not know the law. In fact, ‘it was circular to say that the parties willed what the law prescribed, since the law prescribed what the parties willed’. Put otherwise, an intention imputed to the parties is not necessarily a reflection of their real intention. Despite the ongoing conflict between will and objective theorists, since the beginning of the 20th century the courts have come to discard the fictitious use of intention in respect of implied terms. As Hugh Collins explains, since courts cannot read minds to find out intent, the law uses ‘proxies’ of proof of intent found in ostensible intention.

The courts have gradually come to acknowledge that some terms are consistently implied because they are part of a particular type of contractual relationship (eg an employment relationship), rather than based on the particular facts of a case. These are what we now refer to as terms implied by law. As will be explored further in Chapter 6, only in the last 60 years have they been classified as a distinct category of

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60 On the competing approaches to fictions and implied terms, see generally, Elisabeth Peden, *Good Faith in the Performance of Contracts* (Butterworths, 2003) §2.2-2.6.


64 See, eg, Elisabeth Peden, *Good Faith in the Performance of Contracts* (Butterworths, 2003) §2.2. See also, Luxor (Eastbourne) Ltd v Cooper [1941] AC 109, 137: ‘Sometimes [‘implied term’] denotes some term which does not depend on the actual intention of the parties but on a rule of law, such as terms, warranties or conditions which, if not expressly excluded, the law imports, as for instance under the *Sale of Goods Act* … But a case like the present is different because what is sought to imply is based on an intention imputed to the parties from their actual circumstances’.


implied terms with a distinct test. In these situations, it follows that these terms are now implied not based on the parties’ intentions (ie as with terms implied in fact), but as default rules imposed by law. More will be said about the distinction between terms implied in fact and by law in Chapter 6 in the context of exploring the necessity test for implying a term by law.

### 3.3 Duties owed by employers

Having now considered the history of employment being recognised as a contractual relationship and unitary concept, as well as the development of terms implied by law into those contracts, it is appropriate to explore some of the specific duties that employers owe their employees (ie as terms implied by law into employment contracts as a class). Three of those main duties are considered here. These are an employer’s duty to: (1) provide a safe place of work, (2) indemnify for expenses innocently incurred in the performance of their duties, and (3) inform employees of their rights.

#### 3.3.1 Duty to provide a safe place of work

**3.3.1.1 English origins**

*Priestley v Fowler* is said to be the first reported case in which a servant successfully sued his master for damages for personal injury. Priestley was a butcher’s man who was injured when a van overloaded by fellow employees collapsed on him. It was too early for the employer’s obligation to be phrased as a term implied by law as between an employer and employee. However, it was held, in general terms, that a master owed a tortious duty to ‘provide for the safety of his servant in the course of his

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67 Ibid. As discussed in Chapter 6, this distinction arose out of *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555 and *Liverpool City Council v Irwin* [1977] AC 239. See also the discussion in Chapter 2, which sets out the distinct tests for implying a term in fact and by law.


69 (1837) 3 M & W 1.

employment’. In another early decision, *Brydon v Stewart*, Lord Cranworth similarly held that:

[A master] is only responsible while the servant is engaged in his employment: but whatever he does in the course of his employment according to the fair interpretation of the words – *eundo, morando, et redeundo* [(going, remaining, and returning)] – for all that the master is responsible.

Beyond these early recognitions, in *Wilsons & Clyde Coal Co Ltd v English* it was found that an employer (rather than a master) owed a duty to create a safe system of work for its employees (rather than servants). For the first time, this duty was deemed non-delegable. Again, however, rather than emerging as a contractual duty, the duty was formulated as a duty of care in tort. This case involved Mr English, who was employed at Wilsons & Clyde Coal Co Ltd’s colliery. He was repairing an airway leading off the Mine Jigger Brae (a main haulage road). In doing so, Mr English became caught in the airway and tried to escape through one of the manholes. However, he became caught by a rake of hutches and crushed between it and the side of the road. His family therefore brought an action against his employer, claiming damages. The company claimed that Mr English’s own negligence contributed to his death because he should have told the person in charge of the machinery, or taken an alternative route. Ultimately, Mr English’s family were successful with the House of Lords unanimously finding that an employer owes a non-delegable duty to create a safe system of work. Even if the employer attempted to delegate that duty to another person, they still remained responsible for their employees’ safety.

Only later in 1957 did the House of Lords reconsider this principle in light of an employer’s contractual obligations in *Lister v Romford Ice & Cold Storage Co Ltd*, the facts of which are discussed later in Chapter 6 in respect of distinguishing a term implied by law from a term implied in fact. In particular, Lord Radcliffe commented that:

There is no real distinction between the two sources of obligation. But it is certainly, I think, as much contractual as it is tortious. Since in modern times the relationship between master and

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71 (1837) 3 M & W 1.
72 (1855) 2 Macq 30.
73 [1938] AC 57.
74 [1957] AC 555.
servant, between employer and employed, is inherently one of contract, it seems to be entirely
correct to attribute the duties which arise from that relationship to implied contract.75

3.3.1.2 Current status

Since the House of Lords’ judgment in Lister, there now exists a well-accepted
contractual duty implied by law, both in England76 and Australia,77 requiring employers
to take reasonable care to provide employees with a safe place of work. This duty has
been moulded to fit into a contractual framework, despite evidence of its origins in the
law of tort.

In recognition of its origins, however, this non-delegable duty78 has still been
recognised as being substantially similar to an employer’s duty of care in tort,79 such
that both duties are often treated as coextensive and correlative.80 Indeed, in Astley v
Austrust Ltd,81 the High Court confirmed that contractual and tortious duties of care can
coincide, such that the availability of one will not displace the other.82 In fact, if an
employer’s negligence is found to be responsible for an employee’s injury or illness,
the employee may (subject to workers’ compensation provisions in the relevant

75 [1957] AC 555, 587.
76 See, eg, Watt v Hertfordshire County Council [1954] 1 WLR 835; Matthews v Kuwait Bechtel
77 See, eg, Tame v New South Wales (2002) 191 ALR 449, [140]; Goldman Sachs J B Were Services Pty
471, [8] and [339]; Stubbe v Jensen [1997] 2 VR 439, 443-444; Wright v TNT Management Pty Ltd
78 Kondis v State Transport Authority (1984) 154 CLR 672, 686-688; State of New South Wales v Lepore
(2003) 212 CLR 511, [257] and [265].
79 See, eg, Nationwide News Pty Ltd v Naidu (2007) 71 NSWLR 471, [332], citing Jury v Commissioner
for Railways (NSW) (1935) 53 CLR 273, 290. It is beyond the scope of this thesis to consider the duties
arising in tort, or under various work health and safety laws.
222 CLR 44, [26]; Kondis v State Transport Authority (1984) 154 CLR 672, 680; Nationwide News Pty
536-637.
82 Astley v Austrust Ltd (1999) 197 CLR 1, [44]-[48]

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jurisdiction) sue for damages in either breach of contract or in the tort of negligence.\(^{83}\) The way in which an employee chooses to frame the action, however:

may make a difference to questions such as the contributory negligence of the plaintiff, causation, or the right of contribution between co-defendants. It may also make a difference to subordinate questions such as the appropriate scale of costs \(^{84}\).

Clearly, the employee would seek the most favourable judgement that may flow from either cause of action.\(^{85}\)

### 3.3.2 Duty to indemnify employees for expenses innocently incurred during the performance of their duties

#### 3.3.2.1 English origins

One of the earliest references to a requirement to indemnify in relation to liabilities (rather than expenses) innocently incurred in contract law generally was in the English case *Adamson v Jarvis*.\(^{86}\) At this early stage, the duty was not phrased as a term implied by law, but rather as a contractual entitlement.\(^{87}\) Adamson was an auctioneer who was given cattle by Jarvis to be sold at an auction. Adamson followed Jarvis’ instructions and sold the cattle. However, Jarvis was not actually the true owner of the cattle. In fact, the real owner successfully sued Adamson for conversion. Consequently, Adamson had to pay damages to the real owner. Adamson then sued Jarvis to indemnify him for the loss he suffered by way of damages to be paid to the real owner. The court held that Adamson was entitled to presume that he would be indemnified in the course of carrying out Jarvis’ instructions. Jarvis was therefore ordered to pay damages to Adamson with a view to indemnifying him.

Some years later, an implied right to reimbursement, again in respect of liabilities rather than expenses innocently incurred in the performance of duties for another, was


\(^{85}\) *Wylie v ANI Corp Ltd* [2002] 1 Qd R 320, [39]-[42].

\(^{86}\) (1827) 4 Bing 66.

\(^{87}\) Ibid, 695. As already noted, the concept of a term implied by law was not developed until many years later. See the further discussion as to the development of terms implied by law in Chapter 6.
recognised in the commercial case, Sheffield Corporation v Barclay.\(^8\) It has been said that this actually strengthened an argument that reasonable expenses should be reimbursed, as it presented the first ‘clear authority for an implied right to an indemnity in respect of liabilities innocently incurred’:\(^9\)

> It is a general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the right of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done.\(^10\)

Not long after this decision, the earlier authority in Adamson was cited with approval in Re Famatina Development Corporation\(^9\) – this time, in the context of an indemnity to be given by an employer to an employee (albeit, by reason of their concurrent relationship as principal and agent).\(^2\) Here, a consulting engineer was asked by his employer to prepare a report on the conduct of a managing director. He reported that the managing director had made contracts for worthless properties, had made misleading reports, and arranged certain secret commissions. The managing director then brought an action for libel and slander against the engineer, with the claim eventually being dismissed. The greater part of the engineer’s costs were irrecoverable, and he therefore sought to recover them from his employer. The Court of Appeal held that everything the engineer had done was in connection with his duties as an agent and under the settled rules of agency. Therefore, he (as an agent) was entitled to be indemnified by his employer (as principal) against the cost of defending the action. This reasoning makes it seem that the engineer was entitled to be indemnified, not because of his position as an employee, but instead due to the agency relationship that he also

\(^8\) [1905] AC 392.

\(^9\) Andrew Stewart and Beth Nosworthy, ‘Employees and Indemnity’ (2011) 27 Journal of Contract Law 18, 19.


\(^2\) Curiously, at first instance, Sargent J referred to this relationship as one between ‘principal’ and ‘servant’, rather than ‘agent’: [1914] 2 Ch 271, 280. It should also be noted that an agent’s right to indemnity is a ‘well-established principle under the law of agency’: Andrew Stewart and Beth Nosworthy, ‘Employees and Indemnity’ (2011) 27 Journal of Contract Law 18, 19. However, ‘not all employees are agents of their employer in the strict sense. Agency is confined to the situation where a principal confers an authority or capacity on an agent to create legal relations between the principal and a third party’: Ibid, 19. See also, Scott v Davis (2000) 204 CLR 333, 408 cited therein.
held with his employer. This approach meant that the position surrounding a right to an indemnity in employment following this decision was not quite as clear-cut as it might have first appeared.

The duty to indemnify was later discussed in the context of employment in *Lister.* This time, however, the court’s reasoning did not focus on the agency relationship between the parties, but instead, on their employment relationship. Again, the facts of this case will be returned to in detail in Chapter 6. For present purposes, however, it is necessary to note that the House of Lords applied *Adamson,* finding that an employee is not entitled to be indemnified by an employer in respect of liability for negligent conduct of the employee during the course of employment. No specific reference was made to the fact that the duty to indemnify (in circumstances where there was no negligent conduct) was to be implied by law into all employment contracts in the future.

### 3.3.2.2 Current status

Irrespective of its origins, the requirement of an employer to indemnify their employees for expenses innocently incurred has now become accepted in Australia as a term implied by law into all employment contracts. There is no logical explanation as to why and how this has occurred; what commenced as a contractual obligation arising out of a liability in a specific circumstance has come to be accepted as a term that forms part of every employment contract, both in England and Australia. In fact, it is confidently asserted in a leading Australian employment law text that ‘[t]he law implies an obligation on an employer to reimburse the employee for any expense the employee incurs on behalf of the employer, provided such expenditure is authorised expressly or by necessary implication’. 

By way of example, the court in *Pupazzoni v Fremantle Fishermen’s Co-operative Society Ltd* made it explicitly clear that the duty to indemnify is to operate as a term

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93 [1957] AC 555.
94 Ibid, 595.
95 Carolyn Sappideen et al, *Macken’s Law of Employment* (8th ed, Lawbook Co, 2016) 194, citing *Adamson v Jarvis* (1827) 4 Bing 66; *Burrows v Rhodes* [1899] 1 QB 816. However, ‘these are cases dealing with liabilities, not expenses in the broader sense’: Andrew Stewart and Beth Nosworthy, ‘Employees and Indemnity’ (2011) 27 *Journal of Contract Law* 18, 19.
implied by law in respect of all employment relationships. Pidgeon AJ of the Western Australia Supreme Court held that, in principle, a term should be implied by law ‘entitling a general manager to be indemnified for any travel or entertainment expenses incurred in carrying out the tasks assigned to him by his employer’s committee of management’.  

However, the fact that the general manager’s employment contract contained an express term on the subject, which specifically gave the committee a discretion not to reimburse him, was considered to preclude the implication in this specific case. Ordinarily, though, an employer would have an implied duty to reimburse an employee for expenses reasonably incurred in carrying out specified tasks. This has remained the accepted approach in Australian employment contract law ever since.  

97 The duty to indemnify has even been extended to unlawful acts committed by the employee during the course of their employment, provided the employee is unaware of the unlawful nature of the act. However, the duty does not cover negligent conduct by the employee, or any other loss or liability otherwise limited by the common law or statute.  

3.3.3 Duty to inform employees of their rights  

3.3.3.1 English origins  

In Scally v Southern Health & Social Services Board, the House of Lords first implied a term by law requiring employers to inform employees of their rights, but only

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97 Andrew Stewart and Beth Nosworthy, ‘Employees and Indemnities’ (2011) 27 Journal of Contract Law 18, 19.  
100 This is because a breach of an employee’s contractual duty of care to the employer gives rise to an action for breach of contract by the employer against the employee. See the below discussion concerning an employee’s duty of care at Part 3.4.3. See generally, Belan v Casey (2003) 57 NSWLR 670, [88]-[107].  
102 See, eg, Corporations Act 2001 (Cth) ss 199A and 199B; Employees Liability Act 1991 (NSW) ss 3-5; Civil Liability Act 1936 (SA) s 59; Law Reform (Miscellaneous Provisions) Act (NT) s 22A(1); Insurance Contracts Act 1984 (Cth) s 66, each of which operate to modify the common law position.  
in respect of a very narrow sub-class of employment contracts. This case concerned a
dispute over standard clauses of an employment contract, which had been negotiated
between the employer and employees’ representative in the years prior to the
commencement of employment. One of the clauses related to a superannuation scheme.
The scheme contained a very beneficial provision, which allowed for employees to
purchase additional ‘years’ leading to greater financial benefits, so long as the
employees acted to purchase those additional years within 12 months of commencing
employment. The employees were actually unaware of their right to purchase extra
years. They argued that had they known, they would have exercised the right. In
response, the House of Lords held that where an employment contract is negotiated
between employers and a representative body (not individually) and contained a
particular clause conferring on the employee a valuable right contingent upon them
acting to obtain the benefit, and the employee could not be reasonably expected to be
aware of the clause unless it was specifically brought to the attention of the employee –
then there was a term implied by law that the employer must take reasonable steps to
bring the clause to the attention of the employee, so that they may enjoy the benefit.104
What the decision in Scally demonstrates is that this term is one of only a select few
terms implied into employment contracts that has been conceived from the outset as a
contractually implied term. Another example of a term conceived as a term implied by
law into the class of employment contracts, discussed later in Chapter 4, is the implied
term of mutual trust and confidence. For the vast majority of current terms implied by
law into employment contracts, however, they originated as something other than
implied terms.

3.3.3.2 Current status

The Federal Court of Australia in Mulcahy v Hydro-Electric Commission105
distinguished Scally. While the court similarly recognised the potential for an implied
term requiring employers to notify their employees of changes to their contributory
pension scheme, it decided not to imply the particular term, based on the specific facts

104 Ibid, 307. See also the discussion concerning this decision in Mark Irving, The Contract of
Employment (LexisNexis Butterworths) 240-241.

105 (1998) 85 FCR 170, 210. In relation to the recognition of this implied duty in the United Kingdom, see
also Crossley v Faithful & Gould Holdings Ltd [2004] 4 All ER 447, [41]; Spring v Guardian Assurance
of the case. So, while the court still recognised the potential for the recognition of the term in Australian law, it only did so in respect of the same narrow sub-category of employment contracts referred to in *Scally*.106 Beyond this very specific class of employment contract, the term has not been implied in any other types of employment contract, either in Australia or the United Kingdom.

Consequently, the term founded in *Scally* (and later recognised in *Mulcahy*) has been couched in such a way that it will only ever operate in respect of the very narrow sub-class of employment contracts identified in *Scally*. This treatment of the term seems to blur the distinction between terms implied in fact (ie those implied into the specific employment contract in question) and terms implied by law (ie those implied into the general class of employment contracts). Again, more is said about the distinction between terms implied in fact and by law in Chapter 6. *Scally* will also be revisited in Chapter 6 in respect of that chapter’s assessment of the necessity test for implying terms by law in the class of employment contracts.

### 3.4 Duties owed by employees

As discussed in Chapter 2, an employer has the option of setting out an employee’s obligations by way of express terms in an employment contract. However, there are certain duties that will characteristically be imposed on all employees as terms implied by law. Five of those main duties are considered here. These are an employee’s duty: (1) to obey, even if not expressly stipulated, (2) of fidelity, (3) to exercise reasonable care and skill in the tasks performed, (4) to hold inventions on trust (at least where there is a duty to invent), and (5) not to misuse or disclose confidential information.

#### 3.4.1 Duty to obey lawful and reasonable orders

#### 3.4.1.1 English origins

An employee’s duty to obey the orders of their employer has its origins in the former understanding of employment as a status-based relationship between master and

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106 [1992] 1 AC 294, 307, referred to in *University of Western Australia v Gray* (2009) 179 FCR 346, [138] and distinguished in *Mulcahy v Hydro-Electric Commission* (1998) 85 FCR 170, 210. Cf *Cornwell v The Commonwealth of Australia* [2005] ACTSC 14, where a term was implied by law, such that an employer was obliged to inform the employee of his right to apply under an act for membership of a particular superannuation fund (noting that this case was later affirmed on other grounds: [2006] ACTCA 7 and (2007) 229 CLR 519).
servant. *Spain v Arnott*\(^{107}\) was one of the earliest decisions in which an apparent duty to obey on the part of a servant was identified. The decision concerned a dispute between a master and a servant in husbandry, who was engaged on a 12-month contract. The servant was ordered to take his master’s horses a mile before he ate dinner, but he refused. The master discharged the servant without first seeking the magistrate’s permission. The servant tried to sue to recover his lost wages, but was unsuccessful, as the court found that his master had a right to dismiss him from his service.\(^{108}\) Soon after this initial decision, in *Turner v Mason*\(^{109}\) a menial servant sought leave to attend the bed of her dying mother, which was refused by her master. The servant was dismissed and was later unsuccessful in her wrongful dismissal claim, as she was found to have disobeyed an order.

In both of these early decisions, the servant’s requirement to obey all orders of their master (irrespective of whether they were reasonable or not) was founded on the basis of their complete subordination to their master.\(^{110}\) The expectation that the servants would obey all orders of their master was not founded on a contractual term implied by law, but rather as a norm that purportedly existed in the context of the master and servant relationship. The current notion of employment, and specifically, the notion of a duty to obey as a term implied by law, had no application at this early stage.

Only in the later decision of *Price v Mouat*\(^{111}\) did the courts begin to place contractual limits on an employee’s duty to obey all orders of their employer. In that case, which concerned an employee hired to buy lace, it was said that ‘if he was hired as a buyer, he was not bound to perform services not properly appertaining to that character’.\(^{112}\)

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\(^{107}\) (1817) 2 Stark 256.

\(^{108}\) While there was examination of the reasonableness of the master’s order, how the servant was able to bring an action at common law ‘remains a mystery’: William Cornish, *The Oxford History of the Laws of England*, vol XIII (Oxford University Press, 2010) 644. See also the discussion of the decision in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285, 286-287.

\(^{109}\) (1834) 153 ER 411.

\(^{110}\) As mentioned earlier at Part 3.2.1, servants were engaged under a form of consensual servitude.

\(^{111}\) (1862) 11 CBNS 508.

\(^{112}\) Ibid.
separate decisions, an isolated act of disobedience or neglect was found not to justify the dismissal of a manager or journalist.

The law has now moved on significantly in the United Kingdom. Since the decision in *Laws v London Chronicle (Indicator Newspapers) Ltd*, the duty to obey has been understood as general contractual one applying to all employees, obliging them to obey only lawful and reasonable orders of their employer. In *Laws*, the duty was clearly identified as a ‘condition essential to the contract of service’ and ‘one act of disobedience can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract’. While the worker was referred to as a ‘servant’ in the case, its rationale has since been applied in countless English cases involving employees.

### 3.4.1.2 Current status

In Australia, all employees now find themselves under a similar obligation implied by law to obey lawful and reasonable orders given by their employer. As will be explored in Chapter 5, it has become one of the chief identifying features of an employment relationship. There is no explanation as to why this duty became one implied by law into all employment contracts, either in Australia or the United Kingdom, other than its origins as a norm under the former master and servant regime. It is now well-accepted as a term implied by law, and indeed, that is how it is phrased in all of the leading textbooks on employment law. Since Dixon J’s dictum in 1938 that

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115 [1959] 1 WLR 698.

116 Ibid, 700.

117 Ibid, 701.


the lawful commands of an employer which an employee must obey are those which fall within the scope of the contract of service and are reasonable’, 121 Australian courts have repeatedly held that employees are only obliged to obey lawful and reasonable directions of their employer – not all orders, as previously assumed in the context of the master and servant relationship. In its current form, the duty to obey has three main elements: first, an employee is not obliged to obey orders by their employer to perform unlawful acts, 122 second, the duty only arises in respect of lawful commands by the employer, which fall within the scope of their employment contract, 123 and, third (although this has been more controversial), 124 the employer’s direction must be reasonable. 125 Generally speaking, the courts have also taken a broad view of managerial authority, such that there are numerous lawful directions that an employer may give to an employee. 126

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121 R v Darling Island Stevedoring and Lighterage Co Ltd; Ex parte Halliday & Sullivan (1938) 60 CLR 601, 621-622.


123 R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday and Sullivan (1938) 60 CLR 601, 621-622; Commissioner for Government Transport v Royall (1966) 116 CLR 314, 322.


125 See, eg, McMamux v Scott Charlton (1996) 70 FCR 16, 21-24, the principle of which is derived from R v Darling Island Stevedoring & Lighterage Co Ltd; Ex Parte Halliday and Sullivan (1938) 60 CLR 601, 621-622. Both authorities overwhelmingly favour the requirement of reasonableness. See also the discussion in Mark Irving, The Contract of Employment (LexisNexis Butterworths, 2012) 352-354, which does likewise.

126 See, eg, those listed in Andrew Stewart, Stewart’s Guide to Employment Law (5th ed, Federation Press, 2015) 259. See also the further discussion concerning the exercise of discretionary powers in employment contracts, including the requirements to exercise those powers in good faith in Chapter 4.
3.4.2 Duty of fidelity

3.4.2.1 English origins

While the law relating to the duty of fidelity may have its origins in a ‘melange of contract, equity and statute’, in keeping with the scope of this thesis, this part concentrates mostly on its understanding as a contractual duty. The phrase ‘duty of fidelity’ was first used in a contractual context in the United Kingdom in Robb v Green, albeit arising out of a relationship between a master and servant. Prior to this, the courts considered the operation of the duty solely in the context of a servant as a fiduciary. Robb concerned a servant who had secretly copied a list of customers from his master’s order book. After he left that position, the servant used those same details to solicit the same clients for his own business. His ex-master brought an action primarily for breach of contract, seeking damages on the ground that there was an implied term of confidentiality which arose from the mutual intention of the parties. Hawkins J posited the existence of a general term implied by law that the servant:

shall honestly and faithfully serve his master; that he shall not abuse his confidence in matters appertaining to his service, and that he shall, by all reasonable means in his power, protect his master’s interests in respect to matters confided to him in the course of his service.

Since this finding, it has been said that ‘[a]lthough the decision in Robb was emphatic, the precise nature of the servant’s duty [of fidelity] was not altogether clear’. Indeed, ‘there is reason to believe that the judges were not thinking of the duty as one to be universally implied to such an extent’, as is the case with modern implication of terms by law. For example, in the unauthorised reports, Lord Smith refers to the duty of

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129 [1895] 2 QB 315.

130 The earliest indication was in Pearce v Foster (1886) 17 QBD 536, 539. See also, Boston Deep Sea Fishing and Ice Company v Ansell (1888) 39 Ch D 339; Lamb v Evans [1893] 1 Ch 218.

131 Robb v Green [1895] 2 QB 1, 10-11.


133 Ibid.
fidelity owed by the defendant in the circumstances of ‘that contract’, making it appear more like a term that should be implied in fact. In the authorised version of the decision, Lord Escher also explained that it was ‘impossible to suppose that a master would have put a servant into a confidential position of this kind’ unless the servant were bound to observe good faith. This disjointed reasoning is not surprising – at this time, the courts did not purport to distinguish between terms implied in fact and those implied by law. Given that the notion of employment as a contractual dealing was yet to be fully developed, there was no recognised distinction between the implication of terms from the presumed intention of the parties and those arising by necessary implication from the nature of the engagement.

Later in *Hivac Ltd v Park Royal Scientific Instruments Ltd*, for the first time, Lord Greene phrased the duty of fidelity as a contractually implied term owed by an employee to their employer, rather than between master and servant. This case involved skilled manual workers who had been ‘moonlighting’ for a competitor of their employer, but there was no evidence that they had misused confidential information or reaped any profits. The case therefore focussed on whether the employees were in breach of an implied duty of fidelity that was said to exist in their employment contracts. While a duty of fidelity was ultimately implied (although a breach was not found), it was not entirely clear from the court’s reasoning whether the term ought to be one implied by law or in fact:

> It has been said on many occasions that an employee owes a duty of fidelity to his employer. As a general proposition, that is indisputable. The practical difficulty in any given case is to find exactly how far that rather vague duty of fidelity extends. *Prima facie* it seems to me on considering the authorities and the arguments that it must be a question on the facts of each particular case. I can very well understand that the obligation of fidelity, which is an implied term of the contract, may extend very much further in the case of one class of employee than it does in others.\(^\text{138}\)

\(^{134}\) *Robb v Green* (1895) 64 LJQB 593, 603.

\(^{135}\) *Robb v Green* [1895] 2 QB 315, 317 (emphasis added).

\(^{136}\) Again, the distinction between implying terms in fact and by law is discussed in Chapter 6.

\(^{137}\) [1946] Ch 169.

\(^{138}\) Ibid, 174.
The wording of this judgment appears deliberately vague as to whether the term should be one implied by law into every employment contract. Lord Greene’s suggestion that the existence of the duty ‘must be a question on the facts of each particular case’, as well as his reference to the duty extending ‘further in the case of one employee’ than for another makes it seem more like one that ought to be implied in fact into the particular contract in question, rather than by law into the class of employment contracts generally. Lord Greene made this indication despite an initial reference to the duty apparently being well accepted as one owed by all employees. In any event, as will be elaborated on below, the term has since become well accepted as one implied into all employment contracts as a matter of law.

3.4.2.2 Current status

In Australia, a duty is now implied by law, which obliges all employees to render faithful and loyal service to their employer by way of a duty of fidelity.\(^\text{139}\) However, the present contractual duty has been regarded as synonymous with the fiduciary relationship of agent and principal.\(^\text{140}\) In fact, just as in the United Kingdom, the duty’s initial recognition in Australia by Dixon and McTiernan JJ in *Blyth Chemicals Ltd v Bushnell*\(^\text{141}\) was not explicitly as a contractually implied term, but rather as a general duty owed by all employees apparently as a consequence of their position as fiduciaries.\(^\text{142}\)

Conduct which in respect of important matters is incompatible with the fulfilment of an employee’s duty, or involves an opposition, or conflict between his interest and duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal … But conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be

\(^{139}\) See, eg, *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312, [25]-[26] and [57].

\(^{140}\) It has been repeatedly held by the High Court that the employment relationship is ‘fiduciary in nature’: see, eg, *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 68, 69, 141; *Breen v Williams* (1996) 186 CLR 71, 92 and 107; *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312, 315-316; *John Alexander’s Clubs Pty Ltd v White City Tennis Club Pty Ltd* (2010) 84 ALJR 446, [87]-[88]. In relation to fiduciary duties owed by employees, see generally, Andrew Stewart, *Stewart’s Guide to Employment Law* (5th ed, Federation Press, 2015) 274-275.

\(^{141}\) (1933) 49 CLR 66.

\(^{142}\) Ibid, 81-82.
destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to future conduct arises.\textsuperscript{143}

That said, while the judges in \textit{Blyth} adopted the language of conflict of interest, which often signifies a fiduciary relationship, it must be remembered that the case turned on whether the dismissal was in breach of contract. It was really only later in \textit{Concut Pty Ltd v Worrell}\textsuperscript{144} that the duty was explicitly recognised in Australia as a term implied by law into all employment contracts:

The case is revealed for what it is: nothing more than the invocation of an ordinary remedy belonging to an employer who discovers a serious breach by, in this case, a senior employee of a fundamental term implied into an employment contract by force of law. This is the term that such an employee will exhibit fidelity and good faith in dealing with the employer and its assets and property, avoiding conduct incompatible with the continuing trust between them.\textsuperscript{145}

Even so, based on this statement from \textit{Concut}, subsequent Australian decisions have tended to regard the contractual duty of fidelity as importing equitable obligations or even to assume that an employee’s contractual duty is identical to a fiduciary one.\textsuperscript{146} The contractual duty of fidelity also significantly overlaps with other recognised contractual duties. For instance, breaches of the duty of cooperation\textsuperscript{147} or the duty not to misuse or disclose confidential information\textsuperscript{148} might also be considered acts of disloyalty.\textsuperscript{149}

That said, the contractual duty of fidelity has now come to be recognised as a separate and distinct type of loyalty in its own right. It is most obviously concerned with conduct

\textsuperscript{143} Ibid.

\textsuperscript{144} (2000) 75 ALJR 312.

\textsuperscript{145} Ibid, [57].


\textsuperscript{147} Discussed at Part 3.5.1.

\textsuperscript{148} Discussed at Part 3.4.5.

\textsuperscript{149} See further, Andrew Stewart, \textit{Stewart’s Guide to Employment Law} (5\textsuperscript{th} ed, Federation Press, 2015) 271.
involving acts of competition against the employer. By way of example, running a competing business while still employed, soliciting clients to switch to a new business, recruiting other staff presently working for the employer, deliberately removing, copying or memorising any of the employer’s valuable information, or assisting a rival business that the employee plans to join are all acts that are plainly in breach of the duty. In the case of working for another rival employer, the duty is more likely to be breached where the particular employee is more senior or highly skilled.

It has been said that there is no implied duty that an employee report their own misconduct to their employer, though some doubt has been cast on this view.

3.4.3 Duty to exercise reasonable care and skill in the tasks employees perform

3.4.3.1 English origins

In its earliest form, the duty of an employee to exercise reasonable care and skill was a duty of a superior servant or those skilled in an art (eg a journeyman or artisan), not menial servants engaged in general hiring. One of the earliest references to such a duty was in Harmer v Cornelius. In this case, a master engaged two scene painters for a fixed-term to paint a set for a play. However, the master failed to properly assess whether the two painters were actually good at painting. It so happened that they were...
not, which meant that the master wanted to avoid the contract. He was successful in asking the court to find that there was a general duty owed by superior servants that they ‘possess the requisite care and skill’ in relation to the task they undertake to do. If not, they could be summarily dismissed. As Wiles J observed:

Thus if an apothecary, a watchmaker or an attorney be employed for reward they each impliedly undertake to possess and exercise reasonable skill in their several arts. The public profession of an art is a representation and undertaking to all the world that the professor possesses the requisite ability and skill. An express promise or express representation in the particular case is not necessary.\textsuperscript{161}

Even though the obligation was phrased as one ‘impliedly’ undertaken by the superior servants, there was no defined concept of terms implied by law at this early stage. As discussed earlier in this chapter and later in Chapter 6, the notion of implied terms, and particularly the distinction between those implied in fact and by law, only came much later. Moreover, the concept of employment as a contractual relationship was only in its embryonic stages at this point in time. For these reasons, the use of the word ‘impliedly’ makes it appear that an employee’s duty to exercise reasonable care and skill, like many other duties, developed as a norm in the relationship between masters and their superior servants, rather than as a term implied by law in the class of employment contracts more broadly. It is therefore curious that some years later in the House of Lords’ decision in \textit{Lister, Harmer} was referred to as authority for the existence of an employee’s contractual duty to exercise reasonable care and skill in the tasks they perform.\textsuperscript{162}

\textbf{3.4.3.2 Current status}

In Australia all employees are considered to be under an implied contractual duty to exercise reasonable ability, skill and care in the performance of tasks for which they are employed.\textsuperscript{163} Australian courts commonly phrase this duty as a term implied by law, again, despite its origins as a norm in the master and servant context. For example, in \textit{X}.

\textsuperscript{161} Ibid.

\textsuperscript{162} [1957] AC 555, 587, again, the facts of which are discussed later in Chapter 6.

the majority of the High Court made it clear that ‘it is an implied warranty of every contract of employment that the employee possesses and will exercise reasonable care and skill in carrying out the employment’.165 This assertion is apparently an ‘inherent requirement’ of ‘every employment’.166 Chapter 6 will challenge whether this assertion is true. This duty does not apply, however, where an employer knowingly instructs an employee to perform work for which they lack expertise, or have made no claim in respect of possessing such expertise.167

3.4.4 Duty requiring employees to hold inventions created in the course of performing their employment duties on trust for their employer (at least where there is a duty to invent)

3.4.4.1 English origins

In the United Kingdom, ownership of inventions was initially founded on the basis of a fiduciary relationship between senior employees and their employer. For example, in Worthington Pumping Engine Co v Moore168 the company’s managing director was found to hold his invention on trust for the company. In British Syphon Co Ltd v Homewood169 the same reasoning applied in relation to a senior researcher. That said, the alternative approach in Triplex Safety Glass v Scorah170 considered whether the employment contract required the employee to invent: if they were, then they would hold an invention made in the course of their duties as trustee for the employer. Following this, in Sterling Engineering Company Limited v Patchett,171 a term became implied into each employment contract by law that an invention or discovery made in the course of employment and with the requisite connection to employment is the property of the employer, not the employee:

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165 Ibid, [31].
166 Ibid.
167 Printing Industry Employees Union v Jackson and O’Sullivan Pty Ltd (1957) 1 FLR 175, 177-178.
168 (1902) 20 RPC 41, 48-49.
169 [1956] 2 All ER 897.
170 (1937) 55 RPC 221.
...is an implied term ... in the contract of service of any workman that what he produces by the strength of his arm or the skill of his hand or the exercise of his inventive faculty shall become the product of his employer.

Since 1977 in the United Kingdom this implied term has become redundant in its application. There is now a statutory test under the *Patents Act 1977* (UK), which takes the place of the implied term and is used to determine whether an invention belongs to an employee.\(^{172}\)

### 3.4.4.2 Current status

As a consequence of a term implied by law, until recently in Australia, it was well-accepted that employees may be required to hold on trust for their employer *any* invention created during the course of their employment.\(^{173}\) In keeping with the term’s origins in the United Kingdom, the critical factor was whether or not the employee’s invention was a product of what they were engaged to do. However, the Full Federal Court’s decision in *University of Western Australia v Gray*\(^{174}\) has radically narrowed the scope of this term, such that it will now only crystallise where the employee is regarded as having a duty to invent.\(^{175}\) If there is such a duty, then the invention belongs to the employer. However, the mere fact that an employee’s actual work carries the possibility of developing inventions capable of attracting patent protection will not be enough.\(^{176}\) In *Gray*, the court considered that there was no necessity to imply a term as to ownership of the valuable patents created by Dr Gray (a professor of surgery) by his employer, the University of Western Australia. The Full Federal Court ‘agreed with French J at first instance that such a term will only be implied into the contract of an employee who has a duty to invent, and that Dr Gray was under no such duty’:\(^{177}\)

> He had not been engaged to use his inventive faculty in an agreed way or for an agreed purpose, for UWA’s benefit. While his duty to research was an applied science, it cannot for that

\(^{172}\) See, eg, *Patents Act 1977* (UK) s 391(1)(a).

\(^{173}\) *Victoria University of Technology* (2004) 60 IPR 392, [104], quoted in *University of Western Australia v Gray* (2009) 179 FCR 346, [150].


\(^{176}\) (2009) 179 FCR 346, [194] and [206].

reason be transformed into a duty to invent, notwithstanding that his actual research, in fact, carried the possibility of developing inventions capable of attracting patent protection … The subject matter and the manner of discharge of his duty to research were in his discretion. He was not employed to invent.178

More is said about the Gray decision in Chapter 5, as well as in Chapter 6 in the context of the necessity test for implying a term by law.

3.4.5 Duty not to misuse or disclose confidential information

In relation to an employee’s implied duty not to misuse or disclose confidential information,179 the law now ‘recognises three different ways in which … [this] obligation … might arise. The first is by express provision in a contract. The second is by an implied term in a contract. The third is as an obligation recognised in the exclusive jurisdiction of equity’.180 There is also a statutory duty of confidence established by s 183 of the Corporations Act 2001 (Cth).181 In keeping within the scope of this thesis, this part focuses on the contractually implied obligation of confidence. While the relationship between the implied contractual duty and equity is important,182 the scope of the duty is essentially ‘the same in both cases “despite their different conceptual origins”’.183 The weight of authority is in favour of the co-existence of the duties,184 but as discussed below at Part 3.5.4.2 this matter is not entirely beyond doubt.

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179 The confidentiality of any information will always be a question of fact. As to classifying information as confidential, see further, Ian Neil and David Chin, The Modern Contract of Employment (Lawbook Co, 2012) 204-212; Mark Irving, The Contract of Employment (LexisNexis Butterworths, 2012) 458-463.

180 AG Australia Holdings Ltd v Burton (2002) 58 NSWLR 464, [73]-[74].

181 This is ‘largely co-extensive and concurrent with an employees’ contractual and equitable duties’: Mark Irving, The Contract of Employment (2012, LexisNexis Butterworths) 447.

182 Particularly in identifying the applicable remedies in equity or those available in an action for breach of contract.

183 University of Western Australia v Gray (2009) 179 FCR 346, [161]. The reference to ‘different conceptual origins’ of the contractual and equitable duties is derived from Concut Pty Ltd v Worrell (2000) 75 ALJR 312, [26], citing Paul Finn, Fiduciary Obligations (The Law Book Company, 1977) 267.

184 See, eg, Robb v Green [1895] 2 QB 315, 317-318 and 320; Nicotherm Electrical Co Ltd v Percy [1957] RPC 207, 21-214; Ackroyds (London) v Islington Plastics [1962] RPC 97, 101 and 104; Optus Networks Pty Ltd v Telstra Corp Ltd (2010) 265 ALR 281, where the Full Court of the Federal Court held that equitable and contractual obligations may co-exist. In the context of that decision, this meant that the plaintiff could pursue an account of profits, which is a form of equitable compensation not normally available for breach of contract.
3.4.5.1 English origins

The notion of a contractual duty of confidence in employment arose in the United Kingdom during the 1890s. During this time, the English Court of Appeal began declaring that fiduciary duties were mirrored in the contracts of superior servants and their employers (or even substantially similar contracts between workers who were classified as ‘agents’ and their ‘principals’). This development occurred through the medium of implied terms.\(^\text{185}\) Throughout this period, the ‘measure of protection to those engaged in certain trade activities’\(^\text{186}\) also became increasingly recognised following the repeal of the Master and Servant Acts.\(^\text{187}\) The cases generally involved situations of workers attempting to carry their knowledge and skills into new employment, highlighting the newfound tensions between employer loyalty and a demand for worker mobility.\(^\text{188}\) Unlike under the former master and servant regime, these workers were employed in a more skilled and semi-skilled capacity.\(^\text{189}\)

In one of the earliest examples, *Merryweather & Sons v Master*,\(^\text{190}\) Lord Kekewich held that a former draftsman was bound by his ‘confidential relation’ with his employer not to record details about his employer’s engine designs while still in their service for the purpose of use in his new employment. His Honour found that ‘[p]erhaps the real solution is that the confidence postulates in an implied contract’, which ‘thus calls into exercise the [court’s] jurisdiction’.\(^\text{191}\) While the duty was not explicitly phrased as term implied by law at this early stage, and indeed, the concept of a term implied by law had not yet been developed at this point, this reasoning at least highlighted the impression

\(^\text{185}\) See, eg, *Merryweather & Sons v Master* [1892] 2 Ch 518; *Lamb v Evans* [1893] 1 Ch 218; *Robb v Green* [1895] 2 QB 315, each of which are discussed in turn below.


\(^\text{189}\) Ibid.

\(^\text{190}\) [1892] 2 Ch 518.

\(^\text{191}\) Ibid, 522.
that the idea of confidence was somehow meant to dictate the terms of an employment contract.

Another early example is *Lamb v Evans*. The plaintiff was a proprietor and publisher of ‘The International Guide to British and Foreign Merchants and Manufacturers’ (a trade publication, which had gone through several editions and was registered for copyright). It featured advertisements from traders who had chosen to advertise in the Guide. The defendants, Evans and Evans, were brothers who had been agents of the plaintiff while preparing the continental section of the Guide. During their time working for the plaintiff they had obtained and prepared descriptive advertisements for traders, arranged these in the Guide, and also kept material used in the advertisements for use in later editions of the Guide. Following their work with the plaintiff, the defendants began working for a rival company, performing substantially similar services. In fact, they had retained printing blocks, materials and some notes made during the time of their employment with the plaintiff, which the plaintiff objected to. The plaintiff’s claim was, among other things, a claim for breach of contract. Initially, the claim succeeded before Lord Chitty. The Evans brothers then appealed, with Lords Bowen, Lindley and Kay each referring to an ‘implied term’ of confidence in the contract, or a more general obligation of ‘good faith’, which ‘underlies the whole of an agent’s obligation to his principal’, or a ‘confidential relation’. Importantly, however, *Lamb* was concerned, at least in part, with a duty of confidence in a relationship between agent and principal, rather than between a superior servant and their employer. The duty was further interpreted in the same agent and principal context in *Robb v Green*, the facts of which have been discussed above at Part 3.4.2.1.

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192 [1893] 1 Ch 218.
194 [1893] 1 Ch 218, 213 (Lord Bowen, who referred to ‘what the parties must have intended if the transaction is likely to have any business-like efficacy at all’).
195 [1893] 1 Ch 218, 226 (Lord Lindley).
196 [1893] 1 Ch 218, 235 (Lord Kay).
197 [1895] 2 QB 315, more recently applied in *British Midland Tool Ltd v Midland International Tooling Ltd* [2003] EQHC 466; *Crowson Fabrics Ltd v Rider* [2008] IRLR 288.
3.4.5.2 Current status

In Australia, an employee’s duty of confidence has since been recognised as an implied contractual term, as well as an equitable duty. The Full Court of the Federal Court in Gray agreed that these duties share the same scope:

An employee’s duty of confidence to his or her employer can arise by way of implied contract or as a matter of equitable obligation. The scope of the duty will be the same in both cases despite their different conceptual origins.¹⁹⁸

Despite this apparent acceptance, the ability for the related duties to co-exist remains ‘a matter on which differing views have been expressed’.¹⁹⁹ In Optus Networks Pty Ltd v Telstra Corp Ltd,²⁰⁰ the Full Court of the Federal Court agreed that equitable and contractual obligations of confidence may co-exist, which meant that the plaintiff who had established a breach of confidentiality provisions in an agreement could elect to pursue an account of profits – a type of equitable relief, which is generally not available for breach of contract.²⁰¹ However, in Streetscape Projects (Australia) Pty Ltd v City of Sydney,²⁰² the New South Wales Court of Appeal viewed the equitable duty of confidence as a ‘residual’ obligation, which ‘would only arise where relief was required for some misuse of confidential obligation not otherwise attracting liability in tort or for breach of contract’.²⁰³

Putting this controversy to one side, as to the content of the implied contractual duty, it has been phrased as one requiring an employee ‘not to divulge confidential information or to use it in a way that could be detrimental to the employer’²⁰⁴ without the consent or against the wishes of the employer.²⁰⁵

¹⁹⁸ (2009) 179 FCR 346, [161] (Lindgren, Finn and Bennett JJ). See also Concut Pty Ltd v Worrell (2000) 75 ALJR 312, [26].
¹⁹⁹ Andrew Stewart et al, Intellectual Property in Australia (5th ed, LexisNexis Butterworths, 2014) 88, citing the ‘inconclusive discussion’ in Del Casale v Artedomus (Aust) Pty Ltd (2007) 73 IPR 326, [34]-[35], [76]-[100] and [142]-[145].
²⁰² (2013) 295 ALR 760.
In relation to the application of the duty, ‘the courts draw a distinction between the duties that apply during and after employment’. An employee may remain bound by this duty even after an employment relationship ends. During employment, as suggested earlier in Part 3.4.2, an employee may be instead be breaching a duty of fidelity for revealing information of their employer. However, this does not necessarily mean that the same information will automatically be subject to a post-contractual duty of confidence. In explaining this, Andrew Stewart uses the example of a sales representative or manager who leaves a company with considerable knowledge about its customers (eg who they are, their requirements, what they are prepared to pay etc). If they physically remove that information before leaving employment and go on to use it after their employment ends, not only will they be restrained from using the information, they will also be breaching a duty of fidelity. That said, if the employee does nothing improper before leaving employment, and takes nothing away with them, they can always draw on their natural recollection to assemble a new customer list. Generally speaking, this can occur without consequence.

3.5 Mutual duties owed by employers and employees

There are two well-established mutual duties implied by law into employment contracts: (1) the duty on both parties to cooperate, and (2) the duty to provide reasonable notice on termination of the contract, otherwise than for breach (unless the contract contains an express term regulating the period of notice). Both duties are discussed in turn below. The suggested duties of mutual trust and confidence and good faith can also be categorised as mutual obligations implied by law. As already mentioned, given the controversy (and potential similarities) surrounding both duties, they are discussed separately in Chapter 4.

205 Attorney-General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109, 214.
207 See, eg, Ormonoid Roofing and Asphalts v Bitumenoids Ltd (1930) 31 SR (NSW) 347, 355.
3.5.1 Duty of cooperation

3.5.1.1 English origins

The duty to cooperate in all contracts was first established in the English case of *Mackay v Dick.* In this decision, Mackay contracted with Dick to supply it with an excavating machine, on the condition that it achieved a particular level of excavation. However, Dick refused to provide Mackay with the opportunity for the excavation rate to be tested, which meant that Mackay was unable to carry out the work. In this decision, the duty was expressed as one requiring parties to all contracts to do ‘all that is necessary to be done … for the carrying out of [what the parties had, in the contract, agreed was needed to be done].’ In not allowing for Mackay to complete the work, Dick had breached the duty.

The decision in *Mackay* was later followed in *Butt v M’Donald.* Here, the duty was expressed as ‘a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract.’ It extended the duty from *Mackay v Dick,* which was limited to requiring parties to do those things necessary for the contract to be performed, to doing all acts necessary for the party to have the benefit of the contract.

3.5.1.2 Current status

Based on the finding in *Butt,* the duty to cooperate has since become implied by law into all contracts in Australia, including in employment (following the

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209 (1881) 6 App Cas 251.
210 Ibid, 263.
211 (1896) 7 QLJ 68.
212 Ibid, 70-71.
213 (1881) 6 App Cas 251.
characterisation of employment as a contractual relationship). As Mark Irving describes, however, there are various ways in which the duty has been expressed. Sometimes parties are said to have a duty to cooperate in the doing of acts necessary for the performance of their fundamental obligations under the contract. Other times, it has been said that it is a general rule applicable to every contract that each party agrees, by implication, ‘to do all such things as are necessary on his part to enable the other party to have the benefit of the contract’. Another approach has been to view the duty as containing a negative obligation not to prevent the further performance of the contract. The duty has also proved important in the context of a contract containing a contingent condition, which requires the occurrence of some specified event before the parties are obliged to continue with the performance of the contract.

Given these varied understandings of the duty, it is not surprising that there has been some speculation as to how the duty ought to arise in contracts: as a term implied in fact, a term implied by law, or as a rule of construction. For purposes of this thesis, the focus is placed upon the interpretation of the duty as one implied by law.

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215 Beyond a duty to cooperate in all contracts, including employment contracts, it appears that there may also be a general duty on employees to behave appropriately while at work. Even though the courts have not explicitly identified such a duty, as Stewart suggests, it may be inferred from cases that have held employers to be justified in dismissing or disciplining employees for various forms of misconduct: see, eg, Andrew Stewart, Stewart’s Guide to Employment Law (5th ed, Federation Press, 2015) 260-261. Given that this particular duty of ‘proper conduct’ has not been explicitly recognised by the courts, it is only mentioned briefly here and not explored in further detail. It is beyond the scope of the present exercise to further consider this potential duty.


217 See also Secured Income Real Estate (Aust) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596, 611; Fitzgerald v F J Leonhardt Pty Ltd (1997) 189 CLR 215, 219 and 226.


220 See, eg, Richard Austen-Baker, Implied Terms in English Contract Law (Edward Elgar, 2011) 77, who argues that ‘[i]n each and every case, it is necessary to demonstrate that such a term is necessary to give business efficacy to the contract in contention, and the term will be specific as to what is to be done, so that the term is implied in fact in each case’. See further, A J Bateson, ‘The Duty to Cooperate’ [1960]
3.5.2 Duty to provide reasonable notice on termination

3.5.2.1 English origins

English courts were once prepared to enforce contracts for an indefinite duration by preventing servants from giving notice, making their contracts akin to slavery.\(^{224}\) However, an implied duty to terminate an employment contract on reasonable notice eventually developed as a consequence of changes that occurred in the typical duration of employment contracts in the United Kingdom. When it became acceptable for employment contracts to be indefinite, rather than for a fixed-term, it also became necessary for either the parties, or for the courts through implied terms, to make the contracts terminable on reasonable notice.\(^{225}\)

Throughout the industrial revolution, there was a presumption of fixed-term yearly hiring that applied to servants in agriculture.\(^{226}\) This rule arose out of the *Statute of Artificers of 1562* and the Poor Laws of the 17\(^\text{th}\) century, which conferred a parish settlement (ie a right to relief) on servants with a yearly hiring, but survived the abolition of this legislation to later become a presumption of the common law.\(^{227}\) The

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\(^{223}\) See the more detailed discussion on the relationship between implication and construction in Chapter 2.

\(^{224}\) See, eg, *Wallis v Day* (1837) 150 ER 759; *Phillips v Stevens* (1899) 15 TLR 325; *Ball v Coggs* (1710) 1 ER 471. This approach has since been found contrary to public policy: see, eg, *WH Milstead & Son Ltd v Hamp and Toss & Glendinning Ltd* [1927] WN 233; *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014.


\(^{227}\) Settlement by hiring was abolished by the *Poor Law Amendment Act 1834* (UK) s 64, and the provisions of the *Statute of Artificers 1563* (UK), which required that yearly hiring in agriculture be repealed in 1875.
presumption was formally removed by the English Court of Appeal in 1969, but had fallen into disuse long before then, during the 19th century.

By the middle of the 19th century, indefinite hiring had become increasingly common and the modern notice rule began to emerge. This is contrary to the approach taken by American courts in the late 19th century, who presumed that employment contracts were terminable ‘at will’. The earliest recognition of the ability to terminate an employment contract on reasonable notice was in the 1844 decision, *Baxter v Nurse*. At this time, the duty was not phrased explicitly as a contractual obligation, but this is eventually how it came to be understood later in the 20th century. At its inception, the ability to terminate an indefinite contract on reasonable notice was instead accepted as a ‘norm’ of the particular circumstances of the employment.

At this point in time, what was ‘reasonable’ in the circumstances was generally based on one of two criteria: (1) the period by which the wage or salary was calculated, or (2) the custom in the relevant trade. For example, an employee whose wage was calculated by the week might, for that reason alone, be entitled to receive a week’s notice of termination. Otherwise, ‘general usages … [would be] tacitly annexed to all contracts relating to the business with reference to which they are made, unless the terms of such contracts exclude them’. For domestic servants, a month’s notice was customary. For

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228 See, eg, *Richardson v Koefod* [1969] 3 All ER 1264, 1266: ‘In the absence of an express stipulation, the rule is that every contract of service is determinable on reasonable notice’.


230 (1844) 6 Man & G 935. For modern restatements of the rule in the United Kingdom, see, eg, *McClelland v Northern Ireland General Health Service Board* [1957] 1 WLR 594, 599; *Reda v Flag Ltd* [2002] IRLR 747, [57], where it was emphasised that the rule does not apply to contracts for a fixed-term.

231 See, eg, the earliest reference to the reasonable notice term as a ‘rule’ applicable to every employment contract (in other words, a term implied by law) in *Richardson v Koefod* [1969] 3 All ER 1264, 1266: ‘In the absence of an express stipulation, the rule is that every contract of service is determinable on reasonable notice’.


233 *Metzner v Bolton* (1854) 9 Exch 518, 521.
professional or managerial employees periods of minimum notice ranged from a month
to (less commonly) a year.\textsuperscript{234}

3.5.2.2 Current status

Nowadays in the United Kingdom, minimum notice periods are inserted into all employment contracts for employees with continuity of employment for at least one month by virtue of s 86 of the \textit{Employment Relations Act 1996} (UK).\textsuperscript{235} After one month’s continuous service, an employee is entitled to a minimum of one week’s notice of dismissal. After two years, this increases to two weeks and continues to rise for every additional year of continuous employment up to a limit of 12 weeks’ minimum notice.\textsuperscript{236} Conversely, after one month of continuous employment, the employee is obliged to give the employer at least one week’s notice of termination of the contract.\textsuperscript{237} As such, the ‘statute demands less of the employee’.\textsuperscript{238}

Some have argued that this statutory provision displaces the need for an implied term of reasonable notice, as it has effectively ‘codified’ the common law concept.\textsuperscript{239} However, on a closer investigation, there appear to be no United Kingdom authorities to support this proposition. In fact, the statutory provisions for minimum notice cannot be said to have codified and replaced the common law reasonable notice rule, because the common law reasonable notice period may be higher than the statutory minimum prescribed by the legislation (eg in the case of a senior executive, this will not be uncommon). Rather, ‘the common law rule is restricted to contracts of employment of an indefinite period’.\textsuperscript{240} However, in the ‘modern workplace’ in the United Kingdom,

\begin{itemize}
\item \textsuperscript{235} The operation of this section does not rule out the parties themselves agreeing to longer notice periods on either side. It also does not prevent either party from waiving their right to notice on any occasion or from accepting pay in lieu of notice: \textit{Employment Relations Act 1996} (UK) s 86(3).
\item \textsuperscript{236} \textit{Employment Relations Act 1996} (UK) s 86(1).
\item \textsuperscript{237} Ibid s 86(2).
\item \textsuperscript{238} Douglas Brodie, \textit{The Employment Contract: Legal Principles, Drafting and Interpretation} (Oxford University Press, 2005) 52.
\end{itemize}
the instances where consideration must be given to the common law reasonable notice period are very ‘rare’.\textsuperscript{241} This is a consequence of a statutory direction in s 1(4)(e) of the \textit{Employment Relations Act 1996} (UK),\textsuperscript{242} which provides that the employer must give the employee written particulars of any notice period within two months of the commencement of the employee’s employment. In other words, this legislative provision has the effect of strongly incentivising the employer towards the insertion of an express term governing notice periods into an employee’s written employment contract. The statutory notice requirements also do not apply to employment contracts made in contemplation of the performance of a specific task which is not expected to last for more than three months, unless the employee has been continuously employed for a period of more than three months.\textsuperscript{243} Therefore, it is recognised that there will be very limited circumstances in which the common law reasonable notice term will be necessary to be implied in the United Kingdom. To be clear: the supposition is that the circumstances where this does happen will be limited to situations where the common law reasonable notice period exceeds the statutory minimum and the contract’s terms are silent as to the notice period (ie there is no express term in the written employment contract).

In Australia, where an employment contract is for an indefinite duration (ie as expressly agreed by the parties, or by fixing no time when it will end) the common law position is similarly that the contract is terminable on reasonable notice. In particular, if the parties make no express mention as to the circumstances in which the contract may be brought to an end, or if there is no binding provision made by statute, award or other instrument that governs their relationship, then a term will be implied by law, such that all employment contracts are terminable by either party on reasonable notice to the other.\textsuperscript{244}

\textsuperscript{242} For a detailed explanation of this provision see, eg, David Cabrelli, \textit{Employment Law in Context: Text and Materials} (Oxford University Press, 2014) 141-143.
\textsuperscript{243} \textit{Employment Relations Act 1996} (UK) s 86(5). The statutory requirements apply to employees who have been continuously employed for three months or more on a fixed-term contract of one month or less.
\textsuperscript{244} However, there are still difficult cases at the margins, which makes it difficult to determine the circumstances in which the court will imply a term requiring reasonable notice. See, eg, \textit{NSW Cancer Council v Sarfaty} (1992) 28 NSWLR 28, 74-75, where there was found to be no implied term of reasonable notice because of a contrary express term.
There are numerous Australian decisions in which the content of this implied term has been described. In fact, in an article assessing the requirement of reasonable notice in Australia and Canada, Irving notes that ‘[b]etween 1995 and 2014 there were 34 reasonable notice assessments at trial by Australian superior courts concerning employment contracts and five appellate decisions’.\footnote{Mark Irving, ‘Australian and Canadian Approaches to the Assessment of the Length of Reasonable Notice’ (2015) 28 Australian Journal of Labour Law 159, 160.} \textit{Byrne v Australian Airlines Ltd}\footnote{(1995) 185 CLR 410, a decision referred to throughout this thesis, particular later in Chapter 6 in the context of the necessity test for implying a term by law.} provides a useful reflection of them all:

\begin{quote}
In the absence of anything to the contrary and putting to one side the provision in the award for notice, at common law a contract of employment for no set term is to be regarded as containing an implied term that the employer give reasonable notice of termination except in circumstances justifying summary dismissal.\footnote{(1995) 185 CLR 410, 429.}
\end{quote}

As in the United Kingdom, there are also statutory provisions in Australia concerning the requisite period of minimum notice. In particular, s 117 of the \textit{Fair Work Act 2009} (Cth) ensures that all employees (with only limited exceptions)\footnote{See, eg, \textit{Fair Work Act 2009} (Cth) s 123, which excludes employees employed for a specified period of time, for a specified task, or for the duration of a specified season; employees whose employment is terminated because of serious misconduct; casual employees; employees (other than apprentices) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement; and other employees excluded by the \textit{Fair Work Regulations 2009} (Cth).} must be given a minimum period of notice in writing (or payment in lieu thereof). Modern awards and enterprise agreements may also include terms specifying the minimum notice period.\footnote{\textit{Fair Work Act 2009} (Cth) s 118. This award specification may, in turn, mean that the implication of a term by law is unnecessary: see, eg, \textit{Byrne v Australian Airlines Ltd} (1995) 185 CLR 410, 429 and 446.} Importantly, however, modern awards in practice only regulate notice of termination of employment by employees, not employers.\footnote{See, eg, Andrew Stewart et al, \textit{Creighton and Stewart’s Labour Law} (6\textsuperscript{th} ed, Federation Press, 2016) 741.}

It is worth noting that s 117 of the \textit{Fair Work Act 2009} (Cth) is not a new statutory provision. It repeats a provision that has been in legislative form in Australia since 1993.\footnote{See, eg, \textit{Industrial Relations Reform Act 1993} (Cth) s 170DB.} Notwithstanding its existence for over 20 years, as suggested above, the
implied duty requiring reasonable notice at common law has been referred to in case after case.

Nevertheless, in *Kuczmarski v Ascot Administration Pty Ltd*\(^{252}\) the South Australian District Court suggested that there is no ‘necessity’ for an implied term requiring reasonable notice on termination where the statutory provision under s 117 of the *Fair Work Act 2009* (Cth) operates. His Honour Auxiliary Judge Clayton reasoned that in such a situation, there is ‘no relevant “gap to fill” in light of s 117 of the *Fair Work Act*’.\(^{253}\)

This controversial finding was made despite the fact that there is a wealth of existing authority to support the implied term as referred to above, and including a comment made by the High Court in *Barker*.\(^{254}\) What *Kuczmarski* suggests is that courts have continually been getting their decisions associated with the application of the reasonable notice term wrong – including the High Court’s reference to the existence of the duty in *Barker*. Surely, the wealth of earlier authority supporting the existence of the reasonable notice implied term must not be entirely incorrect.

It is possible that in refusing to recognise the implied duty, the court in *Kuczmarski* was simply relying on what the High Court emphasised in *Barker* about regulation of employment through the implication of terms by law being a matter that is best left to the legislature.\(^{255}\) However, the District Court did not expressly label its reasoning as such. It simply reasoned that the term was unnecessary by reason of s 117 of the *Fair Work Act 2009* (Cth).

In making its finding, the District Court in *Kuczmarski* relied heavily on the South Australian Supreme Court’s ruling in *Brennan v Kangaroo Island Council*.\(^{256}\) That earlier decision concerned an award clause providing that the employee ‘must be given notice of termination’ in accordance with the table set out in the clause. Based on the

\(^{252}\) [2016] SADC 65.

\(^{253}\) Ibid, [56]-[57].


\(^{255}\) Ibid, [1], [19] and [40].

\(^{256}\) (2013) 120 SASR 11. Special leave to appeal to the High Court was refused: [2014] HCASL 153 (15 August 2014). See also *District Council of Barunga West v Hand* (2014) 120 SASR 228, [57]-[62], which noted, but did not explicitly endorse the decision in *Brennan*. 

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existence of this clause, the Full Court of the Supreme Court held that the implication of an obligation to give reasonable notice was not necessary to give business efficacy to the contract. Quite apart from only considering whether the term was implied in fact rather than as a matter of law into all employment contracts, this finding appears to be inconsistent with existing High Court authority.\(^{257}\) Moreover, as the authors of Macken’s Law of Employment point out, ‘an award notice provision generally does not confer a right to terminate the employment, but merely prescribes minimum period of notice that must be given by the employer in the event that it exercises its contractual right to terminate the employment’.\(^{258}\) The same argument can be made in respect of s 117 of the Fair Work Act 2009 (Cth); it is similarly concerned with the quantum of notice, not conferring an actual right to terminate. On that analysis, the District Court’s finding in Kuczmarski that a reasonable notice term was not necessary to imply, based on the operation of s 117, may have been misguided.

This view is to be contrasted with the comments made in obiter dicta by Buchanan J in Westpac Banking Corporation v Wittenberg.\(^{259}\) His Honour agreed with the judgment in Brennan and suggested that where there are award notice provisions, which operate similarly to s 117 of the Fair Work Act 2009 (Cth) by fixing minimum notice periods, this will prevent the implication of a term as to reasonable notice. His rationale behind this conclusion was that such a provision imports a right to terminate into all employment contracts once the requisite period of notice is given. As Buchanan J expressed, on that understanding, there is ‘no gap to be filled by the implication’\(^{260}\) of the reasonable notice term.

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\(^{259}\) [2016] FCAFC 33. The reason Buchanan J’s comments are said to be made in obiter dicta is that express terms precluded the implication of the common law implied term, which, in turn, meant that the question of implication did not actually arise.

\(^{260}\) [2016] FCAFC 33, [234].
The Federal Circuit Court of Australia in *McGowan v Direct Mail and Marketing Pty Ltd* explicitly disagreed with the finding in *Kuczmarski*. In this case, the applicant claimed that he was entitled to reasonable notice at common law, rather than the minimum period under s 117 of the *Fair Work Act 2009* (Cth). The claim was dismissed because the court found that a 1999 contract containing specific terms as to notice remained in force through subsequent variations. Accordingly, a term as to reasonable notice could not be implied at common law. However, Judge McNab went on to say that a ‘genuine controversy’ remains regarding whether s 117 displaces an implied term requiring reasonable notice. After considering *Kuczmarski*, the court said that the ‘better view’ is that s 117 provides a minimum notice period only. Judge McNab held that s 117 does not displace an implied term requiring reasonable notice in the absence of an express notice period in an employment contract for a non-award covered employee. In particular, the court viewed it as significant that the legislature did not make reference to s 117 removing the common law right to reasonable notice when the *Fair Work Bill 2008* (Cth) was introduced into parliament, thus supporting an understanding that s 117 operates as a minimum notice period only. With this conflicting authority, if no notice period is stipulated in the employment contract of an employee, it remains uncertain how this will be resolved.

There is also the possibility that other well-established terms implied by law could be found unnecessary based on the reasoning in *Kuczmarski*. For instance, in relation to an employer’s duty to provide their employees with a safe system of work (another well-established implied term, also referred to as such in *Barker*), this could be ‘displaced’ by an apparently equivalent statutory provision, which sets out the primary duty of care in state and federal Work Health and Safety Acts. While this reasoning fits with that

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261 [2016] FCCA 2227.
262 Ibid, [79].
263 Ibid, [85].
264 Ibid.
265 Ibid, [84]-[85].
in Kuczmarski, it would similarly contradict an entire body of case law, which provides overwhelming support for the existence and necessity of the term.\textsuperscript{268} This is a point that will be returned to in Chapter 6 in considering what terms implied by law are actually necessary in employment contracts.

3.6 Conclusion

As the above historical analysis demonstrates, each of the key terms currently implied by law into Australian employment contracts has its origins in English law. In most instances, however, the terms did not originate in that context as terms implied by law. Even though these incidents of the employment relationship are now understood to be contractual in nature, it is with some difficulty that they have been made to fit into a contractual framework as implied terms. Each implied term came into existence with its own unique and varied historical background. For instance, while an employer’s duty to inform employees of their rights developed as a contractually implied term, this only occurred in respect of a very narrow sub-class of contract. Even in their present contractual form, the other key duties bear evident signs of their origins in equity, tort and/or the former master and servant statutory regime. For instance, an employer’s duty to:

1. provide their employees with a safe place of work originated as a duty of care in tort; and
2. indemnify its employees originated as a fiduciary duty owed between a principal and agent under the former master and servant regime.

An employee’s duty:

1. to obey is derived from the former understanding of employment as a status-based relationship between master and servant;
2. of fidelity arose as a fiduciary duty between a principal and agent under the former master and servant regime;
3. to exercise reasonable care and skill originated as a duty owed by superior servants, again, under the master and servant regime;

\textsuperscript{268} See, eg, the authorities discussed at Part 3.3.1.2.
4. to hold inventions on trust (at least where there is a duty to invent) was first founded on the basis of a fiduciary relationship between senior employees and their employer; and

5. not to misuse or disclose confidential information has its origins as a fiduciary duty between a principal and agent under the master and servant regime.

The mutual duty on both parties to:

1. cooperate developed as part of the general law of contract and was later transferred to employment when the employment relationship became understood as contractual; and

2. provide reasonable notice on termination of the contract arose out of the master and servant regime once the presumption of yearly hiring that applied to servants was abolished and indefinite hiring became more common.

Despite their varied origins, each of the above instances is now justified as a term implied by law into the general class of employment contracts, both in the United Kingdom and in Australia (although, there is now some controversy as to the existence of an implied term requiring reasonable notice of termination in Australia). There is no logical explanation for this, other than that the courts seem to have accepted each ‘norm’ as being so much a part of the employment relationship that they ought to operate across every employment contract as terms implied by law. As suggested in the introduction to this chapter, this presumption is problematic. It is possible that not all terms currently implied into the general class of employment contracts are actually ‘necessary’ across all employment agreements. This idea will be further explored in Chapter 6.


4 THE IMPLIED DUTIES OF MUTUAL TRUST AND CONFIDENCE AND GOOD FAITH

4.1 Introduction

As mentioned in the introduction to this thesis, in its decision in Commonwealth Bank of Australia v Barker, the Australian High Court unanimously ruled out an implied duty of mutual trust and confidence in Australian employment contracts, but left open the potential for a duty of good faith. This finding occurred despite English employment law since the 1970s recognising a duty not to destroy mutual trust and confidence in the employment relationship, as well as a more general duty of good faith and fair dealing at work.

To begin, in Part 4.2.1 this chapter examines the evolution and current existence of mutual trust and confidence in the United Kingdom. What that discussion makes clear is that unlike most of the select key terms discussed in Chapter 3, from its inception in the United Kingdom, the duty was categorised as a term implied by law into all employment contracts. However, it developed there as a consequence of a specific statutory lacuna, which is not mirrored in Australia.

The chapter then recounts the possible rise of the mutual trust and confidence term in Australia in Part 4.2.2, followed by its definite fall as a consequence of the High Court’s decision in Barker. The facts and various findings in that case are discussed. This analysis shows that while there were moments in which some courts considered the term as a ‘necessary’ element of all Australian employment contracts, following Barker, it is now viewed as entirely unnecessary. A more detailed assessment of the necessity test adopted by the High Court in Barker is undertaken in Chapter 6. In Barker, the High Court also considered that the implication of the term ‘involved

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2 See, eg, Commonwealth Bank of Australia v Barker (2014) 253 CLR 169, [42].
4 See, eg, Commonwealth Bank of Australia v Barker (2014) 253 CLR 169, [36]-[37].
complex policy considerations’ \(^5\) with which the courts should not engage – rather, these constituted matters better dealt with by the legislature. This aspect of the High Court’s decision will be explored separately in Chapter 7 for the reason that it has the potential to be extremely problematic; it could result in the courts refusing to imply any new terms by law into employment contracts altogether, thereby leaving gaps in those contracts remaining to be filled.

The purpose of the commentary on *Barker* in this chapter is not to say whether the High Court’s decision was correct, or to try and resolve the debate around whether there should be an implied term of mutual trust and confidence in Australian employment contracts. As the discussion in Part 4.2.3 of this chapter makes clear, that question has already been the subject of much academic debate. Rather, the discussion aims to identify some of the controversies now faced as a consequence of the High Court’s decision.

The chapter then engages in a similar historical analysis of a duty of good faith by considering its origins in the United Kingdom, followed by its current status in Australia in Part 4.3. What this analysis makes clear is that the status of a general duty of good faith in all contracts in the United Kingdom is unclear and historically there has been a lot of hesitation towards applying it. In the employment context, however, the duty originated (and still exists) as a term implied by law into employment contracts in the United Kingdom as a consequence of the mutual trust and confidence term. As will be explained, in that jurisdiction, both duties are understood as being substantially similar.

In Australia, however, a good faith duty has not been similarly recognised. Not only did the High Court specifically leave the matter open in *Barker*, but there are also a range of conflicting authorities as to the status of the duty both in contracts generally and employment contracts specifically (if it even exists). Therefore, the final part of this chapter canvasses the potential future options for the recognition of a good faith duty in Australia: as a term implied by law or in fact, as a rule of construction, or as not existing at all. As to the separate issue of whether a good faith duty *should* be implied

\(^5\) Ibid, [40].
by law into all Australian employment contracts, that question will be specifically addressed in Chapter 8.

4.2 Mutual trust and confidence

4.2.1 Existence and content of duty in the United Kingdom

This employment law concept is well advanced in the United Kingdom. English appellate courts have applied it ‘for over 25 years’. There is extensive case law in support of the implied term, and a wealth of academic commentary on its operation. Following the key decision in Malik v Bank of Credit and Commerce International SA (in liq), which unlocked the remedial potential for a breach of the implied term, it has been described in numerous decisions as a mutual obligation that employers and employees shall not without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy the relationship of confidence and trust between them. It has also been formulated as a positive duty upon employers to act fairly, responsibly and in good faith in the conduct of their business and the treatment of their


employees. More is said about the duty’s links to the development of a good faith duty in employment contracts in the United Kingdom later at Part 4.3.1. Since its inception, the mutual trust and confidence term has been treated as ‘an overarching obligation implied by law as an incident of the contract of employment’. More is said about the term’s evolution in the United Kingdom below at Part 4.2.2.

What the term requires is that each party must have regard to the other’s interests, but not to subjugate their own interests to those of the other. In that respect, the duty is different from a fiduciary obligation. Even though the duty is apparently mutual in operation, it has been said that it:

adds little to the employee’s implied obligations to serve his employer loyally and not to act contrary to his employer’s interests. The major importance of the implied duty of trust and confidence lies in its impact on the obligations of the employer … And the implied obligation … is apt to cover the great diversity of situations in which a balance has to be struck between an employer’s interest in managing his business as he sees fit and the employee’s interests in not being unfairly and improperly exploited.

The rationale behind the duty is that it operates to facilitate the functioning of the employment contract, preserve the employment relationship and protect employees from oppression, harassment and the loss of job satisfaction. As Lizzie Barmes writes, since its recognition, it has created ‘[a] prism … through which to evaluate whether there has been respect for the implicit behavioural commitments made by entry into,

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15 An example of a duty of trust and confidence owed by an employee is demonstrated by the case of Ticehurst v BT [1992] ICR 383, where it was suggested that if the employee refuses to indicate, prior to the time of performance, whether he will perform his obligations, then that may be in breach of the implied term. See further, Douglas Brodie, The Employment Contract: Legal Principles, Drafting and Interpretation (Oxford University Press, 2005) 63.
and continuance in, working relationships’. 18 A leading authority on the operation of the term in the United Kingdom, Douglas Brodie, has described it as an ‘open textured’ term and one which provides ‘a conduit through which the courts can channel their views as to how the employment relationship should operate’. 19

English authorities suggest that a broad range of conduct of the employer during employment 20 will give rise to a breach of the implied term, including: sexual harassment, 21 bullying and excessive workloads, 22 unjustified verbal abuse, 23 unwarranted carping criticism, 24 unjustified accusations of dishonesty, 25 capricious withdrawal of employment benefits, 26 operating a dishonest and corrupt business which affects the employee’s capacity to find new employment, 27 a campaign of vilification of the employee in the press, 28 providing an employee with unjustifiable warnings in respect of their performance, 29 fabricating evidence for a sexual harassment claim against the employee, 30 exercising a contractual right to relocate the employee in a capricious manner, 31 an unjustified request for the employee to undergo a psychiatric examination, 32 and suspending the employee in a ‘knee-jerk’ manner by means of a letter unrealistically overstating the seriousness of the allegations to be investigated. 33

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20 The implied term cannot be breached after employment has ended: see, eg, London Borough of Enfield v Sivanandan [2005] EWCA Civ 10.
21 See, eg, Western Excavating (ECC) v Sharp [1978] ICR 221.
22 See, eg, Triggs v GAB Robins (UK) Ltd [2008] EWCA Civ 17.
31 See, eg, United Bank Ltd v Akhtar [1989] IRLR 507.
32 See, eg, Bliss v South East Thames Regional Health Authority [1987] ICR 700.
33 See, eg, Gogay v Hertfordshire County Council [2000] IRLR 703.
The employer’s motives are irrelevant. There can be a breach of the implied term even if the employer has made a genuine mistake. The standard of conduct required by the employer is not modified simply because the employee is a senior manager in a highly paid, ‘pressure cooker’ environment.

Importantly, in what is commonly referred to as the ‘Johnson exclusion zone’, the term does not apply at the point of dismissal, such that it cannot attach to the power to terminate the employment relationship. The rationale behind this limitation on the term was that a claim for breach of the implied term would be inconsistent with statutory unfair dismissal legislation. Specifically:

[the statutory scheme was administered by specialist tribunals with restrictions on eligibility, the amount of compensation that might be awarded and time limits for bringing applications. This unfair dismissal jurisdiction provided an appropriate balance between the interests of the employee and the employee. A common law claim would not be available which side stepped these limitations.]

That said, damages are recoverable where the breach occurs before termination (eg during a disciplinary process). Where the term is implied and breached, this will give
rise to a right to damages for breach of contract and may also give rise to the right to terminate the employment contract.\textsuperscript{41}

\subsection*{4.2.2 Evolution of the duty in the United Kingdom\textsuperscript{42}}

Taking stock of the select key terms discussed previously in Chapter 3, the mutual trust and confidence term is one of the few terms that evolved as a term implied by law into all employment contracts from its inception in the United Kingdom. There are ‘numerous views’\textsuperscript{43} about its origins. However, the focus in this part is on the well-accepted understanding of the term’s development during the 1970s in response to changes to unfair dismissal legislation.\textsuperscript{44} This part summarises the main steps in that developmental process.\textsuperscript{45}

When statutory protection against unfair dismissal was first enacted in England in 1971,\textsuperscript{46} a new problem emerged. Employers seeking to avoid liability to pay statutory compensation would stop short of terminating employees.\textsuperscript{47} Instead, they used various other techniques to encourage employees to resign. Courts grappled with determining what conduct of the employer would entitle employees to terminate their employment contract within the statutory meaning of ‘dismissal’. The basic definition of ‘dismissal’ under s 23(2)(a) of the \textit{Industrial Relations Act 1971} (UK) was as a ‘termination of the contract of employment by the employer’. The problem for consideration was how a wrongful repudiation by an employer inducing an employee to resign was to be brought within this statutory concept of dismissal.\textsuperscript{48} Eventually, this wrongful repudiation came

\begin{itemize}
\item \textsuperscript{41} See the further discussion on the consequences of a breach of the implied term in Mark Irving, \textit{The Contract of Employment} (LexisNexis Butterworths, 2012) 498-503.
\item \textsuperscript{42} The existence of the mutual trust and confidence term (or substantially similar terms) has support in a range of other common law jurisdictions, including Bermuda, South Africa, Hong Kong, Tonga, Vanuatu, Fiji, New Zealand and Canada (at least to some extent). See the applicable authorities from these jurisdictions cited in Andrew Stewart et al, \textit{Creighton and Stewart’s Labour Law} (6\textsuperscript{th} ed, Federation Press, 2016) 525. In keeping with the scope of this thesis, this chapter focuses on the term’s origins in the United Kingdom.
\item \textsuperscript{43} Mark Irving, \textit{The Contract of Employment} (LexisNexis Butterworths, 2012) 493.
\item \textsuperscript{44} See, eg, \textit{Heptonstall v Gaskin and Ors (No 2) (2005) 138 IR 103}, [19]-[23].
\item \textsuperscript{45} See also the historical survey by Jessup J in the Federal Court in \textit{Commonwealth Bank of Australia v Barker} (2013) 214 FCR 450, [213]-[235].
\item \textsuperscript{46} See, eg, \textit{Industrial Relations Act 1971} (UK) s 23.
\item \textsuperscript{47} Joellen Riley, \textit{Employee Protection at Common Law} (Federation Press, 2005) 70.
\item \textsuperscript{48} Mark Freedland, \textit{The Contract of Employment} (Clarendon Press, 1976) 237.
\end{itemize}
to be regarded, for statutory purposes, as a ‘constructive dismissal’, as the case law applying s 23(2)(a) treated the single concept of ‘dismissal’ as having a constructive as well as literal aspect.\footnote{Ibid, 238, citing Sutcliffe v Hawker Siddeley Aviation Ltd [1973] ICR 560, 564G.}

For example, in *Western Excavating (ECC) Ltd v Sharp*,\footnote{[1978] ICR 221.} it was held that in deciding whether an employee had been ‘constructively dismissed’ in accordance with the relevant statutory definition, one needed to consider whether the employer’s conduct was enough to justify the employee regarding their employment contract as discharged, giving the employee the right to terminate. If so, the employment contract would be terminated by reason of the employer’s conduct, though done by the act of the employee. The employee then had access to a claim for wrongful dismissal. By leaving, the employee was effectively terminating themselves. This outcome meant that there could only be a repudiation or fundamental breach by the employer if a recognised obligation under the employment contract was breached.

As a consequence of *Western Excavating*, the courts’ focus turned to what type of breach could be said to have occurred where an employer had treated an employee badly in some way. Specifically, there was a concern that a practice of ‘squeezing out’\footnote{See, eg, the concern expressed in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 671. See also Malik v Bank of Credit and Commerce International SA (in liq) [1998] AC 20, 37-38 and 46.} would arise. It was feared that some employers, who were keen to be rid of an employee without exposing themselves to a claim for wrongful dismissal, would attempt to make employment sufficiently uncomfortable for the employee to induce them to leave (albeit without going far enough to seriously breach or repudiate their employment contract). Therefore, once the employee left, they would have no access to a claim for unfair dismissal.

It was this recognition that led English courts to formulate the implied term of mutual trust and confidence.\footnote{Significant early decisions include: Isle of Wright Tourist Board v Coombes [1976] IRLR 413; Fyfe & McGrouther Ltd v Byrne [1977] IRLR 29; Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761; Robinson v Crompton Parkinson Ltd [1978] ICR 401; Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84; Post Office v Roberts [1980] IRLR 374; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 (not overturned on appeal in [1982] ICR 693); Lewis v Motorworld Garages Ltd [1986] ICR 157; Bliss v South East Thames Regional Health Authority [1987] ICR 700; United Bank Ltd v Akhtar [1990] ICR 145; The Queen v Mahdi [1991] ICR 149.} It was first couch as a term implied by law into all
employment contracts in a decision of the English Employment Appeal Tribunal in *Courtaulds Northern Textiles Ltd v Andrews*:\(^{53}\)

The test must be, as we think, that one implies into a contract of this sort such additional terms as are necessary to give it commercial and industrial validity … the implied term (as regards “calculated”) extends only to an obligation not to conduct themselves in such a manner as is intended, although not intended by itself, to destroy or seriously damage the relationship in question.\(^{54}\)

Soon after, in *Woods v WM Car Services (Peterborough) Ltd*,\(^{55}\) Browne-Wilkinson P applied *Courtaulds*, and again articulated the duty as a term implied by law into all employment contracts:

In our view it is clearly established that there is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee…\(^{56}\)

This same reasoning was later approved in *Malik*,\(^{57}\) which, as mentioned earlier in Part 4.2.1, was the first occasion upon which the implied term came before the House of Lords.\(^{58}\) However, as will be explained further below at Part 4.2.3, there are reasons as to why this authority perhaps ought not to be relied upon as categorically upholding the implied term.

Nevertheless, following its inception as a term implied by law into all employment contracts in *Courtaulds*, any ‘squeezing out’ became a fundamental breach of the term, which justified the employee’s termination of their employment contract and claim for


\(^{54}\) [1979] IRLR 84.


\(^{56}\) [1981] ICR 666.

\(^{57}\) Ibid, 670-671.


\(^{58}\) However, it should be noted that in *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20, Lord Steyn appeared to make the mistake of referring to ‘calculated and likely’ rather than ‘calculated or likely’. See further, Douglas Brodie, *The Employment Contract: Legal Principles, Drafting and Interpretation* (Oxford University Press, 2005) 63.
As the earlier discussion in 4.2.1 makes clear, despite its initial purpose in filling a statutory lacuna, the mutual trust and confidence term has continued to be implied into English employment contracts to the present day. That is not to say that its continued implication in the United Kingdom has been without criticism, and in some situations, potentially overused.

### 4.2.3 Possible rise of the duty in Australia before Barker

In the lead up to the High Court’s decision in *Barker*, ‘[f]rom the mid-1990s until 2014 there was a vigorous judicial debate about whether the mutual duty of trust and confidence was part of the common law of Australia’. Just a few years before the High Court’s decision in *Barker*, Joellen Riley explained that:

> “Mutual trust and confidence” ... [had] become ... [a term] to conjure within employment litigation... [It was] the “abracadabra” of the plaintiff lawyer, sprinkled liberally over statements of claim, in the hope of summoning up some exceptional damages award from a mundane termination of employment claim.

In addressing such claims, the majority of Australian courts either assumed that the implied term existed or simply conceded its existence. These findings were made,

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60 See, eg, *Leach v The Office of Communication* [2012] EWCA Civ 959, [53], where Mummery LJ warned that ‘it is not a convenient label to stick on any situation’.

61 In a conference paper, the Employment Appeals Tribunal President, Brian Langstaff J, wrote that the term ‘might often be overused, in particular where some perfectly good contractual right could be relied on, with a view to claiming constructive dismissal (because such breaches are inevitably repudiatory)’. He also mentioned on behalf of other judges in that Tribunal that ‘[t]he general experience [of those judges] ... is that parties in resignation cases ... all too often argue that the ... [implied term] has been broken by their employer. It is being slowly picked up by employers too’: Justice Brian Langstaff, ‘Overconfidence in the Implied Term? Court Out...’ (Paper presented at the Industrial Law Society Conference, Oxford, 19 September 2014) 10 and 14.


despite no appellate decision depending on the term’s existence,\textsuperscript{65} including no definitive High Court authority.\textsuperscript{66} Many commentators also asserted that the duty ought to be one implied by law into Australian employment contracts (although not necessarily its power to generate independent damages awards).\textsuperscript{67} To take just one example, Mark Irving explained that without a mutual trust and confidence term in Australia:

employees who are lied to, humiliated or oppressed would have no remedy in contract or any right to terminate the contract. They would be required to continue to serve a dishonest, corrupt, morally repugnant or untrustworthy employer for the term of their contracts. The right of employees in this position to leave immediately must arise from the breach by the employer of an implied term… [Furthermore] the employee is a person. As such, he or she should be treated with respect and dignity.\textsuperscript{68}


\textsuperscript{66} Cf the High Court’s loose references to the duty in \textit{Koehler v Cerebos (Aust) Ltd} (2005) 222 CLR 44, [24], where McHugh, Gummow, Hayne and Heydon JJ referred to ‘the implied duty of mutual trust and confidence’ as part of the ‘contractual position’ that must be explored in determining the extent of an employer’s allegedly excessive workload; \textit{Concut Pty Ltd v Worrell} (2000) 75 ALJR 312, [51](3), where Kirby J, in \textit{obiter dicta}, described the implied duty of ‘mutual trust’ as one of the ‘basic starting points … for the elucidation of the applicable law’; \textit{Blyth Chemicals v Bushnell} (1933) 49 CLR 66, 81, where Dixon and McTiernan JJ referred to ‘the necessary confidence between employer and employee’; \textit{Shepherd v Felt & Textiles of Australia Ltd} (1931) 45 CLR 359, 372 and 378, where Starke J spoke of an employee’s misconduct as being ‘inconsistent with the continuance of confidence between the parties’ and Dixon J of a relation between employer and employee that ‘involved some degree of mutual confidence and required a continual cooperation’.

\textsuperscript{67} Cf the High Court’s loose references to the duty in \textit{Koehler v Cerebos (Aust) Ltd} (2005) 222 CLR 44, [24], where McHugh, Gummow, Hayne and Heydon JJ referred to ‘the implied duty of mutual trust and confidence’ as part of the ‘contractual position’ that must be explored in determining the extent of an employer’s allegedly excessive workload; \textit{Concut Pty Ltd v Worrell} (2000) 75 ALJR 312, [51](3), where Kirby J, in \textit{obiter dicta}, described the implied duty of ‘mutual trust’ as one of the ‘basic starting points … for the elucidation of the applicable law’; \textit{Blyth Chemicals v Bushnell} (1933) 49 CLR 66, 81, where Dixon and McTiernan JJ referred to ‘the necessary confidence between employer and employee’; \textit{Shepherd v Felt & Textiles of Australia Ltd} (1931) 45 CLR 359, 372 and 378, where Starke J spoke of an employee’s misconduct as being ‘inconsistent with the continuance of confidence between the parties’ and Dixon J of a relation between employer and employee that ‘involved some degree of mutual confidence and required a continual cooperation’.


\textsuperscript{69} Mark Irving, \textit{The Contract of Employment} (LexisNexis Butterworths, 2012) 493.
That is not to say that there were not writers who were either tentative as to the term’s existence,⁶⁹ or who wholly rejected it.⁷⁰

Australian courts that recognised the term as one implied by law appeared to have little difficulty in doing so. However, their justifications for its existence were largely based on those given in the United Kingdom. To quote just one of many examples of cases assuming the application of the term on this basis, in *Burazin v Blacktown City Guardian*,⁷¹ the Full Court of the Industrial Relations Court of Australia indicated that there was ‘ample English authority for the implication of the … term’,⁷² and therefore, the term should automatically be implied as one by law in Australia. Following *Burazin*, many judges simply applied that authority, accepting that *Malik* also represented the law in Australia.⁷³ This acceptance occurred without further

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⁷¹ (1996) 142 ALR 144.

⁷² Ibid, 151.

consideration of the term’s actual necessity in Australia’s unique and detailed statutory context.

Some Australian courts, however, were aware of the fact that the same necessity for implying the term in Malik was unparalleled in Australia. A number of courts were actually reluctant to find an implied duty in the face of Australia’s comprehensive statutory regulation of the terms and conditions of employment. In this view, any recognition of the duty would be ‘incoherent’ with statutory law. For example, in Heptonstall v Gaskin and Ors (No 2), Hoeben J said:

The strongest argument on behalf of the third defendant is whether an implied “trust and confidence” term can operate in the context of the Teaching Services Act and the investigatory steps required to be carried out pursuant to that Act. On one approach the very carrying out of those investigatory steps involves a breach of the suggested implied term. Of equal force is the submission that the coherence of the law of employment both in relation to tort, wrongful dismissal and administrative law as it presently stands could be significantly undermined by the operation of an implied “trust and confidence” term in the contract of employment.

In Warren v Dickson, a decision made by a single judge of the Supreme Court of New South Wales, it was stated that ‘[c]are should be taken when referring to United Kingdom authorities in this area of the law’, and that:

The modern English formulation of the implied obligation of trust and confidence has evolved against a different statutory background and as a consequence of the legal recognition in the United Kingdom of arguably higher expectations on an employer. It reflects a contemporary attempt to strike a balance in the United Kingdom between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited: Mahmud v BCCI … at 46 (Lord Steyn). It has particular relevance to cases of constructive dismissal. The differences in origin and approach that lie behind the current state of the law in the United Kingdom were explained in Heptonstall v Gaskin (No 2) ...

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75 (2005) 138 IR 103, [29].


77 Ibid, [42].

78 Ibid.
Greg McCarry similarly warned against the adoption of the term by Australian courts, given that the implication of the term in the United Kingdom was achieved on a notion of necessity that was very different from that in Australia.\textsuperscript{79} The basis for his argument was that Australia did not find itself in a position similar to England in the 1970s, where the statutory unfair dismissal regime provided inadequate protection to employees. If anything, the protections afforded to the majority of Australian employees under applicable industrial instruments, the provisions of the former \textit{Workplace Relations Act 1996} (Cth), and the existing common law were more than sufficient. As such, there was no similar necessity in Australia to allow separate claims for a breach of an implied term of mutual trust and confidence in employment as in the United Kingdom.

Jessup J made a substantially similar argument to McCarry in the Full Federal Court appeal decision in \textit{Barker},\textsuperscript{80} which (as described below in Part 4.2.4.3) became influential in the High Court’s decision on the same matter.\textsuperscript{81} His Honour also criticised the heavy reliance of English courts on \textit{Malik} as a basis for the implying term. In his view, English courts never properly considered the true necessity of the term into all employment contracts in that case. The House of Lords simply assumed the term’s existence.\textsuperscript{82} Jessup J observed that in \textit{Malik}, ‘their Lordships … were not required to rule on the primary question whether there was such a term implied into all contracts of employment, and Lord Nicholls did not deal with the subject’.\textsuperscript{83} Only in \textit{obiter dicta} comments was an attempt made by Lord Steyn to identify the source and jurisprudential justification of the term.\textsuperscript{84} Jessup J then went on to say that ‘the existence of the term was a “fact” in \textit{Malik} because it was common ground as between the parties to the appeal’,\textsuperscript{85} and therefore:

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if one were looking for an authority in which the introduction of the implied term, as a matter of law, into all contracts of employment was categorically upheld after a contested hearing, that authority would not be Malik. 86

Prior to Barker, there was also judicial criticism of the mutual trust and confidence term in Australia with reference to the difficulty of giving it ‘practical and effective content’. 87 In particular, in South Australia v McDonald 88 and Dye v Commonwealth Securities Ltd 89 it was emphasised that any implication of the term ought not to provide an occasion for courts to review employers’ ‘routine management decisions’. 90 There was apparently ‘no ready way of putting a limit to the range of matters which … [could] be brought within the scope of the implied term and be said to be suitable for examination by a court’. 91 On this analysis, a general implication of the term to all employment contracts would detract from what is often referred to as ‘managerial prerogative’, 92 such that it would unduly limit the ‘normal’ employment relationship. 93 While this potential did not seem to present a problem in the United Kingdom, 94 the courts in McDonald and Dye were alive to the fact that the implication could curtail an employer’s ability to ‘manage’ its employees by impacting on its discretionar y use of prerogative powers in the employment relationship (eg through changing policies,

86 Ibid, [230].
88 (2009) 104 SASR 344, a decision that will be discussed again in Chapters 5 and 6.
91 South Australia v McDonald (2009) 104 SASR 344, [275], noting that Buchanan J agreed with this proposition in Dye v Commonwealth Securities Ltd [2012] FCA 242, [613].
92 For an explanation of this concept in the context of the mutual trust and confidence term, see, eg, Carolyn Sappideen et al, Macken’s Law of Employment (7th ed, Lawbook Co, 2011) 157.
93 Cf Malik v Bank of Credit and Commerce International SA (in lig) [1998] AC 20, 46, where it was held that the mutual trust and confidence term provides a means by which ‘a balance [is] … struck between an employer’s interest in managing [its] business as [it] sees fit and the employee’s interest is not being unfairly and improperly exploited’. See also Douglas Brodie, ‘Mutual Trust and the Values of the Employment Contract’ (2001) 30 Industrial Law Journal 84, 93 and 99, in which he agrees with this curtailing of the employer’s managerial prerogative.
relocating employees, altering employees’ working hours, awarding salary increases and granting bonuses etc).\textsuperscript{95}

4.2.4 \textit{Barker} and the definitive fall of the duty in Australia

As the introductions to this chapter and this thesis make clear, in its ruling in \textit{Barker} the High Court put an end to the implied term of mutual trust and confidence in Australian employment contracts. While this decision has been labelled by one text as ‘profoundly disappointing’,\textsuperscript{96} at least it ‘authoritatively settled the debate’\textsuperscript{97} on the status of the mutual trust and confidence term in Australia, which (as discussed above at Part 4.2.3) had been in a state of flux since the mid-1990s.

The discussion below considers the facts of \textit{Barker}, the Federal Court’s decision at first instance, the Commonwealth Bank’s appeal to the Full Federal Court and, finally, the High Court’s decision following a successful special leave application by the Bank.\textsuperscript{98} The analysis of the High Court’s decision is focused on the principal joint judgment of French CJ, Bell and Keane JJ, but also briefly considers the separate reasons of Kiefel and Gageler JJ, who came to the same conclusion not to imply the term. The points of contention arising out of the High Court’s decision are also identified. As explained in the introduction to this chapter, the purpose of this discussion is to identify the controversies the courts now face as a consequence of the High Court’s decision, and


\textsuperscript{96} Andrew Stewart et al, \textit{Creighton and Stewart’s Labour Law} (6\textsuperscript{th} ed, Federation Press, 2016) 526.

\textsuperscript{97} Ibid.

not to provide a definitive view as to whether or not the decision was correct or whether 
the mutual trust and confidence term should have been implied.

4.2.4.1 Facts

Mr Stephen Barker was employed by the Commonwealth Bank as an Executive 
Manager in its Corporate Banking section in Adelaide. He was employed under a 
written employment contract, which permitted the Bank to terminate it, without cause, 
provided that it gave him four weeks’ written notice. Mr Barker had been working at 
the Bank since November 1981 and had worked his way up to a managerial position 
after starting in a series of more junior roles.

The Bank underwent a significant restructure affecting Mr Barker’s area. On 2 March 
2009, he was handed a letter, which informed him that his current position was to be 
made redundant, but it was the Bank’s preference to redeploy him to a suitable position. 
That letter also suggested that it would later consult him to explore ‘appropriate 
options’. Clause 8 of Mr Barker’s employment contract stated that if his position 
became redundant and the Bank was ‘unable to place the employee in an alternative 
position with the Bank or one of its related bodies, in keeping with the employee's skills 
and experience,’ compensation would be payable. The Bank also had a Redeployment 
Policy contained in its HR Reference Manual. However, that Manual stated that its 
terms did not ‘form any part of an employee’s contract of employment’.

Mr Barker was required to clear out his desk, hand in his keys and mobile phone and 
not return to work. His work email and access to the Bank’s intranet were also 
terminated immediately. However, the human resources section of the Bank, which was 
responsible for managing the redeployment process, was unaware that he no longer had 
access to his business email or mobile phone. In fact, that section of the Bank made a 
number of unsuccessful attempts to contact Mr Barker by those means to inform him of 
the position of ‘Executive Manager – Service Excellence’ within the Bank, which 
would have been suitable to his skill set.

This meant that Mr Barker was not able to receive the notifications sent to his office 
email account and his work mobile phone about other vacancies when they arose. 
Whoever was responsible for forwarding him information on other positions ignored 
bounce-backs from email messages, and made no attempt to forward the information to
his home address. Therefore, contrary to the Bank’s Redeployment Policy, Mr Barker missed out on the necessary information about redeployment opportunities, simply because Bank staff had confiscated the tools he needed to receive communication from the Bank.

On 9 April 2009, Mr Barker was advised in writing that his employment was terminated by reason of redundancy, with effect from close of business that day.

In 2010, Mr Barker brought proceedings against the Bank for breach of his employment contract and for damages under s 82 of what was then the Trade Practices Act 1974 (Cth). His claim was, in part, based upon an implied term of mutual trust and confidence that he said existed in his employment contract with the Bank. This term, as described in Malik, was said to oblige the Bank not, without reasonable cause, to conduct itself in a manner likely to destroy its relationship of trust and confidence with Mr Barker.

When this mutual trust and confidence claim came before the Federal Court, there were two main issues to be decided: first, whether Mr Barker’s employment contract contained the implied term; and second, if it did, whether the Bank’s breach of its own Redeployment Policy constituted a serious breach of the relationship of trust and confidence upon which the term was founded.

4.2.4.2 Federal Court’s decision at first instance

At first instance, Besanko J found that the Bank had been almost totally inactive in complying with its policies during the period after notifying Mr Barker of his redundancy.99 Failure to follow the proper communication procedures was held to constitute a serious breach of the Bank’s Redeployment Policy, despite the HR Reference Manual, which contained the relevant Redeployment Policy, being held not to be incorporated into Mr Barker’s employment contract, because they were not referred to in his written employment contract, and the Manual itself expressly excluded any contractual effect.100 Besanko J held that, in turn, this was a serious breach of the implied term of mutual trust and confidence.101 While it was not factually relevant in

100 Ibid, [316].
101 Ibid, [352].
this case, His Honour also noted the possibility that the mutual trust and confidence term could be excluded.\textsuperscript{102} Mr Barker was awarded damages of $317,000 for the loss of the opportunity to be redeployed to a suitable other position within the Bank.\textsuperscript{103} The Bank then appealed to the Full Court of the Federal Court.

4.2.4.3 Full Federal Court’s decision on appeal

The majority of the Full Court (Jacobsen and Lander JJ) considered that, although no High Court authority had determined the question of whether the implied term forms part of employment contracts in Australia, it had obtained a sufficient degree of recognition, both in England and Australia, such that it ought to be accepted by an intermediate court of appeal as a term implied by law into all employment contracts.\textsuperscript{104} They said that Besanko J was wrong to find that a breach of the Bank’s policies was necessarily a breach of the implied term, given that the policies were not part of Mr Barker’s employment contract.\textsuperscript{105} Nevertheless, the majority considered that the Bank was required by the implied term to take ‘positive steps’ to consult with Mr Barker about alternative positions, and to give him the opportunity to apply for them.\textsuperscript{106} Instead, it failed to make contact with him for a period, which the primary judge had found to be unreasonable. Overall, that was sufficient to constitute a breach of the implied term.\textsuperscript{107}

Alternatively, Jacobsen and Lander JJ held that the Bank had breached an implied duty of co-operation, which ‘requires a party to a contract to do all things necessary to enable the other party to have the benefit of the contract’.\textsuperscript{108} They said that the relevant benefit could not be the Redeployment Policy, because it was not a term of the contract.\textsuperscript{109} However, they held that it was sufficient that clause 8 ‘contemplated the possibility of redundancy and redeployment within the Bank, as an alternative to

\textsuperscript{102} Ibid, [329]: ‘The term may be excluded by the express terms of the contract or it may be excluded because it would operate inconsistently with the express terms of the contract’.

\textsuperscript{103} (2012) 229 IR 249, [369].

\textsuperscript{104} Commonwealth Bank of Australia v Barker (2013) 214 FCR 450, [13].

\textsuperscript{105} Ibid, [113]-[114].

\textsuperscript{106} Ibid, [112].

\textsuperscript{107} Ibid, [117].

\textsuperscript{108} Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 59, 607.

\textsuperscript{109} (2013) 214 FCR 450, [125].
termination’. They dismissed the Bank’s appeal, as well as Mr Barker’s cross-appeal against the quantum of damages (other than to correct one error in calculation).

In a lengthy and powerful dissent, Jessup J held that the implied term did not form part of the common law of Australia. His Honour held that it had never been accepted as part of the ratio decidendi of any decision by an appellate court and there was no ‘ready consensus’ as to its existence. Jessup J also said that the implied term did not meet the established requirement that the implication be necessary (and not merely reasonable) to prevent ‘the enjoyment of the rights conferred by the contract [being] ... rendered nugatory, worthless, or ... seriously undermined’. His Honour further considered that, even if the implied term did exist, the Bank’s failure to comply with its own policies did not amount to a breach of it.

The Bank then filed an application for special leave to appeal to the High Court, which was granted. The High Court heard the appeal on 8 and 9 April 2014 and handed down its decision on 10 September 2014.

4.2.4.4 High Court’s decision

The High Court unanimously held that there is no implied term of mutual trust and confidence in Australian employment contracts. In three separate judgments, all five members of the court found that the Federal Court majority was wrong to draw on the United Kingdom’s employment law developments to conclude that the implied term had become part of Australian law. The High Court overturned the Federal Court's damages award to Mr Barker and reduced it to $11,692, being the amount for four weeks' notice owed under his employment contract. It also ordered the Bank to pay...
Mr Barker's costs of the appeal and the application for special leave to appeal, which the Bank had undertaken to do at the special leave hearing for the case.\textsuperscript{119}

4.2.4.5 Joint judgment

(a) The implication of the term is beyond the proper law-making role of the courts

In their joint judgment, French CJ, Bell and Keane JJ said that the implication of the contractual term was ‘a step beyond the legitimate law-making function of the courts,’ which ‘should not be taken’.\textsuperscript{120} They said the primary question raised by the Bank's appeal was ‘whether, under the common law of Australia, employment contracts contain a term that neither party will, without reasonable cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between them’.\textsuperscript{121} The judges said the creation of a new standard of that kind was a form of ‘judicial-law making’\textsuperscript{122} and ‘not a step to be taken lightly’.\textsuperscript{123}

As mentioned earlier, a detailed assessment of this policy-based reasoning will occur in Chapter 7. This basis for avoiding the implication of the term is clearly controversial. Saying that the implication of the term is a matter best left to the parliament has the potential to encourage judges to avoid implying any terms by law into contracts altogether, thereby limiting their law-making function and leaving gaps in contracts needing to be filled. As such, it is an aspect of the judgment that warrants further and separate consideration.

(b) The development of the implied term in the United Kingdom is not applicable in Australia

The majority judgment noted that the common law of the employment contract has developed in a ‘symbiotic relationship’ with legislation in Australia.\textsuperscript{124} Their Honours explained that Australia's common law now differs from the United Kingdom's because

\textsuperscript{119} Ibid.
\textsuperscript{120} Ibid, [1].
\textsuperscript{121} Ibid, [15].
\textsuperscript{122} Ibid, [29].
\textsuperscript{123} Ibid, [20].
\textsuperscript{124} Ibid, [17].
of our different statutory protection of employment rights.\textsuperscript{125} They said that the history of the development of the implied term in the United Kingdom was linked to the concept of constructive dismissal, as it applied to particular legislation, which is not ‘applicable to Australia’\textsuperscript{126} As detailed above in Part 4.2.3, these findings accord with those of some Australian courts in earlier decisions, as well as academics like McCarry, who asserted that the term was unnecessary by reason of Australia’s detailed statutory regime regulating employment.

Even so, a number of commentators have expressed disappointment with this aspect of the High Court’s judgment. In \textit{Creighton and Stewart’s Labour Law}, it is said that even though the High Court identified the differences between the Australian and English industrial relations systems, which might have differentiated \textit{Malik}, it:

\begin{quote}
shed no light on why Australian employees should be different from those in most of the rest of the common law world. The court did not engage in any meaningful way with the reasons referred to in earlier judgments justifying the implication of the term, including the notion that a person’s work is not only a source of livelihood but of identity, self-worth, dignity, and self-confidence. It did not address why the implication of the term would not be consistent with the statutory framework that governs employment in Australia.\textsuperscript{127}
\end{quote}

In an article critiquing the High Court’s decision, John Carter, Wayne Courtney, Elisabeth Peden, Joellen Riley and Greg Tolhurst commented that they found the court’s reasons for rejecting mutual trust and confidence based on the statutory differences between Australian and English employment law ‘unconvincing’.\textsuperscript{128} In their view, later English cases concerning the implication of the mutual trust and confidence term (including \textit{Malik}) concerned:

\begin{quote}
whether the employee … [was] entitled to terminate the contract when faced with adverse and unreasonable conduct by the employer, though such conduct … [fell] short of an explicit repudiation. That question … [did] not depend upon the employee having an entitlement to bring a claim for statutory compensation.\textsuperscript{129}
\end{quote}

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\textsuperscript{125} Ibid, [18].
\textsuperscript{126} Ibid, [35].
\textsuperscript{127} Andrew Stewart et al, \textit{Creighton and Stewart’s Labour Law} (6\textsuperscript{th} ed, Federation Press, 2016) 526.
\textsuperscript{129} Ibid.
\end{flushright}
They argued that ‘[t]he answer to this question is just as important in Australia as in other jurisdictions’. In their opinion, it ‘was open to the court in Barker to explain (and contain) “mutual trust and confidence” in those terms, but it chose instead to dismiss it as a meaningless English import’.

(c) The implied term of mutual trust and confidence is not synonymous with the implied term of cooperation

The majority also said the mutual trust and confidence term was not an application of the implied duty of cooperation, which prohibits conduct that would prevent the proper performance of a contract. They held that as to the direct application of the implied duty of cooperation, clause 8 of Mr Barker’s employment contract conferred a benefit that would apply by way of a termination payment, but did not confer a contractual entitlement to the benefit of the Bank’s Redeployment Policy. As such, the submission made on behalf of Mr Barker that ‘the prospect of “redeployment was a benefit in the relevant sense”’ was not accepted.

Notwithstanding this apparent distinction between the implied term of mutual trust and confidence and cooperation (whether it be understood as a term implied by law into all contracts, or as a rule of construction), there is English authority for the proposition that a term of mutual trust and confidence evolved from the mutual duty of cooperation. On appeal to the Full Court of the Federal Court, the majority of Jacobsen and Lander JJ also rationalised the recognition of mutual trust and confidence term in that way. Their Honours cited Malik, finding that:

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130 Ibid.
132 (2014) 253 CLR 169, [41].
133 Ibid, [25]-[27].
134 Ibid, [27].
One of the various bases for recognition of the implied term was stated by Lord Steyn in *Malik* at 45. He considered that the employer’s obligation probably has its origin in the general duty of co-operation between contracting parties.136

Moreover, in a case commentary issued just before the High Court’s decision, Riley took the view that ‘the implied duty of mutual trust and confidence … is essentially a duty upon each of the parties to cooperate in allowing the other to enjoy the benefit of the contract’.137

Separately, in relation to the correct interpretation of clause 8, Riley recognised that there are many ways in which it could be understood. In her view, and quite apart from that of the High Court majority:

In a case such as this, where the employer is a large national employer with diverse employment opportunities for thousands of people, it is reasonable to infer from a clause such as cl 8 that the parties intended Mr Barker to have the benefit of an opportunity for redeployment somewhere in the Bank’s network before being dismissed for redundancy.138

Riley argued further in support of this alternative interpretation of clause 8, saying that:

The fact that an elaborate HR policy made provision for staff redeployment was part of the factual matrix making this interpretation the most reasonable one. Why maintain such a policy, if there is no practice of assessing redeployment prospects before dismissing staff whose positions have become redundant?139

There is nothing in the High Court’s judgment in *Barker* to suggest that it considered such arguments.

**(d) The implied term is not necessary**

Drawing on the previous decision in *Byrne v Australian Airlines Ltd*,140 the three judges said the implied term of mutual trust and confidence imposes mutual obligations ‘wider than those which are “necessary,” even allowing for the broad considerations which

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138 Ibid.
139 Ibid.
may inform implications in law. It goes to the maintenance of a relationship’. The majority also found that while some lower courts in Australia had made ‘approving references’ to the recognition of the term, it was up to the High Court to ‘determine the existence of the implied duty by reference to the principles governing implications of terms in law in a class of contract’. This required the High Court ‘to determine whether the proposed implication is “necessary” in the sense that would justify the exercise of the judicial power in a way that may have a significant impact upon employment relationships and the law of the contract of employment in this country’.

This aspect of the High Court’s judgment will be explored in detail in Chapter 6. Unfortunately, it has not resolved what the judicial approach ought to be in relation to the necessity test that Australian courts use when asked to imply a term by law into employment contracts. There is a resulting sense of confusion and avoidance by the courts in applying the test to employment contracts, which, as elaborated on in Chapter 6, is problematic because gaps in those contracts may remain and need to be filled.

(e) The implied term could not be implied in fact into Mr Barker’s employment contract

As an alternative, Mr Barker sought to argue that a duty of mutual trust and confidence ought to be implied as a matter of fact into his particular employment contract. However, the majority found that his counsel was unable to point to any particular feature of his contract that would support its implication in fact. This was despite references to Mr Barker's seniority, his long and distinguished career with the Bank, and the silence of the contract on matters of trust and confidence.

While this reasoning marked a clear rejection of the term as one implied in fact into Mr Barker’s employment contract, it still left itself open to criticism. According to John Carter and others commenting on the High Court’s decision, the High Court simply assumed that the five cumulative tests for implying a term in fact in BP Refinery

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141 (2014) 253 CLR 169, [37].
142 Ibid, [36].
143 Ibid.
144 Ibid, [43].
in relation to any contract in writing (or evidenced by writing) applied to the matter. As described in Chapter 2, in *Hawkins v Clayton* Deane J suggested that the five *BP Refinery* tests would not govern factual implication when ‘it is apparent that the parties have not attempted to spell out the full terms of their contract’. This suggestion was later approved in *Byrne*. Deane J’s single criterion from *Hawkins* was that the implied term must be ‘necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case’.

The High Court in *Barker* made no reference to this single criterion for implication. Carter and others believed that this was ‘surprising’, given that many implied terms in employment contracts (including, potentially, the mutual trust and confidence term) would be implied according to Deane J’s criterion. As Carter and others point out, ‘clearly, the criterion of “reasonable or effective operation” does not, in terms, match French CJ, Bell and Keane JJ’s category of terms implied “in fact or ad hoc to give business efficacy to a contract”’. Accordingly, ‘[a] term may be necessary for the “reasonable operation” of a contract without also being “necessary” to give it “business efficacy”’. Therefore, had the High Court interpreted the test for implying the mutual trust and confidence term in fact according to the test in *Hawkins*, this may well have resulted in the implication of the term into Mr Barker’s employment contract.

(f) **The employees who would be affected by the implication were not heard in the appeal, therefore providing a further basis for its rejection**

The majority recognised that it was significant that the term would impose obligations on employees, whose voices were not heard in the appeal. This suggested another
reason for it to remain ‘in the province of the legislature’. The judges concluded by finding ‘the complex policy considerations encompassed by those views of the implication mark it, in the Australian context, as a matter more appropriate for the legislature than for the courts to determine’.

Similar to the majority’s finding that the implication of the term is beyond the proper law-making function of the courts, this reason for avoiding the implication of the term is informed by policy-based considerations. As such, a more detailed assessment of this aspect of the majority’s judgment will be conducted in Chapter 7.

4.2.4.6 Kiefel J’s judgment

In her separate reasons, Kiefel J said the Federal Court had concluded that the term of trust and confidence required the Bank to take positive steps to consult with Mr Barker about redeployment. However, she said clause 8 of his contract left no room for the operation of the term. Her Honour found that ‘A term cannot be said to be necessary in this sense if the contract is effective without it. A contract clearly is effective where it already contains a term to the effect sought’. More generally, she said employment contracts would not be ‘rendered futile’ if they did not contain an implied term that an employer must attempt to redeploy an employee before terminating his or her employment.

Kiefel J also criticised the Full Federal Court majority for ‘brushing aside’ the test of necessity as ‘elusive’. To the contrary, she said it was ‘not uncertain’ and ‘has the advantage of providing objectivity’ to the test for implying terms by law. She noted the Full Federal Court majority ‘did not explain how the obligation to attempt to redeploy [Barker] could arise from the term of trust and confidence’. She said the term of trust and confidence developed from conduct that would allow the employee to

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154 (2014) 253 CLR 169, [38].
155 Ibid, [40].
156 Ibid, [90].
157 Ibid, [108].
158 Ibid, [85].
159 Ibid.
160 Ibid, [101].
terminate the relationship, but out of that context actionable conduct ‘effectively becomes anything that damages the employment relationship’.161

4.2.4.7 Gaegler J’s judgment

Gageler J agreed with the reasons and orders of the majority, adding that the test of necessity meant no more than that ‘a court should not imply a new term other than by reference to considerations that are compelling’.162 His Honour also endorsed Jessup J’s dissenting judgment from the Full Court of the Federal Court that the implied term of mutual trust and confidence ought not to be imported into Australia's common law. In particular, he agreed with Jessup J's view that the term was inherently uncertain and had ‘the potential to act as a Trojan horse in the sense of revealing only after the event the specific prohibitions which it imports into the contract’.163

4.3 Good faith

4.3.1 Evolution of a duty of good faith in the United Kingdom

Having considered the High Court’s reasons for rejecting the mutual trust and confidence term in Australia, the discussion now turns to the duty of good faith. First, it considers the evolution of a good faith duty in the United Kingdom in contracts generally and in employment contracts specifically.164 Second, it considers the duty’s potential in Australia both in respect of contracts generally and employment contracts specifically, noting the confusion as to its existence and content, followed by future options available for embracing the duty.

Courts in the United Kingdom have traditionally been highly averse to developing a general contractual duty of good faith.165 A leading commentary on the issue notes that:

161 Ibid, [102].
162 Ibid, [114].
163 Ibid, [117].
in keeping with the principles of freedom of contract and the binding force of contract, in
English contract law there is no legal principle of good faith of general application, although
some authors have argued that there should be.\(^{166}\)

Gunther Teubner has also described good faith as an ‘irritant’ in English law. He sees it
as an infection from European law, which does not accord with the inherent culture of
the common law.\(^{167}\)

Notwithstanding this defiance, the United Kingdom’s position on a general duty of
good faith appears to be evolving as a consequence of a recent English High Court
decision concerning a distribution agreement, *Yam Seng Pte Ltd v International Trade
Corporation Ltd*.\(^{168}\) In this case, Leggatt J made the bold assertion that ‘I respectfully
suggest that the traditional English hostility towards a doctrine of good faith in the
performance of contracts, to the extent it still persists, is misplaced’.\(^{169}\) His Honour
ultimately held that there was term implied in fact into the particular contract in
question that the parties would deal with each other in good faith.\(^{170}\) Specifically, he
held that what good faith requires is ‘sensitive to context’, but that it included the ‘core
value of honesty’.\(^{171}\) His Honour described the test of good faith as an objective one:
whether, in the particular context, reasonable people would regard the conduct as
‘commercially unacceptable’.\(^{172}\) Notwithstanding this recognition of the duty, the extent
to which Leggatt J’s decision will be followed in the United Kingdom remains
unclear.\(^{173}\) As Douglas Brodie has recently emphasised, the law around a general duty


167 See generally, Gunther Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law

168 [2013] EWHC 111. See the further discussion of this decision in Jeannie Paterson, ‘Good Faith Duties

169 [2013] EWHC 111, [153].

170 Ibid, [131] and [146]. For further discussion on this decision, see, eg, David Campbell, ‘Good Faith
and the Ubiquity of the “Relational” Contract’ (2014) 77 *Modern Law Review* 475; Simon Whittaker,

171 [2013] EWHC 111, [141].

172 Ibid, [144].

173 See, eg, the later decision in *Mid Essex Hospital Services NHS Trust v Compass Group UK and
Ireland Ltd t/a Medirest* [2013] EWCA Civ 200, [105], in which the English Court of Appeal cited *Yam
Seng*, but did not base its decision on the principles stated by Leggatt J.
of good faith across contracts generally ‘is still in a decidedly embryonic stage’.¹⁷⁴ That said, he predicts that this approach is ‘likely to change sooner rather than later where the relationship can be viewed as analogous to employment’.¹⁷⁵

As to the application of the good faith duty in employment, Alan Bogg explains that ‘some caution is warranted before we fix upon a characterisation of [good faith in] English contract law in general, and the English contract of employment in particular’.¹⁷⁶ In making this claim, Bogg draws on the work of Simon Whittaker and Reinhardt Zimmerman, who assert that any statements about the English common law’s rejection of good faith often ‘must be qualified to such an extent as to make these bald general statements appear little more than caricatures’.¹⁷⁷ Whittaker and Zimmerman go on to mention that ‘the law of special contracts is far less hostile to the idea of a good faith doctrine that its general counterpart’.¹⁷⁸ They cite the employment contract ‘as a leading example of such a phenomenon’.¹⁷⁹

Bogg then explains that ‘[w]hat history discloses is how recently the contract of employment [has] displayed elements of good faith in its basic constitution’.¹⁸⁰ He identifies that a duty of good faith in English employment contracts came to fruition in the late 1970s following first, the development of the concept of terms implied by law, and second, the emergence of the mutual trust and confidence term.¹⁸¹ He specifically cites 1977 as the year in which the development of the duty of good faith as a term implied by law in employment ‘coincided with the judicial articulation of the mutual

¹⁷⁵ Ibid.
¹⁷⁹ Ibid.
¹⁸¹ See, eg, ibid, 742.
trust and confidence term’. Nowadays British authorities have tended to support the notion that there is actually a single obligation encompassing both a duty of mutual trust and confidence in employment and a duty of good faith. In that sense, both duties have come to be treated as one and the same.

There are four key reasons for this apparent ‘transformation of the contract of employment into a contract of good faith’. First, it was largely as a consequence of judicial thinking reconfiguring the concept of the English employment contract. Specifically, the regulatory gap left by the disappearance of collective bargaining during that time (and the good faith functions fulfilled by that system of collective bargaining) ‘necessitated a creative regulatory response by the common law and the crafting of a contractual good faith duty’. Second, the courts had developed a ‘distinctive employee-protective philosophy compared with the dominant “judicial philosophy of market individualism”’. Third, some judicial speeches given at that time pointed to the influence of relational contract theory as underpinning the shift toward contractual good faith in employment. Fourth, there was a deep normative reconfiguration of the employment contract in the English common law, such that employment was no longer considered a mere exchange of wages for work and, due to the inherent subordination of the employee to employer, the employee was seen as especially vulnerable to abuses of power by the employer. As Brodie elucidates, this...

182 Ibid, 746-747, citing Bob Hepple, ‘Rights at Work: Global, European and British Perspectives’ (Sweet & Maxwell, 2005) 51-52, which points to the decision of Wood v Freeloader Ltd [1977] IRLR 455.


185 Ibid, 749.

186 Ibid.

187 See, eg, ibid. The concept of employment contracts as ‘relational’ will be returned to in Chapter 5.

188 This reconfiguration was expressed by Lord Hoffman in Johnson v Unisys [2001] ICR 480, who held that ‘Freedom of contract meant that the stronger party, usually the employer, was free to impose his terms on the weaker. But over the last 30 years or so, the nature of the contract of employment has been transformed. It has been recognised that a person’s employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-
focus on ‘human dignity’ has generated a distinctive version of good faith in English employment contracts.\textsuperscript{189} Separately, Brodie has commented that nowadays in the United Kingdom, ‘Good faith … has assumed a central role in the life of the employment contract and has acted, and continues to act, as a catalyst for further evolution at common law’.\textsuperscript{190}

4.3.2 A duty of good faith in Australia?

4.3.2.1 Confusion as to existence

The discussion below considers the widespread confusion surrounding the existence of a duty of good faith in Australia, both in respect of contracts generally and employment contracts specifically. The law concerning a general duty of good faith in Australia remains ‘in a chaotic state’.\textsuperscript{191} ‘Over the past 25 years, despite multiple opportunities, Australian courts have failed to reach anything approaching consensus’.\textsuperscript{192} As already made clear, while the High Court in \textit{Barker} was firm in denying the implication of the mutual trust and confidence term across all employment contracts, it deliberately left open the possibility for a future implication of a more general duty of good faith.\textsuperscript{193} However, the High Court did not make clear its view as to the contractual context in which the duty ought to operate, or if should even operate at all. In their joint judgment, French CJ, Bell and Keane JJ said their rejection of the implied term ‘should not be taken as reflecting upon the question whether there is a general obligation to act in good faith in the performance of contracts’.\textsuperscript{194} Kiefel J said the question had not been

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\textsuperscript{191} Andrew Stewart et al, Creighton and Stewart’s Labour Law (6\textsuperscript{th} ed, Federation Press, 2016) 528.

\textsuperscript{192} Ibid.

\textsuperscript{193} See also the earlier decision in \textit{Royal Botanic Gardens and Domain Trust v South Sydney City Council} (2002) 240 CLR 45, [40] and [156], where the High Court similarly declined to decide whether Australian law should recognise a general obligation to act in good faith in the performance of contracts. Cf the early reference in \textit{Gardiner v Orchard} (1910) 10 CLR 722, 739-740, where Isaacs J found the ability of a contracting party to exercise a termination right was limited by requirements of good faith and reasonableness.

\textsuperscript{194} (2014) 253 CLR 169, [42].

\end{small}
resolved in Australia. She said, ‘Neither that question, nor the questions whether such a standard could apply to particular categories of contract (such as employment contracts) or to the contract here in issue, were raised in argument in these proceedings’. She noted it was therefore ‘neither necessary nor appropriate to discuss good faith further, particularly having regard to the wider importance of the topic’.

When reflecting on these loose references to the duty, Anthony Gray has commented that there was no real need for the court to mention good faith because ‘the submissions in the case barely referred to good faith, and the transcripts reflect justices raising questions about good faith, rather than either advocate making substantial submissions about the doctrine’. With this in mind Gray suggested that:

members of the court went out of their way to keep discussion of good faith bubbling along, perhaps hinting that the court might accept its existence, and be willing in appropriate case to provide the much needed clarity.

Beyond the High Court reserving its position in *Barker*, some lower Australian courts have suggested that there is a duty of good faith in the performance of employment contracts, which is similar to an obligation found in commercial contracts. Others have found that no such duty exists in either type of contract. Several decisions concerning whether the duty ought to be implied into employment contracts following

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195 Ibid, [107].

196 Ibid.


199 The High Court had also left the matter open in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45, [40] and [165].


Barker have rejected the term. In Bartlett v ANZ Banking Group Limited the Court of Appeal mentioned the possibility of the duty in employment, but failed to make a definitive ruling on its existence.

4.3.2.2 Confusion as to content

Apart from the confusion surrounding the duty’s existence, there is also the question as to what its content would actually entail in the Australian context. This is not a simple question to answer. Finn J has described the concept as ‘protean’. Geoffrey Kuene referred to it as ‘chameleonic’. At the very least, it seems to require that parties act in a way that is not capricious or arbitrary in the performance of the contract. However, it cannot operate in a manner inconsistent with ‘the express terms of the contract’, or with rights granted by statute.

Beyond this, courts and academics are divided on the duty’s content. For some, it is restricted to a notion of honesty, but for others, it includes a broader obligation to act reasonably. There is also the circular argument that good faith includes an obligation

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204 Ibid, [38]-[49] and [106]-[107].

205 Secretary, Department of Education, Employment, Training and Youth Affairs v Prince (1997) 152 ALR 127, 130.


not to act in bad faith,\textsuperscript{212} but this hardly progresses an understanding of what good faith itself actually entails.

The broader view of good faith finds support in \textit{Renard Constructions (ME) Pty Ltd v Minister for Public Works}.\textsuperscript{213} Relevantly, a subclause in the contract between Renard Constructions (the contractor) and the Minister for Public Works (the principal) provided that upon default, the contractor could be required to show cause as to why the contract should not be terminated. After the contractor commenced work delays occurred. The principal then gave notice under the subclause calling on the contractor to show cause as to why it should not take over the work or cancel the contract. In his judgment in the Court of Appeal, Priestley JA observed:

\begin{quote}
The contract can in my opinion only be effective as a workable business document under which the promises of each party to the other may be fulfilled, if the subclause is read … as subject to requirements of reasonableness.\textsuperscript{214}
\end{quote}

However, Elisabeth Peden has described this approach, which equates an obligation of reasonableness with one of good faith, as ‘misconceived’.\textsuperscript{215} Peden contends that it cannot be argued that for a party to a contract to act in good faith, it must discharge a positive obligation to act reasonably.\textsuperscript{216} On this understanding, if acting reasonably involves ‘subjective reasonableness, then this description really goes no further than requiring “honesty”’.\textsuperscript{217} She goes on to say that reasonableness in this subjective sense ‘can be used when considering the exercise of rights’, and that this approach sits ‘comfortably with a more limited concept of good faith’.\textsuperscript{218} For some time, in fact,

\begin{footnotes}
\textsuperscript{213} (1992) 26 NSWLR 234.
\textsuperscript{214} Ibid, 258.
\textsuperscript{218} Ibid.
\end{footnotes}
courts have held that discretions or powers must be exercised honestly or in a way that no reasonable person would consider is unreasonable’. 219

Legitimate questions also exist as to whether good faith even differs from the mutual trust and confidence term rejected in Barker. There may actually be no distinction between an implied duty of mutual trust and confidence and one of good faith. 220 In the lead up to Barker, ‘there was little effort or reason to distinguish between … [the two duties]’. 221 During oral submissions in Barker, however, French CJ pondered: ‘How does the implication found here differ from an implication of good faith? Is that just a subset or is it just a manifestation’? 222 Bret Walker SC, for the Bank, responded that he could not discern ‘any factor which would distinguish the supposed implied term in this case from something that is as broad as a notion of good faith’. 223 That said, there is still a view to the contrary, whereby the mutual trust and confidence and good faith duties are separate and able to coexist. 224 In support of this view, Riley argues that:

[the two concepts … describe closely related but nevertheless distinct obligations arising in an employment relationship, and perhaps perform different functions in resolving employment contract disputes. 225

Riley’s reasons for viewing mutual trust and confidence and good faith as two separate (albeit related) duties include that ‘just like siblings, they are derived from the same

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219 Ibid, 237, and the cases discussed from 237-240. See also the discussion below at Part 4.2.3.2 in relation to how a duty of good faith (if it is recognised) might operate in respect of an employer’s exercise of a discretionary power.


222 [2014] HCATrans 73 (8 April 2014), [365].

223 Ibid, [370].


source’, such that they are part of a relationship of employment, but perform different functions. Riley explains that it ‘It is useful to reserve the terminology of “mutual trust and confidence” to describe a particular characteristic of an employment contract that distinguishes it from, say, a contract of sale or other transient contractual arrangement’. The terminology of ‘good faith’ most appropriately describes a distinct ‘governing principle in the construction and interpretation of relational contracts such as employment’.

With the differing views above in mind, both the existence and content of a duty of good faith – whether in employment contracts or contracts generally – remains unclear. The Canadian Supreme Court’s concession that the obligation is ‘incapable of precise definition’ provides little encouragement in the search for a more exacting description. Catherine Mitchell has also suggested that trying to contract for such a behavioural value ‘may at best appear contrived and, at worst, may empty cooperative behaviour of much of … [the contract’s] value by interfering with its natural development’. That is not to say that there are not options, which will allow the duty to be embraced in some capacity in the future. These are canvassed directly below.

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227 Ibid.

228 Ibid.

229 Ibid. As to the relationship between implication and construction, see Chapter 2. For a discussion on employment contracts as ‘relational’, see Chapter 5.


231 Cf the more recent decision in Bhasin v Hrynew [2014] SCC 71, [63]-[64], where the Canadian Supreme Court unanimously accepted that good faith was an ‘organising principle’ of Canadian contract law. The court also attempted to explain what it meant by good faith, emphasising its flexible nature depending on individual circumstances. For a more detailed discussion on this decision, see generally, Claire Mummé, ‘Bhasin v. Hrynew: A New Era for Good Faith in Canadian Employment Law, or Just Tinkering at the Margins?’ (2016) 32 International Journal of Comparative Labour Law and Industrial Relations 117.

4.3.2.3 Future potential for embracing the duty

*Creighton and Stewart’s Labour Law* lists ‘three different views as to how a standard of good faith might be embraced in Australia’ in the future. The first is that a good faith term will be implied by law into all contracts, or at least into all commercial contracts. Whether or not employment contracts should be treated as commercial for this purpose remains unclear. Again, the specific question of whether a good faith duty ought to be implied as a term by law into all employment contracts will be returned to in Chapter 8.

For now, it is worth noting that there are some recent cases recognising an implied duty of good faith and fair dealing as one implied by law, which have involved franchisors who are said to owe the duty to their franchisees. The authors of *Creighton and Stewart’s Labour Law*, as well as British academic Brodie, make the argument that because of shared characteristics between employment and franchise agreements, ‘the franchisee is vulnerable in very similar ways to the employee’. It is hard to see why the same protection ought not to be given to an employee.

The second view rejects the existence of any general good faith duty. This is:

on the basis of a lack of necessity for its implication, a lack of clarity about the class of contract into which it would be implied, uncertainty about its content, or the lack of coherence between a judicial imposition of such a broad normative standard and the statutory imposition of more limited obligations.

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238 Ibid, 528.
That said, ‘those who adopt this [second] view appear to accept that, in some cases at least, a duty of good faith may be a term implied in fact239 into the specific contract in question. Jeannie Paterson has noted that this has been the most common way in which the obligation has been treated in Australian case authorities.240

The third view is that a duty of good faith is not implied as a term at all – rather, it functions as a rule of construction,241 applicable to all contracts.242 As discussed in Chapter 2, on this understanding, the good faith term would constitute ‘a principle or value that informs the meaning and application of express terms in the contract, or at least express written terms’.243 If this becomes the accepted view, ‘the duty is not an independent term of the contract’ capable of being breached and giving rise to a


remedy. Instead, ‘it operates as a fetter upon the exercise of the discretions and powers created by the contract’.244

Overall, while there are several possibilities as to how the duty could be embraced in Australia, these have not yet been ‘scrutinised in any meaningful way in employment cases considering the matter’.245 If anything, a ‘resolution of the debate about the role of good faith in contracts generally will [likely] determine (or at least substantially resolve) the role of good faith in employment contracts’.246 Assuming the duty is recognised, based on a collection of recent authorities,247 it has been said that it will most likely operate where ‘it applies to … [a] particular power, discretion or obligation’248 conferred by the contract. Should the duty attach to a discretionary power of the employer (rather than all acts of the employer under the contract) in this way, then the duty would apply when the exercise of that discretionary power affects the employees’ enjoyment of the contract’s essential benefits.249

4.4 Conclusion

Notwithstanding the United Kingdom’s recognition of a duty of mutual trust and confidence in all employment contracts, as well as a duty of good faith in employment contracts, Australia’s position on both duties is unique. It does not flow naturally from the position in the United Kingdom as with the other key terms discussed in Chapter 3.

As an extension of the historical analysis undertaken in Chapter 3, this chapter first explored the origins of both duties in the United Kingdom and then considered their


246 Ibid.


current status in Australia. That inquiry shows that from their inception, in the employment context, both duties originated in the United Kingdom as terms implied by law. In fact, the good faith term in employment arose out of the now well-established mutual trust and confidence term. These origins are unlike those of most of the other key terms analysed in Chapter 3, which stem from a combination of equity, tort and the former master and servant statutory regime.

Despite these clear British origins, the Australian High Court in Barker still refused to recognise the duty of mutual trust and confidence as one implied by law into the class of employment contracts. It also left the question as to the existence of a duty of good faith open, both in respect of contracts generally and employment contracts specifically. Therefore, as with the select terms discussed in Chapter 3, the historical analysis undertaken in this chapter causes one to question the rationale that Australian courts should use when faced with the question of whether to imply a term by law into the class of employment contracts.

Broader questions are also raised in relation to the High Court’s reasons not to imply the mutual trust and confidence term, particularly in respect of its obscure application of the necessity test, as well as its policy-based reasoning that any implication of the term would be better handled by the legislature. These matters receive further discussion in Chapters 6 and 7, respectively. In relation to good faith, while the future of the duty (if it does exist) remains in doubt, it has the potential to come into operation as a term implied by law or in fact, or as a rule of construction. The question of whether or not the duty of good faith ought to be implied as a term by law into the class of employment contracts will be returned to in Chapter 8. It makes sense to consider this question later, in order to allow for further consideration of the appropriate rationale for the courts to adopt when deciding whether or not to imply a term by law into the class of employment contracts.
5 EMPLOYMENT CONTRACTS AS A CLASS

5.1 Introduction

This chapter investigates employment contracts as a purported ‘class’ into which terms are implied by law.\(^1\) It questions whether the overarching category of ‘employment’ is necessarily the correct or appropriate class of contract into which courts do or should imply terms by law. The discussion in this chapter demonstrates that, in the context of implying terms by law, the class of employment contracts is not easily identifiable. In fact, the so-called ‘class’ of employment contracts is an overly generalised and inconsistently defined category into which terms have been and are implied by law.

Part 5.2 considers how distinct employment contracts are from other classes of contract. This discussion raises the question as to whether employment can truly be deemed a separable class of contract. It occurs through a consideration of: (1) recent academic approaches to identifying general distinctive characteristics of employment contracts in particular, (2) the extent to which general contract law principles are applicable to employment contracts, (3) the common law distinction between employees employed under a contract for service and independent contractors engaged under a contract for services, (4) the operation of statutory rules that are specific to employment or contingent on there being an employment contract, (5) the courts’ imposition of duties that are exclusive to employment, (6) the reluctance of courts to exclude particular duties in employment, and (7) classifying employment as a relational contract. What the discussion throughout this part shows is that employment does not confine itself to an entirely unique definition or understanding. It possesses a whole range of characteristics that are also present in other types of contract.

In light of the discussion in Part 5.2, and the historical analysis already undertaken in Chapter 3, Part 5.3 sets out a typology of the ‘actual’ categories of employment into which terms are implied by law: (1) select types of employment as distinct classes of contract, (2) employment as a non-exclusive class of contract, and (3) employment as an exclusive class of contract. This typology shows that only an employee’s duty to obey can truly be said to remain at the heart of all employment contracts, in that it

\(^1\) As set out in Chapter 2, terms are implied by law as necessary incidents of a particular class or category of contract.
applies exclusively to employment contracts and not to others. If it were recognised in Australia, the same could likely be said in respect of an implied duty of mutual trust and confidence. All other key terms analysed operate in the context of select types of employment only, or in a broader range of contracts that extend beyond employment alone, such as contracts for services. This part presents a case for redefining employment as a class of contract into which terms may be implied by law – an idea that will be explored more fully in Chapter 8.

5.2 How different are employment contracts from other classes of contract?

Trying to define employment contracts as distinct from other types of contract is not simple. As Chapter 3 makes clear, employment contracts have had a unique historical development, whereby statute has come to mould the rules that regulate them.² The focus was once on the status of master and servant, but what we now call the employment relationship is understood as contractual. However, to say that employment contracts are somehow distinct, based on being contracts of a particular category or class without being able to explicitly explain those differences, seems unsatisfactory.

It has been said that there can be no employment without a contract: ‘[I]n modern times the relationship between … employer and employed, is inherently one of contract’.³ This view underpins the Australian High Court’s decision in Ermogenous v Greek Orthodox Community of SA Inc.⁴ In that case the court had to decide whether Archbishop Ermogenous had a contract with the Greek Orthodox community that he had agreed to serve. The High Court decided that he did,⁵ and then remitted the matter back to the Supreme Court of South Australia, which ultimately ruled that the Archbishop’s contract was one of employment.⁶ This finding therefore allowed for him

³ Lister v Romford Ice and Cold Storage Co Ltd [1957] AC 555, 587. See also R v Brown; Ex parte Amalgamated Metal Workers and Shipwrights’ Union (1980) 144 CLR 462, 475, where it was held that ‘employment is a relationship of contract’.
⁵ Ibid, [24].
⁶ See, eg, Greek Orthodox Community of SA Inc v Ermogenous (2002) 223 LSJS 459.
to claim unpaid annual and long service leave under legislation which afforded these rights only to employees. It occurred despite there being ‘many other cases where ministers of religion have been held to be in a spiritual but not contractual relationship with their churches’.7

Given the intricacies associated with understanding employment in its contractual setting, like that expressed in Ermogenous, it is no wonder that Simon Deakin has written that institutions like the employment contract are complex, which mean that problems in identifying its ‘true nature’ are inevitable:

> Viewed in this way, it is possible to see why it is that the contract of employment could be, at one and the same time, the ‘cornerstone’ of the modern labour law system … and the source of anachronisms, confusions and dysfunctions in the application of the law.8

Adrian Brooks has even gone so far as to suggest that ‘as with the unicorn, there is no such beast as the employment contract’.9 According to her, ‘the law purports to impose obligations and to create rights depending on the definition of an employment contract, and it cannot sensibly do that by simply asserting that an employment contract is an employment contract’.10 Instead, Brooks’ view is that there is a ‘contract for the performance of work’, which is broader and encompasses all of the rights and duties thought to be distinguished between employment contracts and contracts for services11 – a distinction that will be addressed further below at Part 5.2.3.

With these definitional challenges in mind, this part investigates various means through which employment has been differentiated from other types of contract. What the seven sections below show is that the employment contract may well be capable of some description based on a wide range of factors. However, these factors will not apply universally to every instance of employment. As such, the employment contract is not

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10 Ibid, 53.

11 Ibid, 53-54.
capable of a unique and singular definition, the key reason for this being that features used to define an employment contract are also present in other types of contractual agreements. To borrow from Brooks:

[W]e have not properly defined a cat if we say that a cat is an animal with four legs, fur and a tail. We have described a substantial number of cats by doing that, but we have not defined the concept ‘cat’. First, the purported definition is not inclusive – it is not true of all cats. Manx cats have no tail; some breeds of cat have no fur. Second, the purported definition is not exclusive – lots of animals have four legs, fur and a tail, yet are not cats. The alleged definitions of employment contracts which have been judicially accepted as employment contracts fail in the same way.¹²

As the introduction to this chapter makes clear, the discussion in this part functions as a precursor to the analysis in Part 5.3, which sets out what are identified as the ‘actual’ categories of employment contract into which terms are implied by law.

### 5.2.1 General distinctive characteristics of employment

Despite the doubts expressed as to whether employment contracts are capable of a comprehensive definition, this is not to say that leading labour law writers have not made convincing attempts to do so. Two recent approaches are discussed in this section. Ways in which the judiciary and the legislature have attempted to understand and differentiate the employment contract are discussed later from Parts 5.2.2 to 5.2.7.

First, Mark Freedland has argued that the employment contract could be envisaged as containing, indeed as being built around, three core structural principles: exchange, integration and reciprocity.¹³ Taking each of these principles in turn, under the ‘exchange principle’ an employment contract ‘should be regarded as essentially consisting of an exchange, or more usually a series of exchanges, of work and remuneration taking place in the context of a personal work relationship’.¹⁴ The ‘integration principle’ provides that where the exchange principle operates, ‘the worker should be regarded and treated as integrated into the organisation of the employer or

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¹² Ibid, 50.
ⁱ⁴ Ibid, 42.
employing enterprise’.\textsuperscript{15} Finally, the ‘reciprocity principle’ provides that ‘the employer or employing enterprise and the worker should be regarded and treated as being committed to reciprocal cooperation in the conduct of that contractual relationship’\textsuperscript{16}. According to Freedland, these three principles ‘can be expanded in such a way as to provide a normative critique or underpinning of the structure of the contract of employment’.\textsuperscript{17} They can be used to ‘both frame and evaluate the functioning of the law of the contract of employment’.\textsuperscript{18} They are said to represent a ‘normative’ view of the employment contract because they present ‘a set of ideas’ that ‘constitute the normative commitments or purposes of the law of the contract of employment because they implement or fulfil the functions of labour law’.\textsuperscript{19}

Whether or not these three principles apply exclusively to employment contracts remains to be considered. It is possible that at least one, or a combination of them, will just as easily apply to other types of work relationship, with the principal example being their potential application to independent contractor relationships (a type of work relationship to be discussed further below at Part 5.2.3). With respect to the ‘exchange principle’, just as employment contracts require an exchange of payment for work, so too do contracts for services. In relation to the ‘integration principle’, Joellen Riley explains that the formulation of that principle consists of ‘a continuing interplay with and between … other attributes of control, subordination and dependency’\textsuperscript{20} – concepts, which are also tied to distinguishing an employee from an independent contractor. This understanding similarly challenges Freedland’s idea of distinguishing employment, as the same principle could equally apply to contracts for services. Finally, when considering the ‘reciprocity principle’, it could just as easily be said that parties to a contract for services are also committed to reciprocal cooperation in the conduct of their working relationship. As already established in Chapter 3, the implied duty of

\begin{itemize}
\item \textsuperscript{15} Ibid.
\item \textsuperscript{16} Ibid.
\item \textsuperscript{17} Ibid.
\item \textsuperscript{18} Ibid, 41.
\item \textsuperscript{19} Ibid.
\item \textsuperscript{20} Joellen Riley, ‘The Definition of the Contract of Employment and its Differentiation from Other Contracts and Other Work Relations’ in Mark Freedland (ed), \textit{The Contract of Employment} (Oxford University Press, 2016) 321, 322.
\end{itemize}
cooperation applies to all contracts, so this can hardly be said to be a distinguishing factor, applicable to employment contracts alone.

Second, Mark Irving has identified what he views as a number of ‘key features’ common to almost all employment contracts,\(^\text{21}\) including:

1. Employment contracts are personal contracts, such that employment contracts involve personal relationships and the personal performance of work. Interestingly, he identifies that an employment contract is the only type of contract that requires one of the parties to be a human.\(^\text{22}\)

2. Employment contracts are contracts of control, meaning that they involve the control of one person by another. The right to control remains one of the identifying features of employment.\(^\text{23}\)

3. There is freedom to contract, which means that employment contracts are almost always formed voluntarily.

4. Employment is a fiduciary relationship, whereby all employees (no matter how junior they are) are in a fiduciary relationship with their employer.

5. The individual contract exists in a social context, in which many employees are performing similar work and many of the principal terms of their employment are not negotiated individually.

6. The contract exists within a statutory context, comprising of at least a dozen statutes. For most Australian employees, the *Fair Work Act 2009* (Cth), *Corporations Act 2001* (Cth), anti-discrimination Acts, *Australian Consumer* 


\(^{22}\) ‘Marriage, for instance, no longer succumbs to contract principles when disputes arise, although we may still occasionally speak of the “marriage contract”’: Joellen Riley, ‘The Future of the Common Law in Employment Regulation’ (2016) 32 *International Journal of Comparative Labour Law and Industrial Relations* 33, 40. Prior to the enactment of the *Marriage Act 1961* (Cth), which codified the law regulating marriages in Australia, marriage was regulated by the law of each state and understood as a contractual relationship: see, eg, Lisa Young et al, *Family Law in Australia* (8th ed, LexisNexis Butterworths, 2013) 217-218.

Law and workers’ compensation laws all form part of the regulatory context of employment.

Irving goes on to refer to four additional characteristics that he has identified as present in most (but not all) employment contracts. Briefly, these are that:

7. work often provides a sense of dignity, self-esteem and an opportunity to further one’s career;
8. employment contracts tend to be long term and evolve;
9. employment relationships tend to be informally regulated by express terms; and
10. employment relationships tend to involve economic dependence and a disparity of power.24

Despite the existence of these ten common characteristics, Irving acknowledges that none are actually exclusive to employment contracts. Taken individually, they all have the potential to exist in other types of contracts, such as contracts for services. Each feature may therefore be present in, but is not exclusive to, an employment contract. On assessment of each of these common, but far from unique characteristics, it may be that the only unique feature of an employment contract is that one of the parties to the contract must be human.

5.2.2 Application of the general principles of contract law to employment contracts

Apart from academic attempts to identify the distinctive characteristics of employment contracts, there exists an ongoing debate as to whether employment contracts should attract their own specific contractual rules, or whether they should be regulated purely by the general law of contract.25 It is logical to argue that the more unique employment contracts are, the less they should be regulated by general contractual principles. As Douglas Brodie points out, whether or not the general principles of contract law should be applied to employment contracts, or whether employment contracts should be


regulated by their own specific contractual rules, has become a ‘paramount question’.\textsuperscript{26} Hugh Collins explains that this question raises a ‘central dilemma’.\textsuperscript{27} He identifies that there is ambiguity as to:

the extent to which [the] … law should, on the one hand, borrow from the general law of contract applicable to commercial and consumer contracts, and on the other, differentiate itself from those general rules in order to tailor a special law for the contract of employment.\textsuperscript{28}

Following on from the recognition of employment as contractual over the last century as discussed in Chapter 3, it could easily be assumed that the ‘general principles of contract law’ will automatically ‘apply to employment contracts in particular’.\textsuperscript{29} This appears to be the view Rothman J took in \textit{Russell v Trustees of the Roman Catholic Church, Archdiocese of Sydney},\textsuperscript{30} when His Honour held that:

The progression, if it be a progression, of the contract of employment from one primarily concerned with status to one of contract has seen a trend which results in the treatment of a contract of employment in the same way as any other contract. There are, of course, differences. Those differences arise from the nature of the contract of employment, its historical development and the incidents that mark it as a contract of a particular type. Nevertheless, to the extent that the particular and peculiar features of a contract of employment do not require differentiation, a contract of employment should be treated no differently from any other type of contract. Even in those matters that require differentiation to take account of the special nature of the contract of employment, there must be coherence between the principles adopted in relation to a contract of employment and other contracts. Some of the matters of differentiation


\textsuperscript{28} Ibid. Brodie critiques this explanation, explaining that many rules that apply to employment contracts take the form of general contract law principles. However, just as with other types of contract, ‘instances exist of modification or exceptions’ with respect to employment contracts and ‘the manner in which such modifications and exceptions are likely to evolve and impact on other types of contract or indeed contract law as a whole’ is just as significant: Douglas Brodie, ‘The Autonomy of the Common Law of the Contract of Employment from the General Law of Contract’ in Mark Freedland (ed), \textit{The Contract of Employment} (Oxford University Press, 2016) 124, 124.

\textsuperscript{29} Mark Irving, \textit{The Contract of Employment} (LexisNexis Butterworths, 2012) 1.

\textsuperscript{30} (2007) 69 NSWLR 198, a decision already referred to in Chapter 4, as well as later in this chapter.

A competing approach exists whereby the law applying to employment contracts ought to be treated as separate and distinct from the general law of contract. After all, other types of contract (eg contracts for the sale of goods, insurance contracts and contracts for the sale of land) attract their own specific statutory and common law rules. In relation to employment contracts, Matthew Boyle argues that ‘Not one of … [the] features of classical contract law is an accurate description of the reality of the employment relationship’.\footnote{32 Matthew Boyle, ‘The Relational Principle of Trust and Confidence’ (2007) 27 Oxford Journal of Legal Studies 633, 634.} Collins has also called for an ‘abandonment’ of the ‘simple view that the [employment] relation comprises a contract governed by the ordinary principles of private [contract] law’.\footnote{33 Hugh Collins, ‘Market Power, Bureaucratic Power and the Contract of Employment’ (1986) 15 Industrial Law Journal 1, 10.} Moreover, in Autocleanz Ltd v Belcher,\footnote{34 [2011] UKSC 41.} Lord Clarke emphasised that employment contracts were to be treated as a specific kind of contract and not the same as commercial contracts.\footnote{35 Ibid, [21].} On this understanding, employment should be regulated according to contractual rules that are specific and exclusive.

Notwithstanding these conceptual challenges, Brodie has recently reminded us that ‘the general principles of the law of contract will continue to play a pivotal role in the development of the law of the employment contract and the resolution of hitherto unresolved controversies’.\footnote{36 Douglas Brodie, ‘The Autonomy of the Common Law of the Contract of Employment from the General Law of Contract’ in Mark Freedland (ed), The Contract of Employment (Oxford University Press, 2016) 124, 141.} He argues that the dynamic rule-making process across contract law in general and other nominate contracts can lead to ‘cross-fertilisation
across a wider range of contracts or even contract law as a whole'.37 Brodie views this ‘cross-fertilisation’ process as beneficial to employment contracts in the sense that it has the potential for ‘further evolution of the employment contract in a manner consonant with contemporary judicial recognition of its nature’.38 With this in mind, he states that it would be ‘foolish to restrict the extent of the contractual doctrine to the creation of solutions to problems that arise in the industrial relations context’.39 Accordingly, Brodie sees that there is room for further specialised development in the law of the employment contract, but that ‘prudent recourse to general principles’40 of contract law remains crucial to the successful development of that area of law. What is required, however, is a ‘proper understanding [of the rules specific to employment contracts, which] can only be gained through consideration of the way in which the law of the employment contract also interacts with the law of other nominate contracts’.41 In making rules with respect to employment contracts, the common law should continue to respond to this ‘need for change by drawing not only on general principles but also on developments in all areas of contract law’.42

What Brodie’s approach demonstrates is the belief that a general contractual framework is able to ‘cope’ with the pressures placed on it by the changing notion of the employment relationship. At least in the near future, general contract law principles will continue to play a major role as the central organising concept of the individual employment relations system. This understanding is true as long as one accepts a reading of employment contracts that extends beyond strict and traditional contract law theory. As such, the general rules of contract should continue to apply to employment, albeit with relevant adaptations that are specific to employment. There is little question, however, that this contractual framework, and more specifically the notion of employment as a contractual relationship, is in need of better understanding and further articulation. As it stands, this continued reliance on the general law of contract (albeit with suitable adaptations and developments) makes employment contracts less distinct

37 Ibid, 130.
38 Ibid, 131.
39 Ibid, 141.
40 Ibid, 143.
41 Ibid, 144.
42 Ibid.
from other types of contract. This approach generates doubt as to whether employment contracts are indeed an appropriate general class into which terms ought to be implied by law.

5.2.3 The employee/independent contractor distinction

Another way in which the employment contractual relationship can be understood uses the common law distinction between workers as ‘employees’ engaged under and employment contract/contract of service, or as ‘independent contractor’ engaged under an independent contract/contract for services. Generally speaking, an employee engaged under a contract of service is subservient to their employer – as a servant to a master in past times – and works under their control and direction, and within an organisational structure determined by the demands of the employer’s business interests. They are an integral part of the employer’s enterprise. By contrast, an independent contractor engaged under a contract for services provides labour to others while in pursuit of their own discrete enterprise. Employment contracts and contracts for services are mutually exclusive; a contract can be one of them, but it cannot be both. Following a brief recount of the historical development of the distinction directly below, the current legal test for distinguishing between these two types of work arrangement is discussed in more detail later in this section.

As mentioned in Chapter 3, it was during the early 19th century that the nature of the relationship between an individual supplier of labour and an enterprise developed into a question of the distinction between a contract of service and a contract for services. ‘Over time the appellation “employee” gradually came to supplant that of servant’. However, this distinction was ‘not without a degree of confusion that lasted well into

44 See, eg, R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd (1952) 85 CLR 138, 153-154.
47 See, eg, Hollis v Vabu Pty Ltd (2001) 207 CLR 21, [39] and [72].
the 20th century’. This confusion arose from the question of whether workers of a ‘superior’ status ought to be classified similarly to more menial workers. Eventually a body of case law developed to ‘suggest an identifiable distinction between two categories of paid work: “employees” and “independent contractors”’. Strictly speaking, there are also other categories of paid work (eg those who perform work under a partnership agreement, certain kinds of agent, bailees in a joint venture, and other types of public sector worker). ‘For the most part, however, courts have been content to assume a “binary” divide, and label as an independent contractor any paid worker found not to be an employee’. The earliest test for determining whether a worker was an employee or an independent contractor was developed by way of the ‘control test’. This test ‘emphasised the capacity to direct not only what work was to be done but how it was to be done’. Nowadays, this test is just one factor to be applied in determining whether or not a person is an employee or independent contractor. The modern approach is a ‘multi-factor test’, which is elaborated on further below in this section.

This brings us to the present understanding of the employee/independent contractor dichotomy. It has been said that it is ‘the emblematic regulatory device deployed to decide whether an individual supplier of labour is entitled to the protection of employment laws’. It is critical to whether an employer is vicariously liable for the tortious acts of its employees. It also has a bearing on other rights and liabilities that

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51 Ibid.

52 Ibid.


55 Ibid, 34.


affect the relationship between the parties under statute. With this in mind, there is a ‘persistently challenging problem’ as to defining whether a contract should be categorised as one of service or for services.

[I]t can be extraordinarily difficult to assess at the margins, and it is becoming more difficult as many employing enterprises seek to avoid the legal obligations attaching to the engagement of directly employed labour. The difficulty is magnified by the many different kinds of consequences that may flow from a finding that the worker is an employee.

It can be difficult to predict the outcome of the test for determining whether a worker is an employee or independent contractor. As suggested above, the present common law provides a multi-factor test that requires scrutiny of particular indicia. This test is set out in Stevens v Brodribb Sawmilling Co. It includes consideration of:

- the employer’s right of control in the relationship;
- a person’s integration into the hirer’s organisation;
- a person’s responsibility for the supply of tools or equipment;
- whether remuneration occurs by time or task;
- whether a person is free to work for others; and
- whether a person has the right to delegate or subcontract to others.

As emphasised by the High Court in Hollis v Vabu Pty Ltd, this multi-factor test should be applied by reference to the ‘totality of the relationship’ between the parties and an employment relationship may be found to exist, even where the parties intend

58 See, eg, the later discussion at Part 5.2.4.
60 See, eg, R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd (1952) 85 CLR 138, 153-154.
61 Joellen Riley, ‘The Definition of the Contract of Employment and its Differentiation from Other Contracts and Other Work Relations’ in Mark Freedland (ed), The Contract of Employment (Oxford University Press, 2016) 321, 324 (and for a discussion of the consequences of a finding that a worker is an employee, see 324-236).
65 Ibid, [44].
otherwise. However, there is nothing conclusive about the way that test is applied. The multitude of factors are not counted up and applied on balance. Instead, the court will make an impressionistic judgment. As such, the application of the multi-factor test is inherently uncertain. It is perhaps an overstatement to label it as a ‘test’ at all, given the fluidity with which the courts apply it.

There is also a slightly more far-reaching approach from On Call Interpreters and Translators Agency v Commissioner of Taxation (No 3), which suggests that whatever the contract purports to say, it is the ‘real’ relationship that must be taken into account. The approach taken in the United Kingdom following the Supreme Court’s decision in Autocleanz Ltd v Belcher is similar: even if the contract says one thing, it is the ‘true’ relationship that matters.

However, recent Australian authorities have muddied the waters in relation to determining what this ‘real’ relationship actually constitutes. While the On Call Interpreters approach has been adopted in later decisions, Jessup J rejected it in Tattsbet Ltd v Morrow. In Tattsbet ‘the operator of a betting agency who employed her own staff was found not to be employed by the appellant, even though it was clear that she was conducting the agency entirely on behalf of the appellant, with no goodwill of her own’. Specifically, Jessup J rejected the notion that the test for determining whether a worker was a contractor ought to be based on (1) whether the worker owns

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66 Accordingly, as Gray J once famously held, ‘the parties [to a work relationship] cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck’: Re Porter (1989) 34 IR 179, 184.
67 (2011) 279 ALR 341.
68 Ibid, [188]-[220].
70 See, eg, Autocleanz Ltd v Belcher [2011] UKSC 41, [35].
their own business,\(^{74}\) and (2) whether the worker is performing work as part of that business.\(^{75}\) Curiously, however, in *Tattsbet*, Jessup J did not question the approach taken in *ACE Insurance v Trifunovski*\(^{76}\) — a decision, which did not specifically mention *On Call Interpreters*, but did suggest that it is the ‘real’ relationship that must be determined.\(^{77}\)

In recognition of the unsatisfactory state of the law distinguishing employees from independent contractors, a number of academic proposals have been made with reference to reframing the operation of employment law. For example, Collins has proposed that there be a presumption that *any* person working for another is an employee unless they are working under a task performance contract and no badges of membership to the firm’s organisation are used.\(^{78}\) While not explicitly stated, it appears that Collins’ suggestion is that this proposal occur through the development of a relevant statutory provision (ie through the development of ‘a test suitable for application by the courts’).\(^{79}\)

Separate from a purported definition of employment (as opposed to a contract for services), writers have made suggestions for the transcending of the concept of employment. Specifically, Mark Freedland and Nicola Kountouris have articulated a multi-faceted view of the personal employment relation, which includes not only ‘contracts’ but also a wider range of ‘arrangements’ under which work is performed, by individuals rendering service, personally, to others under a ‘personal work nexus’.\(^{80}\)

\(^{74}\) (2011) 279 ALR 341, [221]-[258].

\(^{75}\) Ibid, [259]-[297]. In *Tattsbet* Allsop CJ stated that he saw no reason to determine whether the *On Call Interpreters* approach was correct, ‘since even on that view there was still enough to suggest the operator was not an employee’: (2015) 233 FCR 46, [3]. Cf *Fair Work Ombudsman v Ecosway Pty Ltd* [2016] FCA 296, [78], where White J agreed with Jessup J in *Tattsbet*.

\(^{76}\) (2013) 209 FCR 146.

\(^{77}\) Ibid, [15]-[16] and [147]-[148].


Recent work by Jeremias Prassl suggests that another solution could lie in a renewed focus on the concept of the employer instead of on different understandings of the employee. 81 Prassl argues that we should abandon the received unitary concept, which aims to identify a single entity as the employer in all circumstances, in favour of a more openly functional concept, defining the employer as ‘the entity or combination of entities, playing a decisive role in the exercise of relational employing functions, as regulated or controlled in each particular domain of employment law’. 82

Nevertheless, it remains the case at common law that the existing distinction between employment contracts and contracts for services creates a skewed understanding of what is meant by the employment contract, as distinct from a contract for services. Assessing the ‘totality of the relationship’ and what encompasses the ‘real’ relationship between the parties may vary from contract to contract. As just noted above, recent case law has shown that the courts have tended to approach the task of determining whether a contract is one of service or for services in different ways. This confusion does little to identify the specific features common to all employment contracts. It highlights that there is a variable distinction between employment contracts and contracts for services. In drawing that distinction, the relationship between the parties must be assessed as a whole, but the way in which this occurs may vary. Even if the multi-factor common law test is the preferred approach, the indicia used to differentiate between employees and independent contractors focus more on the differences between the two types of contract, rather than the peculiar features present in the class of employment contracts alone.

5.2.4 The operation of particular statutory rules in employment

There are many statutory rules which are contingent on the existence of an employment contractual relationship. Collins explains that ‘[s]tatutory employment rights are … parasitic on the common law of contract’. 83 As another leading author has remarked:

[F]ar from being cowed by statutory assault, the contract of employment has emerged more resilient … [S]tatutory rights have been built upon the common law contractual framework, so

81 See, eg, Jeremias Prassl, The Concept of the Employer (Oxford University Press, 2015).
82 Ibid, 155.
that whilst the contract is of diminishing importance as a direct independent source of rights, it remains central to the operation of statutory provisions.84

The problem is that no exhaustive definition of the ‘employment contract’ exists under statute. An employment contract will sometimes be described in legislation as a ‘contract of service’, which, as already mentioned above, is distinct from a ‘contract for services’.85 There are also probably more than 100 statutes that impose various rights and liabilities according to whether a person is an ‘employee’ at common law.86 Perhaps the closest thing to a definition is contained in s 15 of the Fair Work Act 2009 (Cth), ‘which helpfully explains that any reference to the “ordinary meaning” of employee or employer includes someone who is “usually” an employee or employer’.87 As Andrew Stewart and others note, however, there is no doubt that the Act is to be ‘taken as using these terms in their common law sense’.88

The test for determining who is an employee at common law (as described above at Part 5.2.3) therefore has particular significance in assigning many statutory rights and liabilities in employment. Indeed, while the term ‘employee’ has been defined in over 50 Commonwealth statutes,89 in those statutes, ‘employee’ is generally given its common law meaning as a ‘term of art’.90 That meaning, as described above in respect of the employee/independent contractor distinction is, in some respects, ambiguous,91 and not without its own challenges. Also, the ‘widespread acceptance by legislators of

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85 See, eg, the Independent Contractors Act 2006 (Cth) s 5 and the Fair Work Act 2009 (Cth) ss 357-359, which utilise this distinction.


90 See also, ibid, 36-37. For instances where the term ‘employee’ was given a broader interpretation in a particular statutory context, see, eg, Konrad v Victoria Police (1999) 165 ALR 23; Police Service of NSW v Honeysett (2001) 53 NSWLR 592, as cited in Andrew Stewart et al, Creighton and Stewart’s Labour Law (6th ed, Federation Press, 2016) 196.

the employee/independent contractor distinction has been labelled as somewhat ironic, given that the common law now makes little use of that distinction’. 92

Beyond this understanding, there are many statutes that extend protection to a broader class of ‘workers’ by effectively redefining employment contracts and deeming independent contractors to be employees for the purpose of a particular statute. 93 These extended statutory definitions of ‘employee’ appear in laws covering matters as diverse as workers’ compensation, anti-discrimination, work health and safety, superannuation, annual and long service leave, as well as taxation liabilities (e.g., payroll and fringe benefits tax). 94 As Riley points out, ‘the enactment of the Fair Work Act 2009 (Cth) provided an opportunity to consider a more expansive definition of worker for the purposes of Australia’s general industrial regulation, but this opportunity was ignored’. 95

To focus on just one example, Australia’s Model Work Health and Safety Act takes an expansive approach and imposes liability for workplace safety upon ‘persons conducting a business or undertaking’ in respect of ‘workers’. 96 ‘Worker’ is defined by s 18(1) to include any person who carries out work in any capacity. Therefore, it includes ‘not only direct employees, but contractors, employees of labour hire providers, apprentices and trainees, students on work experience, and volunteers’. 97 The

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96 See, eg, the Work Health and Safety Act 2011 (Cth) ss 5, 19 and 20-26.

rationale behind such a broad definition in a statute purporting to regulate work health and safety standards is that:

[W]orkplace health and safety is a matter of too great importance to be left vulnerable to the risks of employer derogation strategies. The obligations of those with the power and opportunity to manage safety risks ought not to be susceptible to manipulation by the use of alternative contractual forms for engaging labour.\(^9^8\)

Another statutory approach is to expressly deem certain workers to be ‘employees’ for the purpose of a particular statute,\(^9^9\) regardless of whether they would actually satisfy the test to be considered an employee at common law (ie according to the test described earlier at Part 5.2.3). For example, the *Industrial Relations Act 1996* (NSW) deems a whole list of occupations to be ‘employees’ for the purpose of the statute’s protections.\(^1^0^0\) These occupations include milk vendors, cleaners, bread carters, clothing trade outworkers, as well as many other workers who might have failed classification as employees under the common law test for employment. While this legislation no longer applies to private sector workers as a consequence of the enactment of overriding federal laws (and so, has limited practical application),\(^1^0^1\) Riley notes that a ‘common feature of the occupations is that they tend to have limited skills and are price-takers in markets controlled by large suppliers’.\(^1^0^2\)

This deeming legislation can be directly contrasted with the *Owner Drivers and Forestry Contractors Act 2005* (Vic), which ‘seeks to address the “information imbalances” typically present in the transport industry by requiring contracts to be in writing, to specify minimum income or hours of work, and to contain a minimum notice period for termination’.\(^1^0^3\) It also prohibits certain types of ‘unfair terms or practices’.\(^1^0^4\)

\(^9^8\) Ibid, 338.


\(^1^0^0\) *Industrial Relations Act 1996* (NSW) s 5(3) and sch 1.

\(^1^0^1\) See, eg, *Fair Work Act 2009* (Cth) s 26.


\(^1^0^3\) Andrew Stewart et al, *Creighton and Stewart’s Labour Law* (6th ed, Federation Press, 2016) 197, citing an application of the Act in successfully challenging a termination in *A D A Cartage Pty Ltd v Holcim (Australia) Pty Ltd* [2010] VCAT 1771.
Similar to equivalent legislation in Western Australia, this ‘Victorian Act applies only to contracts that do not involve employment’.

A more nuanced statutory strategy permits an industrial tribunal to exercise discretion to deem a worker to be an employee for the purpose of a statute on a case-by-case basis. Riley identifies one example of this strategy under s 275(1) of the *Industrial Relations Act 1999* (Qld), which provides that:

(1) The full bench may, on application by an organisation, a State peak council or the Minister, make an order declaring—

(a) a class of persons who perform work in an industry under a contract for services to be employees; and

(b) a person to be an employer of the employees.

Again, the effect of this provision is limited in Australia because federal law has ‘been expressed to override state laws in respect of the incorporated private sector’.

Overall, while particular statutes may be applicable in the context of employment, the fact that the common law provides the substratum for that regulation does little to assist in understanding what actually constitutes an instance of an employment contractual relationship. Wherever the question arises as to whether a person is an employee (and therefore, a party to an employment contract), theoretically speaking, a consistent test should be applied and the same end result should be reached. As this section demonstrates, however, this consistency has not been achieved. Further, the ability for parliament and the courts to ‘extend’ the definition of an employee or to ‘deem’ an independent contractor to be an employee in certain statutory contexts has also blurred

105 *Owner-Drivers (Contracts and Disputes) Act 2007* (WA).
the distinction between these two types of workers. In turn, this does little to assist in formulating a general understanding of what constitutes an employment contract in a statutory setting. This is not to say that an overarching statutory definition of the employment contract would necessarily solve the problem: ‘[T]here is a risk that a statutory concept of employment status would bring new and perhaps more intractable problems of interpretation’.110

5.2.5 The courts’ imposition of particular duties in employment

As this thesis has already made clear, purely by characterising a contract as one of employment (as opposed to an ordinary commercial contract, or any other kind of contract), the common law triggers the application of certain terms implied by law.111 As terms implied by law into the general class of employment contracts, they are said to ‘not infect a regular commercial contract’.112 Collins explains that the operation of these implied terms as ‘default’ rules inserted into all employment contracts gives them ‘another considerably more ambitious role than [just] interpretation or gap-filling’.113 Citing Freedland,114 Collins goes on to assert that ‘[t]hese terms “implied by law” provide a legal expression of elements of the structural principles that shape the normative core of the legal institution of the contract of employment’.115 Essentially, terms implied by law into the class of employment contract help to make up ‘the legal


111 Cf Simon Honeyball and David Pearce, ‘Contract, Employment and the Contract of Employment’ (2006) 35 Industrial Law Journal 30, where it is argued that the subsistence of implied terms is not necessarily coterminal with the employment relationship. This is reflective of the fact that the employment relationship and the employment contract arguably do not necessarily coexist simultaneously.

112 Joellen Riley, ‘The Definition of the Contract of Employment and its Differentiation from Other Contracts and Other Work Relations’ in Mark Freedland (ed), The Contract of Employment (Oxford University Press, 2016) 321, 339-340. This statement ignores duties that are implied into all classes of contract, including employment contracts (eg the implied duty of cooperation).


framework for the contract of service or contract of employment’. They allow courts to prescribe ‘the ground rules for typical [employment contracts]’.

As already mentioned in Chapter 1, employment contracts are more susceptible to the implication of terms by law than any other type of contract. Collins agrees with this sentiment, saying that the practice of implying terms by law is ‘particularly evident in relation to the contract of employment. These implied terms serve as a regulatory framework that normally applies to and shapes an employment relationship’. Brodie suggests that one of the reasons that employment contracts find themselves so prone to gap-filling is that terms implied by law ‘offer a judicial vision of the obligations which ought to be inherent in employment relations’. By utilising terms implied by law as default rules, courts are able to effectively shape the employment relationship.

The problem established already in this chapter is that the general class of employment contracts is difficult to clearly identify. In deciding whether or not to imply terms by law into the class of employment contracts, courts have actually done relatively little to express a clear and consistent judicial view about the nature of employment contracts. The following four authorities concerning whether a term of mutual trust and confidence ought to be implied by law into Australian employment contracts assist in illustrating this point:

1. Following an historical account of the contract of employment, Rothman J in *Russell v Trustees of the Roman Catholic Church, Archdiocese of Sydney*, emphasised that the element of control of the employer was one of the defining features of modern employment. Among other things, His Honour noted:

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116 Ibid.
117 Ibid, 477.
118 Ibid, 472.
120 *Russell v Trustees of the Roman Catholic Church, Archdiocese of Sydney* (2007) 69 NSWLR 198, [84]-[90], a decision also discussed in Chapters 4 and 6.
122 Ibid, [91]-[94].
‘The employee contracts to devolve to the employer the right to control the manner in which the employee shall work’.

2. In State of South Australia v McDonald, the Full Court of the South Australian Supreme Court found that the ‘contemporary view’ of the employment relationship involves ‘elements of common interest and partnership [between employee and employer], rather than conflict and subordination [between master and servant]’.

3. Jessup J’s lengthy dissent in the Full Federal Court in Commonwealth Bank of Australia v Barker represented a rare attempt by an Australian judge to articulate the distinctive features of an employment relationship to see if they justified the implication of a mutual trust and confidence term. In doing so, His Honour set out what he saw as the ‘relevant features’ of an employment contract that would make an implied term of mutual trust and confidence necessary. These included, first, that employment must involve ‘a relationship, not merely a contractual exchange of work for remuneration’. Second, His Honour held that there was a requirement that ‘the relationship of employer and employee … [must be] one of trust and confidence’ and concluded that ‘[i]f this premise is not valid, the case for the existence of the implied term is seriously compromised if not mortally wounded’. It is worth noting that Jessup J’s judgment was contingent on there being a mutual trust and confidence term. As such, whether his articulation of the distinctive features of employment could apply more broadly is unclear.

4. Most recently, on appeal to the High Court in Commonwealth Bank of Australia v Barker, the joint judgment of French CJ, Bell and Keane JJ added that:

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123 Ibid, [91].
124 (2009) 104 SASR 344, a decision discussed later in this chapter, as well as in Chapter 4.
126 (2013) 214 FCR 450, 470-540. As mentioned in Chapter 4, this dissent was supported by members of the High Court on appeal, and in particular by Gageler J in his separate reasons: (2014) 253 CLR 169, [115]-[118].
127 (2013) 214 FCR 450, [294].
128 Ibid, [295].
Today it would be unusual to find an employment relationship defined purely by contract. Large categories of employment relationships are governed, at least in part, by statutory obligations expressed in awards and agreements ... The relationship also has a fiduciary aspect.¹³¹

Their Honours acknowledged ‘the suggestion that the contract of employment could be described in modern times as a “relational contract,”’¹³² but did not confirm whether they viewed the employment contract as being truly relational in nature. (Further discussion on classifying employment contracts as relational will occur below at Part 5.2.7). Other than recognising Johnson v Unisys¹³³ and McDonald as prior authorities dealing with how the employment relationship ought to be viewed,¹³⁴ the High Court did not elaborate further as to its own view.

Notwithstanding Jessup J’s more expansive approach in the Full Court of the Federal Court decision in Barker,¹³⁵ this selection of authorities supports the proposition that Australian courts have offered relatively sparse and inconsistent judicial guidance on how they view the employment contractual relationship when they decide whether or not to imply terms by law into the general class of employment contracts. This approach is problematic because it creates ambiguity as to when and how an implied term will operate in the supposed class of employment contracts. As will be discussed further below at Part 5.3, it is further complicated by the fact that for certain terms implied by law into the class of employment contracts, substantially similar terms may

¹³⁰ Ibid, [16].


¹³³ [2003] 1 AC 518, a case referred to in Chapter 4 in relation to the ‘Johnson exclusion zone’ and the operation of the mutual trust and confidence term in the United Kingdom.

¹³⁴ (2014) 253 CLR 169, [16]-[18].

also be implied into other types of contract, particularly into contracts for services. This implication of substantially similar terms into other classes of contract further blurs the understanding of employment contracts as a separate and distinct class into which terms can be implied by law.

5.2.6 The inability to exclude particular duties in employment

Apart from implying terms by law as apparently exclusive incidents of employment, the converse is that certain terms implied by law into employment contracts ought to be incapable of exclusion. As borne out below, this is by and large an academic argument. In most instances, it appears that courts have simply not considered the inability of certain terms to be excluded.

While a lack of excludability might mean that certain terms are seen as ‘defining features’ of employment, it has not been without controversy. Simon Deakin and Gillian Morris have recognised this challenge and posed the question: ‘To what extent is it possible to go further and state that certain implied terms are an irreducible core of obligation in the context of employment, which cannot be removed by express agreement?’

Generally speaking, parties to a contract should be able to exclude any term implied by law. In fact, case authority exists to support the proposition that a term will not be implied by law if it is expressly excluded or altered by the parties. In *Malik v Bank of Credit and Commerce International*, for example, Lord Steyn referred to the derogable (ie *ius dispositivum*) nature of implied terms when he remarked that they are ‘default rules [and] the parties are free to exclude or modify them’. On this understanding, implied terms are not entrenched (ie *ius cogens*). Instead, they may be

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138 In the Australian context, see, eg, *Byrne v Australian Airlines* (1995) 185 CLR 410, 488; *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577, [59].

139 [1998] AC 20, a case already discussed in Chapter 4 in relation to the development of the mutual trust and confidence term in the United Kingdom.

140 [1998] AC 20, 45D-E. See also *Sterling Engineering Co v Patchett (No 1)* [1995] AC 634, 543-544; *Johnson v Unisys Ltd* [2003] 1 AC 518, 539F and 536A-B.
ousted by the express terms in the sense that the latter will always supplant the former’.\textsuperscript{141} It is this approach that ‘chimes with general principles of contract law’.\textsuperscript{142}

The paradox is that these terms will have been implied into contracts of a particular type because they are deemed ‘necessary’ to ensure that the enjoyment of the rights conferred by the contract are not rendered worthless, nugatory or seriously undermined.\textsuperscript{143} Despite acknowledging that the notion of inalienable implied terms would amount to a ‘legal heresy’,\textsuperscript{144} Collins says that they will have been ‘devised primarily with a view to constructing an efficient, functioning exchange and a fair balance of obligations between the parties to the relationship constituted by this kind of transaction’.\textsuperscript{145}

This understanding therefore raises the question of how express terms could possibly ‘purport to exclude an obligation normally implied by law in a contract of employment that serves to constitute the basic elements of that relationship’.\textsuperscript{146} With this in mind, ‘[i]mplied terms may not be so easily excluded as is commonly supposed’.\textsuperscript{147} Perhaps, if certain terms were capable of exclusion, then the contract may even cease to be one of employment and be potentially transformed into some other type of contract.\textsuperscript{148}

It should be mentioned that there are different ways in which an exclusion of an implied term might occur through express terms. The most obvious is where an express term

\begin{footnotesize}
\begin{itemize}
\item[142] Ibid.
\item[143] See, eg, \textit{Byrne v Australian Airlines Ltd} (1995) 185 CLR 410, 450. Cf the wider policy-based approach to the necessity test derived from \textit{University of Western Australia v Gray} (2009) 179 FCR 346, discussed later in Chapter 6.
\item[144] See, eg, Hugh Collins, ‘Legal Responses to the Standard Form Contract of Employment’ (2007) 36 \textit{Industrial Law Journal} 2, 9-10. In this text, Collins is wholly sceptical about the desirability of terms implied by law to be treated as inderogable. He sees that implied terms should be restricted to their current role, an important component of which is to subject express terms conferring discretionary powers upon management to a measure of regulatory control.
\item[146] Ibid.
\item[147] Ibid.
\item[148] Ibid.
\end{itemize}
\end{footnotesize}
excludes either ‘all implied terms’ in a very sweeping manner, or a particular implied term in very explicit terms. An express term may also reiterate the effect of, or even extend the reach of, a particular implied term. The result of this kind of exclusion is that the particular implied term is effectively excluded because it is no longer necessary.

An employer may also attempt to insert an ‘entire agreement’ clause under which the parties agree that the written terms of the contract comprise all their rights and obligations to each other with a view to excluding further implied terms. According to Hart v McDonald, implied terms are generally not excluded by operation of an entire agreement clause:

[An entire agreement clause] excludes what is extraneous to the written contract: but it does not in terms exclude implications arising on a fair construction of the agreement itself, and in the absence of definite exclusion, an implication is as much a part of a contract as any term couched in express words.

The resulting question of which terms implied by law ought to be incapable of exclusion due to being absolutely ‘necessary’ to the employment relationship will be explored further in Chapter 6, focussing on the select key terms discussed in Chapter 3. As will be discussed later at Part 5.3 and again in Chapter 6, the implied duty on an employee to obey lawful and reasonable instructions of their employer is one such duty.

At this point it is worth noting the New South Wales Court of Appeal’s finding in the commercial contract decision, Vodafone Pacific Ltd v Mobile Innovations Ltd. That

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149 This potential exclusion will be elaborated on below in discussing Vodafone Pacific Ltd v Mobile Innovations Ltd [2004] NSWCA 15.

150 (1910) 10 CLR 417.

151 Ibid, 427 and 430. See also Johnson Matthey Ltd v A C Rochester Overseas Corp (1990) 23 NSWLR 190, 196. Cf Hope v RCA Photophone of Australia Pty Ltd (1937) 59 CLR 348, 358, 363, 365 and 368. In commercial contracts, an entire agreement clause has also been insufficient to exclude the normal incidents of the contract or terms implied by law: see, eg, Seadrill Management Services Ltd v OAO Gazprom [2011] 1 All ER (Comm) 1077, [27]-[28]. For further discussion on the operation of entire agreement clauses, see, eg, Jeannie Paterson, Andrew Robertson and Arlen Duke, Principles of Contract Law (5th ed, Lawbook Co, 2016) 303-304.

152 Collins agrees with this proposition, asserting that any attempt to exclude it ‘would begin to turn the proper classification of the contract towards a contract for services’: Hugh Collins, ‘Implied Terms in the Contract of Employment’ in Mark Freedland (ed), The Contract of Employment (Oxford University Press, 2016) 471, 483.

decision concerned a contract, which granted Vodafone a power to set the sales levels for its distributor, Mobile Innovations. The power was expressed to be ‘in the sole discretion of Vodafone’.\(^{154}\) The contract also provided that: ‘To the full extent permitted by Law and other than as expressly set out in this Agreement the parties exclude all implied terms … (emphasis added)’.\(^{155}\) The Court of Appeal held that the combination of these provisions was sufficient to exclude any implied duty of good faith.\(^{156}\) In essence, the court’s decision revolved around the fact that no duty could be implied unless it was consistent with the contract’s express terms, which, in that case, it was not.\(^{157}\)

In considering the finding in *Vodafone* more closely, it is hardly feasible to exclude a duty of cooperation, as the court seems to have done by recognising an express exclusion of ‘all implied terms’. As will be discussed later in Chapter 6, the duty of cooperation also ought to be considered absolutely necessary to all contracts, including employment contracts, because without the duty, it would be difficult – if not impossible – for the contract to properly function. However, in making its decision, the court in *Vodafone*, did not consider this issue at all.

For now it is sufficient to note that for at least some standard default rules in employment, if they are excluded expressly, this will raise ‘complex questions’ about whether the contract will remain one of employment.\(^{158}\) Where this is the case, it is obvious that the terms ought to be deemed absolutely necessary to employment and incapable of exclusion. Indeed, Brodie has adopted this selective approach to the entrenchment of terms implied by law in employment, whereby only ‘fundamental’ implied terms would be treated as inderogable.\(^{159}\)

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\(^{154}\) Ibid, [83], referring to clause 18.4 of the contract.

\(^{155}\) [2004] NSWCA 15, [95], referring to clause 24.1(a) of the contract.

\(^{156}\) See, eg, *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15, [184], [191] and [198]. Further discussion concerning a duty of good faith will occur later in Chapter 6.


Both Brodie and Freedland have floated the idea that the implied term of mutual trust and confidence is one such ‘fundamental term’, in that it cannot be excluded by the express terms of an employment contract.\(^{160}\) Collins has recently agreed with this approach, saying that despite the orthodox view being against it, the idea that an employer cannot exclude the implied term of mutual trust and confidence is undoubtedly attractive.\(^{161}\) This is because the:

term is emblematic of the modern employment relationship in which workers are no longer automatons, required to obey orders unquestioningly; now workers deserve to be treated with respect, as human beings not commodities with whom managers should deal honestly and fairly.\(^{162}\)

It is also worth mentioning that prior to the High Court’s decision in *Barker*,\(^{163}\) in the first instance decision of *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney*,\(^{164}\) Rothman J held that a duty of mutual trust and confidence could not be expressly excluded, as it formed an ‘essential’ part of the employment relationship:

If one destroys trust and confidence, and trust and confidence is a necessary and essential ingredient of a contract of employment, then the contract of employment is destroyed. Similarly, if one sought to exclude, expressly, the relationship of trust and confidence, if it were a necessary and essential ingredient of employment, one may still have a contract, but it is unlikely to be a contract of employment. Without trust and confidence there is no submission and subordination and no right of control. *Without trust and confidence there is no contract of employment.*\(^{165}\)

As already described in Chapter 4, however, in the Australian context the mutual trust and confidence term was later viewed as entirely unnecessary by the High Court in *Barker* – a finding which occurred, despite clear assertions by Rothman J and British academics in respect of its apparent non-excludability. Essentially, in one jurisdiction,

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\(^{162}\) Ibid.

\(^{163}\) Which has already been discussed in detail in Chapter 4.

\(^{164}\) (2007) 69 NSWLR 198, a decision already referred to in this chapter and earlier in Chapter 4.

the mutual trust and confidence term is now understood by leading academics as so necessary that it is incapable of exclusion, whereas in another, it is viewed by the judiciary as wholly unnecessary. This outcome is significant because of ‘the range of workplace situations where employees are now denied a right against the employer' in Australia, but not in other common law jurisdictions where the duty is recognised. This judicial non-recognition raises some doubt over the extent to which the courts’ reluctance or unwillingness to exclude certain terms implied by law in employment contracts is truly indicative of the nature of the employment contracts as a class.

5.2.7 Employment as a relational contract

Some contracts, including employment contracts, can be understood as social relationships between contracting parties – an approach which is generally understood as ‘relational contract theory’. Following on from a ground-breaking empirical study conducted by Stewart Macaulay in the 1960s, Ian Macneil and other relational contract theorists have since argued that contract law suffers from too strong a focus on discrete contractual exchanges. Following on from this early theoretical work, in the Australian context, Finn J has listed the following key features of a relational contract in *GEC Marconi Systems Pty Limited v BHP Information Technology Pty Limited*.169

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166 Douglas Brodie, ‘The Dynamics of Common Law Evolution’ (2016) 32 International Journal of Comparative Labour Law and Industrial Relations 45, 48. As Brodie goes on to mention, however, ‘one should also contemplate the possibility of a synthesis emerging on a different basis ... Good faith may be one such “organising” principle’ (at 48).

167 These jurisdictions have already been mentioned in Chapter 4 at Part 4.2.2.

168 This study revealed that in certain circumstances, business people have little regard to the law of contract when they enter into business transactions, make adjustments and resolve disputes. Instead, it is their relationships that typically have a significant impact on the way in which they deal with one another: see, eg, Stewart Macaulay, ‘Non-Contractual Relations in Business: A Preliminary Study’ (1963) 28 American Sociological Review 55.


170 (2003) 128 FCR 1. Many of these features are also highlighted in academic texts on relational contracts: see, eg, David Campbell (ed), The Relational Theory of Contract: Selected Works of Ian
the difficulty of reducing important terms to well defined obligations;
the impossibility of foretelling all the events which may impinge upon the contract;
the need to adjust the relationship over time to provide for unforeseen factors or contingencies which cannot readily be provided for in advance;
the commitment, likely to be extensive, which one party must make to the other, including significant investment; and
that they are in an economic sense likely to be incomplete in failing to allocate, or allocate optimally, the risk between the parties in the event of certain future contingencies.\textsuperscript{171}

As established above at Part 5.2.2, a separate debate exists about the place of employment contracts within the law of contract generally. An extension of that debate is whether or not employment contracts should be classed as relational.\textsuperscript{172}

At one end of the spectrum, there are those who argue that the employment contract is the same as any other contract, such that the general law of contract should be applied with full force and effect. At the other end of the spectrum, there are those who argue that the traditional law of contract should not be so strictly applied because the employment contract is relational.

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\textsuperscript{171} Macneil (Sweet & Maxwell, 2001), cited in Douglas Brodie, ‘Relational Contracts’ in Mark Freedland (ed), \emph{The Contract of Employment} (Oxford University Press, 2016) 145, 150.

According to scholars like Matthew Boyle, traditional commercial contract theory is ‘inadequate’ as an explanation of the law of the employment contract.¹⁷³ On Boyle’s understanding, it is clear that the employment contract is ‘at the very end of the relational end of the discrete/relational spectrum’.¹⁷⁴ Following Finn J’s judgment in GEC Marconi, however, Brodie explains that despite the continuing trend of courts accepting the concept of relational contracts, and exploring the relevant characteristics of those contracts, there is little to suggest how that construction might actually operate in employment law.¹⁷⁵

While the potential for the recognition of Australian employment contracts as relational may have increased following GEC Marconi, this does not hold true in respect of the High Court’s decision in Barker because the potential for employment contracts to be classified as relational was only mentioned very dismissively in that later decision. In making their decision not to imply a mutual trust and confidence term, French CJ, Bell and Keane JJ stated that ‘[These] … observations were linked to the suggestion that the contract of employment could be described in modern terms as a “relational contract”’.¹⁷⁶ Their Honours later observed that:

[The implied duty of mutual trust and confidence] … appears, at least in part, to be informed by a view of the employment contract as “relational”, a characteristic of uncertain application in this context and not one which was advanced on behalf of Mr Barker.¹⁷⁷

Therefore, while employment contracts have the potential to be ‘categorised as relational in nature … it is [now] less than clear whether that [classification] is sufficient to provide a deeper understanding of legal doctrine’,¹⁷⁸ including an understanding of employment contracts as a class into which terms are implied by law.

¹⁷⁴ Ibid, 637.
¹⁷⁶ (2014) 253 CLR 169, [33].
¹⁷⁷ Ibid, [37].
Brodie explains that a reason for the High Court’s hesitance in *Barker* to confirm one way or another whether it actually viewed employment contracts as relational lies in the fact that some of the work undertaken by relational contract theorists in the past has not been overly concerned with determining ‘the sorts of contractual rules that would be compatible with their scholarship’.179 Brodie uses the work of Macneil as an example, explaining that Macneil was not concerned with ‘whether contract law should impose relational duties if the normative constraints that hold the parties together should happen to break down under stress’.180 Rather, Macneil’s work ‘was heavily concerned with how contracts function most effectively’.181

In making these observations, however, Brodie makes the point that ‘[i]t is not axiomatic that the recognition of the concept of the relational contract will enhance the law of the employment contract or indeed the law of contract more widely’.182 In his view, ‘everything turns on what the judiciary understand by the concept and how they see it as relevant to doctrinal developments’.183 Perhaps, as Brodie argues, the categorisation has no practical effect in any event: ‘It is conceivable that there will be no impact on doctrine’.184

Nevertheless, Brodie has indicated some of the changes to common law doctrine that might arise, should the courts continue to accept the categorisation of the employment contract as relational.185 To take just one example, viewing the employment contract as relational may ‘encourage changes to thinking on remedies; much of which is outmoded’, such that ‘greater emphasis’ may be ‘placed on preservation of relations’.186 For instance, ‘[w]here termination is concerned, one would expect the law to function

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182 Ibid, 149.
183 Ibid.
184 Ibid.
185 Ibid, 201.
in a manner that was supportive of the relationship continuing and serve as a restraint on ease of exit’. 187

It is also recognised that the classification of employment contracts as relational is not unique to employment. As Bill Dixon explains in the context of whether a duty of good faith should be implied into relational contracts, the judicial recognition of such contracts is becoming ‘increasingly common’. 188 There are a whole range of other contracts beyond employment that have typically been regarded by courts as relational, including distributorships, agency relationships, partnerships, joint ventures, long-term leases and franchise agreements. 189 In the context of defining employment contracts as a class into which terms are implied by law, it may not necessarily be a useful or unique defining feature of those contracts.

5.3 Actual categories of implication by law in employment

As an extension of the above discussion and the key terms implied by law into the class of employment contracts discussed in Chapter 3, this part sets out what ought to be identified as the ‘actual’ categories of employment into which terms have been implied by law: (1) select types of employment as distinct classes of contract, (2) employment as a non-exclusive class of contract, and (3) employment as an exclusive class of contract. The typology presented in this part has been developed as a matter of logic, following a consideration of the key terms already implied by law in employment, described in Chapter 3. The aim of this discussion is to clarify the reality of implication of terms by law in the context of employment given that, as established in this chapter, there is little ready consensus as to what actually defines the class of employment contracts into which terms are implied by law. The focus here is on the realm in which those implied terms actually operate. As the discussion below makes clear, many terms implied by law operate in circumstances which are not exclusive to employment.

189 See, eg, Bobux Marketing Ltd v Raynor Marketing Ltd [2001] NZCA 348, [42].
5.3.1 Select types of employment as distinct classes of contract

There are terms implied by law that only operate in respect of select types of employment contracts, rather than all employment contracts. Examples of these include the duty of employers to inform employees of their rights, the duty of employees to hold inventions created in the course of their employment on trust for their employer and the duty of both employers and employees to provide reasonable notice of termination.190

Taking each of these in turn, the duty of employers to inform employees of their rights has only ever applied to employment contracts with the following three features as set out in *Scally v Southern Health & Social Services Board*191 (as already quoted in Chapter 3):

(1) the terms of the contract of employment have not been negotiated with the individual employee but result from negotiation with a representative body or are otherwise incorporated by reference; (2) a particular term of the contract makes available to the employee a valuable right contingent upon action being taken by him to avail himself of its benefit; (3) the employee cannot, in all circumstances, reasonably be expected to be aware of the term unless it is drawn to his attention.192

The duty does not apply to employment contracts that do not contain these three characteristics.193 It is wholly specific in its operation.

As already mentioned in Chapter 3, on the current Australian view, the duty for employees to hold inventions on trust only operates where the employment relationship actually involves a duty to invent.194 If there is no such requirement on the employee, quite simply, the implied term has no operation. The mere fact that an employee’s actual work carries the possibility of developing inventions capable of attracting patent protection will not be enough for the operation of the duty.195 The leading authority

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190 See the further discussion on these duties in Chapter 3.
195 *University of Western Australia v Gray* (2009) 179 FCR 346, [194] and [206].
here is *University of Western Australia v Gray*, a decision already discussed in Chapter 3 in which Dr Gray had a duty to conduct research and to stimulate research in an applied science on behalf of the University of Western Australia, but did not possess a duty to invent. As such, his employment fell outside the distinct class of employment contract to which the term applies. The reasoning in *Gray* will be returned to in more detail in Chapter 6.

While doubt as to the continued existence of the common law implied term requiring employers and employees to provide reasonable notice on termination now exists, it will only come into operation in the case of employment contracts that are for an indefinite period. The term will not apply to employment contracts that are expressly for a limited fixed-term or task. As such, the implied term is curtailed in its operation. Moreover, there has been a suggestion that it is not even exclusive to those employment arrangements, as an equivalent default rule exists in contracts for services for an indefinite period. ‘The courts have also been prepared to imply a term permitting a client to end an apparently indefinite contract for services by giving reasonable notice on termination’.

### 5.3.2 Employment as a non-exclusive class of contract

There are also a selection of other terms implied by law that have the potential to apply to both employment and other contractual relationships. As such, these terms are not exclusive to employment.

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197 See the discussion in Chapter 3 as to the doubt that now exists following the South Australian District Court’s decision in *Kuczmarski v Ascot Administration Pty Ltd* [2016] SADC 65.
198 As already noted in Chapter 3, however, this will not necessarily be the case for employment contracts for a significantly long fixed-term or task.
199 That said, even where there is no fixed-term or task, there is still some doubt as to the circumstances in which a court will imply the reasonable notice term: see, eg, *NSW Cancer Council v Sarfaty* (1992) 28 NSWLR 28, 74-75, where there was found to be no implied term of reasonable notice because of a contrary express term.
Typically, these default rules also apply to contracts between employers and independent contractors. Apart from an implied duty to provide reasonable notice on termination (as mentioned above), other implied duties in employment that may also apply to employer/independent contractor relationships include: a duty on an independent contractor not to disclose confidential information and to remain loyal to their employer, a duty on an employer to provide an independent contractor with a safe place of work, a duty owed by an employer to indemnify an independent contractor for expenses innocently incurred during the performance of duties, and a duty on a contractor to exercise reasonable care and skill in the tasks performed for their employer. On the face of it, there is nothing peculiar or special about any of these terms in the employment context to prohibit them from applying to agreements between employers and independent contractors. Adrian Brooks goes even so far as to say that there really is ‘no difference as to … [implied] duties as to the contracts labelled as “employment contracts” from those which will arise under contracts labelled as “independent”‘.

The mutual duty of cooperation applies more broadly than in the context of employment alone. To repeat a statement already made in Chapter 3, the High Court made this clear in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* when it affirmed the original principle stated by Griffith CJ in *Butt v M’Donald* that:

> [I]t is a general rule applicable to every contract that each party agrees by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract (emphasis added).

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201 Here, the word ‘employer’ (more specifically, the ‘principal’) is used to refer to the party engaging the independent contractor. As to the distinction between employees and independent contractors, see the discussion at Part 5.2.3.


203 Ibid, citing *Broadwater Taxation and Investment Services Pty Ltd v Hendriks* (1993) 51 IR 221; *Fortuity Pty Ltd v Barcza* (1995) 32 IPR 517; *Equity 8 Pty Ltd v Shaw Stockbroking* [2007] NSWSC 413.

204 See the discussion of the equivalent duties owed by employers to employees in Chapter 3.


207 (1896) 7 QLJ 68, 70-71.
This passage shows that the duty to cooperate is present in each and every contract, irrespective of their class or category.\textsuperscript{208} It is not exclusive to employment alone.

\textbf{5.3.3 Employment as an exclusive class of contract}

There are almost no terms implied by law that fall exclusively in the realm of employment, such that they do not apply to any other type of contract. If it were recognised in Australia, the implied duty of mutual trust and confidence might be one such term.\textsuperscript{209} As it stands, however, the only operable term that can be said to be truly exclusive to employment is an employee’s duty to obey lawful and reasonable orders of their employer.\textsuperscript{210} Only in the context of this duty can it be said that employment is a truly distinct class of contract into which the terms are implied by law.

The reason for this is that the element of subordination on which the duty is premised is regarded as being at the very heart of the employment contract. As already discussed in Chapter 3, it ‘predates the contractual backcloth of the employment relationship and can be traced back to the 19\textsuperscript{th} century master and servant laws’.\textsuperscript{211} The present obligation of an employee to obey the lawful and reasonable orders of their employer has since been recognised one of the ‘identifying features’ of employment.\textsuperscript{212} In a leading English decision concerning the duty, \textit{Laws v London Chronicle (Indicator Newspapers) Ltd},\textsuperscript{213} Lord Evershed labelled it as ‘a condition essential to the contract of service’.\textsuperscript{214} It has also been noted as the key characteristic ‘which distinguishes … [the employment contract] from other types of contract’.\textsuperscript{215} In support of this contention, Sir Otto Kahn-
Freund wrote that ‘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’. 216

5.4 Conclusion

What this chapter makes clear is that the process of implying terms by law into a general class of employment contracts has been over-simplified. There is no consistent or universal understanding of employment contracts as a class into which terms are implied by law. Current academic, judicial and legislative understandings of that contractual relationship are lacking in uniformity. In recognition of this, courts ought to think more carefully about what makes employment contracts different from other types of contract before they seek to imply terms by law into those agreements. Doing so will make courts more comfortable in performing their gap-filling role in the context of employment, hopefully avoiding a situation like Barker where the court felt ill-equipped to imply a term into the general class. Overall, there is scope for the courts to develop their understanding of employment contracts as a class into which terms are implied by law.

As Part 5.2 demonstrates, there are a whole range of factors that make employment contracts substantially similar to other types of contractual agreement. There is also confusion as to the way in which employment contracts ought to be understood as a class. In particular, the seven sections in that part indicate that:

1. Recent academic attempts to define the general distinctive characteristics of employment contracts are inconsistent with one other. The definitions put forward also contain characteristics that could also apply to other types of contractual arrangement, particularly to contracts for services, thereby making employment contracts appear to be less of a unique class.

2. There is a continuing debate about the extent to which general contract law principles should be applied to employment contracts in particular. While some contractual rules applicable to employment contracts are more nuanced, the general consensus is still that general contract law principles will underpin

employment contracts. Arguably, the application of those general principles to employment contracts makes them less of a distinct class.

3. While an employment relationship is commonly understood at common law as being distinct from an independent contractor relationship, present case authorities enunciating that distinction are difficult to reconcile. In fact, the indicia used to differentiate between the two types of contract focus more on the differences between the two, rather than what makes employment contracts distinct.

4. While the operation of many statutory rules is reliant upon the existence of an employment contract, there is no statutory definition of what constitutes such a contract. This is complicated by the fact that for the most part, statutes rely on the common law definition of employment (as distinct from an independent contract) to dictate when particular provisions will operate. Moreover, under certain statutes, independent contractors are deemed employees for the purpose of statutory protections. This further blurs the understanding of what constitutes an employment contractual relationship.

5. When implying terms by law into employment contracts, the courts have done little to generate an understanding of employment contracts as a class into which the particular default rule will operate. This is complicated by the fact that certain terms implied by law into employment contracts also have the potential to operate in respect of other types of contracts, particularly contracts for services.

6. There is a tension arising out of the apparent ability for parties to exclude terms implied by law and the rationale justifying the implication of those terms as necessary. Given that these default rules will only ever be implied into employment contracts where ‘necessary’, it is possible that if they are excluded, then the contract may start to become less like one of employment.

7. There is relatively little understanding as to what classifying an employment contract as relational may mean for that class of contract. Also, other types of contract can equally be classified as relational, making any such classification in employment less of a distinct or defining feature.

Finally, Part 5.3 establishes that, at least in respect of those key terms discussed in Chapter 3, there are more accurate ways in which to explain or outline the categories
into which terms are implied in the employment context. As will be explored further in Chapter 8, the categories for implication should arguably reflect those actual categories of implication described in Part 5.3, being select types of employment as distinct classes of contract, employment as a non-exclusive contract and employment as an exclusive class of contract.
6 NECESSITY FOR IMPLYING A TERM BY LAW

6.1 Introduction

This chapter examines the necessity test for implying a term by law. That test applies when a term is to be implied as a matter of law into any contract, including employment contracts. As such, much of the discussion in this chapter focuses on the general law as it applies to all contracts. There are also brief mentions of the test as it applies specifically to employment contracts. As already described in Chapter 2 and mentioned again in Chapter 5, following the Australian High Court’s decision in Byrne v Australian Airlines Ltd,1 a contractual term will be implied by law where it is deemed ‘necessary’ to ensure that the enjoyment of the rights conferred by the contract will not be ‘rendered nugatory, worthless or … seriously undermined’,2 having regard to the circumstances of the class of contract in question.3 In University of Western Australia v Gray,4 a case already referred to in Chapters 3 and 5, the Full Court of the Federal Court concluded that the necessity test requires a range of considerations to be taken into account, including those of ‘justice and policy’.5

The application of the necessity test for implying a term by law in Australia is problematic. Specifically, there are competing narrow and wide views as to how the test ought to apply.6 As a result, how the courts are supposed to determine what is necessary is unclear. To date, there have been no leading cases that provide any useful guidelines,7 including the High Court’s recent consideration of whether a term of mutual trust and confidence ought to be implied in Commonwealth Bank of Australia v Barker.8 There is a resulting sense of confusion and avoidance by the courts in applying

5 Ibid, [141]–[147]. What the Full Court meant by ‘justice and policy’ is expanded on later in this chapter in Part 6.3.
6 These views are expanded upon in Part 6.3.
the test. Courts have also tended to confuse the separate tests for implying terms in fact and by law. In recognition of this confusion, this chapter explores the court’s application of the necessity test, as it applies to all types of contract, including employment contracts. It highlights the difficulties courts now face in applying the necessity test as a consequence of the Barker decision.

Part 6.2 traces the English origins of the necessity test for implying a term by law as derived from *Lister v Romford Ice & Cold Storage Co Ltd* and *Liverpool City Council v Irwin.* Part 6.3 then addresses the development of the concept of necessity in Australian decisions to date and summarises existing Australian case law dealing with necessity in the context of employment contracts. This discussion considers the narrow and wide tests espoused in *Byrne* and *Gray,* respectively. It examines the manner in which the High Court in *Barker* applied the narrow *Byrne* test, but still gave oxygen to the broader *Gray* test, consequently leaving Australian courts at a crossroads as to how they ought to apply the necessity test when asked to imply a new term by law in the future. Part 6.4 considers the added confusion Australian courts have experienced in distinguishing between the separate tests for implying terms in fact and by law. Part 6.5 re-examines each of the key terms implied by law that were first introduced in Chapter 3 by assessing whether they are truly necessary in the context of employment. On the whole, the discussion in this chapter functions as a precursor to that in Chapter 8, which (amongst other things) concludes that to achieve clarity and consistency in their decision making, the courts must clearly articulate whether they will apply the narrow or wide necessity test in the future. If they fail to do so, the likely result will be that the courts avoid implying terms by law into employment contracts altogether, with gaps remaining to be filled.

### 6.2 English origins of necessity: the start of Australia’s confusion

To understand the difficulties currently faced with terms implied by law, it is useful to trace the development of the necessity test in England. This is because the development of terms implied by law in England gave rise to what is now commonly referred to as the necessity test, both in England and Australia. Implied terms developed as part of the

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9 [1957] AC 555.
10 [1977] AC 239.
English common law of contract. As Richard Austen-Baker remarks, ‘[i]t is by no means easy to attempt to fix the date or method of entry’ for implied terms in English contract law. Fortunately, Elisabeth Peden has conducted a detailed investigation into the origins of implied terms, including the development of the distinction between terms implied by law and terms implied in fact.

As already suggested in Chapter 3, originally, the test for implication of terms was based on the parties’ intention. Over time, the courts acknowledged that some terms were consistently implied as a consequence of the type of relationship, rather than the facts of the case in question. In Peden’s view, this development of implication by law as a separate category is a consequence of cases that have been decided over the last 60 years. Peden draws on two key English decisions, which she says enunciated this distinction and the first application of the necessity test for a term implied by law: *Lister* and *Irwin*.

As suggested in Chapter 3, *Lister* prompted the first suggestion by the House of Lords that there was a distinction between terms implied in fact and terms implied by law. It was also the first time that the court revealed the potential for the necessity test to ascertain whether it was appropriate for a new term to be implied by law. The case involved Lister, who drove a lorry for Romford. He was reversing the lorry and his father (another employee of Romford) was injured, as Lister carried out the manoeuvre negligently. Lister’s father sued Romford who in turn sued Lister on behalf of the company’s insurer. Romford tried to recover from Lister in tort as well as contract.

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14 See, eg, ibid, 203-210.
15 See, eg, ibid, 225.
16 See, eg, ibid.
17 See, eg, ibid, 226.
In reaching their conclusion not to imply a term that an employer must insure their employee for damage caused by the employee’s negligence, the majority (comprising Viscount Simonds and Lords Tucker and Morton) used a variety of tests to get to their end result. Lord Morton used a business efficacy test,18 which has already been described in Chapter 2 as one of the five cumulative tests for implying a term in fact. Lord Tucker used an obviousness test,19 which has similarly been described in Chapter 2 as one of the tests for implying a term in fact. Viscount Simonds used a test that is similar to the current necessity test for implying a term by law.20 He thought that a ‘wider view’ had to be taken of the question of implication and that the question to be asked was whether ‘in the world in which we live today it is a necessary condition of the relation of master and man that the master should … look after the whole matter of insurance’.21 He rejected the familiar test of business efficacy, but on the facts, he applied the obviousness test.22 Unfortunately, he did not take the opportunity to explain why. As already discussed in Chapter 2, the business efficacy and obviousness tests are but two of five cumulative requirements for implying a term in fact. Overall, these variances in judicial opinion as to the ‘correct test for implication and its future application’ left the ratio from the case unclear.23 Even though the decision in *Lister* is unhelpful for that reason, it did at least generate an initial sense of distinction between terms implied in fact and by law, as well as some reference to the necessity test.24

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18 [1957] AC 555, 583. His Lordship thought that if a term were to be implied it would have to be implied into all contracts where an employee drove a vehicle. However, he felt that the appropriate test to imply terms for a particular type of contract, rather than a specific one, was still the business efficacy test. On that basis, he concluded that there should be no implied term.

19 [1957] AC 555, 594. His Lordship thought that the law should not introduce ‘some quite novel term’ into the master and servant relationship and refused to imply a term.

20 [1957] AC 555, 576-579. The minority judgments also differed. Lord Radcliffe believed that the implication could be justified on the basis that the common law has to develop in response to society’s development: [1975] AC 555, 591. Lord Somervell relied on the business efficacy test: [1957] AC 555, 599.


22 Ibid.


24 See, eg, ibid, 226.
The House of Lords later sought to apply *Lister* in the classic English authority about implied terms, *Irwin*. This case concerned the obligations of a landlord council in relation to the common areas of the stairs, lifts and rubbish chutes in a 15-storey apartment block. The Irwins were tenants in the building. They withheld rent from the council in response to the conditions of the premises. They claimed that the council was in breach of a duty to repair and maintain the common parts of the building. Furthermore, since the council was a public authority under statute, it was responsible for providing housing at subsidised rent for members of the public, selected because of their needs. However, there was no express mention of any obligations owed by the council in the lease.

In making their decision, unfortunately, their Lordship’s speeches were again ‘unclear on the question of the legal principles involved in the implication of the proposed term’. Lord Wilberforce’s speech is commonly cited as providing the necessity test for implying terms by law. His Lordship thought of each of the categories of implied term as shades ‘on a continuous spectrum’, but did not explain the differences between the different types of implication. Instead, he considered the test for implication to be applied to the case in question, finding that ‘such obligation should be read into the contract as the nature of the contract itself requires, no more, no less: a test, in other words, of necessity’.

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Lord Cross agreed with Lord Wilberforce’s decision to imply the proposed term.\(^{30}\) He discussed implied terms generally, adopting the distinction between the two types of implied terms as explained by Viscount Simonds and Lord Tucker in *Lister*.\(^{31}\) Unfortunately, Lord Cross did not go on to acknowledge which test for implication was to be used, but appeared to be applying the test for all contracts of a particular type.\(^{32}\) However, it seems that in doing so, he was looking at what the parties themselves would have agreed to, had they been asked. This contradicts his earlier reasoning because such an approach is substantially similar to the test for implication in fact.\(^{33}\)

In his shorter reasons, Lord Salmon concluded that while the proposed implied term had to be reasonable, it also had to be necessary, as reasonableness alone was not enough.\(^{34}\) Lord Edmund-Davies reached the same conclusion as Lord Salmon,\(^{35}\) but ‘was the only judge to stress the justification of the implication’.\(^{36}\) Ultimately, the House of Lords found in favour of implying the term in question and emphasised a test of ‘necessity’ in doing so.\(^{37}\) Despite this result, it remains difficult to determine a clear test of implication from their speeches.

Since *Irwin*, English decisions have gone on to support the idea that a court is making rules to regulate a contract when it settles on an implied term by law and that the court

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\(^{34}\) *Liverpool City Council v Irwin* [1977] AC 239, 262, citing *Young & Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454, 465.

\(^{35}\) *Liverpool City Council v Irwin* [1977] AC 239, 269.


\(^{37}\) Ibid.
is informed by a notion of necessity,\(^{38}\) as well as making a policy-based decision\(^ {39}\) about how best to regulate a certain type of contract.

However, English support for the necessity test has not been wholehearted. The courts have gone through what Hugh Collins calls ‘collective amnesia’ in which they have forgotten the distinction between legal and factual implication and the separate tests to be applied.\(^ {40}\) They have, at times, fallen into the trap of thinking that all implied terms must be necessary for the effective operation of the contract in question (ie applying the ‘business efficacy’ test).\(^ {41}\)

In other words, English courts have developed an incorrect pattern for implying terms using a test for implication in fact, when they are really dealing with an implication by law, and have realised their mistake and fixed it. For example, as Collins explains, in *Lister* the court denied (or perhaps conveniently forgot) the possibility of a term implied by law as a standardised incident and insisted that all terms must conform to the presumed intentions of the parties, as terms implied in fact, and that in that particular case those tacit intentions probably did not coincide.\(^ {42}\) Later in *Irwin*, however, the court claimed that it was being invited to create a term implied by law for a broad class of contracts, for which it would be inappropriate to legislate.\(^ {43}\)

In explaining why English courts have routinely confused the implication of terms in fact and by law, Collins has identified two separate sources for the courts’ confusion:

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\(^{38}\) See, eg, *Scally v Southern Health and Social Services Board* [1992] 1 AC 294, where Lord Bridge (with Lords Roskill, Goff, Janucy and Lowry agreeing) attempted to summarise the English position by drawing a distinction between *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555, and *Liverpool City Council v Irwin* [1977] AC 239, and confirmed that the test for implication was one of necessity.


\(^{41}\) As already mentioned in Chapter 2, this business efficacy test is derived from *The Moorcock* [1827] 2 KB 99. See further, the discussion concerning the application of the test in Andrew Phang, ‘Implied Terms, Business Efficacy and the Officious Bystander – a Modern History’ [1998] *Journal of Business Law* 1.


\(^{43}\) Ibid, 12.
‘the possibility of a metamorphosis, and an instrumental misclassification’. In relation to metamorphosis, after a succession of similar cases involving a term implied in fact, the courts may begin to assume that the term has become one implied by law, such that ‘in the absence of express terms to the contrary, it will be binding on both parties as a standardised default rule’. Separately, an instrumental misclassification may occur in situations where a term has been described by the court as a term implied by law, ‘when in reality it only applied to the interpretation of that particular contract of employment’, in other words, as a term implied in fact. The similar confusion between implying terms in fact and by law experienced by Australian courts will be discussed below at Part 6.4.

With this potential for confusion in mind, while Irwin was a breakthrough in the development of the implication of terms by law, it was also limiting. In Andrew Phang’s opinion, it is ‘rather surprising that the … case has been cited with such confidence’, given its ambiguities.

6.3 Australia’s current confusion: the narrow and wide views of necessity

Irwin left the Australian courts with a similar problem to that faced in England: how to carry out the process of determining necessity was left vague and unclear. Once the Irwin test was adopted in Australia by virtue of the High Court’s decision in Byrne (a case briefly referred to in earlier chapters), the lack of clarity was transferred.

In Byrne, the plaintiff employees argued that it was necessary to imply a term into their employment contracts that, in accordance with clause 11(a) of the Transport Workers (Airlines) Award 1988, they would not be harshly, unjustly or unreasonably dismissed. As part of its assessment of whether it was necessary to imply such a term by reason of

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custom and usage, the High Court took into account the statutory context of the employees’ contracts. It did not agree that it was necessary to imply a term, as the issue was already covered by clause 11(a) of the award.\(^49\)

While the judgment in *Byrne* was mostly concerned with arguments as to whether or not the particular term ought to be implied in fact or by custom and usage, in their joint judgment McHugh and Gummow JJ took the opportunity to mention that a term will be implied as a matter of law where it is necessary to ensure that the enjoyment of the rights conferred by the contract will not be ‘rendered nugatory, worthless, or … seriously undermined’.\(^50\) This is a very narrow and functional view of necessity, which contains no reference to any broader notions, such as justice and policy.

While the formulation of the *Byrne* necessity test appears narrow in the way it is worded, it has the potential to be applied more widely. Essentially, the test can be read and interpreted in a strict and functional sense, but its application could still incorporate broader policy-based reasoning. Indeed, the Full Court of the Federal Court in *Gray* recognised this possibility when it observed that:

> It doubtless is the case that this necessity test [(specifically, the *Byrne* formulation of the test)] — and its characteristic concern with whether the enjoyment of contractual rights could be rendered nugatory or worthless, or be seriously undermined if no implication is made — has been invoked to address the *broad* range of instances where the issue of such an implication ordinarily arises …\(^51\)

Despite the potential for a wider application of an apparently narrowly worded test, this thesis operates on the presumption that the narrow wording used in *Byrne* similarly means that the necessity test derived from that case is to be applied in a strict and functional sense: that is, by allowing for a term to be implied by law only where it is necessary to make the contract work, without taking broader considerations into account.

Indeed, a contract can, in a practical sense, still be workable without certain terms implied by law. However, there may still be good reasons of policy as to why a particular term *should* still be recognised as one implied by law. For example, there is


\(^{50}\) Ibid, 450.

nothing unworkable about an indefinite employment contract that is set to continue until an employee dies, or if there is some serious breach by either party. To put it otherwise: there is no absolute need to imply a term by law requiring reasonable notice on termination to make the contract function. However, a term requiring reasonable notice on termination is absolutely necessary in a wider sense because if it does not exist, then the contract will cease to be classified as one of employment. Instead, it will be a contract for slavery, potentially requiring the employee to work indefinitely. This example is returned to below at Part 6.5 in the context of discussing which terms implied by law are absolutely necessary to employment. The overarching point here is that while certain terms implied by law may not be necessary to make a contract work, they may still be necessary for broader policy-based reasons.

The narrowness of the Byrne necessity test for implying a term by law is akin to the business efficacy requirement that the term must be necessary to ‘enable the contract to operate in a businesslike manner’. The similarity between these two tests contributes to a blurring of the distinction between implying terms in fact and by law; a confusion that has already been referred to in Chapter 2 and will be elaborated on below at Part 6.4.

The comments made by McHugh and Gummow JJ in Byrne were later applied by the High Court in Breen v Williams. This application meant that McHugh and Gummow JJ’s narrow necessity test became the accepted position for the implication of a term by law in Australian contracts. Breen considered whether a term ought to be implied by law into a contract between a doctor and a patient that would allow a patient a right of access to their medical records. In deciding that it was not necessary to imply such a term by law, the High Court in Breen noted that a doctor was subject to an implied obligation to exercise reasonable care in treating patients. Specifically:

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It could not be said that unless a term relating to the access of records was implied as a matter of law, the enjoyment of the rights conferred on the patient by the contract … would be rendered worthless or seriously undermined.\textsuperscript{55}

The court’s reasoning in \textit{Breen} was concentrated on the narrow view that the contract could operate effectively without the particular implied term. It did not consider whether or not there were good policy reasons or whether patients should have that right. For instance, in his dissenting judgment in the New South Wales Court of Appeal for the same matter, Kirby P (as he then was) cited with approval the decision of the Supreme Court of Canada in \textit{McInerney v McDonald},\textsuperscript{56} which held that the doctor-patient relationship was fiduciary in nature and that a patient is entitled to reasonable access to examine and copy the doctor's records. La Forrest J, writing for a unanimous court, stated:

\begin{quote}
Information about one’s self revealed to a doctor acting in a professional capacity remains, in a fundamental sense, one’s own. The doctor’s position is one of trust and confidence. The information conveyed is held in a fashion somewhat akin to a trust. While the doctor is the owner of the actual record the information is to be used by the physician for the benefit of the patient. The confiding of the information to the physician for medical purposes gives rise to an expectation that the patient's interest in and control of the information will continue. The trust-like ‘beneficial interest’ of the patient in the information indicates that, as a general rule, he or she should have a right of access to the information and that the physician should have a corresponding obligation to provide it.\textsuperscript{57}
\end{quote}

This alternative reasoning further supports the idea that the distinction between legal and factual implication is blurred by the approach in \textit{Byrne}. Both types of implication have the potential to apply a narrow and functional view of necessity, focussing on whether the implication of the particular term is necessary purely to make the contract work, rather than any other broader notions of justice and policy.

The Full Court of the Federal Court later examined the issue of necessity in \textit{Gray}; a case that has already been discussed briefly in Chapters 3 and 5. By way of a reminder, this case concerned various claims made by the University of Western Australia against Dr Gray, who was employed by the University as a Professor of Surgery. One of those

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\begin{itemize}
\item \textsuperscript{55} Ibid, 124.
\item \textsuperscript{56} (1990) 66 DLR 479.
\item \textsuperscript{57} Quoted by Kirby P in \textit{Breen v Williams} (1994) 35 NSWLR 522, 545.
\end{itemize}
claims was that an implied term existed in Dr Gray’s employment contract to the effect that rights to any inventions developed in the course of his employment belonged to the University. While the Full Court did not find in favour of implying such a term, its reasoning suggested that the concept of necessity could take on a different and potentially wider meaning to that in *Byrne*:

> What is clear is that necessity in this context has a different shade of meaning from that which it has in formulations of the business efficacy test … The principal reason for this is, as Viscount Simonds indicated in *Lister* …, that implication in law rests “upon more general considerations”, a view endorsed both by Lord Wilberforce in *Liverpool City Council* … and Lord Bridge in *Scally* …\(^58\)

The Full Court observed that the necessity test adopted by the High Court in *Byrne* could cause difficulties if the ‘elusive concept’ of necessity was too narrowly conceived.\(^59\) In making these findings, the Full Court was clearly suggesting that the net for implying terms ought to be cast much wider than the stricter approach in *Byrne*, instead taking into account matters of ‘justice and policy’.\(^60\)

In an article discussing the policy concerns that enter the court’s decision-making process when a term is sought to be implied by law, Elisabeth Peden has grouped those concerns into the following three broad categories:

1. how the implied term will sit with existing law;
2. how the implied term will affect the parties to the relationship; and
3. wider issues of fairness and society.\(^61\)

The Full Federal Court’s decision in *Gray* stressed that those policy concerns falling under Peden’s third category relating to matters of fairness and society ought to form a significant part of the courts’ decision-making process as to whether or not to imply a term by law. In *Gray* the court made reference to the idea that ‘implication in law rests upon more general considerations … [which] require that regard be had to the inherent

\(^{58}\) (2009) 179 FCR 346, [142].

\(^{59}\) Ibid, [140]-[141].

\(^{60}\) Ibid, [141]–[147].

nature of the contract and of the relationship thereby established’.\textsuperscript{62} The court highlighted that those ‘very considerations themselves can raise issues of justice and policy … as well as consideration, not only of consequences within the employment relationship, but also of social consequences’. This echoes Peden’s discussion about how courts may seek to imply terms by law to emphasise fairness generally between parties.\textsuperscript{63}

Later in Barker, the High Court applied the narrow necessity test from Byrne, yet, curiously, its reasoning suggested that it had not ruled out an application of the wider test from Gray. The relevant facts of that case have already been discussed in Chapter 4. For present purposes, this discussion focuses on the High Court’s reasoning in respect of its application of the necessity test in deciding not to imply the mutual trust and confidence term.

The High Court in Barker cited Byrne as a basis to refuse the implication of a term of mutual trust and confidence as a matter of law. As suggested in Chapter 4, prior to the decision, some writers had confidently asserted that a mutual obligation of trust and confidence would satisfy the Byrne test.\textsuperscript{64} However, the High Court took a different view in Barker. The majority of French CJ, Bell and Keane JJ said that the implied term imposed mutual obligations ‘wider than those which are “necessary,”’ even allowing for the broad considerations which may inform implications in law. It goes to the maintenance of the relationship’.\textsuperscript{65} The majority also found that while some lower courts in Australia had made ‘approving references to the implied term’, it was up to the High Court to ‘determine the existence of the implied duty by reference to the principles governing implications of terms in law in a class of contract’.\textsuperscript{66} This required the High Court to decide whether the proposed implication was ‘necessary’ in the sense that would justify the exercise of the judicial power in a way that may have a

\textsuperscript{62} (2009) 179 FCR 346, [145].


\textsuperscript{65} (2014) 253 CLR 169, [37].

\textsuperscript{66} Ibid, [36].
significant impact upon employment relationships and the law of the contract of employment in this country’.  

However, apart from applying Byrne, the High Court majority also cited Gray on two occasions to reach its final conclusion that the mutual trust and confidence term was not necessary to be implied. While the court did not expressly state that it was applying the wider Gray test, equally it did not expressly rule out its application. In denying the implication of the mutual trust and confidence term, the court’s reasoning focussed on the fact that the term would involve ‘complex policy considerations … more appropriate for the legislature than for the courts to determine’. The majority then recognised that it was significant that the term would impose obligations on employees whose voices were not heard in the appeal, which suggested a further reason for it to remain ‘in the province of the legislature’. This policy-informed reasoning, which will be examined further in Chapter 7 in light of the judicial role in regulating employment contracts, extends beyond a strict application of the narrower considerations espoused in Byrne. It seems more like an application of the wider considerations in Gray, even though the majority did not expressly label it as such. There are references in Gray to issues of ‘justice and policy’, ‘consequences within the employment relationship’, as well as ‘social consequences’. However, there is no guidance as to what weight should be given to each of these factors, or how they should be applied in the employment context. If anything, the policy considerations later applied in Barker could be seen as limiting any future implication of terms by law in employment contracts, since such implication may be similarly viewed as ‘a step beyond the legitimate law-making function of the courts’, which ‘should not be taken’.  

In the earlier 2009 case of State of South Australia v McDonald, a case already discussed in Chapters 4 and 5, the Full Court of the Supreme Court of South Australia was also alive to the policy issue of not wanting to trespass into legislative territory

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67 Ibid.
68 Ibid, [29] and [36].
69 Ibid, [40].
70 Ibid, [38].
71 (2009) 179 FCR 346, [142].
72 (2014) 253 CLR 169, [1].
73 (2009) 104 SASR 344, [275].
when it was asked to imply a term of mutual trust and confidence. The Full Court concluded that ‘the statutory and regulatory context in which … [Mr McDonald’s] contract of employment operated made the implication of a term concerning mutual trust and confidence unnecessary’. The ‘statutory and regulatory context’ in *McDonald* included formal procedures for dealing with teachers’ grievances, a statutory right of appeal against decisions of the employer, and policies regulating the employer’s conduct. The Full Court in *McDonald* therefore contemplated employees like Mr Barker who were not afforded the benefit of such statutory protections having access to the mutual trust and confidence term. In effect, the High Court’s denial of the mutual trust and confidence term in *Barker* for reasons of not wanting to engage in complex policy considerations contradicted the Full Court’s decision in *McDonald*.

The High Court’s decision in *Barker* has left Australian courts at a crossroads as to how they ought to apply the necessity test to employment contracts if they are asked to imply a new term by law. As David Chin explains, ‘the elusive nature of the criterion of “necessity” in this context is reflected in the variable application of this concept to the contract of employment’. The courts remain faced with the question of whether it is strictly the narrow approach in *Byrne*, or whether it includes the wider considerations from *Gray*. If the *Gray* test is adopted for future implication of terms by law, the courts may find themselves avoiding the issue or refusing to imply a term based purely on policy grounds. This is because leaving the courts to try and identify what is deemed reasonable to be the ‘correct’ approach to policy-informed necessity in contracts is highly variable and subjective. This is perhaps even more the case for employment contracts, which may bring with them a unique set of considerations. As Chapter 5 suggests, the distinctiveness of employment contracts is questionable.

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74 Ibid, [270].
75 Ibid, [259].
76 Ibid, [251].
77 Ibid, [267]–[268].
An outcome of adopting the broader *Gray* approach could be that the courts actually avoid making any policy-based decision at all. As Andrew Stewart suggests, a consequence of the High Court’s reasoning in *Barker* is that ‘[I]t may be difficult in the future to persuade an Australian court to recognise any new implied term’.\(^80\) The courts might accept that they are making a policy-informed determination when they are asked to imply a new term by law into employment contracts, but maintain that such action ought to remain a matter for the legislature as a matter of course. This could result in the courts passing off all responsibility for regulating employment contracts through terms implied by law to parliament. Whether or not this shift in the courts’ law-making power should occur will be explored further in Chapter 7. To borrow from Riley’s metaphor used to describe the short coming of private law regulation in 2003, it could be that terms implied by law in employment contracts have now developed into a ‘Rolls Royce with no fuel in the tank. As handsome as … [they are, they] won’t take us anywhere’.\(^81\) Having said that, a strict reading of *Barker* could also still result in the adoption of the narrower approach to necessity in *Byrne*, without reference to the wider concept of necessity in *Gray*.

### 6.4 Australia’s confusion between legal and factual implication

Apart from the above difficulties with the application of the necessity test for implying a term by law, as briefly mentioned, Australian courts have also experienced confusion in distinguishing between legal and factual implication. However, if this distinction is continually muddled, it is questionable as to whether it truly matters, and indeed, whether terms implied by law into employment contracts can be properly classed as ‘necessary’ incidents of that class of contract. This confusion resonates with what Collins coined ‘metamorphosis’ and ‘instrumental misclassification’ (as already described above in Part 6.2 in relation to the United Kingdom).

In relation to ‘metamorphosis’, like English courts, Australian courts have suggested that a term implied in fact often enough may simply become a term implied by law into

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\(^80\) Andrew Stewart, *Stewart’s Guide to Employment Law* (Federation Press, 2015) 105. See also Andrew Stewart et al, *Creighton and Stewart’s Labour Law* (Federation Press, 2016) 298, which makes this same point.

every contract of the relevant class. For example, in *Byrne*, McHugh and Gummow JJ observed that:

> There is force in the suggestion that what now would be classified as terms implied by law in particular classes of case had their origin as implications based on the intention of the parties, but thereafter became so much a part of the common understanding as to be imported into all transactions of the particular description.

In *Barker*, the High Court similarly held that ‘[a]n implication in law may have evolved from repeated implications in fact’. As Andrew Stewart and others remind us, however, this should not be ‘allowed to obscure the fact that one category is concerned primarily with what the parties should be taken to have intended, and the other with what the law regards as an appropriate incident of a particular class of transaction’.

In relation to ‘misclassification’, Australian courts have repeatedly confused the tests for implication of a term in fact and by law. For example, in *South Australia v Day* the South Australian Supreme Court on appeal from the South Australian Industrial Relations Commission refused to imply a term into all employment contracts requiring the employer to give their employee a reasonable opportunity to be reintegrated back into the workforce if they become disabled in the course of their employment. In denying this apparent implication by law, the Supreme Court relied on the five tests for implying a term in fact from *BP Refinery.*

In *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*, the appellant’s argument was one seeking implication of a term into *all* arbitration agreements. The High Court minority of French CJ and Gageler J dealt correctly with the proposed implied term as one to be implied by law. However, the

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86 (2000) 78 SASR 270.
87 Ibid, [33]-[35].
89 Ibid, [16].
majority of Hanye, Crennan, Kiefel and Bell JJ rejected the implied term with reference to the five tests in *BP Refinery*.90

In *Caratti Holdings Co Pty Ltd v Coventry Group Ltd*,91 Martin J of the Western Australian Supreme Court needed to decide on, among other things, the implication of a term of good faith and reasonableness as a matter of law in all commercial leasing contracts. In reaching his decision not to imply the term, Martin J also confused the test for implication of a term in fact with the test for implying a term by law. His Honour held that for an ‘ad hoc implied term’ (ie a term implied in fact), the criterion was one ‘of necessity’, with reference to the earlier decision in *Barker*,92 which concerned the test for implying a term by law.

In *Brennan v Kangaroo Island Council*,93 the Full Court of the Supreme Court of South Australia refused the implication of a term into all employment contracts that did not contain an express term dealing with notice or payment in lieu of notice on redundancy, requiring the employer to give reasonable notice or pay in lieu on redundancy.94 Where such a term is sought to be implied into all contracts of that kind, it ought to be treated as an implication by law. However, in reaching his decision not to imply the term, Parker J (with Vanstone and Anderson JJ agreeing) relied on the five tests in *BP Refinery*, which, as already discussed in Chapter 2, are used to assess whether a term ought to be implied in fact.

In the later decision in *Westpac Banking Corporation v Wittenberg*,95 Buchanan J accepted that the court in *Brennan* applied *BP Refinery* incorrectly. Nevertheless, His Honour concluded that, in a practical sense, this mistake did not matter.96 The rationale behind Buchanan J’s conclusion was that the two separate tests for implying terms in

90 Ibid, [74].
91 [2014] WASC 403.
92 Ibid, [186].
93 (2013) 120 SASR 11 (a decision concerning whether the Kangaroo Island Council had breached its employee’s employment contract).
94 (2013) 120 SASR 11, [28]-[33].
95 [2016] FCAFC 33.
96 Ibid, [234]: ‘In my view, the criticism is misplaced. The essential point, applicable to both forms of implication in the current circumstances, is that there was no gap to be filled by the implication’.
fact and by law are effectively the same, and that there is actually a collapsing of the two types of implication:

In most cases there will be no practical difference arising from the two formulations as to their particular effect concerning contracts of employment. In each case the possible implication is, in my respectful view, secondary, subordinate and tied to questions of necessity in order to make the contract effectively operative.97

There may be some force in an argument that even though there is a theoretical distinction between the two categories, the difference between them ‘must perforce be a mythical one, since regardless of the ostensible categories, everything depends, in the final analysis, on an ad hoc value choice by the court concerned’.98 For example, in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*,99 Priestley JA also commented that the distinction between terms implied in fact and by law tend to merge imperceptibly into each other’.100 In contrast to the apparently definite distinctions between the two categories of implication, John Carter and Wayne Courtney have also explained that ‘there has always been debate as to the content of the legal requirements’.101 Carter has even written that ‘[w]hether each represents a separate category is regarded as doubtful’,102 and separately, that once implied, it can often be difficult to tell whether the court’s decision is based on legal or factual implication’.103

As Chapter 2 of this thesis establishes, however, there remain two well-established distinctions between implication in fact and by law: one takes into account the presumed intention of the parties and the other does not; one affects the particular contract in question and the other affects all contracts in a broader class. Given that the distinction between the two forms of implication is clear, there should be no possibility

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97 [2016] FCAFC 33, [237].
100 Ibid, 260.
of confusion. The idea that they tend to ‘merge imperceptibly into each other’\textsuperscript{104} on the same spectrum surely cannot be correct.

Just the above selection of examples makes it appear that many Australian courts simply imply terms with some disregard or perhaps a lack of true understanding of the particular tests to be applied on the basis of generalised outcomes that they view as desirable. This uncertainty is problematic. Maintaining the distinction between the two types of implication is important. The parties to an employment contract (or, indeed, any contract) share an interest in being able to predict how courts will imply a term, whether it is in fact or by law. The ability to predict such outcomes is important because the parties’ insight into the court’s approach may well influence the way in which they form and later perform obligations under their contract. The alternative approach of basing terms on generalised outcomes without consistently applied tests for implication is shrouded in uncertainty. That is not to say that a mechanistic view toward the implication of terms is desirable. Rather, the court’s approach to implying terms should be as certain as possible. If it is too uncertain, it will create a risk to the parties in contracting and participating in the employment relationship.

6.5 Necessary terms implied by law into employment contracts

This part explores problems with the necessity test for implying terms by law by focussing specifically on the necessity of terms already implied by law into employment contracts. This discussion not only illustrates the potential problems with the application of the necessity test to contracts generally, but also employment contracts in particular.

Generally speaking, as Chapters 1 and 2 have already made clear, terms implied by law play an important role in filling gaps that may be left by the parties to any agreement. It is not possible for parties to predict all future circumstances when entering into a contract. For employment contracts in particular, even if the agreement is written and extensive,\textsuperscript{105} or if it contains an entire agreement clause,\textsuperscript{106} there is still the possibility

\textsuperscript{104} Breen v Williams (1996) 186 CLR 71, 103.


\textsuperscript{106} See the earlier discussion on entire agreement clauses in Chapter 5.
that gaps will remain. Even in what Collins has labelled the current ‘era of extensive written contracts of employment’\textsuperscript{107} there is still a significant role for terms implied by law, often serving as ‘the unwritten assumptions about the basic framework of the legal institution of the contract of employment’.\textsuperscript{108} Indeed, some employment contracts are not in writing at all\textsuperscript{109} – even for employees at the highest executive level. In such situations the likelihood for gaps is even greater. Furthermore, while parliament may create statutory rules (or statutory-based rules) to regulate employment contracts, it is not possible for parliament to account for all future gaps that may require filling through terms implied by law. As also mentioned in Chapter 2, there are actually relatively few statutory implied terms that currently apply to Australian employment contracts. Therefore, the potential for gaps in employment agreements is ever-present. Terms implied by law are a useful judicial technique that can be used to remedy this problem by filling the gaps where necessary.

As explained above in Part 6.3, the problem is that the necessity test that governs the implication of terms implied by law remains uncertain. It is crucial that this uncertainty be eradicated so that terms can continue to be implied by law in fulfilment of their gap-filling function. Should the necessity test remain ambiguous, the courts will likely be inclined to avoid implying terms by law into employment contracts altogether. The reason for this is two-fold: either the courts will do so because of a foreseeable conflict with statute,\textsuperscript{110} or they will apply a necessity test so narrow that it may never be satisfied. In saying this, it is not surprising that the Western Australian Supreme Court has already expressed the view that, as a consequence of the decision in Barker, ‘Australian courts should be and are cautious about taking the step of implying terms into contracts as a matter of law on a plenary basis’.\textsuperscript{111}

To overcome the difficulty associated with the application of the necessity test, rather than trying to ascertain whether a term implied by law is necessary to be implied into


\textsuperscript{108} Ibid, 490-491.


\textsuperscript{110} This possibility will be explored further in the context of the judicial role in implying terms by law into employment contracts in Chapter 7.

\textsuperscript{111} Caratti Holdings Co Pty Ltd v Coventry Group Ltd [2014] WASC 403, [186]. This case addressed the implication of a term of good faith and reasonableness as a matter of law in commercial leasing contracts.
all employment contracts, perhaps the question ought to be: why are some existing terms implied by law considered necessary in employment contracts, and others are not? This is because the problem faced when applying the currently ambiguous necessity test is that it is unclear at what point a term implied by law ceases to be necessary. It is significant that no cases have taken the step of analysing any earlier terms that have been accepted as terms implied by law into employment contracts. All existing terms have been left untouched and continue to operate, despite contradictions in the necessity test to be applied. In recognition of this position, Stewart and others have commented that while it is ‘unlikely that any of the established implied terms would be called into question … there might be room for debate whether some of them would now meet the High Court’s current standard’. 112

As already suggested in Chapter 5, while employers may just try and contract out of every implied obligation that they are said to owe, or attempt to significantly modify certain terms, it seems illogical to do so in respect of some (but certainly not all) duties that have already been deemed necessary in the employment relationship. There are some existing duties implied by law into employment contracts that ought to be capable of exclusion or modification and others which ought not. The point is that those duties that are incapable of exclusion or substantial modification are also those that are truly necessary.

Arguably, if (1) an employee’s duty to obey lawful and reasonable instructions of their employer, (2) a mutual duty to provide reasonable notice of termination for an otherwise indefinite contract, and/or (3) a mutual duty to cooperate were contracted out of or significantly modified, it would mean that the employment relationship is no longer viable. In that sense, they ought to be understood as truly necessary features of the employment relationship. The reasons surrounding the absolute necessity of each of these duties are considered in more detail directly below.

As discussed above at Part 6.3, not all of these terms implied by law are necessary in the strictest sense (ie to make the contract ‘work’, satisfying the Byrne test). Specifically, a mutual duty to provide reasonable notice on termination need not be classified as necessary for the functionality of an employment contract. An employment contract could operate without it, but it can be classified as necessary for the policy-

based reason that without it, the contract would otherwise be categorised as one for slavery. However, the same cannot be said for an employee’s duty to obey, or a mutual duty to cooperate. As will be described below, arguably both duties are strictly necessary for the proper functioning of an employment contract, avoiding the need for any policy-based considerations.

The duty for an employee to obey lawful and reasonable instructions ought to be considered absolutely necessary. As highlighted in Chapter 5, the reason for this is that an employer’s capacity to manage its workforce is underpinned by this duty. In support of this conclusion, Mark Irving describes the obligation of an employee to obey their employer’s orders as ‘one of the identifying features of employment’. He recognises that ‘[t]he obligation of the employee to obey orders is coterminous with the contract’. Collins goes further in making the point that any exclusion or limitation on an employer’s right to direct the performance of work in line with this duty begins ‘to turn the proper classification of the contract towards a contract for services’. Without it, ‘the courts may no longer classify the contract as one of employment’.

In a written employment contract that does not contain any set notice period or is not for any fixed term, a term implied by law provides that the contract is terminable on reasonable notice. Without that term, the employment contract could actually require the employee to be available indefinitely, consequently amounting to a contract for slavery. As Collins argues, an exclusion or substantial modification of this basic liberty of ‘the employee to quit by terminating the contract [would] edge the proper classification of the contract towards forced labour or a non-contractual kind of servitude’. This logic prevails notwithstanding Kuczmarski v Ascot Administration

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113 See, eg, R v Darling Island Stevedoring & Lighterage Co Ltd (1938) 60 CLR 601, 621.
115 Ibid, 351.
117 Ibid, 484.
119 See further the discussion about indefinite contracts in Andrew Stewart, Stewart’s Guide to Employment Law (Federation Press, 2015) 335-356.
where, as described in Chapter 3, the South Australian District Court suggested that there is no necessity for such an implied term requiring reasonable notice on termination where the statutory provision under s 117 of the *Fair Work Act 2009* (Cth) operates. Surely, as Judge McNab described in the later decision in *McGowan v Direct Mail and Marketing Pty Ltd*, the ‘better view’ is that s 117 merely prescribes a minimum notice period. It does not displace an implied term requiring reasonable notice on termination in the absence of an express notice period in an employment contract. Also, if one accepts that s 117 of the *Fair Work Act 2009* (Cth) only gives the employer the right to terminate and does not afford the same right to an employee, then the apparent lack of necessity to imply a term of reasonable notice espoused in *Kuczmarksi* is surely misguided. Taking into account the reasons already described in Chapter 3, it therefore makes little sense for the common law implied term to be displaced in its entirety.

An employment contract (or any contract, for that matter) could surely not operate without a duty of cooperation. Parties are ‘unlikely to have intended the performance of their contract to be obstructed by an unreasonable lack of cooperation’. The only situation that would displace the necessity for an implied term would be one in which the same duty was pitched as an identical express term (or at least an equivalent express term covering the same ground). Without such a term, it would be difficult – if not impossible – for the contract to properly function. It is highly unlikely that the parties will be able to foresee every circumstance that may arise in the future, making the term a necessary element of all contracts. If the parties were not expected to cooperate during the course of their agreement, there would be little point in them contracting in the first place.

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121 [2016] SADC 65.
122 [2016] FCCA 2227.
123 Ibid, [85].
124 Ibid.
125 See the further discussion as to the content of this duty in Chapter 3. As described in Chapters 2 and 3, it may instead be categorised as a rule of construction, rather than an implied term.
Despite the absolute necessity of these three existing terms, which are routinely implied into employment contracts by law, there are many more, which may be viewed as not necessary and capable of exclusion or modification – in other words, ‘less significant’ to all instances of employment.\(^{127}\) This includes the following seven duties: (1) an employer’s duty to provide a safe place of work, (2) an employer’s duty to indemnify their employees for expenses innocently incurred, (3) an employer’s duty to inform an employee of their rights, (4) an employee’s duty of fidelity, (5) an employee’s duty to exercise reasonable care and skill, (6) an employee’s duty to hold inventions on trust, and (7) an employee’s duty not to disclose confidential information of their employer.

As the discussion below concerning each of these terms makes clear, there are two key reasons for the lack of necessity for each of these terms. The first is that the term is not necessary because there is another concurrent obligation (eg under statute, common law or equity). The second is that the employment contract could still function without the particular implied term. This second reason is essentially based on an application of the Byrne necessity test, but is also very similar to an application of the ‘business efficacy’ test for implying a term in fact (discussed in Chapter 2). This type of rationalisation contributes to a blurring of the distinction between terms implied by law and in fact,\(^{128}\) and has most likely added to the courts’ confusion when they are asked to imply terms by law into employment contracts. As Chin explains, conflating the different concepts of necessity in this way also has the potential to erroneously preclude the operation of a term implied by law that ‘may not be necessary to give business efficacy to the contract because the contract is effective without it, but is nonetheless necessary (in the broader sense) to the class of contract to which the contract belongs, and is otherwise not inconsistent with the express terms of the contract or any applicable statutory regime’.\(^{129}\) A key example Chin uses to illustrate this point is a good faith term, which has already been considered in Chapter 4 and will be returned to again in Chapter 8.

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\(^{128}\) See the earlier discussion in Part 6.2 concerning the courts’ confusion in relation to this fact/law distinction.

In relation to an employer’s contractual duty to provide a safe place of work, concurrent statutory provisions exist under state and federal work health and safety laws.\textsuperscript{130} These statutory provisions each create essentially identical duties owed by employers, in that the statutory provisions effectively cover the same ground as the common law implied term. Moreover, employers also owe an obligation in tort to take reasonable care for the safety of their employees.\textsuperscript{131} As explained in Chapter 3, this tortious duty is concurrent with the employer’s contractual duty of care created by the term implied by law. While there are some differences between the two causes of action in tort and contract (eg differences in limitation periods, dates of the causes of action accruing, entitlements to an award of interest, and in assessing the remoteness of damages),\textsuperscript{132} the fact that a concurrent duty exists in tort (in combination with an equivalent statutory duty) makes it seem much less likely that a contractually implied duty is absolutely necessary to be implied by law into all employment contracts. To put it otherwise: as a consequence of the concurrent tortious and statutory duties, there really is no gap to fill through the operation of a contractually implied term by law into the class of employment contracts. Notwithstanding these concurrent obligations, it is also arguable that an employment contract could still function without a contractually implied duty owed by an employer to provide a safe place of work – unlike a duty owed by an employee to obey lawful and reasonable instructions of their employer, it is not central to the function of an employment relationship. While still important in a practical sense, it is arguably peripheral to the function and existence of the employment relationship between the parties.

\textsuperscript{130} See, eg, \textit{Work Health and Safety Act 2011} (Cth); \textit{Work Health and Safety Act 2011} (ACT); \textit{Work Health and Safety Act 2011} (NSW); \textit{Work Health and Safety (National Uniform Legislation) Act 2011} (NT); \textit{Work Health and Safety Act 2011} (Qld); \textit{Workplace Health and Safety Act 2012} (Tas); \textit{Work Health and Safety Act 2012} (SA). Cf Western Australia, where workplace health and safety remains regulated by the \textit{Occupational Safety and Health Act 1984} (WA) because it has not yet adopted the uniform legislation, noting that the provisions of the \textit{Work Health and Safety Bill 2014} (WA) (which is based on the model legislation) were released for public comment in early 2015; Victoria, which continues to use its own \textit{Occupational Health and Safety Act 2004} (Vic), as the Victorian Government has confirmed that it will not be implementing the Model Work Health and Safety Act in its current form.


\textsuperscript{132} Mark Irving, \textit{The Contract of Employment} (LexisNexis Butterworths, 2012) 537.
Nevertheless, a counter-argument exists whereby an employer’s duty to provide a safe place of work is central to employment. On this interpretation, the implied term could be viewed as necessary in either the narrow or wide sense. Requiring an employer to provide a safe place of work could be viewed as necessary to make the employment contract work, in that it would physically impossible for work to be performed in an unsafe environment. From a broader policy perspective, it makes sense to require employers to provide their employees with a safe working environment; requiring any employee to work in an environment that is unsafe is directly contrary to maintaining the employment relationship.

Separately, an employer’s duty to indemnify employees for expenses innocently incurred during the performance of their duties is also not a necessary feature of the employment relationship. Even though, as described in Chapter 3, the duty (in its full force) requires an employer to indemnify an employee for all liabilities and expenses that arise from the performance of the employee’s duties, it can hardly be said that the duty is absolutely necessary to all instances of employment.

As also discussed in Chapter 3, an employer’s duty to indemnify employees for expenses incurred during the performance of their duties is also not a necessary feature of the employment relationship. Even though, as described in Chapter 3, the duty (in its full force) requires an employer to indemnify an employee for all liabilities and expenses that arise from the performance of the employee’s duties, it can hardly be said that the duty is absolutely necessary to all instances of employment.

An employment contract would arguably not be rendered worthless, nugatory or seriously undermined if it did not contain a duty of fidelity to be owed by an employee as broad as that currently implied.134 As the discussion of the duty in Chapter 3 suggests, ‘[c]ourts have repeatedly bemoaned the fact that the duty of fidelity is a rather vague duty’ and ‘clarifying this vagueness is not assisted by the diffuse manner in which some courts and texts have approached the cases’.135 The fact that the duty is

134 The formulations of the duty of fidelity are not without ‘an air of unreality or artificiality’: Richard Austen-Baker, *Implied Terms in English Contract Law* (Edward Elgar, 2011) 53.
vague and not easily identified makes it appear less necessary than others. That said, the
duty could still be viewed as necessary in particular situations of employment that are
largely contingent on the employee remaining loyal to their employer. For example, the
duty would arguably be more necessary for an employee working in sales who sets up a
business in direct competition with their employer. In such instances, the duty would
have greater scope for application and importance.

In relation to an employee’s contractual duty to exercise reasonable care and skill in the
tasks they perform, ss 28(a) and (b) of the Work Health and Safety Act 2011 (Cth), and
the equivalent sections from counterpart Acts in most jurisdictions,\footnote{See, eg, the Work
Health and Safety legislation referred to above at footnote 130 of this chapter.} also impose
equivalent obligations on employees to take care of their own health and safety and to
take reasonable care that their acts or omissions do no adversely affect the health and
safety of others. Moreover, officers and directors have a concurrent statutory duty of
care imposed by s 180 of the Corporations Act 2001 (Cth). Again, notwithstanding the
South Australian District Court’s finding in Kuczmarshi, both statutory regimes impose
concurrent statutory duties on employees as opposed to minimum standards, as with the
minimum notice provision under s 117 of the Fair Work Act 2009 (Cth). As such, there
is no absolute necessity for an equivalent contractually implied duty to operate at the
same time; as a consequence of these statutory provisions, there is no gap that requires
filling. Moreover, the associated obligation on an employee to exercise reasonable
‘skill’ in the tasks they perform will only arise in settings where the exercise of a skill is
actually required. This is certainly not universal to all instances of employment, so it
cannot be said that this aspect of the duty is a necessary feature of every employment
contract either. Nevertheless, while this duty is not strictly necessary in the narrower
‘business efficacy’ sense, it will remain so for those contracts in the sub-category for
which the term is to apply.

As also described in Chapter 3, the duty requiring employees to hold inventions created
in the course of performing their employment duties on trust for their employer (at least
where there is a duty to invent) will only ever apply to an employee who has a duty to
invent as part of their employment. Therefore, it can hardly be said to be necessary in
all instances of employment. Again, while this duty will not be absolutely necessary
across all employment contracts in the narrower ‘business efficacy’ sense, for contracts
where an employee has a duty to invent, the term will become necessary at least in relation to contracts in that sub-category.

As the Full Court of the Federal Court noted in *Gray*, an employee’s duty not to misuse or disclose confidential information is ‘an unhappy mixture’ of equity, contract and statute.\(^{137}\) The relationship between each of the co-existent duties has already been touched on in Chapter 3, but again, given that the duty exists concurrently in areas other than contract, it surely cannot be said that it is necessary to be implied as a term by law in a contractual sense. As above, given that the duty (or a substantially similar equivalent) exists in equity and under statute, it can hardly be said that there is any real gap to fill. Furthermore, like the other duties mentioned above, it is reasonable to suggest that an employee’s duty not to misuse or disclose confidential information is not actually a central element of the employment relationship – unlike an employee’s duty to obey, the relationship would still exist without it.

Overall, what the above discussion shows is that irrespective of the necessity test applied, only certain terms implied by law can be considered absolutely necessary features in employment contracts, and therefore incapable of exclusion or modification. There are really only a select few terms implied by law that are ‘constitutive of the concept of a contract of employment’.\(^{138}\) While they might be labelled as terms implied by law, others are not necessary, or are perhaps ‘less significant’ to employment, despite being ‘routinely incorporated’ into employment contracts as apparently necessary terms implied by law.\(^{139}\) Where that is the case, those terms can be freely excluded or modified by the parties.

### 6.6 Conclusion

This chapter shows that problems with identifying when a term is necessary to imply by law have existed for some time. These difficulties stem from the obscure development of the law in England. *Irwin*, the seminal English case concerning terms implied by law, was lacking in clarity. The result was that when Australian courts followed the

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\(^{137}\) (2009) 179 FCR 346, [159].


\(^{139}\) Ibid, 484.
necessity test derived from Irwin, the confusion continued. To add to this problem, the High Court went on to adopt a somewhat narrow interpretation of the necessity test in its decision in Byrne, which still applies in Australian contract law today. That test provides that any term sought to be implied by law must be necessary to prevent rights normally conferred by contracts of the particular class from being ‘rendered nugatory, worthless, or … seriously undermined’.\(^{140}\) However, in Gray, the Full Court of the Federal Court suggested that necessity could take on a potentially wider meaning and involve consideration of matters of justice and policy in the court’s determination of what is necessary. While the High Court in Barker openly applied the narrow test from Byrne, its policy-based reasons for denying the implication of the mutual trust and confidence term paradoxically suggest that its approach to necessity is actually wider.

The necessity test for implying a term by law now remains uncertain and must be clarified. If not, the courts may refuse to apply even the narrow necessity test from Byrne and avoid implying terms by law into contracts altogether. On top of this, Australian courts also continue to confuse the difference between implying terms in fact and by law, which is problematic because it creates uncertainty as to the courts’ decision-making processes when a term is sought to be implied.

As Part 6.5 highlights, it can be argued that certain terms implied by law are absolutely necessary in employment contracts and therefore incapable of exclusion or modification, specifically: (1) an employee’s duty to obey lawful and reasonable instructions of their employer, (2) a mutual duty to provide reasonable notice of termination of an otherwise indefinite contract, and (3) a mutual duty to cooperate. Each of these terms has operated and continues to operate as a necessary incident in that class of contract to ensure that certain gaps are filled. Despite being labelled as terms implied by law, a greater number of terms that have been routinely implied by law are largely not necessary (in the narrow sense), or, in other words, are less significant incidents of employment, and therefore, capable of exclusion or modification. The reasons for this lack of necessity to employment fluctuate between the particular duty existing through in some other format (eg under statute, tort or equity), or that the term is not necessary for the functioning of an employment relationship. Such terms include: (1) an employer’s duty to provide a safe place of work, (2) an employer’s duty to

\(^{140}\) Byrne v Australian Airlines Ltd (1995) 185 CLR 410, 450 (McHugh and Gummow JJ).
indemnify their employees for expenses innocently incurred, (3) an employer’s duty to inform an employee of their rights, (4) an employee’s duty of fidelity, (5) an employee’s duty to exercise reasonable care and skill, (6) an employee’s duty to hold inventions on trust, and (7) an employee’s duty not to disclose confidential information of their employer.

On the whole, there is uncertainty surrounding the future application of the necessity test in relation to terms implied by law into all contracts. Moreover, a closer analysis of existing terms implied by law into employment contracts shows that many of those terms are actually not strictly necessary features of all employment relationships. Therefore, the courts need to make further efforts to clarify what necessity test it is that they ought to apply, as well as how that test translates back to existing terms implied by law. Chapter 8 will discuss ways in which that clarity might be achieved.
7 THE ROLE OF JUDGES IN REGULATING EMPLOYMENT CONTRACTS THROUGH TERMS IMPLIED BY LAW

7.1 Introduction

This chapter considers the potential for Australian judges to continue to make new law governing employment contracts in the face of ever-expanding statutory schemes. That potential was challenged by the Australian High Court’s decision in Commonwealth Bank of Australia v Barker,¹ the facts of which have been discussed in Chapter 4. In their decision not to imply a mutual trust and confidence term by law into all Australian employment contracts, French CJ, Bell and Keane JJ, in their joint judgment,² emphasised that recognition of the mutual trust and confidence term would involve ‘complex policy considerations … more appropriate for the legislature than for the courts to determine’.³ Their Honours found that the implication of the contractual term was a ‘step beyond the legitimate law-making function of the courts’, which ‘should not be taken’.⁴ The court also held that ‘the common law of Australia must evolve within the limits of judicial power and not trespass into the province of legislative action’.⁵ Accordingly, French CJ, Bell and Keane JJ were not denying the judges’ law-making role. Rather, they were placing limits on that role and introducing ambiguity as to those limits. The problem now faced is where to draw those limits. Specifically, it is unclear what criteria the High Court was applying in determining when it is legitimate for the court to make law and when it is not. As ACL Davies suggests, it is judicial statements like this that mark employment contract law as an area in which the courts are tending

¹ (2014) 253 CLR 169.
² As already noted in Chapter 4, while all judges were unanimous in finding against the implied term of mutual trust and confidence, Kiefel and Gageler JJ issued separate judgments.
³ (2014) 253 CLR 169, [40].
⁴ Ibid, [1].
⁵ Ibid, [19].
to show ‘a high degree of deference to statute, particularly when they are called upon to
develop the common law’.  

In recognition of this challenge, this chapter focuses on the broader implications of the
High Court’s reasoning in Barker, specifically in relation to whether or not courts
should maintain a rule-making power with respect to Australian employment contracts.
On the one hand, it can be argued courts should not feel bound by out-of-date
precedents in making decisions about employment contracts. They should arguably be
able to revise, replace and develop new rules where they view it as necessary, based on
their own judicial interpretations. On the other hand, there is an equally compelling
proposition that judges should be limited to developing the common law incrementally
in a manner bound by existing precedent, as well as interpreting and applying the laws
already made by parliament. To do otherwise may be seen as inherently anti-
democratic, as it allows for unelected and politically unaccountable judges to
participate in governing Australian employment contracts. It may also threaten the
wider public respect for judges as impartial enforcers of law and adjudicators of
disputes.

This chapter concentrates not on the precise form that the regulation of Australian
employment contracts ought to take, but rather on what role the courts ought to play in
that rule-making process. It is acknowledged that parliament will always have the
primary rule-making power, either through the creation of primary or delegated
legislation.7 Indeed, the legislature can overrule any judicial decision it does not agree
with by implementing amending legislation. Following Barker, however, the question
that remains is whether judges should exercise the ability to make rules with respect to
employment contracts at all.

6 ACL Davies, ‘The Relationship Between the Contract of Employment and Statute’ in Mark Freedland
(ed), The Contract of Employment (Oxford University Press, 2016) 73, 81, citing ACL Davies, ‘Judicial

7 See, eg, Richard Mitchell and Malcolm Rimmer, ‘Labour Law, Deregulation and Flexibility in
Australian Industrial Relations’ (1990) 12 Comparative Labour Law Journal 1, 8-15; Mark Bray and
Andrew Stewart, ‘What is Distinctive About the Fair Work Regime?’ (2013) 26 Australian Journal of
Labour Law 20, 25.
In this discussion, it is recognised that implying terms by law is but one way that judges can regulate the employment relationship.\(^8\) For example, judges can interpret the express terms of employment contracts, apply existing laws from both statute and common law, and award remedies where appropriate. But this chapter concentrates on the specific question of whether judges should impose new norms of conduct through terms implied by law, without touching on other regulatory conduct. To go further would be beyond the scope of this thesis. The chapter considers the common law as it applies in Australia, considering comparative common law approaches where relevant.

Part 7.2 sets out the general arguments for and against judicial law-making, in order to come to a more specific view about the judicial law-making role with respect to Australian employment contracts. This discussion also details the view that, as a consequence of the Barker decision, the symbiotic relationship between statute and the common law ought to be reinvigorated to prevent further uncertainty. In light of the discussion in Part 7.2, the conclusion in Part 7.3 introduces the potential for a solution to solve the difficulty associated with determining what role judges should play in regulating Australian employment contracts, which will be addressed in greater detail in Chapter 8.

### 7.2 The courts and parliament

Let us now move to the overarching question governing this chapter: what law-making role should the courts play with respect to regulating Australian employment contracts? Seeking to answer this definitively presents an obvious challenge. There are competing arguments as to whether or not the courts ought to make new rules with respect to those contracts, or whether this role should be exclusively held by parliament. At one time, according to what has sometimes been referred to as the declaratory theory of the common law, judges simply ‘found’ a legal set of rules that were to apply from time immemorial. It is now accepted that judges are necessarily making choices and law

\(^8\) Hugh Collins is optimistic about the courts’ ability to imply terms into employment contracts, suggesting that they apparently ‘permit judicial intervention whilst maintaining the appearance of conformity to respecting the parties’ self-determination’: Hugh Collins, ‘Implied Terms: The Foundation in Good Faith and Fair Dealing’ [2014] Current Legal Problems 1, 1.
when they determine the status and scope of the common law. The question is what role judges should play in doing so.

This part considers the arguments for and against the law-making power of the courts that have been raised in the general literature. It does so with a view to answering the more specific question in Chapter 8 about what rule-making role the courts should play with respect to Australian employment contracts. As set out below at Part 7.2.1, arguments in favour of judicial law-making are focussed on the idea that judges are able to flexibly develop the law, as well as ensure the law’s coherence and predictability. Arguments against the judicial law-making role at Part 7.2.2 are linked to parliament’s perceived democratic legitimacy, its efficiency in developing the law, and the importance of maintaining the perception of an impartial judiciary. The importance of reinvigorating a symbiotic relationship between statute and the common law is discussed at Part 7.2.3.

7.2.1 Why judges should engage in judicial law-making

7.2.1.1 Flexibility

The courts are arguably in a better position than parliament to flexibly develop the law. The judicial role is inherently dynamic. The law is rarely clear and incontestable, therefore leaving room for judges to flexibly develop it in order to achieve important and necessary outcomes. In that respect, common law judges need not remain behind the times, unable to replace strict rules with more suitable standards. Where appropriate, they should have the opportunity to free themselves from the ‘straitjacket of law as authority’. Lord Goff addressed the question of whether judges should effect this kind of developmental change in the common law in *Kleinwort Benson Ltd v Lincoln City Council*, a 1999 case concerning money paid under mistake of law. His Lordship held as follows:

In the course of deciding the case before him [the judge] may, on occasion, develop the common law in the perceived interests of justice, though as a general rule he does this ‘only interstitially’, to use the expression of O W Holmes J in *Southern Pacific Co v Jensen* (1917) 244 US 205,

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221. This means not only that he must act within the confines of the doctrine of precedent, but that the change so made must be seen as a development, usually a very modest development, of existing principle and so can take its place as a congruent part of the common law as a whole...

Occasionally, a judicial development of the law will be of a more radical nature, constituting a departure, even a major departure, from what has previously been considered to be established principle, and leading to a realignment of subsidiary principles within that branch of the law.¹²

In the context of the common law rule as to mistake of law, Lord Goff carefully considered the arguments in favour of judges making more radical changes to the English common law. His Lordship purposefully left open the opportunity for judges to make more significant developments to the law, rather than just basing their decisions on what is to be drawn from the existing law under the traditional common law method. He emphasised this, stating that he could not ‘imagine how a common law system, or indeed any legal system … [could otherwise] operate’ should the law not be capable of ‘organic change’.¹³

With Lord Goff’s suggestion in mind, the implication of a new term by law into all employment contracts arguably illustrates the judicial role being performed in a way that flexibly develops the common law. This is because implying a new term by law can allow judges to take a lead from existing legislative intervention in rebalancing the employment relationship, recognising that employment is more than a contractual exchange of labour for wages, and utilising the common law tool of implying a term by law into all employment contracts accordingly.¹⁴ As Jack Hodder has explained, it is ‘at the end of this incremental and progressive process’ that ‘fairness has been enhanced, the potential for abuse of employer power curbed, and the sum of total human happiness increased. This, it might be asserted, is the adaptive and creative genius of the common law at work’.¹⁵ Ronald Dworkin also had a well-known vision of the common law along these lines. He described it with the metaphor of a ‘chain novel’

¹³ Ibid. In contrast, Brennan J in Mabo v The State of Queensland (No 2) (1992) 175 CLR 1, 29-30, warned against judges departing from precedent ‘where the departure would fracture what I have called the skeleton of principle’.
where judges are authors as well as critics who participate in the collaborative writing of the novel that is the law.16

Furthermore, if a court decides, as it did in Barker, not to imply a term by law into all employment contracts on the basis that such a decision ‘ought to remain in the province of the legislature’,17 there is always the risk that parliament will not step in to clarify the issue. Parliament may not bother to make the matter part of its legislative agenda for whatever reason. As it stands, ‘[w]e only have a very limited knowledge of what demands are likely to be met with legislative action’.18 This is a further reason for judges to avoid a conservative approach to developing the law and to feel comfortable with exercising their creative function.

7.2.1.2 Coherence and predictability

An additional argument in favour of judges making rules with respect to employment contracts is that the common law is often more coherent and predictable than statute. In support, Joachim Dietrich has written that, all too often, we are “‘stuck with’ (in many cases) piecemeal legislation, [and] we cannot assume that there is a “coherent whole” that is merely being obscured by such legislation’.19 Consequently, as Roger Traynor argues, a judge’s role ought to be ‘greater now that legislatures fabricate laws in such volume’.20 In keeping with this idea, Leeming JA has also pointed out that ‘swathes of statutory law lack the complexity brought about by decades or centuries of litigation and analysis, although there is ample scope for analysis and complexity in … many … areas dominated by statute’.21 His Honour further explains that ‘[a]ll this is a natural consequence of a legal system whose norms are statutes of general application enacted by different levels of government, and by governments with different policy objectives’.22 A more controversial view here is that ‘the elected branch, vulnerable to

17 (2014) 253 CLR 169.
22 Ibid.
the felt passions of the time and prone to arbitrary and irrational action must be constrained by the calmer cooler heads of the judiciary’.  

7.2.2 Why judges should avoid judicial law-making

7.2.2.1 Democratic legitimacy

Despite the above arguments in favour of judicial law-making, much has been written both academically and judicially about why judges ought to avoid making bold new statements of law, with legislation considered a more democratically legitimate form of law-making. So much so, it is now a commonplace to speak of an ‘age of statutes’. The reasons for this legislative dominance have often been articulated by the courts, feeling reluctant or ill-equipped to make policy decisions that might be called for in a particular uncertain area of the law. One of the main justifications for this is parliament’s perceived political accountability. In a matter of contested policy, like whether or not imply a new term by law into all employment contracts, there is an argument that parliament is the more appropriate body to make the decision about which policy to adopt. To do otherwise would effectively allow ‘unelected and politically unaccountable judges to participate in government’. This may result in the parties’ rights in their employment contract ‘taking second place to the desire of judges

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25 See, eg, Buck v Comcare (1996) 66 FCR 359, 364-365, where Finn J of the Federal Court held that ‘we live in an age of statutes and … it is statute which, more often than not, provides the rights necessary to secure the basic amenities of life in modern society’.

to create what they believe to be the best rules for the future’. John Gava has gone so far as to label such actions as a ‘sneaky’ way for judges to change the law for political or market-oriented reasons without going through the rigours required for those who wish to become a politician.

The research facilities and resources available to parliament also put it in a more advantageous position than the courts in respect of making well-informed policy decisions. Judges are not given this same access, nor do they have the ability to seek the advice of expert lobbyists. They also avoid the political accountability associated with the scrutiny by the media. The courts are ‘constrained in their ability to take part in and learn from the robust public debate that characterises normal politics’. Parliament finds itself in the unique position of being able to conduct a broad survey of problems in the entire field of which they are a part.

### 7.2.2.2 Efficiency

There is arguably efficiency in parliament being able to avoid the limitations of the common law method when making rules with respect to Australian employment contracts. Even if a court wants to make a significant change in the law, it is limited to the facts of the case before it, as well as any applicable *ratio decidendi*. The court must therefore wait for the appropriate case to be brought before the change can happen. Even then, if the court chooses to make a bold statement of law, there is always the possibility that it will be distinguished in future cases, or that the particular decision will be appealed. On top of this, parliament finds itself in the unique position of being able to intervene and correct any ‘mistakes’ or undesirable decisions made by judges by passing amending legislation.

### 7.2.2.3 Faith in an impartial judiciary

In all common law jurisdictions, including Australia, there is an obvious importance in maintaining a perception of an impartial judiciary. For both practising lawyers and the

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27 Ibid, 751.
28 Ibid, 752.
29 Ibid, 754.
public at large, there is value in being able to face a judge without the concern that they will make their decision based on some political bias. This generates a sense of faith in judges as independent arbitrators of disputes. Allowing judges to press ahead and determine the law of their own volition creates a risk of harming the judiciary’s reputation. As Gava explains, it is important that we avoid a ‘culture in which judges are seen as part of the political regime and not as impartial referees whose decisions can and should be accepted as law’.  

7.2.3 Reinvigorating the relationship between statute and the common law

As demonstrated by the above arguments in this part, there is clearly an issue with assuming either judicial or parliamentary supremacy when it comes to answering what law-making role judges ought to play in regulating employment contracts. To return to a point made earlier, the arguments presented are wide-ranging and often conflicting. This makes it difficult to reach a clear consensus as to how far the courts’ law-making role ought to extend with respect to Australian employment contracts.

What remains clear, however, is that there is a constant interplay between statute and judge-made law. Legislation will always require judges to decide matters involving its application. Statutes are increasingly becoming a source of judge-made law. In response, it makes sense to refer to a ‘kind of legal partnership between statute and common law’ as Professor Atiyah did in 1985. Similarly, Gleeson CJ has held that ‘Legislation and the common law are not separate and independent sources of law; the one the concern of parliaments, and the other the concern of courts. They exist in a symbiotic relationship’. A symbiotic relationship involves the courts interpreting laws made by parliament, as well as parliament making laws phrased in general terms, knowing that the courts will apply that law to specific situations. The relationship allows for the courts to fill in any gaps they perceive as being left by parliament and potentially alerting parliament to any gaps in the law, allowing parliament to legislate in

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33 Brodie v Singleton Shire Council (2001) 206 CLR 512, [31].
response to a problem identified by the courts. Further, in a symbiotic relationship, ‘legislative change may operate as a catalyst to prompt changes in judge-made law’.  

Each of these claims implies that the common law and statute are ‘to a significant degree, products of the same inherently dynamic legal process’. In support of this logic, Robert Williams contends that ‘the common law [should be understood] not as a body of law whose change is impeded or blocked by a static body of rules, but as a process best served by the rational integration of judge-made and legislative law’. Indeed, much has been written about the need for the common law and statute to work together as part of a ‘coherent’ system of law, instead of what Jack Beatson termed the ‘oil and water’ approach, which favours keeping the common law apart from its neighbouring but inferior relation, the statute. In the context of Australian private law, Elise Bant has recently argued in favour of a more integrated approach to the application of statute and common law. Her view is that the interplay between statute and common law should be taken ‘more seriously’, so as to give rise to a more ‘coherent private law as a whole’. In the specific context of the relationship between the common law and statute law of employment, Mark Freedland has suggested that there is an ‘intricate symbiosis’ between the two sources of law. ACL Davies has also suggested that in respect of labour law, ‘[i]t is not accurate in descriptive terms to regard the common law as foundational and statute law as an occasional intruder: the two are much more deeply intertwined’. She goes on to say that because statute and the common law are so closely intertwined in this way, ‘the courts should develop the

common law alongside statutes to create a coherent system in line with the fundamental
tenets of the Rule of Law’. 41

With the above sentiments in mind, Chapter 8 will propose a solution, which would
reinvigorate both the courts and parliament working together in a symbiotic relationship
in the future. This is with the aim of avoiding uncertainty over the extent of the judicial
law-making role in employment contract law. It is argued that judges should still have
an integral role to play in regulating employment contracts by implying new terms by
law, even after the High Court’s decision in Barker. Asking the courts to undertake
law-making by implying new terms by law does not necessarily undermine their
independence. However, by making policy-based decisions, like implying new terms
by law into all employment contracts, the courts have the potential to act as a ‘surrogate
or superior legislature’, 42 which would undermine their independence. Therefore, while
judicial law-making with respect to employment contracts ought to be allowable, it is
important that there be some level of restraint on it. In recognition of this, the proposed
solution encourages parliament to take on more of an active role, through the creation
of a default set of minimum rules that are to apply to employment contracts, but without
diminishing the courts’ ability to imply new terms by law where necessary. That idea,
which warrants further and separate discussion, will be explored in greater detail in
Chapter 8.

7.3 Conclusion

At the very essence of our common law system, there is an uncertain boundary between
the role of the courts and parliament. This ambiguity has been especially prominent in
the wake of the Barker decision, which has cast doubt over the extent to which courts
ought to determine the principles for the content and interpretation of employment
contracts.

The main arguments as to how far the judicial law-making role ought to extend have
been analysed in Part 7.2, along with recognising the importance of reinvigorating the
symbiotic relationship between statute and the common law. That discussion
demonstrates that there are a wide range of different views about whether courts ought

41 Ibid, 95.
to determine the content of employment obligations, particularly where a contract is not clearly drafted, or perhaps not in writing at all. Moreover, the decision in Barker has created the potential for the courts to refuse to imply any new terms by law into employment contracts ever again, consequently diminishing the courts’ future role in regulating employment contracts in Australia. Barker also cast doubt over the way in which courts will treat existing terms implied by law in the future. Essentially, if one takes the decision in Barker at face value, it suggests that there ought to be no judicial law-making role where there are defensible policy positions on both sides of an argument.

Despite these difficulties, Chapter 8 presents a case for the preservation of a residual role for Australian courts in the regulation of employment contracts through terms implied by law, including existing and future terms. It suggests the creation of statutory default minimum rules for the employment relationship, but emphasises that the courts must still remain willing to imply terms by law into employment contracts, because it is impossible for parliament to predict all future gaps that may need to be filled.
8 CONCLUSIONS

8.1 Terms implied by law into employment contracts: rethinking their rationale

This thesis has explored the rationale for implying terms by law into employment contracts, both in relation to existing terms implied by law, as well as those which the courts are yet to articulate. Informed by the Australian High Court’s decision in Commonwealth Bank of Australia v Barker\(^1\) not to imply a term of mutual trust and confidence by law into all Australian employment contracts, the thesis has set out to formulate ways in which the rationale for implying terms by law into employment contracts can be clarified. Focussing on Australian employment contracts and, therefore, primarily on Australian authorities, the thesis has also drawn on authorities from a range of other common law jurisdictions, especially the United Kingdom. It makes contributions to both employment and contract law, as well as employment contract law, which exists at the intersection between those two areas.

This research traversed the concept of implying terms into contracts generally (as distinct from express terms) in Chapter 2, as well as the historical development of a selection of key terms already implied by law into employment contracts in Chapter 3. That historical analysis showed that most terms implied by law into employment contracts have their origins in English employment law and, in particular, as norms in the former master and servant regime. In most instances they originated as something other than terms implied by law, avoiding any consideration of whether they are truly necessary instances of employment. Eventually the terms came to be implied into all employment contracts as terms implied by law, but lacked proper and careful justification for why that was the case. Chapter 4 focussed on the more controversial duties of mutual trust and confidence and good faith. It highlighted that, contrary to the position in the United Kingdom, there is no implied term of mutual trust and confidence in Australian employment contracts. However, the status of a duty of good faith in Australian employment contracts remains uncertain and open for future consideration. In any event, there may actually be no difference between a duty of mutual trust and confidence and a duty of good faith. That idea will be returned to later at Part 8.5 of this

\(^{1}\) (2014) 253 CLR 169.
chapter, which considers the future potential of a duty of good faith in Australian employment contracts.

The thesis then turned to a close examination of the more nuanced issues associated with terms implied by law into employment contracts. These issues included the distinctiveness of employment contracts as a class into which terms are implied by law in Chapter 5, where it was argued that there is no consistent or universal understanding of employment contracts as a class. Chapter 6 highlighted the issues surrounding the application of the necessity test for implying a term by law, with competing narrow (ie functional) and wider (ie policy-based) views as to its application. That analysis of the necessity test is relevant to contracts generally and employment contracts specifically. Chapter 7 analysed the potential for Australian judges to continue to make new law governing employment contracts in the face of ever-expanding statutory schemes. It emphasised the need for greater coherence between common law and statute. It set up a case for the creation of statutory default minimum rules, which could operate without limiting the court’s ability to imply new terms by law where appropriate. Overall, the breadth of this research, which spans the fields of both employment and contract law, has provided a rich picture of the current issues associated with implying terms by law into employment contracts.

As introduced in Chapter 1, implied terms play an important gap-filling function across all types of contract. This gap-filling function is particularly prevalent in the case of employment contracts, which are the subject of numerous terms implied by law. Over time, as a consequence of mixed judicial approaches, uncertainty has arisen around the rationale that courts ought to adopt when implying terms by law into employment contracts as a class, and whether that rationale can explain existing terms implied by law in those contracts. This uncertainty is problematic. Terms implied by law are arguably one of the most important weapons of lawyerly and judicial technique in respect of employment contracts. As first suggested in Chapter 1, and explored further in Chapter 5, employment agreements are perhaps more susceptible to gaps than any other type of contract.

A thorough knowledge of when a term is or is not likely to be implied into the class of employment contracts, in combination with a solid understanding of the status quo of existing terms implied by law into those contracts, is imperative. It will enable
employment lawyers to advise their employer or employee clients as to what is likely to happen in respect of an employment contract that lacks express terms providing for a particular event. It will also enable those lawyers to guide clients away from particular negotiations in instances where they would perhaps be content with the effect of the likely term to be implied by law. As a judicial technique, a better understanding of when a term will be implied by law into the class of employment contracts would allow courts to discover an interpretation of employment contracts that is more clearly aligned to what is necessary for them to operate effectively, without feeling the need to defer to parliament in search of a suitable outcome.

In recognition of the desire for clarity in respect of terms implied by law into employment contracts, this final chapter evaluates four major research findings which will assist in achieving that outcome. Each demonstrates the overarching thesis that there is a need to rethink the rationale used in respect of the implication of terms by law into employment contracts. Firstly, there is a need for the courts to reclassify employment contracts as a class of contract into which terms are implied by law. Secondly, courts must clarify when it is ‘necessary’ to imply a term by law into some or all employment contracts. Thirdly, there must be clarification in respect of the judicial role in regulating employment contracts through terms implied by law. Fourthly, and more specifically, there ought to be greater clarity around whether or not a good faith duty exists in employment contracts and, if it does, whether it operates as a term implied by law, or through some other means. Each of these findings is set out in further detail below.

8.2 Reclassifying employment contracts as a class into which terms are implied by law

Chapter 5 concluded that there is no consistent or universal understanding of employment contracts as a class into which terms are implied by law. Looking to broader academic, judicial and legislative understandings of what constitutes the ‘employment contract’ does little to assist. If anything, that analysis emphasises that understandings as to what constitutes an employment contract are wide-ranging and inconsistent. The chapter also demonstrated that there are actually many similarities between employment contracts and other types of contracts, particularly contracts for
services, therefore making the judicial understanding of how to define and understand these contracts seem even more ambiguous.

Following a consideration of the key terms implied by law into employment contracts discussed in Chapter 3, Chapter 5 made a case for clarifying the categories of contract into which terms are implied by law in the employment context. It suggested that terms implied by law in employment be grouped into one of three main categories, with the first being ‘select types of employment as distinct classes of contract’. This category encompasses terms implied by law that operate exclusively in respect of select types of contract, as opposed to all instances of employment. The second category is ‘employment as a non-exclusive class of contract’, which includes implied terms that have the potential to also apply to other types of contractual relationships, other than employment alone. The final category is ‘employment as an exclusive class of contract’. This category encompasses very rare instances of terms implied by law that fall exclusively into the realm of employment, with the primary example being an employee’s duty to obey the lawful and reasonable instructions of their employer.

Therefore, apart from the High Court needing to fully articulate how it understands the employment contract at a general level, this thesis argues that in respect of terms implied by law in the employment context, clarity could also be achieved if the courts were to acknowledge that they were implying those terms into one of the three categories articulated in Chapter 5. They need to set clearer and more accurate boundaries as to the category of employment contract for which the term is considered necessary. The current approach of implying a term by law into the blanket class of ‘all employment contracts’ is over-generalised and, in many cases, inaccurate in respect of the term’s necessity to all instances of employment. It is anticipated that, by utilising these classifications, the courts will be in a better position to make more informed analyses about what is actually necessary to imply as a matter of law in a situation of employment and, in turn, how existing terms implied by law in those contracts will be affected. Arguably, the more often courts rationalise the implication of a term by law into one of these three categories, the less they will feel as though they are creating law and more that they are ensuring the continuity of the common law.\footnote{See, eg, Elisabeth Peden, ‘Policy Concerns Behind Implication of Terms in Law’ (2001) 117 \textit{Law Quarterly Review} 459, 476. McHugh J has emphasised on several occasions that it is ‘the genius of the common law’ that ‘the first statement of a common law rule or principle is not its final statement. The}
go some way to avoid Barker-like reasoning in the future, with the courts feeling more confident in exercising their judicial law-making function without trespassing ‘into the province of legislative action’. 3

8.3 Defining when terms implied by law are necessary in employment contracts

This thesis argued in Chapter 6 that the necessity test for implying a term by law is uncertain and must be clarified. Not only is this the case for employment contracts specifically, but also for other types of contract more generally, as the same necessity test applies when a term is sought to be implied into any contract by law.

To repeat the two variations of the necessity test outlined in Chapter 6, the narrow interpretation espoused in Byrne v Australian Airlines Ltd 4 requires that the term to be implied by law must be necessary to ensure that the class of contract is not ‘rendered nugatory, worthless, or … seriously undermined’. 5 This test is in contrast to the wider interpretation from University of Western Australia v Gray, 6 which allows for courts to take into account matters of justice and policy in determining what is necessary. 7

As mentioned in Chapter 6, while the formulation of the Byrne necessity test appears narrow in the way it is worded, it has the potential to be applied more widely. Indeed, the Full Court of the Federal Court in Gray recognised that possibility and suggested that notwithstanding the narrow wording of the Byrne test, it could be applied more broadly. 8 To be clear, this thesis operates on the premise that the narrow wording used in Byrne also means that the test is to be applied in a strict and functional sense.

As described in Chapter 6, the High Court in Barker did little to clarify which version of the test ought to be adopted when a term is sought to be implied by law, or how this

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5 Ibid, 450 and 453.
7 Ibid, [141]-[147].
8 Ibid, [140] (emphasis added).
would affect existing terms implied by law. While the High Court appeared to openly apply the narrow formulation of the necessity test from *Byrne* as a means of refusing the implication of the mutual trust and confidence term, its actual application of the test (ie its reasons for refusing the implication of the term) was wider in that it was largely policy-based.

This thesis argues that to achieve clarity, the High Court needs to fully engage with both interpretations of the necessity test for implying a term by law. It must openly decide which criterion ought to operate in respect of rationalising when it is necessary to imply a term by law.

If it fails to fully articulate which version of the test ought to be applied, courts may avoid implying any terms by law altogether, leaving gaps in contracts needing to be filled. This possibility is not just relevant to employment contracts, but to all types of contracts. As already described, all contracts attract the same necessity test when a term is sought to be implied by law. Even so, a court could still decide that the particular matter would be better dealt with by parliament, thereby avoiding the implication on that broader basis. That potential for avoiding implication of a term by law is addressed further below at Part 8.4.

Following an assessment of the application of the narrow necessity test to existing terms implied by law in Chapter 6, it became apparent that despite being labelled as necessary incidents applicable to all employment contracts, in reality, most terms currently implied by law are not actually necessary in *all* instances of employment. To be clear: not all existing terms implied by law into the class of employment contracts are vital to the maintenance and function of each and every employment relationship. Therefore, assuming the narrow necessity test from *Byrne* is applied exclusively and retrospectively, this will unnecessarily narrow the limits of existing terms implied by law. In turn, this approach will inhibit the implication of terms by law in the future. Unfortunately, the High Court in *Barker* failed to apply its formulation of the necessity test retrospectively, meaning that the court’s reasoning was anomalous in respect of the status of existing terms implied by law. It is conceivable that the High Court may never actually undertake this exercise at all in the future.

Nevertheless, given the potential for existing terms to be excluded if the narrow necessity test is applied retrospectively, this thesis argues that the broader view of
necessity should be preferred. Despite the existence of the narrower necessity test, it is the wider test that ought to be applied, so as to not limit the instances in which gaps might need to be filled, even if for reasons of justice and policy.

A key example of why a broader view of necessity ought to be preferred, with a view to preserving existing terms implied by law, has already been addressed in Chapters 3 and 6 in respect of an implied term requiring reasonable notice on termination. As noted in those chapters, the continued existence of that implied term has been cast into doubt following the District Court of South Australia’s decision in *Kuczmarski v Ascot Administration P/L,*\(^9\) which relied heavily on the Full Court of the Supreme Court of South Australia’s findings in *Brennan v Kangaroo Island Council.*\(^10\) As the discussion in Chapters 3 and 6 suggests, it is illogical for the court in *Kuczmarski* to have concluded that there is no necessity for such an implied term requiring reasonable notice on termination where the statutory provision under s 117 of the *Fair Work Act 2009* (Cth) operates. That finding was made ignoring the fact that the reasonable notice term has become a well-established term implied by law, even in the presence of s 117 (or an earlier equivalent statutory provision). As Judge McNab described in the later decision in *McGowan v Direct Mail and Marketing Pty Ltd,*\(^11\) the ‘better view’ is that s 117 merely prescribes a minimum notice period,\(^12\) and does not displace an implied term requiring reasonable notice on termination in the absence of an express notice period in an employment contract.\(^13\) Also, if one accepts that s 117 only gives the employer the right to terminate and does not afford the same right to an employee, then the apparent lack of necessity to imply a term of reasonable notice espoused in *Kuczmarski* must be wrong.

A consistent application of a broader necessity test will also assist in delineating between terms implied in fact and those implied by law because, as discussed in Chapter 2, the implication of a term in fact encompasses a business efficacy test, which

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10 (2013) 120 SASR 11. As discussed in Chapter 3, that earlier decision concerned an award clause providing that the employee ‘must be given notice of termination’ in accordance with the table set out in the clause. Given the existence of that clause, the Supreme Court held that the implication of an obligation to give reasonable notice was not necessary to give business efficacy to the contract.

11 [2016] FCCA 2227.

12 Ibid, [85].

13 Ibid.
is substantially similar to the narrow necessity test in Byrne. To avoid similar reasoning to that in Barker, where the court avoided implying a term by law by applying broader policy-based reasoning, the discussion below considers how the judicial role ought to be clarified.

8.4 Clarifying the judicial role in regulating employment contracts through terms implied by law

Chapter 7 concluded that there are wide-ranging views as to whether the courts ought to determine the content of employment obligations. It also made the point that the High Court’s reasoning in Barker created the potential for courts to avoid implying any new terms by law into employment contracts at all, consequently diminishing their future role in regulating Australian employment contracts. This thesis argues that to avoid such a situation, greater coherence is needed between judicial and parliamentary made law. Arguments in support of a need for coherence were provided in Chapter 7, such that there must be a reinvigoration of the ‘legal partnership’ between statute and the common law. As Elise Bant argues, the interplay between statute and the common law must be taken more seriously, so as to create a more ‘coherent private law as a whole’.

What the High Court should have done in Barker was to fully analyse how and why Australia’s statutory regime precluded the implication of the mutual trust and confidence term. Instead, the court briefly mentioned Australia’s extensive statutory employment regime:

Large categories of employment relationships are governed, at least in part, by statutory obligations expressed in industrial awards and agreements. There are laws dealing with unfair dismissal and the conditions of employment in relation to occupational health and safety. Anti-discrimination statutes of general application affect the conduct of the employment relationship …


16 (2014) 253 CLR 169, [16].
It then drew the blanket conclusion that because of Australia’s extensive statutory protections in employment, this meant that, unlike in the United Kingdom, the mutual trust and confidence term was not necessary in Australia:

The regulatory history of the employment relationship and of industrial relations generally in Australia differs from that of the United Kingdom … Judicial decisions about employment contracts in other common law jurisdictions, including the United Kingdom, attract the cautionary observation that Australian judges must “subject [foreign rules] to inspection at the border to determine their adaptability to native soil”. That is not an injunction to legal protectionism. It is simply a statement about the sensible use of comparative law.17

This reasoning is overly simplistic. Ideally, the court should have critically analysed the statutory regimes mentioned and highlighted exactly how and why they covered the same field as the mutual trust and confidence term, making the term’s implication unnecessary. By contrast, the Full Court of the Supreme Court of South Australia in State of South Australia v McDonald18 engaged in a more thorough analysis of the particular statutory provisions in question, and explained in detail the ways in which that regime prevented the implication of the mutual trust and confidence term:

In our opinion, the statutory and regulatory context in which Mr McDonald’s contract of employment operated made the implication of a term concerning mutual trust and confidence unnecessary. The statutory and regulatory framework itself provided restraints on the exercise of power by the Minister and by those exercising supervisory or other powers under the Education Act which could affect Mr McDonald adversely. The existence of the means of redress can be taken to operate as a normative influence on the behaviour of the Minister and of others in positions of responsibility. Teachers are provided with means of redress in those cases in which powers are exercised unfairly, or are perceived to have been exercised unfairly. In this way, teachers such as Mr McDonald obtain the kind of protection to which, as we understand it, the implied term as to mutual trust and confidence is directed. The statutory and regulatory context in which Mr McDonald was employed provided, by a variety of means, for the achievement of a balance between the Minister’s interests in discharging the obligations imposed by the Education Act and the teacher’s interests in not being unfairly or improperly treated.19

Beyond the need to fully analyse why a statute may or may not be inconsistent with a proposed term to be implied by law, a suggested solution for avoiding future difficulties

17 Ibid, [19].
19 Ibid, [270].
associated with how far the judicial law-making role ought to extend with respect to employment contracts involves combining statutory and common law implied terms to create a ‘set of rules … [that] are presumed to apply [to regulate the employment contractual relationship]’. \(^{20}\) It is anticipated that this would involve the legislature initially taking the lead in developing a default set of terms to be implied into all employment contracts. \(^{21}\)

In developing these default rules, as briefly touched on in Chapter 7, it would be open to parliament to have them function as statutorily implied contractual terms, \(^{22}\) or as statutory rules that operate alongside the employment contract. \(^{23}\) It is debatable which regime would be more or less beneficial to the parties to an employment contract. In her comments on the Consumer Guarantees shifting from statutorily implied contractual terms under the former Trade Practices Act 1974 (Cth) to statutory rules under the Australian Consumer Law, Jeannie Paterson has mentioned that consumers can no longer ‘rely on the law of contract to provide a remedy in the event of a failure to comply with [the Consumer Guarantees]’. \(^{24}\) Parties to an employment contract may have the same experience, should the rules operate as statutory rules, rather than implied contractual terms. Paterson has also highlighted that the measure of compensation and damages available to consumers for a breach of the Consumer Guarantees ‘may not match the damages that would have been recovered under the law of contract’. \(^{25}\) Whether the same could be said with respect to a breach of any statutory regime concerning employment contracts would largely depend on whether the


\(^{21}\) This option for statutory reform through the creation of default rules could also extend to other types of contract. However, a consideration of that broader possibility is beyond the scope of the present exercise, which focuses on employment contracts. In fact, the creation of statutory default rules may well solve problems for employment contracts, but not for other types of contract. As such, it warrants separate and dedicated consideration.

\(^{22}\) Similar to the statutory implied terms that operate under the Sale of Goods Acts in each Australian state/territory (as already mentioned in Chapter 2).

\(^{23}\) Similar to the National Employment Standards under the Fair Work Act 2009 (Cth), or the Consumer Guarantees under the Australian Consumer Law.


\(^{25}\) Ibid, 275.
remedies offered as part of the statutory regime are broader or narrower than those available under the common law of contract. In terms of generating greater certainty and less complexity in the law, there are undoubtedly arguments for and against either regime.

In terms of who is responsible for drafting any proposed model terms, it would be preferable for an independent panel of experts to draft the initial default rules in consultation with the legislature (and potentially the general public), which the legislature could then codify. Such a task would ideally be performed by the Australian Law Reform Commission, which is an independent statutory authority responsible for systematically developing and reforming Australian law. Of course, the legislature would most likely amend the proposed terms, but at least the starting point for the default minimum terms would be theoretically objective. The courts would then be tasked with interpreting and applying those terms, should they come into question.

It is envisaged that the default rules would encompass those terms that already operate as terms implied by law through the common law. As will be outlined below at Part 8.5, there may, for example, be a case for including a good faith term. Less contentious examples might include a duty to obey lawful and reasonable orders, of fidelity and to give reasonable notice on termination (as well as other issues already analysed in Chapter 3). It could also include any further terms deemed necessary by parliament. These default rules would be useful because, as mentioned earlier in this thesis, even when employment contracts are in writing, they are not always complete. Indeed, some employment contracts are not in writing at all – even for employees at the highest executive level. Therefore, the potential for gaps in employment contracts is ever-present. There is clearly a benefit in having these rules operate as a default position in order to provide clarity.

The starting point for most of these default rules is that they would apply to all employment contracts, unless expressly excluded or altered by the parties. It is true that employers may exercise their superior bargaining power by using boilerplate clauses to specifically exclude non-mandatory default rules. As Bob Hepple once pointed out: ‘The … concept of contract which is utilised by the courts and tribunals is inherently

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26 See further, the Australian Law Reform Commission Act 1996 (Cth).

biased in favour of the so-called rule making power of the employer’.

However, the effect of an employer drafting such an exclusion would be no different to that currently experienced in the employment relationship. As it stands, parties are already free to exclude terms implied by law, should they wish to do so.

Further, while the ability to exclude such terms may be acceptable in some circumstances, this may not be the case for all default minimum rules. It would be open to parliament to make some terms essential (and, consequently, non-excludable). As the author has argued elsewhere, as well as in Chapters 5 and 6 of this thesis, there are a number of terms that ought to be viewed as essential (and consequently, non-excludable) in the employment relationship.

The creation of default minimum rules is not a new idea. Hugh Collins proposed it in 2001 and reaffirmed it in 2007. But the Barker decision has given us an important opportunity to reconsider its viability. When Collins initially put the idea forward, he asserted that a default set of implied terms would help to overcome obstacles and ‘provide a legal sanction against opportunism’. In his mind, ‘further implied terms will be required to capture the implicit expectations of the parties [to the employment contract] on other matters’. In addition, he suggested that any such rules would need to be ‘clear and well-defined and their meaning confirmed by consistent interpretations’. Ideally, they would be consistent with existing common law and statutory implied terms in employment contracts, but also include new terms as appropriate. In his later work, Collins emphasised that even though statutory and common law regulation of the employment relationship are ‘on their own each

34 Ibid, 38.
ineffective for the task, a combination of the two [through combining implied terms and statutory controls] appears much more promising’.36

Even though a strong case for legislative intervention exists, asking parliament to legislate to create the initial default minimum rules ought not to diminish the courts’ ability to imply new terms by law into employment contracts, should they identify a gap that requires filling. What the default statutory rules should instead do is to provide broad, principled guidance for cases where gaps have already been identified. Australian employment relations are already governed by extensive statutory and statutory-based regulation. This fact strengthens the argument for leaving regulation of terms of employment to parliament, or its agents (including the industrial tribunals). However, there will still always be gaps and particular issues for which the common law plays an important role.

8.5 Detailing what the approach should be for implying a good faith term by law into employment contracts

Chapter 4 noted that notwithstanding the High Court’s refusal to imply a term of mutual trust and confidence in Barker, the potential for a duty of good faith was deliberately left open. A range of conflicting authorities exist in respect of the duty’s status in contracts generally and employment contracts specifically. In either context, the duty has the potential to function as a term implied by law or in fact, as a rule of construction, or perhaps not at all. Assuming it exists, there is also widespread confusion as to the duty’s likely content.

If it were to operate in employment, any good faith obligation will need to be distinguished from the mutual trust and confidence obligation already rejected by the High Court in Barker. As noted in Chapter 4, there may be no practical distinction between a duty of good faith and one of mutual trust and confidence. Assuming that argument is correct, then the High Court’s refusal to imply a mutual trust and confidence term by law in Barker could well mean that there is similarly no necessity to imply a good faith duty by law into employment contracts.

That said, there is still the possibility that the two duties could be understood separately. Prior to Barker, Joellen Riley argued that the two duties were related, but still separate:

Like siblings, they derive from the same source, ie the existence of a relationship of employment, but they are best understood as separate concepts, performing different functions … ‘mutual trust and confidence’ is an indicative feature of an employment relationship. It describes a necessary element in a relationship characterised by an expectation of mutual cooperation to achieve business objectives … ‘Good faith’, on the other hand, is a principle of construction in certain kinds of contracts. The principle of good faith performance assumes that parties intend to perform their contractual obligations in a manner which permits each party to enjoy the mutually intended benefits of the contract.37

Following Barker, it now remains to be seen how the courts will handle this apparent distinction, if at all.

Returning briefly to the decision in Barker, the High Court’s reasons for refusing to imply a term of mutual trust and confidence were flawed in several ways. The court purported to apply the narrow necessity test for refusing the term’s implication, yet its broader policy-based reasoning suggested otherwise. Part of its reasoning also suggested that Australia’s statutory regime would cover the field that would otherwise be taken up by a mutual trust and confidence term, and consequently, the term was unnecessary. However, as already discussed in Part 8.4, the court failed to conduct any detailed analysis of the statutory regimes mentioned to fully analyse whether they really did cover the field that would otherwise be taken up by the implied term. The court also suggested that a matter like whether or not there ought to be a mutual trust and confidence term constituted a matter better dealt with by parliament. Hence, it was not appropriate for the court to make a ruling as to its existence in any event. However, as argued in Chapter 7, this reasoning appeared to unduly limit the courts’ law-making function, making it seem that courts ought not to imply any new terms by law into employment contracts in the future. Taking stock of this combination of erroneous logic, had the High Court reasoned differently to avoid these flaws, it may have achieved a different result in respect of the implication of the mutual trust and confidence term. Had that been the case, it may mean that a good faith term does have a place as a term implied by law into employment contracts.

With the High Court’s flawed reasoning in mind, and assuming that a duty of good faith is found to be distinct from one of mutual trust and confidence, the recent authorities mentioned in Chapter 4 indicate that if a good faith duty were to operate in the context of employment, it would likely apply to regulate discretionary powers of employers conferred by the contract (rather than all acts of the employer under the contract). If that were the case, then the duty would likely apply when the exercise of that discretionary power affects the employees’ enjoyment of the contract’s essential benefits.

While this appears to be the most logical operation of a good faith duty in employment at common law, there may also be statutory solution. A duty of good faith could operate as a model statutory term, similar to those discussed above at Part 8.4. In fact, the inclusion of a good faith term was alluded to in Collins’ proposal of model terms in the employment contract.

Joellen Riley supports a general statutory duty of good faith in Australian employment law, as already exists in New Zealand. She writes that ‘It may be time for Australian law – like New Zealand Law – to recognise a general statutory obligation of ‘good faith’ in employment contracts’. In justifying her reasons for taking this view, she says that:

I am going to take the enormous risk of suggesting (without investigating actual New Zealand experience in case law) that promoting good faith as a statutory obligation is sensible, because it avoids the problem of trying to develop a coherent common law in a field heavily regulated by statute. One of the most significant benefits of developing a statutory obligation would be the scope for developing appropriately designed statutory remedies for breach of the obligation.

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38 See, eg, the further discussion as to how the duty might operate in respect of the exercise of discretionary powers in Andrew Stewart et al, Creighton and Stewart’s Labour Law (6th ed, Federation Press, 2016) 529-531.
41 See, eg, Employment Relations Act 2000 (NZ) ss 4 and 4A.
43 Ibid.
Gordon Anderson and John Hughes’ investigation of the actual New Zealand experience in case law suggests that the statutory term has evolved into ‘an important and far-reaching innovation’, which has ‘created an open-ended duty that can be developed by the courts over time’. Beyond the existence of the statutory term in New Zealand, it also goes without saying that any such model term would need to have clearly defined content and application. Perhaps then, rather than a model good faith term being general in its application as Riley suggests, it ought to mirror the possible common law position described above by regulating discretionary powers of employers conferred by the employment contract.

8.6 Concluding comments

Despite several challenges concerning the applicable legal test relevant to their implication following the High Court’s decision in Barker, terms implied by law continue to play an important gap-filling role in respect of Australian employment contracts. As this thesis argues, there are ways in which clarity can be achieved to ensure that implying terms by law remains a viable judicial technique through which courts can regulate employment contracts.

A firm judicial determination as to the nature of the employment relationship, utilising the three main categories for implication by law in employment described in Part 8.3, and the High Court making a definitive decision on the proper application of the necessity test, would each assist courts in making decisions about whether or not to imply terms by law into employment contracts. It is envisaged that utilisation of these categories would set boundaries within which the courts can develop terms implied by law in employment. It would also inform the continued operation of existing terms implied by law in employment. Instead, the High Court in Barker has left employment lawyers guessing at present: What is the true nature of the employment relationship, and how should employment contracts be defined as a category into which terms are implied by law? How does the necessity test now apply to existing terms implied by

law? Which necessity test is the correct one to apply when seeking to imply a new term by law – the narrow or wide test?

Furthermore, it is proposed that parliament ought to play the primary role by creating a default minimum set of terms to govern the employment relationship in Australia. Arguably the court in *Barker* went too far in its suggestion that parliament ought to take over the field completely. This claim diminishes the judicial role too greatly and presumes there are no existing gaps to be filled, other than by parliament through legislation.

This apparent limit on the court’s future role suggests that parliament ought to step in and create a default set of minimum rules to regulate the employment relationship, some of which ought not to be excludable. This approach fits with what the High Court wanted in *Barker* – allowing parliament to step in and do what the court did not feel comfortable doing. However, in creating a default set of terms, it would be exceedingly difficult (if not impossible) for parliament to foresee all situations in which a term might need to be implied at some point in the future. Essentially, it is not possible for parliament to predict all future gaps that may require filling. The courts should therefore remain willing to imply terms by law in order to accommodate these situations. These situations will necessarily be far more limited should parliament implement a default minimum set of implied terms. If the set of default minimum rules existed, coherence and arguably fairness in the law would be enhanced, and the roles of the courts and parliament clarified. It has been proposed that any statutory rules reflect what is already contained in the common law through terms implied by law into employment contracts, with the potential addition of a good faith term. However, it would always be open to the court and the parties themselves to go further as needed. The courts would then be tasked with interpreting, applying and potentially adding to those terms, should they come into question.

The conclusions drawn in this chapter make a powerful case for future reform in respect of the legal test for implying terms by law in employment, a test which has been largely been haphazardly applied by the courts in the past, and most recently in *Barker*. This thesis’ key proposal is that parliament should intervene, and that the High Court ought to reform and clarify the common law in respect of terms implied by law into employment contracts, as well as contracts more broadly. These legislative and judicial
changes need not stand alone. In recognising the need for greater coherence between statute and the common law, they ought to coincide. In making these suggestions, this thesis has provided original insights into the operation of an important feature of all Australian employment contracts. Most importantly, it is hoped that the findings and conclusions will provide the reader with a more informed understanding of the law associated with terms implied by law into employment contracts. The thesis seeks to offer insight into the ways in which the legal test for their implication can be refined so as to confront the ongoing challenges associated with the regulation of Australian employment contracts.
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