Necessity, coherence and mutual trust and confidence: *Commonwealth Bank of Australia v Barker*

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Introduction

Professor Brodie has observed that the implied term of mutual trust and confidence 'constitutes judicial recognition of the fact that the employment contract is not just about economic exchange but also social or personal relations.'[1] While the term is 'well-established'[2] in the United Kingdom, there is significant uncertainty about the existence, nature and scope of the term in Australia.[3] In *Commonwealth Bank of Australia v Barker*,[4] a Full Court of the Federal Court held, by majority, that the term of mutual trust and confidence is implied by law into all contracts of employment in Australia.[5] This is the first time that an intermediate appellate court in Australia has accepted the implied term as part of the *ratio decidendi* of its decision and awarded damages for breach of the term. The key proposition emerging from the majority judgment in *Barker* is that the implied term of mutual trust and confidence satisfies the test of necessity for terms implied by law. Following an examination of the majority and dissenting judgments in *Barker,* this paper evaluates the accuracy of that key proposition.

Facts

Mr Barker was a long-standing executive employee of the Commonwealth Bank ('the Bank').[6] At a meeting on 2 March 2009, the Bank advised Mr Barker that his position was to be made redundant. The Bank informed Mr Barker that its preference would be to redeploy him to another position within the Bank but, if he were not redeployed, his employment would be terminated on 2 April 2009. Due to internal administrative errors, the Bank did not notify Mr Barker of any redeployment opportunities until 26 March 2009. On that day, the Bank advised Mr Barker of an alternative position within the Bank. The date of termination of employment was extended to 9 April 2009 to give Mr Barker time to apply for the position. He did not apply for it. On 9 April 2009, the Bank terminated Mr Barker's employment on the basis of redundancy.

Mr Barker initiated proceedings against the Bank in the Federal Court, claiming, *inter alia,* that the Bank had breached his employment contract. The Bank had a redeployment policy which provided that employees whose positions were to be made redundant should be consulted about redeployment opportunities. Mr Barker argued that this policy had been incorporated into his employment contract and that the Bank had breached the policy by failing to inform him of redeployment opportunities. Alternatively, he contended that his employment contract included an implied term of mutual trust and confidence, and that the Bank's serious breach of its redeployment policy amounted to a breach of this implied term.

The decision at first instance

The redeployment policy was contained in the Bank's human resources manual, which included a statement that the manual did not 'form any part of an employee's contract of employment.'[7] Following *Yousif v Commonwealth Bank of Australia*,[8] Besanko J held that this statement precluded the redeployment policy from being incorporated into Mr Barker's employment contract.[9]

Besanko J accepted that the term of mutual trust and confidence was implied by law into all employment contracts in Australia.[10] His Honour held that the redeployment policy required the Bank to take 'timely and meaningful steps'[11] to consult Mr Barker about redeployment opportunities. The Bank's 'almost total inactivity within a reasonable period'[12] constituted a serious breach of the redeployment policy and this, in turn, amounted to a breach of the implied term.[13] This breach caused Mr Barker to lose the opportunity to be redeployed.[14] The chance of redeployment was assessed at 25 per cent.[15] Besanko J awarded Mr Barker $317,500 for economic loss.[16] Applying the principles in *Baltic Shipping Co v Dillon*[17] and *Addis v Gramophone Co Ltd*,[18] Besanko J rejected Mr Barker's claims for 'general damages for hurt, distress and loss of reputation, and aggravated damages for the manner of his dismissal.'[19]

The decision of the Full Federal Court

The majority judgment

The Bank appealed the decision to the Full Federal Court. The majority (Jacobson and Lander JJ) dismissed the appeal. Their Honours observed that the implied term of mutual trust and confidence had received 'a sufficient degree of recognition'[20] in the United Kingdom and Australia to warrant acceptance by an intermediate court of appeal. Their Honours accepted the following formulation of the term: 'the employer will not, without reasonable cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'[21]

Jacobson and Lander JJ held that the Bank had breached the implied term by failing to consult Mr Barker about potential redeployment opportunities.[22] In this case, the conduct constituting breach of the implied term was 'separate from and anterior to the termination of Mr Barker's employment.'[23] This was important in light of *Johnson v Unisys Ltd*,[24] in which the House of Lords held that the implied term does not operate at the point of dismissal. *Johnson* has been followed in Australia in *New South Wales v Paige*[25] and *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney*.[26]

Jacobson and Lander JJ held that breach of the implied term sounded in damages (which were increased to $335,623.57 in light of an error at first instance).[27] Their Honours agreed with Besanko J's conclusion that Mr Barker was not entitled to damages for hurt, distress, reputational harm, or manner of dismissal.[28]

The following sections will consider three key points from the majority judgment: the application of the test of necessity for terms implied by law; the technique used to attribute content to the implied term of mutual trust and confidence; and the 'alternative approach' based on the duty of co-operation.

Implication by law: the test of necessity

Terms implied by law are implied as 'a legal incident of a particular class of contract.'[29] In *Byrne v Australian Airlines Ltd*,[30] McHugh and Gummow JJ stated that terms are implied on this basis in order to prevent 'the enjoyment of the rights conferred by the contract [from being] rendered nugatory, worthless, or, perhaps ... seriously undermined.'[31] In order for a term to be implied by law into a class of contract, it must satisfy the necessity test.[32] In *University of Western Australia v Gray*,[33] a Full Federal Court observed that the notion of necessity is 'elusive'.[34] Unlike implication in fact, 'implication in law rests "upon more general considerations" [which] require that regard be had "to the inherent nature of the contract and of the relationship thereby established"'[35] as well as considerations of 'justice and policy'[36] and 'social consequences.'[37]

In *State of South Australia v McDonald*,[38] a Full Court of the Supreme Court of South Australia identified:

'a variety of bases ... indicating the necessity of the implied term: the close personal relationship between an employer and an employee; the vulnerability of employees to the exercise of power by employers, in particular to conduct "squeezing out" an employee whose services are no longer desired; as an incident of the general duty of co-operation between contracting parties; and the recognition that a person's work is not only a source of livelihood but of identity, self-worth, and self-confidence.'[39]

In *Barker,* Jacobson and Lander JJ stated that these bases (except the duty of co-operation) were 'all informed by policy considerations referable to the nature of the relationship between employer and employee.'[40] Their Honours observed that these policy considerations underpinned the observation in *McDonald* that the 'development of the implied term can be seen as consistent with the contemporary view of the employment relationship as involving elements of common interest and partnership, rather than of conflict and subordination.'[41] Jacobson and Lander JJ concluded that the implied term satisfied the necessity test as explained in *Gray.* This conclusion was based on the policy considerations underpinning the contemporary view of employment.[42]

Attributing content to the implied term

In the United Kingdom, the implied term has been referred to as a 'portmanteau'[43] duty, the content of which is elucidated on a case-by-case basis. In *Barker,* Jacobson and Lander JJ had regard to the 'open-ended nature'[44] of the implied term and stated that the content of the term 'must be moulded according to the nature of the relationship and the facts of the case.'[45] As the redeployment policy had no contractual force, a serious breach of the policy could not constitute a breach of the implied term. Their Honours held that it was incorrect for Besanko J to treat 'the content of the implied term as co-extensive with an obligation to observe the redeployment policy.'[46]

Instead, Jacobson and Lander JJ invoked the 'circumstances' of the case to attribute content to the implied term. Two circumstances were relevant: first, the significant length of Mr Barker's employment with a large corporation; and second, the existence of clause 8 of Mr Barker's employment contract, which contemplated redeployment as a potential alternative to termination in situations of redundancy.[47] Their Honours held that, 'in these circumstances the implied term required the Bank to take positive steps as from 2 March 2009 to consult with Mr Barker about the possibility of redeployment and to provide him with the opportunity to apply for alternative positions within the Bank.'[48]

The implied duty of co-operation

In *Malik v Bank of Credit and Commerce International SA (in liq)*,[49] Lord Steyn observed that the implied term of mutual trust and confidence 'probably has its origin in the general duty of co-operation between contracting parties.'[50] The implied duty of co-operation is accepted in Australian law. In *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*,[51] Mason J stated:

'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.'[52]

In *Barker,* Jacobson and Lander JJ explored this duty as an 'alternative approach'.[53] Their Honours observed that 'the duty of co-operation is anchored upon the need for one party to take a positive step without which the other party is unable to enjoy a right or benefit conferred upon it by the contract.'[54] For the duty to be triggered, a contractual right or benefit must be identified. The redeployment policy could not be the relevant contractual right or benefit because it did not have contractual force.[55] Nevertheless, their Honours held that 'the contract of employment in the present case, when properly construed in light of all the relevant circumstances, [did] confer a benefit which gave rise to the operation of the implied term.'[56] The same two circumstances which were used to attribute content to the implied term of mutual trust and confidence were regarded as being 'sufficient'[57] to anchor an 'implied obligation on the Bank to take the necessary steps towards redeployment.'[58]

The dissenting judgment

Jessup J undertook a comprehensive review of the authorities on the implied term of mutual trust and confidence. His Honour observed that no appellate court in the United Kingdom or Australia had ever considered in detail the question whether the implied term satisfies the test of necessity for terms implied by law.[59] His Honour concluded that the implied term does not satisfy the test of necessity whether in the 'strict sense'[60] (in *Byrne*) or the 'broader policy sense'[61] (in *Gray*). Alternatively, even if the term satisfied the test and was thereby included in Mr Barker's employment contract, the reservation in the Bank's human resources manual, which precluded the redeployment policy from having contractual force, 'did not ... leave any scope for the conclusion that by merely failing to comply with the policy the [Bank] breached the implied term.'[62] The following sections explore two key points from Jessup J's judgment: the reasons why the term of mutual trust and confidence does not satisfy the test of necessity for terms implied by law; and other factors militating against acceptance of the term.

The absence of necessity

Jessup J observed that, prior to 1978, no textbooks or cases had mentioned the implied term of mutual trust and confidence.[63] This placed in doubt the proposition that it was 'necessary' to imply such a term into employment contracts, as 'the law of employment managed quite satisfactorily without the implied term for many years.'[64] His Honour also had regard to *Malik,* where Lord Steyn had observed that '[i]t was the change in legal culture which made possible the evolution of the implied term of trust and confidence.'[65] This change in legal culture included the obsolescence of the 'master and servant' concept and the fact that 'far greater duties [were being] imposed on the employer than in the past, whether by statute or by judicial decision, to care for the physical, financial and even psychological welfare of the employee.'[66] Jessup J held that these considerations did not satisfy the necessity test for terms implied by law.[67]

Jessup J then considered whether employment contracts contain features which make it necessary to imply the term of mutual trust and confidence into this class of contracts.[68] His Honour observed that '[a]t the core of the implied term is the premise that the employer owes duties of trust and confidence to the employee'[69] and that the existence of the implied term depended upon the validity of this premise.[70] His Honour considered two arguments which might sustain the premise and rejected both.

The first argument was that 'the employer's duties of trust and confidence should be recognised because they express as a mutual obligation the employee's duty of fidelity.'[71] Jessup J observed that the employee's duty of fidelity 'operates in one direction only'[72] and there was no basis for suggesting that the employer owes corresponding obligations to the employee.[73]

The second argument invoked Lord Steyn's suggestion in *Malik* that the implied term of mutual trust and confidence developed from the duty of co-operation. Lord Steyn had cited Hepple and O'Higgins for this proposition.[74] Jessup J consulted this text and concluded that it did not provide support for Lord Steyn's observation.[75] Turning to the Australian authorities, Jessup J accepted, in common with the majority in *Barker,* the need to identify a contractual benefit to anchor the operation of the duty of co-operation.[76] Unlike the majority, his Honour held that there was no such contractual benefit in this case. The redeployment policy was not contractual. If the duty of co-operation were to be applied in this case, one would have to accept that 'the employer owes a duty of trust and confidence to the employee unrelated to any other, substantive, entitlement of the latter under the contract.'[77] His Honour stated that '[t]he introduction of such a duty would ... take the law of contract beyond any principled development of the duty of co-operation.'[78]

Other considerations militating against acceptance of the implied term

Jessup J expressed concern at the 'very high level at which the implied term is expressed.'[79] His Honour observed that the term may operate 'as a Trojan horse in the sense of revealing only after the event the specific prohibitions which it imports into the contract.'[80] The obligations imposed by this 'open-ended'[81] term may undermine the boundaries of existing common law and equitable principles.[82] Additionally, the implied term may overlap with existing statutory obligations pertaining to the employment relationship in a way that undermines the 'democratically-drawn architecture of the relevant obligations.'[83] In light of these considerations, and having identified 'no wholly satisfying defence of the term'[84] in the existing authorities, Jessup J concluded that the term should not be accepted as part of the common law of Australia.[85]

Analysis

The key proposition emerging from the majority judgment in *Barker* is that the implied term of mutual trust and confidence satisfies the necessity test for terms implied by law. The remainder of this paper explores some matters that are relevant to assessing the accuracy of this proposition.

The 'contemporary view of the employment relationship'[86]

The majority in *Barker* held that the necessity test was satisfied by reference to policy considerations underlying the various bases for the term identified in *McDonald*.[87] In essence, the majority held that the implied term is 'necessary' in light of the 'contemporary view of the employment relationship.'[88]

Mutual trust and confidence cases in the United Kingdom contain references to this contemporary view.[89] In *Johnson*,[90] Lord Hoffman stated:

'[O]ver 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-esteem. The law has changed to recognise this social reality. Most of the changes have been made by Parliament. ... And the common law has adapted itself to new attitudes, proceeding sometimes by analogy with statutory rights.'[91]

These cases do not approach the matter on the basis of the necessity test for terms implied by law. The following question remains: why does the contemporary view of employment render 'necessary' the implication of the term of mutual trust and confidence into all employment contracts in Australia? With respect, the majority in *Barker* did not address this question directly. In searching for an answer to this question, it is useful to have regard to the historical development of the term in the United Kingdom.

Courts and tribunals in the United Kingdom developed the implied term in response to the introduction of statutory unfair dismissal rights in the Industrial Relations Act 1971 (UK).[92] In order to bring a claim under these provisions, an employee needed to show that he or she had been 'dismissed'. An employee who resigned in response to conduct of the employer which 'no employee could be expected to tolerate'[93] was left without a remedy because there was no 'dismissal' by the employer. In *Eastwood v Magnox Electric plc*,[94] Lord Nicholls explained that the implied term of mutual trust and confidence provides:

'... the means by which an employee who resigns in response to outrageous conduct by an employer may obtain redress. Such conduct is a breach of a fundamental term of the contract of employment, and an employee who accepts this breach as a repudiation of the contract by the employer is "constructively" dismissed by the employer.'[95]

Thus, the implied term of mutual trust and confidence was developed to provide a contractual anchor for unfair dismissal claims.[96] 'Outrageous' or 'intolerable' conduct of the employer, which had not previously constituted a breach of any term of the employment contract, could now be regarded as a breach of this contractual term. As one commentator observed, '[m]any actions of the employer which ... *do not involve a breach of any direct, specific contractual term can be readily assimilated under such a loose and open-ended obligation*.'[97]

The present author submits that it is this aspect of the implied term (the fact that it can impose obligations, and thereby be breached, in respect of conduct which is not directly referable to any term of the employment contract)[98] that gives it work to do over and above the implied duty of co-operation. That duty is only triggered if a contractual benefit or right can be identified. By contrast, the implied term of mutual trust and confidence can operate in the absence of a contractual right or benefit. This aspect of the term underlies a key argument supporting the proposition that the contemporary view of employment renders implication of the term 'necessary'.

That argument might be articulated as follows. Under the contemporary view, employees can expect not only remuneration, but also a sense of identity, dignity,[99] and self-esteem from employment.[100] The latter might be described as non-contractual benefits — no term of the employment contract confers these benefits upon employees. Conduct of the employer may undermine an employee's enjoyment of these benefits. As these benefits are not directly referable to any term of the employment contract, employees have no contractual remedy for this conduct. Implication of the term of mutual trust and confidence is necessary to protect these benefits. The term protects these (otherwise non-contractual) benefits by imposing contractual obligations upon the employer which can be breached by conduct that undermines dignity, identity or self-esteem.[101]

The difficulties with this reasoning need to be acknowledged. A potential difficulty with attributing contractual liability to such conduct is that 'emotions such as senses of identity, self-worth and dignity are felt in the breast of the employee, are highly subjective and would, necessarily, be felt to differing extents by different employees within the same working environment.'[102] Another difficulty is that, assuming that the contemporary view of employment requires these non-contractual benefits to be conferred upon employees, it is not self-evident that these benefits should be protected by way of a contractual term, as opposed to legislation.[103] On one view, an advantage of the implied term of mutual trust and confidence is that its 'open-textured nature ... makes it an ideal conduit through which the courts can channel their views as to how the employment relationship should operate.'[104] On another, this is a reason to regard the term with caution. In *McDonald,* the court observed that 'giving a wide scope'[105] to the term may result in the courts 'becoming the forum for a detailed review of routine management decisions.'[106]

Legal coherence

The concept of legal coherence, which has assumed significance in recent High Court jurisprudence,[107] may be a policy consideration relevant to the application of the necessity test for terms implied by law. In *Miller v Miller*,[108] a majority of the High Court identified 'coherence of the law'[109] as the 'central policy consideration at stake'[110] in that case. Although Jessup J did not refer to any High Court authorities on coherence, his Honour's concerns about the overlap of the implied term with existing legal principles and statutory provisions may be rationalised in light of these.

In *Sullivan v Moody*,[111] the High Court refused to recognise a duty of care on the basis that it would have been 'inconsistent'[112] with certain statutory provisions and would have 'cut across other legal principles so as to impair their proper application.'[113] Similarly, in *CAL No 14 Pty Ltd v Motor Accident Insurance Board*,[114] the High Court refrained from recognising a duty of care which would 'subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms.'[115]

In *Johnson,* the House of Lords held that the implied term of mutual trust and confidence does not operate at the point of dismissal. Statutory unfair dismissal provisions in the United Kingdom provide a remedy for unfairness in dismissal. Their Lordships held that developing a common law remedy covering the same ground would circumvent[116] the limitations in these provisions (such as the cap on compensation) and thereby undermine coherence in employment law.[117] In *Paige,* Spigelman CJ followed *Johnson* in refusing to recognise a duty of care in respect of the manner of dismissal because it would circumvent limitations in the statutory unfair dismissal provisions in Australia.[118]

In *Barker,* the majority held that the reasoning in *Johnson* and *Paige* applies only when the implied term is being invoked in respect of conduct arising at the point of dismissal.[119] Thus, it did not apply in *Barker* because the conduct constituting breach of the implied term arose at a point prior to dismissal.[120] When considering whether the necessity test was satisfied, their Honours did not take into account the existence of statutory obligations which potentially intersect with the implied term. This approach is consistent with that in the United Kingdom, where the existence of intersecting statutory provisions does not bear upon the question of implication (there, it is accepted that the term is implied by law into all employment contracts)[121] but may restrict the operation of the implied term.[122] Jessup J took a different approach, viewing the potential intersection of the implied term with existing principles and statutory provisions as a factor against implication.[123] Some support for this approach may be derived from *Gray*.[124]

Considerations of legal coherence may undermine the case for implying the term of mutual trust and confidence into Australian employment contracts. This, however, is not an inevitable conclusion. An opposing argument is that, in light of the existence of intersecting statutory provisions, it may 'be open to the courts to reason by analogy' that imposition of the relevant obligations upon employers 'is not regarded by Parliament as unduly onerous.'[125] As Lord Steyn observed in *Malik*, 'in the search for the correct common law principle one is not compelled to ignore the analogical force of the statutory dispensation.'[126]

Conclusion

In an article published before *Barker,* Professor Stewart observed that the notion of necessity in *Gray* can 'cut both ways'.[127] He stated:

'On the one hand, a broad emphasis on "justice" within the employment relationship could certainly be used to justify the implication of a term that sought to control unfair treatment at work. At the same time, however, the prospect of courts being a "forum for a detailed review of routine management decisions", as the South Australian Supreme Court feared might happen in *McDonald*, might equally persuade many judges to identify adverse "social consequences" in seeking to tackle so complex an issue as workplace justice through a default common law rule.'[128]

The fate of the implied term of mutual trust and confidence in Australia is likely to depend, ultimately, on how the High Court balances these competing policy considerations.[129]

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1 D Brodie, 'Mutual Trust and the Values of the Employment Contract' (2001) 30 *Industrial Law Journal* 84 at 88.

2 *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22 at [1]. See also *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20 (*Malik*); *Johnson v Unisys Ltd* [2003] 1 AC 518 (*Johnson*); *Eastwood v Magnox Electric plc* [2005] 1 AC 503 (*Eastwood*).

3 I Neil and D Chin, *The Modern Contract of Employment,* Thomson Reuters, Sydney, 2012, at 137. The High Court of Australia has not considered these questions. Brief references to the term can be found in *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at [24]; *Concut Pty Ltd v Worrell* (2000) 176 ALR 693 at [51].

4 [2013] FCAFC 83 (*Barker*). The Commonwealth Bank lodged an application for special leave to appeal against the Full Federal Court's decision in *Barker* [2013] FCAFC 83. The High Court of Australia granted special leave on Friday, 13 December 2013: Transcript of Proceedings, *Commonwealth Bank of Australia v Barker* [2013] HCATrans 325 (13 December 2013).

5 Ibid, at [77]-[95].

6 This summary draws upon the following passages in the first instance decision: *Barker v Commonwealth Bank of Australia* [2012] FCA 942 (*Barker* First Instance) at [1]-[5], [199]-[303].

7 Ibid, at [283].

8 (2010) 193 IR 212.
9 *Barker* First Instance, above n6, at [304]-[318].
10 Ibid, at [323]-[330].
11 Ibid, at [351].
12 Ibid, at [352].
13 Ibid.
14 Ibid, at [353]-[369].
15 Ibid.
16 Ibid, at [372].
17 (1993) 176 CLR 344.
18 [1909] AC 488.
19 Ibid, at [373]-[375].
20 *Barker,* above n4, at [13].
21 Ibid, at [98].
22 Ibid, at [129]-[132].
23 Ibid, at [15].
24 [2003] 1 AC 518.
25 (2002) 60 NSWLR 371 (*Paige*) (concerning a torts claim).
26 (2008) 72 NSWLR 559.
27 *Barker,* above n4, at [133]-[138], [151].
28 Ibid, at [152]-[158].
29 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 345.
30 (1995) 185 CLR 410 (*Byrne*).
31 Ibid, at 450.
32 Ibid.
33 (2009) 179 FCR 346 (*Gray*).
34 Ibid, at [141].
35 Ibid, at [142].
36 Ibid.
37 Ibid.
38 (2009) 104 SASR 344 (*McDonald*).
39 Ibid, at [228].
40 *Barker,* above n4, at [94].
41 Ibid, at [95], citing *McDonald,* above n38, at [231].
42 Ibid.
43 *Malik,* above n2, at 35.
44 *Barker,* above n4, at [82].
45 Ibid, at [108].
46 Ibid, at [113].
47 Ibid, at [[109]-[117], [127].
48 Ibid, at [112].
49 [1998] AC 20.
50 Ibid, at 45. For an excellent analysis of the duty of co-operation, see E Peden, '"Cooperation" in English Law — to Construe or Imply?' (2000) 16 *Journal of Contract Law* 56.
51 (1979) 144 CLR 596.
52 Ibid, at 607.
53 *Barker,* above n4, at [118]-[128].
54 Ibid, at [122].
55 Ibid, at [125].
56 Ibid, at [126].
57 Ibid, at [128].
58 Ibid, at [124].
59 Ibid, at [288].
60 Ibid, at [340].
61 Ibid.
62 Ibid, at [351].
63 Ibid, at [211]-[212], [290].
64 Ibid, at [212].
65 *Malik,* above n2, at 46.
66 Ibid, citing *Spring v Guardian Assurance plc* [1995] 2 AC 296 at 335B.
67 *Barker,* above n4, at [290].
68 Ibid, at [291]-[316].
69 Ibid, at [295].
70 Ibid.
71 Ibid.
72 Ibid, at [303].
73 Ibid.
74 *Malik,* above n2, at 45, citing B A Hepple and P O'Higgins, *Employment Law,* 4th ed, Sweet & Maxwell, London, 1981, at 134-5.
75 *Barker,* above n4, at [306].
76 Ibid, at [307].
77 Ibid, at [315].
78 Ibid.
79 Ibid, at [317].
80 Ibid, at [340].
81 Ibid, at [318].
82 Ibid, at [331].
83 Ibid, at [340].
84 Ibid.
85 Ibid.
86 Ibid, at [95].
87 Ibid, at [94]-[95]. See above n39 and the corresponding text.
88 Ibid, at [95].
89 See, eg, *Malik,* above n2, at 46; *Johnson,* above n2, at [35], [77].
90 [2003] 1 AC 518.
91 Ibid, at [35].
92 *Eastwood,* above n2, at [4]-[6]. In 1974, the unfair dismissal provisions were amended so that a 'dismissal' included the situation where an employee terminated the employment contract 'in circumstances in which he is entitled to terminate it by reason of the employer's conduct': see M Freedland, *The Personal Employment Contract,* Oxford University Press, Oxford, 2006, at 155.
93 Ibid.
94 Ibid.
95 Ibid. Subsequently, the term has been applied to situations which do not involve constructive dismissal: see, eg, *Malik,* above n2; *Gogay v Hertfordshire County Council* [2000] IRLR 703.
96 See also *Barker,* above n4, at [351].
97 P Elias, 'Unravelling the Concept of Dismissal – II' (1978) 7 *Industrial Law Journal* at 102 (emphasis added). For a summary of

the wide range of conduct that may breach the implied term, see M Irving, *The Contract of Employment,* LexisNexis Butterworths, Sydney, 2012, at [8.24]-[8.26].

98 *Barker,* above n4, at [339].

99 See, eg, *Construction, Forestry, Mining and Energy Union v Downer EDI Engineering Power Pty Ltd* [2012] FCA 661 at [19].

100 *Barker,* above n4, [310]-[311]. See also Irving, above n97, at [8.17].

101 For example, humiliating an employee or addressing an employee with abusive language may breach the term: see cases cited in Irving, above n97, at [8.25].

102 *Barker,* above n4, at [310].

103 *Barker,* above n4, at [314].

104 D Brodie, 'The Heart of the Matter: Mutual Trust and Confidence' (1996) 25 *Industrial Law Journal* 121 at 126.

105 (2009) 104 SASR 344 at [275].

106 Ibid. This comment was made in the course of considering breach of the term.

107 See, eg, *Sullivan v Moody* (2002) 207 CLR 562 (*Sullivan*); *CAL No 14 Pty Ltd Motor Accident Insurance Board* (2009) 239 CLR 390.

108 (2011) 242 CLR 446.

109 Ibid, at [15].

110 Ibid.

111 (2002) 207 CLR 562.

112 Ibid, at [62].

113 Ibid, at [53]-[54].

114 (2009) 239 CLR 390.

115 Ibid, at [42], quoting *Sullivan,* above n107, at [42].

116 *Johnson,* above n2, at [56]-[58].

117 Ibid, at [80].

118 *Paige,* above n25, at [132]-[155]. See also *Russell,* above n26.

119 *Barker,* above n4, at [86]-[87].

120 Ibid, at [15].

121 See cases cited at above n2.

122 *Johnson,* above n2.

123 *Barker,* above n4, at [332]-[334].

124 *Gray,* above n33, at [146], quoted in *Barker,* above n4, at [287].

125 B Hepple and G S Morris, 'The Employment Act 2002 and the Crisis of Individual Employment Rights' (2002) 31 *Industrial Law Journal* 245 at 254; *Malik,* above n2, 52-3. Whether Australian courts can develop the common law by analogy to statute is an unsettled question which is beyond the scope of this paper. See *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at [18]-[28]; Justice Gummow, *Change and Continuity: Statute, Equity and Federalism,* Oxford University Press, 1999, at 11-18. On the interaction between the implied term and other common law principles, see J Riley, 'Siblings But Not Twins: Making Sense of "Mutual Trust" and "Good Faith" in Employment Contracts' (2012) 36 *Melbourne University Law Review* 521 at 546-51.

126 *Malik,* above n 2, at 52-3.

127 A Stewart, 'Good Faith: A Necessary Element in Australian Employment Law?' (2011) 32 *Comparative Labor Law and Policy Journal* 521 at 545.

128 Ibid (citations omitted).

129 On the issue of balancing competing policy considerations for terms implied by law, see E Peden, 'Policy Concerns in Terms Implied by Law' (2001) 117 *Law Quarterly Review* 459.