Centre for Employment and Labour Relations Law

The University of Melbourne

July 2017

Student Working Paper No. 22

THE DISMISSAL OF THE IMPLIED TERM OF MUTUAL TRUST AND CONFIDENCE IN EMPLOYMENT CONTRACTS: FILLING THE GAP LEFT BEHIND

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ISSN 1837-1418

The Centre for Employment and Labour Relations Law gratefully acknowledges the support of the following major legal practices and organisations:

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Oliver Wahlstrom-Schatt[*]

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I INTRODUCTION

For some time, contention has surrounded the question of whether the implied term of mutual trust and confidence exists in employment contracts in Australia. Contributing to the confusion is the position in the United Kingdom, where tribunals and courts have accepted the central role of the term in employment contracts since the 1970s.[1] In *Commonwealth Bank of Australia v Barker*,[2] the High Court finally had the opportunity to address the matter and unanimously declared that there is no such term.

This paper posits that this is an unfavourable development for Australian employment law as the presence of mutual trust and confidence in employment contracts is crucial to providing unprotected employees with a safeguard when subject to intolerable conduct by their employer. Its rejection by the High Court relinquishes common law regulation of employment contracts to the legislature.

Part II of this paper touches on the taxonomy of the implied term in employment contracts, but devotes special attention to those implied by law, given this species was at the core of contemplation in *Barker*. It then discusses the role implied terms play in employment contracts, as distinguished from contracts generally, before considering what the term of mutual trust and confidence means. Part III outlines the deliberative process of both the Full Federal Court and the appeal in the High Court in *Barker*, so that the variations in judicial reasoning and outcome may be compared. Part IV discusses the gap that has been left behind by the High Court's decision, specifically in relation to constructive dismissal. Although Australia's legislative employment framework provides protection for workers who are constructively dismissed, its protection has discriminating consequences. With no judge-made law on the matter, some workers have been left with no source of remedy in the wake of *Barker*. It is argued that the implied term can fill this gap. Part VI contends that employment contracts be distinguished from traditional commercial contracts on the basis of the unique elements encountered in the employment relationship including reciprocity, control and fidelity. Once this is acknowledged, it is plain that implying mutual trust and confidence is necessary in employment contracts in order to reflect the needs of the parties unique to employment relationships.

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[1] See, eg, *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761; *Cortaulds Northern Textiles Ltd v Andrew* [1979] IRLR 88.
[2] (2014) 253 CLR 169 ('*Barker*').

II IMPLIED TERMS AND EMPLOYMENT CONTRACTS

In order to appreciate the role that the implied term of mutual trust and confidence may have in employment relationships, it is first useful to understand the greater context in which terms implied by law function in relation to employment contract law. There were two main categories of implied term discussed in some detail in *Barker*. Terms implied in fact are based on the presumed or hypothetical intention of the particular parties, and inserted on the hypothesis that the parties would have included them had they thought of them at the time. Such terms are unique to the particular contract and surrounding circumstances.[3] Second, are terms implied by law. This paper does not contest the finding of the High Court that mutual trust and confidence does not meet the criterion of a term implied in fact,[4] and as such, will only consider it as a term capable of being implied by law. Terms implied by law are imposed on the parties regardless of their intentions as a necessary occurrence of a particular class or category of contract,[5] such as contracts of employment. The criteria for implying these classes of terms are discussed further below.

As it is not possible for parties to anticipate all future circumstances when entering an employment agreement, there will inevitably be gaps left by the terms they have agreed upon. Thus implied terms play an essential role, acting as default terms which state a minimum level of obligation,[6] even in employment contracts that are written and comprehensive.[7] Further, while statutory rules have been established to regulate employment contracts in Australia,[8] it is likely that gaps will arise in the future that Parliament is unable to account for. Yet, comparatively few statutory implied terms apply to employment contracts in Australia to remedy this problem.[9] Terms implied by law are therefore a valuable and sometimes powerful judicial tool, that can be used to address the gaps that leave employees exposed to unfair dismissal. This will be discussed in more depth in Part IV.

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[3] *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410.
[4] Namely that the implied term is necessary to 'give business efficacy' to the contract. *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266.
[5] Gabrielle Golding, 'Terms Implied by Law into Employment Contracts: Are they Necessary?' (2015) 28 *Australian Journal of Labour Law* 115.
[6] J W Carter et al, 'Terms Implied in Law: "Trust and Confidence" in the High Court of Australia' (2015) 32 *Journal of Contract Law* 222.
[7] Joellen Riley, 'Mutual Trust and Good Faith: Can Private Contract Law Guarantee Fair Dealing in the Workplace' (2003) 16 *Australian Journal of Labour Law* 49.
[8] See, eg, *Fair Work Act 2009* (Cth).
[9] Compare with sales of goods legislation where statutory implied terms are more common in contracts for the sale of goods.

It has been said that terms implied by law in employment contracts 'arise from the very existence of the employer–employee relationship',[10] with existing and established implied terms requiring employers to provide a safe work place[11] and to indemnify their employees for expenses innocently incurred at work[12] to name a few. In turn, they can also place obligations on employees, including a duty to obey lawful and reasonable orders[13] and to provide faithful service to their employer.[14] Also implied have been mutual obligations for both employers and employees, such as the duty to cooperate.[15] In this way, terms implied in law allow for the regulation of workplace relations so a standard of accepted treatment, working environment and rights are created and maintained.

A *Mutual Trust and Confidence*

The duty of mutual trust and confidence was conceived in a series of United Kingdom cases in which employees alleged that they were left with no option but to resign as a consequence of their employer's intolerable conduct.[16] Without the implied term of mutual trust and confidence, an employee who had resigned in such circumstances was left without a remedy, because a 'dismissal' had not taken place, as required by the *Industrial Relations Act 1971* (UK). 'Destructive' and 'outrageous' conduct of the employer, which had not formerly amounted to a breach of any explicit term, could now be considered as a repudiation of the employment contract. The duty was affirmed in UK employment law by the decision of the House of Lords in *Malik v Bank of Credit and Commerce International SA (in liq)*[17] where it was stated that an employer has an obligation 'not, without reasonable and proper cause, [to] conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee'.[18] Given the modernisation of the employment domain, with the working relationship moving away from the servant–master

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[10] Carolyn Sappideen et al, *Macken's Law of Employment* (Thomson Reuters, 7th ed, 2012) 136.
[11] *Goldman Sachs JBWere Services Pty Ltd v Nikolich* [2007] FCAFC 120 (7 August 2007) [31].
[12] *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, 595.
[13] *R Darling Island Stevedoring & Lighterage Co Ltd* (1938) 60 CLR 601, 621.
[14] *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66, 81–2.
[15] *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607.
[16] See, eg, *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761; *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84; *Woods v W M Car Services (Peterborough) Ltd* [1982] ICR 693; *Lewis v Motorworld Garages Ltd* [1986] IRC 157; *Bliss v South East Thames Regional Health Authority* [1987] ICR 700.
[17] [1998] AC 20 ('*Malik*').
[18] Ibid 49.

dynamic toward co-operation between contracting parties,[19] Lord Steyn said the implied term 'has proved a workable principle in practice' and its emergence was a 'sound development'.[20]

It is arguable that the maintenance of mutual trust and confidence between employer and employee is chief among the indicia of an employment relationship. Just as an employee would not expect to work under an employer who engages in conduct that destroys the trust and confidence they have in the working relationship, an employer could not be expected to keep the service of an employee who disloyally undermines the business interests of the employer.[21] The implied term captures this reciprocity, enabling the content of the employment contract to reflect the personal element of employment. Indeed New Zealand courts have suggested that it is closely related to the general obligation 'to act fairly'.[22] While that jurisdiction has accepted the term, Australia has more recently denied its application.

III THE CASE IN QUESTION

While the Federal and, subsequently, the Full Federal Court sided with Mr Barker, ultimately, the High Court found in favour of the Bank. *Barker* is a significant statement of the High Court's rejection of the implied term's use in Australia, declaring that any implied term has to be necessary and not just desirable.

A *Facts*

Mr Barker, the applicant, was an executive manager at the Commonwealth Bank of Australia with 30 years of service. On 2 March 2009, the Bank advised Mr Barker that his position was to be made redundant as part of a general restructure. Mr Barker was also informed that the Bank would do its utmost to redeploy him, but if this did not occur, his position would be terminated some four weeks later. His bank email and access to the intranet were discontinued.[23] All attempts to contact him regarding redeployment opportunities were mistakenly made via his work email account, which Mr Barker was no longer able to view. After failed attempts of communication, Mr Barker's employment was terminated on the basis of redundancy. Mr Barker initiated proceedings against the Bank in the Federal Court,

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[19] Ibid 45.
[20] Ibid 46.
[21] Joellen Riley, 'Siblings But Not Twins: Making Sense of "Mutual Trust" and "Good Faith" in Employment Contracts' (2012) 36 *Melbourne University Law Review* 526.
[22] See, eg, *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, 376; *Marlborough Harbour Board v Goulden* [1985] 2 NZLR 378 (CA), 383.
[23] *Barker* (2014) 253 CLR 169, 179 [4].

ultimately claiming that his employment contract contained the implied term of mutual trust and confidence which had been breached.

B *The Decision of the Full Federal Court*

The majority of the Full Federal Court accepted the existence of the term, positing that 'the implied term [of mutual trust and confidence] has obtained a sufficient degree of recognition, both in England and Australia, that it ought to be accepted by an intermediate court of appeal'.[24] The Bank's duty to appropriately engage with Barker regarding his potential redeployment fell within the term, and as such, their failure to do so resulted in a breach of the term implied into his contract. In coming to this decision, their Honours considered the decision of *University of Western Australia v Gray*[25] and its interpretation of the necessity test required to imply a term by law. Thus, they determined that the necessity test could be met given the policy considerations that pertained to the 'nature of the employment relationship between employer and employee'.[26]

In dissent, Jessup J comprehensively reviewed the relevant Australian[27] and UK[28] case law and observed that no appellate court in either jurisdiction had considered in detail whether the implied term in fact passed the necessity test for terms implied by law.[29] His Honour stated that the rationale used in the UK had exposed 'the unwisdom of courts venturing into areas which [are] … to an extent … the subject of legislation'[30] and implying the term imposed ubiquitous and therefore unreasonable obligations on employers.[31]

C *The Decision of the High Court of Australia*

The High Court allowed the Bank's appeal. The majority judgment (French CJ, Bell and Keane JJ) reviewed the evolution of legislative law making and determined that Australian law should not follow English law in accepting the implied term on the basis that regulatory history of industrial relations differed between the two jurisdictions. Particular statutory provisions and context-specific circumstances that exist in the UK did not apply in Australia[32] and therefore,

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[24] *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450, 456 [13].
[25] (2009) 179 FCR 346 ('*Gray*').
[26] Ibid 363 [94].
[27] Ibid 398 [236].
[28] Ibid 394 [211].
[29] Ibid 405 [288].
[30] Ibid 414 [332].
[31] Ibid 414 [331]–[332].
[32] *Barker* (2014) 253 CLR 169, 191 [32].

relying on this precedent was insufficient to import the term.[33] Additionally, the majority considered that implying a term of mutual trust and confidence would exceed the test of necessity, with its purpose focused on the maintenance of the relational characteristic of employment, rather than contributing to the effective performance of employment contracts.[34] While they acknowledged terms implied by law were a 'species of judicial law-making',[35] their Honours concluded that the complex policy considerations marked by this implication made it a matter better placed in the legislative domain.[36]

Justice Kiefel held that the term of mutual trust and confidence was not 'necessary to give efficacy' to the specific contract[37] and nor was it required to be implied to enable effective operation of employment contracts as a class.[38] Considering the Australian legislative structure, specifically the unfair dismissal scheme, her Honour rejected the argument that denying the term left a gap which the common law could fill.[39]

Justice Gageler concurred with the dissent of Jessup J in the Full Court. The scope of the term was unclear and its insertion had the potential to place retrospective and possible hidden obligations on employers.[40] It could circumvent recognised limits of the common law and intrude on the 'carefully calibrated' regulatory system of employment law in Australia.[41]

IV JURISDICTIONAL DIFFERENCES, CONTRACT CONSTRUCTION AND THE GAP LEFT BEHIND

The High Court's reluctance to engage in judicial law-making is disappointing. The justices agreed with the judgment of Jessup J[42] in that the implication of the mutual trust and confidence term would constitute an overreach of judicial power and 'intersect with legislated norms of conduct',[43] impinging on the prerogative of Parliament. However, it may be suggested that statutory frameworks and common law can coexist without intermingling. Certainly, the High Court decision in *Barker* does not sit comfortably in this regard with its previous decision in *Byrne v Australian Airlines Ltd*.[44] In that case, it was held that the employee's employment

[33] Ibid 193 [35].
[34] Ibid 189 [29].
[35] Ibid.
[36] Ibid 195 [40].
[37] Ibid 209–10 [90].
[38] Ibid 214 [109].
[39] Ibid 210–11 [92]–[96].
[40] Ibid 216–17 [117].
[41] Ibid.
[42] *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450.
[43] Ibid 527–8 [332].
[44] (1995) 185 CLR 410 ('*Byrne*').

contract did not necessarily incorporate a clause of a binding industrial award. The systems of common law contract and statutory regulation had different considerations, their own remedies and functioned independently. There are clear distinctions between the two. Contract law enforces the voluntarily made obligations between parties by awarding damages should they renege.[45] Statutory regulation imposes mandatory obligations on employers to comply with minimum entitlements of employees.[46] Compliance with the latter is determined by industrial tribunals, rather than courts, and it addresses policy of broad public interest, rather than the interests of contracting individuals. Some academics argue that the statutory unfair dismissal scheme for example was never intended to influence construction of employment contracts.[47]

In 1998, Greg McCarry said there is no definition of 'dismissal' in Australia that is analogous with that given in UK employment legislation.[48] The *Employment Rights Act 1996* (UK) included a definition of dismissal which allowed for employees who had terminated their contract by reason of the employer's conduct to be caught by statutory unfair dismissal protection.[49] At the time, state legislation in Australia did not contain clear wording on the matter, and resolution of such disputes instead relied on tribunal and court interpretations of the concept of constructive dismissal as described in Britain. The result was said to be 'inaccurate and confusing',[50] perhaps proving that the reasoning of English decisions on the implied term were ill-matched for automatic transfer to domestic shores at that time. However, *Barker* was not decided in 1998 and the *Fair Work Act 2009* (Cth) reflects the definition of dismissal given in the UK legislation, incorporating constructive dismissal.[51] Given that the term is not incompatible with modern legislative developments, nor is it a drastic departure from the common law principles of Australia and the UK, the High Court's view — that British employment law addresses different problems than Australian law — is unconvincing. While it is true that mutual trust and confidence was formulated in a 'particular crucible'[52] of circumstances unique to Britain's position in its employment law evolution, it is difficult to see how its origin is justification for denying the term's practical use now. At the core of the initial cases identifying the implied term (discussed in Part IIA) and later cases such as *Malik*, is

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[45] Joellen Riley, 'Before the High Court — "Mutual Trust and Confidence" on Trial: At Last' (2014) 36 *Sydney Law Review* 164.
[46] Carter et al, above n 6, 226.
[47] See, eg, Riley, above n 45; ibid 227.
[48] Greg McCarry, 'Damages for Breach of the Employer's Implied Duty of Trust and Confidence' (1998) 26(2) *Australian Business Law Review* 141.
[49] *Employment Rights Act 1996* (UK) s 95(1)(c).
[50] Greg McCarry, 'Constructive Dismissal of Employees in Australia' (1994) 68 *Australian Law Journal* 494.
[51] *Fair Work Act 2009* (Cth) s 386(1)(b).
[52] *Barker* (2014) 253 CLR 169, 191–2 [33] (French CJ, Bell and Keane JJ), quoting Mark Freedland, *The Personal Employment Contract* (Oxford University Press, 2003) 155.

whether the employee is entitled to terminate the contract without notice after experiencing unreasonable and adverse conduct by their employer, despite such conduct falling short of technical repudiation. The conclusion to this query is just as important in Australia as in other jurisdictions.

Under the *Fair Work Act 2009* (Cth), Australian employees face two major exclusions from unfair dismissal protection. A statutory remedy is unavailable to employees who have not completed a period of minimum employment[53] or who receive annual earnings above the high income threshold.[54] As Mr Barker was in a managerial role with an income that exceeded the threshold, he did not have access to the jurisdiction. With the decision handed down in *Barker*, employers who conduct themselves unreasonably can 'squeeze out'[55] such employees and avoid a statutory claim for unfair dismissal. Behaviour that would have warranted a breach of the implied term of mutual trust and confidence is now not actionable in contract law, and the statutory regime established to protect workers, cannot be accessed. It is evident that a gap in employee protection has been created. In her judgment, Kiefel J asserted that implying the term would contradict Parliament's specification of who may seek unfair dismissal remedies.[56] With respect, this stance indicates the position of Australian courts who are becoming 'unduly anxious to defer to the legislature'[57] and in this circumstance, willing to stand idly by as injustice continues unacknowledged.

It may also suggest a concerning development. Legislative intervention may be cited to prevent the common law from regulating aspects of employment relations. This was seen in *South Australia v McDonald*, where a teacher's employment contract was denied implication of the term because statutory regulation in the field of education meant it was unnecessary.[58] Reluctance to award common law compensation is understandable where a statutory remedy exists for the claim. However, where a provision's silence results in confusion and imbalance, it is suggested here that the judicial prerogative must '[fulfil its] time-honoured role of updating the common law and [make] it more suitable for modern circumstances'.[59] The unfair dismissal provisions provide for when a person is protected from unfair dismissal,[60] but are silent on whether those deemed ineligible have course for recompense via a non-statutory avenue.

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[53] *Fair Work Act 2009* (Cth) s 382(a). This exclusion is not present in British employment legislation.
[54] Ibid s 382(b)(iii).
[55] *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, 671–2.
[56] *Barker* (2014) 253 CLR 169, 211 [96].
[57] Douglas Brodie, 'The Dynamics of Common Law Evolution' (2016) 32(1) *International Journal of Comparative Labour Law and Industrial Relations* 45, 66.
[58] (2009) 104 SASR 344.
[59] *New Testament Church v Stewart* [2008] ICR 282, 301.
[60] *Fair Work Act 2009* (Cth) s 382.

Inference does not necessarily lead to the conclusion that such employees should receive no protection at all. It is suggested here that where the unfair dismissal legislation is silent, common law remedies should be viewed as supplementary, so that all employees may pursue a claim for constructive dismissal.

The obstacle the Johnson 'exclusion zone' poses to mutual trust and confidence must be briefly addressed because it prima facie appears to prohibit the term's use in Australia. In *Johnson v Unisys Ltd*,[61] it was held that common law compensation cannot be granted for a breach of the implied term for any harm consequential to the fact or manner of dismissal. This was because compensation was already regulated by statutory unfair dismissal schemes. Australian authorities have since adopted this approach.[62] The rule still allows for damages to be awarded for a breach of the implied term outside of unfair dismissal. For example, where the employer provides an unfair reference and the employee suffers resultant loss.[63] However, a strict construction of the exclusion zone may be said to exclude mutual trust and confidence from applying to constructive dismissal. In response to this difficulty, the House of Lords drew a distinction, ruling that loss flowing from conduct before constructive dismissal is unaffected by the Johnson exclusion zone.[64] In practice, this has meant that the implied term and unfair dismissal scheme have been able to coexist in the UK. Rather than regarding trust and confidence as imposing a norm of behaviour and therefore intruding on the legislature's domain, its implication would better reflect the mutual expectations of the parties involved in employment relationships.

V Employment Contracts and the Relational Aspect

The legitimacy of mutual trust and confidence must be measured in respect to the contemporary community's position on what is an appropriate relationship between employer and employee. No longer do employment relationships fall under the master–servant model, where employment contracts were a means to ensure the master had control over a cheap and reliable workforce.[65] Employers' interests were protected as employees owed a duty of loyalty and faithful performance.[66] In a modern democratic society, it is assumed that parties commencing

[61] [2003] 1 AC 518.
[62] See, eg, *Aldersea v Public Transport Corporation* (2001) 3 VR 499, 515 [90]; *New South Wales v Paige* (2002) 60 NSWLR 371, 398 [149]; R*ussell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2008) 72 NSWLR 559, 574–5 [63]–[64].
[63] *TSB Bank plc v Harris* [2000] IRLR 157.
[64] *Eastwood v Magnox Electric plc; McCabe v Cornwall County Council* [2005] 1 AC 503 [31].
[65] Stella Vettori, *The Employment Contract and the Changed World of Work* (Ashgate, 2007) 5.
[66] Above n 44, 4.

and continuing employment do so expecting to be dealt fairly with by one another. Employees' obligations of fidelity and obedience are to be balanced by an employer's duty to behave reasonably in their exercise of control.[67] It is then clear that employer and employee should have mutual trust and confidence as an unspoken requirement of the relationship between them. Implying the term may also be justified by reason of economic rationalism. If the purpose of contract law is to regulate commercial relationships with a view to optimising economic efficiency, then it is necessary that the agreement reflects the symbiotic duty of each party to cooperate in meeting each other's reasonable expectations. In this way, the overall goal of each party, financial reward, is better ensured.

It is this reciprocity, among other factors, that set apart the employment contract from traditional commercial contracts. Purely commercial arrangements exist on the premise that parties pursue their own interests and bargain from a position of relative equality to achieve their individual goals. Some academics have argued that employment relationships are starkly different. Employees present with significantly weaker bargaining positions[68] and must maintain a fiduciary relationship with their employer over an extended period of time.[69] Certainly, employment relationships are not a once-off, isolated transaction. With such differences, it can be argued that employment agreements should be considered a different species. In *Barker*, the High Court appeared to give some credence to the concept of relational contracts, noting that mutual trust and confidence seemed to be 'informed by a view of the employment contract as "relational"'.[70] This posits that contracts do not involve merely discrete transactions,[71] but also a relationship between the contracting parties.[72] While the High Court was sceptical of its application,[73] the concept's principle and its role in recognising the distinction between employment contracts and commercial contracts has been accepted in other jurisdictions[74] and Australian courts.[75] The theory of relational contracts is broad and possibly vague, but it does allow for consideration of the aforementioned key attributes of the employment paradigm in contract law. This is not to say that classical contract law principles

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[67] Ibid 5.
[68] Richard Naughton, 'The Industrial Relations Court and the Contract of Employment' (1998) 17 *Australian Bar Review* 140, 142.
[69] Above n 7, 5.
[70] *Barker* (2014) 253 CLR 169, 191–2 [33].
[71] Ian Macneil, 'Relational Contract: What We Do and Do Not Know' (1985) 1 *Wisconsin Law Review* 483, 485.
[72] MA Eisenberg, 'Relation Contracts' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Faith in Contract Law* (Clarendon Press, 1995) 291, 296.
[73] *Barker* (2014) 253 CLR 169, 194 [37].
[74] See, eg, *Braganza v BP* [2015] UKSC 17 (18 March 2015) [61]; *Johnson v Unisys Ltd* [2003] 1 AC 518, 532 [20]; *Bhasin v Hrynew* [2014] 3 SCR 494 [60].
[75] *South Australia v McDonald* (2009) 104 SASR 344, 389 [231].

do not apply to the modern employment contract, but instead that they should be refined and tailored in their application. In doing so, it might be clearer that an implied term of mutual trust and confidence is necessary in the employment relationship.

VI POSSIBLE SOLUTIONS

Recognising the relational aspect of employment illustrates the desirability of implying the term of mutual trust and confidence into employment contracts. However, in the wake of the *Barker* decision, the future of the term is bleak. Their Honours' reasoning in the case also has the potential to impact future implication of terms implied by law into contracts generally. Yet, the future of the common law should continue to play a role in the development of employment regulation. First, though, it must revise the standards it sets for implying terms by law.

After *Malik*,[76] it was speculated as to whether mutual trust and confidence could be imported into Australia. One of the hurdles it needed to clear was the test of necessity set out in *Byrne*.[77] The criterion for a term to be implied by law stated that without the term, the 'enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless or perhaps seriously undermined.'[78] Some academics had asserted that the implied term would pass the *Byrne* test with little difficulty.[79] Yet, it did not. While applying the test of *Byrne*, the High Court majority also discussed the requirement of necessity as put forth by the Full Federal Court in *Gray*, which concluded that the necessity test should acknowledge 'more general considerations … of justice and policy'.[80] In their reasoning for rejecting the term, the majority placed considerable emphasis on the fact that implication would involve 'complex policy considerations … more appropriate for the legislature … to determine'.[81] They then considered it important that the term would impose obligations on employees 'whose voices about that consequence' were not heard in the appeal.[82] Despite not being labelled as such, this policy-informed reasoning extends beyond the narrow considerations contained in *Byrne* and draws on the wider factors espoused by *Gray*. It is this paper's contention that the substantial emphasis placed by the majority on policy considerations clouded the majority's purported application

[76] *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20, 49.
[77] *Byrne* (1995) 185 CLR 410.
[78] Ibid 450.
[79] See, eg, Greg McCarry, 'Damages for Breach of the Employer's Implied Duty of Trust and Confidence' (1998) 26(2) *Australian Business Law Review* 141, 144; Kelly Godfrey, 'Contracts of Employment: Renaissance of the Implied Term of trust and Confidence' (2003) 77 *Australian Law Journal* 764, 766.
[80] *Gray* (2009) 179 FCR 346, 377 [142].
[81] *Barker* (2014) 253 CLR 169, 195 [40].
[82] Ibid 194 [38].

of the *Byrne* test. Necessity of the implied term could be said to exist on the basis that events detrimental to the relationship of the parties might otherwise occur. It would be in neither party's interests if the employer was 'to act against the employee erroneously and damage a hitherto fruitful relationship'.[83]

If reference was to be made to the *Gray* test in *Barker*, it should have been incorporated in its entirety. It is surely foreseeable that selective application of its factors could only lead to a skewed outcome. Had equal attention been paid to the other considerations in *Gray*, such as 'consequences within the employment relationship', 'social consequences' as well as 'justice',[84] the case for implying mutual trust and confidence would have arguably been reinforced. After *Barker*, the necessity test remains unclear, and many courts have shown a hesitant approach when considering implication in employment contracts.[85]

Given the central role that the relational aspect assumes in employment agreements, it is suggested that courts reconsider whether reciprocal and fair dealing terms, such as mutual trust and confidence, truly do not meet the necessity requirement of *Byrne*. The rights conferred by an employment contract include more than economic reward, having the ability to bestow 'identity and a sense of self-esteem'[86] on the employee and the promise of faithful service to the employer. Mutual trust and confidence in turn facilitates performance of the contemporary employment contract.

VII CONCLUSION

In refusing to acknowledge an existing norm of mutual trust and confidence between employer and employee, *Barker* has committed the common law to an unappealing interpretation of employment standards in Australia. The resulting asymmetry is suited for the master–servant model but does not align with modern expectations. This paper has argued that the principles espoused by the implied term are central among the indicia of employment, and where unfair dismissal schemes are silent, its application is crucial to provide employees with protection when subject to intolerable conduct by their employer. Further, viewing the employment contract as a relational contract would better enable courts to place it in the context of the

[83] Above n 56, 51.
[84] *Gray* (2009) 179 FCR 346, 377 [142].
[85] See, eg, *Regulski v Victoria* [2015] FCA 206 (13 March 2015); *New South Wales v Shaw* (2015) 248 IR 206; *Gramotnev v Queensland University of Technology* (2015) 251 IR 448.
[86] *Johnson v Unisys Ltd* [2003] 1 AC 518, 539 [35] (Lord Hoffmann).

employment relationship. This, in turn, would update and tailor a court's perspective of what is necessary in the unique conditions created by a contract of employment.

In passing the determination of terms implied by law, which exist in a distinctly judicial arena, to the legislature, it devalues the employment contract as a source of common law regulation. The extensive legislation in the field combined with the ambiguity left by *Barker* as to which view of the necessity test should be taken, may make it 'difficult in the future to persuade an Australian court to recognise any new implied term' in employment contracts.[87] Indeed, it may be that the last resort for mutual trust and confidence is to be adopted by employment legislation.

[87] Andrew Stewart, *Stewart's Guide to Employment Law* (Federation Press, 5th ed, 2015) 105.

BIBLIOGRAPHY

A *Articles/Books/Reports*

Brodie, Douglas, 'The Dynamics of Common Law Evolution' (2016) 32(1) *International Journal of Comparative Labour Law and Industrial Relations* 45

Carter, J W, et al, 'Terms Implied in Law: "Trust and Confidence" in the High Court of Australia' (2015) 32 *Journal of Contract Law* 222

Eisenberg, M A, 'Relation Contracts' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Faith in Contract Law* (Clarendon Press, 1995)

Godfrey, Kelly, 'Contracts of Employment: Renaissance of the Implied Term of Trust and Confidence' (2003) 77 *Australian Law Journal* 764

Golding, Gabrielle, 'Terms Implied by Law into Employment Contracts: Are they Necessary?' (2015) 28 *Australian Journal of Labour Law* 115

Macneil, Ian, 'Relational Contract: What We Do and Do Not Know' (1985) 1 *Wisconsin Law Review* 483

McCarry, Greg, 'Constructive Dismissal of Employees in Australia' (1994) 68 *Australian Law Journal* 494

McCarry, Greg, 'Damages for Breach of the Employer's Implied Duty of Trust and Confidence' (1998) 26(2) *Australian Business Law Review* 141

Naughton, Richard, 'The Industrial Relations Court and the Contract of Employment' (1998) 17 *Australian Bar Review* 140

Riley, Joellen, 'Mutual Trust and Good Faith: Can Private Contract Law Guarantee Fair Dealing in the Workplace' (2003) 16 *Australian Journal of Labour Law* 49

Riley, Joellen, 'Siblings But Not Twins: Making Sense of "Mutual Trust" and "Good Faith" in Employment Contracts' (2012) 36 *Melbourne University Law Review* 526

Riley, Joellen, 'Before the High Court — "Mutual Trust and Confidence" on Trial: At Last' (2014) 36 *Sydney Law Review* 164

Sappideen, Carolyn, et al, *Macken's Law of Employment* (Thomson Reuters, 7th ed, 2012)

Stewart, Andrew, *Stewart's Guide to Employment Law* (Federation Press, 5th ed, 2015)

Vettori, Stella, *The Employment Contract and the Changed World of Work* (Ashgate, 2007)

B *Cases*

Aldersea v Public Transport Corporation (2001) 3 VR 499

Auckland Shop Employees Union v Woolworths (NZ) Ltd [1985] 2 NZLR 372

Bhasin v Hrynew [2014] 3 SCR 494

BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) 180 CLR 266

Braganza v BP [2015] UKSC 17 (18 March 2015)

Bliss v South East Thames Regional Health Authority [1987] ICR 700

Blyth Chemicals Ltd v Bushnell (1933) 49 CLR 66

Byrne v Australian Airlines Ltd (1995) 185 CLR 410

Commonwealth Bank of Australia v Barker (2014) 253 CLR 169

Commonwealth Bank of Australia v Barker (2013) 214 FCR 450

Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84

Eastwood v Magnox Electric plc; McCabe v Cornwall County Council [2005] 1 AC 503

Goldman Sachs JBWere Services Pty Ltd v Nikolich [2007] FCAFC 120 (7 August 2007)

Gramotnev v Queensland University of Technology (2015) 251 IR 448

Johnson v Unisys Ltd [2003] 1 AC 518

Lewis v Motorworld Garages Ltd [1986] IRC 157

Lister v Romford Ice and Cold Storage Co Ltd [1957] AC 555

Malik v Bank of Credit and Commerce International SA (in liq) [1998] AC 20

Marlborough Harbour Board v Goulden [1985] 2 NZLR 378 (CA)

New South Wales v Paige (2002) 60 NSWLR 371

New South Wales v Shaw (2015) 248 IR 206

New Testament Church v Stewart [2008] ICR 282

R Darling Island Stevedoring & Lighterage Co Ltd (1938) 60 CLR 601

Regulski v Victoria [2015] FCA 206 (13 March 2015)

Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney (2008) 72 NSWLR 559

Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596

South Australia v McDonald (2009) 104 SASR 344

TSB Bank plc v Harris [2000] IRLR 157

Western Excavating (ECC) Ltd v Sharp [1978] QB 761

Woods v W M Car Services (Peterborough) Ltd [1982] ICR 693

University of Western Australia v Gray (2009) 179 FCR 346

C *Legislation*

Employment Rights Act 1996 (UK)

Fair Work Act 2009 (Cth)