

THE EVOLUTION OF THE CONTRACT OF EMPLOYMENT POST *WORKCHOICES*

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The Howard government's WorkChoices laws take a further step in the progressive re-regulation of employment relations in Australia, away from collectively-based strategies for determining workplace rights, towards a focus on the individual employment relationship. This paper argues that the WorkChoices changes create an opportunity and an incentive for the development of the common law of employment in Australia. The challenge for those who are committed to ensuring that Australian workplace laws retain a commitment to a 'fair go' all round for workplace participants, is to ensure that the development of Australian employment contract law reflects developments in other areas of Australian commercial law.

I A RENAISSANCE FOR EMPLOYMENT CONTRACT LAW

Contract law emerged as an important tool in the regulation of relationships between employers and employees in the 20th century.¹ Nevertheless, the law of employment contracts has remained relatively undeveloped in Australia until recently because statutory regimes providing for the conciliation and arbitration of industrial matters kept many employment disputes out of the ordinary courts. In the days when many employees belonged to unions, when terms and conditions of work were regulated by detailed industrial awards and disputes over the observance of those awards were handled largely by specialist industrial tribunals exercising statutory powers, it was generally only cases involving managerial employees which came to be determined by courts exercising common law jurisdiction. In New South Wales in particular, a vibrant unfair contracts review jurisdiction exercised by the New South Wales Industrial Relations Commission in Court Session for the past 50 years has dealt with

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1 See John Howe and Richard Mitchell, 'The Evolution of the Contract of Employment in Australia: A Discussion' (1999) 12 *Australian Journal of Labour Law* 113; Simon Deakin, 'The Evolution of the Contract of Employment, 1900–1950' in Noel Whiteside and Robert Salais (eds), *Governance, Industry and Labour Markets in Britain and France* (1998) 212.

almost all employment matters which might otherwise have been litigated in the common law courts.²

The regulatory environment has changed radically in recent years. A 'widespread displacement of collectively-based regulatory strategies in favour of individual mechanisms of worker and employer redress'³ has swept Anglo-Australian labour law in the past decade. The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('WorkChoices') is yet another manifestation of that trend. These regulatory developments have created an opportunity for some evolutionary development in employment contract law. This paper first explains how features of the WorkChoices changes are likely to prompt greater reliance on contract law and then considers – somewhat speculatively, and necessarily briefly given the space constraints of a short article⁴ – what kinds of evolutionary changes we may see in the law of employment contracts in Australia. This paper argues that the development of a principle of good faith performance of employment contracts will be necessary to ensure that private law regulation of workplace relationships reflects the commitment to a 'fair go all round'⁵ traditionally expected of labour laws in the Australian community. It also identifies (briefly) a role for estoppel in the employment context, to ensure that the phenomenon of standard form individual employment contract documents does not work injustice in workplace relationships.

II WORKCHOICES AND NEW SPACE FOR CONTRACT LAW

WorkChoices has made a number of changes to the regulation of employment relationships. These changes are expected to encourage greater reliance on common law contract principles to resolve employment disputes (the list of changes that follows is no doubt incomplete).

A Reduced Reliance on Awards and Industrial Arbitration

The *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) first reduced the content of federal industrial awards by restricting content to 20 'allowable award matters' listed in former s 89A of the *Workplace Relations Act 1996* (Cth) ('*WR Act*'). This meant that many matters relating to the terms and conditions on which work was to be performed could no longer be regulated by an industrial award. The termination change and redundancy ('TCR') award

2 See *Industrial Relations Act 1996* (NSW) ss 105–6, discussed in detail in Jeffrey Phillips and Michael Tooma, *The Law of Unfair Contracts in NSW* (2004).

3 Joanne Conaghan, 'Labour Law and 'New Economy' Discourse' (2003) 16 *Australian Journal of Labour Law* 9, 19.

4 A more detailed analysis is published in Joellen Riley, *Employee Protection at Common Law* (2005).

5 This formula from *Loty & Holloway v Australian Workers' Union* [1971] AR (NSW) 95, 99 (Sheldon J) is often cited as an underpinning norm in Australian labour laws. The rhetoric of a 'fair go' has also been adopted by the government in statements surrounding regulation of small business. See the statement of Minister Peter Reith when introducing the Trade Practices Amendment (Fair Trading) Bill 1997, that this legislation was intended 'to induce behavioural change in commercial practices so that small businesses do get a fair go': Commonwealth, *Parliamentary Debates*, House of Representatives, 6 April 1998, 2570 (Peter Reith, Minister for Workplace Relations and Small Business).

clauses which unions won through the arbitration system in the 1980s⁶ were seriously watered down by the 1996 changes. The elements of those clauses requiring consultation with unions and fair procedures for dismissal were lost as award conditions; however certain rights to procedural fairness in terminations were maintained in unfair dismissal provisions in the *WR Act* itself.⁷ Section 513 in the new Act prunes those matters further. For example, former s 89A(2)(n) which allowed the 'notice for termination' to be included in an award is gone. Presumably award dependent workers will now rely either on the statutory minimum notice periods in s 661 of the *WR Act*, or a longer period determined by a private contract of employment. Likewise, many provisions concerning work practices which can no longer be included in awards are now often the subject of detailed 'human resources policies' and work practice manuals. Sometimes these documents are incorporated either by reference, or by implication, in employees' individual employment contracts.

B Unfair Dismissal Protection Withdrawn for Many Employees

WorkChoices restricted access to the federal statutory unfair dismissal protections for employees of enterprises with less than 101 employees.⁸ It also purported to oust the operation of any State industrial laws in respect of any employee of a 'constitutional corporation' (defined in the *WR Act* s 4 as one to which s 51(xx) of the *Constitution* applies).⁹ So long as this provision is constitutionally valid (and the States are testing that in a constitutional challenge to the WorkChoices legislation), it means that employees of incorporated small to medium-sized enterprises will no longer have recourse to a state industrial tribunal to resolve a complaint of unfair termination. No doubt the government's intention is that these complaints will go completely unheard. Nevertheless, it is possible that some cases will find their way to courts exercising common law jurisdiction, perhaps with the assistance of funding from trade unions or conscientious employee advocacy firms willing to work on a pro bono basis. These courts have no jurisdiction to exercise the kinds of discretionary powers conferred by the industrial statutes' unfair dismissal provisions. They will need to resort to principles of the common law of contract to resolve complaints.

C Limitations on Collective Bargaining Under the WR Act

Certain matters excised from awards cannot be included in statutory workplace agreements, including both collective agreements and Australian Workplace Agreements ('AWAs'). WorkChoices introduced a provision (s 356 of the *WR Act*) enabling the Minister to table Regulations prohibiting certain content in workplace agreements. These Regulations, tabled in March 2006, provide (among many other restrictions) that fair dismissal procedures are prohibited

6 See *Amalgamated Metals, Foundry & Shipwrights' Union v Broken Hill Pty Co Ltd* (1984) 8 IR 34 ('Termination Change and Redundancy Case').

7 See former Part VIA Division 3 of the *WR Act*.

8 See *WR Act* s 643(10).

9 See *WR Act* s 16.

from inclusion in a workplace agreement.¹⁰ The impetus for this edict may be a reaction (of the ‘knee-jerk’ variety) to rumours that trade unions circulated prior to the enactment of WorkChoices that they would seek to circumvent the new exemption from unfair dismissal laws for businesses with less than 101 employees by striking workplace bargains including those provisions. A question arises as to whether these kinds of clauses, now prohibited from inclusion in statutory workplace agreements lodged under the provisions of the *WR Act*, may nevertheless be contained in common law employment contracts. It would be a strange result if such clauses could not be enforceable if included in common law contracts. After all, provisions purporting to confer commitments that termination will only be for a just cause are not at all uncommon in executive service contracts. Such contracts often include elaborate termination provisions, allowing for very long notice periods (even payment for the complete term of a fixed term contract) upon termination for any reason other than incompetence or misconduct.

There is no reason in principle why a common law agreement made between an employing enterprise and any of its employees may not include the same kinds of commitments. In fact, Driver FM in the Federal Magistrate’s Court of Australia held this to be the case in *Dare v Hurley*.¹¹ There, the employer’s letter of appointment had required employees to agree to observe the terms of a human resources policy manual. This manual also contained references to the employer’s own commitment to follow certain procedurally fair processes before summarily dismissing workers for incompetence or misconduct. Federal Magistrate Driver held that these commitments on behalf of the employer were also part of the employment contract, and so gave the employee a contractual entitlement to have the benefit of those procedures before she could be dismissed.

There is nevertheless a view circulating that the Minister’s statutory power to prohibit content from workplace agreements made under the *WR Act* may extend to prohibiting content from ordinary common law agreements made between unions and employers, so that any agreement struck between a union and an employer to include fair dismissal terms in all their employment contracts would be void. High Court of Australia authority in *Byrne and Frew v Australian Airlines Ltd*¹² would suggest that this view is misconceived. There, the High Court held that an industrial award was not incorporated as a term of an individual employee’s employment contract, either expressly, or by implication in fact or by law. An essential element in the court’s reasoning was that the industrial award, as a creature of a statutory regime, had a different juridical nature and purpose from general contract law. The award was the result of an arbitration process, while contract was the creature of the parties’ own voluntary agreement. The common law contract was enforceable under the general law, on the basis that the parties themselves had freely assumed those obligations.

10 Workplace Relations Regulation 8.5(5).

11 [2005] FMCA 844 (Unreported, Driver FM, 12 August 2005).

12 (1995) 185 CLR 410.

The same principle must apply in reverse. Citizens' rights to reach agreements binding under the general law are not necessarily cut down by the enactment of a statute directed specifically to the making of a particular type of regulatory instrument to govern limited aspects of workplace relationships. The statute has its own rules, remedies and sanctions, distinct from the principles of the general law. If Parliament intends to abolish any common law rights – including the right to make a contract enforceable at common law – it needs to do so expressly and clearly.¹³ No provision in WorkChoices expressly purports to destroy common law rights. Indeed, the rhetoric surrounding the enactment of WorkChoices reinforces a view that parties are to be weaned off statutory protections and must resort instead to their common law rights.

If the only way in which employees are able to enjoy legal protection from arbitrary dismissal is the inclusion of such a provision in an employment contract, then courts exercising common law jurisdiction may come to hear more contract disputes. Critics may argue that employers are unlikely to include such terms in their employment contracts. *Dare v Hurley*¹⁴ provided an example of an employer who did make such a commitment, and others seeking to recruit qualified staff in the face of skill shortages may consider that promises of job security are a way of attracting appropriate personnel. Not all employees will enjoy this market power, but those who do may strike the kinds of bargains that will provide opportunities to test the principles of the common law in the future.

D Preservation of Rights to Bring Action for Unlawful, Discriminatory Dismissal

The 101-employee restriction applying to unfair dismissal claims does not apply in the case of an unlawful dismissal claim, brought under s 659 of the *WR Act*. This means that all employees enjoy protection against dismissal on the grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.¹⁵ Matters which go to hearing for a breach of this provision will be heard by the Federal Court of Australia, which enjoys accrued jurisdiction to hear common law matters, so long as its jurisdiction is first triggered by a viable claim under a Federal statute. This means that employee advocates alleging discriminatory dismissals will also have the opportunity to argue a case based on contract law principles.

13 In *Coco v The Queen* (1994) 179 CLR 427, 437, Mason CJ, Brennan, Gaudron and McHugh JJ said:

The insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.

14 [2005] FMCA 844 (Unreported, Driver FM, 12 August 2005).

15 See *WR Act* s 659(2)(f).

Indeed, some of the most interesting recent developments in Australian employment contract law have come from the Federal Court of Australia, when it has been hearing matters brought principally under the provisions of an anti-discrimination statute. *Thomson v Orica Australia Pty Ltd*¹⁶ is an example. In this case, Allsop J found that the employer's duty not to destroy mutual trust and confidence in the employment relationship could be used to find that an employer who had ignored its own human resources policies had breached the employment contract, even in the absence of any finding that the policy document itself was incorporated into the employment contract. This decision's contribution to emerging understandings of the employer's obligation of 'mutual trust and confidence' is discussed further below, in the section on the potential evolution of the employment contract in Australia. Here, it is sufficient to observe that the Federal Court judges are drawing on contract law principles and resolving contract claims, in the context of statutory claims for breach of discrimination statutes. Discrimination law is alive and well, even if industrial law generally is on the wane. Discrimination law may prove to be the avenue through which employment contract law disputes come before the Federal Court for resolution.

III OTHER INFLUENCES

The changes to WorkChoices are not the only influences encouraging the emergence of reliance on contract law. Amendments made in 2002 by the New South Wales parliament to the unfair contracts provisions in the *Industrial Relations Act 1996* (NSW) prohibited access in that jurisdiction to employees on incomes of more than \$200,000 a year.¹⁷ This change had a dramatic impact on some employment law practices in law firms in New South Wales. Practitioners – solicitors and barristers alike – who were accustomed to large caseloads of s 106 matters naturally began looking around for alternative means of pursuing their clients' claims. The *Trade Practices Act 1974* (Cth) s 52 (prohibiting misleading and deceptive conduct), and also s 51AA (prohibiting unconscionable conduct) have received considerable attention as a result.¹⁸ Some successes for employees in trade practices claims have encouraged these investigations.¹⁹ As with claims under federal discrimination statutes, a trade practices claim brings a matter to the Federal Court. Once before the court, the advocate may also proceed to offer alternative arguments based on contract law principles.

16 [2002] FCA 939 (Unreported, Allsop J, 30 July 2002).

17 See s 108A, introduced by the *Industrial Relations Amendment (Unfair Contract) Act 2002* (NSW).

18 See Joellen Riley, 'Arguing the Trade Practices Act in Employment Matters' (Paper presented at the 11th Annual Labour Law Conference, Sydney, 4 April 2003); Ronald Baragry, 'The Emerging Significance of Trade Practices Legislation on Employment Law' (Paper presented at the Law Society of NSW Specialist Accreditation Employment and Industrial Law CLE Seminar, Sydney, 28 August 2003); Kelly Godfrey, 'The Trade Practices Act Alternative' (2005) 18 *Australian Journal of Labour Law* 136; and most recently, John Fernon SC, 'Actions under the Trade Practices Act' (Paper presented at the NSW Young Lawyers Employment & Industrial Law One Day Seminar, Sydney, 25 February 2006).

19 See, eg, *Magro v Fremantle Football Club Ltd* [2005] WASC 163 (Unreported, Blaxell J, 27 July 2005); *O'Neill v Medical Benefits Fund of Australia Ltd* (2002) 122 FCR 455.

Practitioners' desires to find alternative causes of action for employees upon the demise of unfair contract review and unfair dismissal protection have also prompted research into the employment contracts jurisprudence emerging in recent decades in the United Kingdom. The jurisprudence developing around the employer's obligation not to destroy mutual trust and confidence has been most fruitful in the United Kingdom.²⁰ The influential House of Lords decision in *Malik and Mahmud v Bank of Credit and Commerce International SA (in liq)* ('*Malik*')²¹ which confirmed the existence of this obligation and its potential to give rise to a damages claim, independently of any claim for wrongful dismissal, has been confirmed more recently in *Eastwood v Magnox Electric plc; McCabe v Cornwall County Council*.²² The extent to which that jurisprudence can be developed in the Australian context is dealt with below.

IV THE EVOLUTION OF EMPLOYMENT CONTRACT LAW IN AUSTRALIA

A return to reliance on contract law is attuned to the rhetoric of the WorkChoices reforms. In theory at least, contract law supports the making and enforcement of mutually beneficial bargains by autonomous, freely-acting parties. Classical contract law principles are based on this notion of 'freedom of contract'.²³ Unfortunately, classical contract law principles, while perhaps well-suited to the mercantile transactions of commercial parties in the 18th and 19th centuries, are inept in many respects when it comes to describing the typical 21st century employment relationship. The assumption of freedom to contract is itself problematic when parties are unequally matched. As Higgins J famously opined, 'the "higgling of the market" for labour, with the pressure for bread on one side and the pressure for profits on the other'²⁴ is usually an unequal contest. 'Despotism in contract' is more common than freedom of contract, in employment relationships.²⁵ Nevertheless, even leaving aside the well-trodden arguments about serious inequalities in bargaining power between corporate employers and individual employees that undermine classical contract law

20 For analysis of this duty and its history, see Mark Freedland, *The Personal Employment Contract* (2003) 154–70. See also Justice Lindsay, 'The Implied Term of Trust and Confidence' (2001) 30 *Industrial Law Journal* 1–16; Douglas Brodie, 'The Heart of the Matter: Mutual Trust and Confidence' (1996) 25 *Industrial Law Journal* 121, cited with approval by Lord Steyn in *Malik and Mahmud v Bank of Credit and Commerce International SA (in liq)* [1997] 3 WLR 95, 109; Douglas Brodie, 'Beyond Exchange: The New Contract of Employment' (1998) 27 *Industrial Law Journal* 79; Douglas Brodie, 'A Fair Deal at Work' (1999) 19 *Oxford Journal of Legal Studies* 83.

21 [1997] 3 WLR 95.

22 [2004] UKHL 35 (Unreported, Lord Nicholls of Birkenhead, Lord Steyn, Lord Hoffmann, Lord Rodger of Earlsferry, Lord Brown of Eaton-under-Heywood, 15 July 2004).

23 This paper adopts Professor Atiyah's term, 'classical contract law', to describe the principles of modern contract law developed and elaborated by the English courts in the 18th and 19th centuries: see Patrick Atiyah, *An Introduction to the Law of Contract* (5th ed, 1995) 7.

24 *Ex Parte H V McKay* (1907) 2 CAR 1, 3 (Higgins P) ('*the Harvester Case*').

25 *Federated Engine Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 5 CAR 9, 28 (Higgins J).

theory,²⁶ there are technical rules of classical contract law which are also unrealistic in the employment context. Take for example the principle of certainty. According to classical contract law principles, the terms of a contract must be sufficiently certain at the time it is made or the contract fails for uncertainty. The typical employment relationship, however, is ambulatory in many of its terms. The employee's duty of obedience (implied by law into every employment contract) requires that the employee cooperate with all lawful and reasonable directions of the employer; such directions may effect a considerable change of duties over the term of an employment relationship.

In this respect, the employment relationship is better described as a 'relational contract', which does not set up rigid terms and conditions upon its initiation, but instead describes an ongoing, evolving relationship through which parties commit to cooperate in a mutually beneficial endeavour.²⁷ An important feature of relational contracts is the assumption that parties commit to cooperate in good faith. The principle of good faith in the performance of relational contracts in the commercial field is well accepted in Australian law²⁸ (although debate remains over the precise scope of what good faith performance entails).²⁹

A Good Faith in Employment Contract Law?

The emerging obligation of 'mutual trust and confidence' plays a similar role in employment contract law to that played by the concept of good faith performance in commercial contract law. Development of the employment law concept is well advanced in the United Kingdom, where it is possible to say that an employer's duty not to destroy mutual trust and confidence in the employment relationship can give rise to an obligation to treat employees even-handedly and fairly.³⁰ An elegant example is provided by the case of *BG plc v O'Brien*,³¹ upheld by the English Court of Appeal in *Transco (formerly BG plc) v O'Brien*.³² In that case, one employee among many was refused redundancy pay when the

26 See, eg. Lord Wedderburn, *The Worker and the Law* (3rd ed, 1986) 5.

27 For a discussion of employment as a relational contract, see Mark Freedland, *The Personal Employment Contract* (2003) 90–2. For relational contract theory, see generally Ian Macneil, 'Contracts: Adjustment of Long-term Economic Relations under Classical, Neo-classical and Relational Contract Law' (1978) 72 *Northwestern University Law Review* 854; Ian Macneil, 'Values in Contract: Internal and External' (1983) 78 *Northwestern University Law Review* 340; Charles Goetz and Robert Scott, 'Principles of Relational Contracts' (1981) 67 *Virginia Law Review* 1089.

28 See, eg. *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 258–63 (Priestley JA); *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 191–8 (Finn J); *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349 (Sheller JA); *Hungry Jack's Pty Ltd v Burger King Corp* [1999] NSWSC 1029 (Unreported, Rolfe J, 5 November 1999); *Burger King Corp v Hungry Jack's Pty Ltd* [2001] NSWCA 187 (Unreported, Sheller, Beazley and Stein JJA, 21 June 2001); *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* (1999) ATPR 41–703; *Far Horizons Pty Ltd v McDonalds Australia Ltd* [2000] VSC 310 (Unreported, Byrne J, 18 August 2000); *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 201 ALR 55; *Vodafone Pacific v Mobile Innovations* [2004] NSWCA 15 (Unreported, Sheller, Giles, Ipp JJA, 20 February 2004).

29 For a critical study of the good faith doctrine in Australian commercial law, see Elizabeth Peden, *Good Faith in the Performance of Contracts* (2003).

30 See Brodie, above n 20.

31 [2001] IRLR 496.

32 [2002] IRLR 444.

business closed down. He had no contractual entitlement to redundancy pay. Nevertheless, the Employment Appeals Tribunal held that the employer had breached its duty not to destroy mutual trust and confidence by failing to offer him the same benefits as it made available to all other employees in his position. This case represents a high tide in English employment contract law. Will this English development translate into any useful principle in Australian contract law?

B Mutual Trust and Confidence in Australia

It is clear that Australian employment law recognises that both parties – employer and employee – owe obligations not to destroy mutual trust and confidence in the relationship. While this duty has not been the subject of any explicit analysis at an appellate court level, it has been implicitly accepted by the High Court of Australia, most recently in *Koehler v Cerebos (Australia) Ltd*.³³ Many Australian courts below the High Court have accepted its existence.³⁴ Rumours that it has no future in Australia have been circulating, no doubt on the strength of equivocal remarks by Hoeben J in *Heptonstall v Gaskin (No 2)*,³⁵ to the effect that it is doubtful whether such an obligation exists in Australian employment contract law. In fact, Hoeben J said that the existence of the term ‘remains controversial and awaits clarification by an appellate court’.³⁶ He also said that ‘due weight’ ought to be given to its acceptance by the United Kingdom’s highest authority, the House of Lords.³⁷ And most importantly, he refused to strike out the claim. Likewise in *Irving v Kleinman*,³⁸ Hodgson JA (supported by Ipp and Tobias JJA) refused to strike out a claim based on an alleged breach of the employer’s duty of mutual trust and confidence. These comments by courts hearing interlocutory applications do not displace the weight of authority accepting the existence of the obligation.

The real issues for resolution are not whether the mutual trust and confidence obligation exists, but what will constitute a breach of the obligation and what remedial consequences flow from breach. At the present time, there is a paucity of Australian case law on these issues.

33 [2005] HCA 15 (Unreported, McHugh, Gummow, Hayne, Callinan and Heydon JJ, 6 April 2005) [24] (McHugh, Gummow, Hayne and Heydon JJ).

34 Some of the many examples of cases (from various jurisdictions) are: *Sea Acres Rainforest Centre Pty Ltd v State of New South Wales* (2001) 109 IR 56, 66 (Haylen J). See also *Gambotto v John Fairfax Publications Pty Ltd* (2001) 104 IR 303, 309–11 (Peterson J); *Hollingsworth v Commissioner of Police* (1999) 88 IR 282, 318 (Wright and Hungerford JJ); *Alderse v Public Transport Corporation* [2001] 3 VR 499; *Jager v Australian National Hotels Ltd* (1998) 7 Tas R 437; *Thomson v Broadley* [2002] QSC 255 (Unreported, Jones J, 20 June 2002); *Linkstaff International Pty Ltd v Roberts* (1996) 67 IR 381.

35 [2005] NSWSC 30 (Unreported, Hoeben J, 9 February 2005).

36 *Ibid* [23] (Hoeben J).

37 See *Eastwood v Magnox Electric plc* [2004] 3 WLR 322 for the most recent House of Lords decision affirming the existence of the obligation. For a thorough account of the English jurisprudence leading up to *Eastwood*, see Douglas Brodie, ‘Mutual Trust and the Values of the Employment Contract’ (2001) 30 *Industrial Law Journal* 84. My own account of this jurisprudence can be read in Joellen Riley, ‘Employee Protection at Common Law’ (2001) 30 *Industrial Law Journal* 77.

38 [2005] NSWCA 116 (Unreported, Hodgson, Ipp and Tobias JJA, 18 April 2005), [27] (Hodgson JA).

It is possible to state with certainty that a breach of the duty gives rise to a constructive dismissal so that the employee may claim any remedies available to them for wrongful termination at common law, or unlawful or unfair dismissal under a statutory provision.³⁹ The WorkChoices amendments to federal unfair dismissal provisions cloud the question of whether a constructive dismissal will give rise to a right under the *WR Act*. A new s 642(4) provides that the employee must show that they were 'forced' to resign, not merely that they elected to treat the employer's serious breach of contract as a repudiation warranting termination, as is the case under the common law.

It can also be stated with some certainty that the duty of mutual trust and confidence can assist in the construction of the contract of employment. For example, the employer's duty not to destroy mutual trust and confidence obliges an employer to honour its own published human resources policies and procedures. The cases of *Dare v Hurley*⁴⁰ and *Thomson v Orica Australia Ltd*⁴¹ mentioned above illustrate this point. The important point to draw from *Thomson v Orica* is that the obligation of mutual trust and confidence can require an employer to observe its own policies, even where those policies are not incorporated into the individual contracts of employment. Justice Allsop held that it was irrelevant whether Orica's return to work policy was expressly or impliedly incorporated as a contractual term. The fact that the employer flouted its own policy was sufficient in itself to signal the employer's lack of regard for the employee and so constituted a breach of mutual trust. Ms Thomson's remedy was to seek damages for wrongful dismissal (she also brought a claim for breach of the *Sex Discrimination Act 1984* (Cth)). In the result, the parties settled the contract claim, so there is no public record of what kind of contract-based damages she was able to obtain for breach of the mutual trust and confidence obligation.

C A Control on Discretion?

One of the questions which remains to be answered in Australian law is whether the mutual trust and confidence term can be called in aid of an employee who has been the victim of an arbitrary or capricious exercise of an employer's discretion to award performance based remuneration. It is typical for performance based remuneration schemes to reserve considerable discretion to the employer to determine bonuses and rewards. This is consistent with the open-textured, relational nature of many employment contracts. Unknown factors like future firm profitability discourage employers from making iron-clad commitments to certain levels of remuneration; however the desire to attract ambitious and talented staff encourages the employer to offer incentives for high performance. Hence, the terms of the contract reserve a discretion for the employer to award performance bonuses. Mutual trust has been used as a tool to

39 See, eg, *Russian v Woolworths (SA) Pty Ltd* (1995) 64 IR 169, where a statutory remedy flowed from a constructive dismissal.

40 [2005] FMCA 844 (Unreported, Driver FM, 12 August 2005).

41 (2002) 116 IR 186.

control such discretions in English cases. For example, in *Clark v BET*,⁴² an employer dismissed a senior manager on a fixed term contract some years early. The contract had provided for salary rises each year at the absolute discretion of the employer. When paying out the manager to the end of the contract term, the employer refused to make any allowance for pay increases over the term of the contract, claiming that awarding pay increases was entirely discretionary. The court decided, in favour of the employee's claim, that the employer was required to exercise its discretion to provide salary raises over the term of a fixed term contract in good faith. Consequently, the employee's payout was increased by the court's assessment of what a reasonable employer would have awarded by way of increases, if it were exercising its discretion in good faith. Likewise, in *Clark v Nomura International plc*,⁴³ an employer who paid performance bonuses to its staff refused to pay a bonus to a particular high-flyer who was dismissed (for reasons unrelated to his performance) nine months into a financial year. The court held that a proper exercise of the employer's discretion to award bonuses would have seen the employee receive a pro-rata payment.

If Australian law were to follow these English examples, the mutual trust and confidence obligation may perform a useful role as a restraint on the arbitrary exercise of contractual discretions in employment contracts. Employers who reserved to themselves discretions to determine important aspects of the relationship – such as the level of remuneration earned, participation in incentive schemes and relocation of staff – could be restrained from exercising those discretions in a capricious way for some ulterior motive. For example, refusing a performance bonus to a high performer to punish them for some non-work related conduct would constitute a bad faith exercise of the discretion, which breached the duty of mutual trust and confidence. The employee's remedy in such a case would be expectation-based damages, calculated on the assumption that the employer was obliged to exercise the discretion properly, in good faith. Damages in such a case could result in more than just payment out of a notice period for wrongful termination. Damages could include a substantial sum representing the bonus denied by the capricious exercise of the discretion.⁴⁴

The articulation of the mutual trust and confidence obligation as a good faith obligation, controlling the abuse of contractual discretions, would go some way to recognising that employment relationships are relational contracts and require the infusion of good faith obligations to ensure that their deliberately open-textured nature is not exploited opportunistically by one party to the relationship. This articulation may be made possible if more employment contract claims make their way into the Federal Court.

42 [1997] IRLR 348.

43 [2000] IRLR 766.

44 For a more detailed argument, see Joellen Riley, 'Mutual trust and good faith: Can private contract law guarantee fair dealing in the workplace?' (2003) 16 *Australian Journal of Labour Law* 28.

V THE PROLIFERATION OF EMPLOYMENT CONTRACT PRECEDENT DOCUMENTS

Although in reality many employment relationships involve highly flexible obligations, especially on the part of employees, many employment lawyers have developed the practice of producing for their employer clients detailed documents, purporting to set out the terms and conditions of employment for the clients' employees. The advent of word processing and computer storage of documents has created, in this field as in others, a body of standard precedents. An employment contract document even for a mid-ranking employee may run to many pages and include elaborate clauses.

The phenomenon of the highly detailed written document raises a particular concern: what consequences flow when there is some important inconsistency between the terms set down in the document and the mutual expectations of the parties to the employment relationship as it develops over time?⁴⁵ The problem is not an uncommon one, especially where employers engage in a practice of issuing a contract document to the new employee after an offer of employment has been accepted – often even after the employee has commenced duties. The deal struck in the interview room may not accord with the standard document issued by the human resources department. In all likelihood, the standard document will have been created by the employer's legal advisers, and will contain clauses carefully drafted to protect the employer's interests. Where such a document does not reflect the real agreement between the parties, it can ultimately cause considerable grief. Usually, it will be an employee who will discover on termination that the documented terms are considerably more niggardly than she or he understood while the relationship thrived. Occasionally, however, an employer will be caught out by a mismatch between the terms of the document and their intentions. A dispute at the beginning of 2006 between the television broadcaster Network Ten and one of its more popular news presenters provides an illuminating example.

*Network Ten Pty Ltd v Rowe*⁴⁶ arose because Network Ten wanted to stop Jessica Rowe from leaving to take up a position with a rival television network. Ms Rowe's written contract with Network Ten was expressed to be a fixed term contract for two years, concluding on 31 December 2005. (She had been engaged on similar fixed term contracts prior to this one.) Late in 2005, Ms Rowe gave Ten notice that she did not intend to seek renewal of her contract. Network Ten claimed that Ms Rowe was obliged to give 26 weeks notice of her intention to terminate the contract and that she should therefore be restrained from taking up any new employment until that 26 week period had expired. Ten relied on a clause in the contract which stipulated that either party could terminate the contract by giving the other party 26 weeks notice. Ten's counsel argued that this term should be construed to imply that the 26 weeks' notice must be given, even if the notice period would run beyond the fixed term of the contract.

45 The argument that follows has been developed more fully in Riley, above n 4, 96–134.

46 [2005] NSWSC 1356 (Unreported, Simpson J, 30 December 2005).

Counsel for Ten said that this interpretation of the clause should be implied from the parties conduct throughout their relationship. They had treated the contract as an ongoing employment relationship.

One may well wonder why Ten's contract was stated to be a fixed term contract for only two years if they did in fact intend to treat staff as continuing employees. Perhaps Ten had deliberately adopted an increasingly common practice of stipulating that contracts are for a short term so as to give themselves greater flexibility to hire and fire staff, without exposing themselves to large payouts on severance. Despite the short-term contract, however, Ten clearly treated Ms Rowe as a continuing employee and expected her to give notice before leaving.

The problem posed for the court was how to interpret this employment contract. Consistently with classical contract law principles, Simpson J looked first to the terms of the written document. The document signed by the parties stated that the agreement was an 'entire agreement' – a device used by lawyers to foreclose any arguments that matters raised during contract negotiations are terms of the contract. The document stipulated that it was for a fixed term, concluding on 31 December 2005; it made provision for remuneration in each of the two years of the term, but it made no provision for the payment of any remuneration beyond that date. Justice Simpson held that this must mean that the contract ceased on 31 December 2005 and that the termination clause must be interpreted as a clause allowing for early termination, within the contract period. It would, after all, be intolerable to suggest that Ms Rowe might bear an obligation to work out a long period of notice, during which time she had no contractual entitlement to any remuneration.

Justice Simpson's judgment in the matter is entirely consistent with contract law principles. Ten asked her to imply a term into the contract, on the basis of the way the parties had conducted their relationship, but where a contract is in writing, no term can be implied if it would contradict any express term of the contract. This is the fifth requirement for implication of terms in fact, set out by Lord Simon of the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hasting*.⁴⁷ Ten's own document – expressed as an 'entire agreement' – precluded any implication of terms.

The case provides a poignant illustration of the risks of adopting a contract document which does not reflect the mutual expectations of the parties. This problem raises an obvious question: is there any legal way around this kind of problem? Perhaps parties may be able to find a solution to a mismatch between a written document and an actual agreement by drawing on certain common law and equitable doctrines, developed to ensure that people cannot profit from unconscionable exploitation of others.

47 (1977) 180 CLR 266, 283 (Lord Simon of Glaisdale, Viscount Dilhorne, Lord Keith of Kinkel).

VI ESTOPPEL

One of the law's most potent tools for dealing with the unconscionable insistence on contract rights is the doctrine (or doctrines⁴⁸) of estoppel. Space forbids reiteration of the arguments developed more extensively in Chapter 4 of *Employee Protection at Common Law*.⁴⁹ Essentially, estoppel is a tool which may – in an appropriate case – allow a court to look beyond a written contract document to oral representations made and relied upon by parties to employment relationships, and to find that those oral representations govern the rights and responsibilities of the parties. Where a party has relied to their detriment on such an oral representation, and the other has taken unconscionable advantage of that reliance, estoppel may provide a remedy. For example, an employee who has relied on promises of performance based bonuses, and is subsequently denied those bonuses by reference to some written document which the parties have consistently ignored throughout their dealings, may argue that the employer should be estopped from relying on the written contract document.

The first case to attempt such an argument in the employment context will be a novel one. There are principled reasons why such an argument should succeed. Not the least of them is that estoppel may provide a justification for surrendering up (again, in the appropriate case) the presumption that a written document must prevail over testimony which goes to prove a different set of mutual understandings between the parties. Estoppel by convention⁵⁰ allows the parties to argue that their relationship should be governed not by a superseded written document, but according to mutually agreed arrangements, outside of or even inconsistent with the document.

This doctrine may potentially assist in defeating injustices which might arise by too religious an adherence to the parol evidence rule, which privileges the words of a written contract document over oral testimony. This rule may well have made sense at a time in history when it was an onerous and serious task to produce a written document. These days, several hundred pages of standard precedent terms can be spewed from a computer without anyone taking the trouble to really read the whole document. Parties to employment contracts notoriously sign documents without reading carefully and considering their contents. As the *Network Ten v Rowe* case discussed above demonstrated, sometimes even employers can be caught out when the document misdescribes the parties' mutual expectations. Justice of Appeal McHugh said in *State Rail Authority of New South Wales v Heath Outdoor Pty Ltd*⁵¹ that the parol evidence rule has no operation until it is first determined that the contract is in fact in

48 Space precludes discussion here of whether estoppel is one unifying doctrine or a 'federation of principles with a unifying idea in common': see Patrick Parkinson, 'Equitable Estoppel: Developments after *Waltons Stores (Interstate) Ltd v Maher*' (1990) 3 *Journal of Contract Law* 50, 68.

49 Riley, above n 4.

50 The principles of estoppel by convention are explained by Dixon J in *Grundt v Great Boulder Proprietary Mines Ltd* (1937) 59 CLR 641 and *Thompson v Palmer* (1933) 49 CLR 507, 547 (Dixon J). See generally Rory Derham, 'Estoppel by Convention – Parts I and II' (1997) 71 *Australian Law Journal* 860, 976.

51 (1986) 7 NSWLR 170, 191 (McHugh JA).

writing.⁵² Where a contract document is a work of fiction, it may be that the real contract – the agreement created by acceptance of an offer, on mutually understood terms – is not evidenced in writing at all. Estoppel provides a means of escaping the tyranny of the document, when it would be unconscionable for parties to continue to insist upon enforcing its terms.

VII CONCLUSION

It seems clear that contract law will be called upon to do much more work in the field of workplace relations, following the enactment of the WorkChoices legislation. How effective contract law will be in ensuring fair dealing in workplace relationships will depend very much on the ability of our judiciary to return to fundamental principles of contract law and to develop those principles in a way which recognises the relational nature of employment contracts. As this paper has attempted to show, one of the most fundamental and important principles is that a contract is a real agreement and not merely words on paper. If WorkChoices is to fulfil its political promise of encouraging freely negotiated workplace bargains so that employers and employees may enjoy mutually beneficial, productive relationships, then principles such as the principle of good faith performance need to be developed in this field. Likewise, doctrines developed to resolve commercial and property disputes – such as estoppel by convention – need also to be invigorated in the employment law context.

52 For full authorities on the parol evidence rule and the contemporary departure from it, see Kevin Lindgren, John Carter and David Harland, *Contract Law in Australia* (3rd ed, 1996) 224.