

Terms Implied by Law into
Employment Contracts: Rethinking
their Rationale

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ABSTRACT

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

DECLARATION

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

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

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

Gabrielle Golding, 'Terms Implied by Law Into Employment Contracts: Are they Necessary?' (2015) 28 *Australian Journal of Labour Law* 113.

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

Gabrielle Golding, 'Terms Implied by Law: Are they Necessary?' (Paper presented at the Seventh Biennial Australian Labour Law Association Conference, Manly, 13-15 November 2014).

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

Gabrielle Golding, 'The Role of Judges in the Regulation of Australian Employment Contracts' (2016) 32 *International Journal of Comparative Labour Law and Industrial Relations* 69.

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

Gabrielle Golding, 'Courts, Parliament and the Regulation of Australian Employment Contracts' (Paper presented at the Second Biennial Labour Law Research Network Conference, Amsterdam, 25-27 June 2015).

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

Gabrielle Golding, 'High Court Rules Out Mutual Trust and Confidence in Australian Employment Contracts: *Commonwealth Bank of Australia v Barker* [2014] HCA 32' (2014) 36 *Bulletin (Law Society of South Australia)* 12.

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

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

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

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

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Signature: Gabrielle Golding

8 March 2017

Date

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

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