ALTERNATIVE ACTIONS IN THE LIGHT OF WORK CHOICES—IMPLIED TERMS

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THE EMERGENCE OF WORKPLACE CONTRACT LAW?

Practitioners of employment and industrial law have always needed a sound knowledge of contract law, however, a number of changes in recent years have created more pressure to think creatively about the work that contract law principles might play in employment dispute resolution. The first significant challenge to New South Wales practitioners was the 2002 amendment to the Industrial Relations Act 1996 (NSW) which closed off access to the unfair contracts review provisions in that legislation to employees on incomes higher than $200,000 a year.[1] Those changes are now well–documented and hopefully already well–digested by the legal market.[2] The Workplace Relations Amendment (Work Choices) Act 2005 (Cth) (Work Choices) offers some new challenges. Employees of constitutional corporations will no longer have access to unfair dismissal protections in state legislation,[3] and employees of constitutional corporations with 100 or fewer employees will have no access to the federal provisions either.[4] Employees of constitutional corporations will have no access to any state provisions allowing review of unfair contracts. So it may be that those employees who are aggrieved by the termination of their employment and would once have sought either an unfair dismissal remedy, or review of an unfair contract, will seek a remedy in the common law courts instead – if they have the resources to bring such an action. Perhaps those who enjoy the assistance of trade unions, or whose cases attract the assistance of lawyers doing pro bono work, will be able to afford to do so.

It is possible that the Work Choices amendments to collective workplace agreement making may also encourage unions to seek common law collective agreements to secure the kinds of commitments that employers may now be prohibited from making when the minister tables Regulations under the new section 101D to the Workplace Relations Act 1996 (Cth). Such a development would also test the application of contract law principles, if disputes were to arise over the interpretation or breach of such agreements.

In the light of these developments, it is timely to consider the principles of contract law, and their potential application in workplace dispute resolution. In this paper I will leave aside the question of common law collective agreements, and focus on individual employment contract law matters.

IMPLIED TERMS

I have been invited in particular to consider the role that implied terms may play in resolving employment contract law disputes. To this end, I would like to make two observations.

The first observation is that it seems that many employers now seek to leave as little room as possible for the implication of any terms, by requiring their staff to sign elaborately detailed employment contracts. So the first issue we might address here is: what role remains for implied terms in an era of detailed and often standard form employment contracts? To this end I would like to make some brief comments on the recent decision of Simpson J in Network Ten Pty Ltd v Rowe.[5]

The second observation is that the employer's duty not to destroy mutual trust and confidence in the employment relationship has made considerable progress

in developing the common law of employment contracts in the United Kingdom, but is still standing at the threshold in Australia. I will identify where I think the development of this concept stands in Australian law at the moment. I will also attempt to explain how I think this obligation is most sensibly understood. It is often described as a term implied into employment contracts as a matter of law, however there is a cogent argument that this duty is better understood as a principle of construction of employment contracts. Here I would like to digest some thoughts from a chapter in my recently published book, Employee Protection at Common Law.[6]

THE DEVIL IN THE DETAIL

During a symposium titled 'Reconstructing Employment Contracts' held at the London School of Economics on 13 January 2006, Mummery LJ commented (in reflecting on a paper by Professor Hugh Collins concerning the rise of standard form employments) that detailed written employment contracts often left a judge with a difficult task indeed, because the terms of some elaborately worded document frequently bore no resemblance to the actual course of dealing between the parties to the employment relationship. Some documents, he said, proved to be complete works of fiction when compared with the way the parties had conducted their relationship, prior to the breakdown which brought them before the court.

This raises an important question. In employment contract law, should the express terms of a written contract be given the same precedence as express written terms are generally given in commercial contracts? In the leading case on implied terms where a contract is in writing—BP Refinery (Westernport) Pty Ltd v Shire of Hasting[7]—Lord Simon of the Privy Council stated five requirements for implication of a term. The fifth was that the proposed term 'must not contradict any express term of the contract'.[8] How useful is such a rule where it is clear on the face of the evidence before the court that the written document does not in truth describe the agreement between the parties? Too often, long written documents are prepared by lawyers using standard precedents designed to provide their employer client with an ironclad protection in case of dispute. These are presented to the employee—often after the employment relationship has in fact commenced—and signed without any negotiation, or even attention whatsoever. I speak from experience here. I was once invited to take up a contract teaching position in an institution—not the esteemed institution which currently employs me. I was asked to sign a contract which contained a number of very onerous and in my view completely unnecessary clauses requiring me to take out a particular type of professional indemnity insurance, and requiring me to surrender up intellectual property rights in any material I adopted for use in my classes, whether or not the material was prepared solely for those classes or not. I did not wish to sign the contract document while these clauses remained in it, so I attempted to negotiate some amendments. I was told that the institution itself could not negotiate any amendments, because 'that is the contract our lawyers tell us to use', and in any event, the institution had no intention of enforcing any of the particular clauses I had identified as problematic. The human resources professional with whom I was dealing could not understand my refusal to sign the document. I passed up the opportunity of engagement, and the institution lost the opportunity to benefit from my services, because being a lawyer I understood that should a dispute ever arise between us I would have a very difficult time arguing that the terms of the written document should be ignored. And yet in such a case as this, the terms of a written document which bore no relationship to the real agreement between the parties should indeed have been ignored. The piece of paper created by the lawyers did not reflect the true terms of the offer I was invited to accept.

An argument based on implied terms will not assist a person who has signed such a document. The common law may offer a solution in the more esoteric doctrines of estoppel, especially estoppel by convention,[9] but implied contractual terms will not assist. This indicates, to my mind, a serious weakness in contract doctrine when it comes to sorting out disputes in employment relationships. If the standard form contract document does not reflect the real agreement between the parties, why should it be given any respect at all at the time of dispute? As far as I can see, however, in employment law, as in commercial law generally, the terms in a signed document will invariably carry considerable weight in determining disputes.

There are, however, two sides to this problem. The one side is that described above, that the terms of the document may not reflect the real agreement between the parties and may unfairly disadvantage the employee should a dispute arise. The other is that a standardised contract prepared by lawyers to shield the employer from all risks that might arise in the employment

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relationship may prove to be more cautious than the employer really wants or needs. The recent litigation involving Network Ten and one of its news presenters, Jessica Rowe, illustrates this side of the problem.

It appears that Network Ten preferred to engage Ms Rowe on fixed term contracts. Network Ten surely had its own reasons for this. Many other employers also adopt short term fixed contracts because they want to limit their liability for severance pay on termination of contracts at the end of the term. As it turned out, Network Ten did not want Ms Rowe to leave at the end of the two year fixed term stipulated in her most recent contract with them. Network Ten tried to prevent her from taking up a position with a rival television network, by claiming that a clause of the contract obliged her to give 26 weeks notice of her resignation, and that this notice period had to be given, even if the proposed termination date would fall beyond the conclusion of the fixed term.

The problem posed for the court was how to interpret the apparently conflicting terms of this contract. This was really a problem of interpretation of express terms, and not one of implying terms. The contract signed by the parties stated that the agreement was an 'entire agreement', so there was no room to accept the employer's invitation to imply terms from the way the parties had conducted themselves throughout the relationship. In the end, resolution of the problem fell to an interpretation of the document read as a whole. Most importantly, the document provided for remuneration at a set amount in each of the two calendar years of the fixed term. It made no provision for any remuneration to be paid beyond that date. That being so, it was held that the contract must terminate on the expiry of the fixed term and the notice provision must be read as a provision allowing for early termination within that fixed term. Any other interpretation would mean that Ms Rowe could be required to work for Network Ten after her right to receive remuneration had expired. Simpson J's decision was entirely consistent with the NSW Court of Appeal decision in Bredel v Moore Business Systems Ltd,[10] a case in which a sales representative who kept working beyond the end of a contract which fixed his base salary and commission rate was held to have no contractual entitlement to any commission rate beyond the end date of his contract, despite the fact that he had continued to make sales, and the employer had continued to accept his services.

In summary, the point to be made from the above discussion is that there is very little opportunity to imply terms to resolve employment disputes when the parties have brought into existence a highly detailed written document purporting to govern their relationship. Both sides—employees and employers—stand to suffer disappointed expectations if they too readily adopt a document which does not truly record their mutual expectations. There is a deep irony in this. Contracts are supposedly enforceable at law because they represent the serious and voluntary commitments of autonomous persons. Perhaps contract law made a lot more sense—theoretically at least—before the advent of computer word processing.

MUTUAL TRUST AND CONFIDENCE

From these pessimistic beginnings, allow me now consider the more hopeful issue

of the scope for the so–called 'mutual trust and confidence' obligation to resolve employment disputes.

First, allow me to set at rest a rumour that mutual trust and confidence is dead in the water in New South Wales. I believe too much has been read into some remarks by Hoeben J in Heptonstall v Gaskin (No 2),[11] 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'.[12] He also said that 'due weight' ought to be given to its acceptance by the United Kingdom's highest authority, the House of Lords.[13] And most importantly, he refused to strike out the claim. Likewise in Irving v Kleinman,[14] 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. Although the High Court of Australia has not had to decide any question concerning the existence of this obligation, it has alluded to its existence in uncritical terms, most recently in Koehler v Cerebos (Australia) Ltd.[15] Many Australian courts below the High Court have accepted its existence.[16] In my view, the question is not whether employers owe a contractual duty not to destroy the mutual trust and confidence inherent in the employment relationship, but what kind of conduct will constitute breach of that obligation and what the remedial consequences of breach might be. These are indeed difficult questions, and ones upon which we have very little in the way of Australian appellate decisions to draw for answers. We can however make a few reliable observations about the duty.

The first is that breach of the duty gives rise to a constructive dismissal. The employer's breach of the duty of mutual trust and confidence constitutes a repudiation of the employment contract, giving the employee an entitlement to terminate the employment relationship and lay the blame for termination at the employer's feet. Any remedies available upon termination by the employer will be available to the employee.[17]

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 any of its own policies and procedures concerning the treatment of employees which have been communicated to employees. Cases which illustrate this principle include Thomson v Orica Australia Ltd[18]—in which Allsop J of the Federal court held that an employer had breached its duty of mutual trust and confidence by flouting its own policy for return to work after maternity leave. Allsop J held that even if the policy was not incorporated into the employment contract, ignoring the policy signalled the employer's lack of regard for the employee and so constituted breach of mutual trust. Ms Thomson's remedy was to seek damages for wrongful dismissal.

A similar case is Dare v Hurley,[19] where Driver FM held that an employer's best practice human resources procedures manual had been ignored when the employee was summarily dismissed. The procedures manual provided that employees should be given warnings if they failed to meet certain performance or conduct standards, which were also set out in the manual. Ms Dare's letter of appointment required that she agree to be bound by these procedures, and although the letter did not expressly commit the employer to do likewise, Driver FM held that the employment contract would be unworkable unless the obligation to observe the procedures manual was reciprocal. (The notion that a term may be implied if it is necessary to give the agreement 'business efficacy' adopts one of the five tests for terms implied in fact from the BP Refinery decision.[20]) Driver FM noted that the employer had 'taken the trouble to become a quality endorsed business by Standards Australia'[21] and that its proprietor, Mr Hurley, 'placed great store on following procedures'. Most importantly for our concerns here, Driver FM held that it would be inconsistent with the mutual obligation of trust and confidence implied by law into all employment contracts if the employer were free to ignore the procedures that bound the employee.[22]

On the negative side, it seems clear that in Australia, breach of the duty of mutual trust and confidence will not give rise to an entitlement to claim damages for hurt feelings, distress or humiliation upon termination of employment in a harsh and rude manner. The principle in Addis v Gramaphone Co Ltd[23]—that no damages flow from the manner of breach of a contract of employment – appears entrenched in Australian law. The Work Choices amendment to the federal unfair and unlawful dismissal provisions which inserts a prohibition on the Commission or a court allowing any compensation in respect of 'shock, distress or humiliation, or other analogous hurt' caused

to the employee by the manner of terminating the employee's employment'[24] demonstrates that Federal Parliament has shut its ears to arguments that it is time to reconsider the Addis principle (as has in fact been done in New Zealand[25]). It seems to me unlikely that a court would be persuaded to grant damages for distress due to the manner of dismissal in a common law suit, in the face of this clear legislative statement opposing such a development.

While it perhaps makes sense that hurt feelings alone ought not to sound in damages for breach of an employment contract, it is certainly arguable that the employer's egregious behaviour ought to sound in damages if it causes the employee some pecuniary loss. If an employee is able to show that the employer's breach of the duty of mutual trust and confidence has indeed inhibited the employee in obtaining other employment, recovery of damages ought to be allowed. This principle is affirmed by the leading House of Lords decision in Malik and Mahmud v Bank of Credit and Commerce International SA (in liq),[26] although the plaintiffs in that case were ultimately unable to sustain a claim on the facts.[27]

OVERLAP WITH THE DUTY OF CARE?

Addis also leaves room for claims of damages where more serious personal harm is caused by the employer's egregious behaviour, but such a result is more likely if the claim is framed as a breach of the employer's duty of care to the employee during the employment relationship. In Patrick Stevedores (No 1) Pty Ltd v Vaughan,[28] the NSW Court of Appeal affirmed a significant damages award to an employee who had suffered psychiatric illness after being left by his employers to the abuse of striking waterfront workers. The claim was framed as a breach of the employer's duty of care to the employee. Care needs to be taken in framing such claims after the High Court of Australia's decision in Koehler v Cerebos (Australia) Ltd[29] In that case, the court refused to allow the victim of a work stress induced illness to recover damages, on the basis that she had agreed to undertake the excessive duties when she accepted employment. The court effectively allowed the employer to rely on a 'voluntary assumption of risk' argument. Nevertheless, even in that case, the court leaves room for successful claims, where the employee can demonstrate that she suffered harm as a consequence of complying with an employer's instructions to vary her original duties. The joint judgment of McHugh, Gummow, Hayne and Heydon JJ stated:

It may be that different considerations could be said to intrude when an employer is entitled to vary the duties to be performed by an employee and does so.[30]

It is likely that the employer's duty of care will prove a more fruitful source of appropriate remedies for employees than the mutual trust and confidence obligation, when the question concerns serious work–related illness. This contractual duty also overlaps with duties in tort and statutory obligations to maintain a safe work place.

POTENTIAL DEVELOPMENT OF MUTUAL TRUST AND CONFIDENCE

As the above discussion suggests, we have a long way to go in developing the concept of an employer's obligation of mutual trust and confidence in Australia, if we are to follow developments in the United Kingdom. I make an argument in Employee Protection at Common Law that the English jurisprudence has reached the point that this duty entails a positive obligation to treat employees fairly and even–handedly, and I draw particularly on the decision of BG plc v O'Brien,[31] affirmed on appeal in Transco plc (formerly BG plc) v O'Brien.[32] In that case, the employer's duty of mutual trust and confidence lead to an order requiring the employer to offer the same contractual benefits to an aggrieved employee as had been offered to all similar staff. Where might such an obligation take us in Australia?

It seems to me that the mutual trust and confidence obligation has the potential to foster useful development in employment contract law if it is seen not as a stand alone term implied into the employment contract, but as a principle of interpretation to be applied to all terms of the contract. Often, employment contracts are open–textured. They reserve considerable discretion to employers to determine important aspects of the relationship from time to time: rights to receive bonuses or other performance based incentives can be expressed to be at the absolute discretion of the employer; likewise, the allocation of work, and requirements to relocate to other sites can be left to the employer's discretion. The mutual trust and confidence obligation could perform a useful role in employment law as a restraint on the employer's exercise of these discretions in ways which would harm employees. Where an employment contract allows the employer a discretion, the obligation of mutual trust and confidence would require the employer to exercise that discretion in a fair and even–handed manner, and not in a manner calculated to destroy mutual trust and confidence in

the relationship. In this respect, mutual trust and confidence may be seen as analogous to a good faith obligation—powers are to be exercised for proper purposes and in the spirit of mutual cooperation which underpins contractual obligation. Exercising discretions for proper purposes means, for example, that a discretion to determine performance bonuses should be exercised taking into account the purposes for which the discretion was created: to create incentives for productive work and to link employee remuneration to firm profitability. A capricious or arbitrary exercise of the discretion for an improper purpose—such as to punish a high performing employee for some non–work related conduct—would be in breach of the duty of mutual trust and confidence.

To illustrate this point, let us consider the typical NSW unfair contracts review case brought by an executive employee aggrieved by a sudden termination which disappoints expectations of rewards under a performance based remuneration scheme. Many such cases were brought (prior to the 2002 amendment imposing an income limit on claims) by people claiming pro–rata entitlements to bonuses or share options when they were made redundant prior to the vesting of these benefits.[33] The disputes in these kinds of cases often arise because there are collateral contracts or arrangements with conflicting provisions. Typically, a share option scheme claims to provide performance incentives and promises benefits contingent on periods of service, but if it says nothing about pro–rata vesting in case of early termination through no fault of the employee, it leaves open the prospect that an employee may perform for the employer's benefit, without receiving the full remuneration promised for that work. If the employment contract also provides for termination on short notice, without providing a means for paying performance rewards on a pro–rata basis, the employee who is terminated shortly before accruing full entitlement to important benefits will be seriously aggrieved. If this happens in circumstances where it appears that the employer has deliberately engineered this result for opportunistic reasons, or to inflict harm on the employee, then there is a clear case that the employer has breached the duty of mutual trust and confidence.

The remedy that ought to flow from such a breach is that which would put the employee in the position she would have been in, had the breach not occurred. In a case like Canizales v Microsoft Corporation[34] (decided in the NSW unfair contracts jurisdiction) the remedy granted for this kind of opportunistic conduct was to extend the notice period for termination from one to two months (a reasonable enough period for a senior executive) which was a sufficient period to entitle the employee to receive benefits under a share option scheme.

Essentially, holding that the obligation of mutual trust and confidence requires an employer to perform the contract and exercise any discretion under the contract in good faith would bring Australian law into line with the kinds of decisions made by English courts. For example, in Clark v BET,[35] an employer was required to exercise its discretion to provide salary raises over the term of a fixed term contract in good faith, and in Clark v Nomura International plc,[36] an employer was required to provide a proportion of an annual performance bonus to a high performing employee dismissed nine months into a financial year.

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At the moment, we are seeing these kinds of decisions only in the unfair contracts review jurisdictions.

This approach has the advantage that mutual trust and confidence informs the performance of all obligations under the contract, so it can influence the remedy granted, and does more than simply identify a point at which the relationship has broken down, at the fault of the employer.

EXCLUDING MUTUAL TRUST AND CONFIDENCE

In closing, I would like to reflect on the interrelationship between my two principal observations—the first that employers are using more elaborate standard form contracts to exclude implication of terms, and the second that the obligation of mutual trust and confidence may fruitfully be developed in Australia as it has in the United Kingdom. The overlap concerns a difficult question, often raised in discussion among practitioners: can the obligation of mutual trust and confidence be excluded by an express term in a contract of employment? After all, terms implied by law (except that special class of conditions entrenched by mandatory statutes) can be excluded by express provision in a contract. Clearly the question arises because the drafters of those standard form contracts want to be able to sell their employer clients an ironclad guarantee that they will never face a successful damages claim from an employee.

Allow me to make some speculative observations about this strategy.

First, a contract which excludes an obligation of mutual trust and confidence would not, on its face, be an employment contract at all. Mutual trust is of the essence of the employment relationship. So a contract which excluded that obligation may also by implication exclude all of the other terms which are implied into employment contracts by virtue of their nature in describing employment relationships: the duty to obey lawful and reasonable orders, the duty of fidelity. So it would appear to me to be a very dangerous experiment to attempt to exclude mutual trust and confidence on behalf of the employer.

Secondly, a written document which excluded obligations of mutual trust on behalf of the employer is likely to completely contradict the communications between the parties at the outset of the relationship. Such a term in a written contract may be the very signal that an astute and conscientious judge might use to make a finding that the written document bore no relationship to the real agreement between the parties to this relationship at all. As we all learned in law school, a contract is an agreement—a consensus between autonomous parties. It need not be in writing, and the existence of some writing does not in itself determine the question of what constitutes the contract. As McHugh JA (as he then was) said in State Rail Authority of New South Wales v Heath Outdoor Pty Ltd,[37] the parol evidence rule (privileging the words of a written document over oral testimony) has no operation until it is first determined that the contract is in fact in writing.[38] A clause excluding mutual trust from an employment relationship would be evidence indeed that the real contract was not contained in the document at all.

Finally—and perhaps most speculatively—a contract of employment expressly excluding the employer's obligation of mutual trust, but preserving all the employee's duties, may fall foul of statutory prohibitions on misleading and deceptive or unconscionable conduct.[39] It may arguably be challenged under the provisions of the Contracts Review Act 1980 (NSW). This statute, which allows review of contracts which are relevantly unjust at the time they are made, affords the court a broad discretion to grant a range of remedies, 'if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result': section 7(1). The statute has principally been used by consumers under finance contracts. In principle, there appears to be no reason why this Act should not apply to an employment contract, so long as it is not excluded by the general exception in section 6(2), for contracts entered into in the course of or for the purpose of a trade, business or profession. Section 21 explicitly contemplates that 'contracts of service' are within the purview of the Act, except to the extent that they include terms which are consistent with some industrial award.

CONCLUSIONS

On the whole, I believe it is true that contract law will be called upon to do much more work in the field of workplace relations, following the enactment of the Work Choices 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 a wad of paper.

REFERENCES

1. See the Industrial Relations Amendment (Unfair Contracts) Act 2002

2. See for example Gibson S 'Section 106: Call for Legislative Reform Should be Silenced' (2002) 24 Sydney Law Review 231.

3. See Workplace Relations Act 1996 (Cth) s7C

4. See Workplace Relations Act 1996 (Cth) ss170CE(5E)–(5F)

5. [2005] NSWSC 1356 (30 December 2005)

6. Federation Press, Sydney, 2005

7. (1977) 180 CLR 266

8. Ibid at 283

9. For detailed argument on this issue, see Riley J Employee Protection at Common Law, Federation Press, Sydney 2005, Chapter 4

10. [2003] NSWCA 117

11. [2005] NSWSC 30

12. Ibid at [23]

13. 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 Brodie D '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 Employee Protection at Common Law, pp 77–83

14. [2005] NSWCA 116 at [27]

15. [2005] HCA 75 at [24]

16. 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; [2001] NSWIRComm 207, 109 IR 56, per Haylen J at 66. See also Gambotto v John Fairfax Publications Pty Ltd (2001) 104 IR 303; [2001] NSWIRComm 87, 104 IR 303 per Peterson J at 309–311; Hollingsworth v Commissioner of Police (1999) 88 IR 282 at 318 (per Wright and Hungerford JJ); Aldersea & Ors v Public Transport Corporation [2001] 3 VR 499; [2001] VSC 169 (28 May 2001) at par 67; Jager v Australian National Hotels Ltd (1998) 7 Tas R 437; [1998] TASSC 54 (12 May 1998); Thomson v Broadley & Ors [2002] QSC 255 (20 June 2002); Linkstaff International Pty Ltd v Roberts (1996) 67 IR 381 (IRC of SA)

17. See for example Russian v Woolworths (SA) Pty Ltd (1995) 64 IR 169, where a statutory remedy flowed from a constructive dismissal.

18. (2002) 116 IR 186

19. [2005] FMCA 844 (12 August 2005)

20. (1977) 180 CLR 266 at 282–283

21. At par [112]

22. At par [121]

23. (1909) AC 488

24. See ss 170CH(7A) and 170CR(1A)

25. See Stuart v Armourgard Security [1996] 1 NZLR 484

26. [1997] 3 WLR 95

27. See Husain v BCCI [2002] EWCA Civ 82

28. [2002] NSWCA 275

29. [2005] HCA 15

30. At par [37]

31. [2001] IRLR 496

32. [2002] IRLR 444. See Employee Protection at Common Law at pp 77–83

33. See for example Mitchell–Calvert v Yahoo! Inc (2001) 106 IR 36; Westfield Holdings Ltd v Adams (2002) 114 IR 241

34. (2000) 99 IR 426

35. [1997] IRLR 348

36. [2000] IRLR 766

37. (1986) 7 NSWLR 170 at 191

38. For full authorities on the parol evidence rule and the contemporary departure from it see Carter J W and Harland D J Contract Law in Australia, 3rd ed, 1996 pp224ff.

39. See the Trade Practices Act 1974 (Cth) ss52 and 51AA

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