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*Practice Group(s):*

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## A Win for Employers: High Court of Australia Rejects the Expansion of Employment Law Rights

*Australia Labour, Employment and Workplace Safety Alert*

*By Nick Ruskin and David Hartnett*

The High Court of Australia (High Court) has handed down a much anticipated decision in *Commonwealth Bank of Australia v Barker* [2014] HCA32 (10 September 2014) with respect to the implied term of mutual trust and confidence in employment contracts.

The Federal Court had previously held that employment contracts contain an implied term of mutual trust and confidence. As a consequence, employers (and probably employees) were subject to what amounted to a general obligation to treat the other party to the contract fairly or reasonably. That obligation was uncertain in its scope and extended the operation of the employers' (and probably employees') express contractual obligations.

The key issue which arose on appeal is whether Mr. Barker's employment contract contained an implied term of mutual trust and confidence.

The High Court has overturned the earlier decisions of both the Federal Court (3 September 2012) and Full Court of the Federal Court (6 August 2013) by concluding that under the common law of Australia, employment contracts do not contain an implied term of mutual trust and confidence.

The Federal Court's finding in September 2012 that employment contracts contain an implied term of mutual trust and confidence, and the Full Court of the Federal Court's confirmation of that decision in August 2013, albeit adopting a different approach, was the first time that a superior Court in Australia had made such a finding. The immediate result was a significant number of claims being made by employees alleging a breach of the mutual trust and confidence term, often in conjunction with another cause of action. The Commonwealth Bank's (CBA) appeal provided the High Court with an opportunity to settle this very contentious issue and it has done so by allowing CBA's appeal.

### *Facts*

Mr. Barker was a long serving employee of the CBA. His employment contract stated that he would be provided with a redundancy payment if he could not be redeployed. He was dismissed on the basis of redundancy. Mr. Barker contended that CBA did not make a sufficient effort to redeploy him and that its conduct constituted a breach of the implied term of mutual trust and confidence.

### *The Decision*

The High Court held that employment contracts do not contain a term that neither the employer nor the employee will, without reasonable cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between them. The High Court held that the term was not implied in law in employment contracts generally.

Central to the High Court's decision was the view that the implication of the term into employment contracts is not 'necessary', in the sense that would justify the exercise of

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the Court's judicial power in a way that may have a significant impact upon employment relationships, and the law of contract of employment in Australia. The High Court elaborated on the concept of 'necessity' by referring to terms that an employment contract implicitly requires to operate. The Court held that the concept of 'necessity' is not satisfied by demonstrating the reasonableness of the implied term.

In making its decision, the High Court concluded that it was not appropriate for it to follow the approach taken by the Courts in the United Kingdom, which have found that the implied term does exist in employment contracts. In that regard, the High Court concluded that it must be cautious to observe the dividing line between judicial and legislative powers in Australia. It concluded that importing a term of mutual trust and confidence into employment contracts would trespass into the province of legislative action in the Australian context, which is not appropriate for the judicial branch of Government.

### *Significance for Employers*

The decision is of great significance to employers as they are no longer exposed to uncertain and ill defined potential claims arising out of their conduct, or alleged conduct, towards employees. Employers can now take comfort that their legal relationship with their employees will be determined primarily by well defined contract law principles and legislative provisions. Employment contracts in Australia still contain numerous implied terms, however, none of those are of such wide reaching and ill defined scope as the purported implied term of mutual trust and confidence. The case represents a significant win for employers.

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