

Estoppel in the Employment Context: A Solution to Standard Form Unfairness?

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A solution to standard form unfairness?*

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* This paper is work in progress. Some elements have already been published in 'The Evolution of the Contract of Employment, post *Work Choices*' (2006) 29 *UNSWLJ* 166, and 'Alternative actions in the light of *Work Choices*: Implied terms' (2006) 106 *Australian Construction Law Newsletter* 12-19.

Introduction

My object in this paper is to propose the invigoration of an old legal tool – estoppel by convention – to fix an emerging problem in workplace law: the problem of the fictional contract document. It seems to me that considerable injustice can be done at the time of severance of a work relationship if the parties are held to the terms of a written document that does not reflect the reality of their agreement. It also seems to me that this is not an infrequent problem – and it arises because of the nature of working relationships.

When people enter into arrangements through which one will provide labour for the other on a continuing basis, we might describe their relationship according to the three ‘rationalities’ described by Hugh Collins in his monograph, *Regulating Contracts*.¹ These ‘rationalities’ forming the normative framework of the working relationship are the business relation, the business deal, and the contract.

The business relation describes the contextual reality of the parties’ interdependent relationship. The business deal describes the particular bargain they propose to engage in, within that context. The written contract is a planning document that attempts to describe that deal – but it may do so imperfectly. This is because it can be difficult to capture within the terms of a document the expectations of parties to an evolving, co-operative relationship. Working relationships are *not* – despite the *Work Choices* rhetoric – just like any other commercial contract. They are certainly very *unlike* simple commercial sales transactions. The ‘employment contract’, if contractual at all, is a relational contract.²

Collins has suggested that the business relation and the deal are of greater real importance to the parties to a relational contract than the contract documenting the deal, especially while the relationship thrives. And yet when courts are called upon to resolve disputes, the contract documentation is given precedence. Collins states that this should *not* be so:

¹ H Collins *Regulating Contracts*, Oxford University Press, Oxford, New York, 1999, p 173.

² See J Riley *Employment Protection at Common Law*, Federation Press, Sydney, 2005, p 20.

Where the task requires the revision of planning documents or the interpretation of broad clauses designed to achieve flexibility and adjustments in performances, however, the courts normally fail to grasp the point that, in order to give effect to the business expectations based on the long term relation and the balance of the deal, they should be less mesmerised by the words of the planning documents.³

Certainly, if a contract document does not adequately reflect the reality of the parties' mutual expectations arising from the context of their relationship and the wider parameters of their deal, then rigid adherence to the contract document at the point of dispute resolution defeats the functional purpose of contract law to support the mutual expectations of the parties to voluntary agreements. Collins advises, 'the legal system must eschew closed reasoning in favour of doctrines which render the facts of these expectations central to its determinations'.⁴

This problem is especially acute where the contract in question is an employment contract – or perhaps a contract for services – entered into without any real negotiation, and on the basis that the worker will sign a standard form contract. New recruits are often blinded by enthusiastic optimism – or worse still, desperation for work – and will not properly consider the written document when it is issued to them. And even if they do pay some regard to the document, it may not reflect the mutual expectations of the parties to the relationship as it evolves over time. Where this is the case, legal rules which privilege the written document over evidence of the parties' real expectations of the relationship, create a risk of 'legally endorsed opportunism'.⁵ When the relationship ends, one party may opportunistically rely on the fiction of the document to secure an advantage which is not supported by the mutual expectations of the parties while the relationship survived.

The use of standard form employment contracts create a particular risk, especially where they have been downloaded from a precedent data base and used without appropriate modification for the particular circumstances of the relationship they purport to describe.

³ Collins above n 1 at 173.

⁴ *Ibid* at p 196.

⁵ *Ibid* at p 201.

Standard form unfairness?

The use of precedent documents in many areas of legal practice can provide a trap for the inexperienced or overworked lawyer. When drafting up a contract for a client, the temptation is often to start with the precedent document instead of the client's instructions. The risk of this strategy – in any area of law – is that it is possible to end up with a document that does not represent the deal that was done, or at least, a document that contains a number of express provisions that the parties never negotiated, or turned their minds to at all. If all contracting parties are equally well-advised, and if the document is examined thoroughly before execution, this risk will probably be avoided. But if the precedent is used to produce a standard form contract that is routinely issued without any opportunity for negotiation, and if the document is issued by an employer to an individual worker who signs it without proper consideration of its content, then the risk is high that the document will not truly reflect the mutual understandings of the parties.

This risk is especially high if the employer party *also* adopts the standard form document provided by the lawyers, without properly considering its content. Then you really *can* create problems – problems that will become acutely apparent if the employment relationship breaks down and litigation ensues.

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 Hugh Collins concerning the rise of standard form employment contracts⁶) that detailed written employment contracts often left a judge with a difficult task indeed. 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 dispute that brought them before the court.

So should the express terms of a written employment 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*

⁶ H Collins ‘Legal Responses to the Standard Form Contract of Employment’ *Reconstructing Employment Contracts: A Symposium*, London School of Economics, 13 January 2006.

*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, the standard form documents provided by lawyers are designed to provide their employer clients with ironclad protection from all manner of risks. The document drafted by the lawyer is sometimes accepted without consideration or comment by the employer, and issued to the employee for signature. Sometimes the employee will be given the document *after* the employment relationship has in fact commenced.

I speak from experience here. I was once invited to take up a contract teaching position in an institution – not the esteemed institution that currently employs me. The arrangements were made verbally, the course I was to teach was advertised to prospective students, and I prepared the course outline and materials. Some time after this agreement, but before I was due to commence the teaching work, 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 that bore

⁷ (1977) 180 CLR 266

⁸ *Ibid* at 283.

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 initially invited to accept.

Why did the standard form document contain such odd provisions (especially the one concerning professional indemnity insurance)? I suspect it was a document drawn up by reference to a set of standard precedent clauses for all manner of contracting arrangements. As I was not building anyone a battleship, however, it seemed entirely unnecessary that I should be required to dissipate a considerable portion of the modest fee for the work, in order to take out an expensive form of insurance designed to cover risks to third parties. The unwillingness of the institution to negotiate the terms of the agreement – notwithstanding their statement that they would not enforce it – showed that the legal document was being used as something other than contract documentation. It was indeed some kind of risk management tool – but it was not a true contract, according to the precepts we all learned at law school. It was not an agreement, arising from the communicated acceptance of a sufficiently certain offer, supported by consideration.

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.

A double-edged sword

There are two sides to this problem. One is that employees⁹ who have relied on assurances given verbally in the interview room will discover on termination that the severance terms in the document they subsequently signed are considerably more niggardly than they understood them to be. The other, however, is that a standardised contract prepared by lawyers to shield the employer from all risks that might arise in the employment relationship may prove to be more cautious than the employer really wants or needs. A dispute at the beginning of 2006 between the television

⁹ The arguments in this paper are equally applicable to individual independent contractors.

broadcaster, Network Ten, and one of its news presenters, provides an illuminating example.

*Network Ten Pty Ltd v Rowe*¹⁰ 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. 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, and, 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 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.

¹⁰ [2005] NSWSC 1356 (30 December 2005).

Simpson J 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.

In this respect, Simpson J's decision was entirely consistent with the NSW Court of Appeal decision in *Bredel v Moore Business Systems Ltd*.¹¹ In that case, 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.

Ten's counsel attempted to persuade the court to imply a term into the contract, on the basis of the way the parties had conducted their relationship. Justice Simpson rejected this invitation, for the orthodox reasons explained above: 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*.¹²

Of course, a contract of employment need not be in writing, and the mere existence of some writing (even an elaborate document) 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*,¹³ 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.¹⁴ Unfortunately for Ten, however, its own document settled any argument over whether there were other oral contractual terms. The 'entire agreement' clause precluded finding any oral terms.

This case provides a poignant illustration of the risks of adopting a contract document that does not reflect the mutual expectations of the parties. There is very little opportunity to imply terms to resolve employment disputes when the parties

¹¹ [2003] NSWCA 117.

¹² (1977) 180 CLR 266 at 283.

¹³ (1986) 7 NSWLR 170 at 191.

¹⁴ For full authorities on the parol evidence rule and the contemporary departure from it see JW Carter and D J Harland *Contract Law in Australia*, 3rd ed, 1996 at pp 224ff.

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 that 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.

An escape route?

Is there a way out of this problem? Collins describes the common law courts' tendency to prefer the terms of the written contract as a 'virus of legal formalism'.¹⁵ I am going to suggest that estoppel – and particularly estoppel by convention – may provide a reliable antidote in appropriate cases.

Estoppel is a well-established legal tool which may be called in aid by a party to a relationship who seeks to rely on commitments made outside of a formal contract. It has been described as 'one of the most flexible and useful in the armoury of the law'.¹⁶ Patrick Parkinson has articulated the essence of estoppel thus:

The object of estoppel is to preclude the unconscientious departure by a party from an assumption for which he or she bears some responsibility, and which has been adopted by another party as the basis of a course of conduct, an act or an omission which would operate to that other party's detriment if the assumption were not adhered to.¹⁷

Whether estoppel is in fact one or many doctrines remains a topic of some debate. It may be seen as a 'federation of principles with a unifying idea in common',¹⁸ or as a single coherent and unified doctrine.¹⁹ Some English authority has suggested resistance to the notion (espoused by former Chief Justice of the High Court of

¹⁵ Collins above n 11 at p 201.

¹⁶ *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1981] 3 All ER 577 per Lord Denning MR at 584.

¹⁷ P Parkinson, 'Estoppel', in P Parkinson (ed) *Principles of Equity*, 2nd ed, Lawbook, Sydney, 2003 at p 211, par [701].

¹⁸ P Parkinson 'Equitable Estoppel: Developments after *Waltons Stores (Interstate) Ltd v Maher*' (1990) 3 *Journal of Contract Law* 50 at 68

¹⁹ See *Waltons Stores (Interstate) v Maher* (1988) 164 CLR 387 per Deane J at 451 and *Commonwealth v Verwayen* (1990) 170 CLR 394 per Mason CJ at 413, and Deane J at 440. See also A Robertson 'Towards a Unifying Purpose for Estoppel' (1996) 22 *Monash University Law Review* 1-29.

Australia, Sir Anthony Mason) of a single overarching doctrine of estoppel.²⁰ In *Republic of India v India Steamship Co Ltd (The Indian Endurance) (No 2)*²¹ Lord Steyn expressed concern that too high a level of abstraction in formulating an overarching principle for estoppel might ‘blur the necessarily separate requirements’ for different kinds of estoppel.

For the purposes of this paper I will take this more conservative view – that the distinct characteristics of particular ‘species’ of the genus ‘estoppel’ need to be regarded in formulating arguments to solve particular disputes. It is a view that appears to be consonant with current judicial attitudes – particularly on the current High Court – in this new age where ‘judicial activism’ of any kind, past or present, is viewed with suspicion and scorn. In this paper, I will investigate the scope for a particular species of common law estoppel, known as estoppel by convention, to address the injustices often inflicted on parties to workplace contracts by unthinking reliance on a document purporting to be an entire contract.²²

This approach necessitates an excursion back through history, to early authorities on common law estoppel.²³

Common law estoppel

The common law recognises many kinds of estoppel. Generally, an estoppel prevents a person from denying the veracity of a state of affairs which they have asserted – explicitly, by acquiescence or by conduct – to be true. The usual result in the case of a common law estoppel is that the parties’ rights and entitlements are determined as if the assertions were true.

The principles of estoppel *in pais* (or estoppel by conduct) were set out by Sir Owen Dixon in *Grundt and Others v The Great Boulder Proprietary Gold Mines Limited*.²⁴ Five forms of common law estoppel were identified in that case:

²⁰ See for example *First National Bank plc v Thompson* [1996] Ch 231 at 236 per Millett LJ, and *Republic of India v India Steamship Co Ltd (The Indian Endurance) (No 2)* [1998] AC 878 at 914 per Lord Steyn.

²¹ Above n 20.

²² For an argument that equitable estoppel may have work to do in the field of workplace contracts, see J Riley *Employee Protection at Common Law*, Federation Press, Sydney, 2005, at pp 102-134.

²³ For a complete taxonomy of estoppel, see A K Turner (ed) *Spencer Bower and Turner: The Law Relating to Estoppel by Representation*, 3rd ed, Butterworths, London, 1977. See also A Leopold ‘Estoppel: A Practical Appraisal of Recent Developments’ (1991) 7 *Australian Bar Review* 47 at 71-73; and Justice K Handley AO ‘Estoppel’ (2006) 20(2) *Commercial Law Quarterly* 29.

1. Where parties have mutually assumed a particular basis for their relationship, regardless of the actual terms of any written contract or deed. This is estoppel by convention.²⁵
2. The principle that one may not approbate and reprobate²⁶ – one cannot take a benefit of a transaction without also accepting any burden which attaches to that transaction.
3. Remaining silent, or acquiescing in another's mistake, when good conscience would dictate an obligation to speak out. The proprietary estoppel cases are founded on this principle.²⁷
4. Negligently inducing another to make and rely upon an assumption.
5. Estoppel by direct representation. At common law, estoppel by representation must be a representation of an existing fact or state of affairs, not a representation of future intention or promise. The persistence, despite criticism, of the distinction drawn between present facts and future promises by a majority of the House of Lords in *Jorden v Money*²⁸ has maintained a divide between common law and equitable (or 'promissory') estoppel.

It is clear from this taxonomy, that estoppel by representation (requiring a sufficiently clear statement of fact which another relies on to their detriment) is by no means the only form of common law estoppel. Indeed, the facts in *Grundt* gave rise not to estoppel by representation, but to estoppel by convention.

Grundt involved tributers who had mined gold from a mining company's mines under an agreement. There was a dispute over the terms of the agreement, and specifically over whether gold that was being taken by the tributers was from the part of the mine covered by the agreement. The company allowed the tributers to continue mining despite disagreement over this issue, and continued to supply them with the compressed air, tools, etc, necessary to continue the mining activities. The company

²⁴ (1937) 59 CLR 641.

²⁵ For an extended analysis of estoppel by convention see R Durham 'Estoppel by Convention – Parts I and II' (1997) 71 *Australian Law Journal* 860 and 976. See also MNC Harvey 'Estoppel by Convention – An Old Doctrine with New Potential' (1995) 23 *Australian Business Law Review* 45.

²⁶ This principle is stated by Scrutton LJ in *Vershures Creameries v Hull and Netherlands Steamship Co* (1921) 2 KB 608 at 612.

²⁷ See for example *Dillwyn v Llewelyn* (1862) 4 De G F & J 517; 45 ER 1285; *Ramsden v Dyson* (1866) LR 1 HL 129; *Plimmer v Wellington Corp* (1884) 9 App Cas 699; *Inwards v Baker* [1965] 2 QB 29; *Crabb v Arun District Council* [1976] Ch 179.

²⁸ (1854) 5 HLC 185; 10 ER 868. For criticism of the case, see *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, per Mason CJ and Wilson J at 399, and Deane J at 447-449.

continued to accept and process the ore, and paid the tributers for it. Subsequently, the company took action against the tributers in trespass and conversion, seeking a return of the money paid over.

The tributers argued that the company should be estopped from asserting this claim. Latham CJ held that the company should be estopped. Dixon J found on the facts that there was no estoppel, but that the company could nevertheless not claim a return of payments made voluntarily, in full knowledge of their potential claim. Despite their disagreement as to how the law should be applied to the facts, Latham CJ and Dixon J (with whom McTiernan J agreed) both adopted the same principles to determine the case. Both cited as authority the categories of common law estoppel expounded by Dixon J in *Thompson v Palmer*,²⁹ and in particular, they agreed that the circumstances demonstrated that the parties had mutually assumed a particular basis for their relationship, regardless of the actual terms of any written contract or deed. This was estoppel by convention.

Estoppel by convention

More recently, the High Court has explained estoppel by convention as:

a form of estoppel founded not on a representation of fact made by a representor and acted on by a representee to his detriment, but on the conduct of relations between the parties on the basis of an agreed or assumed state of facts, which both will be estopped from denying.³⁰

The doctrine of estoppel by convention is well illustrated by *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd (Texas)*.³¹ This case concerned a dispute between a borrower company and a bank over whether a guarantee of loans was binding in respect of a particular loan made to the company by a subsidiary of the bank. Both parties had conducted their affairs on the basis that the guarantee did encompass this debt, however when the company became insolvent and liquidators tested the enforceability of the guarantee, it was held that the guarantee did not, in its terms, cover the debt in question. Justice Robert Goff at first instance, and all three members of the bench in the Court of Appeal, found that the company was

²⁹ (1933) 49 CLR 507 at 547.

³⁰ *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 244.

³¹ [1981] 3 All ER 577.

estopped from denying the validity of the guarantee. Lord Denning MR's reasoning provides the most lucid explanation of why this should be so.

First, Lord Denning MR expressed a view that the rule of contract law forbidding reference to the parties' conduct after the contract was made defied common sense in circumstances where the meaning of the contract was uncertain. He said (citing the authority of the Privy Council in *Watcham v Attorney General of East African Protectorate*³² in support of the proposition):

For many years I thought that when the meaning of a contract was uncertain you could look at the subsequent conduct of the parties so as to ascertain it. That seemed to me sensible enough. The parties themselves should know what they meant by their words better than anyone else.³³

He went on to explain that the common sense of this proposition was always refuted by the 'more logical minds in Chancery', who eventually won the argument, holding that the meaning of a contract must always be discernable at the time it is made and cannot be interpreted in the light of 'anything which the parties said or did after it was made'.³⁴ Nevertheless, the logical minds of Chancery conceded that subsequent conduct by parties may give rise to an estoppel.

This kind of estoppel is 'estoppel by convention'; Lord Denning MR also referred to it as estoppel by 'a course of dealing':

If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not, or whether they were mistaken or not, or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.³⁵

So it can be seen that estoppel by convention is a legal tool for ensuring that parties to a continuing relationship are obliged to adhere to their mutually agreed

³² [1919] AC 533.

³³ *Texas*, above n 31 at 582.

³⁴ *Ibid* at 583, citing *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 at 603 per Lord Reid.

³⁵ *Texas* above n 31 at 584.

expectations of that relationship, notwithstanding the existence of some earlier document containing contrary terms.

Examined in the light of the fundamental principles of contract law, this doctrine is by no means radical. Indeed, Samuel Stoljar has questioned the need for such a doctrine at all, on the basis that an estoppel such as this is effectively based on agreement: 'The estoppel simply reveals itself as an actionable agreement of a new type, an agreement that not just modifies an existing contract in some partial respect, but modifies it virtually entirely.'³⁶ The doctrine requiring consideration for an enforceable agreement provides no obstacle here, as 'the later convention is as much an exchange for a price as the contract displaced'.³⁷

Application in the workplace

Estoppel by convention could prove a particularly useful tool in cases where parties have used a standard form contract which does not reflect the reality of a working relationship. If the guarantee contract in the *Texas* case could be ignored in the light of a course of dealing between large well-advised commercial parties, there is certainly no reason why a written employment contract should not also be scrutinised against reality. Interestingly, the guarantee document in *Texas* also appears to have been a 'fill in the blanks' precedent document which was used without proper consideration of its suitability to the real circumstances of the parties' dealings.

What kinds of written contracts might be ignored, in the light of a true course of dealings? One example is the fixed term contract document issued to a person who has been engaged on what is really a continuing basis, in order to limit an employer's liability under unfair dismissal laws. In *D'Lima v Board of Management of Princess Margaret Hospital for Children*,³⁸ for example, a casual cleaner was ostensibly engaged under a long and continuous string of one month contracts. The Industrial Relations Court of Australia, hearing her claim for unlawful dismissal under the *Industrial Relations Act 1988* (Cth) s 170EA, was prepared to look past the terms of a string of standard written documents to find that in reality she was engaged

³⁶ S Stoljar 'Estoppel and Contract Theory' (1990-1) 3 *Journal of Contract Law* 1 at 13.

³⁷ *Ibid.*

³⁸ (1995) 64 IR 19.

continuously. She was expected to continue to attend for work, and was paid to do so, notwithstanding that any given 'contract' had expired and had not yet been renewed.

D'Lima was a relatively easy case to determine, given the very obvious mismatch between the written record of an engagement on a series of fixed term contracts, and the reality of an ongoing employment relationship. Longer fixed term contract arrangements may also present reasons for ignoring a documented fixed term.

A case such as *Bredel v Moore Business Systems Ltd*³⁹ might be solved in this way. In that case, a sales representative had a written contract which purported to fix his base salary, plus a rate of commission on sales made 'in 1998'. He continued to work and make sales well into 1999. When he made a particularly large sale in May 1999, and expected to be paid commission at his 1998 rate, the employer promptly issued him with a new back-dated contract, containing no guaranteed commission rate on sales. The plaintiff brought a claim based on an entitlement to be paid commission at the 1998 rates. His argument failed in contract, and the Court of Appeal stated that it would also have failed as an equitable estoppel claim, had it been argued, because he was unable to point to a sufficiently explicit representation that the 1998 commission rate would continue into 1999.⁴⁰

The court – at first instance and on appeal – was not invited by counsel to consider an argument based on estoppel by convention. Arguably, the facts demonstrated a good case for this species of estoppel. An objective observer to these arrangements would have assumed that the parties must have decided to continue their 1998 arrangements into the new year. Otherwise they would certainly have put in place alternative arrangements. While the parties continued to work on this basis, their current 'course of dealing' governed their respective rights and responsibilities. It cannot be the case that they had no rights and responsibilities at all for the period during which there were no written terms. The absence of any written terms cannot have precluded the existence of an informal agreement between them, provable by their course of dealing with each other.

The *Bredel* case was an unsatisfactory one in many respects, so is perhaps not a great example upon which to pin a comprehensive criticism of the common law of

³⁹ [2003] NSWCA 117.

⁴⁰ This aspect of the case has been canvassed more thoroughly in J Riley 'A cautionary tale for employee advocates: *Bredel v Moore Business Systems Ltd*' (2004) 18 *Commercial Law Quarterly* 3.

contract.⁴¹ Nevertheless, the problems in this case suggest there is scope for counsel to inform themselves more thoroughly about the potential application of estoppel by convention in cases where there are gaps in the documentation of contractual relationships.

A better alternative to *Trade Practices* claims?

Written contracts which contain very short notice periods, notwithstanding oral commitments that a job is a secure long term position, also raise the prospect of an estoppel by convention argument. In a case such as *O'Neill v Medical Benefits Fund of Australia Ltd*,⁴² for example, a finding that the commitments given to Mr O'Neill created a common law estoppel may have proved more practically convenient than the actual finding that he had been misled and deceived within the terms of the *Trade Practices Act 1974* (Cth) s 52. The facts in Mr O'Neill's case would have supported an argument based on estoppel by representation, since he relied on an express statement as to the fact that the position was a long term, secure appointment.

The Trade Practices remedy granted in this case was that Mr O'Neill should be put in the position he would have been in, had he not been deceived by the recruitment agency who promised him a secure, long term appointment. This reliance-based remedy necessitated a reconstruction of the remuneration he would have received over a long period of time, if he had not changed jobs in the first place. The beauty of a result derived by estoppel is that the parties are taken to be bound by the arrangements evidenced by their representations or course of dealing. The remedy for a common law estoppel is effectively expectations-based, rather than reliance-based. In Mr O'Neill's case, this would arguably have been considerably easier to calculate. An entitlement to fulfilment of the expectation created by the representation made to him would have paid him a reasonable period of notice for a position promised to be a long term, secure position.

Another case decided under the *Trade Practices Act*, *Magro v Freemantle Football Club Ltd*,⁴³ provides an even clearer example of why estoppel by convention produces a more rational result in such a case. In *Magro*, a football coach who moved

⁴¹ For a comprehensive critique of the case see Riley above n 2 at pp 109-123,

⁴² (2002) 122 FCR 455.

⁴³ [2005] WASC 163.

to Freemantle on the understanding he was being engaged for a three year fixed term was terminated prematurely. It was held that he did not in fact have a contractual entitlement to a three year term, but that he had been misled into thinking that he did. For this breach of s 52 of the *Trade Practices Act*, he was awarded damages to put him in the position he would have been in, had he remained in Victoria and never taken the job with the Freemantle club. In the end, the compensation figure calculated exceeded what he would have been paid out to the end of the putative three year term.

With respect, this seems an entirely odd result, and one which would have been avoided if estoppel by convention had been applied. By their course of dealing the parties had apparently agreed to a three year term, notwithstanding the terms of a written document which contradicted their dealings. All of the parties should therefore be estopped from denying the existence of an agreement to a three year term. Mr Magro should have been treated as if he had an entitlement to that term – no more and no less. Paying him for the remainder of a three year term would have been far more straightforward than the remedy ultimately granted by the court, as it attempted to construct the life that he might have had, but for this failed relationship. Estoppel by convention would, in fact, have provided greater certainty for the parties. They would know that they would be held to the commitments demonstrated by their course of dealing.

Indeed, while ever the *Trade Practices Act* has any operation in respect of work contracts, parties who use misleading standard form documentation are at risk of suit in any event. Rather than encourage the development of trade practices remedies in this field, surely it would be more convenient and more conducive of commercial certainty to adopt a more conventional common law tool which addresses more precisely the mischief at hand: the documentation of the contract does not reflect the real agreement, proven by conduct. Let the agreement proved by conduct prevail over the unreliable written words.

Conclusions

Post *Work Choices*, contract law is likely to be called upon to do much more work in the field of workplace relations. 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 the common 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 common law principles is that a contract is a real agreement and not merely a wad of paper. Estoppel by convention is one doctrine – ancient and wise – that recognises that very important legal fact.

