

# AUSTRALIA AND THE INTERMEDIATE TERM— 'NO COUNTRY FOR OLD RULES'

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*The High Court recently provided guidance on the circumstances in which an innocent party can terminate a contract under the common law. In *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*, the Court confirmed that there are three situations in which termination for breach can occur: first, where one party has 'renounced' the contract; second, where there has been a breach of an essential term and third, where there has been a serious breach of a non-essential term. In endorsing the status of the intermediate term as a third category of contractual term, the Court approved of the tripartite classification of contractual terms first discussed in the UK case of *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*. In doing so, the Court adopted a policy that favours contractual performance over greater simplicity and certainty. Kirby J agreed with the decision but argued strongly for the preservation of the traditional dualistic approach.*

*'[The intermediate term] is a comparatively recent invention, finding little or no reflection in the common law that preceded Hong Kong Fir.'*

– Kirby J

## I INTRODUCTION

In *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*,<sup>1</sup> the High Court finally determined the status of the intermediate or innominate term in Australian law. Until this decision, the High Court had not given the concept 'unequivocal endorsement in a decision for which such recognition comprised part of the ratio decidendi of the case'.<sup>2</sup>

It is trite law that a breach of contract by one party may give the other party a right to terminate the contract. The right may arise from the contract itself or by operation of law. Where the right arises by operation of law, the innocent party can terminate where the breach is repudiatory (where the conduct of one party indicates an unwillingness or inability to perform the contract as a whole or a fundamental obligation under it) or where the breach is of an essential term ('condition'). There has been considerable doubt over the status of a third category of term – the intermediate or innominate term – which stands somewhere between a condition and a warranty, capable of operating as either a condition or warranty, depending on the gravity of the breach. The concept of an intermediate

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1 (2007) 233 CLR 115 (*Koompahtoo*).

2 Ibid [104] (Kirby J).

or innominate term originated in the judgment of Diplock LJ in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*.<sup>3</sup> Prior to the decision in *Koompahtoo*, it had received some support from various courts in Australia, including the High Court,<sup>4</sup> although some scholars doubted the need for a third category 'as a means of legitimising termination, by reference to the extent of loss actually caused by a breach'.<sup>5</sup> In the absence of unequivocal endorsement from the High Court, there has been some judicial caution in applying it.<sup>6</sup>

This article begins with a brief review of the common law position in relation to unilateral termination for breach. It then examines the joint judgment of the majority and the views of the dissident.

## II THE COMMON LAW POSITION

### A Termination for Breach of an Essential Term

Where a term is categorised as a condition, *any* breach of the term, regardless of the consequences, gives the innocent party a right to terminate the contract. A condition is an essential term which 'goes to the root of the contract'. It may be characterised as a condition by statute,<sup>7</sup> by the parties themselves,<sup>8</sup> or, if neither of these apply, as a matter of construction of the contract. This is determined by asking what the parties intended, as evidenced by the contract. A court will only conclude that a particular term is a condition as a matter of construction if the parties have made their intentions clear. In the absence of a clear expression of intent, the High Court has indicated on a number of occasions that damages are the preferred remedy for breach of contract. By preferring damages over unilateral termination, the courts have indicated a preference for giving the contract a chance to work rather than destroying it. This position was summarised by Mason ACJ, Wilson, Brennan and Dawson JJ in *Ankar Pty Ltd & Arnick Holdings Ltd v National Westminster Finance (Australia) Ltd* in the following terms:

in deciding whether a promise has the status and effect of a condition, courts are not too ready to construe a term as a condition and ... will hold that a term is of such a kind that breach of it does not give rise to an automatic right to rescind [as it would if it were regarded as a condition].

3 [1962] 2 QB 26 ('*Hong Kong Fir*').

4 *Ankar Pty Ltd & Arnick Holdings Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549. Note, however, that the Court's observations in support of intermediate terms were *obiter dicta*, as it held that the relevant clauses were conditions. See also *Shevill v Builders Licensing Board* (1982) 149 CLR 620.

5 See, eg, Nicholas Seddon and Manfred Ellinghaus, *Cheshire and Fifoot's Law of Contract* (9<sup>th</sup> ed, 2007) [21.22]. See also Donald Greig and J L R Davis, *Fourth Cumulative Supplement to the Law of Contract* (1992). Cf John Carter, Elisabeth Peden and G J Tolhurst, *Contract Law in Australia* (5<sup>th</sup> ed, 2007) [30-22] and John Carter, *Breach of Contract* (2<sup>nd</sup> ed, 1991).

6 See especially *Shevill v Builders Licensing Board* (1982) 149 CLR 620 and *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17.

7 See, eg, *Goods Act 1958* (Vic) s 19(a), (b); *Trade Practices Act 1974* (Cth) ss 70(1), (2).

8 See *L Schuler AG v Wickman Machine Tools Sales Ltd* [1974] AC 235.

This approach is explained by a preference for a construction that will encourage performance rather than avoidance of contractual obligations.<sup>9</sup>

In determining whether a term is properly to be construed as a 'condition', the courts apply a test of 'essentiality'. This test was famously explained by Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd*:<sup>10</sup>

The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict, or a substantial, performance of the promise, as the case may be, and that this ought to have been apparent to the promisor ... If the innocent party would not have entered into the contract unless assured of a strict and literal performance of the promise, he may in general treat himself as discharged upon any breach of the promise, however slight.<sup>11</sup>

The decision in *Tramways* was reversed on appeal to the High Court but the above statement of law was not affected. Latham CJ expressed the test even more succinctly:

It [the guarantee] was a term of the contract which went so directly to the substance of the contract or was so 'essential to its very nature that its non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all' ... Accordingly any breach of the clause would entitle the defendant to determine the contract.<sup>12</sup>

In other words, in determining whether or not a term is to be characterised as a condition, the court asks whether the parties would have entered into the contract had they not been assured of strict compliance with the term. The courts look at the language used by the parties (has the term been labelled as a condition?);<sup>13</sup> the likely consequences of a breach of the term (would every breach of the term deprive the innocent party of substantially the whole of the benefit of the contract or can there be trivial breaches?); the need to promote certainty of outcomes (classifying the term as a condition promotes certainty of outcomes as *any* breach of a condition gives the innocent party a right to terminate the contract); and finally, whether damages would be an adequate remedy for the innocent party (if so, the court is less inclined to construe the term as a condition).

9 (1987) 162 CLR 549, 556 (Mason ACJ, Wilson, Brennan and Dawson JJ).

10 (1938) 38 SR (NSW) 632 ('*Tramways*').

11 *Ibid* 641–2 (Jordan CJ).

12 *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286, 304–5 (Latham CJ).

13 See *L Schuler AG v Wickman Machine Tools Sales Ltd* [1974] AC 235.

## **B Termination for Serious Breach of an Intermediate Term: The Hong Kong Fir Doctrine**

Some terms are not easy to characterise, *ex ante*, as either conditions or warranties. In *Hong Kong Fir* the English Court of Appeal introduced a new category to the traditional taxonomy.

In *Hong Kong Fir* the issue was whether charterers under a time charterparty had a right to terminate the contract for breach of an obligation found in clause 1 of the charterparty agreement. The clause obliged the shipowner to deliver a vessel 'in every way fitted for ordinary cargo service'. The charterer purported to terminate the contract when it was forced to retire the ship for significant periods of time because of damage done by an incompetent engine-room crew. In doing so, the charterer relied on clause 1 of the charterparty, which it regarded as a condition.

The problem in this case was that the obligation contained in clause 1 of the charterparty was extremely broad, such that breaches of the clause could be anywhere on a spectrum from trivial to catastrophic. As the court pointed out, the term:

embrace[d] obligations with respect to every part of the hull and machinery, stores and equipment and the crew itself. It [could] be broken by the presence of trivial defects easily and rapidly remediable as well as by defects which must inevitably result in a total loss of the vessel.<sup>14</sup>

This militated against the classification of the term as *either* a condition or a warranty. If the clause was classified as a condition, breach of the term would *always* give rise to a right to terminate, even where the breach was minor. On the other hand, if the term was classified as a warranty, the charterers would *never* be able to terminate the contract for breach of the seaworthiness term, no matter how serious the breach. It was for this reason that the Court was reluctant to classify the term as a warranty, even though it was labelled as such in the charterparty.<sup>15</sup>

Diplock LJ found a 'third way'. After reiterating the accepted distinction between conditions and warranties in relation to 'simple contractual undertakings', his Lordship, in a now famous passage, said:

There are, however, many contractual undertakings of a more complex character which cannot be categorised as being 'conditions' or 'warranties' ... Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and the legal consequences of a breach of such an undertaking, unless provided for expressly in the contract,

14 *Hong Kong Fir* [1962] 2 QB 26, 71 (Diplock LJ).

15 Since the clause was labeled as a 'warranty', the Court could simply have applied existing principles (reflected in the Sale of Goods legislation) and found that the charterers had no right to terminate (despite the fact that in a charterparty the label 'warranty' is often applied to conditions: See, eg, *Behn v Burgess* (1863) 122 ER 281. Nevertheless, the Court declined to do so, for reasons explained above.

depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a 'condition' or a 'warranty'.<sup>16</sup>

In applying this new category of term to the facts before it, the Court of Appeal decided that clause 1 was an 'intermediate' or 'innominate' term.<sup>17</sup> However, as the breach did not deprive the charterers of substantially the whole benefit of the charterparty, their termination was wrongful.

In policy terms, this was a crucial decision. The Court did not simply reject the condition-warranty duality as inadequate, it also adopted a system of classification that preferenced performance of the contract over termination. After *Hong Kong Fir*, unless the parties agreed that a term was a condition, once a term was classified as 'intermediate', the consequences of the breach would have to be extremely serious before the innocent party was given a right to terminate. As Carter put it:

the contract may not be terminated unless the consequences of the breach are dire indeed ... In the absence of agreement that a particular term is a condition, termination of a commercial contract is a matter of last resort.<sup>18</sup>

For example, in *Cehave NV v Bremer Handelsgesellschaft mbH (the Hansa Nord)*,<sup>19</sup> the English Court of Appeal extended the principles of *Hong Kong Fir* to contracts for the sale of goods. In that case, the relevant term provided for the 'shipment to be made in good condition'. This term was classified by the Court as an intermediate term. On arrival, a significant quantity of the goods (citrus pulp pellets) was damaged as a result of spontaneous combustion during shipment. As a result, the value of the goods dropped by two-thirds from approximately £100,000 (the contract price) to £33,000 (the price obtained at resale). Despite this decline in value, the Court considered that the effect of the breach was not sufficiently serious to justify termination by the buyer.<sup>20</sup>

### III THE DECISION IN KOOMPAHTOO

The dispute in *Koompahtoo* arose out of a joint venture agreement signed in 1997 between Koompahtoo Local Aboriginal Land Council ('Council') and Sanpine Pty Ltd ('Sanpine') for the development and sale of land owned by the Council as a result of claims made under the *Aboriginal Land Rights Act 1983*

<sup>16</sup> *Hong Kong Fir* [1962] 2 QB 26, 70 (Diplock LJ).

<sup>17</sup> The Court of Appeal did not use the phrase 'intermediate term' or 'innominate term'. This came from later scholarly commentary: See J W Carter, G J Tolhurst and Elisabeth Peden 'Developing the Intermediate Term Concept' (2006) 22 JCL 268, 271 (see especially fn 19 where the authors suggest that the 'innominate term' expression was first used in M P Furmston, *The Classification of Contractual Terms* (1962) 25 MLR 584).

<sup>18</sup> *Ibid* 270.

<sup>19</sup> [1976] QB 44.

<sup>20</sup> Note, however, that this conclusion was supported by the fact that the goods ended up being used for their original purpose (thus undermining the argument that the buyers had suffered substantial loss or detriment).

(NSW). The development project was the first self-funded project of its type to be undertaken in New South Wales by a Local Aboriginal Land Council. Sanpine agreed to manage the project. The project, which raised sensitive environmental issues within the Aboriginal community, proved to be a disaster and did not even proceed to the stage of getting the necessary rezoning permits. Within five years, the original funds were gone and liabilities in excess of \$2 000 000 had been incurred, secured by mortgages over the land. Furthermore, Sanpine had breached various obligations under the agreement relating to the appointment of consultants, development of programs, establishment of bank accounts and maintenance of proper books and accounts. In particular, Sanpine had failed to comply with clause 16.5(a) of the agreement, which required it to 'ensure that proper Books are kept so as to permit the affairs of the Joint Venture to be duly assessed ... in such a manner as enables the Venturers to extract from the Books any information in relation to the affairs of the Joint Venture as that Venturer may reasonably require from time to time'.<sup>21</sup>

In February 2003, an administrator was appointed. From that time until December 2003, the administrator sought unsuccessfully to obtain financial information from Sanpine under clause 16.5(a) of the agreement. In December 2003, the Council terminated the agreement on the basis of Sanpine's alleged repudiation. Sanpine sought a declaration that the termination was invalid.

At trial,<sup>22</sup> Campbell J found that Sanpine had committed 'gross and repeated' breaches of the agreement.<sup>23</sup> His Honour rejected the Council's argument that there had been a breach of an essential term, which would have allowed for termination regardless of the seriousness of the breach. Rather, his Honour held that the relevant terms were intermediate terms, the breaches of which were sufficient to amount to a repudiation of the contract.

On appeal,<sup>24</sup> the New South Wales Court of Appeal decided that the central question was whether Sanpine, by its conduct, had evinced an intention to perform the agreement only in a manner that suited it and not in any other way. That is, the Court treated the primary issue as one of repudiation. The Court held that there was no such repudiatory conduct, nor was there a breach of any essential terms. The Court found that there had been breaches of intermediate terms of the contract but that they were not sufficiently serious to constitute a basis for its termination.

The Council appealed successfully to the High Court. In the course of its decision, the majority (Gleeson CJ, Gummow, Heydon and Crennan JJ) expressed its view on the appropriate use of the word 'repudiation'. The majority held that the term 'repudiation' refers to two things: (a) conduct which 'evinces an unwillingness or

21 *Koompahtoo* (2007) 233 CLR 115, [14] (Gleeson CJ, Gummow, Heydon and Crennan JJ).

22 *Sanpine Pty Ltd v Koompahtoo Local Aboriginal Land Council* [2005] NSWSC 365 (Unreported, Supreme Court of New South Wales, Campbell J, 22 April 2005).

23 *Ibid* [372].

24 *Sanpine Pty Ltd v Koompahtoo Local Aboriginal Land Council* [2006] NSWCA 291 (Unreported, New South Wales Court of Appeal, Giles, Tobias and Bryson JJ, 2 November 2006).

an inability to render substantial performance of the contract'; and (b) 'any breach of contract which justifies termination by the other party'.<sup>25</sup>

More significantly, the majority considered the different approaches ('taxonomies')<sup>26</sup> that might be used to determine whether an innocent party has a right to terminate a contract for breach. The majority affirmed the approach developed in *Hong Kong Fir* in holding that there are 'two relevant circumstances in which a breach of contract by one party may entitle the other to terminate': (a) where the defaulting party breaches an essential term; or (b) where the defaulting party commits a serious breach of a non-essential term. As to what constitutes a 'serious breach of a non-essential term', the majority held that breach of an intermediate term will be sufficiently serious to give rise to a right of termination where it can properly be described as:

'going to the root of the contract', a conclusory description that *takes account of the nature of the contract and the relationship it creates; the nature of the term; the kind and degree of the breach; and the consequences of the breach for the other party*. Since the corollary of a conclusion that there is no right of termination is likely to be that the party not in default is left to rely upon a right to damages, *the adequacy of damages as a remedy may be a material factor in deciding whether the breach goes to the root of the contract* (emphasis added).<sup>27</sup>

The majority based its decision on both policy and pragmatic considerations. In terms of policy, it pointed to the tension that exists between, on the one hand, rules that favour certainty of outcomes through the classification of terms as conditions and, on the other, those which encourage contractual performance by restricting the right of termination to cases where the breach occasions serious prejudice. Faced with a conflict between those two policy objectives, the majority came down on the side of the latter. It was also a pragmatic decision: although the majority acknowledged that alternative classifications might achieve a similar outcome, it pointed out that '*Hong Kong Fir* was decided in 1961 and has long since passed into the mainstream law of contract ... in Australia'.<sup>28</sup>

On the particular facts in question, the majority decided that the breaches by Sanpine were breaches of non-essential terms which 'went to the root of the contract' and which, 'as a matter of construction of the contract ... deprived [the Council] of a substantial part of the benefit for which it contracted'.<sup>29</sup> As such, the Council was entitled to terminate the agreement.

25 *Koompahtoo* (2007) 233 CLR 115, [44] (Gleeson CJ, Gummow, Heydon and Crennan JJ).

26 Both the majority and the dissenting judgments are peppered with references to the term 'taxonomy'. As the anonymous referee has indicated, this is a term that is not normally associated with legal classification, suggesting perhaps that the Court was seeking to give its legal analysis a more scientific look.

27 *Koompahtoo* (2007) 233 CLR 115, [54] (citations omitted).

28 *Koompahtoo* (2007) 233 CLR 115, [50] (Gleeson CJ, Gummow, Heydon and Crennan JJ). The majority conceded, however, that the High Court had not, hitherto, accepted *Hong Kong Fir* as part of the ratio decidendi in any case.

29 *Ibid* [71] (Gleeson CJ, Gummow, Heydon and Crennan JJ).

Although Kirby J agreed with the decision, he strongly rejected the majority's view on the place of the intermediate term in Australian jurisprudence. His Honour said that:

The performance of legal tasks is not assisted when misleading, imprecise and self-fulfilling labels are invoked in an attempt to rationalise results in individual cases after the event. Such labels comprise a source of needless complication and disputation. If what is required is an evaluation of whether the circumstances of a particular breach are of such an objectively serious nature as to vindicate unilateral termination, then this court should formulate the relevant principles to say so. Continued reference to the vague and artificial concept of 'intermediate terms' inhibits this exercise and obscures clear thinking in the performance of the legal task in cases such as the present.<sup>30</sup>

His Honour endorsed the statement by Australian contract scholars Seddon and Ellinghaus that 'a breach that substantially deprives the other party of the benefit of a contract should entitle that party to terminate it, no matter whether the term in question is essential, intermediate, or inessential'.<sup>31</sup> His Honour continued:

This throws into sharp relief the extreme vagueness of the *Hong Kong Fir* 'intermediate' term. Its imprecision occasions difficulties and confusion for parties and those advising them. It has the potential to encourage a proliferation of detailed but disputable evidence in trial courts and consideration of such evidence in intermediate courts. It renders uncertain the distinctions between the several categories said to provide a legal justification for the very significant step of terminating an otherwise valid contract.<sup>32</sup>

His Honour then went beyond the doctrinal argument and cited a number of precedential and normative considerations that militate against the incorporation of the concept into Australian law:

It is a comparatively recent invention, finding little or no reflection in the common law that preceded *Hong Kong Fir*. It is inconsistent with the approach of Australian legislation dealing with breach of contract in particular contexts. It is not reflected in the general codifications of contractual remedies law adopted in some common law countries. It is inconsistent with approaches suggested on the part of law reform bodies in England and Australia. It finds no reflection in the relevant parts of the

30 Ibid [111] (Kirby J).

31 Seddon and Ellinghaus, above n 5, 1032 cited in *Koompahtoo* (2007) 233 CLR 115, [113] (Kirby J).

32 *Koompahtoo* (2007) 233 CLR 115, [107] (Kirby J).



United States Restatement of the law.<sup>33</sup> Nor is it adopted in the Uniform Commercial Code of the United States.<sup>34</sup> There is nothing like it in the United Nations Convention on Contracts for the International Sale of Goods 1980.<sup>35</sup> Nor does it appear in the United Nations International Institute for the Unification of Private Law (UNIDROIT) *Principles of International Commercial Contracts 2004*.<sup>36</sup> Even where recognising a classification analogous to 'essential' terms, none of these codifications encumbers itself with an artificial additional subdivision of the broad class of 'non-essential' terms that remains.<sup>37</sup>

Thus, according to Kirby J, an innocent party would only have a right to terminate where there is '(1) breach of an essential term; (2) breach of a non-essential term causing substantial loss of benefit; or (3) repudiation (in the sense of "renunciation")'.<sup>38</sup> On the particular facts of the case, Kirby J held that none of the terms breached was 'essential', including clause 16.5 of the agreement, which obliged Sanpine to maintain proper books so as to permit the financial affairs of the joint venture to be duly assessed. However, he considered that the breaches by Sanpine deprived the Council of the substantial benefit of the contract (which was the management and financial expertise that Sanpine could bring to the project), thus giving the Council a right to terminate the contract.

33 The *Restatement (Second) of Contracts* (1979) lists the following criteria as 'significant' in determining whether a specific failure constitutes a breach: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing: American Law Institute, *Restatement (Second) of Contracts* (1981) § 241 (footnote added).

34 For example, the UCC § 2-703 states, in relation to sellers' remedies, that 'a breach of contract by the buyer includes the buyer's wrongful rejection or wrongful attempt to revoke acceptance of goods, wrongful failure to perform a contractual obligation, failure to make a payment when due, and repudiation (footnote added).

35 See *Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3, art 25 (entered into force 1 January 1988). Under that article, a contract can only be avoided for a 'fundamental breach'. For a breach of contract to be fundamental, it must result in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract (footnote added).

36 The *UNIDROIT Principles of International Commercial Contracts 2004* include, for example, article 7.3.1, which provides that: (1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance. (2) In determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether (a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result; (b) strict compliance with the obligation which has not been performed is of essence under the contract; (c) the non-performance is intentional or reckless; (d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance; (e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated (footnote added).

37 *Koompahtoo* (2007) 233 CLR 115, [107] (Kirby J).

38 *Ibid* [114] (Kirby J).

## IV CONCLUSION

The (formal) adoption of intermediate terms as a new category of contractual terms may be a sensible and practical development. In a commercial environment in which there is a rigid division between ‘conditions’ and ‘warranties’, a court has little option but to construe any significant term as a condition, thus giving the innocent party a right to terminate the agreement for *any* breach. The intermediate term allows for a more nuanced approach, as a court may have regard to the *effect* or *seriousness* of the breach.

However, it also increases the risk of uncertainty and unpredictability because it may not be until legal proceedings are issued (or at least mooted) that the effect of the breach becomes clear. This being the case, it may have been better to have maintained the traditional dualistic approach and to have adopted the view advocated by Kirby J (and indirectly by others) that if the effect of the breach is sufficiently serious, a right to terminate arises despite the fact that there has been no breach of an essential term nor has there been any repudiatory conduct.<sup>39</sup> As pointed out by Kirby J, this view has two key advantages: (a) avoiding the kind of vagueness and imprecision that ‘causes difficulties and confusion for the parties and their advisers’; and (b) ensuring that the common law of contract is in harmony with domestic statutes,<sup>40</sup> international conventions and the law in most foreign jurisdictions.

However, as the majority noted, the doctrine has gradually been absorbed into Australian law and it would be difficult to turn back the clock. In addition, Kirby J’s appeal to simplicity and certainty may be optimistic given that the ‘substantial loss of benefit’ faces the same problems that are inherent in the ‘root of the contract’ test. Thus, although the court would not be charged with the task of distinguishing between intermediate terms and the general body of non-essential terms, there would still be the risk that a termination for breach of a non-essential term would produce the same ‘proliferation of detailed but disputable evidence’.<sup>41</sup>

39 See Seddon and Ellinghaus, above n 5, [21.21], where the authors make the point that the common law has often acknowledged that the *effect* of the breach is considered prior to the court attaching a label – ‘condition’ or ‘warranty’ – to the term: see, eg, *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423, 426; *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17, 31; *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549, 554; *Stern v Macarthur* (1988) 165 CLR 489, 510.

40 See, eg, *Trade Practices Act 1974* (Cth) ss 69–72, 74.

41 *Koompahtoo* (2007) 233 CLR 115, [108] (Kirby J) (citations omitted).