Rescuing 'reasonable notice' in indefinite employment contracts

Joellen Riley Munton[1]

A number of recent cases have doubted the continued necessity of the implied term of reasonable notice in indefinite employment contracts, given the enactment of a national standard for minimum notice of termination of employment in the Fair Work Act 2009 (Cth) s 117. This article explains the challenge to reasonable notice, and proposes an alternative doctrinal basis for preserving an entitlement to reasonable notice in those admittedly rare cases in which an employee has been engaged for an apparently indefinite term with an implicit promise of long term job security. It is arranged in four Parts. Part I outlines the overall argument. Part II explains the circumstances in which an entitlement to reasonable notice is claimed, and the cases which have recently rejected it. Part III summarises key arguments for retaining reasonable notice as an implied term, and Part IV proposes an alternative doctrinal basis to preserve an entitlement to reasonable notice in indefinite employment contracts.

I Reasonable Notice under Threat

When senior employees face termination of their employment, they commonly claim an entitlement to 'reasonable notice', well in excess of the minimum notice periods set out in the *Fair Work Act* 2009 (Cth) (FW Act) s 117.[2] For example, in *Ma v Expeditors International Pty Ltd*, decided by the New South Wales Supreme Court in 2014, a senior employee with no explicit notice clause in her employment contract was awarded damages recognising an entitlement to reasonable notice of ten months.[3] Whether it is safe to continue to rely on this term long implied by law into employment contracts has been cast into doubt in recent years by a line of South Australian cases (chief among them the decision of a full bench in *Brennan v Kangaroo Island Council*[4] followed in *Kuczmarski v Ascot Administration Pty Ltd*[5]), and some Federal Court decisions, which have suggested that an entitlement to reasonable

notice should no longer be implied, because either the statutory provision (s 117) or a modern award or enterprise bargain term has rendered such implication unnecessary.[6] Eminent authors have provided robust and convincing justifications for the maintenance of this implied term, notwithstanding the findings of the South Australian authorities (and those justifications are summarised in Part IV below).[7] Nevertheless a niggling doubt remains, fuelled by a comprehensive review of the origins of the implied term by Buchanan J in *Westpac Banking Corporation v Wittenberg.*[8] Although Buchanan J did not expressly deny the existence of this implied term, he noted the finding in *Brennan*, and rejected counsel's criticism of the case. 'The essential point,' said Buchanan J, 'is that there was no gap to be filled by the implication' of reasonable notice in that case.[9] Unfortunately, the High Court refused leave to appeal from *Brennan*, stating that the 'Full Court's analysis is consistent with the statements in *Byrne v Australian Airlines Ltd.*[10] An appeal to this court would not enjoy sufficient prospects of success to warrant a grant of special leave'.[11] Of course, refusal of special leave does not create any precedent.[12] It does however leave the *Brennan* decision standing as an appellate level precedent in a State Supreme Court.

In *Heldberg v Rand Transport (1986) Pty Ltd*,[13] White J found it unnecessary to decide whether to follow *Brennan* and *Kuczmarski,* because he found sufficient evidence of an express notice term to rely upon, without needing to imply any reasonable notice term. He did however opine that if these cases were correct it may be 'an unforeseen consequence of the enactment of s 117'.[14] More recently still, two Federal Circuit Court decisions, *Nair v Queensland University of Technology*[15] and *Carrabba v PFP (Aust) Pty Ltd*,[16] have expressly followed *Brennan* and *Kuczmarski*. In *Carrabba*, the court explicitly referred to the High Court's refusal to grant special leave from *Brennan* as a reason for following the South Australian Court of Appeal's decision. *Carrabba* also cited *Australian National Hotels v Jager*,[17] a case in which the Tasmanian Court of Appeal overturned an award of two years' reasonable notice to a casino manager, and replaced it with the one month notice provided in the Industrial Relations Act 1984 (Tas). (The High Court also refused leave to appeal from the *Jager* decision.[18]) The decisions following *Brennan* and *Kuczmarski* are first instance decisions of the Federal Circuit Court and District Courts, and *Wittenberg* did not need to determine the issue. We are yet to see an appellate Federal Court decision squarely on point. The trouble is, most employees do not have the resources to mount appeals,

especially in a common law matter with the risk of an adverse costs order.[19] This trickle of first instance decisions may well become the mainstream without a robust defence for the maintenance of the implied term of reasonable notice. Some have cited *McGowan v Direct Mail and Marketing Pty Ltd*,[20] for that defence. In *McGowan*, Judge McNab stated that s 117 imposed only a minimum notice period and did not preclude a longer period of reasonable notice under contract, however this was obiter. It was not necessary to imply a reasonable notice term in this case, because Mr McGowan's original 1999 employment contract was held to provide an express notice term.[21] And in *Carrabba*, the court stated that *McGowan* was 'wrongly decided'.[22] The risk remains that more courts hearing employment contract disputes will be persuaded by the reasoning in *Brennan*.

A novel defence?

This paper briefly considers the arguments for and against the implication of the reasonable notice term in the face of statutory notice periods. Its main focus, however, is a proposal for an alternative doctrinal basis for a contractual entitlement to reasonable notice upon termination of an otherwise indefinite contract of employment. Put shortly, this paper argues that *if* it is indeed unnecessary to imply a term of reasonable notice into indefinite employment contracts, now that a statutory provision has supposedly closed any 'gap', it is nevertheless justifiable to treat those contracts as continuing, so that any purported termination of the contract except by a negotiated agreement should be treated as a breach of contract attracting an entitlement on the part of the innocent party to an assessment of damages. In other words, if an employment contract is entered into without the parties agreeing that it can be terminated by giving a certain amount of notice, no term allowing unilateral termination should be implied. This may seem an unpalatable proposal. Surely parties must be permitted to extricate themselves from a contract of service. We do however now live in a world where statutory unfair dismissal protections and general protections of workplace rights contemplate potential reinstatement (and hence 'jobs for life') for employees who have been dismissed for capricious reasons.[23] It is very easy for employers to make their intentions regarding termination on notice clear in express contractual terms. So it will only be in the very rare case that parties have made no such provision, and have perhaps entered into an arrangement on the assumption of a long term

engagement, that this question will ever arise. If it does, it is argued here that the parties should be left to the consequences of their own agreement, and the usual principles of contract law should be applied, without the implication of any terms.

The usual principles of contract law mean that any assessment of damages for terminating the engagement without mutual agreement will require reasonable attempts at mitigation. In all likelihood, such an assessment would produce the same result as the body of existing jurisprudence assessing reasonable notice, because the factors taken into account in assessing reasonable notice largely focus on the length of time required for the innocent party to find suitable alternative employment, or (in the case of an employer aggrieved by an employee's unexpected resignation) to recruit a replacement staff member.[24]

This argument is admittedly unorthodox, and requires some reassessment and reinterpretation of older authorities, so readers are kindly requested to suspend antagonism to the argument until it has been unpacked in its entirety. Its virtue, however, is that it provides a consistent rationale for the preservation of a legitimate expectation of a reasonable period of notice upon termination of an employment contract where no express contractual term permits termination upon giving notice, without the need for any implied term. It does not depend on any heterodox assumption that employees are owed a contractual 'right' to reasonable notice in the absence of express provision for notice. It honours the clear delineation made in *Byrne v Australian Airlines*[25] between entitlements arising under contract and those determined by statute or statutory instruments. It respects the position implicit in *Commonwealth Bank of Australia v Barker* that terms must not be implied into employment contracts unless they conform with a strict test of necessity.[26] It offers the collateral benefit of providing a basis for the sound principle, sometimes misunderstood, that the amount of notice required to terminate an indefinite employment contract need not be the same for both the employer and the employee, because the amount of time it will take employers to adjust to a resignation may well be considerably shorter than the time it will take a senior person to find acceptable alternative employment. The learned Mr Mark Irving asserts, with considerable justification, that a reasonable notice period will not necessarily be of the same duration for the employer as

the employee.[27] In particular he cites *Thorpe v South Australian National Football League*[28] for that proposition.

II Challenges to reasonable notice

In these days of word processing and standard form contracts it should be rare for any employment contract to lack a term, or indeed several terms, stipulating the circumstances in which the contract can be terminated by either party. Nevertheless, in practice, claims for additional compensation for a period of reasonable notice are not uncommon when long standing staff are shown the door. The case of *Quinn v Jack Chia (Aust) Ltd*[29] is much to blame for this practice, because it is regularly cited as authority for the proposition that an express employment contract may have become stale with the effluxion of time, and where the employee's salary, duties and seniority have changed. In such a case it is regularly argued in negotiations for severance pay that the notice period stipulated in the former written contract no longer applies, and the parties are bound instead by an implied term that each must give 'reasonable notice' in order to terminate the contract, absent an agreement.

The now largely defunct unfair contracts jurisdiction under the Industrial Relations Act 1996 (NSW) s 106 and its predecessors may bear some blame for the proliferation of such arguments in New South Wales. A short notice period sometimes supported an argument that the contract in question was relevantly unfair and susceptible to review, particularly where the reason for termination was an alleged redundancy.[30] Law firms practising in this area kept 'reasonable notice calculation tables' among their precedents, to provide a rough approximation of how much notice an executive could claim (notwithstanding an express contract term), bearing in mind age, seniority, length of service, level of remuneration and all the other factors indicated in cases such as *Quinn*.[31] Unfair contracts review for private sector employees is now largely a dead letter, following the enactment first of the Workplace Relations (Work Choices) Amendment Act 2005 (Cth) and then the FW Act which have overridden State industrial laws for national system employment.[32] Nevertheless the shadow of s 106 still clouds the expectations of some employment law practitioners in New South Wales. Whatever the reason, claims for

reasonable notice of up to a year are still commonly made on behalf of long serving managers, on the basis that *Quinn* is still good law.[33] If *Brennan*, *Kuczmarski* and *Wittenberg* continue to be followed, however, these claims may prove futile.

Brennan

Ms Brennan was a Human Resources Manager employed by the Kangaroo Island Council on a salary of approximately $120,000 a year, which meant that her position was not covered by the Council's enterprise agreement.[34] When her position was made redundant just under four years after appointment, she brought a contract claim for severance pay that included an amount of between 12 to 18 months for reasonable notice. At first instance, Judge Cole determined that Ms Brennan's employment was governed by a South Australian award which provided a notice period of three weeks. Judge Cole expressly rejected counsel's submission that 'a term requiring that reasonable notice be given in the event of a redundancy was an implied term of all employment contracts which did not contain an express term dealing with notice, or payment in lieu of notice, on redundancy'.[35] Judge Cole said there was no evidence that such a term should be implied as a matter of custom, and that it failed the five step test set out in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*[36] for a term implied in fact.[37] She held that there was ample evidence, from the parties' correspondence, that those matters were intended to be governed by the award, so she allowed only three weeks in respect of notice. If Ms Brennan's employment had not been covered by the award, Judge Cole said she would have awarded six months as reasonable notice of a decision to make her redundant.[38]

It is interesting that Judge Cole did not expressly consider the possibility that the reasonable notice term should be implied by law (rather than in fact or by custom). This may have been because the claim was for reasonable notice *of a redundancy*, and not merely reasonable notice of termination. There is, after all, ample authority supporting the existence of a term implied by law that all indefinite employment contracts may be terminated upon reasonable notice.[39] It is not clear why the employer's reason for deciding to terminate the employment prematurely (whether for redundancy, or some capricious reason) should have any bearing on whether reasonable notice of termination should be implied. In any event, Judge Cole would have awarded six months' notice in the absence of

an award clause, implying that the common law would fill the gap with an implied term of reasonable notice in a case of redundancy.

On appeal the Full Court of the Supreme Court of South Australia upheld Judge Cole's decision. Parker J (with whom Vanstone and Anderson JJ agreed) said that no evidence had been brought of any term implied by custom.[40] He also agreed that a reasonable notice clause would not pass the *BP Refinery* test for implication in fact.[41] While acknowledging that the High Court in *Byrne* held that common law employment contracts operate separately from awards, so that award clauses are not incorporated as contract terms, he nevertheless held that the existence of an award clause providing for notice of termination precluded any necessity for implication of a term in the contract.

Perhaps the most devastating observation in Parker J's reasons is the reference (without express quotation) to an obiter statement by Brennan CJ, Dawson and Toohey JJ in *Byrne*, that an award clause prescribing the applicable notice periods for the baggage handlers in that case 'preclude[d] the implication of a term that reasonable notice be given'.[42] And if it had not precluded the implication of reasonable notice, it 'might provide evidence of what constitutes reasonable notice at common law'.[43] This statement assumes that an applicable award clause either negates any need for implication of a contractual notice term, or supplies the content of that term by indicating what is 'reasonable' between the parties to an employment relationship that is governed by an industrial award.

Parker J also cited other cases which refused to imply a reasonable notice term where an industrial instrument applied,[44] and dismissed a case which did (*Westen v Union Des Assurances De Paris (No 2)*[45]) as inconsistent with *Byrne*.[46]

Wittenberg

The next serious threat to the implication of reasonable notice came in Buchanan J's reasons concerning the implied term of reasonable notice in *Westpac Banking Corporation v Wittenberg.*[47] In *Wittenberg* the issue for resolution was whether executives made redundant as a consequence of a bank merger were able to claim an amount of severance pay in respect of reasonable notice of termination. Buchanan J held that there was no scope for implication of reasonable notice because a notice period was already specified in written employment contracts.[48] These contracts continued to govern the employment

relationships, and had not been superseded by any unwritten contract, so there were no grounds to apply *Quinn*.[49] In the course of reaching that conclusion, Buchanan J made several observation about the implication of reasonable notice that have a bearing on the findings in *Brennan*.

First he explained the relatively recent historical origins of this implied term. It was first proposed in 1969 by the English Court of Appeal in *Richardson v Koefod*,[50] in order to dispense with the earlier presumption 'that a contract of employment for an indefinite period endured at least from year to year and was automatically renewed on the anniversary of the contract unless brought to an end on that date'.[51] The new rule was that '[i]n the absence of express stipulation . . . every contract of service is determinable by reasonable notice'.[52] This was followed in Australia in *Thorpe v South Australian National Football League*[53] in 1974. The genesis of the term demonstrates that it functioned principally as a right to terminate an apparently indefinite employment contract. It did not arise out of any concern to ensure that employees received reasonable notice of termination of their employment.

Buchanan J went on to describe many cases where there was no need to imply a right to terminate upon reasonable notice, either because other terms of the contract indicated a mutual intention that the contract was for a fixed term,[54] or because provisions of a statute or an industrial award dealt with termination on notice.[55] He also cited *Byrne*, emphasising that the implication of reasonable notice applied 'in the absence of any provision in the award and of any express provision in the contract'.[56]

Wittenberg did not need to determine whether FW Act s 117 had any effect on these executives' contracts, because it was readily found that their written employment contracts continued to prescribe notice periods, notwithstanding their claim that these contracts had become irrelevant. *Wittenberg* was nevertheless cited in *Kuczmarski* in support of a finding that reasonable notice ought not to be implied in the face of the statutory notice period.

Kuczmarski

Kuczmarksi concerned a private sector employee who did not have a written employment contract and whose employment was not covered by any modern award. His position was made redundant, and he was provided with five weeks' pay in lieu of notice calculated

according to FW Act s 117(3).[57] He challenged this on the basis that he should be paid between 12 and 18 months' pay in lieu of the reasonable notice that was implied by law into his unwritten employment contract. Judge Clayton of the District Court of South Australia followed *Brennan* (which he said he was bound to do[58]), notwithstanding that *Brennan* concerned an applicable award clause, and there was no award here. His reasons drew on the passages in *Byrne* (cited above[59]), and in *Wittenberg*. He distinguished *Guthrie v News Limited* on the basis that Mr Guthrie's contract, being one for a fixed term of three years, was excluded from the application of s 117 by FW Act 123(1) (which provides that the Division does not apply to employment for a specified period of time).[60] Judge Clayton accepted the submissions made on behalf of the employer that the reasonable notice term was no longer 'necessary', according to the understanding of necessity explained by French CJ, Bell and Keane JJ in *Barker*, because s 117 now provided an orderly means for permitting termination of an indefinite employment contract.[61] He also noted Buchanan J's apparent approval of *Brennan* and *Jager* in *Wittenberg*.[62] Finally, he distinguished *Thorpe* on the basis that when *Thorpe* was decided in 1974 there was no statutory provision to fill the gap.[63] In the result, although *Kuczmarski* (being a District Court decision) is not a strong precedent in itself, its demolition of arguments in favour of the implication of reasonable notice presents a clear challenge to the arguments mounted by Irving, and Roeger and Stewart in support of the implied term.[64]

III Support for reasonable notice

Others have mounted a persuasive defence of maintenance of an implication of reasonable notice notwithstanding the enactment of a national standard for notice in s 117.[65] Readers are referred to those excellent commentaries, so those arguments will not all be rehearsed here, but it is useful to note some key points. The strongest argument in favour of maintaining the implied term lies in the terms of the statutory provision itself. Strictly construed, s 117 does not confer upon an employer a positive right to terminate an indefinite employment contract. It provides only that '[a]n employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of termination', and 'must not terminate the employee's employment unless: (a) the

time between giving the notice and the day of the termination is at least the period (the *minimum period of notice*)' set out in a table in sub-s (3).[66] Section 117 therefore applies regardless of any contrary stipulation in a contract between the parties. Section 123 provides that Division 11, in which s 117 appears, does not apply to employees employed for a specified time or a specified task, so a person employed for a fixed term or a special project will not be covered by this provision, and by implication, their employer will not be able to terminate the fixed term or project engagement prematurely by giving notice under s 117.

The minimum periods stipulated in s 117 do not override express stipulations in awards, enterprise agreements, or common law employment contracts to the extent that those provisions provide more generous notice periods. Section 55 of the FW Act deals with the relationship between the NES and modern awards and enterprise agreements (which also provide *minimum* entitlements for employees covered by those instruments). Section 55(6) stipulates that NES entitlements operate as minimum standards. Modern awards and enterprise agreements may provide terms that are more beneficial to employees.[67] By logical extension, common law employment contracts may also provide for more beneficial notice periods, or may promise continuing employment with termination only permitted for cause.

The NES, modern awards, enterprise agreements, and common law employment contracts provide for distinct avenues of complaint and their own remedies if breached. Breach of a provision of the NES offends s 44 of the Act, which is a civil remedy provision attracting potential penalties under Pt 4-1, s 539 of the Act. Breach of an award or enterprise agreement triggers the dispute resolution processes contained in the award or agreement and may also give rise to civil penalties or other statutory remedies. Only a breach of contract will give rise to a claim for expectation-based damages under the common law, as *Byrne* made clear. *Byrne* also clarified that statutory instruments operate concurrently with, but separately from common law contracts.[68] They will not form part of an employment contract unless specifically incorporated as contract terms. Given the limited application of s 117, and the clear delineation in our system of employment law between statutory entitlements and common law obligations, there is arguably no ground for assuming any statutory intention to oust an established term implied by law into

employment contracts, especially as the High Court in *Barker* acknowledged that reasonable notice had already been accepted into the limited canon of terms implied by law into employment contracts. [69]

As we have seen above, however, these arguments have not dissuaded some courts from finding otherwise in recent times. The chief enemy of reasonable notice is the notion that a term will only be implied into an employment contract where there is a gap that must necessarily be filled. Courts may only fill a gap with a term that is both consistent with the presumed intentions of the parties,[70] and is necessary 'to make the contract effectively operative'.[71] Since the contract can operate (however unsatisfactorily) on the basis that the statute provides the required notice for termination by an employer, those who wish to champion continued claims for reasonable notice in indefinite employment contracts may need a new doctrinal basis for claiming reasonable notice that does not depend upon implying a term in fact or by law.

IV An alternative doctrinal basis

Even if *Brennan* and *Kuczmarksi* have been correctly decided, and Buchanan J in *Wittenberg* is correct in doubting any need to imply a term of reasonable notice where statute closes the gap, there is a sound basis for claiming that a party to an indefinite employment contract should be compensated by payment for a period of reasonable notice if the other party unilaterally terminates the contract prematurely. It is an argument that will rarely arise, and will no longer justify a claim for reasonable notice in a *Quinn* situation, where the employment contract is said to have become stale over time. The room for making an argument that an existing written contract of employment should be ignored because the relationship has evolved over time has narrowed considerably, following cases such as *Wittenberg*, and *Easling v Mahoney Insurance Brokers.*[72] Parties who have already committed the terms of their relationship to writing, and who have agreed the terms upon which it can be concluded, have little ground for grievance when the relationship ends and those terms are applied. However where an employee is engaged on an open-ended contract, with no termination provisions stipulated, and possibly with warm encouragement to see the position as a 'job for life', there is an argument for supporting a claim to

compensation for reasonable notice. Such an employee has a legitimate complaint if their long term commitment to an enterprise is cut short for no good reason with no more than the statutory one to five weeks' notice period to adjust. How should the common law deal with a complaint of this nature?

Let us start with the proposition that the implied term permitting termination of an indefinite employment contract on reasonable notice is a relatively recent phenomenon, invented to counter the inconvenient presumption of yearly hiring.[73] This judicial innovation suited the reasonable expectations of employers and employees in the world of work in the 1960s, when yearly hiring was an anachronism, but even the IBM golf ball typewriter had not yet been invented to facilitate easy preparation of written employment contracts. That world has evolved further in sixty years. We now live in a world where it is extremely easy for an employer to provide an employee with written terms of employment. Managers of even the smallest of businesses can tap out basic provisions with thumbs on a smart phone keypad, if they wish to limit their contractual obligations to employees. We also live in a world where for the past thirty odd years, many employees have become accustomed to an expectation of a level of job security. Statutory unfair dismissal laws have promoted an assumption that employees may not be capriciously dismissed. Unless an employer has a valid reason based on the employee's conduct or competence, or the operational needs of the enterprise, permanent employees expect to enjoy continuing employment. And human resource managers know they need to be able to establish evidence of good reasons before dismissing staff.

In this 21st century world, it is arguable that there is no longer any reason to imply a term permitting unilateral termination of an indefinite employment contract. The parties' failure to stipulate termination provisions may be taken as an indication of an intention to continue the relationship until such time as they mutually agree to separate. The natural consequence of the parties' decision not to agree termination provisions in their contract at the outset is that a purported unilateral termination without cause would be a breach of the contract. There is no apparent necessity for a court to step in to manage a risk that the parties might easily have managed themselves by stipulating termination provisions. As Buchanan J said in *Wittenberg*: 'The courts have not set out to rewrite individual contracts of employment.'[74]

This does not mean that the parties to an indefinite employment contract will be yoked together in perpetual misery as a consequence of neglecting to make their own severance terms. Another firmly established principle of the common law is that contracts for personal services will not attract the remedy of specific performance, nor any injunctive orders that would require an employee to continue to serve, or an employer to continue to accept service.[75] This common law principle has been maintained, notwithstanding acceptance of actual reinstatement of employees to their jobs under statutory unfair dismissal laws.[76] The remedy for breach of an indefinite employment contract will always be damages (and possibly an injunction requiring the contract to remain on foot, without any obligation to serve, if there are special reasons for such a finding[77]).

A further established principle of contract law would limit claims to ensure that employees would *not* be entitled to lost salary until an anticipated retirement age: the duty to mitigate.[78] Mitigation means that an employee will only be able to claim damages for the amount of time it would reasonably take that person to find alternative employment, taking into account an obligation to be reasonably diligent in the search. Factors such as age, seniority, length of service would all contribute to that calculation. Likewise, an employer aggrieved by a resignation would be entitled to claim damages for the period of time it would take them to engage replacement staff, and factors such as the specialised nature of the skills required would affect that calculation.[79] Damages for unilateral termination of an indefinite employment contract would therefore attract damages calculated on the very same principles as breach of the implied term of reasonable notice. We have come full circle, but without the need to invent any implied terms.

The conceptual benefit of this approach is that it avoids any judicial contract rewriting whatsoever. The parties to employment contracts are held only to those terms that they create for themselves. It permits a clean separation between common law rights and remedies and statutory entitlements, and so respects the High Court's decisions in both *Byrne* and *Barker*.

In deference to *Byrne*, this approach ensures that neither the NES minima nor any award or enterprise bargain will be taken to trespass into the territory of private contract law. Parties who wish to adopt the provisions of the NES or an applicable industrial instrument as contract terms will need to incorporate those provisions expressly into their

employment contracts. This is a simple matter, requiring no more than confirmation with employees of an agreement to that effect.

Much ink has been spent in analysis of *Barker*.[80] One thing is clear from that decision: the High Court has turned its face against the development of any 'transformative approach' to the common law employment contract.[81] Far better to leave matters concerning 'social conditions and desirable social policy' to the legislature.[82] To date the legislature has made no prescription about the desirable length of notice for indefinite employment contracts. It has determined minimum periods in FW Act s 117, so that any shorter periods stipulated in employment contracts will not be enforceable. FW Act s 55(6) expressly contemplates that parties to enterprise agreements (a form of collective contract) may agree longer periods, and if so, those longer periods will be binding. The legislature has clearly set a minimum only, and leaves it to the parties themselves to determine their own arrangements above the safety net. If the parties themselves make no express provision for termination of a contract at all, there is no justification (on *Barker*'s reasoning) for a court exercising common law jurisdiction to invent a risk mitigation tool in the form of an implication of a right to terminate on reasonable notice. There is no necessity for the common law to fill the supposed 'gap' with a provision from a separate, statutory branch of the law. There is no injustice in leaving the parties to the consequences of their own decisions if they have entered their relationship on the mutual assumption of ongoing employment, terminable only by agreement or for cause.

From a practical perspective, this solution may encourage employers to be more transparent in their dealings with new recruits, lest their representations of secure long term employment, implicitly supported by the absence of any termination clauses in a written employment contract, deceive those employees who are not aware of the existence of a niggardly statutory provision allowing no more than one to five weeks' pay in lieu of notice upon termination.

An illustration: *Tran v Kodari Securities Pty Ltd*[83]

It will be a rare case where an employer has not taken the precaution of setting out termination provisions in a written employment contract, but such cases do arise occasionally, especially where the employer and employee are engaged in a close and

trusting relationship. In *Tran v Kodari Securities Pty Ltd*, a personal body guard was engaged by a wealthy businessman (Kodari) to undertake a range of duties, including setting up and maintaining business systems and supervising other staff. He was given the title Chief Operations Officer and was paid a salary of $150,000 per annum, plus other benefits, but for the first 18 months he was given no written contract outlining the terms of his appointment. After about 18 months Mr Kodari presented him with a thick document purporting to be a new employment contract. When Mr Tran asked for some time to obtain legal advice before signing the document, he was sacked unceremoniously, and the employer subsequently alleged that his request for time before signing was a resignation. Bromwich J held that the employer had taken adverse action against Mr Tran,[84] and awarded appropriate remedies, but in the alternative, also held that the employer had breached the original unwritten employment contract. Bromwich J said that Mr Tran had been employed indefinitely in a highly trusted position. Given his 'age and the time that it should have taken him to find alternative equivalent employment, a reasonable notice period would have been six months'.[85] The case was determined on the basis that there was an implied term of reasonable notice in his unwritten contract, and the principles in *Guthrie v News Limited*[86] were applicable to determine a reasonable notice period. There was no consideration of the potential application of FW Act s 117, and no reference to *Brennan* or *Wittenberg,* so this case does not assist us in determining whether the implied term of reasonable notice is likely to survive, at least in the federal jurisdiction. It does however provide a useful illustration of the kinds of factual scenarios that still occasionally arise, and in which serious injustice may be done if the implication of reasonable notice is squeezed out of existence by s 117. If there is to be no implication of the obligation to provide reasonable notice, then let there be no implication of an entitlement to terminate on reasonable notice, either.

Conclusion

Brennan, *Kuczmarski*, *Wittenberg*, and a few other recent cases have threatened the customary practice whereby employees seek payment in lieu of a reasonable period of notice when they have been dismissed without the benefit of any clearly applicable termination provisions in an employment contract.[87] As White J opined in *Heldberg v Rand*

Transport (1986) Pty Ltd,[88] this may be an unforeseen consequence of the enactment of a national standard for minimum notice periods in FW Act s 117. The best solution to this problem would be amendment to the FW Act to clarify that s 117 does not purport to substitute the NES minima for reasonable notice periods determined by common law principles, but such an amendment seems most unlikely in the current political climate. Another solution may be to press the courts more firmly with the arguments already mounted so eloquently by eminent scholars in this field.[89] The more radical alternative proposed in this article is to accept the arguments of Buchanan J in *Wittenberg*, but to go a step further by abolishing the implied term in its entirety, so that it no longer applies to permit unilateral termination of an indefinite employment contract. It is easy enough for an employer to stipulate a right to terminate, either absolutely or according to particular conditions, in an employment contract. An employer who chooses not stipulate any right to terminate upon giving notice must be taken to have contemplated an indefinite contract, terminable only by agreement. Unilateral termination would therefore be a technical breach of contract, giving rise to an entitlement to contractual damages.

It is, admittedly, a jarring thought that a contract of employment that stipulates no right to terminate should be treated as giving rise to an entitlement to life-long employment. But this is ameliorated by the application of a number of orthodox principles of common contract law that ensure that the parties will not be yoked together till kingdom come. The first principle is that courts will not specifically enforce contracts for personal services, so the remedy for breach of an indefinite employment contract will invariably be an award of appropriate damages. The second is that the parties will be obliged to make reasonable attempts to mitigate their losses, by seeking out alternative employment, or, in the case of an employer aggrieved by a premature resignation, by recruiting a replacement. This would mean that the measure of damages would be the same as the market is already well accustomed to, given that the body of precedent concerning reasonable notice already measures the entitlement to notice according to how long it would take to find alternative employment, or recruit new staff.

When one considers that as recently as 1974 in Australia, an employment contract containing no termination provisions could be treated as a yearly hiring, perhaps this proposal is not so radical at all. We do now live in a world where statutory unfair dismissal

protections and general protections of workplace rights contemplate potential reinstatement of employees who have been dismissed for capricious reasons. Perhaps it is time to encourage a judiciary who (following *Barker*) have already abdicated their role in determining terms implied by law in employment, to vacate the field entirely, by leaving the parties to the consequence of their own agreements. Let Parliament legislate for any such implied terms, if 'desirable social policy' so demands.

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[1] Professor of Law, University of Technology Sydney. Email: Joellen.Munton@uts.edu.au.
[2] These notice periods range from 1 week to 4 weeks, depending on the length of service, and employees older than 45 with at least two years' continuous service are entitled to an extra week: FW Act s 117(3).
[3] [2014] NSWSC 859.
[4] (2013) 120 SASR 11; [2013] SASCFC 151 ('*Brennan*').
[5] [2016] SADC 65 ('*Kuczmarski*').
[6] In addition to *Brennan* and *Kuczmarski*, see *Carrabba v PFP (Aust) Pty Ltd* [2019] FCCA 2857 (9 October 2019) at [45]-[47]; *Pappas v P & R Electrical Pty Ltd* [2016] SADC 132 (4 November 2016) at [105]; *Nair v Queensland University of Technology* [2019] FCCA 1709 (19 June 2019) at [146]-[148].
[7] See S Roeger and A Stewart, 'Is there still an implied term of reasonable notice on termination?' (2016) 7 *WR* 105; M Irving, 'Australian and Canadian Approaches to the Assessment of the Length of Reasonable Notice' (2015) 28 *AJLL* 159. See also A Stewart et al, *Creighton & Stewart's Labour Law*, 6th edn, Federation Press, Sydney, 2016, at [22.08]; C Sappideen et al, *Macken's Law of Employment*, 8th edn, Lawbook Co, Sydney, 2016, at [9.30].
[8] [2016] FCAFC 33; 330 ALR 476 ('*Wittenberg*').
[9] *Wittenberg* at [234].
[10] (1995) 185 CLR 410 at 422-423 per Brennan CJ, Dawson and Toohey JJ.
[11] [2014] HCASL 153,at [5], per Bell and Gageler JJ, 15 August 2014. Of course, refusal of special leave does not create any precedent (see *North Ganalanja Aboriginal Corporation v Qld* (1996) 185 CLR 595 at 643, and *Mt Bruce Mining v Wright Prospecting* (2015) 256 CLR 104 at [112]. It does however leave the Brennan standing as an appellate level precedent in a State Supreme Court.
[12] See *North Ganalanja Aboriginal Corporation v Qld* (1996) 185 CLR 595 at 643, and *Mt Bruce Mining v Wright Prospecting* (2015) 256 CLR 104 at [112].
[13] (2018) 280 IR 93; [2018] FCA 1141.
[14] (2018) 280 IR 93, at [104].
[15] [2019] FCCA 1709 (19 June 2019) at [146]-[148].
[16] [2019] FCCA 2857 (9 October 2019) at [47].
[17] [2000] TASSC 43 ('*Jager*').
[18] See *Jager v Australian National Hotels Pty Ltd* H3/2000 (5 April 2001).
[19] See *Brennan v Kangaroo Island Council (No 2)* [2013] SADC 106 (15 August 2013), awarding costs against Ms Brennan.
[20] [2016] FCCA 2227 ('*McGowan*').
[21] [2016] FCCA 2227 at [67].
[22] [2019] FCCA 2857] at [47].

[23] See FW Act s 391 (reinstatement by the Fair Work Commission for unfair dismissal), and s 545(2)(c) (reinstatement by a federal court as a remedy for breach of the General Protections).
[24] See for example *Rankin v Marine Power International Pty Ltd* [2001] VSC 150,107 IR 117 at [220]; *Howard v Pilkington (Australia) Ltd* [2008] VSC 491 at [142]-[143].
[25] (1995) 185 CLR 410 ('*Byrne*').
[26] (2014) 253 CLR 169 ('*Barker*').
[27] Irving, above n 7 at 177-182.
[28] (1974) 10 SASR 17 at 36.
[29] [1992] 1 VR 567 ('*Quinn*').
[30] See J Phillips and M Tooma *The Law of Unfair Contracts in NSW*, Thomson Lawbook, Sydney, 2004, at [4.285]-[4-295], citing *Caulfield v Broken Hill City Council* (1995) 60 IR 221; *Lavings v Barclay Mowlem Constructions (NSW) Ltd* (1994) 99 IR 247; *Newton v Goodman Fielder Mills Ltd* (1997) 81 IR 227, and *Moray Vincent v Merrill Lynch Australia Pty Ltd* [2000] NSWIRComm 160. See also *Westfield v Adams* (2001) 114 IR 241. Some of these cases were decided under the earlier Industrial Relations Act 1991 (NSW) s 275.
[31] The author is relying on her own experience of practising employment law in New South Wales before 2004 for this information.
[32] See now FW Act s 26(3)(a). In fact, unfair contracts claims under s 106 had already diminished, as a consequence of enactment of s 108A by the Industrial Relations (Unfair contracts) Act 2002 (NSW), to exclude claims from employees earning more than $200,000 per annum.
[33] See for example *Ma v Expeditors International Pty Ltd* [2014] NSWSC 859, where an award of 10 months' reasonable notice was awarded.
[34] See *Brennan v Kangaroo Island Council* [2013] SADC 99 (31 July 2013).
[35] [2013] SADC 99 at [32].
[36] (1977) 180 CLR 266 at 282.
[37] [2013] SADC 99 at [33]-[34].
[38] [2013] SADC 99 at [35].
[39] See *Byrne* at 429: 'at common law a contract of employment for no set term is to be regarded as containing an implied term that the employer give reasonable notice of termination except in circumstances justifying summary dismissal'. See also *New South Wales Cancer Council v Sarfaty* (1992) 28 NSWLR 68, at 74-75; *Guthrie v News Limited* [2010] VSC 196 at [196]-[198].
[40] [2013] SASCFC 151 at [27].
[41] [2013] SASCFC 151 at [28].
[42] (1995) 185 CLR 410 at 429.
[43] Ibid.
[44] *Brackenridge v Toyota Motor Corporation Australia Ltd* (1996) 67 IR 162 and *Elliott v Kodak Australasia Pty Ltd* (2001) 108 IR 23.
[45] (1996) 88 IR 268.
[46] [2013] SASCFC 151 at [32]-[33].
[47] [2016] FCAFC 33 at [216]-[238].
[48] [2016] FCAFC 33 at [238].
[49] [2016] FCAFC 33 at [288].
[50] [1969] 1 WLR 1812; [1969] 3 All ER 1264
[51] [2016] FCAFC 33 at [219].
[52] [2016] FCAFC 33 at [221], citing *Richardson v Koefod* [1969] 1 WLR 1812 at 1816; [1969] 3 All ER 1264 at 1266 per Lord Denning MR.
[53] (1974) 10 SASR 17 ('*Thorpe*').
[54] For example *New South Wales Cancer Council v Sarfaty* (1992) 28 NSWLR 68, where a medical director was held to enjoy professorial tenure in his position.
[55] For example *Holt v Musketts Timber Sales Pty Ltd* [1994] FCA 137; (1994) 54 IR 323; *Australian National Hotels Pty Ltd v Jager* (2000) 9 Tas R 153 at 168; and *Brennan*.
[56] (1995) 185 CLR 410 at 422-423.
[57] *Kuczmarksi* at [4].
[58] Ibid at [71].
[59] See n42 above.
[60] *Kuczmarski* at [45].
[61] Ibid at [48].
[62] Ibid at [52].

[63] Ibid at [69].
[6464] Above n 7.
[65] See above n 7.
[66] A similar provision existed in the Workplace Relations Act 1996 (Cth) s 661, which made it unlawful for an employer to terminate an employee's employment without giving the 'required' period of notice set out in s 661(2), except in cases of the employee's serious misconduct.
[67] See also Fair Work Act s 61(1) which describes the NES as 'minimum standards'.
[68] *Byrne* at 453 (per McHugh and Gummow JJ). See too *Kilminster v Sun Newspapers Ltd* (1931) 46 CLR 284.
[69] *Barker* at [30].
[70] *Byrne* at 449.
[71] *Wittenberg* at [237].
[72] (2001) 78 SASR 489.
[73] *Richardson v Koefod*, above n 52.
[74] *Wittenberg* at [237].
[75] See Sappideen et al, above n 7 at [11.10].
[76] See *Blackadder v Ramsay Butchering Services Pty Ltd* (2005) 221 CLR 539; 215 ALR 87; 139 IR 338; 79 ALJR 795.
[77] See for example *Turner v Australasian Coal & Shale Employees Federation* (1984) 6 FCR 177; *Hill v Parsons* [1972] 1 Ch 305; *Tullett Prebon (Australia) Pty Ltd v Purcell* [2009] NSWSC 1079; [2010] NSWCA 150.
[78] See Sappideen et al, above n 7 at [10.350].
[79] See *Zuellig v Pulver* [2000] NSWSC 7.
[80] J W Carter et al 'Terms Implied in Law: "Trust and Confidence" in the High Court of Australia' (2015) 32(3) *Journal of Contract Law*, 203-230; G Golding 'Terms Implied by Law into Employment Contracts: Are They Necessary?' (2015) 28 *AJLL* 113; L Hillbrick 'Why the High Court Went Too Far in Rejecting the Implied Term of Trust and Confidence in its Entirety, in the Context of Constructive Dismissal Claims' (2018) 31(1) *AJLL* 45.
[81] *Barker* at [41].
[82] Ibid.
[83] [2019] FCA 968 (21 June 2019). At the time of writing this case was subject to an as-yet undetermined appeal.
[84] Under FW Act s 340(1)(a)(ii), for exercising a workplace right to seek legal advice.
[85] [2019] FCA 968 at [81].
[86] [2010] VSC 196 at [196]-[198].
[87] See cases cited above n 6.
[88] (2018) 280 IR 93; [2018] FCA 1141.
[89] See above n 7.