Article Information

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Federal Court confirms reasonable notice term may be implied into employment contracts

The Federal Court of Australia (Federal Court) in Cropper v Energy Action (Australia) Pty Ltd (No 2) [2025] FCA 663 (Cropper) has recently confirmed courts will imply a contractual term requiring reasonable notice of termination into employment contracts where necessary, and that in this case, notice of termination in excess of the minimum requirements under the National Employment Standards was appropriate. The conclusions in this case reinforce the need to ensure written employment contracts are issued and regularly reviewed to ensure they accurately define the nature of a person's engagement and contain clear provisions regarding notice of termination.

Background

Mr Cropper, an information technology (**IT**) specialist, was initially engaged by Energy Action (Australia) Pty Ltd (**EAAPL**) in January 2005 as an independent contractor. Around one year later, certain events occurred (including moving Mr Cropper onto EAAPL's payroll, and integrating his role into the business operations), that the Federal Court subsequently found had the effect of converting Mr Cropper's engagement from independent contractor to employee of EAAPL. This remained the basis of Mr Cropper's engagement with the company until his termination on 28 February 2020.

Because there was a lack of clarity between the parties as to the basis of Mr Cropper's engagement, there was no written contract that specified the terms and conditions of Mr Cropper's employment with EAAPL, including notice of termination. In these proceedings, EAAPL maintained that it had engaged Mr Cropper not as an employee but as an independent contractor.

Mr Cropper's employment was subsequently terminated and he received EAAPL's standard termination package typically issued to permanent workers. This payment included an entitlement to "5 weeks' notice of termination pay", consistent with the minimum period of notice prescribed by section 117 of the *Fair Work Act 2009* (Cth) (**FW Act**), as well as amounts equivalent to 12 weeks' long service leave and 12 weeks' redundancy pay. EAAPL maintained that, as an independent contractor, Mr Cropper was not entitled to these amounts, but they were being paid to him "as a gesture of good faith".

Mr Cropper argued he was entitled to reasonable notice in the amount of 12 months' pay. Although not the subject of this article, Mr Cropper also argued he was entitled to accrued annual leave, public holidays and personal leave, none of which he was paid during his employment.

What is 'reasonable notice' and when will it be implied?

Every employment relationship in Australia is governed by a contract. That contract may be in writing, or it may be unwritten, comprising of terms agreed verbally or terms that are implied by the operation of law. One of the key terms of any employment relationship is the ability for it to end. If no terms governing the end of the employment have been agreed between the employer and the employee on that front (e.g. by way of an express termination clause in a written contract of employment), the law will impose an implied term of reasonable notice where it is *necessary* to ensure that the rights created by a contract are not "rendered nugatory, worthless, or, perhaps, be seriously undermined".[1]

This position was noted by the High Court in *Byrne v Australian Airlines*[2] as follows:

In the absence of anything to the contrary and putting to one side the provision in the award for notice, 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.

For example, in the Supreme Court of Victoria decision of *Quinn v Jack Chia (Australia) Ltd*[3] (**Quinn**) the Court implied a reasonable notice term of 12 months after an employee's change in duties rendered their original contract inapplicable, meaning they were subject to a new unwritten contract which required the giving of reasonable notice by the employer in order to terminate.

In *Susanna Ma v Expeditors International Pty Ltd*,[4] the Supreme Court of NSW accepted that *"[a]bsent evidence to the contrary, a term of reasonable notice is to be implied into a contract of employment"* and held that the proper period of notice the employer should have given its long term employee with an out-dated contract was ten months' notice.

In *Brennan v Kangaroo Island Council* [2013] 120 SASR 11 the Full Court of South Australian Supreme Court declined to imply a term of reasonable notice into the employee's contract as the Full Court held it was not *necessary* to imply such a term where an industrial award applied to the employee that included a term about termination.[5]

The Federal Court's Findings

Prior to *Cropper*, there was no binding Federal Court authority as to whether section 117 of the FW Act overrode the ability of the court to imply a reasonable notice term where no express notice provision existed and no employment instrument applied (e.g. an award or enterprise agreement). In considering whether it ought to imply a reasonable notice term by law into Mr Cropper's implied contract of employment, notwithstanding the minimum notice required under section 117 of the FW Act, the Federal Court noted:

Section 117 of the FW Act does not confer a right of termination. Rather … it assumes that such a right exists elsewhere, most logically as a term of the relevant employment contract. The section operates so as to prohibit the exercise of such a right unless or until certain criteria are met. It does that by stipulating a minimum period of notice that the employer must give before the termination takes effect, or a minimum amount that it must pay to the employee in lieu thereof. But, at the risk of repetition, it does not confer a right of termination upon parties to employment contracts, including employers.

Where no such right is conferred expressly – whether as a term of the contract itself (as would be the usual case) or by operation of some other instrument – it is well established that the law will imply into a contract of service an entitlement to terminate on reasonable notice.

The Federal Court was satisfied it was *necessary* in the circumstances to imply a term enabling termination on reasonable notice into Mr Cropper's employment contract.

In determining what would be considered reasonable notice, the Federal Court took into account the following factual matters relating to Mr Cropper:

- his period of service with EAAPL of approximately 14 years;
- his age and his tertiary qualifications; and
- his income at the time of the termination.

The Federal Court consequently found that the reasonable notice period at the time of the termination was three months' notice. Mr Cropper was also entitled to damages for breach of contract for EAAPL's failure to provide reasonable notice of the termination of his employment (plus being entitled to recover amounts on account of unpaid annual leave, sick leave, and public holidays).

Lessons for Employers

The Federal Court's decision in *Cropper* makes it clear that, in the absence of a clear written term of the contract, or the application of an industrial instrument (e.g. an award or enterprise agreement) employers cannot necessarily rely on the minimum notice periods as set out by section 117 of the FW Act as representing the outer limit of entitlements to notice of termination of an employment contract.

However, this decision suggests that the same outcome *may not* apply in relation to an employee who is covered by a modern award or enterprise agreement that contains termination provisions.

Cropper confirms the importance of ensuring workers (whether employees or independent contractors) are engaged on up-to-date written contracts that accurately set out the terms of the engagement.

Risks can arise in respect of employees engaged without written employment contracts, or where circumstances change

and the existing contract could no longer reasonably be said to govern the relationship.

This decision should prompt employers to ensure that their employment contracts are up to date and accurately reflect the true nature of the engagement and the role and duties an employee has been engaged to perform. If an employee is promoted into a new role, the terms of the contract should be varied (or a new contract offered) reflecting the promotion.

Contracts are not “set and forget” documents. In order to best protect all parties, they need to remain accurate and up to date. A failure to do so will increase the risk of a reasonable notice term being implied by law.

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[1] *Byrne v Australian Airlines* (1995) 185 CLR 410 at 450.

[2] (1995) 185 CLR 410 at 429.

[3] [1992] VicRp 37.

[4] [2014] NSWSC 859 at [53].

[5] Note that an application for special leave to the High Court in this matter was refused.