IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY No. A1 of 2014

BETWEEN: **COMMONWEALTH BANK OF AUSTRALIA (ACN 123 123 124)**
Appellant

and

STEPHEN JOHN BARKER
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Issues

2 Does the common law of Australia require that employment contracts contain an implied term that the employer will not, without reasonable cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the parties?

3 If so, what steps does such an implied term require an employer to take on the redundancy of an employee's position, prior to making a decision to terminate employment, both at all and in circumstances where there is an express contractual right of termination on notice?

4 Are damages available for a breach of such an implied term in circumstances where the conduct said to constitute the breach occurred in relation to the termination of employment?

Part III: Section 78B of the *Judiciary Act 1903*

5 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

Part IV: Citations

6 The appeal is from a decision of the Full Court of the Federal Court of Australia, reported at (2013) 214 FCR 450. That was an appeal from a decision of the Federal Court of Australia, reported at (2012) 296 ALR 706.

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Part V: Facts

7 The appellant employed the respondent for 27 years. On 2nd March 2009, the appellant informed the respondent that his position was redundant. The appellant terminated the respondent's employment without written notice on 9th April 2009. The written contract of employment made provision for termination on four weeks' written notice, or payment of four weeks' salary in lieu of notice. The trial judge found that the appellant had repudiated the respondent's contract of employment, which repudiation the respondent had accepted.

8 The respondent pleaded that there was incorporated into the contract of employment a written policy entitled "Redundancy, Redeployment, Retrenchment and Outplacement Policy" (**Redeployment Policy**). Aspects of the Redeployment Policy prescribed various responsibilities of the employee on the one hand, and of managerial and human resources staff of the appellant on the other, to facilitate steps to achieve the redeployment of any employee whose position within the appellant was made redundant.

9 The respondent also pleaded that the appellant had failed to conduct the termination or redundancy process in a bona fide and or proper manner thereby breaching the Redeployment Policy and that the appellant's conduct was in breach of an implied term of mutual trust and confidence. He pleaded that this resulted in him being denied the opportunity of redeployment.

10 The trial judge found that the Redeployment Policy was not incorporated into the contract of employment.

11 The respondent further pleaded at paragraph [14] of the Amended Statement of Claim that the following terms were implied into the contract to give it "business efficacy and arising from the mutual intentions of the parties":

(a) that the appellant "would maintain trust and confidence with the [respondent]"; and

(b) that the appellant "would not do anything likely to destroy or seriously damage the relationship of trust and confidence without proper cause for so doing".

12 The trial judge found that there was implied into the contract of employment (by law, rather than because of the factual circumstances of the particular case) a term of trust and confidence such that the appellant was required to not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of

confidence and trust between employer and employee (**the implied term**) {Reasons for Judgement 3 September 2012 (**FCA**) [329]-[330]}.

13 The trial judge also found that a serious breach of the Redeployment Policy was a breach of the implied term {FCA [330]}, that a serious breach of the policy such as to breach the implied term can give rise to a claim for damages {FCA [333]} and that in the particular circumstances of the case, it was incumbent upon the appellant to take timely and meaningful steps to comply with the Redeployment Policy {FCA [351]}. He found that the appellant's inactivity within a reasonable period after 2nd March 2009 was a serious breach of the Redeployment Policy and that it was in breach of the implied term {FCA [352]}.

14 The trial judge assessed the chance of the respondent being redeployed (in the period 2nd March 2009 – 9th April 2009) at 25 per cent {FCA [369]}. He consequently assessed damages on the basis of 25 per cent of the evidence of past economic loss, together with the assessment of future economic loss based on a notional retirement age, reduced by 30 per cent for contingencies. This resulted in an award of damages of $317,500 {FCA [370]-[372]}.

15 On appeal, a majority of the Full Court of the Federal Court comprised of Jacobson and Lander JJ (**the majority**) concluded that the implied term had obtained a sufficient degree of recognition, both in England and Australia, that it ought to be accepted by an intermediate court of appeal as a term implied by law {Reasons for Judgement 6 September 2013 (**FCAFC**) [13]}.

16 The majority rejected the view that a serious breach of the Redeployment Policy amounted to a breach of the implied term, as the terms of the Redeployment Policy were not part of the contract of employment {FCAFC [113]-[116]}. However, it found that the implied term required the appellant to take positive steps from 2nd March 2009 to consult with the respondent about the possibility of redeployment and to provide him with the opportunity to apply for alternative positions within the appellant {FCAFC [112]}.

17 The majority further found that the breach sounds in damages where the breach is anterior to and independent of termination {FCAFC [136]}. It upheld the trial judge's conclusions as to damages {FCAFC [138]}, save as to making a minor, conceded alteration to the actual calculation {FCAFC [151]}.

18 Jessup J dissented, rejecting the proposition that the implied term was a necessary incident of contracts of employment and further holding that even if the implied term did exist, it had not been breached in this case.

Part VI: Argument

Does the common law of Australia require that employment contracts contain the implied term?

The development of the term in the United Kingdom

19 The implied term, as a term implied by law, is an English development. It did not develop from a principled application of the doctrine of necessity. Rather, it arose from judicial treatment of the legislative introduction of the concepts of unfair dismissal in the *Industrial Relations Act 1971*, and subsequently what became to be described as "constructive dismissal" in the *Trade Union and Labour Relations Act 1974* {*Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761 at 767-768 (Lord Denning MR) (**Sharp**)}. That latter Act introduced a section to the effect that an employee would be taken to be dismissed if "the employee terminates that contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct."

20 The Court of Appeal in Sharp was required to determine whether this section expressed a test as to the employer being guilty of conduct which is a significant breach going to the root of the contract of employment or showing that it no longer intends to be bound by the essential terms of the contract, or whether it introduced a new concept of unreasonable conduct on the part of the employer. It determined that the test was the former {Sharp at 768-770 per Lord Denning MR, 772 per Lawton LJ}.

21 It consequently became necessary to find a formulation by which this construction could be given content. This opportunity arose in *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84 (**Courtaulds**). The Employment Appeal Tribunal there accepted a formulation that "it was an implied term of the contract that the employers would not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties" {Courtaulds at [10]}. That conception was then developed by the Employment Appeal Tribunal, notably in *Woods v W.M. Car Services (Peterborough) Ltd* [1981] ICR 666 at 671 per Browne-Wilkinson J.

22 The development of the law as recognising such an implied term was finally recognised and approved by the House of Lords almost 20 years later, in *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20 at 37-38 per Lord Nicholls and 45-46 per Lord Steyn. Lord Steyn said at 46:

> The evolution of the implied term of trust and confidence is a fact. It has not yet been endorsed by your Lordships' House. It has proved a workable principle in practice. It has not been the subject of adverse criticism in any decided case and it has been welcomed in academic writings. I regard the emergence of the implied obligation of mutual trust and confidence as a sound development.

23 In *Johnson v Unisys Ltd* [2003] 1 AC 518, (**Johnson**) Lords Nicholls, Hoffman and Millett (with Lord Bingham agreeing with Lords Hoffman and Millett) decided that the implied term should not apply in relation to dismissal, as Parliament had established a statutory unfair dismissal regime (see Lord Nicholls at [2]; Lord Hoffman at [50]ff; Lord Millett at [80]). This has become known as the "**Johnson exclusion area**". Lord Hoffman (with whom Lord Bingham agreed) also considered that it would be inconsistent with the express contractual notice provision in Mr Johnson's contract for the implied term to extend to dismissal.

24 Lord Nicholls in *Eastwood and another v Magnox Electric plc* [2005] 1 AC 503 at 524 [15] (**Eastwood**) reinforced the logic of the Johnson exclusion area by pointing out that "[i]f an implied term to act fairly, or a term to that effect, applies to events leading up to dismissal but not to dismissal itself unsatisfactory results become inevitable."

25 The implied term has been further refined by the United Kingdom Supreme Court in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22 (**Edwards**).

Treatment of the implied term in Australia

26 Until the decision of the Court below, there had been no authoritative acceptance of the implied term by an Australian appellate court. The term has been considered on eleven occasions at that level. Numerous first instance judgments have given it consideration. Jessup J in dissent reviewed the superior court decisions, both at first instance and at intermediate appellate level, concluding that the question whether the implied term is part of the law of contracts in Australia has never been answered in the affirmative by an Australian appellate court in the sense of being part of the *ratio decidendi* {FCAFC [239]-[280]}.

27 The first Australian superior court decision to contemplate the implied term at all was *Blaikie v South Australian Superannuation Board* (1995) 65 SASR 85 at 105 (**Blaikie**), a case of constructive dismissal. Olsson J identified, but did not analyse, the implied term by reference to one of the English authorities, *Woods v W M Car Services (Peterborough) Ltd* [1981] ICR 666. He reiterated those comments in his dissenting judgment in the Full Court decision of *Easling v Mahoney Insurance Brokers* (2001) 78 SASR 489 at 514 [99], also a constructive dismissal case, and again without analysis of the application of the implied term in Australia.

28 The intermediate appeal case that has proved the most influential in other courts accepting the existence of the implied term in Australia is *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144 (**Burazin**). The Full Court of the Industrial Relations Court of Australia accepted at 151 that there was "ample English authority for the implication of the suggested term" and consequently (*obiter dicta*) that the implied term existed in the contract of employment in question {Burazin at 154} but did not accept that that authority supported the view that damages were available for its breach. It found that the employee was entitled to statutory compensation sufficient to cover the claimed loss and damage and so left the question open {Burazin at 154}.

29 The closest analysis of the implied term prior to the dissent of Jessup J in the present case was by the Full Court of the Supreme Court of South Australia in *State of South Australia v McDonald* (2009) 104 SASR 344 (**McDonald**). The Court considered the historical development of the term in the UK but ultimately noted that whether the term was to be implied as a matter of law in Australian employment contracts "would require a closer analysis of the basis of the term, the nature, scope and effect of the term, and of the interrelationship of the term with other established terms and conditions of employment relationships" {McDonald at [234]}. It held that the contract in question did not contain the term. Any such implication was unnecessary, by reason of the statutory and regulatory framework that governed the employment relationship {McDonald at [270]}. This Court refused a grant of special leave from that decision {*McDonald v The State of South Australia* [2010] HCATrans 25 (12 February 2010)}.

30 The other Australian intermediate appellate cases that have given some consideration to the implied term are *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 (**Perkins**), *Blood Transfusion Service of the Australian Red Cross v Raffoul* [1998] FCA 1497 (**Raffoul**), *Hollingsworth v Commissioner of Police* (1999) 47 NSWLR 151

(**Hollingsworth**), *State of New South Wales v Paige* (2002) 60 NSWLR 371 (**Paige**), *Irving v Kleinman* [2005] NSWCA 116 (**Irving**), *Delooze v Healey* [2007] WASCA 157 (**Delooze**), *Russell v Roman Catholic Church, Sydney* (2008) 72 NSWLR 559 (**Russell**) and *Shaw v State of New South Wales* [2012] NSWCA 102 (**Shaw**). As Jessup J in dissent summarised in respect of all of the intermediate appeal cases {FCAFC at [280]}:

> Of the judgments of the intermediate appellate courts discussed above, in three the term was referred to, but it played no real role in the determination of the issues at hand (*Perkins*, *Raffoul* and *Hollingsworth*), in two the existence of the term was recognised only to the extent of holding that the plaintiff had a case that could reasonably be argued (*Irving* and *Shaw*), one was not an employment case (*Delooze*), and one involved the recognition of the implied term in a dissenting judgment only (*Easling*). That leaves *Burazin*, *Paige*, *Russell* and *McDonald*. In *Paige* and *Russell*, although (as in the other cases) the question did not have to be directly determined, there was an unmistakeable note of caution in the terms in which the implied term was discussed. Their Honours seemed to be of the view that it was not at all obvious that the term existed as part of the employment law in Australia.

31 Other cases have cast doubt on the proposition that the implied term forms part of the common law: See *Heptonstall v Gaskin (No 2)* (2004) 138 IR 103 at 115 (Hoeben J); *Walker v Citigroup Global Markets Australia Pty Ltd* (2005) 226 ALR 114 at [203]-[205] (Kenny J); *McDonald v Parnell Laboratories (Aust) Pty Limited* (2007) 168 IR 375 at [83] – [94] (Buchanan J); *Van Efferen v CMA Corporation Limited* (2009) 183 IR 319 at [79]-[86] (Tracey J).

32 In *McDonald v Parnell Laboratories (Aust) Pty Ltd* (2007) 168 IR 375, Buchanan J reviewed the authorities, noting that the early observations in *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 at 81 (Dixon and McTiernan J) and *Shepherd v Felt Textiles of Australia Ltd* (1931) 45 CLR 359 at 372 (Starke J), 378 (Dixon J) did not support the existence of a term or condition giving rise to a freestanding right of damages or some other remedy on its breach: (2007) 168 IR 375 at [84]. He noted that the attempts to imply such a term were generally made with a view to avoiding the effect of *Addis v Gramophone Company Limited* [1909] AC 488, which disallows damages for the manner of dismissal.

33 At the point of logical analysis, however, Buchanan J remarked that having regard to the usual requirements for implying a term as articulated in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283, it was very difficult to sustain an argument that such a term could be said to be necessary to give business efficacy to a contract or to be so obvious that it goes without saying, especially in circumstances where any such term had gone unrecognised for so long. At the practical level, he observed that

in many cases such a term would *"collide"* with express terms of the contract. Thus in the case he was considering, he noted that it would be of *"no avail"* to suggest that such an implied term could restrict a right of termination in accordance with the express terms of a contract.

34 Buchanan J pursued this objection in *Dye v Commonwealth Securities Limited* [2012] FCA 242, confirming that part of his reservations about such an implication "arose from the need to always test the question of the existence and suggested practical content of any such implied term against the express terms of the contract": [2012] FCA 242 at [601].

35 In *Van Efferen v CMA Corporation Limited* (2009) 183 IR 319, [79]-[86] Tracey J considered Buchanan J's remarks in *McDonald* to be correct; he also noted that Kenny J's observations in *Walker v Citigroup Global Markets Australia Pty Ltd* (2005) 226 ALR 114 at [203]-[205] formed part of the ratio of that decision and, had it been necessary to do so, he would have followed them: [2009] FCA 597; (2009) 183 IR 319 at [85]. Kenny J in *Walker* held that such a term does not apply to employment contracts: (2005) 226 ALR 114 at [203]-[205].

The Legislative Context: Unfair Dismissal Laws in Australia

36 Before considering whether the implied term should be part of Australian law, it is appropriate to consider statutory context. In *Brodie v Singleton Shire Council* (2001) 206 CLR 512, Gleeson CJ said

> Legislation and the common law are not separate and independent sources of law; the one the concern of parliaments, and the other the concern of courts. They exist in a symbiotic relationship.

37 The Australian unfair dismissal laws have a long and complex history. The present day position is simpler, with the main unfair dismissal laws being contained in Part 3-2 of the *Fair Work Act 2009* (**Fair Work Act**) and the State unfair dismissal laws having only a small residual operation.

38 Prior to 1994, the unfair dismissal laws were ad hoc State-based laws. There were no unfair dismissal laws at federal level. However, in 1984, the Australian Conciliation and Arbitration Commission decided to introduce a standard form set of termination, change and redundancy provisions (**TCR Provisions**) into industrial awards in the *Termination Change and Redundancy Case* (1984) 8 IR 34 and (1984) 9 IR 115. The TCR Provisions included a prohibition on unfair dismissal. This prohibition was the subject of

the High Court decision in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 (**Byrne**) which considered, amongst other things, whether this prohibition formed part of the contract of employment.

39 The *Industrial Relations Reform Act 1993* (Cth) (**Industrial Relations Reform Act**) first introduced federal unfair dismissal laws into the then *Industrial Relations Act 1988* (Cth). These laws were subsequently included in the *Workplace Relations Act 1996* (Cth), which was substantially rewritten by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (**Work Choices**), and now in the Fair Work Act. There has been a range of amendments, of varying degrees of significance, since the introduction of the laws. To distinguish between the Workplace Relations Act 1996 before Work Choices and afterwards, these submissions use the terms **pre-2006 Workplace Relations Act** and **2006 Workplace Relations Act** respectively.

40 Since Work Choices, the federal unfair dismissal laws have covered the field and excluded State unfair dismissal laws. The reach of the federal unfair dismissal laws has been further consolidated by State referrals of power contained in the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* (Cth) and associated State legislation (although Western Australia has not referred its powers). This has resulted in coverage of the State unfair dismissal laws now being largely confined to the State public services.

41 The key features of the current federal unfair dismissal laws are as follows. Most of these are well-established features and have applied (with minor variations) to the previous laws as well. In this regard, it is necessary to consider the historical differences because, at the time of formation of the respondent's contract in 2004, the pre-2006 Workplace Relations Act applied – while at the time of the respondent's dismissal in 2009, the 2006 Workplace Relations Act applied.

42 Unfair dismissals are heard by the federal industrial tribunal (presently the Fair Work Commission, but prior to that, Fair Work Australia and the Australian Industrial Relations Commission). They are not heard by a Court. This has been the case since the 1996 Workplace Relations Act – originally, the Industrial Relations Court heard unfair dismissal applications.

43 Unfair dismissal applications must be made within 21 days of dismissal (subsec 394(2)). Very short limitation periods are a long-standing feature of the laws. See pre-

2006 Workplace Relations Act s170CE(7A); 2006 Workplace Relations Act, subsec 643(14).

44 Particular classes of employees are excluded from making unfair dismissal applications. Most importantly, employees who earn above a particular 'high income' threshold (currently $129,300 per annum) are excluded unless they are covered by an industrial instrument. (Fair Work Act, s382; 2006 Workplace Relations Act, para 638(1)(f), subsec (6) and (7)); pre-2006 Workplace Relations Act, para 170CBA(1)(f)). This exclusion was originally introduced in 1994, a few months after the Industrial Relations Reform Act commenced.

45 An employee can bring an unfair dismissal application where the termination is at the 'initiative of the employer' (Fair Work Act, sec386). This is a long-standing provision, which applied as part of the pre-2006 Workplace Relations Act (subsec 170CD(1)) and the 2006 Workplace Relations Act (subsec 642(1)). The Fair Work Act has also included, in the definition of dismissal, where an employee '*resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer*' (para 386(1)(b)).

46 There are restrictions on when an employee can bring an unfair dismissal claim where the termination of employment is due to *'genuine redundancy'*. An unfair dismissal application can be brought where either:

(a) the employer has not complied with their consultation obligations in an industrial instrument; or

(b) the employee could have been reasonably redeployed.

See definition of *'genuine redundancy'* in sec 389.

48 The origin of these restrictions is the 2006 Workplace Relations Act, which precluded an employee from bringing an unfair dismissal where their employment was terminated for '*genuine operational reasons*' (subsec 643(8)).

49 Under the pre-2006 Workplace Relations Act, an employee could bring an unfair dismissal where their employment was terminated due to redundancy, without restriction.

50 The basic test for unfair dismissal is whether the dismissal is harsh, unjust or unreasonable. Fair Work Act, para 385(b), sec 387; 2006 Workplace Relations Act, para 643(1)(a), subsec 652(3) and sec 654; pre-2006 Workplace Relations Act, para 170CE(1)(a), subsec 170CG(3) and 170CH(1). There is a significant volume of case law

on what comprises an unfair dismissal. In the case of a redundancy, both a failure to redeploy and a failure to consult properly with an employee can render a dismissal unfair.

51 The remedies are:

(a) re-instatement of the former employee (Fair Work Act, sec390) with back-pay and continuity of service (sec 391);

(b) if reinstatement is inappropriate, compensation of up to 6 months pay or half the high income threshold (whichever is lower) (Fair Work Act, sec 392). .

These remedies are also longstanding (see 2006 Workplace Relations Act, sec 654; pre-2006 Workplace Relations Act, sec 170CH).

52 In *State of New South Wales v Paige* (2002) 60 NSWLR 371 at [154] (**Paige**), Spigelman CJ described the unfair dismissal system (as it then existed) as representing 'a particular and carefully calibrated balancing of the conflicting interests involved namely, between preserving the expectations of employees on the one hand and enabling employers to create jobs and wealth, on the other hand'.

Necessity

53 For a term to be implied by law, it must be necessary. In Byrne at 450-452, McHugh and Gummow JJ characterised necessity as requiring that "unless such a term be implied, the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined." Necessity is to be determined having regard to the circumstances of the class of contract in question: *Liverpool City Council v Irwin* [1977] AC 239 at 254 per Lord Wilberforce and *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 at 307 per Lord Bridge. The implication is a necessary incident of that class of contract: *Breen v Williams* (1996) 186 CLR 71 at 103 per Gaudron and McHugh JJ (**Breen**).

54 Terms implied by law have their origins in the intention of parties to contracts of the relevant class, becoming so much a part of common practice over time that the courts import the term into all contracts of the class as a matter of course. See Byrne at 449 per McHugh and Gummow JJ and Breen at 103 per McHugh and Gaudron JJ.

55 The Full Federal Court in *University of Western Australia v Gray* (2009) 179 FCR 346 at [141]-[147] (**Gray**) identified that the necessity test requires a range of considerations to be taken into account, including those of justice and policy. They emphasized that "considerations of policy can be of considerable significance in negativing

the making of an implication, or else in demonstrating that the issues raised by the proposed implication are of such a character or complexity as to make it inappropriate for a court, as distinct from a legislature, to impose the obligation in question" {Gray at [146]}. In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 (**Toll**) at 182-183 [53], this Court noted that in most Australian jurisdictions, legislation has been enacted to enable the courts to "ameliorate in individual cases hardship caused by the strict application of legal principle to contractual relations" and that "[a]s a result, there is ... every reason to adhere to [principle] in cases where such legislation does not apply, or is not invoked."

56 The majority in the present matter accepted the statement by the Full Court of the Supreme Court of South Australia in McDonald that the development of the implied term was 'consistent with the contemporary view of the employment relationship', being a view that the relationship is one of common interest and partnership, rather than one of conflict and subordination. It held that "that approach" was in accordance with the explanation of the necessity test stated by the Full Federal Court in Gray {FCAFC at [95]}.

57 This is not a correct application of the test of necessity. The test requires that in the absence of the term, the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined. The test is not one of consistency of the term with a contemporary view of the "employment relationship", but necessity of the term for the enjoyment of the contractual rights. Neither, for reasons developed below, is the view of the employment relationship being one of common interest and partnership consistent with the common law's regulation of employment contracts.

58 That there is no necessity for such a term is underscored by the fact that neither the English case law, not the Australian intermediate appellate case law that has concluded or assumed the existence of the implied term, has grappled with the test of necessity, as identified by Jessup J at FCAFC [288]ff. When the implied term is traced to its source, it is apparent that the United Kingdom cases did not apply the necessity test, there having been no cause to do so in Courtaulds or Malik (the existence of the term not having been contested).

59 That the implied term has not hitherto been identified or even recognised as necessary for contracts of employment to be workable and effective speaks strongly against the need for the implication of such a term {Byrne at 453}.

60 In Byrne, this Court rejected an argument that employment contracts contained a term implied by law precluding the employee from being unfairly dismissed. This was

where an applicable term of an industrial award prohibited unfair dismissal. McHugh and Gummow JJ said that even before the award term was introduced, that was not a case where such an implied term would be necessary "lest the contract be deprived of its substance, seriously undermined or drastically devalued in an important respect" {Byrne at 453}.

61 The recognition that the necessity of a putative implied term is informed by considerations of policy raises squarely the observation that not only is there a dearth of justification for the implied term, but there are also sound policy reasons against its recognition, which arise from the Australian unfair dismissal laws, described above.

62 Two matters arise from this.

63 The first is that the United Kingdom rationale for implying the term as described in paragraph 19 above, is inapplicable in Australia. As discussed above, the Australian federal unfair dismissal laws have long applied where the termination was 'at the initiative of the employer' – which has been interpreted to include where 'the act of the employer results directly or consequentially in the termination of the employment' (*Mohazab v Dick Smith Electronics Pty Ltd* (No 2) (1995) 62 IR 200 at 205-206, cited with approval by McHugh J in *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 at [64]). Unlike the English position, this includes where the employee resigns as a consequence of the employer's actions, regardless of whether there has been a breach of contract by the employer.

64 The second is that any acceptance of the implied term has to be reconciled, at the level of analysis of policy-informed necessity, with the existence of such unfair dismissal laws. In Johnson, the House of Lords attempted to deal with this by formulating the Johnson exclusion area – with the implied term not applying in relation to dismissal, but applying in relation to matters anterior to dismissal. The main rationale for the Johnson exclusion area is to avoid creating a common law unfair dismissal regime, in circumstances where Parliament has established statutory unfair dismissal laws.

65 This rationale extends to employees who do not have access to statutory unfair dismissal laws because of their level of remuneration. The respondent was such an employee. In this regard, Parliament has made particular decisions as to who will have access to unfair dismissal laws and who will not. See Johnson at [80] per Lord Millett, *Paige* at [143]-[154] per Spigelman CJ and *Russell v Roman Catholic Church, Sydney* (2008) 72 NSWLR 559 at [63] (**Russell**) per Basten JA. This reasoning is also supported

by the fact the Commonwealth unfair dismissal laws originally applied to all employees irrespective of their level of remuneration; they were subsequently amended to exclude highly paid employees: see the original Part VIA of Division 3 of the Industrial Relations Act as inserted by sec 21 of the Industrial Relations Reform Act; sec 170CD of the Industrial Relations Act which was inserted by sec 6 of the *Industrial Relations Amendment Act 1994* (No. 2) (Cth).

66 However, the creation of such an exclusion zone is not a satisfactory solution to the need to reconcile any perceived desirability of such a term with the fact of the legislature's stepping into the area of unfair dismissal. The boundary line is not easily drawn and employees have sought to identify "elements in the events preceding dismissal, but leading up to dismissal, which can be used as pegs on which to hang a common law claim for breach of an employer's implied contractual obligation to act fairly". (See Eastwood at [33]). This is a matter which Lord Nicholls has said merits urgent attention by the United Kingdom Parliament (Eastwood at [33]; see further FCAFC at [332] per Jessup J). In Australia, any implication of the term would set up a regime that from a policy point of view would compete with, and have to be reconciled to, the unfair dismissal regime established by statute. Parliament's stepping into the area at all underscores the desirability of this area of regulation being its province: witness the difference between the statutory limit on compensation for unfair dismissal of 6 months (pre-2006 Workplace Relations Act subsec 170CH(8), 2006 Workplace Relations Act subsec 654(11), Fair Work Act subsecs 392(5)-(6)), compared with the assessment of damages on the basis of lifetime employment, as occurred here.

67 The Johnson exclusion area also creates significant anomalies, for example, by creating a right to recover in the less serious case of suspension of employment, but not in the case of dismissal: see Eastwood at [30]-[33] and Russell at [63].

68 Finally, the implied term is inconsistent with the long established tenets of the employer – employee relationship (that contradict the loose concept of the "contemporary view of the employment relationship" as being in some sense a relationship of "partnership", as mooted in McDonald):

(a) the employee owes fiduciary duties to the employer – not the other way round;

(b) the employee owes a duty of fidelity to the employer – it is not a two-way duty;

(c) the employer may dismiss – on proper notice – for any reason or no reason and without any obligations of fairness, natural justice or – for that matter – good faith. As Lord Reid said in *Malloch v. Aberdeen Corporation* [1971] 1 W.L.R. 1578 at 1581:

> At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but the dismissal is valid. The servant has no remedy unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract.

10 **69** See further, *Intico (Vic) Pty Ltd v Walmsley* [2004] VSCA 90 per Eames JA at [27].

The implied duty of co-operation

70 The Full Court also relied on the implied duty of co-operation as an alternative source of the implied term, drawing from a statement by Lord Steyn in Malik at 45 {FCAFC at [118]}. By that duty, each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract. See *Secured Income Real Estate (Aust) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607 (per Mason J, Gibbs, Stephen and Aickin JJ concurring).

71 As Jessup J identified, this approach does not withstand analysis either historically
20 (FCAFC [306]} or as a matter of principle {FCAFC [307]ff}. There is no contractual benefit the enjoyment of which makes it necessary for the employer to act consistently with the implied term. Jessup J rejected as candidates for such benefits the right of remuneration (which is protected by the parameters of the contractual relationship) {FCAFC at [309]} and the benefits that might be described as job satisfaction, a sense of identity, self-worth, emotional well-being and dignity {FCAFC at [310]-[315]}. As his Honour noted, neither authority (referring, in particular, to *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539 at 566-567 [80]) nor principle justified the notion that the consideration provided by an employer under a contract of employment includes job satisfaction etc {FCAFC at [311]}. The difficulty was that there was no
30 underlying "contractual point of anchorage" upon which to base the implied term {FCAFC at [315]}

72 The majority, however, did conclude that the contract conferred a benefit that gave rise to the operation of the implied term {FCAFC at [127], see also FCAFC [111]}. This conclusion is problematic. They appear to describe this benefit as being length of service of the respondent, the size of the bank and the terms of clause 8 of the contract. However, the first two of those matters are not "benefits". They are facts. The third, clause 8, does confer a benefit (that is, a termination payment). This is not a benefit that could give any relevant content to the implied term.

73 In any event, all three identified matters are specific to this contract rather than to employment contracts as a class. They cannot justify the implication of a term of mutual trust and confidence across that class.

Uncertainty of the implied term and the problem of content

74 Finally, any such implied term can only ever be plagued by uncertainty. It leaves its content to be determined, as occurred here, wholly on a case by case basis. In the present matter, the trial judge found that while the Redeployment Policy was not incorporated into the contract of employment, a serious breach of its relatively directory terms constituted a breach of the implied term {FCA [331]). That was rejected unanimously by the Full Court {FCA [124]-[125], [349]}.

75 The majority then had to source the content of the term elsewhere. It did so by reference to the benefits it identified as giving rise to the operation of the implied term, being the length of service of the respondent, the size of the appellant and clause 8 of the contract. Clause 8 prescribed the amount of compensation payable to the respondent "where the position occupied by the Employee becomes redundant and the Bank is unable to place the Employee in an alternative position...". It then articulated the consequent content of the term at [131], being highly reflective of the expressly unincorporated redeployment policy, namely to "take positive steps to consult with Mr Barker about alternative positions and to give him the opportunity to apply for them."

76 These matters are inadequate to give content to any such implied term. The benefit conferred by clause 8 is a right to compensation on termination for redundancy in an amount being the greater of either a particular expressed sum or the result of a calculation according to an identified formula. Clause 8 confers no benefit in the form of any substantive opportunity for redeployment that might then require, by implication, an

obligation to consult. The matters identified at FCAFC [127] illustrate just how uncertain the operation of the implied term would be.

77 In Breen, Gaudron and McHugh JJ rejected the argument that contracts between doctors and patients contained a term implied by law requiring the doctor to act in the patient's best interests. They observed (at 104, footnotes omitted):

> ... the meaning and application of an implied term must be reasonably certain. The notion of "best interests" has been criticised as uncertain in the context of child welfare. That criticism is just as pertinent, if not more so, in the context of contract law which places a premium on certainty.

10 **78** The same criticism may be made of the implied term: FCAFC at [317] per Jessup J.

If the implied term exists, what steps does it require an employer to take on the redundancy of an employee's position, prior to making a decision to terminate employment, both at all and in circumstances where there is an express contractual right of termination on notice?

79 This raises, first, the scope of the Johnson exclusion area (the existence of which the majority accepted). If an employee's position is declared redundant and the employee is not redeployed to another position, then it follows that they will be dismissed – a fact which the Appellant expressly told the Respondent when declaring his position
20 redundant(FCAFC [36]). Declaring an employee's position redundant, considering redeployment (to any degree) and consequent termination are all steps within a single process. There is no principled rationale to sever any of those steps. Compare Edwards at [50]-[54] per Lord Dyson JSC, [86]-[87] per Lord Phillips of Worth Matravers PSC, [95], [99]-[104] per Lord Mance JSC.

80 The rationale for Johnson exclusion area should inform the scope of the exclusion. In the context of a redundancy, whether or not an employer has properly consulted with an employee whose position is made redundant and has properly considered redeployment will be key issues in any statutory claim for unfair dismissal.

81 In August 2004, at the time of formation of the respondent's contract, an employee
30 could bring an unfair dismissal application under the pre-2006 Workplace Relations Act on the ground that the dismissal was harsh, unjust or unreasonable: s170CE. In the case of redundancy, redeployment and consultation were relevant to the merits of such an application. See *Lockwood Security Products Pty Limited v Sulocki* (Full Bench, Australian Industrial Relations Commission, PR908053, 23 August 2001) and *Paper*

Australia Pty Limited v Day (Full Bench, Australian Industrial Relations Commission, PR954801, 1 February 2005).

82 Under the Fair Work Act, an employee cannot bring an unfair dismissal in relation to a "genuine redundancy". However, a dismissal will not be a genuine redundancy if (amongst other things) the employee could have been reasonably redeployed or the employer has breached an obligation in an industrial instrument to consult about the redundancy: sec 389. If an employee can establish that their dismissal was not a 'genuine redundancy', then the issues of redeployment and consultation will also be relevant to the merits. See, for example, *UES (Int'l) Pty Ltd v Leevan Harvey* [2012] FWAFB 5241 and *Aldred v J Hutchinson Pty Ltd* [2012] FWA 8289; see also FCAFC at [334] per Jessup J.

83 At the time of termination of the respondent's employment, it was not possible to bring an unfair dismissal application in relation to a redundancy: pre-2006 Workplace Relations Act, sec 643(8).

84 Secondly, the implied term with the content as found cuts directly across the express contractual right of the appellant to terminate without cause, on four weeks' notice, or to make a payment in lieu of notice. It prevents an employer from availing itself of its express contractual right in the event of a declaration of redundancy by qualifying that right of termination. See, e.g., *Helicopter Sales (Aust) Pty Ltd v Rotor-Work Pty Ltd* (1974) 132 CLR 1 at 4 (Barwick CJ), 6 (Menzies J), 11-13 (Stephen J), 15 (Mason J).

85 Finally, any general proposition as to universal content of the implied term must be located in the original analysis of necessity. If the implied term does exist, then there could be no principled rationale of necessity to suggest that it necessarily requires an employer to take positive steps to redeploy an employee before termination on the basis of redundancy. Neither the trial judge nor the majority in the Full Court suggested that this could be the case; they located that duty in the present instance in the particular elements of this employment relationship.

Are damages available for a breach of such an implied term in circumstances where the conduct said to constitute the breach occurred in relation to the termination of employment?

86 Damages are not available for the reasons advanced as to the scope of the Johnson exclusion area and the necessary content of the term in this case. There may be some uncertainty as to whether the Johnson exclusion area governs the content of the term or the

question whether damages lie in the particular case. On either view, damages cannot sound in the present matter (other than for the express four weeks' notice period, which does not arise from the implied term).

Part VII: Legislation

87 *Industrial Relations Act 1988* (Cth), s170CD

88 *Workplace Relations Act 1996* (Cth) (in force August 2004), Part VIA, Division 3, Subdivision B but in particular secs 170CBA, 170CD; 170CE; subsec 170CG(3); sec 170CH

89 *Workplace Relations Act 1996* (Cth) (in force April 2009), Part 12, Division 4 but in particular subsecs 638(1), (6), (7); 642(1); 643(1), (8), (14); secs 652 and 654

90 *Fair Work Act 2009* (Cth), Part 3-2, but in particular, secs 382-389; subsecs 392(5)-(6)

Part VIII: Orders sought

91 The appellant concedes that on the facts as found and the law, there should be a finding that there has been a breach of contract, with damages being awarded for the required period of notice. A submission to this effect was put to the Full Federal Court.

92 In the event that the appeal is allowed, set aside Orders 1 and 2 of Jacobson J, Lander J and Jessup J of the Federal Court of Australia made on 6th August 2013 (except as to costs).

93 In lieu thereof, uphold the appeal against the decision at first instance, set aside Orders 1 and 2 of Besanko J of the Federal Court of Australia made on 3rd September 2012 and in lieu thereof, enter judgment for the respondent against the appellant in a sum equivalent to four weeks' pay at the time at which the respondent's employment was terminated, being $11,692.31 plus interest.

94 Such further or other Orders as this Honourable Court deems fit.

Part IX: Time estimate

95 The appellant would seek no more than two hours for the presentation of the appellant's oral argument.

Dated: 17 January 2014

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