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AN EMPIRICAL ANALYSIS OF THE STATUS OF GOOD FAITH IN CONTRACTUAL PERFORMANCE: THE AUSTRALIAN EXPERIENCE

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October 2015

A thesis submitted in partial fulfilment for the degree of
Doctor of Philosophy
Discipline of Business Law
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Abstract

This thesis examines the concept of good faith in contractual performance as an important element in Australian contract law. The research begins with an empirical investigation of the extent of judicial support for an obligation of good faith in contract law since it was first put onto the judicial agenda in Australia by the case of Renard Construction (ME) v Minister for Works (1992) 26 NSWLR 234 through the obiter comments of Priestley J in 1992. The research continues with an empirical investigation of the meaning of good faith. There are many possible interpretations of the meaning of good faith, most of which are complex, contradictory, and unclear, which has led to undesirable uncertainty in the concept of good faith. The research then critically evaluates the possibility of legislating an obligation of good faith in contractual performance.

104 Australian cases from 1992 to 2009 that raised the issue of good faith were identified. The study period was divided into three phases; ‘Introduction Phase 1992-1998’, ‘Development Phase 1999-2003’, and ‘Consolidation Phase 2004-2009’. These phases are examined for trends and development of the concept. A four Likert-type scale was used to access the attitude of the judges regarding the concept of good faith. In order to measure the validity and reliability of the data, the ‘average’ and ‘standard deviation’ is used in this study. The empirical observation concluded that there is still inconsistency of support from judges towards the issue of good faith. A rigorous thematic analysis of the meaning of good faith was conducted to propose a workable meaning of good faith. Despite the traditional reservations arising from uncertainty associated with the many meanings of good faith, an empirical analysis concluded that a workable meaning of good faith could be achieved by way of ‘multi-categories’. The previous Australian government accepted the recommendation to legislate good faith in the context of franchising to regulate the unethical behaviour of franchisors toward franchisees. In the context of franchising, good faith is legislated by way of ‘non-discretionary reference criteria’ as prescribed in S 22 of Australian Consumer Law. The development of good faith in the context of franchising offers a valuable opportunity for legislating good faith in contractual performance.

Overall, this thesis argues that in the absence of a High Court decision regarding the application and meaning of good faith in contract law, there is scope for legislating a good faith obligation by defining good faith. This thesis suggests that good faith can be defined by way of ‘multi-categories’.
Statement of Originality

This is to certify that to the best of my knowledge, the content of this thesis is my own work. This thesis has not been submitted for any degree or other purposes. I certify that the intellectual content of this thesis is the product of my own work and that all the assistance received in preparing this thesis and sources have been acknowledged.

Nurhidayah binti Abdullah
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During my period of study, I was pregnant after seven years of marriage. When all the doctors that I met in Malaysia and Australia told me it was near impossible for me to conceive without reproductive assistance, fate had something different in store
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To my late father in law who passed away on 27th February 2013, during my final year of study, may God accept him among the guided ones. Amen.
I dedicate this thesis to my parents, my husband, my children and my beloved families for their unending support and unconditional love.
# Table of Contents

Abstract .................................................................................................................. i
Statement of Originality ....................................................................................... ii
Acknowledgements ............................................................................................... iii
Table of Contents ................................................................................................... vi
List of Figures .......................................................................................................... x
List of Tables ........................................................................................................... xii

1 INTRODUCTION ............................................................................................ 1
   1.1 RESEARCH BACKGROUND ........................................................................ 1
      1.1.1 Good Faith in the Common Law ................................................................. 1
      1.1.2 Good Faith in Australian Contract Law ....................................................... 4
   1.2 RESEARCH OBJECTIVES, SCOPE AND QUESTIONS .................................. 7
   1.3 RESEARCH METHODOLOGY AND SOURCES ........................................... 10
   1.4 RESEARCH CONTRIBUTION ....................................................................... 11
   1.5 THESIS STRUCTURE ..................................................................................... 14

2 GOOD FAITH AS A GENERAL PRINCIPLE IN CONTRACT LAW .................... 18
   2.1 INTRODUCTION ............................................................................................ 18
   2.2 CIVIL LAW AND COMMON LAW APPROACHES TO GOOD FAITH .......... 19
      2.2.1 Bona Fides in Civil Law ............................................................................. 21
      2.2.2 Common Law: The Common Law Approaches to Good Faith ............... 23
   2.3 GOOD FAITH AND RELATED DOCTRINES ............................................... 26
      2.3.1 Good Faith and Unconscionability ............................................................. 28
      2.3.2 Good Faith and Fiduciary Obligation ......................................................... 31
      2.3.3 Good Faith and Non-Derogation from Grant .......................................... 35
      2.3.4 Good Faith and Common Law Duty to Cooperate .................................... 37
   2.4 SOURCES OF GOOD FAITH ...................................................................... 40
      2.4.1 Legislation and Common Law ................................................................. 40
      2.4.2 Good Faith as a Term of the Contract ....................................................... 41
   2.5 PERSPECTIVES ON GOOD FAITH ............................................................. 46
      2.5.1 Good Faith Goes Against Parties’ Intentions ............................................. 46
      2.5.2 Good Faith Creates Uncertainty ............................................................... 48
      2.5.3 Good Faith as the Essence of Contract Law ............................................. 50
      2.5.4 Good Faith is Not a Concept in English Law ........................................... 51
      2.5.5 Good Faith as a Universal Term .............................................................. 53
   2.6 CONCLUSION ............................................................................................... 54
3 INTERNATIONAL REVIEW OF GOOD FAITH.................................................. 56
3.1 INTRODUCTION ......................................................................................... 56
3.2 GOOD FAITH IN CIVIL LAW COUNTRIES ............................................ 59
  3.2.1 Germany .......................................................................................... 60
  3.2.2 Italy .................................................................................................. 63
  3.2.3 France ............................................................................................. 65
3.3 GOOD FAITH IN THE UNITED KINGDOM .............................................. 67
3.4 GOOD FAITH IN THE US ......................................................................... 76
  3.4.1 Uniform Commercial Code .................................................................. 78
  3.4.2 Restatement (Second) of Contracts ...................................................... 81
3.5 GOOD FAITH IN CANADA ........................................................................ 83
3.6 GOOD FAITH IN NEW ZEALAND ............................................................ 86
3.7 GOOD FAITH IN THE PEOPLE’S REPUBLIC OF CHINA ..................... 90
3.8 GOOD FAITH IN INTERNATIONAL LAW .............................................. 94
  3.8.2 The Principles of International Commercial Contracts ......................... 96
  3.8.3 The Vienna Convention on the Law of Treaties ..................................... 97
  3.8.4 The Principle of European Contract Law ............................................. 99
3.9 CONCLUSION ........................................................................................... 101
4 THE DEVELOPMENT OF GOOD FAITH IN AUSTRALIA ....................... 102
4.1 INTRODUCTION ......................................................................................... 103
4.2 THE WATERSHED DECISION: RENARD CONSTRUCTIONS (ME) PTY LTD V MINISTER FOR PUBLIC WORKS ................................................................. 105
  4.3 GOOD FAITH IN SPECIFIC Instances ................................................... 112
    4.3.1 Common Law .................................................................................. 112
    4.3.2 Legislation ...................................................................................... 115
  4.4 IMPLICATION OR CONSTRUCTION ....................................................... 116
  4.5 IMPLICATION IN FACT ........................................................................... 121
  4.6 IMPLICATION IN LAW ........................................................................... 126
  4.7 THE DEVELOPING AUSTRALIAN POSITION ........................................ 132
  4.8 CONCLUSION ......................................................................................... 137
5 EMPIRICAL STUDIES OF GOOD FAITH: DATA AND METHOD ........... 139
5.1 INTRODUCTION ......................................................................................... 139
5.2 CONSTRUCTION OF DATA SET .............................................................. 143
  5.2.1 Cases and Case Law Database ............................................................ 144
  5.2.2 The Review Process .......................................................................... 146
5.3 CODING OF VARIABLES ......................................................................... 148
5.3.1 Statistical Analysis of Case ......................................................... 150
5.3.2 The Taxonomic Solution to the Definition of Good Faith ............. 150
5.4 CONCLUSION .................................................................................. 151
6 EMPirical Study of the Development of Good Faith in
Australia Contract Law ........................................................................ 152
  6.1 INTRODUCTION ........................................................................... 152
  6.2 GOOD FAITH AS AN ISSUE IN AUSTRALIAN CONTRACT LAW .... 153
    6.2.1 Cases Raising Good Faith as an Issue (Per Year) ....................... 153
  6.3 GOOD FAITH IDENTIFIED AS AN IMPLIED TERM IN AUSTRALIAN
      Contract Cases .............................................................................. 160
  6.4 BREACHES OF IMPLIED TERM OF GOOD FAITH IN AUSTRALIAN
      CONTRACT CASES .......................................................................... 167
    6.4.1 Recognised Implication Cases and Breach Cases ...................... 167
    6.4.2 Cases Where the Court found Breach of Implied Term of Good Faith from
          Implied Term Cases ..................................................................... 168
  6.5 CONCLUSION .................................................................................. 177
7 EMPirical Study of the Judicial Attitude for Good Faith in
Australia Contract Law ........................................................................ 180
  7.1 INTRODUCTION ........................................................................... 180
  7.2 LEVEL OF JUDICIAL REVIEW FOR A GOOD FAITH OBLIGATION ...... 183
  7.3 LEVEL OF JUDICIAL SUPPORT FOR GOOD FAITH OBLIGATION .... 185
    7.3.1 Level of Judicial Support ......................................................... 186
  7.4 VARIATION OF SUPPORT LEVEL BETWEEN FIRST INSTANCE AND
      APPEAL DECISION BY JURISDICTION ........................................... 193
    7.4.1 Average Support Level for Good Faith by Year and by Jurisdiction .. 199
    7.4.2 Average Support NSW Cases by Year ....................................... 203
    7.4.3 Average Support Victorian Cases by Year .................................. 209
    7.4.4 Average Support Commonwealth Cases by Year ....................... 212
    7.4.5 Average Support Other Jurisdictions Cases by Year ................... 215
  7.5 SUPPORT LEVEL FOR GOOD FAITH BY INDIVIDUAL JUDGES ...... 221
  7.6 CONCLUSION .................................................................................. 227
8 DEFining Good Faith ............................................................................. 230
  8.1 INTRODUCTION ........................................................................... 230
  8.2 THE PROBLEM OF DEFINING GOOD FAITH .................................. 232
    8.2.1 A Concept in Search of a Definition ........................................ 232
    8.2.2 Diverse Interpretations of Good Faith ....................................... 233
    8.2.3 Difficulty of Defining the Meaning and Content of Good Faith in a Vacuum 235
8.2.4 The Experience of One Other Jurisdiction ....................................................... 236
8.3 GOOD FAITH FAMILIES ................................................................................. 240
  8.3.1 Labels of the Meaning of Good Faith ................................................... 244
8.4 THE PROPOSED TAXONOMIC SOLUTION ..................................................... 272
  8.4.1 Group 1: Honesty, Loyalty and Cooperation and Group 2: Reasonableness 274
  8.4.2 Group 3: Having Regards to the Other’s Interests .................................. 276
  8.4.3 Group 4: Fairness ..................................................................................... 277
  8.4.4 Group 5: The Standard of Appropriate Behaviour .................................. 277
  8.4.5 Group 6: Parties’ Reasonable Expectations ............................................. 278
  8.4.6 Group 7: Excluder .................................................................................... 278
8.5 A PROPOSED DEFINITION OF GOOD FAITH ............................................. 279
8.6 CONCLUSION .................................................................................................. 283
9 LEGISLATING A GOOD FAITH OBLIGATION ..................................................... 286
  9.1 INTRODUCTION ............................................................................................. 286
  9.2 A GENERAL OBLIGATION OF GOOD FAITH .............................................. 289
  9.3 A GOOD FAITH OBLIGATION IN A SPECIFIC BUSINESS CONTEXT ......... 300
  9.4 THE CHALLENGES OF LEGISLATING A GOOD FAITH OBLIGATION .... 314
  9.5 CONCLUSION ................................................................................................ 317
10 CONCLUSION .................................................................................................... 319
  10.1 MAJOR RESEARCH CONTENTIONS ............................................................ 322
    10.1.1 Judicial Attitudes Towards Good Faith ............................................... 322
    10.1.2 The Meaning of Good Faith ............................................................... 327
    10.1.3 Legislating a Good Faith Obligation in Australian Contract Law .......... 332
  10.2 IMPLICATIONS OF THIS RESEARCH ......................................................... 335
    10.2.1 Implications for Theory ...................................................................... 335
    10.2.2 Implications for Practice ................................................................. 336
  10.3 LIMITATIONS OF THE RESEARCH .......................................................... 337
  10.4 FUTURE RESEARCH DIRECTIONS ........................................................... 337
Bibliography ........................................................................................................... 339
Appendix A-Database case law .............................................................................. 377
List of Figures

Figure 6.1: Cases that Raised Good Faith as an Issue (Per Year) ..............................................154
Figure 6.2: Cases in which Good Faith was Raised as an Issue (by Jurisdiction) ..................157
Figure 6.3: Cases in which Good Faith is Raised as an Issue by Year and Jurisdiction ......159
Figure 6.4: Implied Term Recognised by Year ........................................................................161
Figure 6.5: By Year: Term Implied in Fact v Term Implied in Law ......................................163
Figure 6.6: Cases Where Term Implied by Jurisdiction .........................................................165
Figure 6.7: Recognised Implication and Breach Cases ..........................................................167
Figure 6.8: Cases where the Court Found Breach of Implied Term of Good Faith from Implied Term Cases ..............................................................169
Figure 6.9: Breaches of Implied Term of Good Faith .............................................................171
Figure 6.10: Breach Rate Where Term Implied by Year .........................................................174
Figure 6.11: Cases Where the Court Found a Breach and Implied Term of Good Faith by .174
Figure 7.1: Overall Judicial Review for Good Faith Obligation ............................................183
Figure 7.2: Overall Level of Judicial Support for a Good Faith Obligation ............................187
Figure 7.3: Average Support Level (First Instances) by Jurisdiction .................................196
Figure 7.4: Average Support Level (Appeal) by Jurisdiction ................................................196
Figure 7.5: Average Support All Cases by Year .................................................................200
Figure 7.6: Overall Average Support All Cases by Three Phases ........................................202
Figure 7.7: Average Support NSW Cases by Year ...............................................................204
Figure 7.8: Overall Average Support Score NSW cases by Three Phases .............................207
Figure 7.9: Average Support Victoria Cases by Year ............................................................209
Figure 7.10: Overall Average Support Victorian Cases by Three Phases ..........................211
Figure 7.11: Average Support Commonwealth Cases by Year ...........................................212
Figure 7.12: Overall Average Support Commonwealth Cases by Three Phases ...............214
Figure 7.13: Average Support Other States by Year ............................................................215
Figure 7.14: Overall Average Support Other States by Three Phases ................................217
Figure 7.15: Average Support All Jurisdictions by Year ......................................................219
Figure 7.16: Top Six Judges by Decision Volume .................................................................222
Figure 7.17: Average Support Level of Six Good Faith Judges .............................................224
Figure 7.18: Average Support Level by Decision Volume .....................................................226
Figure 8.1: Overall Cases which Define Good Faith ............................................................240
Figure 8.2: Good Faith Defined by Jurisdiction .................................................................242
Figure 8.3: Good Faith defined as Honesty by Year ............................................................246
Figure 8.4: Good faith defined as honesty by jurisdiction ....................................................247
Figure 8.5: Good Faith as Reasonableness by Year .................................................................250
Figure 8.6: Good Faith as Reasonableness by Jurisdiction .................................................250
Figure 8.7: Good Faith as Fairness by Year ............................................................................253
Figure 8.8: Good Faith as Fairness by Jurisdiction ...............................................................254
Figure 8.9: Good faith defined as Parties’ Reasonable Expectation .....................................258
Figure 8.10: Good faith defined as Parties’ Reasonable Expectation by Jurisdiction .........259
Figure 8.11: Good Faith defined as Cooperation by Year ......................................................262
Figure 8.12: Good Faith defined as Cooperation by Jurisdiction ..........................................263
Figure 8.13: Good Faith defined as Having Regards to Other’s Interests by Year ...............267
Figure 8.14: Good Faith defined as Having Regards to Other’s Interests by Jurisdiction ...267
Figure 8.15: Good Faith defined as an ‘Excluder’ by Year ....................................................271
Figure 8.16: Good Faith defined as an ‘Excluder’ by Jurisdiction ........................................272
Figure 8.17: The Three Labels which have the Potential to serve as the Definition or
Meaning of Good Faith .........................................................................................................278
List of Tables

Table 1.1: Structure of Thesis ........................................................................................................14
Table 5.5.1: Variable, Coding, and Description ........................................................................148
Table 6.1: Percentage of Cases in Which Good Faith Raised as an Issue (by Jurisdiction).157
Table 6.2: Term Recognition of Good Faith by Year .....................................................................161
Table 6.3: Percentage of Cases Where Term Implied by Jurisdiction ......................................165
Table 6.4: Percentage of Recognised Implications and Breach Cases ........................................167
Table 6.5: Breaches of Implied Term of Good Faith .................................................................171
Table 6.6: Breach Rate Where Term Implied by Year .................................................................174
Table 6.7: Cases Where Court Found a Breach and Implied Term of Good Faith by Jurisdiction ..................................................................................................................175
Table 7.1: Percentage of Overall Level of Judicial Support for a Good Faith Obligation ............192
Table 8.1: Summary of the Labels of Meaning of Good Faith Identified as Follow ................243
Table 8.2: Good Faith and Bad Faith according to Summers .....................................................269
Table 8.3: Summary of Labels, Including Frequency and Jurisdiction ........................................272
Table 8.4: Seven General Groupings of Good Faith from the Identified Label: .......................274
Table 8.5: Frequency and Percentage of the Good Faith Labels ..............................................280
1 INTRODUCTION

Good faith is arguably the most controversial, frustrating and poorly defined concept in contract law. Judges and scholars have different and contradicting views of the concept of good faith, both as to its operation and its meaning. The concept of good faith nevertheless is gaining recognition and continues to have an increasing influence on many types of contracts, in many contexts. In Australia, the concept of good faith was introduced by Priestley J in his obiter comments in Renard Constructions (ME) v Minister for Works.\(^1\) This case paved the way for the emergence of the concept of good faith in Australian contract law. This thesis aims to examine the principle of good faith in the performance of a contract following the foundation laid down by Priestley J.

This chapter is structured as follows. Chapter 1.1 gives a general overview of the research background in which the role of good faith is discussed in contract law. It also includes a discussion of the development of good faith in Australia as raised by Priestley J in Renard in 1992. Chapter 1.2 indicates the research objectives, questions and scope of the research. Chapter 1.3 discusses the research methodology and the sources used in the study. Chapter 1.4 highlights the research contribution. The remaining nine chapters in the study are outlined in Chapter 1.5.

1.1 RESEARCH BACKGROUND

1.1.1 Good Faith in the Common Law

Good faith is a ubiquitous but poorly understood concept in contract law. Two decades after Priestley J first put onto the Australian judicial agenda, it remains a confusing, nebulous, and mutable concept. The concept of good faith encompasses the theme that all parties to the contract owe a duty to each other beyond those expressly provided by the terms of the contract. In this context, it is

\(^1\) (1992) 26 NSWLR 234.
expected that the contracting parties take into account other parties’ interests when exercising their contractual rights. Good faith is pivotal to the contracting parties (1) in achieving cooperation and fairness as well as (2) in the prevention of unfairness when express terms are absent from the contract. Good faith is therefore treated as an implicit expectation of the parties. Burrows further explained the function of good faith stating that:

The concept of good faith is regularly invoked not only to condemn deception and lack of candor at the time a bargain is concluded, but also to require a forthcoming attitude, to condemn chicanery and sharp practice in the carrying out of contractual obligations.

In countries where civil law is the basis of the legal system, the concept of good faith is recognised as a general and pervasive principle, as illustrated in many of the European civil codes. Under common law, there is no overarching duty of good faith; nevertheless it has a role in English law. English law takes a different approach to the concept of good faith. It relies on a number of specific doctrines that achieve some of the same results as might be required by good faith, but does not explicitly refer to that concept.

In English law, good faith is recognised in specific settings and legislation whereby the most common expression of good faith can be found in insurance contracts. In legislation, there is an increasing recognition of good faith in specific instances.

---

3 See J.F. Burrows, ‘Contractual Cooperation and Implied Terms’ (1968) 31 Modern Law Review 390 for an interesting discussion of a somewhat broader notion of good faith, an implied duty of cooperation, for discussion of the extent to which each party has a duty to cooperate in the contractual undertaking, 395-405.
4 See (list is not exhaustive) the German Civil Code s242, the French Civil Code art 1134(3), the Italian Civil Code art 1375, the Swiss Civil Code art 2, the Greek Civil Code art 288 and the Quebec Civil Code arts 6,1375 and 1434. Many of the European codes make reference to good faith in the statutory provision as mentioned above.
5 In specific context like insurance, it is a fundamental principle of insurance law that both insurer and insured must observe a duty of utmost good faith towards each other. Later the concept of utmost good faith was given a statutory recognition in S 13 of the Insurance Contracts Act 1984 (Cth) where it is stated that ‘A
One of the general recognitions of good faith in legislation was done by Lord Bingham who described good faith as ‘the most important contractual issue of our time’. This can be found in the landmark case of *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*, where Lord Bingham implied the concept of good faith and in a comment which held that:

In many civil law systems and perhaps most legal systems the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts, parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as ‘playing fair’, ‘coming clean’, or ‘putting one’s card face upwards on the table’……English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire-purchase agreements. The common law also has made its contribution, by holding that certain classes of contract require the utmost good faith by treating as irrecoverable what purport to be agreed estimates of damage but are in truth as disguised penalty for breach, and in many other ways.

A similar view is shared by other common law countries, such as Australia, New Zealand and Canada, where good faith is not recognised as an overriding obligation but it is nevertheless recognised in other doctrines such as unconscionability and in specific statutory provisions. However, the approach of contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.’

6 *In Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 [84], the court held that there are at least 154 federal Acts that mention the term good faith.


the United States of America (US) is different whereby the concept of good faith is entrenched in the *Uniform Commercial Code*\(^9\) and *Restatement (Second) of Contracts*.\(^{10}\)

The concept of good faith is widely employed at international levels, where many international trade instruments incorporate it.\(^{11}\) In *Nuclear Tests Case (Australia v France)*, the International Court of Justice claimed that ‘One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith’.\(^{12}\) An example of the adoption of good faith in an international trade instrument can be found in the *United Nations Convention on Contracts for International Sale of Goods* Article 7.1, known as the Vienna Sales Convention (CISG), which provides that:

> …in the interpretation of the Convention, regard is to be had to its international character and the need to promote uniformity in its application and the observation of good faith in international trade.

### 1.1.2 Good Faith in Australian Contract Law

Good faith was put onto the agenda in Australia through obiter comments by Priestley J in the landmark case of *Renard* in 1992.\(^{13}\) In that case, Priestley J suggested the notion of good faith in his interpretation of Australian contract law. His Honour held that:

---

\(^9\) See the *Uniform Commercial Code*, ss 1 203, 201(11), 2 (103) (1) and 2 104(1).

\(^{10}\) See the *Restatement (Second) of Contracts* § 205.

\(^{11}\) See also the *Principles of International Commercial Contracts* (UNIDROIT Principles 2004) article 1.7, which clearly supports the duty of good faith. It stated that:

> In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade and prohibits the parties from limiting or excluding the duty in their contracts.

The *Vienna Convention on the Law of Treaties* article 31(1) provides that:

> A treaty shall be interpreted in good faith in accordance with the ordinarily meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The *Principles of European Contract Law* article 1.201 provides that:

> In exercising his rights and performing his duties, each party must act in accordance with good faith and fair dealing.


\(^{13}\) (1992) 26 NSWLR 234.
The kind of reasonableness I have been discussing seems to me to have much in common with the notions of good faith which are regarded in many civil law systems of Europe and in all States in the United States as necessarily implied in many kinds of contract. Although this implication is not yet been accepted to the same extent in Australia as part of judge-make Australian contract law, there are many indications that the time may be fast approaching when the idea, long recognised as implicit in many of the orthodox techniques of solving contractual disputes, will gain explicit recognition in the same way as it has in Europe and in the United States.\textsuperscript{14}

Nevertheless, the concept of good faith had a significant impact on Australian contract law, with many other cases following Priestley J’s opinion.\textsuperscript{15}

There are two means by which a general term of good faith is recognised in contract law: implication or construction. There are two types of implication; term ‘implied in law’ and term ‘implied in fact’. A term ‘Implied in law’ is based on the test of necessity in a particular class of contract. A term ‘Implied in fact’ is based on the judge’s view of the actual intention of the parties. Peden argues that ‘construction’ is the best approach for incorporating good faith in contract.\textsuperscript{16} The New South Wales Court of Appeal in \textit{Burger King Corporation v Hungry Jack’s Pty Ltd}, has held that:

\begin{quote}
There … appears to be increasing acceptance … that if terms of good faith and reasonableness are to be implied, they are to be implied as a matter of law.\textsuperscript{17}
\end{quote}

\textsuperscript{14} (1992) 26 NSWLR 234, 264.
\textsuperscript{16} See Elisabeth Peden, ‘Cooperation’ in English Contract Law - To Construe or Imply?’(2000) 16 \textit{Journal of Contract Law} 56.
\textsuperscript{17} [2001] NSWCA 187 [164].
There are instances in which the concept of good faith is not accepted, especially in commercial contracts where the parties have the freedom to decide on the terms of their contract. In *GSA Group Pty Ltd v Siebe Plc*, Rogers CJ commented that:

Against a trend toward a general obligation of good faith, fairness or reasonableness, there have been judicial comments to the effect that the court should be slow to intrude into the commercial dealings of the parties who are quite able to look after their own interests. The courts should not be too eager to interfere in the commercial conduct of the parties, especially where the parties are all wealthy, experienced, commercial entities able to attend to their own interest.\(^{18}\)

In contrast, the concept of good faith is receiving particular attention with positions associated to relational contracts such as franchising. In the context of franchising, good faith is now considered to be an implied duty owed by the franchisor to franchisee to curb unethical conduct when there is an imbalance of power between them. In *Far Horizons Pty Ltd v McDonald's Australia*, Byrne J emphasised the need for an implied term of good faith to ensure a successful relationship between the franchisor and franchisee. His Honour made the following comments:

I do not see myself as at liberty to depart from the considerable body of authority in this country which has followed the decision of the New South Wales Court of Appeal in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*. I proceed, therefore, on the basis that there is to be implied in a franchise agreement a term of good faith and fair dealing which obliges each party to exercise the powers conferred upon it by the agreement in good faith and reasonably…\(^{19}\)

The competing argument towards the acceptance and recognition of good faith indicates that the status of good faith in Australian contract law is still not clear.

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\(^{18}\) (1993) 30 NSWLR 573, 579 (F).

To date, there has been no High Court decision to provide comprehensive guidance on this issue. In *Royal Botanic Gardens and Domain Trust v South Sydney City Council*, the Court held that: ‘Whilst the issues respecting the existence and scope of a ‘good faith’ doctrine are important this is an inappropriate occasion to consider them’.\(^{20}\)

Despite it being a well-known concept, there is a controversy as to the meaning of good faith, which makes defining it an almost impossible task. Most of the definitions are confusing and contradictory.\(^{21}\) Some scholars and judges suggest that attaching a definition to good faith is impossible. Other scholars and judges nevertheless maintain that it is possible to define good faith. As a consequence, the precise role of the concept of good faith in Australian contract law remains unsettled. The unresolved issues represent a key motivation for this research.

### 1.2 RESEARCH OBJECTIVES, SCOPE AND QUESTIONS

This thesis has the following three broad objectives: (1) to analyse the attitude of Australian judges to the issue of good faith, (2) to provide clarity on the definition of good faith, and (3) to consider whether a general obligation of good faith should be enshrined in Australian legislation. This research uses both qualitative and quantitative approaches to the issue of good faith in Australia. The qualitative study traces the origin and development of good faith from secondary sources. The quantitative study is based on cases between 1992 and 2009 which cite *Renard* case that focus on good faith in contractual performance. The study employed the longitudinal approach, where the study is framed by the 1992 to 2009 period, with the years divided into three phases: ‘Introduction Phase 1992-1998’, ‘Development Phase 1999 to 2003’ and ‘Consolidation Phase 2004 to 2009’ in order to trace the evolution and development of good faith in Australian contract law.

\(^{20}\) (2002) 240 CLR 45, 63.

\(^{21}\) For further discussion see Chapter Eight.
Although there is a wide and rich literature on good faith in Australia, there are limited in-depth empirical studies on good faith or how the concept of good faith is applied in Australia. This thesis reports the results of an empirical study on the reception and development of the concept of good faith in Australia across the various Australian jurisdictions.

**Research Question One: What is the attitude of Australian judges to the issue of good faith?**

Since Priestley J introduced the concept of good faith in *Renard* case in 1992, there have been diverse opinions from other judges. Justice Kirby quotes Lord Denning’s view that there are two types of judges: ‘timorous souls’ and ‘bold spirits’.

> ‘Timorous souls’ refers to judges who are fearful to allow a new course of action, while ‘bold spirits’ refer to judges who are ready to allow a new course of action if justice so requires.

In dealing with the issue of good faith, the ‘timorous souls’ may argue that an implied obligation of good faith will add uncertainty to contract law, while the ‘bold spirits’ may argue that there is a need to explore good faith as necessary or desirable. These statements by two types of judges suggest that there is a conflicting attitude regarding the concept of good faith. The first research question is aimed at determining the attitudes of Australian judges to the issue of good faith in contract law in Australia. A sample of 104 Australian cases from 1992 to 2009 is studied.

**Research Question Two: What is the meaning of good faith?**

There are many different interpretations of the meaning of good faith, some of which are contradictory. Justice Steyn argued that ‘a definition of good faith and

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fair dealing is impossible’.\textsuperscript{24} The second research question aims to determine whether a precise meaning can be established and to propose a workable definition.

\textit{Research Question Three: Should a good faith obligation be legislated in Australia?}

The issue of legislating a good faith obligation is on the regulators’ agenda in Australia. This on-going debate has often revolved around the issue of uncertainty associated with its meaning or lack of meaning. Given the ethical underpinnings of the concept, it is naturally difficult to define in a single authoritative definition. It is precisely this seeming inability to define the concept that has sustained this lengthy debate. However, in this discourse, certain concrete milestones are reached that mark concrete steps in the evolution of the concept in Australia. Perhaps the most notable of these is the decision of the previous Australian government to accept the recommendation to include good faith in the specific business context of franchising.\textsuperscript{25} The previous Australian government appointed Wein, an experienced franchisor operator and small business advisor, to review the \textit{Franchising Code of Conduct}. The previous Australian government accepted the recommendation made by Wein to introduce an express obligation of good faith for both the franchisor and franchisee to curb the unethical conduct that is the cause of major problems in the franchising context. The Wein review recommended the incorporation of the common law duty of good faith rather than devising some new and different definition of good faith. This was decided based on the premise that the concept will not be defined but understood through ‘non-discretionary reference criteria’, namely in a manner similar to the unconscionable conduct prohibition set out in s 22 of the \textit{Australian Consumer Law}.\textsuperscript{26} The third


research question therefore considers whether good faith should be enshrined in Australian legislation and examines the merits of the approach decided by the government.

1.3 RESEARCH METHODOLOGY AND SOURCES

The multi-disciplinary nature of this thesis requires a number of approaches in order to understand the concept of good faith as a general principle in contract law and good faith in Australian contract law.

Part Two (Chapters Two to Four) is based on traditional legal research methods combined with historical comparative methodology and narrative research (discourse analysis). Each research strategy has its limitations and no single strategy is adequate for the analysis undertaken. In-depth analysis of the concept of good faith in contract law, combined with narrative research (discourse analysis), allows the most appropriate method to be applied to each specific area of the analysis. Furthermore, a comprehensive historical analysis is adopted for an international review of good faith. A similar approach is also adopted in reviewing the development of good faith in Australia.

Part Three (Chapters Five to Seven) uses a combination of research approaches; theoretical and empirical approaches are adopted to identify the ‘landscape’ of good faith in Australia. A combination of methods is suitable for this, tracing a brief history of good faith in Australia, its development, its reception, and expectations for the future. An extensive range of cases is examined to determine the overall status, definition or meaning, and judicial approach in relation to good faith. The reasons for the sample selection and data collection and analysis are set out in Chapter 5.

The research sources used in this thesis include primary and secondary legal sources. The primary legal sources referred to are statutory provisions including
Federal and state acts, and cases that focus on good faith in contractual performance. Secondary legal sources include texts, articles, research theses, reviews of research, and other publications containing factual information and commentaries.

1.4 RESEARCH CONTRIBUTION

The main contribution of this research is, it adds to the research on good faith in contractual performance using the empirical legal research approach. An empirical legal research approach adds a new dimension to traditional legal research because it involves the analysis of the various impacts of empirical data on society.27 In this study, the empirical analysis to the concept of good faith will offer significant insights to the concept in Australian contract law. There is limited literature available on this subject. Carlin was the first to collect and discuss empirical data on good faith in Australia.28 Carlin analysed 94 cases from 1992 to 2004, focusing on good faith in the contractual performance based on statistical analyses. He looked into two perspectives: (1) the status of the good faith and judicial support and (2) development of good faith in Australian contract law within the period of review.

In this thesis, the scope of the research is broader in terms of the materials and study period. This research focuses on the attitude of the judges to good faith, the definition of good faith and the possibility of legislating a good faith obligation in Australian contract law. 104 cases were collected from 1992 to 2009. In reviewing the level of support, a four point Likert-type scale is used to analyse the level of support. The four point Likert-type scale measurements are as follows: Support Level 1 = total support, Support Level 2 = qualified support, Support Level 3 = qualified rejection and Support Level 4 = outright rejection. The four point Likert-type scale is used to assess the support level to avoid any

bias compared to a five point Likert-type scale, which is not suitable to review the support level of judges. In evaluating the support level of the judges, there is no ‘neutral’ support level when the judges give their decision; therefore, a four point Likert-type scale is suitable to review the support level of judges. 29 In order to measure the validity and reliability of the data, the basic statistical analyses of ‘average and standard deviation’ are used to analyse the attitude of the judiciary.

In analysing the definition of good faith, a new approach of a taxonomic solution is used. The collected definitions or meanings of good faith are analysed and similar expressions or terminology are grouped together as a ‘family’ based on their similarity using a distinct ‘label’. Each ‘label’ is supported by the empirical data by year and jurisdiction to detect the frequency received. The more frequency received for the ‘label’, the more confident the data. The ‘label’ that received more support has greater potential to serve as a definition of good faith. The findings of the definition of good faith are significant because it is based on the genuineness of the 19 cases that defined good faith in Australia.30 Therefore, the definition chosen is reliable in that it is supported by the literature and empirical observations during the period of review.

Another significant contribution is by way of legislating a good faith obligation to eliminate uncertainty. The previous Australian government has supported the recommendation made by Wein, an experienced franchisor operator and small business advisor to legislate good faith in franchising to curb the unethical conduct between the franchisor and franchisee. Such an obligation of good faith should not be defined; instead good faith should be incorporated in a manner similar to the unconscionable conduct as set out in s 22 of the Australian

30 See Figure 8.1: Overall Cases which Define Good Faith, 240.
The development of good faith in the context of franchising offers a valuable precedent for its consideration in the context of contractual performance.

Uncertainty is the main problem when good faith is not defined. This is because parties in the litigation, lawyers, and judges will have different opinions as to what good faith means. This factor will have an immense practical contribution to both parties in the litigation, lawyers, and judges in dealing with the issue of good faith. When the concept is clarified by means of a definition, parties in the litigation will have a clear understanding of what good faith means and are thus better able to argue their case based on this concept. Lawyers become more confident in using the concept of good faith as part of their argument due to a well-established definition of good faith. The judge will be more certain in discussing the concept of good faith because there is a definition of good faith as a reference to guide his/her interpretation.

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1.5 THESIS STRUCTURE

The thesis is arranged in four parts comprising of ten chapters. Table 1.1 outlines the structure.

Table 1.1: Structure of Thesis

<table>
<thead>
<tr>
<th>PART ONE: INTRODUCTION</th>
<th>PART TWO: GOOD FAITH IN THEORY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapter 1 Introduction</td>
<td>Chapter 2: Good Faith as a General Principle in Contract Law</td>
</tr>
<tr>
<td></td>
<td>Chapter 3: International Review of Good Faith</td>
</tr>
<tr>
<td></td>
<td>Chapter 4: The Development of Good Faith in Australia</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>PART THREE: GOOD FAITH IN PRACTICE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapter 5: Empirical Study of Good Faith: Data and Method</td>
</tr>
<tr>
<td>Chapter 6: Empirical Study of the Development of Good Faith in Australian Contract Law</td>
</tr>
<tr>
<td>Chapter 7: Empirical Study of the Judicial Attitude for Good Faith in Australian Contract Law</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>PART FOUR: GOOD FAITH IN THEORY AND PRACTICE</th>
<th>PART FIVE: CONCLUSION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapter 8: Defining Good Faith</td>
<td>Chapter 10: Conclusion</td>
</tr>
<tr>
<td>Chapter 9: Legislating a Good Faith Obligation</td>
<td></td>
</tr>
</tbody>
</table>

Part One consists of the introductory chapter, sets out the research background, objectives, research questions, scope, structure, research methodology, and sources of this thesis.
Part Two comprises three chapters. Chapter Two examines good faith as a general principle in contract law. The discussion includes the different approaches of civil and common law to good faith. In civil law countries, good faith is considered as a general and pervasive principle recognised in the civil codes. In common law, there is no overarching duty of good faith, but there are a number of legal concepts that incorporate good faith. Four related legal concepts are discussed: unconscionability; fiduciary obligation; non-derogation from grant; and the common law duty to cooperate. Good faith can be traced to two sources: legislation and common law. This suggests that good faith is an important and acknowledged concept in common law, despite the varying approaches taken by judges and scholars. Chapter Three analyses the reception of good faith in both civil law and common law countries. The discussion includes the background, development, and reception of the concept of good faith in various jurisdictions. Apart from its recognition at the national level, good faith is also recognised at the international level where many international trade instruments refer to good faith. Chapter Four outlines the emergence and historical development of good faith obligations in Australia. The concept of good faith was first put onto the judicial agenda in Australia through obiter comments by Priestley J in Renard case in 1992. Despite there being no overarching duty of good faith, good faith is recognised in both common law and legislation. There are two sources of good faith: Implication and Construction. There are two types of implication: term ‘by law’ and term ‘by fact’. A term ‘Implied by law’ is based on the test of necessity as a legal incident of a particular class in contract. A term ‘Implied by fact’ is concerned with ‘business efficacy’. Without a High Court decision to determine its status, good faith remains untested, presenting a key motivation for the execution of detailed empirical analysis of good faith in Australia.

Part Three consists of three chapters. Chapter Five presents the method and data used in the thesis with a discussion of the construction of the research sample, data sources, and method. Chapter Six reports a detailed empirical review of Australian case law (104 cases) on good faith in contractual performance as it has
evolved since the remarks of Priestley J in Renard. Chapter Seven reports on a
survey based on 104 cases to gather insights into the attitudes of the judiciary
towards good faith in contractual performance. The 104 cases are analysed using a
statistical method. The average and standard deviation is used to measure the
validity and reliability of the data. A four point Likert-type scale was constructed
for each of the 104 cases to access the attitude of the judges towards the concept
of good faith. The four point Likert-type scale measurements are as follows:
Support Level 1 = total support, Support Level 2 = qualified support, Support Level
3 = qualified rejection and Support Level 4 = outright rejection.

Part Four consists of two chapters. Chapter Eight examines the various definitions
or meanings that have evolved since the introduction of the notion of good faith.
Each of the definitions or meanings found is grouped together to form a family.
Each family of definitions or meaning is supported by empirical data that is
showed by year and jurisdiction to detect the frequency of each good faith family.
It is the aim of this chapter to propose a workable definition for good faith.
Chapter Nine examines the possibility of legislating a good faith obligation in
Australia. As a general application, there are preliminary discussions to codify
good faith similar to the civil law codes model approach whereby good faith is not
defined. As a specific obligation, the previous Australian government accepted the
recommendation by the Wein Report to introduce an express obligation of good
faith in the franchising code to regulate the unethical behaviour of franchisor and
franchisee in the franchising context. The Wein Report suggested that good faith
is not defined but leaves the interpretation to the judges assisted with a ‘non-
discretionary reference criteria’ similar to s 22 of Australian Consumer Law.32 The
previous Australian government had shown support with regards to the
introduction of good faith in the franchising context.

32 Alan Wein, Submission to Federal Government of Australia, Review of the Federal Franchising Code of

Conduct, 30th April 2013, 75.
Part Five constitutes the concluding chapter. Chapter Ten synthesizes the arguments raised and a conclusion is drawn on the basis of the empirical data reported throughout the thesis.
2 GOOD FAITH AS A GENERAL PRINCIPLE IN CONTRACT LAW

This chapter describes the evolution of the concept of good faith as a general principle in contract law. It also provides a background to the concept of good faith from both civil law and common law perspectives. It explores the relationship between the concept of good faith and legal concepts related to the doctrine of good faith such as unconscionability, fiduciary obligation, non-derogation from grant, and common law duty to cooperate. It also surveys the perspectives of good faith from the point of view of judges and scholars.

2.1 INTRODUCTION

In civil law, good faith is recognised as a general and pervasive principle.\(^1\) In most European civil codes, there is a general good faith provision. However, in common law systems, there is no such general principle of good faith, but this does not mean that the rules of contract law do not generally conform to the requirements of good faith. Instead, the invocation of the concept of good faith can be reached in other ways in common law. While the underlying principles are found in the common law, the concept is not specifically referred to.\(^2\) For example, the equitable doctrine of unconscionability is used by the court to review unconscionable conducts and a more liberal statutory doctrine of unconscionability is laid down in the *Australian Consumer Law*.\(^3\)

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\(^3\) The *Australian Consumer Law* 2010, section 20 prohibits unconscionable conduct within the meaning of the unwritten law, from time to time; s 21 prohibits unconscionable conduct in connection with the supply of goods or services to a person; s 22 prohibits unconscionable conduct in connection with the supply of goods or services, or the acquisition of goods or services, in business transactions.
There are two sources of good faith: legislation and common law. In legislation, good faith is mentioned in different ways; in some, good faith is expressly spelled out in the legislation while in others, the reference is more oblique. In common law, good faith is a growing concept acknowledged by many judges. There are two types of terms in the contract: express and implied. Furthermore, there are two types of implied terms recognised by the court: terms ‘implied in fact’ and ‘implied in law’. Judges and scholars differ in their perspectives on good faith. Some scholars welcome the concept, while others are cautious due to the difficulty in understanding the concept. However, it is not surprising that the growing recognition of good faith may produce fundamental changes.

This chapter proceeds as follows. Chapter 2.2 reviews historical approaches to the concept of good faith, from the perspectives of civil law and common law. A number of legal concepts incorporate good faith and these are discussed in Chapter 2.3. Chapter 2.4 analyses the sources of good faith in contract law: common law and legislation. In common law, the sources of good faith are either express or implied terms in the contract. In legislation, the expression of good faith is either express or oblique. Chapter 2.5 outlines current debates about the concept of good faith in common law.

2.2 CIVIL LAW AND COMMON LAW APPROACHES TO GOOD FAITH

There are three types of legal systems in the world that discuss the concept of good faith; the civil law, common law\(^4\) and Islamic law. The concept of good faith, which has its roots in civil law, has influenced common law. In Islamic law, the concept of good faith is an integral part of the contract. The contract is regarded as lacking in perfection without the element of good faith, in accordance with what is considered appropriate behaviour, decency and ethical standards in

\(^4\) In Common law, the concept of good faith has no general foundation but it is recognised in specific settings for example the most common expression of good faith can be found in the insurance context.
Islam. For the purposes of this chapter, the discussion is focused on civil law and common law.

Civil law has its origins in Roman law, which has influenced the continental system of law. The civil law legal system has been widely adopted in Europe, as well as in Latin America, Asia, Africa and the Middle East. Common law originates in the English legal system and has been adopted in the United Kingdom (UK), the US (excluding Louisiana), Canada (excluding Quebec), Australia, New Zealand and other countries colonised by the British, including India, Hong Kong, Singapore and Malaysia.

There is a fundamental difference between civil law and common law legal systems. Civil law is based on codification, where its legal rules are predominantly written. In the context of civil law, the role of the judge is limited to the interpretation and application of the law based on the civil law code. In contrast to civil law, common law is developed by judges through decisions of the court or based on the doctrine of binding precedent. Both common law and civil law adopted two different legal systems. However, it is interesting to note that in the law of contract, there is a tendency of common law lawyers to refer to the civil law. According to Nicholas, ‘it is in the law of contract also that Common lawyers have most often looked to Roman or civil law’. In civil law, the influence of Roman law can be traced back to the law of obligation, particularly in the law of contract. Therefore, in the context of good faith, there is a higher chance that good faith, which was rooted in civil law, will have a big influence on common law lawyers.

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7 Ibid.
10 Ibid.
2.2.1 **Bona Fides in Civil Law**

Amongst the features of Roman law characteristic of the civil law system is *bona fides*. The concept of *bona fides* require that ‘one’s word must be kept’, and ‘one’s conduct should be in exact conformity with it [promise]’.

Therefore, it is a kind of social and moral concept that regulates the relationship. The underlying theme of *bona fides* is to ensure justice and fairness is upheld regardless of the expressed intention of the parties to the contract.

Prior to *bona fides*, the concept of *strict juris* (formal contract) already existed in Roman contract law. *Strict juris* is a concept whereby a judge is required to decide a contractual dispute according to the strict rules of the civil law.

A right in the contract could only be applied when the right is expressly granted. Therefore, it is difficult to fulfil the requirement of *strict juris* when the right needs to be implied. However, the requirement of *strict juris* seems of little value regarding the rights and duties concerning everyday dealings such as sale, letting and hiring, and especially those rights and duties which were not explicitly expressed but implied. This concept causes a problem when the plaintiff pleads breach of contract but he is unable to assert a definite and express right in the contract. However, there were problems with the use of *strict juris*. Firstly, upon breach of contract, according to *strict juris*, the issue must be defined in precise Latin words, sometimes invoking the Roman god. This situation was problematic to non-Roman citizens not well versed in Latin and who did not believe in the Roman gods. This made it difficult for non-Roman citizens to comply with the requirement that was set by the *strict juris*. Secondly, as early as the third century, with the expansion of business between Rome and other countries, there was a need for the court to provide adequate remedies for breach of contract. Therefore, in order to accommodate these two limitations, Roman law introduced the concept of *bona fides*.

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14 Ibid.
There were procedural differences between the two concepts. In applying *bona fide*, the court has to consider other elements. For example, the circumstances of the case and parties’ intention, compared to when applying *stricti juris* which relies on the right given.\(^{15}\) The praetor (Roman magistrate) would always reject a remedy if the person seeking it was not in good faith, without having to show any element of bad faith in the contract.\(^{16}\) The ultimate effect which *bona fides* had on Roman law is described by Martin Schermaier:

> The expansion of the judicial discretion in assessing the merits of a case lay at heart of the brilliant development of Roman contract law form time of the late Republic until the end of the classical period. Before the introduction of the *bonae fidei iudicia* the judge was confined to determining whether the claim asserted under the procedural *formula* did or did not exist. The *bona fide* clause enabled him to consider the parties’ relationship in its origin and all its effects, within the framework of all surrounding circumstances and the conduct of the parties.\(^{17}\)

The historical origin of *bona fides* within the Roman law has played a vital part in the acceptance of good faith within contemporary contract law in European civil codes. Most European civil codes contain a general good faith provision. In addition, some codes contain specific rules in which reference is also made to the concept of good faith. The inclusion of good faith both in specific code provisions and as a blanket concept of importance for entire fields of law has given good faith an ‘institutional’ or formal role in codified civil law systems unlike in common law.\(^{18}\) Moreover, many specific rules in the codes are said to be special applications of good faith.\(^{19}\)

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16 Watkin, above n 8, 309.
18 Schermaier, above n 17, 85.
In Germany, a general good faith provision is enshrined in the *German Civil Code* s 157, which provides that contracts must be interpreted in accordance with good faith, having regard to common usage. S 242 of the *German Civil Code* provides that the debtor is bound to perform the contract in accordance with good faith having regard to common usage.

In France, the *French Civil Code* Article 1134 (3) pronounces that contracts must be performed in good faith. The Code does not define good faith or the standards by which it is to be judged. Article 1134 (3) seems to impose a minimum obligation of honest conduct where duties are not prescribed by the contract or by the law.  

In the Italian law, by virtue of the *Italian Civil Code* Article 1375, contracts are to be performed to an objective standard of good faith. In the *Swiss Civil Code*, Article 2 provides that every person is bound in exercising their rights and fulfilling their duties as well as to act in accordance with good faith. In addition to that, the *Greek Civil Code*, and the *Dutch Civil Code* (Article 6:248) all make reference to the concept of good faith.

### 2.2.2 Common Law: The Common Law Approaches to Good Faith

Unlike civil law, there is no overriding general positive duty of good faith imposed on the parties to a contract either in negotiation or performance in common law. Lord Ackner has commented that:

> …[T]he concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making representations. A duty to negotiate in good faith is as

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20 Powell, above n 12, 30.
unworkable in practice as it is inherently inconsistent with the position of the
negotiating parties.\(^{21}\)

In the context of performance, common law confers the parties’ rights as stipulated in the contract. In *James Spencer & Co Ltd v Tame Valley Padding Co. Ltd*, Potter LJ commented that:

\[\text{[t]here is no general doctrine of good faith in the English law of contract. The}
\text{Plaintiffs are free to act as they wish provided that they do not act in breach of a}
\text{term of the contract.}\(^{22}\)

This parallels the features of the common law itself, which is based on precedent. The development of good faith in common law stems from the English law through the Court of Chancery.\(^{23}\) In the Court of Chancery, the first Chancellors were ecclesiastics well versed in the Canon law. The principle of good faith is inherent in Canon law (the law of the Church of England). Therefore, Canon law has been significant in the development of common law. Canon law emphasised that every promise was binding on the conscience of the person who made it and that failure or refusal to keep it was a breach of that person’s duty to God.\(^{24}\)

The jurisdiction of Common Law Courts over contracts was limited during the Middle Ages, and was no remedy for the breach of a simple contract. However, the Ecclesiastical courts were willing to enforce such contracts. For this reason, Common Law Courts issued writs of prohibition to prevent recourse to the Court of Chancery as means to avoid conflict.

\(^{22}\) See *James Spencer & Co Ltd v Tame Valley Padding Co. Ltd* (Court of Appeal, 8th April 1998, unreported).
\(^{23}\) Powell, above n 12, 22.
\(^{24}\) Powell, above n 12, 21.
Due to the rapid development of international trade in the 13th century, a general remedy for breach of contract was needed. Even though there were many available statutes and petitions that were addressed to the King that called for contracts to be honoured. The available statutes and petitions were insufficient to provide a remedy for breach of contract. In the 16th century, the Court of Chancery progressed and developed from a Court of Conscience to being a Court of Equity. This event led to the development of the concept of good faith. It also implies that the concept of good faith is separate from the concept of conscience. Thus, it would appear that the basic obligation of good faith arising from a promise or an agreement (pacta sunt servanda), which was enforced on grounds of conscience in the Court of Chancery became the basis of the general remedy for breach of contract in common law. In view of this, it is beyond dispute that the Court of Chancery was mainly responsible for the development of good faith in common law.

By the 18th century, under the influence of Lord Mansfield, it seemed that good faith might emerge as a broad principle of significance in English contract law. Lord Mansfield emphasised basic fairness and the intentions of the parties as governing principles. In his famous decision in Carter v Boehm, Lord Mansfield, relying on the ideal of good faith bargaining in contract formation, held that:

> The governing principle is applicable to all contracts and dealings. Good faith forbids either party from concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.

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25 O’Connor, above n 15, 8.
Despite the strong advocacy of Lord Mansfield, the concept of good faith is still in its infant stages. English contract lawyers are familiar with the concept of subjective good faith in the sense of honesty in fact or a clear conscience. However, until very recently, the idea of a general doctrine of good faith, in the sense of an overriding and objective requirement of fair dealing has not been part of the established norms of English contract law.\textsuperscript{29} There has been relatively little support for the concept of good faith in common law. For example, Lord Steyn observed that there is no need for English law to introduce a general duty of good faith as it is unnecessary as long as the courts respect the reasonable expectations of the parties ‘in accordance with [English law’s] own pragmatic tradition’.\textsuperscript{30}

From the above discussion, it can be concluded that the perception of good faith as an important legal principle appears to be much clearer in civil law systems compared to common law. The application of good faith in common law is still ambiguous.

\subsection*{2.3 GOOD FAITH AND RELATED DOCTRINES}

As mentioned earlier, in civil law, the concept of good faith is well recognised through the term \textit{bona fides} and many of the European codes have adopted the concept. While there is no general duty of good faith in common law this does not mean that the concept of good faith is unable to deal with the problems of unfairness, contractual injustice, or unequal bargaining. Nor does it fail in making clear the benefit of the contract or carry out the common intention of the parties as clearly stated in the contract.

In common law, there are other legal concepts that can overcome these problems. This section discusses the most important relevant legal concepts:

unconscionability, fiduciary obligation, non-derogation from grant and the common law duty to cooperate. These legal concepts are well established as well as longstanding and the setting of each legal concept is stable compared to the broad concept of good faith.

This means that the idea of good faith may be an unnecessary addition to Australian contract law. It has been stated by Gummow J in *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (in relation to specific equitable interventions in Anglo-Australian contract law where notions of good conscience play a part) that:

…it requires a leap of faith to translate these well-established doctrines and remedies into a new term as to the quality of contractual performance, implied by law.\(^\text{31}\)

The concept of good faith, unconscionability and fiduciary obligation were explained in *Shelanu Inc v Print Three Franchising Corporation*, where the Court of Appeal for Ontario quoted Finn (formally Finn J of the Federal Court of Australia):

‘Unconscionability’ accepts that one party is entitled as of course to act self interestedly in his actions towards the other. Yet in defence to that other’s interests, it then proscribes excessively self-interested or exploitative conduct. ‘Good faith’, while permitting a party to act self-interestedly, nonetheless qualifies this by positively requiring that party, in his decision and action, to have regard to the legitimate interests therein of the other. The ‘fiduciary’ standard for its part enjoins one party to act in the interests of the other-to act selflessly and with undivided loyalty. There is, in other words, a progression from the first to the third: from selfish behaviour to selfless behaviour. Much the most contentious

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\(^{31}\) (1993) 45 FCR 84, 97.
of the trio is the second ‘good faith’. It often goes unacknowledged. It does embody characteristics to be found in the other two.\textsuperscript{32}

This shows a blurred dividing line between the concepts. This inevitably contributes to a lack of clarity in definition and reflects the fact that good faith is a context-dependent notion.\textsuperscript{33} The following subsections discuss these concepts in more depth.

### 2.3.1 Good Faith and Unconscionability

The equitable doctrine in relation to unconscionable conduct is a longstanding doctrine. It operates to protect parties with special disadvantages\textsuperscript{34} from a stronger party trying to enforce some unfair bargain or gain some benefit. The equitable doctrine was given statutory recognition in \textit{Trade Practices Act 1974} (Cth) in s 51AA,\textsuperscript{35} to extend the statutory remedies to equitable unconscionability cases. However, the equitable doctrine is limited by the restricted meaning given to special disadvantage. In \textit{Commercial Bank of Australia v Amadio}, Mason J explained that a court would grant relief to:

\begin{quote}
…the class of case in which a party make unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from special disability or is placed in some special situation of disadvantages, e.g a catching bargain with an expectant heir or an unfair contract made by taking advantage of a person who is seriously affected by an intoxicating drink.\textsuperscript{36}
\end{quote}

A mere inequality of bargaining power was held by the court not to constitute a special disadvantage. Therefore, the legislature introduced a new and more liberal

\begin{footnotes}
\textsuperscript{32} (2003) 64 OR (3d) 533, 555-6.
\textsuperscript{33} \textit{Bropho v Human Rights & Equal Opportunity Commission} [2004] FCAFC 16 [84].
\textsuperscript{34} The requirement of ‘special disadvantages’ was explained in \textit{Bloomley v Ryan} (1956) 99 CLR 362, 415.
Kitto J held that:

This is a well-known head of equity. It applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because of illness, ignorance, inexperience, impaired faculties, financial needs or other circumstances affect his ability to conserve his own interest, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.

\textsuperscript{35} After the amendment, this section is now referred to as Section 20-22 of \textit{Australian Consumer Law}.
\textsuperscript{36} (1983) 46 ALR 402, 412.
\end{footnotes}
doctrine of unconscionability. The statutory unconscionability which was enacted in s 51AB for consumer unconscionable and s 51AC for business to business unconscionability, freed unconscionability from the equitable requirement of a special disability. Today, the unconscionability provisions are contained in the *Australian Consumer Law* which was given legislative effect as schedule 2 of *Competition and Consumer Act 2010* (Cth) which came into effect on 1st January 2011.

The key issue in the unconscionability provision is the meaning of unconscionable conduct. The *Australian Consumer Law* does not define unconscionability – indeed a government report relating to this issue found that defining unconscionability is impossible because it is a wide and vague concept.\(^{37}\) Instead, the *Australian Consumer Law* includes in s 22 a list of twelve factors ‘non-exclusive discretionary factors’ which the court may take into account in determining whether conduct is unconscionable. One of the factors considered is the extent to which the supplier/acquirer and the customer/supplier acted in good faith.

Without a definition of unconscionable conduct in the statutory provision, the requirement for unconscionability to be established is broad and vague. In *Antonovic v Volker*, Mahoney JA suggested that the concept of unconscionability was better described than defined because the principle is stated in very general terms.\(^{38}\) However, several cases have attempted to define the meaning of unconscionability. In *Australian Competition & Consumer Commission v CG Berbatis Holdings* Gummow and Hayne JJ state that:

> The term ‘unconscionable’ is used as a description of various grounds of equitable intervention to refuse enforcement of or to set aside transactions which

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\(^{38}\) (1986) 7 NSWLR 151,165.
offend equity and good conscience. The term is used across a broad range of the 
equity jurisdiction. Thus, a trustee of a settlement who misapplies the trust fund 
and the fiduciary agent who makes and withholds an unauthorised profit may 
properly be said to engage in unconscionable conduct.  

In a similar vein, in *Hurley v McDonald’s Australia Ltd*, Dowsett J proposed that:

> For conduct to be regarded as unconscionable, serious misconduct or something 
clearly unfair or unreasonable, must be demonstrated — *Cameron v Qantas 
Airways Ltd* ... (1994) 55 FCR 147 at 179. Whatever ‘unconscionable’ means in 
Section 51AB and 51AC, the term carries the meaning given by the Shorter 
Oxford English Dictionary, namely actions showing no regard for conscience, or 
that are irreconcilable with what is right or reasonable-*Qantas Airways Ltd v 
Cameron* ... (1996) 66 FCR 246 at 262. The various synonyms used in relation to 
the term ‘unconscionable’ import a pejorative moral -*Qantas Airways Ltd v 
Cameron* ... at 183–4 and 298.  

The difficulty of defining unconscionability was noted four decades earlier by 
Fullagar J. His Honour stated that the concept of unconscionability is incapable of 
a precise definition:

> Circumstances adversely affecting a party, which may induce a court of equity 
either to refuse its aid or to set a transaction aside, are of great variety and can 
hardly be satisfactory classified.  

The dividing line between unconscionability and good faith is still unclear. In *Renard*, Priestley J stated that ‘there is a close association of ideas between the 
terms unreasonableness, lack of good faith and unconscionability’. This 
statement by Priestley J confirmed that there is a relationship between the concept

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41 *Blomley v Ryan* (1956) 99 CLR 362,405.  
42 (1992) 26 NSWLR 234, 265.
of good faith and unconscionability. Zumbo in giving his opinion to the Senate Standing Committee on Economic Affairs, proposed a definition to unconscionability by including a list of no fewer than nine terms to guide the courts, which include unfair, unreasonable, harsh, oppressive, (or contrary to the concepts) of fair dealing, fair-trading, fair play, good faith and good conscience. He also commented that the definition of unconscionability is non-exhaustive where the courts can consider other guideposts. In addition to that, Finn also broadly defined unconscionable conduct as conduct which is unfair, in breach of faith, in circumstances where fairness or good faith are properly to be expected.

Seddon and Ellinghaus also noted that ‘a breach of good faith must often also constitute unconscionable dealing or unconscionable conduct’. Some courts have equated the two concepts as illustrated in *Australia Pty Ltd v Bruness Pty Ltd*:

The law does not prescribe a precise meaning of the term ‘good faith’ and it is probably no more than a prohibition on acting unconscionably. In that respect, it is significant that s 51AC of the *Trade Practices Act 1974* (Cth) refers to the requirement for both parties to act in good faith in their dealings with each other.

### 2.3.2 Good Faith and Fiduciary Obligation

A fiduciary relationship is where one party owes a duty to act with care and in good faith in the interests of the other party. It is a kind of special relationship

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44 Paul Finn, ‘Unconscionable Conduct’, (1994) 8 *Journal of Contract Law* 37, 38. His Honour referred to the definition from the Oxford English Dictionary where it is given as ‘showing no regard for conscience; not in accordance with what is right or reasonable’ and also a definition given by Spence, Chancery’s historian: [t]he term Conscience, as denoting a principle of judicial decision, appears to have been of clerical invention; it seems to have embraced the obligations which resulted from a person being placed in any situation, as regards to another that gave to the one a right to expect, on the part of the other, the exercise of good faith towards him.
existing in certain relationships such as between principal and an agent, bank and borrower, lawyer and client, doctor and patient, as well as between brokers and other intermediaries of financial services. These kinds of relationship imposes on each party the duty to act in the best interests of the other party to whom the obligations are owed and not just for self interest. In other words, to act as a fiduciary is to serve in a relationship of trust and confidence that carries with it duties of loyalty, due care and utmost good faith.

The particularity of the fiduciary relationship is illustrated in the High Court of Australia’s rejection to any suggestion of a fiduciary relationship in *Hospital Products Ltd v United States Surgical Corporation* which relates to a commercial relationship between a manufacturer and a distributor. Gibbs CJ, Wilson and Dawson JJ placed much importance on the fact that the distributorship contract was essentially a commercial arrangement. Gibbs CJ held that:

>[T]he fact that the arrangement between the parties was of purely commercial kind and that they had dealt at arm’s length and on an equal footing has consistently been regarded by this court as important, if not decisive, in indicating that no fiduciary duty arose.

In *Kiwi Gold NL v Propehcy Mining NL*, Thomas J held that a fiduciary obligation arose as a natural consequence of the relationship of joint venture and thus the fiduciary duty was breached. However, Casey, McGechan and McKay JJ reversed that decision in that same case on appeal. McKay J held that:

>We do not regard the relationship between the parties in the present case as being sufficient of itself to establish fiduciary obligations, but we agree with Thomas J

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49 (Unreported 18 July 1991, Court of Appeal, CA/30/91).
that similar duties to act reasonably and in good faith can be implied into the contract itself.\textsuperscript{50}

It was argued that whenever a contract involves a fiduciary acting in this capacity, that person will owe a very wide range of duties of good faith to the other person simply as a result of this status.\textsuperscript{51} A fiduciary relationship is a kind of relationship in which the duty of good faith arises after the contract has been made by reason of the fiduciary position of one or both of the parties.\textsuperscript{52} This statement is in line with the view of Finn, who draws the concept of ‘loyalty’ from the fiduciary obligation of the parties.\textsuperscript{53} Loyalty is often associated with the concept of good faith as emphasised by Luke;

Good faith is defined as loyalty, where loyalty will not completely abandonment of self-interest. Many rules of our existing contract law can quite plausibly be seen as manifestations of good faith as loyalty. Good faith as loyalty finds an even simpler and more fundamental expression in the recognition of a legal duty to perform contractual undertakings: \textit{pacta sunt servanda}.\textsuperscript{54}

It is interesting to note that when Sir Anthony Mason defined good faith, the notions his Honour included were cooperation or loyalty, honesty and to regard the interests of the parties.\textsuperscript{55} In \textit{United Dominions Corporation Ltd v Brian Pty Ltd},\textsuperscript{56} it was held that the joint venture agreement constituted a form of partnership among the UDC, SPL and Brian giving rise to a duty of good faith that prevented UDC from taking the benefit of the collateralisation clause at the

\begin{thebibliography}{9}
\bibitem{50} (Unreported 18 July 1991, Court of Appeal, CA/30/91), 12.
\bibitem{51} Schermaier, above n 17, 47.
\bibitem{52} Powell, above n 12, 25.
\bibitem{56} (1985) 157 CLR 1.
\end{thebibliography}
expense of the other partner. Mason, Brennan and Deanne JJ held that the relationship between them had plainly assumed a fiduciary character:

A fiduciary relationship can arise and fiduciary duties can exist between parties who have not reached, and who may never reach, agreement upon the consensual terms which are to be governed by the arrangement between them. In particular, a fiduciary relationship with attendant fiduciary obligations may, and ordinarily will, exist between prospective partners who have embarked upon the conduct of the partnership business or venture before the precise terms of any partnership agreement have been settled. Indeed, in such circumstances, the mutual confidence and trust which underlie most consensual fiduciary relationships are likely to be more readily apparent than in the case where mutual rights and obligations have been expressly defined in some formal agreement.57

Fiduciary duties impose high standards of behaviour on the parties, while the duty of good faith is highly context specific. The underlying premise is that parties are unable to have a complete contract. Therefore, the law is required to promote an efficient outcome. In this way, the concepts of fiduciary duty and good faith are considered as a means to promote efficiency by providing the parties with the terms they would have contracted for in a world of zero transaction costs and unlimited foresight.58 It is argued in the US that:

Contract law includes a principle of good faith in implementation-honesty in fact under the Uniform Commercial Code, plus an obligation to avoid (some) opportunistic advantage taking. Good faith in contract merges into fiduciary duties, with a blur and are not in line...59

57 (1985) 157 CLR 1, 12.
Hence, it is argued that good faith is similar to the fiduciary duties on the basis of their special relationship. Both obligations owe a duty to take care of the interests’ of the other parties without abandoning one’s own interest. In this regard, there is a high expectation to the parties’ duty as a consequence of their special relationship apart from those spelt out in the contract.

2.3.3 Good Faith and Non-Derogation from Grant

The doctrine relating to derogation from the grant is an ancient and established concept in property law. However, it is surprisingly not a well known concept due to scarcity of case law. Derogation from grant occurs when one party agrees to grant rights to another but then does something which detracts from this grant. The most commonly cited definition of the maxim is given by Bowen LJ in *Birmingham Dudley & District Banking Company v Ross*:

> The principle will be applied in a proper case by the law that a grantor having given a thing with one hand is not to take away the means of enjoying it with the other. And this principle will be carried out by a necessary implication of whatever fiction is required to support the origin of the right not to be interfered with by the grantor.

The scope is uncertain and the main guiding principle is to look into the facts of the case and the circumstances of the parties at the time of the grant. For example, if a lessee leases part of the lessor’s property for carrying on a particular business, the lessor is bound to abstain from doing anything on the remaining portion of the property which would render the leased premises unfit for conducting the lessee’s

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60 See also W D Duncan, ‘Non Derogation from Grant and Tenant Mix’ (1998) 6 *Australian Property Law Journal* 2.


62 (1888) 38 Ch D295, 312.
business in a way that is ordinarily carried out and one cannot grant land to another and yet retain rights that are necessary for the use of the land granted.

This is demonstrated by Lord Denning MR in *Molton Builders Ltd v City of Westminster London Borough Council* when his Lordship commented that non-derogation from grant:

> is a general principle of law that, if one man agrees to confer a particular benefit on another, he must not do anything which substantially deprives the other of the enjoyment of that benefit: because that would be to take away with one hand what is given with the other.

An interesting case is *JLCS Pty Ltd v Squires Loft City Steakhouse Pty Ltd,* where a restaurant licensee argued that there is an implied term in the licence which provides that the use of similar trademark by another restaurant was not allowed to protect the goodwill of the restaurant. Finkelstein J refers to the concept of non derogation from grant as ‘he must not seek to take away with one hand what he had given with the other’. This is ‘a principle which merely embodies in a legal maxim a rule of common honesty’. His Honour held that the licensor is required to ensure that the licensee can use the trademark without ‘undue interference’ as it is the hope of the parties to operate a successful business. His Honour also clearly stated that the obligation on the licensor is ‘not to use, or permit the use of the similar trademark in a location so close to the current restaurant that it would likely result in a significant adverse effect on the goodwill of the licensee’.

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63 See *Aldin v Latimer Clark, Muirhead & Co* [1984] 2 Ch 437, 444 per Stirling J.
64 See *Wheeldon v Burrows* (1879) 12 Ch D 31, 49.
65 (1975) 30 P & CR 182,186.
66 78 IPR 319.
67 Ibid.
68 See *Harmer v Jumbil (Nigeria) Tin Areas Ltd* [1921] 1 Ch 200,225 where sometimes it is said that the principle rests on an implied term.
69 Ibid. Interestingly, the non derogation from grant doctrine does not seem to have been raised by the parties but by Finkelstein J, who stated that: ‘Harold and Saul [the directors of the licensee] have not sought belief
An analogy can be drawn from this; an expectation from the licensee to the licensor to ensure that the intention of the parties is implemented based on any agreement made. In simple terms, the concept of good faith exists in the contract to protect the parties’ interests; that is to protect the licensee from the unscrupulous behaviour of the licensor. From the above discussion, it is clear that the doctrine of non derogation from grant is significant to contracting parties so that they do what is right when dealing with each other. Terry and Di Lernia claim that:

Based on the current expectation of what a duty of good faith would achieve, the doctrine of non-derogation from grant could potentially cover the field and provide the knights of good faith with what they seek. 70

2.3.4 Good Faith and Common Law Duty to Cooperate

A duty to cooperate, as a general moral standard, has long existed in common law as one of the principles to ensure a contract is executed based on the parties’ intention to the contract. This duty is derived from the nature of the contract itself. When the contracting parties make a contract, the court assumes the parties intended the contract to be effective by applying a duty to cooperate. It is clear that the duty to cooperate could be part of the intention of the contract unless the parties express a contrary intention, 71 which is rare.

The duty of cooperation has been accepted as part of the law as early as 1881. In Mackay v Dick the duty to cooperate was found to be part of the obligation of good faith. Lord Blackburn stated:

based on the rule that a person may not derogate from his grant. Were they to apply to amend their cross-claim to include relief in that regard I would accede to the application’.


Where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances.\(^{72}\)

The above statement indicates that the duty of cooperation is performed when both parties agreed to do something to the benefit of the contract even though it is not expressly stated. A contract will not be effective without the duty of cooperation, without which the parties are deprived of the benefit of the contract. A duty of cooperation is imposed to the extent that is necessary to make the contract workable. In the context of business, the parties must rely on the desire to validate the interests of both parties in the way that business is normally run,\(^{73}\) which is analogous to the concept of good faith where one is expected to help one’s contractual partners. It was further explained in the following statement drawn from *Butt v McDonald*:

> It is a general rule applicable to every contract that 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.\(^{74}\)

On the other hand, an implied duty to cooperate applies to acts which are necessary to the performance of fundamental obligations under the contract. However, when the acts are not fundamental, although necessary to entitle the other party to a benefit under the contract, the implication of a duty to cooperate depends on the intentions of the parties. Thus, there is a need for the court to

\(^{72}\) (1881) 6 App Cas 251, 263.

\(^{73}\) See *Mona Oil Equipment Co v Rhodesia Railways Ltd* [1949] 2 All E.R1014, 1018. Devlin J also refers to Lord Blackburn, who spoke of ‘necessity’ in *Mackay v Dick* arguing that he perhaps did not mean in the strictest sense, but he did mean to emphasise that there are definite limits on what a man is expected to do to help his contractual partners.

\(^{74}\) (1896) 7 QLJ 68, 70-71.
decide. This was discussed in *Secured Income Real Estate (Australia) Ltd v St Martin’s Investments Pty Ltd* in which it was held that:

> Whether the contract imposes a duty to cooperate on the first party or whether it leaves him at liberty to decide for himself whether the acts shall be done, even if the consequence…is to disentitle the other party to a benefit.\(^{75}\)

Cooperation includes: (1) an obligation not to hinder or prevent the fulfilment of the other party’s purpose,\(^ {76}\) (2) an obligation to do all such things that are necessary to enable the other party to have the benefit of the contract and (3) an obligation that neither party will prevent the other from performing the contract. It is further argued by Carter, Peden and Tolhurst that:

> [g]ood faith is inherent in all common law contract principles, and any attempt to imply an independent term requiring good faith is unnecessary and a retrograde step.\(^ {77}\)

Peden argued that the introduction of good faith overlaps the duty of cooperation because both concepts require parties to do all that is reasonably necessary to facilitate performance of contract. Furthermore, the expected outcome of the duty of cooperation is similar to that duty of good faith. Therefore, Peden contends that cooperation is analogous to good faith:

> ‘Cooperation’ is sometimes seen as equivalent to ‘good faith’, and this seems appropriate. The effect of requiring cooperation often overlaps with what is trying to be achieved by the newly created obligation of ‘good faith’. Cooperation (or good faith if that term is preferred) basically must embrace a duty to act honestly and a duty to have regard to the legitimate interests of the other party.\(^ {78}\)

Similarly, when Sir Anthony Mason formulated the definition of good faith, his Honour defined good faith from three notions: honesty, the interests of the parties

\(^{75}\) (1979) 144 CLR 596, 607 per Mason J.

\(^{76}\) *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359, 378.


\(^{78}\) Elisabeth Peden, *Good Faith in the Performance of Contract* (LexisNexis Butterworths, 2003), 170
and cooperation/loyalty (that is loyalty to the contract where contract is treated as a promise).\textsuperscript{79} This definition affirms Peden’s view that good faith is analogous to duty to cooperation.\textsuperscript{80}

On the other hand, Burrows argued that the duty to cooperate is a vague term and can be used to cover a wide range of situations that rest on each party to a contract.\textsuperscript{81} While good faith is a broad principle that covers a wide range of definitions in different contexts,\textsuperscript{82} the duty to cooperate, however, although vague, is well established in the common law doctrine and has a clear foundation when compared to good faith.

\section*{2.4 SOURCES OF GOOD FAITH}

\subsection*{2.4.1 Legislation and Common Law}

There are two sources of law in the common law legal system: law enacted by Parliament, referred to as legislation, and law developed by decisions of the court. In this context, both are aimed to provide a solution to the problem of unfairness due to lack of good faith. Both sources of law have made distinct contributions to the concept of good faith as discussed below:

There are more than 154 federal Acts in Australia that mention the words ‘good faith’.\textsuperscript{83} These Acts apply good faith in different ways; in some, good faith is expressly spelled out in the legislation while in others, the reference is more oblique. One of the well known examples of legislation of good faith is found in the\textit{Insurance Contracts Act 1984 (Cth)} s 13:

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\textsuperscript{79} Mason, above n 55, 69.


\textsuperscript{82} See Chapter Eight for further discussion of the various meanings of good faith.

\textsuperscript{83} \textit{Bropho v Human Rights & Equal Opportunity Commission} [2004] FCAFC 16 [84].
A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.

It is clear that there is an expectation that parties to the insurance contract have a duty to disclose the required information to each other in order to ensure the sanctity of the contract. The concept of utmost good faith in the insurance contract is a longstanding one.

In other legislation, the reference to the obligation of good faith is oblique. For example, in s 181(1) of the Corporations Act 2001 (Cth), it is explained that

a director or other officer or a corporation must exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose.

The existence of such a wide range of legislative references to good faith suggests that there is a strong indication from the legislature that the good faith obligation is a commonly expected norm. This is to the extent that the common law recognises good faith as a term of contract which is further discussed in 2.4.2.

2.4.2 Good Faith as a Term of the Contract

A duty of good faith may be assumed by the parties either expressly or by implication. While the parties can expressly incorporate a term requiring performance in good faith, most of the cases on good faith have been based on implied terms.
Express term

An express term of the contract refers to a term in the contract which the parties intend to be binding. The terms of the contract govern the relationship between the contracting parties and determine their rights and obligations. Express terms concerning good faith can be included in the contract. However, there has been judicial debate as to the effect of an obligation to negotiate in good faith. In *Walford v Miles*, Lord Ackner, with regard to reasons of uncertainty and policy commented that:

> The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties involved in negotiations...A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party.84

On the other hand, in *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd*,85 the Full Court faced a dispute over a mining contract, which contained a clause in these terms:

> The successful operation of this contract requires that [Thiess] and [Placer] agree to act in good faith in all matters relating both to carrying out the works, derivation of rates and interpretation of this document.86

The Full Court took this to mean that the parties were obliged to agree on rates in advance of work done and they were required to cooperate in the establishment of rates based as far as reasonably possible on actual costs. This meant that Thiess had to disclose all facts relevant to the establishment of rates based on actual costs. This was the ‘content’ of the obligation of good faith. When Thiess knowingly misrepresented to Placer that certain costs were its genuine estimate of

86 [2000] WASCA 102 [22].
costs, but the truth of the matter was that they actually included profits. This was in breach of the express terms to act in good faith.

Thus, the express term of good faith is a mechanism to ensure the parties adhere to the agreed contract whereby the contracting parties are required to behave in good faith as expressly stated in the contract.

**Implied term**

There are two types of implied term: term ‘implied by law’ and term ‘implied by fact’. In *Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd*, Hope JA discussed two kinds of implication of terms in a contract. It is either based on the legal incidence of a particular class of contract or based on the test of necessity to give business efficacy to the contract. The former is commonly called implication as a matter of law and the latter is known as implication as a matter of fact. The term is prima facie implied in all contracts of a particular class, but its implication may be excluded due to the express terms of the contract and ‘the relevant surrounding circumstances of the case’. His Honour observed that the classes of contracts in which the law will imply terms is not limited and considered a test for deciding for the first time whether a term should be implied in a particular class of contract.

**Term ‘Implied in Fact’**

As a general proposition, in cases where parties intend a term or terms to be a part of a contract, but where, for one reason or another, such a term or terms failed to be drafted into the final contract, the court may imply such a term or terms into the contract. This is known as implication in fact. In ascertaining the intention of the parties, the courts use the objective test of what the reasonable person would conclude as to the parties’ intentions. The implication of a term in fact allows the

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87 (1987) 10 NSWLR 468 (see particularly 486-7).
88 Ibid, 487.
courts to fill contractual ‘gaps’ created by the silence of the contract on a particular subject. The court has to infer the actual intention of the parties from the contract. The traditional test for implication in fact was enunciated in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*, in which it was established that the implied term must be

a) Reasonable and equitable;
b) Necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
c) So obvious that ‘it goes without saying’
d) Capable of clear expression; and
e) Must not contradict any express term of the contract

The task of the court must be undertaken with a degree of caution enjoined by Giles JA (with whom Heydon JA and Ipp JJA agreed) in *State Bank of New South Wales Ltd v Currabubula Holdings Pty Ltd*, as stated by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*, the courts are slow to imply a term. It is not enough that it is reasonable to imply the term. It must be necessary to do so in order to give business efficacy to the contract. The term must also be obvious that it goes without saying: ‘Further, there is the difficulty of identifying with any degree of certainty the terms which the parties would have settled upon had they considered the question’.

In such a case, it is necessary to arrive at some conclusion as to the actual intention of the parties before considering any presumed or imputed intention of the parties. Implied term by fact gives little scope for good faith. It is only in rare situations that the contract will be effective without it.

*Term ‘Implied in Law’*

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90 (1977) 180 CLR 266, 283.
91 (2001) 51 NSWLR 399.
Good faith has been treated as a term implied in law,\textsuperscript{93} in relation to a particular class of contract. A term is implied by law where the courts consider that the imposition of a particular obligation in a particular class of contract \textsuperscript{94} is necessary to prevent ‘the enjoyment of the rights conferred by the contract’ from being ‘rendered nugatory, worthless, or perhaps being seriously undermined’.\textsuperscript{95}

In \textit{Breen v Williams},\textsuperscript{96} in a passage adopted in the High Court in \textit{Australis Media Holdings Pty Ltd v Telestra Corporation Ltd}, Gaudron and McHugh JJ said:

A term implied by law on the other hand arises from the nature, type or class of contract in question … Some terms are implied by statutes in contracts of a particular class, for example money lending and home building contracts. Such terms give effect to social and economic policies which the legislature thinks are necessary to protect and promote the rights of one party to that class of contract. Other terms are implied by the common law because, although originally based on the intentions of parties to specific contracts of particular descriptions, they ‘became so much a part of the common understanding as to be imported into all transactions of the particular description.’\textsuperscript{97}

It is easier to identify good faith from term ‘implied by law’ based on a particular type of contract. To satisfy the requirement of implied term by law is less controversial, not because of what the parties intended but because the court or legislature thinks it is for the fair functioning of the contract.


\textsuperscript{94} \textit{Liverpool City Council v Irwin} [1977] AC 239.

\textsuperscript{95} \textit{Bryne Australia v Australian Airlines Ltd} (1995) 185 CLR 410, 450.

\textsuperscript{96} (1996) 186 CLR 71.

\textsuperscript{97} (1998) 43 NSWLR 104,122.
2.5 PERSPECTIVES ON GOOD FAITH

Judges and scholars are divided as to the desirability of qualifying the concept of good faith. Some scholars welcome the concept of good faith in contract because it helps to overcome gaps in the contract. Good faith was put onto the judicial agenda in Australia through obiter comments by Priestley J in the landmark case of Renard in 1992. His Honour held that:

The kind of reasonableness I have been discussing seems to me to have much in common with the notions of good faith which are regarded in many civil law systems of Europe and in all States in the United States as necessarily implied in many kinds of contract. Although this implication is not yet been accepted to the same extent in Australia as part of judge-make Australian contract law, there are many indications that the time may be fast approaching when the idea, long recognised as implicit in many of the orthodox techniques of solving contractual disputes, will gain explicit recognition in the same way as it has in Europe and in the United States.98

However, some scholars disagree with the introduction or acceptance of the concept of good faith as it will overwrite the essence of the contract. One of them is Bristow who claims that ‘defining the concept of what good faith actually encompasses is an exercise that frequently proves to be frustratingly circular’.99

The following subsections outline the varying perspectives adopted in relation to the concept of good faith.

2.5.1 Good Faith Goes Against Parties’ Intentions

The recognition of an implied duty of good faith has been seen as an unnecessary and undesirable judicial intervention, especially for commercial parties. English law takes the view that, in general, it is for the parties themselves to allocate risk

through the terms of their contract, and it is not the role of the courts to do it for them.\textsuperscript{100} Thus, it gives freedom and autonomy to the commercial parties to the contract.\textsuperscript{101} The court’s duty is to respect and enforce the parties’ intentions in the contract. This was supported by Rt. Hon Sir Robert Goff:

\begin{quote}
[w]e [the United Kingdom Commercial Court] are there to help businessmen not to hinder them: we are there to give effect to their transactions, not to frustrate them: we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil.\textsuperscript{102}
\end{quote}

When parties bargain there is an expectation of an outcome similar to the intention of the contract. Therefore, implying a requirement that the parties deal with each other in good faith may go against the parties’ intention and consequently make the contracting process no longer reflect their intention.

Furthermore, the fear is that good faith will interfere with the commercial conduct of the parties where the parties have equal bargaining power and where the expected outcome is consistent with the contract agreed. It was held by Rogers CJ in \textit{GSA Group Pty Ltd v Siebe Plc} that:

\begin{quote}
Against a trend towards a general obligation of good faith, fairness or reasonableness, there have been judicial comments to the effect that the courts should be slow to intrude into the commercial dealings of the parties who are quite able to look after their own interests. The courts should not be too eager to interfere in the commercial conduct of the parties, especially where the parties are all wealthy, experienced, and commercial entities are able to attend to their own interests.\textsuperscript{103}
\end{quote}

\begin{footnotes}
\item[100] Ibid 20
\item[101] Bristow, above n 99, 19. Fear that an ambiguous good faith doctrine would somehow jeopardise the Anglo-Canadian legal tradition of individual autonomy and free to contract. The tension between the individual and the society is clearly illustrated in a recent House of Lords case, \textit{Walford v Miles} [1992] 2 AC 128.
\item[103] (1993) 30 NSWLR 573, 579 (F).
\end{footnotes}
2.5.2  Good Faith Creates Uncertainty

Contract law must provide parties with certainty.\textsuperscript{104} However, good faith creates uncertainty because it has no definite meaning.\textsuperscript{105} Over two decades ago, Professor Roy Goode told an Italian audience that;

\ldots[we] in England find it difficult to adopt a general concept of good faith. He seemed not at all overcome by regret and added that we do not know quite what [good faith] means.\textsuperscript{106}

Good faith is often associated with the concept of honesty, reasonableness, fairness and cooperation. These concepts are believed to be too subjective and uncertain.\textsuperscript{107} Therefore, the concept of good faith has been described as a ‘mystery’ with its meaning susceptible to ‘change’ which shows that there is a lack of clarity around the concept of good faith. According to Farnsworth, an eminent American commentator, the doctrine of good faith performance has produced a ‘tangled case law’ and has had an ‘uncertain development’.\textsuperscript{108} However, the term good faith is rich in connotation and even among laymen regarded as highly expressive.\textsuperscript{109} Meaning that it is a fruitful exercise to identify the various contexts in which a flexible approach can be taken in order to provide benefit to all parties in a contract. It is important to note, however, that just

because a term cannot be exhaustively defined, it does not mean that it is uncertain. On the contrary, Summers expounded the idea of good faith as an ‘excluder’, that is, as a phrase that has no general meaning or meanings of its own but which serves to exclude many heterogeneous forms of bad faith.\footnote{110} He suggested that:

In case of doubt, a lawyer will determine more accurately what the judge means by using the phrase ‘good faith’ if he does not ask what good faith itself means, but rather asks: What does the judge intend to rule out by his use of this phrase?\footnote{111}

According to Summers, it is easier to identify bad faith than good faith. Even though Lucke recognised this explanation as having ‘an agnostic flavour’,\footnote{112} Summers’ definition of good faith was recognised and adopted in s 205 \textit{Restatement (Second) of Contracts} s 205, Comment (d) which notes:

A complete catalogues of types of bad faith is impossible, but the following type are among those which have been recognised in judicial decision: evasion of the spirit of the bargain, lack of diligence and slacking off, wilful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate in the other party’s performance.

Hence, similar to unconscionability, good faith is a difficult concept to define. Due to the problem in defining the concept, unconscionability was given a legislative effect whereby the meaning was determined by a set of ‘non-discretionary reference criteria’ as prescribed in s 22 of \textit{Australian Consumer Law} as guidance to assist its meaning. Therefore, having a guideline like ‘non-discretionary reference criteria’ will help make defining good faith much easier.


\footnote{111} Ibid 200.

2.5.3 Good Faith as the Essence of Contract Law

Carter and Peden argue that ‘Every aspect of contract law is, or should be, consistent with good faith because good faith is the essence of contract’. Because good faith is inherent in all contract doctrines, it seems obvious that if a court implies a term of good faith, the court is either implying a redundant term or implying a term in which by definition, must impose a more onerous requirement. Carter and Peden explain that one of the criticisms of recent cases is the failure to acknowledge the good faith element of contract rules. For example, in the law of contract, many elements to enforce a valid contract underlie the concept of good faith. One of them is the contract between offeror and offeree, where there is a concern from the law of contract that the offeror acts in good faith. Any revocation must be communicated to the offeree prior to the time of the acceptance. Because an offer does not create any legal obligations, can there be a justification for the requirement that the revocation be communicated? Carter and Peden view that it can only be in good faith that elementary considerations of honesty and fairness have the right of revocation.

Thus, although it has sometimes been recognised that many rules of contract law give expression to ideas that can only be explained in terms of good faith, the implications of this may not have been fully understood or appreciated in recent Australian cases.

113 Peden and Carter, above n 80, 162.
114 Ibid.
115 Ibid.
2.5.4 Good Faith is Not a Concept in English Law

Good faith is regarded as a foreign rule in English law. This statement was supported by Harrison who claimed that “it is customary for English lawyers to say ...‘we do not have a principle of good faith in English law’ ”. The concept of good faith is rooted in civil law via the concept of bona fides. Many European countries adopted the requirement of good faith in their civil code, some of which are: s 242 of the German Civil Code, Article 1375 of the Italian Civil Code, Article 1134 (3) of the French Civil Code and more recently Article 6:2 of the Dutch Civil Code. Adopting good faith in English law will implant a ‘foreign rule’ which may be applied differently. For example, in the German Civil Code, good faith is applied in many aspects of the contract from the negotiation process, performance, and to the enforcement of a contract.

There is no general duty of good faith in the making of contracts in English law, in relation to performance as well as formation of contract. The underlying reason against the adoption of a general principle of good faith in English contract law is to apply a specific legal concept rather than a general principle to police unfairness. There are various specific legal concepts that clearly govern behaviour, such as the doctrine of economic duress. One of the elements in the doctrine of economic duress is the improper or illegitimate nature of the pressure used. In this context, a general doctrine cannot be appropriate when contracting contexts vary so much. In particular, a general doctrine of good faith would make little sense in those contracting contexts in which the participants regulate their dealings in a way that openly tolerates opportunism. In addition, good faith is

121 Atiyah, above n 26, 164.
recognised in specific classes of contract, for example, in insurance contracts\textsuperscript{124} and fiduciary contracts.\textsuperscript{125} In legislation, there is an increasing recognition in specific instances like the \textit{Unfair Terms in Consumer Contract Regulations 1999} that was introduced to protect the presumed weaker parties.\textsuperscript{126} Furthermore, Bridge also shared a similar view in his article on the doctrine of good faith performance and speculated that good faith is ‘[F]ar from involving the community ethic in the day to day task of law-making and decision-making … good faith is more likely to produce idiosyncratic judgments’.\textsuperscript{127}

On the other hand, the common law has long used recourse to interpret parties’ intentions to achieve a variety of normative results,\textsuperscript{128} with the aim of ascertaining the actual intention of the parties by looking at the typical intentions or expectations of the parties to the type of contract in question. In this context, it means that the interpretation of expressed contractual terms or the implication of terms where one of the parties is held to be responsible to the other for defects in the subject matter of the contract, whereby some information was not disclosed before the contract took place will lead to legal consequences. In such circumstances, other systems are dealt with by a general requirement of good faith.\textsuperscript{129} Thus, there is strong support by Lord Steyn who stated that ‘there is not a world of difference between the objective requirement of good faith and the reasonable expectation of the parties’.\textsuperscript{130}

In 1991, in a lecture on good faith at Oxford University, Lord Steyn explained that, due to the lack of a doctrine of good faith, ‘English law has to resort to the

\textsuperscript{124} The contract of insurance is an example of that special class of contract known to the common law as contracts \textit{uberrimae fidei} that is the utmost good faith, requirement imposed both on insurer and insured.

\textsuperscript{125} See above section 2.3.2 for discussion of the relationship between fiduciary duty and good faith.

\textsuperscript{126} See Chapter Three for further details.


\textsuperscript{128} Whittaker and Zimmermann, above n 122, 45.

\textsuperscript{129} Nicholas above n 9, 950.

\textsuperscript{130} Steyn (1997), above n 30, 450.
implication of terms’. His Honour urged that ‘in using the high techniques of common law, the close attention paid to the purpose of the law of contract is to promote good faith and fair dealing’. His Honour asserted that there is no need for a good faith concept because common law prefers to look at the intention and the expectation of the parties. Therefore, implying good faith resulted in implanting a ‘foreign language’ in English law.

Good faith is a foreign concept. Therefore, good faith is still not the favourable concept in English law. English law has its own way in dealing with the issue of unfairness in a contract. This is evident in available specific legal concepts which have achieved an outcome similar to that of good faith when policing unfairness. Despite the specific legal concept, English law emphasises the interpretation of the parties’ intention to understand the parties’ expectations, which they believe provides a better outcome. When parties draft a contract, they should understand what is expected from the contract.

2.5.5 Good Faith as a Universal Term

A duty of cooperation and reasonableness are two underlying concepts in contract that imply good faith. Therefore, good faith is regarded as a universal term. Thus, it can be said that there is no need for the concept of good faith because the current legislation and legal concepts discussed earlier, such as unconscionability, duty of cooperation, non-derogation from grant and fiduciary duty, are sufficient to tackle issues of unfairness and injustice. On the contrary, there is a need to have good faith as a universal term to act as a gap filling in the absence of express term of the contract.

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131 Steyn (1991), above n 105, 133.
132 Ibid.
133 Seddon and Ellinghaus above n 45, 419.
2.6 CONCLUSION

Good faith in civil law countries is a well-established concept and has been adopted in the civil law codes. In common law, there is no general duty of good faith, but good faith is recognised in discrete settings and contexts. This does not mean that common law operates in a ‘vacuum’ when considering issues of unfairness and injustice. The four related legal concepts, unconscionability, fiduciary obligation, non-derogation from grant, and common law duty to cooperate provide an alternative to the concept of good faith in common law.

The common law prefers to apply specific doctrines rather than a general concept (such as good faith) where the application of specific concepts generates the same result.\textsuperscript{134} For example, where there is unequal bargaining power between the parties, the statutory of unconscionability is available to settle the problem as clearly stated in the Australian Consumer Law which was given a legislative effect as schedule 2 of Competition and Consumer Act 2010 (Cth) which came into effect on 1\textsuperscript{st} January 2011. Certain problems relating to property law may be addressed under the concept of non-derogation from grant, which may make available remedies to the injured parties. Therefore, to say that common law is handicapped due to the absence of a general duty of good faith in contract law is an overstatement, as the existing legal concepts are available to police an unfair contract.

Although the concept of good faith is uncertain, frustrating and meaningless, it has been adopted in some legislation and in common law. Insurance is the obvious example, where the concept of \textit{uberrimae fidei} or utmost good faith has long been in existence where it is expected that the parties to the insurance contract must disclose all relevant information. The expression of good faith can be seen as an express term and an implied of term in the contract. When good faith is

expressly stated as a term or clause of the contract, the parties are expected to behave in good faith as expressly stated in the contract. However, there are some instances where much of the context of the contract may not be spelt out, but is left to implication. There are two types of implied term: term ‘implied by law’ and term ‘implied by fact’. Good faith is considered as a term ‘implied by law’ rather than term ‘implied by fact’. It is easier to satisfy the requirement of term ‘implied by law’ based on a particular class of contract than the modern test for term ‘implied by fact’. Sometimes the modern test for term ‘implied by fact’, as discussed in BP Refinery (Westernport) Pty Ltd v Shire of Hastings,\textsuperscript{135} is too difficult to be satisfied.

Therefore, it is not surprising that there remains a range of different perspectives among scholars and judges as to the concept of good faith. It is a fairly new concept in common law and therefore, is open for further debate and interpretation.

\textsuperscript{135} (1977) 180 CLR 266, 283.
3 INTERNATIONAL REVIEW OF GOOD FAITH

This chapter reviews the concept of good faith in civil law and common law legal systems. Germany, France and Italy represent the civil law legal system in which the concept of good faith was codified into the civil law codes. However, the United Kingdom, Canada and New Zealand represent the common law legal system, whereby good faith is recognised in a particular contract. US on the other hand, is the only common law country which recognises good faith in the statutory provision despite inheriting the common law legal system. On the contrary, The People’s Republic of China is influenced by both the civil law and socialist law, nonetheless the concept of good faith has been of interest due to China’s economic expansion. Besides recognising good faith in both legal systems, this chapter also reviews good faith in key international trade instruments.

3.1 INTRODUCTION

As discussed in Chapter Two, good faith, a civil law concept, is gaining recognition in common law countries. Many common law countries have recognised the concept of good faith but the recognition is in limited situations such as in the insurance context. In the insurance context, good faith is a well known concept. The concept of utmost good faith and its relationship in the insurance contract was recognised for more than 250 years from the case of *Carter v Boehm*.\(^1\) There is an expectation that both insured and insurer should behave in utmost good faith to effectuate the insurance contract. In addition, there are some specific legal concepts in common law which illustrate the execution of good faith, for example; the common law duty of co-operation achieves the same result as might be required by good faith without explicitly referring to that concept. When the contracting parties make a contract, the court assumes the

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\(^1\) (1766) 3 Burr 1905, 1910.
parties intend the contract to be effective by applying a duty to cooperate. This is similar to the concept of good faith to express the parties’ intentions. In *Butt v McDonald*, the concept of common law duty to cooperate further explained that ‘it is a general rule applicable to every contract that 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’.²

In civil law countries, the concept of good faith is clearly expressed in the civil law codes. In the civil law codes, good faith is recognised as a general and pervasive principle in all phases of contract from negotiation, to performance as well as enforcement. This means that good faith is treated as a standard of behaviour which is expected from the parties in a contract. In civil law codes, good faith is mentioned but no definition is given. The definition of good faith depends on the facts of each case.³ The position taken by these countries is explained by the Commission on European Contract Law in the statement below:

The principle of good faith and fair dealing is recognised or at least appears to be acted on as a guideline for contractual behaviour in all EC countries. There is, however, a considerable difference between the legal systems as to how extensive and how powerful the penetration of the principle has been. At the one end of the spectrum figures a system where the principle has revolutionised the contract (and other parts of the law as well) and added a special feature to the style of that system (GERMANY). At the other end we find systems which do not recognise a general obligation of the parties to conform to good faith in the performance of a contract, but which in many cases by specific rules reach the results which the other systems have reached by the principle of good faith (ENGLAND and IRELAND).⁴

² (1896) 7 QLJ 68, 70-71.
In civil law countries, notably Germany, France and Italy, the concept of good faith is well recognised as a general and pervasive principle in the civil law codes. Common law countries however, tend to be suspicious of the idea that parties must act in good faith. In common law countries, there is no overarching duty of good faith but good faith is recognised in particular contexts. Other common law countries have adopted a similar position, for example, Canada and New Zealand. The situation however is different in the US. The US has inherited a similar common law background, yet, the concept of good faith has been given a statutory provision as demonstrated in the *Uniform Commercial Code* and *Restatement (Second) of Contracts*. Uniquely, The People’s Republic of China is influenced by both civil law and socialist law whereby there is an emerging interest in the concept of good faith. In China, good faith is considered as a general principle in contract law and is also given a statutory recognition in the *Contract Law of the People’s Republic of China*. The concept of good faith is also well recognised in many international trade instruments, where the concept of good faith is used as the expected behaviour of the contracting parties in dealing with international business transactions.

The chapter proceeds as follows. Chapter 3.2 outlines the significance of good faith in civil law countries. Chapter 3.3 reviews the development and reception of good faith in the UK, where no general principle of good faith has been recognised. Although the US has inherited common law, the concept of good faith is found in its statutory provisions, as discussed in Chapter 3.4. Chapter 3.5 discusses the issue of good faith in Canada, while Chapter 3.6 discusses it in New Zealand. Chapter 3.7 examines the emerging interest in good faith in the Peoples’ Republic of China. Chapter 3.8 discusses international trade instruments that recognise the concept of good faith.
GOOD FAITH IN CIVIL LAW COUNTRIES

The concept of good faith is well established in civil law countries through its inclusion in their civil codes. The civil law approach to good faith is derived from a general philosophy of contract where it ‘focuses on the relationship between the parties’, this means the contracting parties are generally expected to behave in good faith. For example, the approach of the drafter of the German Civil Code to the role of good faith, which is also applicable to other civil law systems, has been described as follows;

Utilizing the general concepts developed by civil-law theory, they sought to lay down abstractly formulated rules, couched in terms of rigidly defined concepts and comprising as many individual’s solutions as possible, which were to be binding on the judges. Still, they had sufficient insight into the variety and variability of life-situations to insert in the Code a number of blanket concepts modelled after the bona fidei interpretation and the boni mores of Roman Law, such as good faith (Treu und Glauben), ‘good morals’ (güte Sitten), ‘fairness’ (Billigkeit), and the like, which left some lee-way for judicial law-finding.

In the Civil law codes, contracts must be performed and interpreted in accordance with the requirement of good faith with the aim of creating a ‘gapless’ system of law. In this context, good faith is regarded as a fundamental principle of the law.

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5 See for example the Italian Civil Code art 1375, which provides for contracts to be performed to an objective standard of good faith. The Swiss Civil Code art 2 provides that every person is bound, in exercising their rights and fulfilling their duties, to act in accordance with good faith. The Greek Civil Code by virtue of art 288, the Quebec Civil Code by virtue of art 6, 1375 and 1434 and the Dutch Civil Code by virtue of art 6:248 all made references to the concept of good faith.
of contract where every phase of the contract from negotiation to performance and enforcement must be carried out with good faith.

There are two types of reference to good faith in the civil law codes: general clauses and specific clauses. A general clause is a clause where good faith is generally applicable to all contracts and parties in a contract. An example of a general clause can be found in the Swiss Code Article 2, where ‘every person is bound, in exercising their rights and duties, to act in accordance with good faith’. A specific clause on the other hand, is a clause where good faith is limited to a particular context or circumstance. An example could be in the case of a debtor. To illustrate, a specific clause in the German Civil Code Article 242 states that ‘the debtor is bound to perform the contract in accordance with good faith having regard to common usage’. The significance of the inclusion of good faith in both a specific clause and in a general clause provides a formal role for good faith in the civil law code, which is lacking in the common law systems. The Civil Codes of Germany, Italy and France are now discussed in more detail.

### 3.2.1 Germany

In German contract law, the concept of good faith plays an important role in regulating the contract. The principle of good faith is essentially enshrined in Article 242 which relates specifically to the manner in which the obligation is to be performed. The German Civil Code Article 242 (specific clause) provides that the ‘[t]he debtor is bound to perform the contract in accordance with good faith having regard to common usage’. Article 242 focuses on the behaviour of the contracting parties in commerce by taking into consideration the general practice in commerce. Article 242 describes the duty of good faith as *treu und glauben*, which can be translated to mean faith and credit. Therefore, good faith is

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9 In Germany, The German Civil Code Article 242 has been expanded far beyond the actual wording to become the legal foundation for the courts to develop the law.
evidently taken into consideration when dealing with the fair balancing of interests and needs of the parties in a contract.\textsuperscript{12} Historically speaking, the concept of \textit{treu und glauben} is deeply rooted in the “\textit{bona fides}” of Roman law which is equivalent to “\textit{bonne foi}” in French, which is in essence, good faith.\textsuperscript{13} The concept of \textit{treu und glauben} was further explained by Whittaker and Zimmerman:

\begin{quote}
“\textit{Treu}”…signifies faithfulness, loyalty, fidelity, reliability; ‘\textit{Glaube}’ means belief in the sense of faith or reliance. The combination of “\textit{Treu und Glaube}” is sometimes seen to transcend the sum of its components and is widely understood as a conceptual entity. It suggests a standard of honest, loyal and considerate behaviour, of acting with due regard for the interests of the other party, and it implies and comprises the protection of reasonable reliance. Thus, it is not a legal rule with specific requirements that have to be checked but may be called an ‘open’ norm. Its content cannot be established in an abstract manner but takes shape only by the way in which it is applied.\textsuperscript{14}
\end{quote}

In deciding whether the debtor has an obligation to perform his/her contract in the manner required by good faith giving consideration to common usage within the parameter of Article 242, Article 157 was invoked to deal with this issue. Article 157 provides that ‘[c]ontracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration’. Article 157 deals with the standard for contractual interpretation. This means the determination of the content of a contract should be interpreted in light of good faith. Therefore, the combination of Article 242 and Article 157 suggests that good faith is required in all aspects of the contract.

\textsuperscript{13} Ibid.
Although Article 242 requires good faith to be specifically related to how the debtor is to perform, the specific provision has evolved due to the process of interpretation far beyond its actual wording, particularly in the area of private law. This is because German courts have used this provision in a wider scale, compared to its originally narrow scope, as the statutory basis for deriving a new general principle of law when existing rules of law proved to be inadequate in adjudicating actual cases. Courts also rely on Article 242 to create additional duties for the parties that were not expressly provided for in the statute or in the contract. This modification that occurs to Article 242 has been done to settle economic and social problems which arose after the two world wars and the reunification of Germany as well as to suit the social and moral attitudes that change in the society. Therefore, Article 242 is regarded as a universal application to solve contractual problems occurring between contracting parties Schlechtriem commented that:

You can find a source (be it a court decision or a scholarly theory) for every solution imaginable or wanted, BGB Article 242 [German civil code good faith provision] serving as the legal anchor to even the wildest propositions and results.

This provision had a profound effect on the development of German contract law by courts that created a number of obligations to ensure a loyal performance of a contract such as a duty of the parties to cooperate, to protect each other’s interests and to give information. However, even though good faith is mentioned and has a central role in the German Civil Code, there is no formal definition of good faith. This evidently shows that judges in civil law system like Germany are more frequently engaged in creativity to interpret the meaning of good faith on case by case basis.

15 O’Connor, above n 10, 85.
17 Styles, above n 9 Error! Bookmark not defined., 175.
18 Peter Schlechtriem, Good Faith in German Law and in International Uniforms Law (Feb 1996) http://www.uniromal.it/idc/ventro/publications/24sclactriem.pdf
3.2.2 Italy

In Italy, the *Italian Civil Code* also mentions the concept of good faith. The drafting of the *Italian Civil Code* was influenced by Article 242 of the *German Civil Code* where good faith is considered as an important concept.\(^{19}\) In the *Italian Civil Code*, the concept of *buona fede* has been interpreted as synonymous to the German *Treu und Glaube*, where the Italian court gives consideration to the principle of freedom of contract to the contracting parties.\(^{20}\) This means good faith is the expected behaviour of the contracting parties with an aim to protect the relationship in the contract. Therefore, it can be said that Italy has a well-developed concept of good faith in the same way as Germany has. It covers pre-contractual negotiations, formation, as well as performance of contract.

In the *Italian Civil Code*, good faith is considered as a tool to regulate the conduct of the parties in a contract. Therefore, the *Italian Civil Code* highlights the importance of good faith in different stages of a contractual relationship in several articles of the code. For example, Article 1337 provides that ‘the parties, in the conduct of negotiations and the formation of contract should conduct themselves according to good faith’. It was further explained by Palmieri that ‘good faith is a limitation on private autonomy that restricts, during negotiation as well as in execution of a contract, the freedom of the parties; private control of legal transactions is not indiscriminate freedom to act, but freedom to act in good faith’.\(^{21}\) In the context of negotiation, good faith acts as a tool to protect the relationship of the contracting parties by creating a legal obligation between them.

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\(^{20}\) Ibid 8.

Besides Article 1337, there are few other articles that clearly mention good faith, for example, Article 1366 provides that a ‘contract must be interpreted in good faith’, and Article 1375 states that a ‘contract must be executed in good faith’. It also covers the relationship between the debtor and creditor to behave in good faith as illustrated in Article 1175: ‘debtor and creditor must behave according to good faith and fair dealing rules’. Article 1460 provides that;

[I]n contracts providing for mutual counter-performance, each party can refuse to perform his obligation if the other party does not perform his own at the same time, unless different times for performance have been established by the parties or otherwise stipulated by the nature of the contract. However, performance cannot be rejected if, considering the circumstances, such rejection is contrary to good faith’.

Despite the fact that good faith has been mentioned in many of the articles, the Italian Civil Code does not contain any definition of good faith. In Italian Civil Code, good faith is recognised as a broader ethical idea between the contracting parties.\textsuperscript{22} The ethical ingredient of good faith is explained thus:

The need for good faith, taken in its ethical sense, constitutes one of the hinges of the legal discipline of obligations and establishes a legal duty in the true sense of the word ... which is violated not only if one of the parties has acted maliciously to the other party’s detriment but also when the conduct of said party was not guided by openness, diligent fairness, and a sense of social solidarity, which are integral parts of good faith; thus, even if the result of mere negligence, or even silence ... such constitute a transgression of the duty of good faith if suitable to induce reasonable reliance in the other party.\textsuperscript{23}

\textsuperscript{22} Ibid.
\textsuperscript{23} Ibid.
In general, good faith is defined as ‘openness, diligent fairness and a sense of social solidarity’.\textsuperscript{24} This definition compels the contracting parties to acknowledge the importance of good faith and at minimal, to act reasonably.\textsuperscript{25} In the \textit{Italian Civil Code}, good faith is analogous to an ethical obligation which is an integral part of public policy.\textsuperscript{26} In this context, parties must acknowledge the public policy behind good faith and value its importance when contracting. The Italian scholars are sceptical about the concept of good faith as it is too abstract and it might vest judges too broad of discretionary power in interpreting the concept.\textsuperscript{27} Due to this problem, the concept of good faith has not been able to offer the judges a clear picture of the definition of good faith.

\subsection*{3.2.3 France}

In France, good faith was mentioned in the \textit{French Civil Code}. The obligation of good faith is enshrined in Article 1134 of the \textit{French Civil Code}. Article 1134 of the \textit{French Civil Code} states that:

\begin{quote}
Agreements lawfully formed take the place of law for those who have made them. They cannot be revoked except by mutual consent or on grounds allowed by law. They must be performed in good faith.
\end{quote}

According to Article 1134 of the \textit{French Civil Code}, all contractual obligations must be performed in good faith. In the first paragraph of Article 1134 of the \textit{French Civil Code}, it clearly states that ‘[a]greements lawfully formed take the place of law for those [contracting parties] who have made them’. In that same paragraph, the word ‘good faith’ is mentioned to emphasise the importance of the contracting parties to behave in good faith in their agreements. However, good faith is evidently not defined. This seems to force French judges to find a creative

\begin{flushright}
\textsuperscript{24} Powers, above n 11, 338.
\textsuperscript{25} Ibid.
\textsuperscript{26} Ibid, 387.
\textsuperscript{27} Musy, above n 19, 9.
\end{flushright}
way to impose the good faith principle to the contracting parties.\textsuperscript{28} In this sense, the obligation of good faith has provided a creative instrument for the French judges to determine the content of the contract. Unfortunately, it has made a big impact to the concept of good faith as the meaning of good faith is now open for further interpretation by the French judges. The Obligation Section in the \textit{French Civil Code}, by virtue of Article 1135 of the \textit{French Civil Code} does not contain other explicit references to the good faith principle:

\begin{quote}
Agreements obligate not only to what is expressed in the agreement creating them, but also to the consequences which equity, custom or the law (\textit{loi}) give to the obligation in accordance with its nature.
\end{quote}

The concept of good faith in the \textit{French Civil Code} appears to be undeveloped, due to the fact that it does not define good faith.\textsuperscript{29} This is because French jurists are somewhat uncertain with regards to the idea of good faith. Some of the jurists who support the idea of good faith warned that the idea of good faith should not be allowed to lead to the idea of an ‘absolute altruism negating one’s own interest’.\textsuperscript{30} Thus, it also made good faith a broad principle. As explained by Jourdain who mentioned that;

\begin{quote}
In the end, good faith remains a hazy notion, which is expressed effectively only when it runs into the legal mould of other concepts with more precise contents. This congenital weakness stems from the vague nature of a notion which in practice remains essentially moral and which has been made into a norm of behaviour governing pre-contractual relations. But if the notion of good faith appears to be of somewhat restrained utility as an instrument of legal technique, no one would contest that the idea of good faith inspires many actual solutions to
\end{quote}

\textsuperscript{29} O’Connor, above n 10, 95.
\textsuperscript{30} Whittaker and Zimmermann, above n 14, 38.
legal problems. For this reason, should one at least raise it to the rank of a general principle of law? The debate on this question though, remains open.\(^3\)\(^1\)

Article 1134 and Article 1135 of the French Civil Code serves as an open-ended concept that is open to consider the concept of good faith rather than having good faith as a criterion for a contractual agreement. One of the reasons for the lack of development of good faith in France is that French lawyers are ‘more inclined to view law in terms of the legal rules used in practice and applied by the court and place less emphasis on statements of general principle and rules of ideal conduct’.\(^3\)\(^2\) Therefore, despite being mentioned in the French Civil Code, there is no definition to good faith.

The above discussion indicates that good faith is a well-recognised concept in civil law countries in all phases of contract from negotiation, to performance, as well as enforcement, indicating that good faith can be relied upon by both parties to a contract.\(^3\)\(^3\) However, despite its wide recognition in civil law countries, good faith is not defined in civil law codes but has developed based on the interpretation of the judge on a case-by-case basis. Therefore, an attempted search for an all-encompassing definition of good faith may be pointless because good faith is an abstract concept that depends on the facts of each case.\(^3\)\(^4\)

### 3.3 GOOD FAITH IN THE UNITED KINGDOM

There is no general principle of good faith in the English law of contract. Powell upheld that “there is in English law today ‘no overriding general positive duty of good faith imposed on the parties to a contract’”.\(^3\)\(^5\) In saying that there is no duty of good faith in this context, means there is no general duty to negotiate a contract

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\(^3\)\(^1\) Whittaker and Zimmermann, above n 14, 38-39.
\(^3\)\(^2\) Ibid, cites Rene David, *French Law, Its Structure, Sources and Methodology* (Trans. Michael Kindred), Louisiana State University Press (1972), 76 in support of this proposition.
\(^3\)\(^3\) Powers, above n 11, 338.
in good faith; nor any general duty to perform the contract in good faith, nor to renegotiate in good faith in the event of a significant change of circumstances affecting the balance of the contract; nor any general duty on contract parties to exercise good faith in their rights arising under the contract. For example, the position of the duty of good faith in negotiation is discussed in *Walford v Miles*, where Lord Ackner held that:

> The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interests, so long as he avoids making misrepresentations. A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of the negotiating parties.\(^{36}\)

The position of English law with relation to the principle of good faith can be found in the landmark case of *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*,\(^{37}\) where Lord Bingham held that:

> In many civil law systems and perhaps most legal systems in the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts, parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as ‘playing fair’, ‘coming clean’, or ‘putting one’s card face upwards on the table’… English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the

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\(^{37}\) [1989] QB 433. In this case, the issue started when the plaintiff had omitted to draw intention to the defendants about Condition 2 of the delivery note that states that the consequences in the event of the defendant’s failure to return the photographs. Dillon L J held that Condition 2 is an onerous clause and therefore the defendants should be alerted by the plaintiff as the defendant had to pay an extortionate holding fee for photographs returned after the due date. Since the plaintiff had done nothing to draw the attention of the defendant, Condition 2 was not a part of the contract.
form of certain hire-purchase agreements. The common law also has made its contribution, by holding that certain classes of contract require the utmost good faith by treating as irrecoverable what purport to be agreed estimates of damage but are in truth as disguised penalty for breach, and in many other ways.38

Despite good faith being a well-recognised principle in civil law legal systems and also in many common law legal systems, English law takes a different position. This means English law’s preference for pragmatic solutions means that no such overriding principle of good faith has been adopted. The fact that English law does not recognise a duty of good faith does not mean that the rule of contract law does not generally conform to the requirements of good faith. Instead, English law responds to perceived cases of unfairness by developing piecemeal solutions in which good faith is implied.

Firstly, apart from the philosophy of caveat emptor, 39 English courts prefer to apply a specific legal concept rather than a general principle, as the application of specific legal concepts generates the same results.40 For example, misrepresentation, duress, undue influence, or mistake are specific legal concepts available to police specific issues of fairness rather than fairness generally in contracts and their performance. In New Zealand Shipping Co. Ltd v A.M Satherwaite & Co Ltd, Lord Wilberforce characterised English law as follows:

> English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts uneasily into the marked slots of offer, acceptance and consideration.41

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Secondly, the common law of contract has been transformed over the last half of the twentieth century or so by statutory intervention, sometimes at a general level but more often at the particular level. Although the concept of good faith has no general foundation in English law, in specific instances, good faith is recognised in specific settings in legislation.

In legislation, there is an increasing recognition of good faith in specific instances for example in the UK consumer contract, the *Unfair Terms in Consumer Contracts Regulations 1999*. The primary aim of the regulation is to protect the presumed weaker party. This is by virtue of clause 5(1) of the *Unfair Terms in Consumer Contracts Regulations 1999* which provides that:

> A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ right and obligations arising under the contract, to the detriment of the consumer.

Schedule 2 of the *Unfair Terms in Consumer Contracts Regulations 1999* contains an indicative and non-exhaustive list of terms that may be regarded as unfair.\(^{42}\) The requirement of good faith was clearly mentioned in the *Unfair Terms in Consumer Contracts Regulations 1999*, with the definition of an unfair term in Regulation 5(1). There are two conditions that must be satisfied; the term must be ‘contrary to the requirement of good faith’ and the term must ‘cause a significant imbalance in the parties’ rights and obligations arising under the contract’ to the detriment of the consumer. The difficulty lies in distinguishing between good faith and ‘significant imbalance’. This is not a simple issue in English law because there is no general principle on which to rely in English courts. Therefore, the court must draw upon the European origin of good faith.

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\(^{42}\) Schedule 2 states that particular regard shall be had to (a) the strength of the bargaining positions of the parties; (b) whether the consumer had an inducement to agree to the term; (c) whether the goods or services were sold or supplied to the special order of the consumer, and (d) the extent to which the seller or supplier has dealt fairly and equitably with the consumer. The list is significant to establish the criteria of good faith.
The issues are explored in more detail by the House of Lords in *Director General of Fair Trading v First National Bank*. The decision represents an important step toward further integrating the concept of good faith into English law. In this case, the bank included a term in its common form loan agreement that upon default of the borrowers’ repayment, the bank is entitled to recover from the borrower the whole balance of the customer’s loan together with outstanding interest and the costs of seeking judgement. The trial judge held that the term was fair. On appeal, the Court of Appeal concluded that the term was unfair and believed that:

The bank, with its strong bargaining position as against the relatively weak position of the customer has not adequately considered the consumer’s interest in this respect. In our view, the relevant term in that respect does create unfair surprises and so does not satisfy the test of good faith; it does cause a significant imbalance in the rights and obligations of the parties by allowing the bank to obtain interest after judgement…

The Court of Appeal relied on the requirement of fairness elaborated by Lord Bingham in *Interfoto Picture Libraries Ltd v Stilleto Visual Programmes Ltd.* His Honour further elaborated that:

The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageous to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconscionably, take advantage of the consumer’s necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or

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43 [2000] 1 All ER 97. This case is actually concerned with the interpretation of the 1994 rather than 1999 Regulations but the differences between the two sets of Regulations are immaterial for the purpose of the case. Therefore this decision is relevant to the interpretation of the 1999 Regulations.

44 *Director General of Fair Trading v First National Bank* [2000] QB 672, 688 [16].

any other factor listed in or analogous to those listed in Schedule 2 to the Regulations.\textsuperscript{46}

Lord Steyn agreed with Lord Bingham that the term of the agreement was unfair. Lord Bingham also commented that good faith looks to good standards or commercial morality.\textsuperscript{47} Lord Steyn observed in his opinion that in this context the notion referred to is good faith and fair dealing. Lord Bingham also briefly described a significant imbalance where:

\begin{quote}
The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to title the parties; rights and obligations under the contract significantly in his favour. This may be by granting to the supplier of a beneficial option or discretion or power, or by imposing on the consumer of a disadvantageous burden or risk or duty…This involves looking at the contract as a whole.\textsuperscript{48}
\end{quote}

From the \textit{Interfoto} case, it is clear that good faith is now firmly embedded in consumer law in the UK.\textsuperscript{49} Despite the fear of a foreign concept, Goode claimed that once the courts have become familiarised with the application of this wider concept of good faith, as well seen in the \textit{Unfair Terms in Consumer Contracts Regulations 1999}, they may well find that to use it on a broader basis is simple and satisfactory.\textsuperscript{50}

Thirdly, the law of special contracts is far less hostile to the idea of good faith than is its general counterpart. The common law has developed the law of special contract in which good faith is a recognised principle in contract law. There is a ‘special kind of relationship’ established by the contract which carries an implied

\begin{footnotes}
\item[46] Director General Of Fair Trading v First National Bank [2000] QB 672, 688 [17].
\item[47] Director General Of Fair Trading v First National Bank [2000] QB 672, 688 [17].
\item[48] Director General Of Fair Trading v First National Bank [2000] QB 672, 688 [17].
\end{footnotes}
obligation of good faith via mutual trust and confidence. Various popular contracts involved duties expressly put in terms of good faith, whether this results directly from a rule of law applicable to the contract such as insurance, fiduciary or employment by way of the implication of a term.

In the insurance context, good faith is a well-known concept. The duty of good faith in insurance law was introduced almost 250 years ago in *Carter v Boehm*, in which Lord Mansfield commented that:

Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstances do not exist. The keeping back of such circumstances is fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement...The policy would be equally void against the underwriter if he concealed...Good faith forbids either party, by concealing what he privately knows to draw the other into a bargain from his ignorance of the fact, and his believing the contrary.

Later, the concept was codified in the *Insurance Act 2015* by virtue of s 14 of the *Insurance Contracts Act 2015* (Part 5) which provides that:

Any rule of law permitting a party to a contract of insurance to avoid the contract on the ground that the utmost good faith has not been observed by the other party is abolished.

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51 (1766) 3 Burr 1905.
52 (1766) 3 Burr 1905, 1910.
A fiduciary relationship is a relationship in which one party undertakes or agrees to act for or on behalf of, or in the interests of, another person in the exercise of a power or discretion that will affect the interests of that other person in a legal or practical sense. It is a kind of relationship of trust and confidence or confidential relationship, viz trustee and beneficiary, agent and principal, solicitor and agent, employee and employer, director and company and partners. It is a requirement to act in the interests of another as a consequence of a ‘special kind of relationship’. The employment of such a relationship was recognised as one of the categories of relationship in which fiduciary duties were implied by implication of terms without the need for the fiduciary epithet. Employees may owe fiduciary duties to their employers, this is similar to the duty of good faith and fidelity. Hence, in *Pearce v Foster*, the English Court of Appeal held that an employee had breached an implied contractual duty because he ‘had deliberately placed himself in that position which rendered his interest conflicting with his duty’. The duty was implied because ‘the relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully’.

In this context, the special relationship requires trust and confidence that carries with it an expectation of utmost loyalty and good faith. In the partnership agreement, there is a relationship of trust and mutual confidence that gives rise to a fiduciary duty of full disclosure on the part of both parties. The partners are bound to exercise the utmost good faith in their dealings with one another. The requirement of trust and mutual confidence was observed in *Helmore v Smith*, where Bacon VC observed that ‘their mutual confidence is the life-blood of the concern. It is because they trust one another that they are partners in the first

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53 (1886) 17 QBD 536, 541-542 (Lindley L.J).
54 (1886) 17 QBD 536, 539 (Lord Esher MR).
56 (1886) 35 ChD 436.
instance; it is because they continue to trust one another that the business goes on.’ 57

In employment, the duty of good faith is implied from the relationship between the employer and employee. It was clearly stated in Wessex Dairies Limited v Smith that ‘it is a necessary implication which must be engrafted on such a contract (employment) that the servant undertakes to serve his master with good faith and fidelity’. 58 Riley argues that the duty of good faith in the employment context is consistently implied as a duty of ‘mutual trust and confidence’ where both parties are expected to act in the best interests of maintaining trust in the relationship. 59 This statement is elaborated further in Eastwood v Magnox Electric Plc, where Lord Nicholls held that ‘the trust and confidence in an implied term means, in short, that an employer must treat his employers fairly. In his conduct of his business, and his treatment of his employees, an employer must act responsibly and in good faith’. 60

Good faith appears to be implied in many of the context of English law. However it is evident that good faith is not defined. This is most probably because good faith is an abstract concept. English courts have expressed concern about the lack of certainty in defining the content of a duty of good faith in the context of the relationship between contracting parties. Many legal experts have also expressed concern over the ambiguity of the meaning of good faith. Steyn J has argued that ‘[a] definition of good faith and fair dealing is impossible’ 61, Goode laments that, ‘[w]e do not know quite what it means’ , 62 while White and Summers have warned that, ‘[w]e caution anyone who is confident about the meaning of good faith to

57 (1886) 35 Ch D 436, 44.
58 [1935] 2 KB 80.
reconsider’. There is a reluctance to imply a condition of good faith on the ground that it will introduce uncertainty into contract law. In *Union Eagle Ltd v Golden Achievement Ltd*, Lord Hoffman held that:

The principle that equity will restrain the enforcement of legal rights when it would be unconscionable to insist upon them has an attractive breadth. But the reasons why the courts have rejected such generalisations are founded not merely upon authority…but also upon consideration of business. These are, in summary, that in many forms of transaction it is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be ‘unconscionable’ is sufficient to create uncertainty.

Thus, introducing the concept of good faith would cause much dissatisfaction among legal jurists due to its vagueness. A contract requires clear definitions of legal concepts in order to avoid uncertainty and confusion among parties. Without a comprehensive and concise definition, the contract becomes meaningless.

### 3.4 GOOD FAITH IN THE US

In US, good faith is well recognised as a fundamental concept in modern contract jurisprudence. At an earlier stage, US courts were slow to recognise the duty of good faith in common law contracts cases only. Later, the concept of good faith was acknowledged in the *Uniform Commercial Code* and later adopted by the American Law Institute as part of the *Restatement (Second) of Contracts*. Since the middle of the Twentieth Century it has attracted the attention of American legal scholars to employ the good faith concept particularly in commercial cases.

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64 [1997] AC 514 [218-219].
66 Ibid 561.
The case of *Wood v Lucy, Lady Duff- Gordon*, is a significant illustration of the good faith principle in American contract law. This case is important because it illustrates that there is an implied promise within a contract in which a party will use their best effort to fulfil the term of the contract. In this case, Cardoza J held that:

The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking and yet the whole writing may be ‘instinct with an obligation’, imperfectly expressed. 67

Later in 1933, in *Kirke La Shelle Co v Paul Armstrong Co*, the New York Court of Appeals recognised that:

In every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing. 68

Although its existence is no longer questioned as an important principle in US, there is still an issue pertaining to its definition and American scholars still cannot agree on a precise definition. Several scholars have attempted to define good faith by the function it serves. Summers argues that good faith cannot be defined. 69 He proposed the theory of ‘excluder’ where it excludes any form of bad faith and claimed that ‘[i]t is a phrase which has no general meaning or meanings of its own, but which serves to exclude many heterogeneous forms of bad faith’. 70

67 222 NY 88,118 NE 214, 214(1917).
68 188 NE 163, 167 per Hubbs J (NY, 1933).
70 Ibid.
Burton introduced a ‘foregone opportunity analysis’ where good faith is a standard based on the expectation of the parties,\(^71\) and argued that good faith:

limits the exercise of discretion in performance conferred on one party by the contract, so it is bad faith to use discretion to recapture opportunities forgone upon contracting as determined by the other party’s expectations—in other words, to refuse to pay the expected cost of performance.\(^72\)

Despite the fact that there is still no unanimous definition to good faith, the concept of good faith gained increased acceptance when it was incorporated into the *Uniform Commercial Code* and *Restatement (Second) of Contracts*. The following sections further illustrate the increased recognition of good faith in US.

### 3.4.1 *Uniform Commercial Code*

The *Uniform Commercial Code* was the product of a collaborative effort by the National Conference of Commissioners of Uniform State Laws and the American Law Institute in the 1960s. The *Uniform Commercial Code* is a set of laws that provide legal rules and regulations governing commercial or business dealings and transactions. The *Uniform Commercial Code* regulates the transfer or sale of personal property such as cars, rice and alcohol but does not address dealings in real property such as the sale of land, services and stocks. The underlying purpose and policy of the *Uniform Commercial Code* is to create uniform laws amongst the various state jurisdictions in the US.\(^73\) The concept of good faith plays a significant role in the *Uniform Commercial Code*. Indeed, good faith is referenced in at least 50 different *Uniform Commercial Code* provisions.\(^74\)

\(^72\) Ibid 372-373.
\(^73\) *Uniform Commercial Code*, s 1 102.
\(^74\) Powers, above n 11, 339.
The concept of good faith is the requirement for all Code transactions as set in the General Provisions Chapter in s 1-203 of Uniform Commercial Code which provides that ‘Every contract or duty within the Act imposes an obligation of good faith in its performance or enforcement’. Good faith is defined in s 1-203 of Uniform Commercial Code to mean ‘honesty in fact in the conduct or transaction concerned’. An exclusive definition of good faith concerning merchants is provided in Article 2 (Sales), s 2-103 (1) (b) of the Uniform Commercial Code, which provides that:

   In this article, unless the context otherwise requires ... good faith in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

It is evident that good faith is mentioned in those sections but the definition is nebulous. It is important to highlight that ‘there is an express mention of good faith in some fifty out of the four hundred sections of the code’. For example, s 2-311(1) which expressly mentioned good faith in a specific fact situation such as in the sale contract whereby;

   An agreement for sale which is otherwise sufficiently definite (s 2-204(3)) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

Despite express provision of good faith, there is also an implied term requiring parties to behave in good faith. For example in s 2-601, buyers’ rights on improper delivery where the buyer may reject the whole; or accept the whole; or accept any commercial unit or units and reject the rest.

75 It should be noted that this provision does not apply to negotiation or formation stage.
As a result, the *Uniform Commercial Code* has two varying definitions of good faith. In this context, Farnsworth classified good faith into two senses: (i) good faith purchase and (ii) good faith performance or enforcement.\(^\text{77}\) In the first sense and in a larger group of provisions, good faith is described as a ‘state of mind’ whereby:

A party is advantaged only if he acted with innocent ignorance or lack of suspicion. This meaning of good faith is very close to that of lack of notice.\(^\text{77}\)

…In addition, the Code also uses good faith as did prior law-in substantially the same sense in protecting others, the purchasers, and these situations will be included in this discussion under the generic term ‘good faith purchase’.\(^\text{78}\)

This approach looks only to the actual belief of the party. In the second sense and in a smaller group of the Code, in which good faith is used to describe performance or enforcement it is stated that:

In this sense good faith has nothing to do with a state of mind…Here the inquiry goes to decency, fairness or reasonableness, or notice. This sense of the term may be characterized as ‘good faith performance’ to distinguish it from ‘good faith purchase’ and is the sense in which ‘good faith’ is used in the general obligation of good faith. It is also the sense in which that term is used in a number of more specific sections. …resulting in an implied term of contract requiring cooperation on the part of one party to the contract so that another party will not be deprived of his reasonable expectations.\(^\text{79}\)

The former approach focused only to the actual belief of the party. The later approach includes not only the actual belief of the party but also the reasonableness of the belief and conduct. These divergent views have created an unclear definition of good faith in the *Uniform Commercial Code*. Dobbins cautioned the fear it would cause when ‘the inability to define good faith leaves

\(^{77}\) Ibid 668.
\(^{78}\) Ibid.
\(^{79}\) Ibid 669.
contracting parties with no clear understanding of their obligation’, which resulted in uncertainties to the contract.\textsuperscript{80}

Although the *Uniform Commercial Code* requirements of good faith are stated in the vaguest of terms, in practice, most courts find their way to a reasonable construction of the obligation following litigation.\textsuperscript{81} A few courts have used the doctrinal vagueness as a pretext to impose unprecedented liabilities on commercial parties. This is because the abstractness of good faith allows advocates of the term to suggest many different meanings which create obligation.

In certain situations, good faith might require a contract party to act as a good and upright person under the same set of circumstances while to others, it might require a party of the contract to work in the best interests of both parties. In other circumstances, good faith imposes a moral obligation on the contracting parties in order to effectuate a contract which did not arise from the parties’ agreement.

### 3.4.2 Restatement (Second) of Contracts

The *Restatement (Second) of Contracts* is a legal treatise from the second series of the *Restatements of the Law*,\textsuperscript{82} which intends to inform judges and lawyers about general principles of contract common law. It covers particularly the areas of contracts and commercial transaction but is non-binding. The American Law Institute began work on the second edition in 1962 and completed it in 1979. The *Restatement (Second) of Contracts* first emerged in 1980 and like the *Uniform Commercial Code*, constitutes another fundamental and important source of the duty of good faith in contractual relations. The *Restatement (Second) of Contracts*


\textsuperscript{82} *Restatements of the Law* are essentially model laws, designed to explain the common law in a particular field of law. *Restatements* are published by the American Law Institute.
imposes a duty of good faith in performance and enforcement upon each contracting party.\textsuperscript{83} which is acknowledged in s 205, which provides that:

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.\textsuperscript{84}

Unlike the \textit{Uniform Commercial Code}, the \textit{Restatement (Second) of Contracts} mentions the terms ‘good faith and fair dealing’. Robert Braucher, chief drafter of the \textit{Restatement}, commented that the section is very general, very abstract and needs more explanation of the concept of good faith. Summers’ formulation of good faith, the ‘excluder’ approach which suggests good faith is anything that excludes bad faith, was then incorporated.\textsuperscript{85} Using the ‘excluder’ approach, the comments to s 205 of the \textit{Restatement}, proceed to define good faith by what constitutes ‘bad faith’.\textsuperscript{86} It states that:

A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognised in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate in the other party’s performance.\textsuperscript{87}

As a consequence, good faith has no definition but relies on any type of bad faith to constitute a good faith definition. Indeed, the scope of the duty of good faith depends on the ‘nature of the agreement’, along the line with the notion of


\textsuperscript{84} It should be noted that this provision, like those in the \textit{Uniform Commercial Code}, only applies to contractual performance and not to contract negotiation.


\textsuperscript{87} \textit{Restatement (Second) Contracts} s 205, Comment (d).
fairness results to uncertainty. Farnsworth also commented on the duty of good faith in *Restatement (Second) of Contracts* and stated that:

\[\text{…the duty [good faith] may not only proscribe undesirable conduct, but may require affirmative action as well. A party may thus be under a duty[good faith] not only to refrain from hindering or preventing the occurrence of conditions of the party’s own duty or performance of the other party’s duty, but also to take some affirmative steps to co-operate in achieving these goals…}^\text{88}\]

Although the *Restatement (Second) of Contracts* does not have the force of legislation which is distinct from the *Uniform Commercial Code*, it had a substantial influence on the courts in the US and by the 1980s, the state court systems of many US states had explicitly adopted a general obligation of good faith in a contractual relationship.\textsuperscript{89}

It is evident that both the *Uniform Commercial Code* and *Restatement (Second) of Contracts* are compelling authoritative sources of the duty of good faith in commercial contracts. Despite the pervasiveness of the concept of good faith throughout the statutory provision and the attempt by some of the American scholars to define good faith, there is still no firm definition and guidelines for the concept of good faith.

### 3.5 GOOD FAITH IN CANADA

In Canada, there is no acceptance of a duty of good faith applying to all contracts as of yet.\textsuperscript{90} The courts are generally reluctant to apply the principle of good faith in contract when asked to override express contractual provisions and the reasonable expectations of the parties. Consequently, the acceptance of good faith

\[\text{\underline{\text{References:}}} \]
\[\text{88 Summers, above n 83, 134.} \]
is identified in specific categories of contract, for instance, in franchise, employment, tendering, joint ventures, enterprise and other relational contracts. In the context of employment, the case of Wallace v United Grain Growers held that employers owe a duty of good faith and fair dealing in the dismissal of the employees.\footnote{[1997] 3 SCR 701.} In the context of tenders, the case of Tarmac Canada Inc. v Hamilton Wentworth (Regional Municipality) held that there was a long line of authority for the proposition that not only was the Municipality obligated to treat all tenders fairly, but it must also act in good faith.\footnote{O.J. 3273 (1999).}

However, there also appears to be a degree of extra-judicial support for good faith in Canadian contract law. In 1979, the Ontario Law Reform Commission’s Report on Sale of Goods recommended the adoption of a good faith standard of fair dealing.\footnote{Ontario Law Reform Commission, \textit{Report on Sale of Goods} (1979), Vol 1,163-71.} Later, in the \textit{Report on Amendment of the Law of Contract} (1987), the Ontario Law Reform Commission stated:

> While good faith is not yet an openly recognized contract law doctrine, it is very much a factor in everyday contractual transactions. To the extent that the common law of contracts, as interpreted and developed by our Courts, reflects this reality, it is accurate to state that good faith is part of our law of contracts. In this vein, a great many well-established concepts in contract law reflect a concern for good faith, fair dealing and the protection of reasonable expectations, creating a legal behaviour baseline.

In this report, the Commission recommended that the legislation recognise the doctrine of good faith in the performance of contracts generally. Reitier commented that good faith is an important norm in contract law.\footnote{B. J. Reitier, ‘Good Faith in Contracts’ (1983) 17 \textit{Valparaiso University Law Review} 705, 707.} He further argued that ‘the pervasiveness of good faith in contracts has important implications for theories of contract law, for the relationship between law and
society, and for the law in its practical, day to day operation’.\textsuperscript{95} In *Gateway Realty v Arton Holdings (No.3)* Kelly J opined that ‘...the insistence of a good faith requirement in discretionary conduct in contractual formation, performance and enforcement is only the fulfilment of the obligation of the courts to do justice in the resolution of disputes between the contracting parties.’ It is evident that there has been interest to recognise a general obligation of good faith in Canadian law of contract.

However, there is statutory recognition to the concept of good faith in Quebec, where the influence of civil law stems from its distinct French inheritance. The acceptance of the concept of good faith is clearly stated in the *Quebec Civil Code*. Article 6 states that ‘Every person is bound to exercise his civil rights in good faith’; Article 7 states that ‘[n]o right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith’ and Article 1375 states that ‘[t]he parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished’. Even though good faith seems to play a central role in the *Quebec Civil Code* as mentioned by the three general provisions above, a clear definition of good faith is still not given.

The issue of the meaning of good faith is controversial. O’Bryne argues that attempts to define continually prove to be futile because ‘...good faith can have no absolute meaning: it simply assumes its contents from the facts of each particular case’.\textsuperscript{96} It is self evident that defining good faith is a frustrating task as ‘it is impossible to take into account all the situations, type of behaviour, tactics or conduct that may in a given situation constitute a departure from ‘good faith’.\textsuperscript{97}

\textsuperscript{95} Ibid 706.
\textsuperscript{96} Shannon Kathleen O’Byrne, ‘Good Faith in Contractual Performance: Recent Developments’ (1995) 74 *Canadian Bar Review* 70, 73.
Although good faith is not defined, it has been expressly incorporated into the franchising legislation in Canada. In franchise, breach of terms of good faith is an increasing common feature of modern pleadings. In Canada, franchising is purely a province matter and currently, only five provinces have franchise legislation in place which are namely; Alberta, Ontario, Prince Edward Island, New Brunswick and Manitoba. Manitoba is the newest province to enact franchise specific legislation with a passage in its Franchise Act. The franchise legislation of each province include a covenant of fair dealing which also carries an obligation to act in good faith between the franchisor and franchisee.

In Canada, under the common law, good faith is regarded as a general principle and recognised in a specific category of contract. While under the civil law, specifically in Quebec, good faith is given a statutory recognition. Despite being acknowledged under both common law and civil law, there is still no definition to the concept. As a consequence, the concept of good faith does not appear to be uniformly applied and remains subject to the vagaries of judicial interpretation.

3.6 GOOD FAITH IN NEW ZEALAND

The position of good faith in New Zealand is similar to that of the UK and Canada, where there is no general obligation of good faith in all types of contract. The status of good faith in New Zealand is discussed in the landmark case of Livingstone v Roskilly. In this case, Thomas J agreed with the decision made by Lord Bingham in Interfoto Picture Library Ltd v Stiletto Visual Programme in which his Honour commented that:

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99 Franchises Act, RSA 2000, c F-23, s 7 (Alberta); Franchises Act, SNB 2007, c F-23.5, ss 3(1), (3) (New Brunswick); Arthur Wishart Act (Franchise Disclosure), SO 2000, c 3, ss 3(1), (3) (Ontario); Franchises Act, RSPEI 1988, c F-14.1, ss 3(1), (3) (Prince Edward Island) and Franchises Act, CCSMc F156 s 3 (Manitoba).
101 [1989] QB 433, 439. In this case, Lord Bingham had acknowledged a general recognition of good faith in English law whereby his Lordship held that ‘…English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable
I would not exclude from our [New Zealand] common law the concept that, in general, the parties to a contract must act in good faith in making and carrying out the contract … [Lord Mansfield’s] tradition was never swamped in the United States as it was in England by the formalism of the 19th and 20th centuries. But the principle has survived, I suggest, as the latent promise of much of our law relating to formation and performance of contracts.\(^\text{102}\)

Despite it being a civil law concept, Thomas J has advocated a general doctrine of good faith to be implied into contract in which ‘parties to a contract must act in good faith in making and carrying out the contract’. The duty of good faith is recognised in the obvious areas such as in the insurance context whereby good faith is the underlying duty.\(^\text{103}\) This position is stated in *Archibald Barr Motor Company Ltd & Anor v ATECO Automotive New Zealand*, Allen J suggested that:

New Zealand courts are unlikely to incorporate an obligation of good faith into all contracts generally, particularly those commercial contract where the parties have spelt out their obligations in details, and where a good faith requirement would not fit comfortably with those detailed express term.\(^\text{104}\)

Nonetheless, cases where a duty of good faith has been applied are largely confined to relational contracts, such as, franchise, partnership, joint ventures and employment. In *Bobux Marketing Ltd v Raynor Marketing Ltd*,\(^\text{105}\) Thomas J, in the course of dissenting judgement, discussed comprehensively on the academic and judicial comment that relates to good faith in contract law. In this case, his Honour continued to display vigilance to recognise a duty to exercise good faith bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire-purchase agreements. The common law also has made its contribution, by holding that certain classes of contract require the utmost good faith by treating as irrecoverable what purport to be agreed estimates of damage but are in truth as disguised penalty for breach, and in many other ways.’

\(^{103}\) Rick Bigwood, ‘Symposium Introduction: Confessions of a Good Faith Agnostic’ (2005) 11 New Zealand Business Law Quarterly 371. In the insurance context, the good faith characteristic to insurance contracts has been recognised for more than 250 years. The application of good faith within insurance law is predominantly focused on the disclosure of information applicable to both insurer and insured.

\(^{104}\) (High Court, Auckland, CIV 2007–404–5797, 26 October 2007) [79].
\(^{105}\) [2002] 1 NZLR 506.
in the performance of a contractual obligation particularly in the case of relational contracts. His Honour commented that:

There can be little doubt that the contract between Bobux and Raynor is predicated upon mutual trust and confidence and gave rise to a reasonable expectation of communication, cooperation and predictable performance. These features become all the more important when the contract is for an indefinite period ... It therefore seems to me that it would be open to Bobux to assert that the parties’ obligations under the contract are subject to an obligation to act in good faith.\(^{106}\)

His Honour explained that a relational contract is a type of contract which is often a long-term contract. Therefore, there is a need to maintain the relationship because these types of contracts are often exposed to uncertainty and unforeseen factors that cannot readily be provided for in advance due to the long engagement. It was further explained by Thomas J that:

…The norms of the ongoing relationship, of necessity, tend to supplement the express contractual obligations. Good faith is required to ensure that the requisite communication, cooperation and predictable performance occur for the advantage of both parties.\(^{107}\)

In the joint venture, the duty of good faith requires the parties to act at most only with due care and/or in good faith towards each other. Joint ventures are business arrangements whereby parties collaborate by contributing money, property, or skill in a particular trading, commercial, or other financial undertaking to achieve certain outcomes in the business agreement. The parties are bound by the express and implied terms of the agreement between them. If one of the parties breaches the agreement, the remaining parties are left to their traditional and well-established remedies for breach of contract. The leading case in respect of

\(^{106}\) Ibid 508.

\(^{107}\) [2002] 1 NZLR 506, 518.
obligation owed by joint venture parties is the decision of the Supreme Court in *Chirnside v Fay*. In this case, the court held that ‘the relationship between partners is one which has traditionally been regarded as a classic example of a fiduciary relationship in that the parties owe to each other duties of loyalty and good faith’.  

In the employment context, there is a statutory requirement of good faith in the employment relationship with the aim to promote a productive employment relationship. The *Employment Relations Act 2000* (ERA) expressly recognises a duty of good faith in s 3 of *Employment Relations Act 2000* (ERA). It is states that the object of this Act is:

(a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship-

(i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence but also a legislative requirement for good faith behaviour.

S 4 of *Employment Relations Act 2000* (ERA) mentioned good faith as the expected behaviour of the parties in the employment relationship. It is stated that

The parties to an employment relationship must deal with each other in good faith.

Although good faith was recognised in the relational contract and in the statutory provisions, nonetheless the courts have not yet incorporated the concept of good faith into the law in New Zealand. In *Gibbons Holdings Ltd v Wholesale Distributors Ltd*, Thomas J agreed that good faith is a prevalent concept in most...
common law and civil law countries, but the courts are careful in accommodating the concept of good faith into the law in New Zealand. His Honour stated that:

There is a widespread belief that existing concepts of judicial services already encompass a requirement of good faith. It would, it is said, add nothing to the existing tools and principles of the common law, such as estoppels and implied terms. This case serves to demonstrate that this belief is misplaced.\textsuperscript{110}

One of the problems is with regards to the definition of good faith. Good faith has many meanings therefore it is difficult to attach a precise definition to it. The fear is that defining it could result to an insufficient meaning of good faith which may cause vagueness to the concept itself.\textsuperscript{111} In \textit{Vero Insurance New Zealand Ltd v Fleet Insurance & Risk Management Ltd}, Asher J stated:

Although a number of New Zealand cases have considered the circumstances in which a term of good faith will be implied, the application and meaning of good faith in contracts has not as yet been thoroughly considered in New Zealand.\textsuperscript{112}

Despite the fact that good faith is mentioned in New Zealand contract law, particularly in relational contracts, the issue of its meaning evidently remains unsettled.

3.7 GOOD FAITH IN THE PEOPLE’S REPUBLIC OF CHINA

The People’s Republic of China is influenced by both the civil law and socialist law. Chinese scholars generally consider good faith as the fundamental principle in the contract law and also a fundamental principle of civil law. Recently, China legislated a new \textit{Contract Law of the People’s Republic of China} which covers a wider scope compared to the previous contract law. One of the major fundamental

\textsuperscript{110} [2008] 1 NZLR 277, 316-317.
\textsuperscript{111} Bigwood, above n 103, 372.
\textsuperscript{112} (High Court, Auckland, CIV 2007-404-1438, 21 May 2007), [44].
guiding principles of the new contract law is the concept of good faith. The concept of good faith is considered as a general principle in contract law and is given statutory recognition.\textsuperscript{113} The new contract law comprises three types of contract; Economic Contract Law,\textsuperscript{114} Foreign Economic Contract Law,\textsuperscript{115} and Technology Contract Law.\textsuperscript{116} This new \textit{Contract Law of the People’s Republic of China} came into effect on 1 October 1999 and seeks to establish a more advanced, systematic, and comprehensive contract law which is better suited to the particular needs of China’s transitional economy.

Good faith was given statutory recognition under the new contract law as a general principle, which is illustrated in Article 6 which begins with;

\begin{quote}
The parties should abide by the doctrine of good faith when exercising their rights of fulfilling their obligation.
\end{quote}

The recognition given to the principle of good faith has brought the law in China in line with international business practice. It is argued that Article 1.7 of the International Institute for the Unification of Private Law (UNIDROIT) principles\textsuperscript{117} is similar to Article 6 of \textit{Contract Law of the People’s Republic of China},\textsuperscript{118} which emphasised the obligation of good faith to encourage more business opportunities at the international level.\textsuperscript{119}

\begin{enumerate}
\item The Economic Contract Law was adopted on the 5\textsuperscript{th} National People’s Congress on 13\textsuperscript{th} December 1981. The Economic Contract Law applied to any domestic economic contracts.
\item The Foreign Economic Contract Law was adopted by the National People’s Congress on the 21\textsuperscript{st} March 1985. The Foreign Economic Contract Law addressed the issues of foreign interest such as the application of the law when settling disputes involving foreign economic contracts; confirmation of the invalidation and revocation of foreign economic contracts; dealing with foreign economic contracts after confirmation of invalidation or revocation; and liability for breach of foreign economic contracts.
\item The Technology Contract Law was adopted by the National People’s Congress on 23\textsuperscript{th} June 1987. The Technology Contract Law was implemented to encourage foreign investment projects that involve the importing of high technology into China and also to guide technology transfer associated with economic development.
\item Article 1.7 of the International Institute for the Unification of Private Law (UNIDROIT) principles stated that: Each party must act in accordance with good faith and fair dealing in international trade.
\item Article 6 of \textit{Contract Law of the People’s Republic of China} stated that;
\end{enumerate}
Apart from Article 6, Articles 42, 60, 92 and 125 explicitly require parties to adhere to the concept of good faith in all stages of the contract. Article 42 deals with the issue of negotiations in bad faith and the duty of confidentiality, where it stipulates:

A party shall be liable for damages if, in concluding the contract, it acted under one of the following circumstances, thereby causing a loss to the other party: (1) pretending to conclude a contract, and negotiating in bad faith; (2) intentionally concealing a fact relevant to the contract or providing wrong information; (3) any other circumstance which runs counter to the principle of good faith.

Article 60 states that there is a duty to perform a contract in good faith:

Parties are expected, in addition to performing their obligations according to the terms of the contract, to abide by the principle of good faith and to perform implied obligations such as notice, assistance, confidentiality etc. based on the nature and purpose of the contract or on usages.

In Article 90, there is also a duty of good faith when the contract is terminated:

Upon the termination of contractual rights and duties, the parties shall follow the principle of good faith and fulfil duties such as notification, assistance, confidentiality, etc. in accordance with business customs.

Article 125 deals with an interpretation of a contract clause which is based on its true meaning:

Shall be determined according to the terms and expressions used in the contract, the contents of the relevant clauses, the purposes of the contract, usages and the principle of good faith.

The parties should abide by the doctrine of good faith when exercising their rights of fulfilling their obligation.

In interpreting an ambiguous contract, the court should uphold the principle of good faith by taking into account relevant factors such as the nature and purpose of the contract as well as the business customs of where the contract’s formation takes place. This is to derive the parties’ true intentions and meaning of the contract.

The enforcement of the concept of good faith is parallel with The People’s Republic of China’s traditional moral and commercial ethic.\textsuperscript{120} Traditional moral values in China are influenced by Confucianism, which advocates the concept of good faith as a part of everyday life. Many bad commercial ethics are condemned such as unethical business activities like false advertising, forgery and corruption.\textsuperscript{121} The Chinese court recognises good faith as the ‘highest guiding principle’ or the ‘royal principle’ for legal obligations, where it requires parties to act honourably and responsibly in performing duties, to avoid abusing the rights of other parties and to adhere to business law practices.\textsuperscript{122} According to this principle, the parties shall not try ‘to evade law or contracts but to perform duties under the contract voluntarily’.\textsuperscript{123} Parties are also required to exercise their rights and fulfil their duties in strict accordance with the principle of good faith in every stage of their transactions, which include negotiations, formation and performance. There is an expectation that in each of the transactions, the parties are expected to act in good faith, which includes keeping promises, loyalty, honesty and non-deception as well as respecting confidentiality.

In sum, good faith is regarded not only as a traditional moral value but is also taken seriously in commercial ethics. One of the major impacts of the concept of good faith in China is on business activities. Business activities are highly dependent on contract law to govern contractual activities between parties. The

\textsuperscript{121} Ibid 22.
\textsuperscript{122} Wang Liming and Xu Chaunxsi, above n 120, 16.
\textsuperscript{123} Wang Chenguang and Zhang Xianchu (eds), Introduction to Chinese Law (Sweet & Maxwell Asia, 1997) 239.
new contract law represents the achievement of a uniform law for contract where good faith, as one of the fundamental principle is given a clear statutory recognition in the new contract law. Even though good faith is mentioned at every stage of the contract, a definition of the meaning of good faith is still lacking.

3.8 GOOD FAITH IN INTERNATIONAL LAW

Apart from the recognition of good faith at the national level, good faith is recognised internationally with many international trade instruments imposing an obligation of good faith as discussed below.


The United Nations Convention on Contracts for International Sale of Goods, known as the Vienna Sales Convention (hereinafter CISG), is a tool to harmonise international sales law. It was drafted to govern international sales between contracting parties. The CISG was developed by United Nations Commission on International Trade Law (UNCITRAL) and was signed in Vienna in 1980. After the debates and conferences in resolving the parameters of good faith in CISG, the concept of good faith was finally mentioned by Article 7(1) which states that:

In the interpretation of the Convention, regard is to be had to its international character and the need to promote uniformity in its application and the observation of good faith in international trade.

Despite its inclusion in Article 7(1), there is an argument whether good faith is relevant only as an interpretative tool or as a standard of behaviour for the contracting parties.124 A plain reading of the provision embodied in Article 7(1)

provides that good faith is to be used as a principle for interpreting provisions of CISG. Farnsworth commented that ‘this provision does no more than instruct a court interpreting the Convention’s provision to consider the importance of the listed factors.\textsuperscript{125} The list of factors includes (i) regard to the international character of the convention, (ii) need to promote uniformity in its application and (iii) observance of good faith. This also means that Article 7(1) does not impose on the parties an obligation to act in good faith. This situation is also confirmed in the ICC Award No 8611 of 1997 where the court stated that:

Observance of good faith (observation by arbitrator that the principle of good faith mentioned in Article 7(1) is applicable to the interpretation of the CISG only, and is not to be referred to as a source of the parties’ rights and duties with respect to performance of the contract.\textsuperscript{126}

Despite good faith being regarded as an interpretative tool, the principle of good faith also gives an impact to the parties’ behaviour. This means that promoting the observance of good faith in international trade can only be achieved by requiring the parties to act in good faith. If the parties did not act in good faith, the principle of good faith in Article 7(1) would be meaningless. Korenu strongly supports that good faith is the standard of behaviour of contracting parties whereby ‘good faith cannot exist in a vacuum and does not remain in practice as a rule unless the actors are required to participate’.\textsuperscript{127} Bonell similarly believes that good faith is a standard of behaviour for the contracting parties. He pointed out that ‘the need to promote…the observance of good faith in international trade is also necessarily

\textsuperscript{126} ICC Arbitral Award No 8611 of 1997, URL:http://cisgw3.law.pace.edu/cases/978611i1.htm
directed to the parties as a standard of behaviour to be maintained throughout the life of the contract.\textsuperscript{128}

The main reason for the argument of whether good faith is relevant only as an interpretative tool or as a standard of behaviour for the contracting parties is the lack of definition of good faith. The lack of a definition will lead to ambiguity. The CISG fails to define it, thus, it causes uncertainty to the international contract. Good faith is an elusive term which results in no uniform interpretation. Thus, when good faith cannot expressly define the intention of the provisions, it becomes meaningless.

\subsection*{3.8.2 The Principles of International Commercial Contracts}

Despite the vagueness of the concept of good faith in CISG, good faith is also mentioned in the \textit{Principles of International Commercial Contracts} (hereinafter UNIDROIT Principles 2004). In 1994, the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT) gave its imprimatur to the publication of the \textit{Principles of International Commercial Contracts} (hereinafter UNIDROIT Principles 2004). UNIDROIT is an independent intergovernmental organisation that aims specifically to harmonise international commercial contracts between merchants and other professionals with a territorial scope.

The general duty to act in good faith is expressly stated in the UNIDROIT Principles 2004. This means that good faith is the expected behaviour of the parties in the international commercial contracts. The UNIDROIT Principles 2004 Article 1.7, clearly supports the duty of good faith:

\begin{flushright}
\end{flushright}
(1) Each party must act in accordance with good faith and fair dealing international trade.

The reference to ‘good faith and fair dealing in international trade’ means that the standard which has ordinarily been adopted within the different national legal systems should not be applied unless commonly accepted by all legal systems. Indeed, the duty of good faith is also found in a number of articles of the UNIDROIT Principles 2004 which constitute a direct or indirect application of the principle of good faith and fair dealing in all phases of the contract. These articles make it clear that good faith and fair dealing are considered as fundamental principles underlying the UNIDROIT Principles 2004. For these reasons, there is still no meaning to the principle of good faith, as the meaning of good faith will be constructed in the light of the special conditions of international commercial contract. However, the general duty to act in good faith is not binding unless chosen by the parties to be the governing rules in the international commercial contract relationship.

3.8.3 The Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties (hereinafter VCLT) was opened for signature on 23 May 1969. VCLT is the law that guides interpretation of international treaties that include its formation and operation of treaties. One of the principles in the VCLT observed that the principles of good faith and the *pacta sunt servanda* rule are universally recognised. The *Nuclear Tests case* (*Australia v France*), illustrates that good faith is the integral part of the rule of *pacta sunt servanda* whereby the International Court of Justice held that:

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130 See for instance arts 2, arts 2.4(2)(b), arts 2.15, arts 2.16, arts 2.18, arts 2.20, arts 3.5, arts 3.8, arts 3.10, arts 4.1 (2), arts 4.2(2), arts 4.6, arts 4.8, arts 5.2, arts 5.3, arts 6.1.3, arts 6.1.5, arts 6.1.16(2), arts 6.1.17(1), arts 6.2.3(3)(4), arts 7.1.2, arts 7.1.6, arts 7.1.7, arts 7.2.2.(b)(c), arts 7.4.8 and arts 7.4.13.
131 *pacta sunt servanda* means agreements are to be kept; treaties should be observed. According to customary international law of treaties, *pacta sunt servanda* is the foundation of international law. Without such an acceptance, treaties would become worthless.
One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.\(^{132}\)

The concept of good faith is particularly relevant in the performance of treaties. It is illustrated in Article 26 of VCLT which states that ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith’. This means good faith is the foundation to the rules of *pacta sunt servanda*. It is always an implicit expectation that whenever states enter into a contract, they have willingly committed themselves to its terms to ensure the successfulness of a contract. In drafting the VCLT, the Special Rapporteur referred to this provision by commenting that:

> the intended meaning was that a treaty must be applied and observed not merely according to its letter, but in good faith. It was the duty of the parties to the treaty not only to observe the letter of the law, but also to abstain from acts which would inevitably affect their ability to perform the treaty.\(^{133}\)

Article 31(1) mentioned that ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. This means that all obligations deriving from treaties are to be interpreted in good faith. According to O’Connor, the provision above means that the requirement of good faith shall be interpreted by considering the literal meaning of the treaty to reflect the principle


of *pacta sunt servanda*. In this context, good faith focused on what the parties actually agreed on. However the literal meaning approach fails to interpret the meaning of good faith and caused an unclear meaning. Therefore, in interpreting good faith, the requirement of honesty, fairness and reasonableness was used to prevent unintentional literal interpretation that can cause an unfair or unjust advantage over another party. In VCLT, good faith is considered as the foundation to the rules of *pacta sunt servanda*. This suggests that good faith is an important concept in the VCLT but unfortunately there is still no definition of good faith.

### 3.8.4 The Principle of European Contract Law

The Commission on European Contract Law produced the *Principles of European Contract Law* (hereinafter Principles) with an aim to harmonise the law of contract in the international business community by taking into account the requirements of the European domestic trade. The Principles is based on the concept of a uniform European contract law system. Their scope of application is only limited to the member States of the European Union.

The Principles also mentions the concept of good faith. The general obligation of good faith was clearly mentioned in Article 1.201(General Obligations) whereby ‘Each party must act in accordance with good faith and fair dealing and the parties may not exclude or limit this duty’. This is a clear indication that good faith is the basic principle which is required in the performance and enforcement of the contractual duties in the contract. The formula of ‘good faith and fair dealing’ is used in the Principles in which this proposition is made plain by the commentary in the Principles relating to Comment E in Article 1.201 that distinguishes the two concepts in the following manner:

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134 O’Connor, above n 10Error! Bookmark not defined., 109.
136 Ibid 110.
‘Good faith’ means honesty and fairness in mind, which are subjective concepts. A person should, for instance, not be entitled to exercise a remedy if doing so is of no benefit to him and his only purpose is to harm the other party. ‘Fair dealing’ means observance of fairness in fact which is an objective test.\textsuperscript{137}

Although good faith is mentioned in the Principles, it still has not been defined thus is open for further debate in terms of its definition.

By virtue of Article 1.102 (Freedom of Contract) which states that ‘Parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles’. Furthermore, Article 1.106 laid down guidelines for the interpretation and supplementation in the Principles which includes the promotion of good faith. It is clearly illustrated in Article 1.106 that ‘These Principles should be interpreted and developed in accordance with their purposes. In particular, regard should be had to the need to promote good faith and fair dealing, certainty in contractual relationships and uniformity of application’.

The Principles is a non-binding application as it only offers protection to those parties who choose for such protection in their contract. Unfortunately, there is still an issue of a lack of definition of good faith which causes uncertainty to the contracting parties who opt for the protection under the Principles.

Despite the differences in its purpose, these international trade instruments show that good faith plays an important role for international contracts. However, there is a major problem to its application because there is still a lack of a clear definition of good faith which causes reservations to the international parties.

3.9 CONCLUSION

It is interesting to note that although good faith has its roots in civil law countries, it has now extended beyond its geographical borders to common law countries. The brief review of good faith in various jurisdictions confirms that good faith is a highly versatile concept due to its adaptability in both civil law and common law countries. However, the concept of good faith differs in its scope and application depending on which legal tradition governs the particular commercial transaction.

In civil law countries, good faith is regarded as a general and pervasive principle in contract law. As a general and pervasive principle, it has found its expression in the civil law codes and is recognised in all phases of the contract: negotiation, performance and enforcement. This means good faith is served as a standard of behaviour which is expected from the parties in a contract. In common law, there is no overarching duty of good faith but good faith is recognised in certain specific contexts, for example, insurance. In the insurance context, the duty of utmost good faith was recognised for a long time in which there is an expectation of behaviour to effectuate the insurance contract. Unlike other common law countries, good faith has a different status in the US legal system as illustrated by the recognition of good faith in the Uniform Commercial Code and Restatement (Second) of Contracts. It is observed that the perception of good faith as an important principle in civil law appears to be much clearer compared to common law countries.

At the international level, good faith is an important concept as illustrated in many international trade instruments to regulate the behaviour of the international contracting parties. Despite its recognition at both the national and international levels, they all have one common problem with regards to its definition. It is evident that there is a lack of a definition despite it being a well-known concept.
4 THE DEVELOPMENT OF GOOD FAITH IN AUSTRALIA

This chapter provides a context for understanding the concept of good faith in Australia. Although the concept of good faith is widely discussed, it is without a definitive guide in Australian contract law. Nevertheless, despite the absence of an underlying obligation of good faith in Australian law, the concept of good faith is relevant to Australian contract law. In fact, there is an increasing body of literature on good faith in Australia, which suggests that good faith has a role in Australian contract law.¹

4.1 INTRODUCTION

One of the earliest discussions of good faith in Australia was in the opening speech at the Second Annual Journal of Contract Law conference in 1991. Lord Goff of Chieveley commented that English and Australian lawyers have a lot in common and that the principle of good faith is an issue for both jurisdictions.\(^2\) His Lordship commented that:

> We know that there is such a principle [good faith] in one of the most famous provisions of the German BGB. I think that I am right saying that there is also such a principle [good faith] in the United States *Uniform Commercial Code*. Do we need such a principle [good faith] as this in our commercial law?\(^3\)

His Lordship further commented that he was unsure of the position taken by Australian judges and practitioners but believed that there were some academic lawyers who were sympathetically inclined towards the idea of good faith.\(^4\) Lord Goff was of the opinion that because of the conservative attitude of English judges, good faith could only exist if introduced by a commercial code akin to which is introduced by the US. His Lordship further commented on the position of good faith in Australia saying:

> In this country [Australia], we are more likely to see a gradual refinement and development of a recognised concept such as estoppel, which perhaps has yet to achieve its full potential.\(^5\)

In his opening address at the Fourth Journal of Contract Law conference two years later, Lord Staughton noted the uncertain position of good faith in

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\(^3\) Ibid.

\(^4\) Ibid.

\(^5\) Ibid.
Australia. His Lordship affirmed that good faith is of importance in some commercial contexts, such as insurance contracts, but noted that the common law does not proceed too readily from a series of examples to the adoption of a general principle of good faith.

The concept of good faith was first judicially considered in 1992 by Priestley J in NSW Court of Appeal in *Renard Constructions (ME) Pty Ltd v Minister for Public Works (Renard)*. Priestley J was clearly of the opinion that the appropriate course was towards the development of a general principle of good faith and fairness. His Honour stated that:

> …people generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view, this is in these days the expected standard, and anything less is contrary to prevailing community expectations.

His Honour reviewed the influence of the *Uniform Commercial Code* and *Restatement (Second) of Contracts* of US case law, and considered that there were strong arguments ‘for recognition in Australia of [such] a duty’. Despite Priestley J’s strong belief on the position of good faith in Australia, its application remains uncertain. There remains no High Court decision regarding the position of good faith in Australia.

This chapter proceeds as follows. In Australia, the concept of good faith was first introduced in the case of *Renard*, which will be discussed in Chapter 4.2.

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7 Ibid.
9 Despite Priestley J’s strong support for good faith, it should be noted that his comments were obiter.
Although there is no overarching duty of good faith in Australian law, good faith is recognised in both common law and legislation as discussed in Chapter 4.3. Chapter 4.4 elucidates the two important sources of good faith: ‘Implication’ and ‘Construction’. Chapter 4.5 elaborates the implication in fact, which is concerned with business efficacy and Chapter 4.6 examines implication in law, based on the test of necessity as a legal incident of a particular class of contract. Chapter 4.7 discusses the developing concept of good faith in Australia subsequent to the watershed case of Renard.

4.2 THE WATERSHED DECISION: RENARD CONSTRUCTIONS (ME) PTY LTD V MINISTER FOR PUBLIC WORKS

The judgment of Priestley J in Renard has paved the way for the emergence of the concept of good faith in Australian contract law. The Renard case did not establish the doctrine of good faith because Priestley J’s comments were obiter, but it has no doubt influenced many cases.12 Renard has been a catalyst for debate about the doctrine of good faith.

Renard concerned a dispute that arose between Renard Constructions (the contractor) and Minister for Public Works (the principal) over the construction of sewerage works. Clause 44.1 of NPWC3-1981 General Conditions of Contract stated that:

If the contractor defaults in the performance or observance of any covenant, condition or stipulation in the Contract or refuses or neglects to comply with any direction as defined in clause 23 but being one which either the principal or the Superintendent is empowered to give, make, issue or serve

under the Contract and which is issued or given to or served or made upon
the contractor by the principal in writing or by the Superintendent in
accordance with clause 23, the principal may suspend payment under the
Contract and may call upon the contractor, by notice in writing, to show cause
within a period specified in the notice as to why the powers hereinafter contained
in this clause should not be exercised.

The clause provided that if the contractor defaulted, the principal was entitled to
call upon the contractor by notice in writing to ‘show cause within a period
specified in the notice’ as to why the powers set out in the clause ‘should not be
exercised’. The clause also conferred on principal the power to take over the
whole, or any part, of the work and to exclude the contractor from the site.

When the contractor did not complete the work on time, the principal served a
notice under clause 44.1. One of the reasons for the contractor not completing the
work on time was due to the failure of the principal to supply the required
material at the agreed time of the contract. The information about the failure of the
principal to supply the required material at the agreed time of the contract was
unknown to the officer, who had the power to make final decisions to terminate
the contracts and sign the appropriate notices. At the same time, the contractor had
also enlarged its work force, worked longer hours, and engaged an experienced
foreman in response to the show cause notice. For these reasons, the contractor
regarded the Principal’s conduct as repudiatory. The arbitrator found that the
principal was unreasonable in exercising the power under clause 44.1. By virtue
of s 38 of the Commercial Arbitration Act 1984 (NSW), the principal appealed the
award of the arbitrator.

Cole J held that the decision of the arbitrator should be reversed on the basis that
clause 44.1 did not carry an implied obligation upon the principal to the effect that
the power to take over the work and exclude the contractor from the site must be
exercised reasonably. The contractor then appealed against Cole J’s order. In the
Court of Appeal, the issue that needed to be considered was whether the principal was under a duty to act reasonably, which permitted the principal to take over the builder’s work. The three judges who heard the appeal; Priestley J, Handley JA and Meagher JA, delivered separate judgments.

**Priestley J**

In Priestley J’s view, a requirement of reasonableness is implied in clause 44.1. His Honour suggested the requirement could either be implied in fact or implied in law. His Honour further held that:

For myself, I cannot see why a term should not be implied at both stages; that is, it seems to me relatively obvious that an objective and reasonable outsider to this contract upon reading clause 44.1 would assume without serious question that the principal would have to give reasonable consideration to the question whether the contractor had failed to show cause and then, if the principal had reasonably concluded that the contractor had failed, that reason consideration must be given to whether any power and if any which power should be exercised.

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13 Implication by fact, known as implication ad hoc, is an implication by a judge based on the judge’s view of the actual intention of the parties drawn from the surrounding circumstances of the particular contract, its language and its purpose as that emerges from the language and in the circumstances. See *BP Refinery (Westernport)* Pty Ltd v Hastings Shire Council (1977) 180 CLR 266, which discusses the rules governing implication in fact. A number of Australian cases treating a duty of good faith as a term ‘implied by fact’, See for example; *GSA Group Pty Ltd v Siebe Plc* (1993) 30 NSWLR 573; *News Ltd v Australian Rugby Football League Ltd* (1996) 58 FCR 447, 541; *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151; *Advance Fitness Corp Pty Ltd v Bondi Diggers Memorial & Sporting Club Ltd* (1999) NSWSC 264; *Saxby Bridge Mortgages Pty Ltd v Saxby Bridge Pty Ltd* [2000] NSWSC 433, [61]-[62]


His Honour held that all the accepted criteria for term ‘implied in fact’ were clearly satisfied. Priestley J agreed with the findings by the arbitrator that the principal was not entitled to exercise any power under clause 44.1 when the contractor had served the notice to show cause. Therefore, the principal’s announcement to the contractor that the contractor was to be excluded from the site, and that the remaining work was to be taken over by the principal was undoubtedly repudiatory. In this event, the contractor could bring the contract to an end.

In reaching this conclusion, an analogy was drawn between the incidents judicially attached to various classes of contract and those attached by statute. There are many instances in which Acts of Parliament impose a similar effect in the form of attaching implied conditions to contracts as an incident of law. In both instances, it arrived at the same outcome with an aim of making the contract fairer between the parties. In addition to statutory analogy, His Honour drew support from good faith:

Good Faith. The kind of reasonableness I have been discussing seems to me to have much in common with the notions of good faith which are regarded in many civil law systems of Europe and in all States in the United States as necessarily implied in many kinds of contract. Although this implication is not yet been accepted to the same extent in Australia as part of judge-make Australian contract law, there are many indications that the time may be fast approaching when the idea, long recognised as implicit in many of the orthodox techniques of solving contractual disputes, will gain explicit recognition in the same way as it has in Europe and in the United States.16

Priestley J further commented that ‘in ordinary English usage there has been constant association between the word fair and reasonable. Similarly, there is a close association of ideas between the terms unreasonableness and lack of good

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faith. Although they may not be always co-extensive in their connotations, partly as a result of the varying senses in which each expression is used in different contexts, there can be no doubt that in many of their uses there is a great deal of overlap in their content."^{17}

His Honour also considered that the increased legislative interference with freedom of contract resulted in that people generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contracts which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations."^{18}

Despite Priestley J’s comments concerning the obligation of good faith being regarded as fundamental in the development of the obligation in Australia, it is clear that these comments did not form part of the reasoning upon which his Honour’s conclusion was reached. It is interesting to contrast the approaches of Handley JA and Meagher JA with regards to this issue.

*Handley JA*

His Honour agreed with Priestley J and found that the contractual power must be exercised reasonably but employed different reasoning from Priestley J’s decision."^{19} As a matter of construction, the contract required the principal to act both honestly and reasonably in forming the opinion that the contractor had failed to show cause and, thereafter in deciding whether to take over the work or to cancel the contracts. His Honour concluded that:

\[17\] (1992) 26 NSWLR 234, 265.
It seems to me that cl 44.1 should be construed as requiring the principal to act reasonably as well as honestly in forming the opinion that the contractor had failed to show cause to his satisfaction.\textsuperscript{20}

Handley JA held that the principal’s decision, although honest, was ‘objectively unreasonable and therefore, an invalid exercise of power.\textsuperscript{21}

\textit{Meagher JA}

Meagher JA disagreed with Priestley J and Handley JA with regards to the requirement of reasonableness implied in clause 44.1. His Honour considered that there was no reason ‘why the principal should have regard to any interests except his own’.\textsuperscript{22} His Honour agreed that the principal acted ‘honestly’ where the principal was not corrupted by any pecuniary consideration and the principal believed that he was entitled to act as he did. Meagher JA agreed with Coles J when his Honour rejected the requirement of reasonableness to be implied in clause 44.1 of the contract. His Honour held that:

\begin{quote}
Obviously enough it does not arise as a matter of construction of cl.44. It is not referred to expressly in that clause, nor is it to be discerned as a matter arising by necessary implication from the words used. Nor, in my view, is there any room to imply a term … There is no reason why the principal should have regard to any interests except his own.\textsuperscript{23}
\end{quote}

Meagher JA commented that unless that clause was expressly stated or as a matter arising by necessary implication from the words used,\textsuperscript{24} his Honour preferred to decide the case on the simple basis that clause 44.1 required the principal to act on accurate information when forming a view on whether the contractor had shown cause.

\textsuperscript{20} (1992) 26 NSWLR 234, 280.
\textsuperscript{21} (1992) 26 NSWLR 234, 279.
\textsuperscript{22} (1992) 26 NSWLR 234, 275.
\textsuperscript{23} (1992) 26 NSWLR 234, 275.
\textsuperscript{24} (1992) 26 NSWLR 234, 275.
The *Renard* case is significant in Australia because this case recognised that a duty of good faith could, in some circumstances, be implied into contracts. Although consideration was given to good faith by only one of three members of the NSW Court of Appeal, and only as obiter comments, nevertheless the case has been significant in subsequent cases, which have traced their authority back to *Renard*, including cases in jurisdictions other than NSW.²⁵

In 2002, the High Court had the opportunity to discuss the issue of good faith in *Royal Botanic Gardens and Domain Trust v South Sydney CC*,²⁶ but did not discuss the status or definition of the concept. Kirby J stated that:

…the debate in various Australian authorities concerns the existence and content of an implied obligation or duty of good faith and fair dealing in contractual performance and the exercise of contractual rights and power … The result is that, whilst the issues respecting the existence and scope of a ‘good faith’ doctrine are important, this is an inappropriate occasion to consider them.²⁷

Although the development of good faith in Australia can be traced to this case, Priestley J must nevertheless be disappointed since the *Renard* case was discussed almost 20 years ago and yet both the status and meaning of good faith are still unsettled.

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4.3 GOOD FAITH IN SPECIFIC INSTANCES

References to good faith are increasingly found in both common law and legislation. The pervasiveness of the concept of good faith in common law and legislation indicates that good faith behaviour is the commonly expected norm.

4.3.1 Common Law

The common law has developed limited categories in which good faith is a recognised principle in contract law. In the insurance context, good faith is a well-known concept. Apart from insurance, good faith is also recognised in fiduciary and employment relationships where there is a ‘special kind of relationship’ established by the contract which carries an implied obligation of good faith via mutual trust and confidence. The duty of good faith in insurance law was introduced almost 250 years ago in *Carter v Boehm*,28 in which Lord Mansfield commented that:

Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstances do not exist. The keeping back of such circumstances is fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement...The policy would be equally void against the underwriter if he concealed...Good faith forbids either party, by concealing what he privately knows to draw the other into a bargain from his ignorance of the fact, and his believing the contrary.29

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28 (1766) 3 Burr 1905.
29 (1766) 3 Burr 1905, 1910.
In a similar case occurring in the US, Stephen J, in *Comunale v Traders & General Insurance Co.*, further commented that good faith is an important principle in the insurance contract to ensure the benefits of the agreement is achievable by the insurer and the insured. His Honour stated that:

There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. This principle is applicable to policies of insurance. The rights of the insured ‘go deeper’ and that implied obligations are imposed ‘based upon those principles of fair dealing which enter into every contract’.  

Later, the concept was codified in the *Insurance Contracts Act 1984* (Cth) by requiring the insurer and the insured to exercise utmost good faith before entering into an insurance contract. S 13 of the *Insurance Contracts Act 1984* (Cth) provide that:

A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.

A fiduciary relationship is a relationship in which one party undertakes or agrees to act for or on behalf of, or in the interests of, another person in the exercise of a power or discretion that will affect the interests of that other person in a legal or practical sense. It is a requirement to act in the interests of another as a consequence of a ‘special kind of relationship’. In *Hospital Products Limited v United States Surgical Corporation*, Mason J noted:

The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that

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30 50 Cal.2d 653, 328 P.2d (1958).
31 It is a kind of relationship of trust and confidence or confidential relationship, viz trustee and beneficiary, agent and principal, solicitor and agent, employee and employer, director and company and partners.
other person who is accordingly vulnerable to abuse by the fiduciary of his position … It is partly because the fiduciary’s exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed.33

In this context, the special relationship requires trust and confidence that carries with it an expectation of utmost loyalty and good faith.34 In the partnership agreement, there is a relationship of trust and mutual confidence which gives rise to a fiduciary duty of full disclosure on the part of both parties. The partners are bound to exercise the utmost good faith in their dealings with one another. The requirement of trust and mutual confidence was observed in Helmore v Smith,35 where Bacon VC observed ‘their mutual confidence is the life-blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on’.36

In employment, the duty of good faith is implied from the relationship between the employer and employee. It was clearly stated in Wessex Dairies Limited v Smith that ‘it is a necessary implication which must be engrafted on such a contract (employment) that the servant undertakes to serve his master with good faith and fidelity’.37 Riley argues that the duty of good faith in the employment context is consistently implied as a duty of ‘mutual trust and confidence’ where both parties are expected to act in the best interests of maintaining trust in the relationship.38 This statement is elaborated further in Eastwood v Magnox Electric

35 (1886) 35 ChD 436.
36 (1886) 35 Ch D 436, 44.
37 [1935] 2 KB 80.
Plc, where Lord Nicholls held that ‘the trust and confidence in an implied term means, in short, that an employer must treat his employers fairly. In his conduct of his business, and his treatment of his employees, an employer must act responsibly and in good faith’.39

4.3.2 Legislation

The legislature increasingly relies on good faith as a mechanism to achieve justice. There are more than 154 federal Acts that mention the term good faith.40 In legislation, there are two types of expressions to the concept of good faith, which are a) express and b) oblique. Express means a statutory obligation to act in good faith and oblique means good faith is a factor that has to be taken into account. An example of express good faith is the Insurance Contracts Act 1984 (Cth), s 13, in which it is stated that:

A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.

By virtue of the above, the requirement of good faith has been interpreted to mean that both parties, namely the insurer and the insured must act with fairness and honesty particularly when disclosing information to each other.41 Due to its long engagement, the good faith requirement is considered as an important element in the insurance contract to ensure a successful contract.

Another example of good faith in legislation can be found in the Corporations Act 2001 (Cth), s 181(1), where the requirement of good faith is implied based on the

41 See Kelly v New Zealand Insurance Co Ltd (1993) 7 ANZ Insurance Case 61-197 [78, 258].
best interests of the corporation as opposed to the mandatory requirement in the insurance contract. That section provides that:

A director or other officer or a corporation must exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose.

An example of oblique good faith is found in s 22(1) of the Australian Consumer Law as prescribed in schedule 2 of Competition and Consumer Act 2010 (Cth). This section provides a list of factors, which the court may have to consider for the purpose of determining unconscionable conduct. One factor that needs to be taken into account is the good faith factor as illustrated below:

‘To the extent to which the supplier and the customer acted in good faith’.

### 4.4 IMPLICATION OR CONSTRUCTION

The issue of implying a general term of good faith into contracts has been described as the most important unresolved issue in Australian contract law. As noted earlier, the issue of good faith was raised in the High Court of Australia in Royal Botanic Gardens and Domain Trust v South Sydney Council. The Court did not decide whether good faith should be implied but nevertheless acknowledged the importance of the issues in respect of the existence and scope of a good faith doctrine. Kirby J commented that an implied term of good faith would appear to conflict with fundamental notions of caveat emptor that are inherent (statute and equitable intervention apart) in common law conceptions of economic freedom.

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43 (2002) 186 ALR 301 [40].
44 In English law, there is a well-recognised maxim of ‘caveat emptor’. Literally ‘caveat emptor’ means ‘let the buyer beware’. In this context, it means there is no duty on the seller of the goods to point out their defects.
45 (2002) 196 ALR 312 [88].
On the other hand, Callinan J noted that a duty of good faith might deny a party an opportunistic or commercial exercise of an otherwise lawful commercial right.46

At this stage, the High Court has not decided the method of incorporating good faith either as an ‘implication of a term’ or based on the ‘principle of construction’. Both methods are dissimilar in terms of incorporating good faith. In the context of implication of a term, the judge may imply a term into the contract to overcome an oversight on the parties either through inadvertence or poor drafting or may have failed to incorporate terms to cover a particular situation which had they thought about it, they would certainly have made provision for. In such a case, the judge may imply appropriate terms as to give ‘business efficacy’ to the contract in accordance with the presumed intention of the parties. In the context of ‘principle of the construction’, the judge interprets the meaning of a term in a contract by giving the term a legal effect to give effect to the parties’ intention.

In many instances, the duty of good faith is conceived as an implied term.47 There are two types of implication; term ‘implied in law’ or term ‘implied in fact’. Term ‘Implied in law’ is based on the legal incident of a particular type of contract. Term ‘Implied in fact’ is based on the test of necessity. There has been some debate and some confusion as to whether the implied duty of good faith, if it exists, is an ‘implied term in law’ or an ‘implied term in fact’.

In Renard, there is an argument that good faith can be implied in both terms; term ‘Implied by fact’ and term ‘Implied by law’. However, in practice, there may be some overlap. In Renard, Priestley J said:

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46 (2002) 196 ALR 317 [156].
Although the authorities discussed by Hope JA in *Castlemaine Tooheys* seem to require a sharp distinction to be drawn between implication ad hoc and by law, assigning the former to the fact of particular contract, and the latter to the legal incidents of contracts of different classes, consideration of the contract in the present case shows there may be a good deal of overlap between the two categories.48

On the contrary, Peden argues that the method of incorporating good faith that is usually relied upon, namely the implication of a term, could in fact prove a ‘hindrance rather than a positive force in the introduction of an obligation of good faith’.49 Peden argues that construction is the best approach for incorporating good faith in a contract. The rule of construction consists of an interpretation and construction process.50 Interpretation describes the process whereby courts determine the meaning of words. Construction describes the process of determining their legal effect. The main requirement is to give effect to the parties’ intention to construe the contract as a whole and to avoid an unreasonable construction where possible.

The rule of construction was adopted in *Auag Resources Ltd v Waihi Mines Ltd*,51 where the High Court was asked to determine whether there was a joint venture between the parties. In this case, parties had signed the joint venture agreement. The issue arose when the defendant sold its interest in the joint venture to another person. The plaintiff as one of the parties in the joint venture alleged that there is a breach of the joint venture agreement. The plaintiff claimed *inter alia*, a breach of fiduciary obligation. The joint venture agreement provided that the parties should be just and faithful in joint venture dealings but were otherwise free to pursue their interests. The joint venture was not a partnership; therefore, there was no

51 [1994] 3 NZLR 571.
fiduciary duty. The defendant claimed that the joint venture agreement covered the parties' legal relationship and applied to strike out the fiduciary course of action. Barker J referring to the judgment of Mason J in Hospital Products Ltd v United States Surgical Corporation,\textsuperscript{52} construed the joint venture agreement based on its true construction where the fiduciary relationship cannot be superimposed upon the contract in such a way that it alters the intention of the contract. Therefore, a carefully-drawn mining joint venture agreement, such as the one under consideration, is not to be viewed as a partnership.

Peden also emphasised that the principle of construction is based on the theory of cooperation\textsuperscript{53} and ‘that any other approach can lead to illogical or inappropriate reasoning’.\textsuperscript{54} The duty of cooperation has long been part of the law of contract where there is a necessary standard of fairness and cooperation in the performance of contractual obligations.\textsuperscript{55} This duty to cooperate is usually traced back to Lord Blackburn’s statement in Mackay v Dick where it was held that:

As a general rule … where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agree to do all that is necessary to be done on his part of the carrying out of that thing, though there may be in express words to that effect.\textsuperscript{56}

It is clear that cooperation is imposed to the extent that it is necessary to make the contract workable and the contract would come to a complete halt if the act in question was not performed.\textsuperscript{57} In Mona Oil Equipment Co v Rhodesia Railways,\textsuperscript{58} Devlin J held that:

\begin{itemize}
  \item \textsuperscript{52} (1984) 156 ALR 417.
  \item \textsuperscript{53} Elisabeth Peden, \textit{Good Faith in the Performance of Contract} (LexisNexis Butterworths, 2003), ch.6.
  \item \textsuperscript{54} Elisabeth Peden, ‘Co-operation in English Contract Law-To Construe or Imply’ (2000) 16 \textit{Journal of Contract Law} 56, 67.
  \item \textsuperscript{55} See also Charles E .F. Rickett, ‘Some Reflections on Open-Textured Commercial Contracting’ (2001) \textit{AMPLAYearbook} 374, 383. Rickett also favoured the duty of cooperation as a principle of construction.
  \item \textsuperscript{56} (1881) 6 App Cas 251, 262.
  \item \textsuperscript{57} See J.F.Burrows, ‘Contractual Co-operation and Implied Terms’ (1968) 31 \textit{Modern Law Review} 390, 403.
\end{itemize}
It is, no doubt, true that every business contract depends for its smooth working on co-operation, but in the ordinary business contract, and apart, of course, from the express term, the law can enforce co-operation in a limited degree to the extent that is necessary to make the contract workable. For any higher degree of co-operation the parties must rely on the desire that both of them usually have that the business should be done.\textsuperscript{59}

The courts assume that parties intend their bargain to have legal effect and they would therefore intend to cooperate to ensure that this happens, unless they express a contrary intention in their contract.\textsuperscript{60} Therefore, to imply an obligation of good faith is an unnecessary step where the same result is achieved by considering the parties’ intentions in construction of the contract to ensure cooperation.\textsuperscript{61} It is also evident that the duty of cooperation has been established in contract law for over a century as Griffith CJ said in \textit{Butt v McDonald}:\textsuperscript{62}

\begin{quote}
It is a general rule applicable to every contract that each party agrees, by implication, to all such things as are necessary on his part to enable the other party to have the benefit of the contract.
\end{quote}

There is an expectation that one party should cooperate in doing all that is necessary to be done for the performance by the other party of his obligations under the contract. This statement was reaffirmed in the High Court decision in \textit{Secured Income Real Estate (Australia) Ltd v St Martin’s Investments Pty Ltd}:

\begin{quote}
But it is common ground that the contract imposed an implied obligation on each party to do all that was reasonably necessary to secure the performance of the contract.\textsuperscript{63}
\end{quote}

\textsuperscript{58} [1949] 2 All E.R 1014.
\textsuperscript{59} [1949] 2 All E.R 1014, 1018.
\textsuperscript{61} Ibid.
\textsuperscript{62} (1896) 7 QLJ 68, 70-71.
As mentioned earlier, cooperation is the expected obligation of the parties to ensure the success of the contract. Therefore, cooperation is a term that is not implied from the contracts but is a term that arises out of construction. Peden commented that cooperation is the basic rule of construction where she further elaborated by giving an example;

… it was once thought that contracts contained an implied term about frustrating events. However, today it is accepted as a principle of construction. We do not say it is an implied term in law that frustration will discharge a contract because the doctrine generally applies to all contracts. Once it applies to all contracts the ‘term’ is a rule of construction, applicable to all contracts. Another example is the ‘implication’ of a reasonable time for performance. Repudiation could also join the list, since the implied term rationale there has also been rejected, and cooperation could be seen as the basis of the rule of construction that determines whether there is a lack of readiness, willingness and ability to perform.⁶⁴

It is also argued that as good faith is already inherent in all contracts, when a court implies a term of good faith, it is ‘implying a redundant term’.⁶⁵ Furthermore, good faith is a universal term and the status of the implied duty of good faith is clearly that of a universal term, in which, ‘an obligation implied in all contracts, of whatever kind, along with the duty of cooperation’ as described above.⁶⁶

### 4.5 IMPLICATION IN FACT

Implication in fact is based on the judge’s view of the actual intention of the parties drawn from the surrounding circumstances of the particular contract, its

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⁶³ (1979) 144 CLR 596,607-608 per Mason J.
language and its purpose. When a judge is asked to imply a term in a contract, the parties’ presumed intention must be determined. The earliest test used to determine this was what came to be called the ‘officious bystander’ test. The ‘officious bystander’ test was developed by Mackinnon LJ in Shirlaw v Southern Foundries, where Mackinnon LJ said that:

For my part, I think that there is a test that may be at least as useful as such generalities. If I may quote from an essay which I wrote some years ago, I then said: “Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common ‘Oh, of course!’” 67

The need for terms implied in fact arises out of circumstances not contemplated in the written terms. 68 When the contract has not been reduced to any complete written form, McHugh and Gummow J held in Byrne v Australian Airlines that:

If the contract has not been reduced to complete written form, the question is whether the implication of the particular term is necessary for the reasonable or effective operation of the contract in the circumstances of the case; only where this can be seen to be true will the term be implied. 69

In ascertaining the parties’ presumed intentions and identifying an appropriate term to be implied in a contract, the Privy Council held in BP Refinery (Westernport) Pty Ltd v Shire of Hastings that for a term to be implied, the following conditions must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious as to go

67 [1939] 2 KB 206, 227.
69 (1995) 185 CLR 410, 422.
without saying; (4) it must be capable of clear expression; and (5) it must not contradict any express term.\(^{70}\)

The leading authority for condition (3) is *The Moorock case*\(^{71}\), in which the defendant had agreed to allow the plaintiff to load his vessel at the defendant’s wharf on the River Thames. However, the plaintiff’s vessel suffered damage when resting at the defendant’s jetty during low tide. The damage to the vessel had been due to a ridge of hard ground beneath the mud and the plaintiff claimed compensation. The English Court of Appeal said that a term had to be implied into the contract imposing an obligation of the defendant to see that the bottom of the river was reasonably fit, or to exercise reasonable care in finding out its condition and to advise the plaintiff of its condition. Bowen LJ held that:

In business transaction such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in contemplation of both parties that he should be responsible for in respect of those perils or chances.\(^{72}\)

It is clear that the parties are expected to know that the vessel will rest on the bottom at low tide, and therefore the contract cannot be performed unless the ground is safe for the vessel. In this case, the plaintiff was able to recover damages for breach of contract. In *Narni Pty Ltd v National Australia Bank*, Tadgell JA commented that:

[T]he remark of the ‘officious bystander’ postulated by Mackinnon LJ, from which the condition number (3) evidently draws inspiration, is not always

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\(^{70}\) (1977) 180 CLR 266, 282-283.

\(^{71}\) (1889) 14 PD 64.

\(^{72}\) (1889) 14 PD 64, 68.
helpful or useful; and that ‘it seems no longer the exclusive means of approaching the question’. The five conditions, although evidently expressed to operate cumulatively, may nevertheless overlap; and in some cases, I think this is one of them; a more simplified approach may be appropriate and permissible.  

In *Shipping (London) Ltd v Polish Steamship Co (The Manifest Lipkowy)* May LJ remarked that:

> For my part, I think that reference to the officious bystander frequently does not assist in deciding whether or not a term is to be implied. Officious bystanders may well take different views depending on which side they happen to be standing. In my opinion, it is quite clear from such cases as *Liverpool City Council v Irwin* [1997] AC 239 that the real basis upon which a term can be implied in contracts such as this is that they are necessary in order to make the contract work.  

The following cases illustrate term ‘Implied in fact’ which is based on the requirement of *BP Refinery* test. One of the requirement in the *BP Refinery* test holds that to be an implied term in fact, a term must be capable of being expressed in a clear or precise manner. This is illustrated in *Ansett Transport Industries v Commonwealth*.  

This case between Commonwealth and Ansett refers to the implementation of the ‘two airlines’ policy by the Commonwealth. Ansett complained that there was a breach of an implied term in its agreement with the Commonwealth upon granting permits to rival companies which allows Commonwealth to compete with Ansett in interstate air freight services. The argument of breach of an implied term in its agreement was rejected by the High Court. One of the reasons given by Gibbs J was that:

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73 [2001] VSCA 31 [16].  
75 (1977) 139 CLR 54.
If a term were to be implied it would be to the effect that the Commonwealth would do whatever it might lawfully do to maintain the position (which has already been secured) that there are two and more than two operators of trunk route airline services in Australia, or put negatively, that it would not do anything which would destroy or undermine that position. The width and lack of precision of such a condition is an argument against implying it.\(^76\)

On the other hand, \textit{BP Refinery test} also discussed the requirement of obviousness in ascertaining the parties’ presumed intention. This is illustrated in \textit{Codelfa Construction Pty Ltd v State Rail Authority of New South Wales}.\(^77\) In this case, Codelfa was hired to do work for State Rail Authority. The contract provided Codelfa to complete works by certain dates and to complete all work within 130 weeks. Codelfa commenced work, three shifts a day, and seven days a week. Because of the noise, dirt and disruption, local residents obtained an injunction preventing work from being carried out on Sundays between the hours of 10pm and 6am. This injunction was granted and had caused Codelfa to reduce their working days to six days a week which meant no work on Sundays and only to work two shifts a day. At the time of contracting, there was a common assumption of the parties that the work was subject to s 11 of the \textit{City and Suburban Electric Railways (Amendment) Act 1967} (NSW) which protected Codelfa from injunctions due to nuisance. Therefore, Codelfa argued that a term has to be implied into the contract to give business efficacy to it due to their inability to work three shifts a day. However, the claim by Codelfa was denied by the High Court. Mason J commented that the inability of Codelfa to work three shifts a day could not be implied because it was unclear what form it would have taken. In this regard, a term can only be implied if it is ‘necessary to do so’ and if it is so obvious that it ‘goes without saying’ as stated in the \textit{BP Refinery test}.

\(^76\) (1977) 139 CLR 54, 62.  
\(^77\) (1982) 149 CLR 337.
Implication in fact gives little scope for good faith. Only in rare situations is a contract ineffective without it. Recently, courts have moved away from implying terms of good faith in fact to implying them in law.\textsuperscript{78} This is partly because of the difficulty in satisfying the legal test for implication in fact. It is also argued that the express intention of the parties at the time of the making of the contract is less easily identified than an established term implied in law, which encompasses standard terms implied in all contracts of a particular class.\textsuperscript{79} In addition, when the express intention is difficult to deduce, there can be no other conclusion than that it is the court that is imposing its own views of what was intended which is contrary to the parties intention.\textsuperscript{80}

\section*{4.6 IMPLICATION IN LAW}

Implication in law is the implication of a term into a contract as a necessary incident of a specific type of contract, with reference to the circumstances of the case and for which the particular implied term has sufficient policy justifications. In \textit{Simonius Vischer & Co v Holt & Thompson}, Samuels JA commented that ‘the imposition of terms as a matter of law amounts to no more than the imposition of legal duties in cases where the law thinks that policy requires it’.\textsuperscript{81} Terms ‘Implied in law’ are obligations that arise within the contract irrespective of the intentions of the parties. In \textit{Australis Media Holdings Pty Ltd v Telstra Corporation Ltd}, Mason P, Beazley JA and Stein JA held that ‘At the end of the day, it is to be remembered that terms implied at law do not depend upon the intention of the parties’.\textsuperscript{82} The court is reluctant to imply new terms in law. This is partly because

\begin{thebibliography}{99}
\bibitem{81} (1979) 2 NSWLR 322, 348.
\bibitem{82} (1998) 43 NSWLR 104, 123.
\end{thebibliography}
legislation covers many important areas and probably partly because courts are wary of creating new obligations that will catch a vast number of contracts.\textsuperscript{\textit{83}}

An example of the kind of contracts in which terms are implied are relational contracts such as distributorship, partnership, franchise arrangements and joint ventures. A relational contract is a type of contract, often a long-term contract, where there is a need to maintain the relationship because these types of contracts are often exposed to uncertainty and unforeseen factors that cannot readily be provided for in advance due to the long engagement. In \textit{Bobux Marketing Ltd v Raynor Marketing Ltd}, Thomas J commented that:

\begin{quote}
The norms of the ongoing relationship, of necessity, tend to supplement the express contractual obligations. Good faith is required to ensure that the requisite communication, cooperation and predictable performance occur for the advantage of both parties.\textsuperscript{\textit{84}}
\end{quote}

The test of necessity was introduced in the decision of \textit{Liverpool City Council v Irwin},\textsuperscript{\textit{85}} in which the landlord and tenant disputed an obligation with respect to the common areas of the stairs and lift. The express term of the contract between the parties contained a list of obligations owed by the tenant, however none by the landlord. The House of Lords held that the landlord was under an implied obligation to take reasonable care of the common area. The House of Lords was prepared to imply the term in law in the class of contract in question, namely tenancies in high-rise apartment blocks. Lord Wilberforce held that:

\begin{quote}
In my opinion such obligation should be read into the contract as the nature of the contract itself implicitly requires, no more, no less: a test, in other words, of necessity. The relationship accepted by the corporation is that of landlord and
\end{quote}

\textsuperscript{84} [2002] 1 NZLR 506.
\textsuperscript{85} [1977] AC 239, 254.
tenant: the tenant accepts obligations accordingly, in relation to the stairs, the lifts and the chutes. All these are not just facilities, or conveniences provided at discretion; they are essentials of the tenancy without which life in the dwellings, as a tenant, is not possible. To leave the landlord free of contractual obligation as regards these matters, and subject only to administrative or political pressure, is, in my opinion, inconsistent totally with the nature if this relationship. The subject matter of the lease (high rise blocks) and the relationship created by the tenancy demand, of their nature, some contractual obligation on the landlord.\footnote{1977 AC 239, 254, 255.}

The underlying concern of the above case revealed that the test for implied term at law is not whether it is necessary for the existence of the contract, but whether it is necessary to the fair functioning of the agreement. In \textit{Bryne v Australia Airlines Ltd}, \footnote{(1995) 131 ALR 422, 450.} McHugh and Gummow JJ determined the meaning of ‘necessity’ and held that:

Many of the terms now said to be implied by law in various categories of case reflect the concerns of the court 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 being seriously undermined. Hence the reference in the decisions to ‘necessity’…This notion of ‘necessity’ has been crucial in the modern cases in which the courts have implied for the first to a new term as a matter of law.\footnote{(1995) 185 CLR 410, 450.}

Finn J, a proponent of good faith, writing extra-judicially commented that:

While it is true in the \textit{South Sydney} case I indicated … that our law has not yet committed itself unqualified to the proposition that every contract imposes on each party a duty of good faith and fair dealing (and I believe that was then an accurate summary of the law), the implication when it is made should in my view be an implication of law.\footnote{Paul Finn, ‘Equity and Commercial Contracts: A Comment’ [2001] \textit{AMPLA Yearbook} 414, 418.}
A number of cases treat a duty of good faith as a term implied in law as follows:

In *Burger King Corporation v Hungry Jack’s Pty Ltd*, the New South Wales Court of Appeal stated that:

> There also appears to be increasing acceptance ... that if terms of good faith and reasonableness are to be implied, they are to be implied as a matter of law. We consider that to be correct.  

Similarly, in *Hughes Aircraft v Airservices Australia*, a universal duty of good faith was suggested. Finn J held that:

> I should add that, unlike Gummow J [in *Service Station Association v Berg Bennet* (1993) 45 FCT 84] I consider a virtue of the implied duty to be that it expresses in a generalisation of universal application the standard of conduct to which all contracting parties are to be expected to adhere throughout the lives of the contract.  

Some cases treat an implied term of good faith as a legal incident of every contract. In *Overlook v Foxtel*, Barrett J held that:

> An additional term implied by law into commercial contracts is a term requiring the exercise of good faith in the performance of contract. This is now in this State a legal incident of every such contract.  

In *Alcatel Australia Ltd v Scarcella & Ors*, the lessee was under an agreement to keep the premises in ‘substantially good repair or in reasonable repair’. When the council issued a fire safety order, it was unusual because it was on the request of

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91 In this case, Gummow J stated that ‘no authority which binds this Court supports the implication by law of a term of such a width [as the duty of good faith].
92 (1997) 146 ALR 1, 37.
the lessor. Twenty-four items were subsequently found not to comply with building regulations, including the stairway. The lessee failed to comply with a subsequent fire safety order. The lessee argued that there is an implied term of good faith in the lessors’ performance of their lease obligations, which bound them to cooperate in a reasonable way to ensure that the lessee was not subjected to the expense and impact of an unreasonable fire order. On the facts, the lessee’s action failed because it could not be said that a property owner acted unconscionably or in breach of an implied term of good faith in a lease of the property by taking steps to ensure that the requirements for fire safety advised by an expert fire engineer should be put in place. However, it was held by Sheller JA (with whom Powell and Beazley JJA agreed) that the decisions in *Renard* and *Hughes Bros* mean that in New South Wales, a duty of good faith in performing obligations and exercising rights, may by implication be imposed upon parties as part of their contract.  

In this context, there is an obvious reason why the duty of good faith can be implied in a commercial lease between lessor and lessee.

The same position is found in *Gary Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd*, where Subaru terminated the plaintiff’s dealership with 13 months’ notice, ostensibly because the plaintiff was not prepared to abide by a new ‘6 star revitalisation program’ that Subaru wanted implemented in all dealerships. The provision concerned with termination was to be found in Clause 11.1, which provided that:

> Notwithstanding anything contained in the Letter of Appointment and the Terms and Conditions, either party may terminate this arrangement by giving to the other notice in writing ...

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95 (1998) 44 NSWLR 349, 368.

96 (1999) ATPR ¶ 41-703.
The plaintiff claimed there was breach of *inter alia*, an implied term not to exercise any power conferred by the agreement, including the power of termination otherwise than in good faith. Finskelstein J affirmed *Renard, Hughes* and *Alcatel* and held that the recent cases accepted that in appropriate contracts, perhaps even in all commercial contracts, such a term will ordinarily be implied, not as implication in fact (based on the presumed intention of the parties) but as a legal incident of the relationship. Finskelstein J held that:

A term of a contract that requires a party to act in good faith and fairly, imposes an obligation upon that party not to act capriciously. It would not operate so as to restrict actions designed to promote the legitimate interests of that party. In addition, provided the party exercising the power acts reasonably in all the circumstances, the duty to act fairly and in good faith will ordinarily be satisfied.\(^97\)

Many cases have shown support for implied good faith by way of implied ‘term in law’. It is easier to identify good faith from the term ‘implied by law’ based on the legal incident of a particular class of contract, for example in the relational contract. To satisfy the requirement of term ‘implied by law’ is less contentious it is not what the parties intended but what the court or legislature thinks is necessary for the fair functioning of the contract.

\(^97\)(1999) ATPR ¶ 41-703, 43, 014.
4.7 THE DEVELOPING AUSTRALIAN POSITION

As noted above in 4.2, the decision of Renard opened up the possibility for the development of the doctrine of good faith in Australian jurisprudence.98 However to date, the position of the concept of good faith in contractual performance is still unclear.

Most Australian cases rely on the duty of good faith in contractual performance where the duty of good faith is implied in various types of commercial contracts such as tenders,99 commercial leases,100 licence agreements,101 building contracts, contracts between football clubs and leagues,102 contracts between business consultants and their sub-contractors,103 dealership agreements,104 contracts for supply of materials and labour,105 and transportation.106 What is interesting about these cases is the state of confusion about the definition and attitude of the judges in expressing the concept of good faith.

In the development of the concept on the context of Australia, much debate has centred on its meaning107 with many believing that good faith takes on different

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98 Renard was affirmed in Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church (1993) 31 NSWLR 91 [93]. Kirby P noting that: ’I am therefore bound by what was decided by the Court in Renard [good faith]. I must therefore apply Renard in the present appeal. To do so is part of my judicial duty’. There is a strong support received in Alcatel Australia Ltd v Scarcella (1998) 44 NSWLR 349, 368, where Shellar JA held that ‘the decision in Renard and Hughes Bros means that in New South Wales a duty of good faith, both in performing obligations and exercising rights, may by implication be imposed upon parties as part of the contract’.


100 See Alcatel Australia Ltd v Scarcella (1998) 44 NSWLR 349; Advance Fitness v Bondi Diggers Memorial and Sporting Club Ltd (NSW Supreme Court, Austin J, 30 March 1999).

101 See Asia Television Ltd v Yau’s Entertainment Pty Ltd [2000] FCA 254.


103 See Saxby Bridge Mortgages Pty Ltd v Saxby Bridge Pty Ltd [2000] NSWSC 187.


105 See Howtrac Rentals Pty Ltd v Thiess Contractors (NZ) Limited (Victorian Supreme Court, Gillard J, 21 December 2000).


107 See Chapter Eight for further discussion on the problem of defining good faith.
meanings depending on its context.\textsuperscript{108} Einstein J in \textit{Aiton Australia Pty Ltd v Transfield Pty Ltd} held that ‘the concept of good faith acquires substance from the particular events that take place … the standard must be fact intensive and it is best determined on a case by case basis.’\textsuperscript{109}

Peden suggested that the most appropriate meaning of good faith is a requirement ‘to have regard to the interests of the other party including the obligation of loyalty to the contract and honesty.’\textsuperscript{110} The requirement ‘to have regard to the interests of the other party including the obligation of loyalty to the contract and honesty’ does not require the parties to behave with ‘unreasonableness’ or ‘unconscionability’.\textsuperscript{111} Peden’s proposed definition of good faith was given strong support in \textit{Overlook v Foxtel},\textsuperscript{112} where Barratt J stated that:

It must be accepted that the party subject to the obligation is not required to subordinate the party’s own interests, so long as the pursuit of those interests does not entail unreasonable interference with the enjoyment of a benefit conferred by the express contractual terms so that the enjoyment becomes (or could become) … ‘nugatory, worthless or, perhaps, seriously undermined’ … the implied obligation of good faith underwrites the spirit of the contract and support the integrity of its character. A party is precluded from cynical resort to the black letter. But no party is fixed with the duty to subordinate self-interest entirely which is the lot of the fiduciary … The duty is not a duty to prefer the interests of the other contracting party. It is rather, a duty to recognise and to have due regard to the legitimate interests of both the parties in the enjoyment of the fruits of the contract as delineated by its terms.\textsuperscript{113}

\textsuperscript{109} (1999) 153 FLR 236, 263.
\textsuperscript{111} Ibid.
\textsuperscript{112} [2002]NSWSC 17.
\textsuperscript{113} [2002]NSWSC 17 [65], [67].
The proposed definition is in line with the proposition of Sir Anthony Mason, who suggested that good faith embraces three notions: an obligation on the parties to cooperate in achieving the contractual objects (loyalty to the promise itself), compliance with honest standards of conduct, and compliance with standards of conduct that are reasonable having regard to the interests of the parties. Honesty as a moral value is the most common expression of good faith. Cooperation is the expected requirement of the parties to a contract. In *Butt v McDonald*, Cooperation is regarded as ‘a general rule applicable to every contract that each party agrees, by implication, to all such things as are necessary on his part to enable the other party to have the benefit of the contract.’ Having regards to the other person’s interests is an important element to reflect the common intention of both parties.

In an attempt to define the meaning of good faith, two theories were developed based on two general groups: the ‘contractual approach’ and the ‘generalised moral standards’. The ‘contractual approach to good faith’ is based on the intention or expectation of the parties. In this context, the approach is in line with the term ‘implied in fact’ to give business efficacy to a contract. Meanwhile, when the definition of good faith is based on ‘generalised moral standards of conduct approach’, it seems the definition is based on desirable behaviour in a contractual relationship. For example, by virtue of the *Uniform Commercial Code* s 2-103(1)(b), in contracts for the sale of goods where the party subject to the duty is a merchant, good faith means ‘honesty in fact’ and the observance of reasonable commercial standards of fair dealing in trade. In Australia, these types of morally based theories find some support in the approach of Priestley J, where his Honour

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115 (1896) 7 QLJ 68, 70-71.
suggested that a certain standard of ‘fairness’ in contract performance may be demanded by prevailing community expectations.\textsuperscript{117}

The uncertainty surrounding the concept left judges without a guide in their interpretation of the concept as reflected in their decisions. It is unclear as to which approach judges refer; that is, whether a judge refers to the common law traditional approach or adopting the civil law tradition where good faith is part of the statutory provision. There are two types of judges in dealing with the concept of good faith: ‘timorous souls’ and ‘bold spirits’. The ‘timorous souls’ judges may argue that an implied obligation of good faith will add to uncertainty to the contract. In \textit{Bilgola Enterprises Ltd v Dymocks Franchise Systems (NSW) Pty Ltd}, Henry J commented that ‘the significance of the need for certainty, particularly where parties to an arm’s length commercial transaction have carefully set out the details of their relationship, must be an important factor in any particular case’.\textsuperscript{118}

On the other hand, ‘bold spirits’ judges, like Priestley J, propose the idea of good faith in \textit{Renard}. His Honour also referred to other jurisdictions which have a clear understanding and foundation in the concept of good faith such as in the US, where good faith is a well-established principle in the \textit{Uniform Commercial Code} and \textit{Restatement (Second) of Contracts}. Similarly, Meagher JA also supports the idea of good faith in \textit{Renard}\textsuperscript{119} and \textit{Hughes Bros Pty Ltd v Trustee of the Roman Catholic Church for the Archdiocese of Sydney}.\textsuperscript{120} In addition to that, Finn J supported the concept of good faith in \textit{Hughes Aircraft Systems International v Air Services Australia}, in which his Honour stated that ‘I consider a virtue of the implied duty [good faith] to be that it expresses in a generalization of universal application, the standard of conduct to which all contracting parties are to be expected to adhere’.\textsuperscript{121}

\textsuperscript{117} (1992) 26 NSWLR 234, 268.  
\textsuperscript{118} (2000) 3 NZLR 169, 180.  
\textsuperscript{119} (1992) 26 NSWLR 234.  
\textsuperscript{120} (1993) 31 NSWLR 91.  
\textsuperscript{121} (1997) 146 ALR 1, 37.  

\textsuperscript{117} (1992) 26 NSWLR 234, 268.  
\textsuperscript{118} (2000) 3 NZLR 169, 180.  
\textsuperscript{119} (1992) 26 NSWLR 234.  
\textsuperscript{120} (1993) 31 NSWLR 91.  
\textsuperscript{121} (1997) 146 ALR 1, 37.
In contrast, Roger CJ is clearly a more ‘timorous soul’ in this debate. His Honour raised concerns that parties are able to secure their own interests in the contract, in contradictory to the concept of good faith. This can be illustrated in *GSA Group Pty Ltd v SiebePlc*, in which Roger CJ held that:

Against a trend towards a general obligation of good faith, fairness, or reasonableness, there have been judicial comments to the effect that the courts should be slow to intrude the commercial dealings of parties who are quite able to look after their own interests. The courts should not be too eager to interfere in the commercial conduct of the parties, especially where the parties are all wealthy, experienced, commercial entities able to attend to their own interests.\(^{122}\)

A step towards dispelling this confusion is apparent in the context of franchising, whereby the previous Australian government made a major step toward legislating an obligation of good faith but hardly a major step to the definition. The Australian government accepted the recommendation made by Wein to introduce an express obligation of good faith for both the franchisor and franchisee to regulate the unethical conduct of the franchisor towards franchisee by taking advantage of any imbalance of bargaining power between the two of them. The Wein review recommended the incorporation of the common law duty of good faith rather than devising some new and different definition of good faith. This was decided based on the premise that the concept will not be defined but understood through ‘non-discretionary reference criteria’, namely in a manner similar to the unconscionable conduct prohibition set out in s 22 of the *Australian Consumer Law.*\(^{123}\)

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\(^{122}\) (1993) 30 NSWLR 573, 579.

Nonetheless, some scholars have suggested that the explicit recognition of such a duty would be beneficial and its development possible. Other scholars, however, suggest that the development of a duty of good faith should be approached with considerable caution and care,\textsuperscript{124} while others reject it outright.\textsuperscript{125} These competing views from the scholars are central to the understanding of the development of good faith in Australia.

4.8 CONCLUSION

It is interesting to trace the emergence of an obligation to act in good faith since Priestley J first raised the concept of good faith in *Renard*. To date, the High Court has yet to pronounce its application, status, and definition of good faith and there is a lack of consistency in the decisions of Federal and state courts. Despite its unclear position, references to good faith are increasingly found in both the common law and in legislation. The issue of implying a general term of good faith is still a dilemma in Australian contract law. Despite that, good faith is increasingly recognised as a term ‘implied by law’ not as a term ‘implied by fact’. It is easier to identify good faith from the term ‘implied by law’ based on the legal incidents of a particular class of contract compared to the test set by *BP Refinery* case to determine term ‘implied by law’. Its status remains vague despite good faith being implied in various types of commercial contracts. With regards to the definition of good faith itself, there is still no consensus to the definition of good faith. Most of the definitions are complex, contradictory, and uncertain. The judicial perspective also competes with each other. The ‘bold spirits’ judges argue that there is a need to have good faith while the ‘timorous souls’ judges fear the uncertainty that good faith will bring. In the context of franchising, the previous Australian government has taken a step further to introduce an express obligation of good faith in the *Franchising Code of Conduct* to regulate the relationship between the franchisor and franchisee and to ensure a successful business


relationship. This means the interpretation of the meaning of good faith is assisted with a ‘non-discretionary reference criteria’, which is a new approach to its definition.

The recent approach to the concept of good faith in the franchising context provides a context to develop a definition of good faith. This is a positive development. Although the debate is ongoing in Australia, there is nevertheless a trend towards recognising that a duty to act in good faith is important in determining the direction of good faith in contractual performance in the future.

The empirical data in Chapters Six, Seven, Eight, and Nine will outline the development of good faith in Australia, assess the approach of judges in dealing with the concept, propose a solution to the problem of its definition, and consider whether an obligation of good faith should be legislated in Australian contract law.
5 EMPIRICAL STUDIES OF GOOD FAITH: DATA AND METHOD

Chapter Five discusses the data and method adopted in this study. The empirical data extracted will be further discussed in the empirical chapters (Chapters Six, Seven, and Eight).

5.1 INTRODUCTION

In Australia, the issue of good faith in the contractual performance was judicially discussed as early as 1992 in the case of Renard.\(^1\) Despite a growing literature on the matter, the question of the development of good faith in the contractual performance as an element in the Australian law of contract remains a vital yet unresolved issue. This research adopts an empirical legal research approach which adds a new dimension to traditional legal research.\(^2\) Despite being a new approach, it is rapidly gaining acceptance.\(^3\)

Empirical legal research involves the analysis of the various impacts of empirical data on society, in this particular context, to understand the impact of the concept of good faith on Australian contract law. Macaulay, one of the proponents of empirical study commented:

\begin{quote}
Empirical evidence is the kind of studies which are based on observation not in theory, which provides explanations and insights into how the law operates in society at general level and how it is perceived by participations in the legal system.\(^4\)
\end{quote}

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\(^1\) See Chapter Four for detailed discussion.
There is a growing empirical law movement in the US, Canada and the UK at present and a similar approach has been taken by Australian legal scholars in adopting the current trend in empirical legal research. Many Australian legal scholars have expressed interest in empirical legal research, based on the number of empirical legal research articles written and conferences held. It is an indication that there is a positive response from the Australian legal scholarly community in applying empirical legal research as an alternative to the traditional approach, the doctrinal approach. In addition, the law does not operate in a vacuum; it operates in society to illuminate the effects of law on society. Posner even suggested that law is:

Not a field with a distinct methodology, but an amalgam of applied logic, rhetoric, economics and familiarity with a specialised vocabulary and a particular body of texts, practices and institutions.

Empirical legal research is cognisant of the context for change and the possibilities for constant evaluation of the way law works in society in order to

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improve its effectiveness.\textsuperscript{10} There are advantages in using empirical legal research compared to doctrinal legal research. Hutchinson argues that;

\begin{quote}
[E]mpirical legal research is one of the social science methodologies is looking at the context in which the law operates with an aim to providing reasonably reliable data regarding human behavior. This data can be used to deal with the ‘grey’ areas between the rules, their implementation, and the resulting effectiveness of regulation of society.\textsuperscript{11}
\end{quote}

The empirical legal research has the potential to illuminate the workings of the legal system, to reveal its shortcomings, problems, and successes, in a way that no amount of library research can match.\textsuperscript{12} One of the proponents of empirical legal research, Korobkin, encouraged the study of the legal empiricism of contracts due to its usefulness.\textsuperscript{13} The advantage of the use of empirical findings to study a contract is that ‘a doctrinal claim or reported results of independent empirical work aimed at affecting policy; in this case the research is not performed as a mere academic exercise’.\textsuperscript{14} This suggests that articles containing empirical work serve as a beneficial addition to traditional scholarship rather than as a substitute for it.\textsuperscript{15}

In 2005, Carlin was the first to collect and discuss empirical data on good faith in Australia.\textsuperscript{16} Carlin analysed cases from 1992 to 2004, focusing on good faith in

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\textsuperscript{11} See Terry Hutchinson, \textit{Researching and Writing in Law}, (Law Book Co., 2010) 97.
\textsuperscript{13} Russell Korobkin, ‘Empirical Scholarship in Contract Law: Possibilities and Pitfalls’ (2002) \textit{University of Illinois Law Review} 1033. The contribution of this article is an attempt to guide scholars concerning how empiricism can be used to enhance the study of contract law.
\textsuperscript{14} See Shari Seidman Diamond and Pam Mueller, ‘Empirical Legal Scholarship in Law Reviews’ (2010) 6 \textit{The Annual Review of Law and Social Science} 581, 594. Another reason for the increasing use of empirical data is the growing availability of large, publicly available data sets and computerised records that now make it possible for scholars to access and analyse many court decisions and other products of the legal system with relative ease.
\textsuperscript{15} Ibid 594.
\end{flushright}
the contractual performance. His findings of the research revealed that good faith
was not a well-developed and established concept in Australia, and that there were
differences according to year and jurisdiction. Empirical observation suggested
that good faith was favoured by some judges and in selected jurisdictions. Carlin
also claimed that:

The journey of good faith into Australian law to date has been characterised by
morally laced assertion as to the exercise of such obligations, followed by
haphazard (and arguably as yet unsuccessful) ex post attempts to attain order and
meaning.\(^{17}\)

The empirical legal research adopted in this thesis will offer a significant
contribution in understanding the concept of good faith in Australia from the
empirical perspective. This thesis builds on Carlin’s research by examining a
longer time span, from 1992 to 2009 (inclusive), in which questions relating to
good faith in the contractual performance are material to tracing the evolution of
the concept of good faith in Australia. The findings of the thesis will benefit the
judiciary, lawyers, legal scholars, policy makers and law reformers in better
understanding the concept of good faith.

There are two steps to the design and execution of the study. First, the
construction of a comprehensive dataset of the law relating to good faith in the
contractual performance in Australia by year (1992-2009) and by jurisdiction is
made. Second, the drawing of key analytical insights from the descriptive data is
gleaned in the context of the execution of the study.

This research is distinct from most research conducted on good faith because it
adds to the research on good faith in contractual performance using the empirical
legal research approach. The scope of the research is broader in terms of the

\(^{17}\) Tyrone M Carlin, 'Good Faith in Contractual Performance-Smoke Without Flame?' (2005) 4 Journal of
Law and Financial Management 18, 35.
materials and study period. This research focused on the attitude of the judges to 
good faith, the definition of good faith, and the possibility of legislating a good 
faith obligation in Australian contract law.

This chapter proceeds as follows. Chapter 5.2 discusses the data, the sources of 
that data and the data gathering techniques employed. In addition, this section of 
the chapter also describes the data analysis procedures employed. Chapter 5.3 
explains the variables of interest (those relating to the empirical chapters), 
provides a description about the data coding procedures and the method used in 
analysing the cases and a description of the taxonomic solution to the definition of 
good faith.

5.2 CONSTRUCTION OF DATA SET

The aim of the data collection is to identify the cases raising good faith in the 
contractual performance in contract law. The period chosen is from 1992 until 
2009. The year 1992 is chosen as the starting year of the research because this was 
the year when the issue of good faith was first raised in Australia in the case of 
Renard. The year 2009 is chosen as the end of the research period as the PhD 
research started in 2009. The period of study is divided into three distinct phases; 
and ‘Consolidation Phase from 2004 to 2009’ with an aim to trace the evolution of 
the concept of good faith. The ‘Introduction Phase from 1992 to 1998’ indicates 
the period where the concept of good faith was first discussed in Australian case 
law since Renard case in 1992. The ‘Development Phase from 1999 to 2003’ 
indicates the period where good faith cases increasingly received judicial attention 
in the judgment. The ‘Consolidation Phase from 2004 to 2009’ indicates the

18 For the purposes of this chapter, each identified Australian case in which questions relating to implied 
terms requiring good faith contractual performance represented a data point to be examined by empirical 
scrutiny.
19 At the time of writing, Renard was cited in at least 225 cases from 1992 to 2010 and 71 law journal articles 
referred to this case.
period in which good faith had wider judicial acceptance although its status and meaning are not resolved.

5.2.1 Cases and Case Law Database

Cases were collected from all jurisdictions in Australia at federal, state and territory level. The rationale is to improve confidence that the data sample used for the purposes of conducting the analysis is as representative as possible of the population and to maximise the external validity of the analysis. Several techniques were used in an effort to discover as many useable data points as possible. The two main sources of materials for Australian case sources adopted in this study were FirstPoint Citator and AustLII (the Australian Legal Information Institute).

FirstPoint Citator provides key details about a case, including parallel citations (with the most authorised citation at the beginning), the name and date of judgment, judges presiding, purc history, cases considered and cited, legislation judicially considered, words and phrases judicially considered, journal article references and full party names. FirstPoint Citator was used to generate a list of cases by using its keyword search in which the progenitor Australian good faith case, Renard, was cited. The theory underpinning this approach was that Renard is generally regarded as representing the starting point for wide scale judicial consideration of questions relating to good faith in the contractual performance. FirstPoint Citator was also queried using its keyword search functionality as an additional means of uncovering cases where the implied good faith performance issue had been discussed. Keywords such as ‘good faith and contract law’, ‘good faith and the performance of contract’ and ‘good faith and commercial law’ were used.

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21 See Hutchinson above n 11, 85.
In addition to the use of the *FirstPoint Citator*, the *AustLII* case law database also uses an identical search strategy as for the *FirstPoint Citator*. While many of the cases identified as a result of this process were in common with those identified as a result of the initial *FirstPoint* review, some additional cases were identified via *AustLII* which had not been identified via *FirstPoint*. This combination of techniques resulted in the generation of an initial list of cases to be subjected to more detailed review.

A further technique adopted to ensure the credibility of the data was the use of ‘classic cases’ as a benchmark to measure reliability. For the purpose of this chapter, ‘classic cases’ are considered to be those cases that are frequently referred to, considered or cited after *Renard* and where there is an extensive reference made to the discussion of good faith, particularly within the parameters of contractual performance. By using *LawCite on AustLII*, a new citatory service available through *AustLII*, ‘classic cases’ are flagged. The function of ‘classic cases’ is to double check the list of the cases generated from the databases. Hence, it increases confidence in the list.

In addition, *AGIS Plus Text* database were used to generate a list from published articles about good faith in the contractual performance. *AGIS Plus Text* is a useful resource to research legal topics as it offers a broad coverage of Australian law journals, conference proceedings and reports as well as some overseas

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23 *LawCite Case* and *AustLII* records consist of a header followed by up to four tables. The header lists consist of the name of the case or article, the citation list, the court/journal, the jurisdiction and the date. It includes legislation cited (with live links to the full-text, cases and articles cited), cases referring to this case or article and journal articles referring to this case or article.

24 See Tucker and Milne above n 20, 162.
journals. These articles helped to ensure that there were no important cases left out.25

As a methodological triangulation check, cases collected from the FirstPoint Citator, AustLII, LawCite on AustLII and AGIS Plus Text databases were examined to ensure that relevant and valid cases were collected. This process resulted in a comprehensive literature on the subject of good faith in the contractual performance of contract. A copy of the case report for each case listed in the initial case list was obtained and subjected to detailed review.

5.2.2 The Review Process

The next stage was to review the selected cases by reading them systematically.26 The review process revealed that there are three criteria where cases were excluded from the initial list (194 cases) as below:

I. The case cited Renard but good faith was not an issue;

II. The case referred to good faith in contractual performance but this issue was not material; and

III. The case raised good faith in the context of insurance (46 cases), employment (26 cases) and negotiation (18 cases) and was excluded from the initial list. These cases were excluded because they were not the focus of the study and/or already have some degree of recognition. In the insurance context, the duty of utmost good faith is a well-recognised duty in insurance contracts.27 In employment context, the duty of good faith is


27 The duty of good faith in insurance law was introduced almost 200 years ago in Carter v Boehm [1766] 3 Burr 1905, 1910 where Lord Bingham held that;

...Good faith forbids either party, by concealing what he privately knows to draw the other into a bargain from his ignorance of the fact, and his believing the contrary
implied in employment contracts. In negotiation context, there is no duty of good faith during the negotiation process unless both parties expressly agreed to the duty of good faith.

The final case database consists of a sample of 104 Australian cases reported between 1992 and 2009 (inclusive). While it is not possible to conclude that this list represents the total population of decided cases from that period in which good faith in the contractual performance was an issue, every effort was made to include the maximum possible number of cases to ensure the highest sampling coverage possible. Once cases were selected, the next step was to code them as discussed in the following section 5.3.

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28 In employment, the duty of good faith is implied from the relationship between employer and employee. It was clearly stated in Wessex Dairies Limited v Smith [1935] 2 KB 80; It is necessary implication which must be engrafted on such a contract (employment) that the servant undertakes to serve his master with good faith and fidelity.

29 There was no implied duty of good faith in contractual negotiations. This position is well illustrated by House of Lords in Walford v Miles [1992] 2 AC 128 where Lord Ackner held that; Duty to negotiate is unworkable in practice as it is inherently inconsistent with the position of a negotiating party.

30 See Appendix A: Database case law.
5.3 CODING OF VARIABLES

The use of key variables is to facilitate the deciphering of the development of the concept of good faith and to draw patterns by year (1992 to 2009) and jurisdiction of good faith in the performance of contract cases during the period of review. The variables used in this study are illustrated in Table 5.1.

Table 5.5.1: Variable, Coding, and Description

<table>
<thead>
<tr>
<th>No</th>
<th>Variable</th>
<th>Coding/Label</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Jurisdiction</td>
<td>Labelling according to the jurisdictions (NSW, Victoria, ACT, Western Australia, Tasmania, Queensland, South Australia, Northern Territory and Federal)</td>
<td>Cases detected from all jurisdictions (NSW, Victoria, ACT, Western Australia, Tasmania, Queensland and Federal) in Australia. There are no cases reported in South Australia and Northern Territory.</td>
</tr>
<tr>
<td>2</td>
<td>Year of decision</td>
<td>Labelling according to year.</td>
<td>The range of years spans from 1992 to 2009.</td>
</tr>
</tbody>
</table>
| 3  | Level of court in which the decision was made | 1=denotes the first instance hearing before a single judge of a state Supreme Court or the Federal Court.  
2=denotes the appeal before a State Court of Appeal or the Full Federal Court. | Both federal and state level.                                                                                                               |
|    |                                    |                                                                             | The Federal court hierarchy includes High Court of Australia, Federal Court of Australia (Appeal and single judge) and Federal Magistrates Court. |
|    |                                    |                                                                             | The state court hierarchy includes High Court of Australia, Supreme Courts of Appeal, Supreme Courts (divisional), District Court and State Supreme Courts (Court of Appeal and Court of Criminal Appeal). |
| 4  | Judge/Judges                       | Labelling according to the name of judge                                    | Name of the judge who decided the case.                                                                                                   |
| 5  | Sources of good faith              | Whether good faith term implied in fact (Coded for data analysis using binary dummy variable; 0=No, 1=Yes)  
Whether good faith term implied in law (Coded for data analysis using binary dummy variable; 0=No, 1=Yes) | There are two types of implication term: ‘implied by law’ and ‘implied by fact’.                                                            |
<table>
<thead>
<tr>
<th>6</th>
<th>Meaning of good faith</th>
<th>Whether good faith defined (coded for data analysis using binary dummy variable; 0=No, 1=Yes)</th>
<th>The judges provide an original meaning of good faith or borrow the meaning of good faith from previous cases.</th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
<td>Judicial support</td>
<td>Support level for implied good faith performance obligations (coded for data analysis as follows):</td>
<td>First support level: When the court shows total support for good faith, for example, the judge agrees with the position of good faith in the performance of commercial settings, judge affirms Renard or an extensive reference to other jurisdictions, which support the idea of good faith for example in Uniform Commercial Code.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1=denotes unqualified support for the existence and enforceability of implied good faith contractual performance obligations</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>2=denotes qualified support for the existence and enforceability of implied good faith contractual performance obligations</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>3=denotes qualified rejection of the existence and enforceability of implied good faith contractual performance obligations</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>4=denotes the unqualified rejection of the existence and enforceability of implied good faith contractual performance obligations</td>
<td></td>
</tr>
</tbody>
</table>

31 See Chapter Three above for details discussion.
5.3.1 Statistical Analysis of Case

104 Australian cases from 1992 to 2009, which raised the issue of good faith were analysed. A four point Likert-type scale was constructed for each of the 104 cases. The Likert-type scale is used as a means to study the attitude of the judges to the concept of good faith.\(^3\) The benefit of using the Likert-type scale is that ‘questions used are usually easy to understand and so lead to consistent answers’.\(^3\) There are typically between four and seven points on the Likert-type scales. A five point Likert-type scale is very common. For the purpose of this study however, a four point Likert-type scale was constructed for each of the 104 cases. The four point Likert-type scale measurements are as follows: \(\text{Support Level 1} = \) total support, \(\text{Support Level 2} = \) qualified support, \(\text{Support Level 3} = \) qualified rejection and \(\text{Support Level 4} = \) outright rejection. The four point Likert-type scale is used to exceed the support level to avoid any bias compared to a five point Likert-type scale, which is not suitable to review the support level of judges. In evaluating the support level of the judges, there is no ‘neutral’ support level when the judges give their decision; therefore a four point Likert-type scale is suitable to review the support level of judges. In order to measure the validity and reliability of the data, the ‘average’ and ‘standard deviation’ is used in this study.

5.3.2 The Taxonomic Solution to the Definition of Good Faith

In analysing the definition of good faith, a taxonomic approach is pursued. The collected definitions or meanings of good faith were analysed and similar expressions or terminologies were grouped together as a ‘family’ based on their similarity using a distinct ‘label’. Each ‘label’ is supported by the empirical data by year and jurisdiction to detect the frequency of its use. The greater the frequency for each ‘label’, the more confident the data. The ‘label’ that receives more support can potentially serve as a definition of good faith. The findings of the definition of good faith are significant because it is based on the genuineness

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of the 19 cases, which defined good faith in Australia.\textsuperscript{34} In this way, the definition chosen is reliable as it is supported by the literature and empirical observation during the period of review.

5.4 CONCLUSION

In summary, the method applied in this chapter generated a database of 104 cases for empirical scrutiny to answer the research questions. It is hoped that an empirical approach adopted in this thesis will enhance the understanding of the implications and effects of the concept of good faith in Australian contract law.

In Chapters Six, Seven, and Eight, the empirical evidence will be discussed to respond to the research questions about the status of good faith, the judicial attitudes and the definition of good faith in Australian contract law.

\textsuperscript{34} See Figure 8.1 for further details.
6 EMPIRICAL STUDY OF THE DEVELOPMENT OF GOOD FAITH IN AUSTRALIAN CONTRACT LAW

The doctrinal discussion of good faith in the context of a developing concept in Australian contract law was discussed in Chapter Four. However, the doctrinal discussion offered only a limited view of the concept of good faith in Australian contract law. For this purpose, an empirical overview of good faith is provided in this and the following chapters to supplement the doctrinal discussion of good faith. A more detailed review of the ‘landscape’ of decided cases on the issue of good faith in contractual performance during the period of review is presented with tables and graphs to aid understanding of the discussion.

6.1 INTRODUCTION

As mentioned in Chapter Four, good faith was put onto the judicial agenda in Australia through obiter comments by Priestley J in the landmark case of Renard in 1992.1 Priestley J was clearly of the opinion that the appropriate course was towards the development of a general principle of good faith in Australia. The issue of good faith nevertheless continues to be debated, with its status and meaning still uncertain in the absence of an authoritative High Court judgment. In these circumstances, there is benefit in examining the line of development of good faith in contract law cases in Australia in an attempt to extract the general principles of the concept, the growth of the concept, its extension, and development.2

Good faith was identified as an issue in 104 cases in Australia. In 74 of these, the source of good faith was from implication.3 There are 64 cases where the court

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3. The sources of good faith of the remaining 30 cases were from express term of the contract.
implied good faith as ‘implied in law’ and 10 cases where the court implied it as a term ‘implied in fact’. From these 74 cases of implication, 32 cases were found to have breached the implied term of good faith. The cases are divided into three phases: ‘Introduction Phase from 1992 to 1998’, ‘Development Phase 1999 to 2003’ and ‘Consolidation Phase from 2004 to 2009’. This allows the evolution of the concept to be monitored over time.

It is the aim of this chapter to analyse and evaluate the reception and acceptance of the concept of good faith in Australia by using empirical data categorised by years (1992-2009) and jurisdiction. The remainder of the chapter proceeds as follows. Chapter 6.2 analyses cases in which good faith is raised as an issue. Chapter 6.3 explains the cases in which the court recognised an implied term of good faith. The discussion encompasses total implication rate by year and jurisdiction and term ‘implied in law’ and term ‘implied in fact’. Chapter 6.4 discusses findings of a breach of implied term of good faith.

### 6.2 GOOD FAITH AS AN ISSUE IN AUSTRALIAN CONTRACT LAW

#### 6.2.1 Cases Raising Good Faith as an Issue (Per Year)

One means of analysing the good faith phenomenon in Australia is to measure the number of instances in which the issue of good faith was raised as a material issue. Figure 6.1 shows, by year, that there were 104 identified good faith cases in Australia during the 1992-2009 period.
**Introduction Phase**

During the ‘Introduction Phase’ from 1992-1998, only eight cases were identified. In 1992, 1994, 1995, 1996, 1997 and 1998, one case was identified for each year. However, in 1993, three cases were identified. During this phase, there appears to have been a degree of confusion about the issue of good faith, with only eight cases being identified. One interpretation of this may be that plaintiffs and judges were not well versed in the concept and as such, lacked confidence to discuss the issue of good faith in their cases. The discussion of the concept of good faith in *Renard* was only obiter comments and as such did not constitute a binding precedent for other courts. The acceptance and recognition of the concept of good faith may take time because good faith is still a new concept without a clear meaning. A good example is the duty of cooperation which has a longstanding acceptance and recognition in contract law. In *Mackay v Dick,*\(^4\) the duty of cooperation is recognised as part of the underlying concept of contract law as early as 1881. Since then, the duty of cooperation has developed to the extent that it is the expected standard that the parties in the contract are required to secure the expected benefit of the contract. The longer period of time has provided ample opportunity for a duty of cooperation to be well established in contract law.

\(^4\) (1881) 6 App Cas 251.
**Development Phase**

During the ‘Development Phase’ between 1999 to 2003, there is an increasing number of reported good faith cases compared to the Introduction Phase. The number of reported good faith cases by year are as follows: 1999 (7), 2000 (8), 2001 (12), 2002 (16), and 2003 (12). This shows a dramatic increase in identified good faith cases. Of the 104 cases in the entire study period, 55 occurred during the development phase (1999 to 2003). The figure also shows that the majority of good faith cases were raised in 2002 (16), and the least in 1999 (7). One conclusion that can be drawn from this is that the issue of good faith had become part of the legal landscape during this period.

**Consolidation Phase**

The period between 2004 and 2009 constitutes the consolidation phase in which there is greater acceptance of the issue of good faith. The number of reported good faith cases by year are as follows: 2004 (4), 2005 (7), 2006 (8), 2007 (7), 2008 (9), and 2009 (6). 41 cases were identified from a total sample of 104 cases. This phase suggests that the judges are ready to hear pleadings put forward by the plaintiff on the basis of the concept of good faith. One conclusion that could be drawn from this phase is that the issue of good faith has become more recognised.

Overall, the data suggests that the development of good faith in Australian case law from 1992 to 2009 is inconsistent due to the inconsistent distribution of cases that raised good faith as an issue as illustrated in Figure 6.1. The development of good faith as a new concept has undergone a development similar to the experience of any new principle of law. A good example is s 52 (misleading or deceptive conduct) of the *Trade Practices Act 1974* (Cth)\(^5\), which received little attention before becoming an accepted provision. French J observed in *Trade Practices Act 1974* (Cth) that ‘judicial exploration of the scope of s 52

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\(^5\) See *Trade Practices Act 1974*(Cth), which was enacted as schedule 2 of *Competition and Consumer Act 2010* (Cth) which came into effect on 1st January 2011.
(misleading or deceptive conduct) has, in the 14 years since its enactment, generated a considerable body of case law. His Honour’s statement is supported by the increasing number of decisions involving the section reported in the Australian Trade Practices Reports:

In the first years to 1979 there were 19. In the next five years to 1984, there were 131. In the three years and eight months to August 1988, there have been a further 236 cases reported or digested in that service. In the two years since August 1988 there has been a further 166 cases reported or digested.

At present, s 52 currently s 18 of Australian Consumer Law is commonly used, but only after the concepts of the section underwent a lengthy development process. Similarly, it is also expected that the concept of good faith must also undergo a similar process before it becomes more widely accepted.

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7 See Deborah Healey and Andrew Terry, Misleading or Deceptive Conduct (CCH Australia Limited, 1995) 19-20.
Figure 6.2: Cases in which Good Faith was Raised as an Issue (by Jurisdiction)

Table 6.1: Percentage of Cases in Which Good Faith Raised as an Issue (by Jurisdiction)

<table>
<thead>
<tr>
<th></th>
<th>NSW</th>
<th>QLD</th>
<th>TAS</th>
<th>VIC</th>
<th>ACT</th>
<th>WA</th>
<th>FED</th>
<th>SA</th>
<th>NT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases</td>
<td>47</td>
<td>2</td>
<td>3</td>
<td>21</td>
<td>1</td>
<td>7</td>
<td>23</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>%</td>
<td>45%</td>
<td>2%</td>
<td>3%</td>
<td>20%</td>
<td>1%</td>
<td>7%</td>
<td>22%</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Figure 6.2 provides an overview of the identified good faith cases raised in Australia by jurisdiction. Table 6.1 illustrates the quantity and percentage of identified cases by jurisdiction.

Figure 6.2 suggests an unbalanced distribution of the issue of good faith in Australia. The number of identified good faith cases by jurisdiction are as follows: NSW (47), Queensland (2), Tasmania (3), Victoria (21), ACT (1), Western Australia (7) and Federal (23) identified good faith cases. No cases were identified in South Australia and Northern Territory. Because a small number of cases of good faith were identified from Queensland, Tasmania, ACT and Western Australia, these states are grouped together and classified as ‘Other States’. The figure is interpreted cautiously because it is influenced by an uneven population distribution. For example, New South Wales (NSW) has the highest population, with approximately 7,247,700 people, followed by Victoria, with approximately
5,574,500 people while the Northern Territory has the least, which constitutes approximately 232,400 people.\footnote{Australian Bureau of Statistics, Dec 2011

It is apparent from Table 6.1 that the majority (47) of identified cases are decisions of NSW courts, which is not surprising as it has the largest population. The number of reported cases amounts to 45 percent of all identified cases. Victoria has the second most number of reported cases with 21 percent, again most likely because it is the second most populated area. This percentage amounts to 20 percent of total cases. The Federal courts reported 23 cases, amounting to 22 percent of the total. ‘Other States’ reported 13 cases out of the total of 104 identified cases (Western Australia 7, Queensland 2, ACT 1 and Tasmania 3), amounting to 13 percent of the total percentage.

One conclusion that can be drawn from this is that the issue of good faith is influenced by jurisdiction. The fact that the Renard case was first decided in NSW undoubtedly influenced many cases in NSW to follow suit. The data also reveals that good faith is a well-known issue in NSW and that there is strong judicial support for the term compared to the other states.
Analysis of the influence of good faith in each Australian jurisdiction provides a more comprehensive view of the growing awareness of the good faith issue. Figure 6.3 identifies cases in which good faith is raised as an issue by year and jurisdiction.

**Introduction Phase**

During the ‘Introduction Phase’ from 1992 to 1998, four cases relying on an argument of good faith were identified in NSW, three in Federal Courts, and one in Victoria with no identified cases in Other States. During this stage, it is undeniable that the issue of good faith was still in its infancy stages.
Development Phase

During the ‘Development Phase’ from 1999 to 2003, there was a growing number of identified cases relying on good faith as an issue when compared to the ‘Introduction Phase’. The number of identified good faith cases by jurisdiction are as follows: NSW (23), Victoria (11), Federal Courts (13) and Others States (8). The highest number of identified cases is in NSW (23), followed by Federal Courts (13), Victoria (11) and Other States (8). This suggests a growing awareness of, and interest in, the issue of good faith. It may be considered that the opinion of Priestley J had convinced litigants in NSW to plead the issue of good faith.

Consolidation Phase

In the ‘Consolidation Phase’ from 2004 to 2009, the distribution of identified cases arguing good faith as an issue across jurisdictions is stable. The number of identified good faith cases by jurisdiction is as follows: NSW (20), Victoria (9), Federal Courts (5) and Other States (7). The number of reported cases during the period of review showed a consistent distribution of cases compared to the ‘Development Phase’. One interpretation that can be inferred here is that good faith is beginning to receive a warm welcome in NSW. This may be because the concept has become more widely recognised and the judges are more willing to consider the concept as a result of it having been introduced in NSW.

6.3 GOOD FAITH IDENTIFIED AS AN IMPLIED TERM IN AUSTRALIAN CONTRACT CASES

Chapter 6.2 addressed the total sample of cases which raised good faith as a substantial issue. This section examines the sample to determine the cases in which the court upheld an argument that an obligation of good faith was implied in the contract. As mentioned in Chapter Four, the issue of the implication of a good faith term has yet to be decided upon by the High Court.
Good faith can be implied as a term of the contract in two ways: term ‘implied in law’ and term ‘implied in fact’. A term ‘implied in law’ is based on the legal incident of a particular class of contract. A term ‘implied in fact’ is based on the intention of the parties. This section examines the data pertaining to the number of instances in which a term requiring good faith performance was implied compared to the total number of cases in which good faith was raised by year (1992-2009).

Figure 6.4: Implied Term Recognised by Year

Table 6.2: Total number of cases, the quantity and percentage of implied case by Year

<table>
<thead>
<tr>
<th>Year</th>
<th>Implied</th>
<th>Cases</th>
<th>%Implied</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>0</td>
<td>1</td>
<td>0%</td>
</tr>
<tr>
<td>1993</td>
<td>0</td>
<td>3</td>
<td>0%</td>
</tr>
<tr>
<td>1994</td>
<td>0</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>1995</td>
<td>0</td>
<td>1</td>
<td>0%</td>
</tr>
<tr>
<td>1996</td>
<td>1</td>
<td>2</td>
<td>100%</td>
</tr>
<tr>
<td>1997</td>
<td>1</td>
<td>2</td>
<td>100%</td>
</tr>
<tr>
<td>1998</td>
<td>2</td>
<td>6</td>
<td>200%</td>
</tr>
<tr>
<td>1999</td>
<td>2</td>
<td>4</td>
<td>100%</td>
</tr>
<tr>
<td>2000</td>
<td>6</td>
<td>9</td>
<td>86%</td>
</tr>
<tr>
<td>2001</td>
<td>4</td>
<td>7</td>
<td>75%</td>
</tr>
<tr>
<td>2002</td>
<td>9</td>
<td>10</td>
<td>86%</td>
</tr>
<tr>
<td>2003</td>
<td>10</td>
<td>7</td>
<td>86%</td>
</tr>
<tr>
<td>2004</td>
<td>7</td>
<td>8</td>
<td>86%</td>
</tr>
<tr>
<td>2005</td>
<td>10</td>
<td>12</td>
<td>86%</td>
</tr>
<tr>
<td>2006</td>
<td>8</td>
<td>12</td>
<td>78%</td>
</tr>
<tr>
<td>2007</td>
<td>7</td>
<td>4</td>
<td>58%</td>
</tr>
<tr>
<td>2008</td>
<td>6</td>
<td>7</td>
<td>47%</td>
</tr>
<tr>
<td>2009</td>
<td>4</td>
<td>9</td>
<td>78%</td>
</tr>
</tbody>
</table>

9 See Chapter Four for further discussion.  
10 See Chapter Four for further discussion.
Figure 6.4 illustrates the cases by year in which the court recognised implication of a term requiring good faith in contractual performance. Table 6.2 depicts the total number of cases, the quantity and percentage of implied cases during the period of review.

**Introduction Phase**

In the ‘Introduction Phase’, from 1992 to 1998, only five cases were found to have been implied from the eight identified cases. The number of identified cases of implied term recognised by year are as follows: 1996 (1), 1997 (2) and 1998 (2). This shows that the implication rate and the identified cases are almost equal with an exception in 1993, where there is no implied term recognised from three identified cases. It shows that the court has not yet established a direction to take in deciding to imply a term of good faith in contract. However, it is noteworthy to mention that in 1997 and 1998, even though each year dealt with only one case, both cases recognised both term ‘implied in law’ and term ‘implied in fact’. It is possible that during this time, judges were not certain in deciding which term was more suitable to be used to imply a term of good faith in a contract.

**Development Phase**

In the second phase, 1999 to 2003, the implication rate is higher. 36 cases were found to have recognised an implied term of good faith from the 55 identified cases. The number of identified cases of implied term recognised by year are as follows: 1999 (6), 2000 (4), 2001 (8), 2002 (10), and 2003 (7). The average implication rate is more than 50 percent, with the year 1999 having the highest implication rate wherein six cases were found to imply a term from seven identified cases which is equivalent to 86 percent. At this stage, it can be said there is an emerging trend in implying a term of good faith.
**Consolidation Phase**

In the ‘Consolidation Phase’, from 2004 to 2009, 33 cases were found to have been recognised as an implied term of good faith from 41 identified cases. The number of identified cases of implied term recognised by year are as follows: 2004 (2), 2005 (7), 2006 (7), 2007 (6), 2008 (7) and 2009 (4). The implication rate is greater than 50 percent, showing a growing recognition for the concept. In 2005, all the seven identified cases are also found to be implied terms. This indicates that in 2005, the court was willing to accept implication of good faith term in seven identified cases.

One conclusion that could be drawn from this is that the implication of a term is increasingly accepted over the study period.

As discussed in Chapter 6.4, there are two types of implications recognised by the court. The court has approached good faith as a term which may be either term: ‘implied in fact’ or ‘implied in law’. Figure 6.5 illustrates the instances of the term: ‘implied in fact’ and the term ‘implied in law’ by year in Australia.
**Introduction Phase**

In the first phase from 1992 to 1998, there are two identified cases in which the term ‘implied in fact’ was found, namely in 1996 (1) and 1997 (1) and three cases which the term ‘implied in law’ as found in 1997 (1) and 1998 (2). During this stage, there remains no binding authority to decide which concept is preferable.

**Development Phase**

Interestingly, in the second phase, from 1999 to 2004, there was only one case of which the term ‘implied in fact’ was found in 1999 and 35 cases of which the term ‘implied in law’ was found in 1999 (5), 2000 (4), 2001 (9), 2002 (10), and 2003 (7). This empirical data clearly suggests that there is an increasing acceptance of the term good faith as a term ‘implied in law’.  

**Consolidation Phase**

There are seven cases where the court decided to imply a term ‘implied in fact’ as found in 2004 (1), 2005 (1), 2006 (2), 2008 (2), and 2009 (1). No such case was found in 2007. There are 26 cases where the court decided to imply a term ‘implied in law’ as found in 2004 (1), 2005 (6), 2006 (5), 2007 (6), 2008 (5), and 2009(3). Overall, there are more cases which were identified using the term ‘implied in law’. This finding clearly supports the comments of the NSW Court of Appeal that this term (‘implied in law’) is preferred to imply a good faith obligation.  

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11 See *Burger King Corporation v Hungry Jack’s Pty Ltd* (2001) 69 NSWLR 558, 569.

Figure 6.6: Cases Where Term Implied by Jurisdiction

Note: ‘Others’ comprises the jurisdictions of WA, QLD, TAS and ACT
- Number of Cases which good faith raised
- Number of Cases which good faith as a term is implied

<table>
<thead>
<tr>
<th></th>
<th>NSW</th>
<th>VICTORIA</th>
<th>FEDERAL</th>
<th>OTHER</th>
</tr>
</thead>
<tbody>
<tr>
<td>No of cases</td>
<td>47</td>
<td>21</td>
<td>23</td>
<td>13</td>
</tr>
<tr>
<td>Term Implied</td>
<td>36</td>
<td>16</td>
<td>14</td>
<td>8</td>
</tr>
<tr>
<td>% of Term Implied</td>
<td>77%</td>
<td>76%</td>
<td>82%</td>
<td>82%</td>
</tr>
</tbody>
</table>

Figure 6.6, depicts the cases by jurisdiction during the period of review. Table 6.3 explains the quantity and percentage of term implied based on the number of cases from each of the jurisdictions. These rates contrast significantly with the observed implication for cases by year as illustrated in Figure 6.6.

NSW
NSW has the most cases identified, 36 out of 47 cases, where the terms are implied. This amounts to 77 percent from the total percentage of term implied. There has been strong judicial support for the implication of term of good faith in NSW.\footnote{See Overlook v Foxtel [2002] Aust Contract Reports ¶90-143, 91 972.}

**Victoria**

In Victoria, the frequency of cases where term implied is also significant with 16 out of 21 cases identified. This amounts to 76 percent from the total percentage of term implied.

**Other States**

It is reported that in Other States, there is a small number of cases reported where the term is implied, that is, eight cases where the court decided to imply a term from 13 identified cases. This amounts to 62 percent of the total percentage of term implied.

**Federal Courts**

In Federal courts, the number of cases where term is implied by jurisdiction is 14 out of 23. This amounts to 61 percent of the total percentage of term implied.

Overall, the implication of good faith demonstrated that NSW has an acceptance rate of 79 percent whilst Victoria, 76 percent. This data indicates that Victoria and NSW show most interest in the implication of the concept. The rate of Federal Courts (61 percent) and Other States (62 percent) shows that these jurisdictions take an equal interest in recognising an implication of good faith despite a smaller quantity of reported cases during the period of review.
6.4 BREACHES OF IMPLIED TERM OF GOOD FAITH IN AUSTRALIAN CONTRACT CASES

The previous discussion in 6.3 addresses the issue of the number of cases in the total sample in which the court found an implied term of good faith. Chapter 6.4 examines cases in which breach of implied term of good faith was found.

6.4.1 Recognised Implication Cases and Breach Cases

Figure 6.7 depicts the number of cases where the court recognised breach and implied term of good faith. Table 6.4 shows the number of the total cases, number and percentage of implication cases and the number of implication and breach cases during the period of review.

Table 6.4: Percentage of Recognised Implications and Breach Cases

<table>
<thead>
<tr>
<th>Quantity</th>
<th>Total Cases</th>
<th>Implication Cases</th>
<th>Implication and Breach Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>%</td>
<td>0</td>
<td>71%</td>
<td>43%</td>
</tr>
<tr>
<td>% Total Sample</td>
<td>0</td>
<td>0</td>
<td>31%</td>
</tr>
</tbody>
</table>

74 out of 104 cases are implication cases, amounting to 71 percent. 32 out of 74 cases are implication and breach cases, amounting to 43 percent. 32 out of 104
cases are the total number of implication and breach cases from the total sample of cases, amounting to 31 percent of total cases.

Figure 6.7 and Table 6.4 illustrates two important figures for the study. Firstly, it shows the total implication cases in which 74 cases are identified from the total identified cases, and secondly, the total implication and breach cases, that is 32 of 74 total implication cases were identified. The data suggests that at least 70 percent of the total cases recognised implication rates compared to the smaller number of cases recognising implication and at the same time recognising breach of implication, that is, 43 percent. From the total cases, only 31 percent are implication and breach cases. This data suggests a gap between the capacity to convince a court of the existence of an implied term and the capacity to demonstrate that such a term had in fact been breached.

6.4.2 Cases Where the Court found Breach of Implied Term of Good Faith from Implied Term Cases

The tendency of the court to find a breach of implied term of good faith from implication cases also varied by year. Figure 6.8 depicts the number of cases where breach of implied term of good faith from implication cases were recognised during the period of review.
**Introduction Phase**

During the ‘Introduction Phase’ from 1992 to 1998, a small number of cases were found to be in breach of the implied term of good faith. In 1996, two cases were found to be implied term cases. One out of the two cases found breach of implied term of good faith from an implication case. In 1997, two cases were found to be implication cases but no cases were found to be in breach of an implied term of good faith. In 1998, one case was found to be an implication case but no case was found to be in breach of an implied term of good faith. The data suggests that when there is an implication issue, it is not necessarily a breach of an implied term of good faith issue. This indicates that the court is still unclear on dealing with the issue of breach of an implied term of good faith.

**Development Phase**

In the ‘Development Phase’ from 1999 to 2003, there is an upsurge of interest in the number of cases, in which 18 cases were reported to have breached an implied term of good faith from 36 implication cases. In 1999, there are six implication cases. In two of the six cases, there was found to be a breach of an implied term of good faith. In 2000, there were four implication cases of which two were found to
have breached an implied term of good faith. In 2001, there were nine implication cases. Six out of nine cases were found to have breached an implied term of good faith. In 2002, there are ten implication cases. Three out of the ten cases were found to have breached an implied term of good faith. In 2003, there are seven implication cases. Five out of seven were found to have breached an implied term of good faith. The data suggests that both instances reflect the increasing recognition of the plaintiff and judges of the issue as compared to the introduction phase.

Consolidation Phase
During the ‘Consolidation Phase’ from 2004 to 2009, the distribution of breach of an implied term of good faith and implication cases are not stable. In this phase, there are 13 cases where the court found a breach of an implied term of good faith from 33 cases of implication. In 2004, there are two implication cases. The two cases were found to have breached an implied term of good faith. In 2005, there are seven implication cases of which two were found to have breached an implied term of good faith. In 2006, there are seven implication cases of which one was found to have breached an implied term of good faith. In 2007, there are six implication cases of which five were found to have breached an implied term of good faith. In 2009, there are four implication cases of which two were found to have breached an implied term of good faith. This shows that the court had not accepted an implication issue where there was a small possibility that there is a breach of implied term of good faith. Nevertheless in 2007, the court found five cases of breach of an implied term of good faith from six implication cases. The data in 2007 indicates that there was a higher chance than in any other year that when there was an implication, the case was likely to be found as a breach of an implied term of good faith.

Overall, the data suggests that when the parties plead breach of an implied term of good faith in implication cases, there is a low chance of the court to accept its
plea. One conclusion that can be drawn from this is that pleading for a breach of an implied term of good faith is a fairly new course of action.

Figure 6.9: Breaches of Implied Term of Good Faith

Table 6.5: Breaches of Implied Term of Good Faith

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Breaches</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>6</td>
<td>3</td>
<td>5</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>5</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>Cases</td>
<td>1</td>
<td>1</td>
<td>5</td>
<td>0</td>
<td>3</td>
<td>1</td>
<td>7</td>
<td>6</td>
<td>12</td>
<td>16</td>
<td>12</td>
<td>4</td>
<td>2</td>
<td>7</td>
<td>8</td>
<td>6</td>
<td>9</td>
</tr>
</tbody>
</table>

Figure 6.9 illustrates the trend pertaining to breach of implied term of good faith by year. Table 6.5 shows the number of breaches and percentage of the breaches based on the number of cases during the period of review in Australia.

Introduction Phase

The first phase is the ‘Introduction Phase’ from 1992 to 1998, in which there was only one identified case in 1996 that recognised a breach of an implied term of good faith. In this phase, the issue of a breach of an implied term of good faith was newly pleaded and considered to be in the ‘embryonic’ stage after Renard in
1992. This is also the case for Figure 6.5 where the implication rate in the ‘Introduction Phase’ was also in its infancy.

Development Phase
During the ‘Development Phase’ from 1999 to 2003, there was an upsurge of interest in the issue compared to the ‘Introduction Phase’. In 1999, two out of seven cases recognised a breach of an implied term of good faith, which equates to 29 percent of the total cases. In 2000, two out of eight cases recognised a breach of an implied term of good faith, which equates to 25 percent. In 2001, six out of 12 cases recognised a breach of an implied term of good faith, which equates to 50 percent. In 2002, three out of 16 cases recognised breach of implied term of good faith, which equates to 19 percent. In 2003, five out of 12 cases recognised a breach of an implied term of good faith, which equates to 42 percent. The data shows that the level of recognition is increasing, for example, six out of 12 cases or 50 percent were identified in 2001 to have breached an implied term of good faith in contractual performance. However, the data shows that the percentage of breaches is less than 50 percent, which indicates that the level of recognition of the breach of an implied term of good faith remains low.

Consolidation Phase
In the third phase from 2004 to 2009, the acceptance of a breach of an implied term of good faith in contractual performance is steadier when compared to the ‘Development Phase’. In 2004, two out of four cases recognised a breach of an implied term of good faith, which equates to 50 percent. In 2005, two out of seven cases recognised a breach of an implied term of good faith, which equates to 29 percent. In 2006, one of seven cases recognised a breach of an implied term of good faith, which equates to 14 percent. In 2007, five out of eight cases recognised a breach of an implied term of good faith, which equates to 63 percent. In 2008, one out of eight cases recognised a breach of an implied term of good
faith, which equates to 11 percent. In 2009, two out of six cases recognised a breach of an implied term of good faith, which equates to 33 percent.

There are two instances where there are higher rates of acceptance of breach which is evident, in 2004 and 2007, where two out of the four identified cases are breach cases, which equate to 50 percent. In 2007, five out of eight cases were breach cases, equating 63 percent. The remaining years are reported to be less than 50 percent. The data demonstrates that the recognition to breach an implied term of good faith is still low.

Overall, the data demonstrates that the argument of breach of an implied term of good faith was not able to convince the court. One conclusion that can be drawn from this data is that the claim of breach of an implied term of good faith is a new course of action. There is also the possibility that the claim of breach was misguided given that there were no clear guidelines for interpreting the concept of good faith.
Figure 6.10: Breach Rate Where Term Implied by Year

Table 6.6: Breach Rate Where Term Implied by Year

<table>
<thead>
<tr>
<th>Year</th>
<th>Breach Count</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>1993</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>1994</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>1995</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>1996</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>1997</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>1998</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>1999</td>
<td>2</td>
<td>6%</td>
</tr>
<tr>
<td>2000</td>
<td>6</td>
<td>18%</td>
</tr>
<tr>
<td>2001</td>
<td>5</td>
<td>15%</td>
</tr>
<tr>
<td>2002</td>
<td>2</td>
<td>6%</td>
</tr>
<tr>
<td>2003</td>
<td>2</td>
<td>6%</td>
</tr>
<tr>
<td>2004</td>
<td>1</td>
<td>3%</td>
</tr>
<tr>
<td>2005</td>
<td>5</td>
<td>15%</td>
</tr>
<tr>
<td>2006</td>
<td>1</td>
<td>3%</td>
</tr>
<tr>
<td>2007</td>
<td>2</td>
<td>6%</td>
</tr>
<tr>
<td>2008</td>
<td>1</td>
<td>3%</td>
</tr>
<tr>
<td>2009</td>
<td>2</td>
<td>6%</td>
</tr>
</tbody>
</table>

Figure 6.10 illustrates the quantity of breach rates as a proportion of the total sample and the sub-sample of cases in which a good faith obligation term was implied respectively. Table 6.6 shows the number of cases and percentage of breach rates by year. It shows that throughout the period of review, the breach rate where term implied by year is less than 20 percent compared to the breach of implied term of good faith cases as illustrated in Figure 6.9. Both Figure 6.9 and Figure 6.10 demonstrate a high degree of inconsistency between breaches of implied term of good faith and breaches rate where term implied by year. One interpretation of this inconsistency is that the nature of good faith is still not clear in Australian contract law.
Figure 6.11: Cases Where the Court Found a Breach and Implied Term of Good Faith by Jurisdiction

Table 6.7: Cases Where Court Found a Breach and Implied Term of Good Faith by Jurisdiction

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Total</th>
<th>NSW</th>
<th>VICTORIA</th>
<th>FEDERAL</th>
<th>OTHER</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>Total</td>
<td>47</td>
<td>21</td>
<td>23</td>
<td>13</td>
</tr>
<tr>
<td>%Total</td>
<td>%Total</td>
<td>45%</td>
<td>20%</td>
<td>22%</td>
<td>13%</td>
</tr>
<tr>
<td>Implied</td>
<td>Implied</td>
<td>36</td>
<td>16</td>
<td>14</td>
<td>8</td>
</tr>
<tr>
<td>%Implied</td>
<td>%Implied</td>
<td>77%</td>
<td>76%</td>
<td>61%</td>
<td>62%</td>
</tr>
<tr>
<td>Breach</td>
<td>Breach</td>
<td>13</td>
<td>6</td>
<td>7</td>
<td>6</td>
</tr>
<tr>
<td>%Breach</td>
<td>%Breach</td>
<td>28%</td>
<td>29%</td>
<td>30%</td>
<td>46%</td>
</tr>
</tbody>
</table>

The data is now analysed by jurisdiction in order to evaluate the overall legal construct opinion. Figure 6.11 illustrates the cases where the court found breach of an implied term of good faith by jurisdiction. Table 6.7 depicts the quantity and percentage of breach rate, and the quantity and percentage of implied term of good faith based on the total number of cases from each jurisdiction.
**NSW**

47 cases of good faith were identified, which equates to 45 percent of good faith cases. The number of implication cases are 36, which equates to 77 percent of implication cases. The breach cases are 13, which equates to 28 percent of breach cases.

**Victoria**

There are 21 identified good faith cases, which equates to 20 percent of good faith cases. The implication cases are 16, which equates to 76 percent of implication cases. The breach cases are six, which equates to 29 percent of breach cases.

**Federal**

There are 23 identified good faith cases, which equates to 22 percent of good faith cases. The implication cases are 14, which equates to 61 percent of implication cases. The breach cases are seven, which equates to 30 percent of breach cases.

**Other States**

There are 13 identified good faith cases, which equates to 13 percent of good faith cases. The implication cases are eight, which equates to 62 percent of implication cases. The breach cases are six, which equates to 46 percent of breach cases.

Overall, the empirical evidence suggests that NSW has the highest number of cases from the total case sample; 47 of 104 cases, which equates to 45 percent of the total case sample. The implication rate is higher. Out of 36 of 47 cases, which equates to 77 percent of the total cases, a good faith term was implied. The breach rate is also higher across samples, 13 of 36 of implication cases or 28 percent came from NSW. This empirical data is significant to prove that the issue of good
faith is receiving more attention in NSW compared to Victoria, Federal and Other States.

6.5 CONCLUSION

The data described above reveals material variation in the incidence of good faith cases raised, the issue of implication of good faith, and the instances of breach of an implied term of good faith, both by year and jurisdictions in Australia.

It is noteworthy to discover that there are 104 cases from 1992 to 2009 which discussed an implied term of good faith in Australia since it was first put onto the judicial agenda in 1992 in the case of Renard. The number of issues concerning good faith are growing over the period of review as illustrated by the three phases; Introduction Phase (1992-1998), Development Phase (1999-2003) and Consolidation Phase (2004-2009). NSW had the most identified cases pleading an implied term of good faith both by year and jurisdiction, with 47 cases which, equates to 45 percent. Victoria followed with 21 cases, which equates to 20 percent, Federal courts cases numbered 23 cases, which equates to 22 percent, and Other States reported 13 cases, which equates to 13 percent, as illustrated in Figure 6.2 and Table 6.1 above.

The empirical data shows that the implication rate is higher. There are 74 cases of implication from the 104 identified cases which equates to 77 percent as illustrated by Figure 6.7. The empirical data demonstrates that when the court implies a term they prefer to imply term ‘implied in law’ as a necessity for legal incident of particular cases law. The empirical data demonstrates that there are 64 cases identified to imply a term ‘implied in law’ and 10 cases identified to imply a term ‘implied in fact’. The empirical data also reported that NSW had the most implication cases, 36 cases of implication from 47 identified cases which is equivalent to 79 percent. This was followed by Victoria, 16 cases of implication from 21 identified cases which is equivalent to 76 percent. Commonwealth courts
and Other States had 14 cases of implication from 23 identified cases which is equivalent to 61 percent, and eight cases of implication from 13 identified cases which is equivalent to 62 percent, respectively as illustrated in Figure 6.6 and Table 6.3 above.

The court recognised breaches of an implied term of good faith based on implication either in the form of term ‘implied in law’ or term ‘implied in fact’. 43 percent of those cases are found to breach an implied term of good faith. This data suggests that less than half of all cases accepted pleading for a breach of an implied term of good faith as illustrated in Figure 6.7 and Table 6.4 above. The number of cases argued for a breach of an implied term of good faith is low. There is also the possibility that the claim of breach was misguided in the absence of specific and precise meaning of good faith. This indicates that the argument of breach of an implied term of good faith was not able to convince the court as illustrated in Figure 6.9. Therefore, when the party pleads a breach of an implied term of good faith based on implication, the rate is low as the court is not convinced.

The NSW data suggests that litigants in NSW were able to convince a court that a breach of an implied good faith term had transpired during the period of review. Figure 6.11 suggests that there is a popular reception of good faith in NSW, in terms of total number of cases, implied cases and breach cases compared to other jurisdictions. In total, in NSW, the implication cases is 36, which equates to 77 percent, and the breach of an implied good faith term is 13 cases, which equates to 28 percent, as illustrated in Table 6.7.

Three key propositions may be derived from this exercise. First, the instability in the incidence of good faith from the three phases (Introduction phase 1992-1998, Development Phase 1999-2003 and Consolidation Phase 2004-2009) suggests that the law relating to the concept of good faith is still fractured along jurisdictional
lines. NSW was still the dominant state in dealing with the issue of good faith. Secondly, volatility remains in the incidence of good faith litigation, implication rates as well as breach that suggests considerable tension and inconsistency in the judiciary. Finally, while there was growth of recognition from when it was first introduced in 1992, the empirical data indicates that the growth of the recognition was inconsistent across the three phases.

It should also be noted however, that the observed incidence, term implication rates, and breach rates represent only a partial view of the data. To gain further insight into good faith in Australia, the role played by the judges concerning the legal acceptance of good faith needs to be examined. This is endeavoured in the following chapter.
7 EMPIRICAL STUDY OF THE JUDICIAL ATTITUDE FOR GOOD FAITH IN AUSTRALIAN CONTRACT LAW

Chapter Seven reviews the attitude of Australian judges to good faith in contract law by year and jurisdiction. Australian judges differ in their view of good faith. Confusion seems to have mostly arisen from the nature of its first appearance within the Australian legal framework, namely in the form of obiter comments by Priestley J in the Renard case. The trends of support by Australian judges are analysed based on 104 cases by year and jurisdiction. A four point Likert-type scale is used to access the attitude of judges regarding the concept of good faith. In order to measure the validity and reliability of the data, the ‘average’ and ‘standard deviation’ is used in this study.

7.1 INTRODUCTION

Parties draft contracts based on their mutual understanding. The parties agree on the terms of the contract with the expectation that what was agreed upon in the contract will be carried out as promised. In reality however, it may turn out that one party to the agreement refuses to perform or that one party’s performance is substandard. In some cases, the judge has to arrive at a different decision to uphold justice in which will most likely result in decision which are different from the agreed contract. Conventionally in the common law, the judge will decide the case based on the agreed contract and not rewrite the contract.

Lord Denning once classified judges as ‘timorous souls’ and ‘bold spirits’.1 The ‘timorous souls’, that Lord Denning referred to were “judges who were fearful of allowing a new cause of action, whereas his Lordship’s use of ‘bold spirits’

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referred to judges who were ready to allow a new cause of action if justice so required.” In dealing with the issue of good faith, those judges who are ‘timorous souls’ may argue that an implied obligation of good faith will add to uncertainty in contract law. While, those judges who are ‘bold spirits’ may argue that there is a need to explore good faith to ensure the contract is honoured on just terms. When the expected benefit of a contract is achieved, this means that justice is upheld which is parallel with the contract expectation. Lord Denning emphasised that the issue of justice is the main agenda of a judge. His Lordship stated that:

My root belief is that the proper role of the judge is to do justice between the parties before him. If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all that he legitimately can to avoid the rule –or even to change it-so as to do justice in the instant case before him.

In Renard, Priestley J joined the ‘bold spirits’ in favouring the development of a general principle of good faith by way of his Honour’s obiter comments. His Honour added good faith to the judicial agenda in Australia. His Honour further commented that:

The kind of reasonableness I have been discussing seems to me to have much in common with the notions of good faith which are regarded in many of the civil law systems of Europe and in all States in the United States as necessarily implied in many kinds of contract.

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3 In *Bilgola Enterprises Ltd v Dymocks Franchise Systems (NSW) Pty Ltd* (2000) 3 NZLR 169,180, Henry J commented that:

the significance of the need for certainty, particularly where parties to an arm’s length commercial transactions have carefully set out the details of their relationship, must be an important factor in any particular case.
In contrast, Rogers CJ is clearly a more ‘timorous soul’ in this debate. His Honour raised concerns that parties are able to secure their own interests in the contract. In *GSA Group Pty Ltd v Siebe Plc*, Rogers CJ commented that:

> Against a trend towards a general obligation of good faith, fairness, or reasonableness, there have been judicial comments to the effect that the courts should be slow to intrude the commercial dealings of parties who are quite able to look after their own interests. The courts should not be too eager to interfere in the commercial conduct of the parties, especially where the parties are all wealthy, experienced, commercial entities able to attend to their own interests.\(^6\)

This chapter seeks to analyse trends that support good faith obligation by Australian judges based on 104 cases by year and jurisdiction. This includes the patterns of support between jurisdiction and the degree of respect in which some judgements may be held by their peers. The 104 cases are analysed statistically. The average and standard deviation are ascertained to measure the validity and reliability of the data. In addition, a four point Likert-type scale is used to review the support for good faith obligation by the Australian judges. Chapter 7.2 discusses the level of judicial review in the sample by jurisdiction, i.e. the judicial level in which the decision was made. Chapter 7.3 considers the level of judicial attitude in the sample by jurisdiction. Chapter 7.4 discusses the average support for all cases by year, by three phases and in each specific jurisdiction. Chapter 7.5 concludes with a discussion of the level of support offered by individual judges on Priestley J’s obiter comments of good faith.

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\(^6\) (1993) 30 NSWLR 573, 579.
7.2 LEVEL OF JUDICIAL REVIEW FOR A GOOD FAITH OBLIGATION

As noted above, in 1992, the obiter comments of Priestley J in the case of Renard introduced the concept of good faith in the Australian judicial agenda. One means of analysing the support of Australian judges for the concept of good faith is by reviewing the level of judicial review in which the decision of good faith was made. For the purpose of analysis, there are two levels of judicial review, namely: Level 1: the case was a first instance decision by a single judge in a state Supreme Court or Federal Court, and Level 2: a case heard by a state Court of Appeal or by the Full Court of the Federal Court of Australia. The discussion is based on the frequency of the cases and the issue of precedent. The data encapsulating the level of judicial review in which the decision was made in Australia is presented in Figure 7.1 below.

Figure 7.1: Overall Judicial Review for Good Faith Obligation

<table>
<thead>
<tr>
<th></th>
<th>Level 1</th>
<th>Level 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW</td>
<td>40</td>
<td>7</td>
</tr>
<tr>
<td>Victoria</td>
<td>20</td>
<td>1</td>
</tr>
<tr>
<td>Federal</td>
<td>18</td>
<td>4</td>
</tr>
<tr>
<td>Others</td>
<td>10</td>
<td>4</td>
</tr>
</tbody>
</table>

Note: ‘Others’ comprises the jurisdictions of WA, QLD, TAS, and ACT

Figure 7.1 illustrates that at Level 1 there are 40 cases reported in NSW, 20 cases reported in Victoria, 18 cases reported in the Federal court and 10 cases reported in Others States. In sum, there are 88 cases at Level 1. At Level 2, there are seven
cases reported in NSW, one case reported in Victoria, four cases reported in the Federal court and four cases reported in Other States. In sum, there are 16 cases at Level 2.

Overall, there is more support received at Level 1 as there are 88 cases at Level 1 compared to the 16 cases at Level 2 from all the various jurisdictions throughout Australia. One conclusion that can be drawn from this data is that when good faith was pleaded at Level 1, there is a higher chance that the judge will decide based on good faith. This may indicate that good faith is a new concept and the judges are open to discussing the concept. In contrast, relatively few cases reach Level 2. Problems of cost and risk faced by the concerned parties limited their ability to plead on good faith at Level 2.7

The Renard case was decided at Level 2 in NSW. The issue of good faith was raised as obiter comments in the NSW Court of Appeal. One conclusion that can be drawn from this is that the obiter comments have become a ratio decidenti8 in many NSW cases. Most of the cases in NSW referred to the obiter comments in the Renard case as their reason to decide the case. This means that the obiter comments have developed as a precedent for other courts lower in the judicial hierarchy in NSW. Under the theory of precedent, it should have great influence on judges hearing the issue of good faith at Level 1. To illustrate, this is shown by the data where in NSW, there are more cases at Level 1. This indicates the obiter comments of Priestley J had become a precedent in NSW. The precedent of a state court however is not binding on other state courts. Therefore, the precedent that was set up by NSW is not binding on other state courts.

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7 The cost to appeal at a higher level of court is higher compared to the cost at the first instance court. There is also a risk of uncertainty when the contracting parties appeal; whether the case will be won or not upon appeal.

8 Literally ratio decidendi means the reason for a decision. From the empirical observation, the obiter comments of Priestley J in Renard case has become the reason which determine the decision in the following cases.
There are two conclusions that can be drawn from this data. Firstly, good faith is a new concept in Australia whereby the judges are open to discuss the concept of good faith. Secondly, in NSW, the obiter comments of Priestley J had become a precedent in NSW as illustrated in Figure 7.1, where many NSW cases considered the precedent as ratio decidendi.

### 7.3 LEVEL OF JUDICIAL SUPPORT FOR GOOD FAITH OBLIGATION

Apart from determining the level of support for the concept of good faith in regards to the level of judicial review, it is also important to measure the level of judicial support for a good faith obligation. To this end, the Likert-type scale is used as a means to study the attitude of the judges concerning the concept of good faith. A four point Likert-type scale was constructed for each of the 104 cases. The four point Likert-type scale are as follows: Support Level 1 = total support, Support Level 2 = qualified support, Support Level 3 = qualified rejection and Support Level 4 = outright rejection. The four point Likert-type scale is used to excess the support level to avoid any bias compared to a five point Likert-type scale, which is not suitable to review the support level of judges. In evaluating the support level of the judges, there is no ‘neutral’ support level when the judges give their decision; therefore, a four point Likert-type scale is suitable to review the support level of judges. Among the benefits of using the Likert-type scale is that the ‘questions used are usually easy to understand and thus result in consistent answers’. Each support level is supported by the expression of the cases indicating the specific support level.

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7.3.1 Level of Judicial Support

The data pertaining to the support levels of the sample cases used in this study is set out in Figure 7.2. Further explanations to each of the Support level are as follows:

*Support Level 1* is used to denote a situation where the judge unambiguously and without reservation declares the existence of good faith in the performance of contracts.

*Support Level 2* is where the judge expresses a generally optimistic view as to the existence of good faith obligations but also expresses some degree of reservation. One common example of this was the tendency of the judge to discuss the good faith question on the assumption that good faith performance obligations would generally be implied as legal incidents of commercial contract but without actually deciding so. Here, the judge does not express aversion to the issue, but apparently, the judge is sufficiently confident in the state of the law to simply declare, in its own right, that the law is that terms requiring good faith in contractual performance will be implied into commercial contracts.

*Support Level 3* denotes situations where the judge expresses doubt or reservation as to the existence or desirability of a good faith performance obligation in the Australian law of contract. An indication of *Support Level 3* is that the cases did not engage in further discussion of good faith.

*Support Level 4* refers to cases where the judge expressly rejects the existence of the issue of good faith in contractual performance obligation.
The analysis of the data in Figure 7.2 are as follows:

Support Level 1
32 out of 104 cases were at Support Level 1. NSW had most support (20) followed by Victoria (4), Federal (6) and Other States (2).

One conclusion that can be drawn from this data is that those judges at Support Level 1 are simply following the precedent set in NSW. In NSW, there was most support at Support Level 1 compared to Victoria, Federal and Other States. The largest number of cases pertaining to good faith occurred in NSW with 47 cases.\(^{11}\) Clearly the concept of good faith was much more evident in the judicial thinking of NSW judges and had gained obvious momentum. It therefore appears that the precedent introduced by the obiter comments of Priestley J in the Renard case was particularly influential in NSW.

\(^{11}\) See Figure 6.3: Cases in which Good Faith is Raised as an Issue by Year and Jurisdiction, 159.
Although the concept of good faith was first discussed as an obiter comment of Priestley J in the *Renard* case, the obiter comment has become a precedent to the subsequent cases. For example, in the NSW Supreme Court case of *Alcatel Australia Ltd v Scarcella*, Sheller JA followed the obiter comments of Priestley J to the concept of good faith in *Renard* and *Hughes Bros Pty Ltd v Trustees of Roman Catholic Church, Archdiocese of Sydney*. His Honour held that:

> The decision in *Renard Construction* and *Hughes Bros* means that in New South Wales a duty of good faith, both in performing obligations and exercising rights may by implication be imposed upon parties as part of a contract.

In *Commonwealth Bank of Australia Ltd v Spira*, Gzell J commented that good faith should be applicable to all types of contract. His Honour stated:

> I was invited to depart from *Burger King* on the basis that any extension of the type of contract in which an implication as a matter of law should be made should be circumscribed and not extended to commercial contracts generally. I decline to do so. I regard myself as bound by *Alcatel* ... and *Burger King*... to the view that such implication arises or may arise in commercial contracts... In my view, once it is accepted that a term of good faith may be implied in a contract of a particular type as a matter of law if it is both reasonable and necessary to do so in the sense specified in *Byrne*, there seem no good reason to confine the types of contract in which the implication may arise or to allow for extension of the categories in limited circumstances only.

In the WA Supreme Court case of *Dockpride Pty Ltd v Subiaco Redevelopment Authority*, Le Miere J commented that good faith is a developing concept in Australia. His Honour held that:

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16 [2005] WASC 211.
Good faith has been recognised as implied in a contract in a number of cases in Australia: e.g. *Hughes* (supra); *Renard Constructions (ME) Pty Ltd v Minister for Public Works* [1992] 26 NSWLR 234; *Garry Rogers Motors (Aust) Pty Ltd* [1999] FCA 903; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349…A duty to act in good faith in the performance of a contract is an emerging doctrine in Australian contract law…I accept that it was an implied term of the process contract between the Authority and *Dockpride* that the Authority would deal with *Dockpride*, fairly and in good faith.17

The expression of the judges at *Support Level 1* is a positive and confident statement that indicates complete support of the concept of good faith.

*Support Level 2*

49 out of 104 cases were found at *Support Level 2*. The proportion of cases in each jurisdiction is as follows: NSW (16), Victoria (13), Federal (11) and Other States (9).

In *Support Level 2*, the judges simply declared that implication should be made to good faith to all commercial contracts, 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’.18 There are two kinds of implication of terms: term ‘implied in law’ and ‘implied in fact’. Term ‘Implied in law’ is based on the legal incidents of a particular class of contract. Term ‘Implied in fact’ is concerned with business efficacy. The judges are confident in declaring that good faith should be term ‘Implied in law’ to ensure the benefit of the contract is reaped. For example, in competitive sports like rugby, there is an implication that the rugby club would not deprive itself of its team or deprive itself of the capacity to fulfil its obligation under the commitment agreement to

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17 [2005] WASC 211 [152-156].
18 See *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 450.
participate in the rugby competition. The expression of this kind of support can be seen in the Federal Court as illustrated below.

In *News Ltd v Australian Rugby Football League Ltd*, Burchett J suggested that there is a need to imply an obligation of good faith in a sport like rugby. His Honour further stated that:

> There is some controversy as to whether there is generally a contractual obligation of good faith…But it seems to me that a contract of the kind that the commitment agreement represents, made between parties involved in the conduct of a sporting competition, is in a special position, for reasons elaborated at length in United States authorities to which I have already referred. Accordingly, I think the suggested implication should be made.\(^{19}\)

In *Hughes Aircraft v Airservices Australia*,\(^ {20}\) Finn J considered that good faith is a well recognised idea in contract law. His Honour was of the opinion that there should be a universal duty of good faith to all kind of contracts, where it is the expected standard to achieve the success of the contract. His Honour stated that:

> Having said this, it is also appropriate to indicate that my own view inclines to that of Priestley JA. Of that inclination I would say only this. Fair dealing is a major (if not openly articulated) organising idea in Australian law. It is unnecessary to enlarge upon that here. More germane to the present question, the implied duty is, as is well known, an accepted idea in the contract law of United States and probably in Canada; notwithstanding the significant adjustments this would occasion to some of contract law’s apparent orthodoxies.

> I should add that, unlike Gummow J, I consider a virtue of the implied duty to be that it expresses in a generalisation of universal application, the standard of conduct to which all contracting parties are to be expected to adhere throughout

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\(^{19}\) (1996) 135 ALR 33, 120.

\(^{20}\) (1997) 146 ALR 1.
the lives of their contracts. It may well be that, on analysis, that standard would be found to advance little the standard that presently may be extracted from contracting parties by other means. But setting the appropriate standard of fair dealing is, in my view, another matter altogether from acceptance of the duty itself.\textsuperscript{21}

At \textit{Support Level 2}, the judges simply declared that good faith should be implied to all kinds of contracts. In this context, the judges are confident that good faith is a term ‘Implied by law’ based on the legal incidents of a particular class of contract. It is easier to identify good faith as a term ‘Implied in law’ based on the legal incident of a particular class of contract and to ensure the benefit of the contract is reaped by both contracting parties.

\textit{Support Level 3}

There are 23 out of 104 cases that were found at \textit{Support Level 3}. The proportion of cases in each jurisdiction is as follows: NSW (11), Victoria (4), Federal (6) and Other States (2). The expression of this kind of support is illustrated in the examples below.

For example in \textit{GSA Group Pty Ltd v Siebe Plc}, Roger CJ held that:

\begin{quote}
Against a trend towards a general obligation of good faith, fairness, or reasonableness, there have been judicial comments to the effect that the courts should be slow to intrude the commercial dealings of parties who are quite able to look after their own interests. The courts should not be too eager to interfere in the commercial conduct of the parties, especially where the parties are all wealthy, experienced, commercial entities able to attend to their own interests.\textsuperscript{22}
\end{quote}

For example in \textit{Arrowcrest Group Ltd v Ford Motor Company of Australia Ltd}, Heerey J held that:

\textsuperscript{21} (1997) 146 ALR 1, 37.
\textsuperscript{22} (1993) 30 NSWLR 573, 579.
It is at least doubtful whether there is any such implied obligation [of good faith] in a contract of this type. (Citations omitted).\textsuperscript{23}

The judges at \textit{Support Level 3} have greater reservations as to the need to legislate a good faith obligation as they maintain that parties to a contract are more than capable of securing their interests and ensuring that their interests are not contractually abused by the other party. There is an evident fear of becoming too involved in the contract and the consequence that may arise from what they consider is an unwarranted intrusion.

\textit{Support Level 4}

\textit{Support Level 4} refers to cases where the judge expressly rejects the existence of the issue of good faith in contractual performance obligation. No such case was found.

\textbf{Table 7.1: Percentage of Overall Level of Judicial Support for a Good Faith Obligation}

<table>
<thead>
<tr>
<th>Support Level</th>
<th>NSW</th>
<th>Victoria</th>
<th>Federal</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Support Level 1</td>
<td>20 (63%)</td>
<td>4 (13%)</td>
<td>6 (19%)</td>
<td>2 (6%)</td>
</tr>
<tr>
<td>Support Level 2</td>
<td>16 (33%)</td>
<td>13 (27%)</td>
<td>11 (22%)</td>
<td>9 (18%)</td>
</tr>
<tr>
<td>Support Level 3</td>
<td>11 (48%)</td>
<td>4 (17%)</td>
<td>6 (26%)</td>
<td>2 (9%)</td>
</tr>
<tr>
<td>Support Level 4</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Table 7.1 illustrates the percentage of overall level of judicial support for a good faith obligation. At \textit{Support level 1}, NSW has the most support, namely 20 cases which is equivalent to 63 percent compared to Victoria, Federal and Other States, which reported 12 cases, equivalent to 38 percent. This indicates that the support received by the NSW judges is greater than 50 percent, which indicates full support. At \textit{Support Level 2}, there are 33 cases or the equivalent of 67 percent from the combination of Victoria, Federal and Other States, and there are 16 cases

\textsuperscript{23} [2002] FCA 1450 (See Question No. 37).
which is equivalent to 33 percent in NSW. The combination of Victoria, Federal and Other States is double the quantity and percentage of cases from NSW at Support Level 2, which indicates that there is a general optimum view as to the existence of good faith but also expresses some degree of reservation to the concept of good faith. At this stage, there is a tendency that the judges would generally imply good faith by term ‘implied by law’ to all commercial contracts.

At Support Level 3, there are 11 cases or 48 percent from NSW and 12 cases or 52 percent from a combination of Victoria, Federal and Other States. This indicates that at Support Level 3, all jurisdictions showing the similar amount of quantity and percentage of cases indicates a qualified rejection where the judges are sceptical of the uncertainty the concept of good faith will bring to the contract. Despite the differences in support of the Australian judges for the concept of good faith as illustrated in Table 7.1, they have not entirely rejected the concept. This is a positive sign from the Australian judges concerning the development of the concept of good faith.

**7.4 VARIATION OF SUPPORT LEVEL BETWEEN FIRST INSTANCE AND APPEAL DECISION BY JURISDICTION**

The aim of this discussion is to examine the variation in the support level between first instance and appeal decisions by jurisdiction. This exercise aims to determine the degree of influence of the obiter comments of Priestley J. Sometimes the obiter comments of a judge have no influence but on certain occasions, obiter comments can prove to be significantly influential. The analysis of the variation of support level for good faith between decisions at first instance and appeal decisions by jurisdiction provides an additional view of the support level of the judges. The level of support by judges between decisions at first instance and appeal decisions by jurisdiction is measured using the ‘average support type’ and ‘standard deviation’.
The following is the formula used to calculate the ‘average support type’ and the ‘standard deviation’. The formula for the ‘average support type’ of each jurisdiction from both first instances and appeal level is calculated using the following formula: 

\[ \bar{X} = \frac{\sum_{i=1}^{n} X_i}{n} \]

where;

- \( \bar{X} \) represents the sample mean of support level.
- \( X_i \) represents the support level of a particular jurisdiction.
- \( n \) represents the number of cases.
- \( \sum \) represents the summation.

The ‘average support type’ is calculated by adding the support types within each jurisdiction for a particular instance and then divided with the sum by the number of cases.

The ‘standard deviation’ is calculated to show the dispersion of the support level. The dispersion of the support level shows the scattering of the values of a frequency distribution from an ‘average’. The smaller the dispersion from the average, the more concentrated the data which indicates stronger confidence level. While the bigger the dispersion from the average, the less concentrated the data which indicates lower confidence level. The formula of calculating standard deviation is as follows;

\[ S = \sqrt{\frac{\sum_{i=1}^{n} (X_i - \bar{X})^2}{n-1}} \]

where;

- \( S \) represents standard deviations.
- \( \bar{X} \) represents the sample mean of support levels.
- \( X_i \) represents the support level of a particular jurisdiction.
- \( n \) represents the number of cases.
- \( \sum \) represents the summation.
The value of the ‘average support type’ estimates the strength of the support for, or opposition to, the concept of good faith in each jurisdiction. The ‘average support type’ stands for level of support and those closest to the ‘average support type’ are those wherein the most support is given.

The ‘standard deviation’ is another form of calculating an average, however, it does not show the centre of the data, rather it shows how the data is spread. In this instance, the ‘standard deviation’ will show the dispersion of confidence of each jurisdiction. These two formulas are used for the remaining figures from Figure 7.3 through to Figure 7.18.\(^\text{24}\)

Figure 7.3 illustrates the support level at first instance by jurisdiction. Figure 7.4 presents the support level at appeal level by jurisdiction. Both figures are important in order to analyse the variation between the two instances.

\(^{24}\) Assuming all the figures are positive.
Figure 7.3: Average Support Level (First Instances) by Jurisdiction

Note: ‘Others’ comprises the jurisdictions of WA, QLD, TAS and ACT

Figure 7.4: Average Support Level (Appeal) by Jurisdiction

Note: ‘Others’ comprises the jurisdictions of WA, QLD, TAS and ACT
First Instance by Jurisdiction

In NSW, the average support score is 1.93 and the standard deviation is 0.86, which shows that most of the support scores are at either Total Support or Qualified Support. In Victoria, the average support score is 2 and the standard deviation is 0.65, which shows a relatively smaller dispersion compared to NSW. Here the support level is concentrated at Qualified Support. In Federal Court the average support score is 1.83 and the standard deviation is 0.71, which is very similar to NSW data and shows that its support scores are concentrated at Total Support and Qualified Support. In Other States the average support score is 2.1 and the standard deviation is 0.6, which indicates the support scores are concentrated at Qualified Support.

Figure 7.4 shows similar data between jurisdictions. One conclusion that can be drawn from this is that good faith was first introduced at the first instance level therefore the overall support for each jurisdiction is between Total Support and Qualified Support.

Appeal Level by Jurisdiction

In NSW, the average support score is 1.29 and the standard deviation is 0.49, which indicates confidence in the support system, as most of the data is concentrated at Total Support. In Victoria, the average support score is 2 and there is no standard deviation because there was only one case. Much cannot be said on this due to the low number of cases. In the Federal Court, the average support score is 3 and the standard deviation is 1, which indicates less confidence in the support system because the data is dispersed between Qualified Support and Total rejection. In Other States, the average support score is 1.67 and the standard deviation is 0.58, which is similar to NSW, but with lesser support system because the data is dispersed between Total Support and Qualified Support.
The data suggests that there is a higher confidence level of appeal judges when the issue of good faith is raised in NSW followed by Other States. At this stage, the confidence level ranges from Total Support to Qualified Support from both NSW and Other States. This means when the party raised the issue of good faith in appeal both in NSW and Other States, the confidence level of the judges to deal with the issue of good faith is higher.

*Comparison between First instance and Appeal level*

In NSW, the confidence level at appeal level is higher than at first instance. At first instance, the average support score is 1.93 and the standard deviation is 0.86, whereas at the appeal level, the average support score is 1.29 and the standard deviation is 0.49. The standard deviation of the data decreases at the appeal level, which indicates that the judges at the appeal level in NSW are gaining more confidence in their use of the concept of good faith.

In Victoria, there is an insufficient number of cases at the appeal level compared to the first instance level.

At the Federal level, the confidence at both first instance and appeal level is different in terms of the data. There is more dispersion in the appeal level compared to the first instance as illustrated by the increase of standard deviation, which also indicates a lack of confidence of the judges in the concept of good faith.

In Other States, the confidence of both first instance and appeal level indicates trust. However, at the first instance level there is relatively more dispersion of the data compared to the data at the appeal level, which indicates the lack of confidence of the judges in the concept of good faith.
In sum, in NSW, the confidence level at the appeal level is higher than at first instance. At the first instance level, most of the data ranges from Total Support to Qualified Rejection, whereas at the appeal level the data ranges from Total Support to Qualified Support. In Victoria, it is difficult to interpret the data due to insufficient data. At the Federal level, however, confidence at first instance is higher. It ranges from Total Support to Qualified Support, whereas at the appeal level it ranges from Qualified Support to Total Rejection. In Other States, confidence levels are similar. However, at the appeal level it is slightly higher. In both instances, the confidence levels range from Total support to Qualified support.

One conclusion that can be drawn from this is that the obiter comments of Priestley J in the Renard case set an unusually strong precedent in NSW. Another factor that influenced the higher level of confidence in NSW includes the fact that many cases were decided in NSW, as the largest state in Australia. It is without a doubt that this would have positively influenced the confidence levels of judges. The higher confidence levels of NSW appeal judges influenced other judges at the appeal level in other states.

7.4.1 Average Support Level for Good Faith by Year and by Jurisdiction

This section assesses the average support level for good faith by year and jurisdiction by the judges in order to trace its development. The study period for this assessment is divided into three phases, namely the ‘Introduction phase 1992-1998’, ‘Development phase 1999 to 2003’ and ‘Consolidation phase 2004 to 2009’. The ‘Introduction Phase from 1992 to 1998’ indicates the period where the concept of good faith was first discussed in Australian case law since Renard case in 1992. The ‘Development Phase from 1999 to 2003’ indicates the period where good faith cases increasingly received judicial attention in judgment. The ‘Consolidation Phase from 2004 to 2009’ indicates the period in which good faith
had wider judicial acceptance. The average represents the assessed ‘support values’ as follows: Level 1 = total support, Level 2 = qualified support, Level 3 = qualified rejection and Level 4 = outright rejection.

Figure 7.5 depicts the average good faith support score and standard deviation during the three phases across the entire sample of 104 cases, calculated on a case weighted basis.

**Figure 7.5: Average Support All Cases by Year**

![Bar chart showing support levels by year across three phases: Introduction Phase, Development Phase, and Consolidation Phase.]

**Introduction Phase**

The ‘Introduction Phase’ covers the years 1992 to 1998. In 1992, 1994, 1995, 1996, 1997 and 1998, there is only one case reported in each of these years, so there is no standard deviation. In 1993, three cases were reported. The standard deviation is 1, which indicates Total Support. This is considered to be a high support score. The Introduction Phase is a phase in which there was confusion about the concept of good faith, where support scores were inconsistent. Here, the support scores ranged from Total Support, Qualified Support and Qualified Rejection. One conclusion that can be drawn from this data is that the judges are
still uncertain regarding the existence and scope of good faith due to its relatively recent introduction to Australia.

**Development Phase**
The ‘Development Phase’ covers 1999 to 2003. In 1999, there are seven reported cases with an average score of 1.86 and a standard deviation of 1.07. This indicates a high dispersion of data ranging from Total Support to Qualified Support. In 2000, there are eight reported cases with an average score of 1.75 and standard deviation of 0.71. Dispersion is also present here, but it is smaller than the dispersion of data in 1999 ranging from Total Support and Qualified Support. In 2001, there are twelve reported cases with an average score of 1.75 and standard deviation of 0.62. This is similar to the data of the year 2000 but there is a greater number of cases; offering more concrete information ranging from Total Support and Qualified Support. In 2002, there are sixteen reported cases with an average score of 2.19 and standard deviation of 0.98. The data is a touch widespread here, ranging from Total Support and Qualified Rejection. In 2003, there are sixteen reported cases with an average score of 1.92 and standard deviation of 0.51, which indicates less dispersion and concentrated data at Qualified Support. During the ‘Development Phase’ from 1999 to 2003, the average annual good faith support score varied significantly between a minimum of 1.75 in 2000 and 2001 and a maximum of 2.19 in 2002, indicating a Qualified Support. However, the standard deviation (the dispersion of data) steadily decreases. This shows that the judges at this stage are accepting the concept of good faith and are all leaning towards Qualified Support.

**Consolidation Phase**
The ‘Consolidation Phase’ ranges from 2004 to 2009. In 2004, there are four reported cases with an average score of 1.75 and standard deviation of 0.50. This shows a small dispersion with the data ranging from Total Support to Qualified Support.
Support. In 2005, there are seven reported cases with an average score of 2.29 and standard deviation of 0.52. This also shows a small dispersion but the data is more concentrated at Qualified Support. In 2006, there are eight reported cases with an average score of 2.13 and standard deviation of 0.64. The dispersion of data has increased and ranges from Total Support to Qualified Rejection. In 2007, there are seven reported cases with an average score of 1.71 and standard deviation of 0.76. The dispersion is increasing, but the data ranges from Total Support to Qualified Support. In 2008, there are nine reported cases with an average score of 2.00 and standard deviation of 1.00. The dispersion is large and the data greatly ranges between Total Support to Qualified Rejection. In 2009, there are six reported cases with an average score of 2.00 and standard deviation of 1.10. This data is very similar to the data in 2009, but has a slightly higher dispersion.

At the ‘Consolidation Phase’, the standard deviation (the dispersion of data) increases, which shows the judges vary in their perception of the concept of good faith. At this stage, good faith is no longer a new concept and the judges have made up their mind whether or not they are for or against it. The average support score continues to focus on Qualified Support.

**Figure 7.6: Overall Average Support All Cases by Three Phases**

<table>
<thead>
<tr>
<th></th>
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<th></th>
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</thead>
<tbody>
<tr>
<td>Average</td>
<td>1.75</td>
<td>1.93</td>
</tr>
<tr>
<td>Std. Deviation</td>
<td>0.85</td>
<td>0.79</td>
</tr>
</tbody>
</table>
Figure 7.6 depicts the overall average good faith support score and standard deviation by three phases across the entire sample of 104 cases in the final case database, calculated on a case weighted basis. The three-phased classification renders it easier to determine the changes in support levels.

At the Introduction Phase from 1992 to 1998, the total average score is 1.75 and the standard deviation is 0.89. This shows the data ranges between Qualified Support to Total Support. At the Development Phase from 1999 to 2003, the total average score is 1.93 and the standard deviation is 0.79. The dispersion is slightly smaller and the range is similar to the range of the introduction phase. At the Consolidation Phase from 2004 to 2009, the average score is 2.00 and the standard deviation is 0.77. Again, the dispersion has increased a little and the range has changed from Total Support to Qualified Rejection.

In total, the overall support for all cases by year is moving towards Qualified Support as illustrated in Figure 7.6. The standard deviation (the dispersion of the data) is consistent. One conclusion that can be drawn from this data is that it has taken over a decade for Australian judges to decide their stance towards the concept of good faith. Like other new concepts, familiarisation and acceptance takes time.

7.4.2 Average Support NSW Cases by Year

This section discusses the average support score in each jurisdiction by year.
Figure 7.7: Average Support NSW Cases by Year

Figure 7.7 depicts the average support by the judges in NSW by year. Judges in NSW have the longest tradition in supporting the concept of good faith in Australia.

**Introduction Phase**

In 1992, there is one reported case. The average support score is 1 and there is no standard deviation score. This indicates Total Support. In 1993, two cases were reported. The average support score is 2 and the standard deviation is 1.41. This indicates a very high dispersion from the average. From 1994 to 1997, there were no reported cases. In 1998, only one case was reported. The average support score is 1 and there is no standard deviation. This indicates Total Support.

During the Introduction Phase, good faith had been newly introduced in NSW, and the number of cases was low.\(^{25}\) Despite a low number of cases, the support level was high during this phase. The minimum average support score was Total Support in 1992 and 1998. There is one instance in 1993 wherein the judge

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\(^{25}\) See Figure 6.1: Cases that Raised Good Faith as an Issue (Per Year), 154.
showed Qualified Support. One conclusion that can be drawn from this data is that the obiter comments of Priestly J have gained in normative strength towards becoming a de facto precedent in NSW. This is because the recent decisions can be presumed to have canvassed the latest authorities on good faith, the upward trend towards greater acceptance can be assumed to be real, and that the concept of good faith as a precedent would have influenced future decisions regarding Australian contract law. This is supported by the case of Alcatel Australia v Scarcella and Ors, in which the appellant relied upon the obiter comments of Priestley J in the Renard case. The appellant argued that there is an implied term of good faith or reasonableness in the respondents’ performance of their lease obligations or exercise of their lease right which bound them to cooperate in a reasonable way to ensure that the appellant was not subjected to the expense and impact on an unreasonable fire order. The court rejected the appeal and held that the respondents had a legitimate interest in ensuring that the building was properly protected. This case is significant to illustrate that the obiter comments of Priestley J in the Renard case has set a precedent to other cases in NSW.

Development Phase

In 1999, there were four reported cases. The average support score is 2.25 and the standard deviation is 1.26. The dispersion is high and data ranges from Total Support to Qualified Rejection. In 2000, no case was reported. In 2001, five cases were reported. The average support score is 1.67 and the standard deviation is 0.82. The dispersion is relatively low compared to 1999 and the range is between Total Support to Qualified Support. In 2002, there were eight reported cases. The average support score is 1.78 and the standard deviation is 0.67. The data is similar to 2001 with the same range but with slightly less dispersion. In 2003, there were four reported cases. The average support score is 1.75 and the standard deviation is 0.5. Data is similar to the past two years but with a smaller dispersion.

In this phase, the maximum support score is found in 1999 in which the average score is 2.25, whereas the minimum support score is 1.67 in 2001. This indicates that the support score is approximately Qualified Support. The standard deviation decreases, which shows that the judges are becoming more familiar with the concept and showing more support. One conclusion that can be drawn from this data is that the obiter comments of Priestley J in the Renard case had set an unusual precedent for the Development Phase. At this stage, the judges were undergoing a period of adjustment to the concept introduced in the Introduction Phase.

Consolidation Phase
In 2004, three cases were reported. The average support score is 1.67 and the standard deviation is 0.58. This indicates that the data ranges between Total Support to Qualified Support. In 2005, there was only one reported case so no analysis is possible. The average support score is 3 and there is no standard deviation. This indicates Qualified Support. In 2006, there were three reported cases. The average support score is 2.33 and the standard deviation is 0.58. Here, the data ranges between Qualified Support to Qualified Rejection. In 2007, there were four reported cases. The average support score is 1.5 and the standard deviation is 1. The dispersion is high and data ranges from Total Support to Qualified Rejection. In 2008, there were six reported cases. The average support score is 2 and the standard deviation is 1.10. This indicates higher dispersion and range to that observed in 2007. In 2009, only one case was reported. The average support score is 1 and there is no standard deviation. This indicates Total Support. Although the precedent had already been set, the yearly average at this phase is inconsistent. The standard deviation is increasing, which shows that the judges have made up their minds and are either for or against the concept of good faith. In 2005 for example, there was only one reported case indicating Qualified Rejection, whereas in 2009, in which there was also only one reported case, this showed Total Support. The other years (2004, 2006, 2007, and 2008) varied in
their level of support. One conclusion that can be drawn from this data is that some judges continue to have their reservations while others have accepted the concept of good faith. This is because by this period, good faith was no longer a new concept. Judges were able to decide their stance toward the concept. This data correlated with Figure 7.5 in which the average support for all cases by year showed the same impact where longer periods of time have resulted in positive support of the concept.

Figure 7.8: Overall Average Support Score NSW cases by Three Phases
Figure 7.8 depicts the overall average support by the judges in NSW by year based on 3 phases. The three-phased classification renders it easier to determine the changes in support levels.

At the Introduction Phase ranging from 1992 to 1998, the total average score is 1.50 and the standard deviation is 1.00. This shows a high dispersion between Total Support and Qualified Support. At the Development Phase from 1999 to 2003, the total average score is 1.83 and the standard deviation is 0.78. This indicates less dispersion compared to the Introduction Phase but the data remains along the same range. At the Consolidation Phase from 2004 to 2009, the average score is 1.90 and the standard deviation is 0.91. The dispersion increases from the Development Phase, and the data ranges from Total Support and Qualified Rejection.

Overall, the support level over the three phases indicates that during the Introduction Phase the judges in NSW showed more support compared to the Development Phase and Consolidation Phase as illustrated in Figure 7.8. The standard deviation is higher in the Consolidation Phase compared to the Development Phase. The standard deviation in the Introduction Phase is irrelevant due to the low number of cases. This increase of standard deviation shows how the judges in NSW have decided their stance towards the concept. This indicates that the obiter comments of Priestley J in Renard case had set up a precedent in NSW. The average support levels generally centre on Qualified Support, which supports the notion that the concept of good faith is popular in NSW.
7.4.3 Average Support Victorian Cases by Year

Figure 7.9: Average Support Victoria Cases by Year

Figure 7.9 illustrates the average support in Victoria cases by year.

**Introduction Phase**

In Victoria, no cases were identified in 1992, 1993, 1995, 1996, 1997 and 1998. However, one case was reported in 1994. The average support score is 3 and there is no standard deviation. This indicates a Qualified Rejection based on this one case. During this phase, it is impossible to interpret the status of the support score at this level as there is only one instance in 1994 where the support score average indicated Qualified Rejection.

**Development Phase**

There were no reported cases in 1999 and 2002. In 2000 however, three cases were reported. The average support score is 1.67 and the standard deviation is 0.58. This indicates that the data ranged from Total Support and Qualified
Support. In 2001, there were four reported cases. The average support score is 1.75 and the standard deviation is 0.5. Data range and dispersion are similar to that of 2000. In 2003, there were four reported cases. The average support score is 2.25 and the standard deviation is 0.5. The range is between Qualified Support and Qualified Rejection, however, the data slightly leans towards Qualified Support. The average increases and the standard deviation is approximately the same as the concept is still developing and the judges are relatively unfamiliar with the concept. The data demonstrated that all the judges are on the same perspective whilst steadily decreasing their support. One conclusion that can be drawn from this data is that although NSW had set an unusual precedent, it did not influence Victoria.

Consolidation Phase

In 2004, 2005, and 2007 only one case was reported for each year. The average support score is 2 and there is no standard deviation. This indicates Qualified Support. However in 2006, one case was reported. The average support score is 3 and there is no standard deviation. This indicates Qualified Rejection. In 2008, only one case was reported. The average support score is 1 and there is no standard deviation. This indicates Total Support. In 2009, there were two reported cases. The average support score is 2 and the standard deviation is 1.41. Since there are only two cases, the dispersion looks high but data is not very accurate due to the low number of cases. There are fewer cases in the Consolidation Phase but from the cases available, the majority of judges in Victoria support the concept. For example, there are four instances indicating Qualified Support as illustrated in 2004, 2005, 2007 and 2009. Only one case indicated Qualified Rejection as found in 2006 and one case indicating Total Support as found in 2009. One conclusion that can be drawn from this data is that in Victoria, there is minimal support for the concept of good faith.
Figure 7.10: Overall Average Support Victorian Cases by Three Phases

Figure 7.10 depicts the overall average support by the judges in Victorian cases by year based on three phases. The three-phased classification renders it easier to determine the changes in support levels.

At the Introduction Phase ranging from 1992 to 1998, the total average score is 3.00 and the standard deviation is 0.00. There is an insufficient number of cases to provide accurate data. During the Development Phase from 1999 to 2003, the total average score is 1.91 and the standard deviation is 0.54. This indicates that the data tends to support Qualified Support. During the Consolidation Phase from 2004 to 2009, the average score is 2.00 and the standard deviation is 0.71. The dispersion is higher than the Development Phase and the data ranges from Total Support to Qualified Rejection. In total, the overall support level by phase indicates that the judges in Victoria support the concept of good faith but seldom use it compared to NSW. One conclusion that can be drawn from this data is that the unusual precedent set by NSW had little effect on Victoria.
7.4.4 Average Support Commonwealth Cases by Year

Figure 7.11: Average Support Commonwealth Cases by Year

The category of cases that provides the greatest analytical challenge is the set of cases drawn from ‘Commonwealth’ jurisdiction courts. Figure 7.11 illustrates the average support Commonwealth cases by year.

**Introduction Phase**

In 1992, 1994, 1995 and 1998, no cases were reported. In 1993 and 1996, one case was reported for each year. The average support score is 2 and there is no standard deviation. This indicates Qualified Support from judges in both years. In 1997, there was one reported case. The average support score is 1 and there is no standard deviation. This indicates Total Support from judges in 1997. During the ‘Introduction Phase’, there was a low number of cases but there was strong support from the judges. There are two instances where the average support score indicated Qualified Support as seen in 1993 and 1996. There is only one instance in 1997 where the support score average is Total Support. There is insufficient data for the remaining years. This suggests the judges are still uncertain about the concept of good faith.
**Development Phase**

In 1999, only one case was reported. The average support score is 1 and there is no standard deviation. This indicates Total Support from the judge in 1999. In 2000, two cases were reported. The average support score is 2 and the standard deviation is 1.41. This shows a very high dispersion but since there are only two cases, the data is not very accurate. In 2001, there was one reported case. The average support score is 2 and there is no standard deviation. This indicates Qualified Support for that particular case. In 2002, there were five reported cases. The average support score is 3.2 and the standard deviation is 0.84. This indicates a wide range from Qualified Support to Total Rejection (leaning towards qualified rejection). In 2003, there were two reported cases. The average support score is 1.67 and the standard deviation is 0.58. This indicates a range from Total Support to Qualified Support, however data is not very accurate due to the low number of cases. At this stage, there are slightly more cases compared to the Introduction Phase. The standard deviation decreases over the years, which shows that the judges are in agreement during this phase. Support scores ranged between Total Support to Qualified Rejection, indicating that the degree of acceptance of the judges was in a period of adjustment.

**Consolidation Phase**

No cases were reported in 2004, 2007 and 2008. In 2005, there was only one reported case. The average support score is 2 and there is no standard deviation. This indicates Qualified Support from the judge. In 2006, there were four reported cases. The average support score is 1.75 and the standard deviation is 0.5. This indicates a range from Total Support to Qualified Support. In 2009, there was one reported case. The average support score is 3 and there is no standard deviation. This indicates Qualified Rejection from the judge. The ‘Consolidation Phase’ consisted of a low number of cases. Among the few cases, the average support score ranged between Qualified Support and Qualified Rejection. This is perhaps
due to greater caution exercised by judges after the Development Phase. During this phase, the data shows an opposite trend to other judicial forums in that increasing caution was exercised by the Commonwealth judges, which is indicative of less acceptance of the concept of good faith during this phase.

Figure 7.12: Overall Average Support Commonwealth Cases by Three Phases

Figure 7.12 depicts the overall average support by the judges in Commonwealth cases by year based on three phases. The three-phased classification renders it easier to determine the changes in support levels.

At the Introduction Phase ranging from 1992 to 1998, the total average score is 1.67 and the standard deviation is 0.58. This indicates a range from Total Support to Qualified Support. At the Development Phase from 1999 to 2003, the total average score is 2.23 and the standard deviation is 1.09. The dispersion of data is high and ranges from Total Support to Qualified Rejection. At the Consolidation Phase from 2004 to 2009, the average score is 2.00 and the standard deviation is 0.58. This indicates that most of the data tends to lean towards Qualified Support and Qualified Rejection. Overall, the support level by the three phases indicates that the judges at the Commonwealth court were not convinced of the concept of
good faith. This can be seen by the inconsistent level of support level and the decreased standard deviation in addition to the low number of cases. One conclusion that can be drawn from this data is that the unusual precedent set in NSW had no effect to the Commonwealth court.

### 7.4.5 Average Support Other Jurisdictions Cases by Year

**Figure 7.13: Average Support Other States by Year**

![Graph showing average support cases by year](image)

Note: ‘Other’ States comprises the jurisdictions of WA, QLD, TAS, SA, ACT and NT

Figure 7.13 shows an increasing pattern of caution for Other States by year.

**Introduction Phase**

There were no reported cases from 1992 to 1998.

**Development Phase**

In 1999, there was one reported case in WA. The average support score is 2 and there is no standard deviation. This indicates Qualified Support was received from
judges in WA. In 2000, there were three reported cases each from WA, QLD and ACT. The average support score is 1.67 and the standard deviation is 0.58. This indicates a range from Total Support and Qualified Support. In 2001, only one case was reported. The average support score is 2 and there is no standard deviation. This indicates Qualified Support. In 2002, there were two reported cases both from WA. The average support score is 1.5 and the standard deviation is 0.71. This indicates a wide range from Total Support to Qualified Support (leaning towards total support). In 2003, only one case was reported from TAS. The average support score is 2 and there is no standard deviation. This indicates Qualified Support from a judge in TAS. During the Development Phase, this was the first time the concept of good faith was introduced as there were no cases during the Introduction Phase. Here, both average support score and standard deviation are fairly consistent. This is because good faith was introduced for the first time. Although, it was newly introduced, the average support score is considered to be high at Qualified Support.

Consolidation Phase

In 2004 and 2006, no cases were reported. In 2005, one case from WA was reported. The average support score is 2 and there is no standard deviation score. This indicates Qualified Support from the judge in WA. In 2007, there were two reported cases. The cases were from TAS and QLD. The average support score is 2 and there is no standard deviation score. This indicates Qualified Support from the judges in TAS and QLD. In 2008, there were two reported cases. Both of the cases were from WA and TAS. The average support score is 2.5 and the standard deviation is 0.71. This indicates a wide range from Total Support to Qualified Rejection. In 2009, there was one reported case from QLD. The average support score is 3 and there is no standard deviation. This indicates Qualified Rejection from the judge in QLD.
Although there were a low number of reported cases during the Consolidation Phase, the average support score increased over the years. This is explained in that the judges are adjusting to the concept and tended towards Qualified Rejection. Inspection of the data for this phase reveals a contrary expectation to the concept of good faith as the judges of other jurisdictions are becoming increasingly cautious in their use of good faith; indicative of less acceptance of the concept during this phase.

Figure 7.14: Overall Average Support Other States by Three Phases

![Graph showing overall average support by phases](image)

Figure 7.14 depicts the overall average support by the judges in Other States cases by year based on three phases. The three-phased classification renders it easier to determine the changes in support levels.

There were no reported cases during the Introduction Phase ranging from 1992 to 1998. At the Development Phase from 1999 to 2003, the total average score is 1.75 and the standard deviation is 0.46. This indicates that the range was from Total Support to Qualified Support. At the Consolidation Phase from 2004 to 2009, the average score is 2.40 and the standard deviation is 0.55. This indicates a range from Qualified Support to Qualified Rejection.
Overall, the number of cases in Other States is low compared to other jurisdictions. The Development Phase acts as the Introduction Phase and the Consolidation phase acts as both the Development and Consolidation Phase. The average support score increased, which shows that the judges are tending towards Qualified Rejection. The standard deviation is consistent showing that the judges are of the one mind, namely towards Qualified Rejection. One conclusion that can be drawn from this data is that the unusual precedent set in NSW had no effect at all on the Other States.

Summary from the average support level for good faith by jurisdiction

In summary, judges in NSW are ‘bold spirits’ judges due to the fact that many cases were decided in NSW. This may be because it is the most populated state in Australia. However, more convincingly, more judges in NSW are considered to be ‘bold spirits’ judges probably due to the influence of obiter comments by Priestley J in Renard case. Therefore, it can be concluded that good faith is a popular concept in NSW based on the empirical data above. However, the popularity of good faith had little effect in Victoria. In Victoria, there is increasing awareness among judges regarding the concept albeit with minimal support to the need for good faith.

In Commonwealth courts and Other States, the unusual precedent set in NSW had no effect at all. The refusal of some of the judges to act on the unusual precedent set in NSW may be due to many possibilities. The fact that good faith was introduced through the obiter comments of one Court of Appeal judge for which it has no binding effect towards other judges was not conducive to its adoption.

28 See Figure 6.2: Cases in Which Good Faith was Raised as an Issue (by Jurisdiction), 157 and Table 6.1: Percentage of Cases in Which Good Faith Raised as an Issue (by Jurisdiction), 157.
Figure 7.15: Average Support All Jurisdictions by Year

![Average Support All Jurisdictions by Year](image)

Figure 7.15 illustrates the overall average support in all jurisdictions by year. The comparison is by jurisdiction based on trends from 1992 to 2009 and the highest number of cases reported in 2001 and 2003.29

The trends from 1992 to 2009

The trends in support scores are inconsistent from 1992 to 2009 in each jurisdiction. In NSW, support scores was 1, indicating Total Support in 1992, which was maintained in 2009. In Victoria, support in 1994 was 3, indicating Qualified Rejection and in 2009, the support score was 2, indicating Qualified Support. In Commonwealth courts, support in 1993 was 2, indicating Qualified Support.

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29 See Figure 6.2: Cases in Which Good Faith was Raised as an Issue by Jurisdiction, 157 and Table 6.1: Percentage of Cases in Which Good Faith Raised as an Issue by Jurisdiction, 157.
Support and in 2009, it was 3, indicating Qualified Rejection. In Other States, the support scores in 1999 was 2, indicating Qualified Support and in 2009, it was 3, indicating Qualified Rejection.

It comes as no surprise that when the concept of good faith was first introduced in NSW in 1992, it received Total Support. Other jurisdictions, however, showed no level of support. One conclusion that can be drawn from this data is that jurisdictions other than NSW were not convinced by the obiter comments of Priestley J. The collected data shows inconsistent support scores throughout Australia and towards the end of the study period (2009), the support score of each jurisdiction varied. NSW continues to have a high support score. The obiter comments of Renard had become a usual precedent in NSW as illustrated in the data. In Victoria, the final support score is Qualified Support although it has no support score in 1992 when good faith was first introduced. This indicates that Victoria showed minimal support for the concept of good faith. The Commonwealth courts and the courts of Other States tended toward a Qualified Rejection indicating that the precedent set in NSW had no effect on other Australian states. Since its introduction in 1992, the overall trend of support suggests that the NSW judges have supported the concept of good faith. It took approximately two decades (1992-2009) to gain this support from the judges as an expression of their ‘bold spirit’ attitude.

*The Highest Number of Cases in 2001 and 2003*

It seems that with the turn of the 21st century, judges became more open to the concept of good faith as illustrated in the two instances where the number of cases were higher in 2001 and 2003. Both reported to have 12 cases each. In 2001, the average support score for NSW is 1.67 indicating Qualified Support, the average support score for Victoria is 1.75 indicating Qualified Support, the average
support score for Commonwealth court is 2 indicating Qualified Support and the average support score for Other States is 2 indicating Qualified Support. In 2003, the average support score for NSW is 1.75 indicating Qualified Support, the average support score for Victoria is 2.25 indicating Qualified Support, the average support score for Commonwealth court is 1.67 indicating Qualified Support and the average support score for Other States is 2 indicating Qualified Support. One conclusion that can be drawn from this data is that although the highest number of cases occurred in 2001 and 2003, this had no influence in the level of support, which remained at the level of Qualified Support.

7.5 SUPPORT LEVEL FOR GOOD FAITH BY INDIVIDUAL JUDGES

Despite being a new concept in Australia, a number of individual judges believed that there is a need to explore good faith to ensure the expected benefit of the contract is achievable. It is the aim of the discussion to examine the support played by individual judges in the development of this concept within the Australian law of contract. There are altogether 91 judges that produced decisions relating to the concept of good faith in these 104 cases. Six out of 91 judges produced the greatest volume of decisions as illustrated by Figure 7.16.

30 This study only concentrates on the judges who showed support for the concept of good faith. For example, at the appeal level, out of three judges, only one showed support. The judges who showed support is counted and not the other two judges who did not show support. This is in line with the aim of the section to focus on the judges who showed support for the concept of good faith.
Figure 7.16 shows that there are six judges who stand out above the others in terms of their engagement with the concept of good faith during the period of review. Einstein J produced the highest number of decisions (9). Followed by Finn J (5). McDougall J, Sheller J, Bergin J and Dodd-Streton produced similar number of decisions (4). Out of the six judges, four judges are from NSW, namely Einstein J of the Supreme Court of NSW; his Honour produced the most decisions, with nine identified decisions. McDougall J of the Supreme Court of NSW, Sheller J of the Full Court of the Supreme Court of NSW and Bergin J of the Supreme Court of NSW produced four good faith decisions, each in the period under review. One conclusion that can be drawn from this data is that three out of the four judges were NSW judges who produced the most decision volumes. This implies that the obiter comments of a well-known and highly regarded judge like Priestley J in NSW Court of Appeal carried more weight in influencing other members in the same judicial hierarchy. It is likely to do so because of its persuasiveness. This is in line with the number of cases that raised good faith as
an issue of which 45 percent, which accounts for two-thirds of all cases, are cases from NSW.\(^{31}\)

The precedent of a state Supreme Court can be highly persuasive in another state Supreme Court as a matter of judicial comity. In this context, it is also a practice of courtesy of the court that respects the judicial decisions of another state. This is illustrated by the data of Dodds-Stretton J of the Supreme Court of Victoria, which produced four good faith decisions each in the period under review. However, this data can be considered an exceptional case where only one judge is detected. One conclusion that can be drawn from this data is that the influence of good faith on judges in Victoria is low compared to NSW judges.

At the federal level, it is observed that Finn J of the Federal Court of Australia produced five decisions. Finn J, who is another major proponent of good faith, claimed that good faith should be recognised as a general obligation in all contracts in Australia.\(^{32}\) According to his Honour, good faith is a universal concept that exists in ‘international and transaction developments already in train.’\(^{33}\) His Honour refers to the *Convention on Contracts for the International Sale of Goods*, *UNIDROIT’s Principle, Contract Law of the People’s Republic of China and the Uniform Commercial Code* and *Restatement of Contracts*, which all made reference to good faith. A year after the *Renard* case, Finn J had expressly showed support to good faith in his Honour’s most often cited decision, *Hughes Aircraft Systems International v Airservices Australia*. Finn J recognised a duty of good faith by ruling that there was an implied term in a tender contract that the party calling for tenders (refer to the Civil Aviation Authority) would conduct its evaluation fairly and in a manner that would ensure a fair tender.\(^{34}\) One conclusion that could be drawn from this is that despite the absence of a High Court decision

\(^{31}\) See Table 6.1: Percentage of Cases in Which Good Faith Raised as an Issue (by Jurisdiction), 157.


\(^{33}\) Ibid, 416.

\(^{34}\) (1997) 146 ALR 1, 37.
on good faith, the obiter comments of Priestley J, which started at the state level, influenced a federal level judge like Finn J.

Overall, the empirical data demonstrated that good faith is still a ‘state issue’ of NSW, where a very limited number of judges primarily drawn from just one state supported this concept. The Priestley J obiter comments successfully influenced other NSW judges.

**Figure 7.17: Average Support Level of Six Good Faith Judges**

<table>
<thead>
<tr>
<th>Judge</th>
<th>Avg Support Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>Einstein</td>
<td>2.1</td>
</tr>
<tr>
<td>Finn</td>
<td>1.6</td>
</tr>
<tr>
<td>McDougall</td>
<td>2.5</td>
</tr>
<tr>
<td>Sheller</td>
<td>1.25</td>
</tr>
<tr>
<td>Bergin</td>
<td>1.2</td>
</tr>
<tr>
<td>Dodds-Streeton</td>
<td>2.25</td>
</tr>
</tbody>
</table>

Figure 7.17 depicts the average support level of six good faith judges. The average support level of Einstein J is 2.1 indicating Qualified Support. The average support score of Finn J is 1.6 indicating Qualified Support. The average support score of McDougall is 2.5 indicating Qualified Rejection. The average support level of Sheller J is 1.25 and Bergin J is 1.2 indicating Total Support. The average support score of Dodds-Streeton J is 2.25 indicating Qualified Rejection.

Two judges, Sheller J of Full Court of the Supreme Court of NSW and Bergin J of the Supreme Court of NSW showed Total Support. The remaining four judges showed Qualified Support, i.e. Finn J of the Federal Court of Australia, Einstein J
of the Supreme Court of NSW, McDougall J of the Supreme Court of NSW, and Dodds-Streeton J of the Supreme Court of Victoria.

It is interesting to note that the data in Figures 7.16 and 7.17 provide the impression that there is an association between the volume of good faith decisions made and the degree of support for the issue of good faith in contractual performance. Both figures illustrate that the volume of decisions does not correlate with the support level. For example, even though Einstein J of the Supreme Court of NSW produced the most volume of decisions, his Honour’s average support score is 2.1, which indicates Qualified Support as compared to Finn J of the Federal Court of Australia who produced five decisions, but has an average support score of 1.6, which indicates Total Support. One conclusion that can be drawn from this is that there are other factors that influence the level of support such as the background, the legal education or the degree of involvement in international law. For example, Finn J, who is an expert and a highly regarded judge, is found to be more in tune with international law.
Figure 7.18 shows the relationship between the frequency of good faith decisions made by the judges and the average support type. For ‘1 decision’, the average support type is 2.08 and the standard deviation is 0.76. This indicates a wide dispersion around Qualified Support. For ‘2 decisions’, the average support type is 2.37 and the standard deviation is 0.81. This indicates wide dispersion between Total Support and Qualified Rejection (leaning towards qualified support). For ‘3 decisions’, the average support type is 1.9 and the standard deviation is 1.02. This indicates a high dispersion from Total Support to Qualified Support. For ‘4 and more decisions’, the average support type is 2.03 and the standard deviation is 0.82. This indicates high dispersion from Total Support to Qualified Support.

The data shows that the level of confidence of the judges who produced more than three decisions were confident in the concept of good faith. One conclusion that can be drawn from this is that the support levels do not depend on the frequency of the decision but based on the level of familiarity to the concept. The more good faith decisions made, the greater confidence of the judges with the concept.
7.6 CONCLUSION

It can be concluded that good faith is still primarily a NSW development based on the empirical observation of the judicial support for good faith in Australian contract law. Despite the differences in support of the Australian judges for the concept of good faith as illustrated in Table 7.1, they have not entirely rejected the concept. This is a positive sign from Australian judges concerning the development of the concept of good faith. The judges in NSW and the judges during the ‘Consolidation Phase 2004-2009’ possessed the ‘bold spirits’ attitude. The unusual precedent set in NSW influenced other judges in NSW, but had limited influence in Victoria. Consequently, there is no visible influence on the Commonwealth court and in Other States. Shellier JA is an example of a ‘bold spirits’ judge. A ‘bold spirits’ judge supports the need to explore good faith to ensure the contract is honoured on a just term. In *Alcatel Australia Ltd v Scarcella*, Shellier JA followed the obiter comments of Priestley J with regards to the concept of good faith set in the *Renard* case and *Hughes Bros Pty Ltd v Trustees of Roman Catholic Church, Archdiocese of Sydney*.35 His Honour held that ‘the decisions in *Renard Construction* and *Hughes Bros* meant that in NSW, a duty of good faith both in performing obligations and exercising rights may by implication, be imposed upon parties as part of a contract’.36 Furthermore, his Honour acknowledged the development of good faith in Australia following those two cases. Further discussions, could be observed from the empirical data by jurisdiction, by year and by three phases, in addition to the thoughts of individual judges as discussed below.

Reviewing cases based on jurisdiction is important to understand the development of good faith. This is because good faith was first put onto the judicial agenda in NSW. The empirical observation revealed these findings: First, judges in NSW are the most active in hearing the issue of good faith at the first instance and appeal

level as illustrated by Figure 7.1. Second, despite the inconsistencies in level of support, the judges in NSW are more committed in supporting the issue of good faith. It was found that in NSW, there were many cases at Support Level 1 = total support as illustrated by Figure 7.2. Third, judges in NSW show greater support at the appeal level compared to the level of first instance. Despite this, the judges in NSW are confident in the concept of good faith at both levels of first instance and appeal as illustrated by Figures 7.3 and 7.4. Fourth, there is stable support from judges in NSW compared to Victoria, the Federal court and Other States. Overall, the data suggests that the acceptance of good faith is stable in NSW.

Apart from jurisdiction, the patterns that could be traced from the period of review (1992-2009) demonstrate the trends of the development of the concept of good faith. Since the introduction of the concept of good faith in 1992, it takes more than 17 years to determine the attitude of the judges to the concept of good faith. It is observed that the judges from 2004-2009 showed a ‘bold spirits’ attitude in which judges were more ready to recognise good faith as illustrated by Figure 7.5. This demonstrated that those judges at the Consolidation Phase from 2004 until 2009 are also ‘bold spirits’ judges. This is due to the fact that the longer engagement in the concept reflected greater familiarity and confidence.

The individual judges who support the concept of good faith are also evaluated in order to understand the attitude of the judges towards good faith. Six out of 91 judges who produced decisions relating to the issue of good faith could be considered as possessing the ‘bold spirits’ attitude. Four out of six judges came from NSW. However, there is correlation between the volume of decisions made and the degree of support. This is illustrated in Figure 7.12 where Einstein J produced the most decisions, but his Honour’s average support score is 2.1 which indicates Qualified Support. Finn J produced five decisions but has an average support score of 1.6, which indicates Total Support. This data shows one important outcome, whereby the support score for good faith is not based on the
volume of decisions. Similar circumstances can be observed in the average level of support by volume of decision as illustrated in Figure 7.12, where the support score is not based on the amount of decisions made.
8 DEFINING GOOD FAITH

This chapter explores the numerous meanings of good faith in contract law. The wide range of meanings attributable to good faith supports the argument made in this thesis that essentially, the concept of good faith has no specific or precise meaning. Most of the meanings identified in this study are complex, contradictory and unclear. The apparent lack of a single authoritative definition of good faith has resulted in an ongoing and diverse conceptualisation of the concept in addition to a constant reinterpretation of existing definitions. As a concept, good faith remains widely debated with each new meaning subjected to criticism. This chapter not only seeks to demonstrate the lack of consensus among judges and scholars as to the meaning of good faith, but also proposes a workable meaning of good faith.

8.1 INTRODUCTION

In specific legal contracts such as insurance contracts and fiduciary and employment relationships, the meaning of good faith is established. Outside of these categories however, its meaning remains vague due to a lack of an established definition. Many legal experts have expressed concern over the ambiguity of the meaning of good faith. Steyn J has argued that ‘a definition of good faith and fair dealing is impossible’\(^1\). Goode laments that, ‘we do not know quite what it means’,\(^2\) while White and Summers have warned that, ‘we caution anyone who is confident about the meaning of good faith to reconsider’\(^3\). Similarly, Lucke observed that ‘good faith has not just one but many meanings, as well as an unusual capacity to acquire expanded and altogether new meanings’.\(^4\)

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Reiter commented that despite many meanings of good faith ‘no one meaning will suffice universally’. All the above comments indicate that those legal experts were sceptical of the concept of good faith due to the inherent difficulty of establishing a specific or precise meaning of good faith. In Council of the City of Sydney v Goldspar Australia Pty Ltd, Gyles J referred to “the ‘variety of opinions’ in both the authorities and commentaries as ‘bewildering’ and noted that approaches vary from the ‘cautious’ to the ‘adventurous’”.

The above comments suggest a mood of dissatisfaction among legal experts concerning the meaning of good faith. This is because good faith is a concept for which it is difficult to attach a specific and precise meaning. Despite the current lack of consensus regarding its meaning, legal scholars remain interested in the concept of good faith and continue to invest time and effort in the subject. To date, much has been written by scholars from various countries about the meaning and definition of good faith in the context of contract law, yet no consensus has been reached concerning the fundamental step of its definition. It is agreed that good faith is a term often used but rarely defined or analysed with care. Many believe that good faith has different meanings depending on its context.

It is the aim of this chapter to address the meaning and content of good faith in contract law. Analyses of the meaning of good faith advocated by judges and scholars will be descriptively catalogued by grouping the various meanings into families of meaning in order to propose a taxonomic solution. The significance of this exercise is to develop a workable meaning of good faith. This chapter proceeds as follows. Chapter 8.2 outlines the problem of defining good faith. Chapter 8.3 demonstrates that there are numerous meanings of good faith available in the relevant legal literature and in the 104 cases that represent the

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8 See Aiton Australia Pty Ltd v Transfield Pty Ltd (2000) 16 BCL 70,156 per Einstein J; R Brownsword, N J Hird and G Howells (eds), Good Faith in Contract, Concept and Context (Ashgate, 1999) 3.
sample for this study. Many of the meanings collected were grouped together based on similarities. Chapter 8.4 demonstrates that the numerous meanings of good faith can be simplified by proposing a taxonomic solution. A definition of good faith is finally proposed in Chapter 8.5.

8.2 THE PROBLEM OF DEFINING GOOD FAITH

As noted earlier, one of the main problems with the concept of good faith is its definition. As a concept, good faith has several problems associated with its diverse interpretation, the difficulty of defining the meaning and content of good faith in a factual vacuum, and the different perspectives of the term based on the experience of other jurisdictions such as the US. These issues are discussed below:

8.2.1 A Concept in Search of a Definition

The main reason for the lack of a commonly agreed upon or specific definition of good faith in contract law is that good faith has many meanings. Most identified meanings of good faith are complex, contradictory and unclear. In his attempt to define good faith, Davis claimed that:

The more that I have sought to give some meaning to the phrase, the more I have realised that any possible meaning would need to be so qualified, or so general, as to be of no real assistance at all.10

He further commented that:

Let me hasten to say that I am by no means alone in this inability to provide a meaning, or even a working description, of good faith. Everyone intuitively

9 US is a common law country like Australia.
knows what it is, and would recognise good faith, or bad faith, if confronted with an example, but that does not aid the process of meaning.\textsuperscript{11}

The most contentious aspect of the concept of good faith is the variety and generality of possible meanings which lead to confusion, frustration and difficulty in its application. The competing meanings of the concept are a direct result of differing frames of reference. The most prominent of these definitions frame good faith as a moral concept. However, ambiguity surrounds certain key moral values such as honesty. The inclusion of such moral values as part of the meaning of the concept gives it a definite orientation, yet leaves unavoidable room for flexibility. Another approach has been to frame good faith based on the interpretation of the intention of the contracting parties. This can be expressed in terms of ensuring a workable contract such that the benefit of the contract is achievable. Both approaches, namely a moral framing in terms of honesty and the expected intent of the parties involve both concrete and malleable aspects. For example, although the general meaning of honesty is easily understood, its specific meaning within a specific religious or cultural framework is by no means uniform. Similarly, intention can be rather difficult to determine. In other words, the general meaning of good faith is to honour the contract and to exercise moral standards. However, moral standards vary and are therefore malleable. It is the subjectivity of ethical standards that renders the concept of good faith difficult to define. It is ultimately this aspect that injects a significant degree of complexity to the task of attributing to the concept of good faith a single definite and authoritative meaning.

\subsection*{8.2.2 Diverse Interpretations of Good Faith}

In attempting to define the meaning of good faith, Paterson explained that many commentators divided the problem of interpreting the context of good faith into

\footnote{Ibid.}
two groups: the contractual approach to good faith and the generalised moral standard of the conduct approach.\textsuperscript{12}

The first group, the contractual approach of good faith, attempts to give good faith a meaning consistent with existing contractual doctrines by treating it as an implied term based on the parties’ probable intention or expectation.\textsuperscript{13} This is consistent with the traditional contractual approach to the implication of terms to give business efficacy to the contract.

The second approach grounds the duty of good faith on generalised moral standards of conduct. This measure of good faith is based on desirable behaviour in a contractual relationship not determined by reference to the parties. This is demonstrated in s 2-103(b) of the \textit{Uniform Commercial Code}, which states that:

"Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

In this context, good faith is based on the moral standard of honesty. In commercial practice, good faith is the expected commercial practice. This ‘moral standards’ approach gained support in the case of Renard where Priestley J suggested that certain standards of ‘fairness’ in contract performance may be demanded by prevailing community expectations.

From the above, it can be seen that there are two approaches to interpret good faith, namely by means of intention, or moral standard. Given the complexities of both approaches, interpretations can vary significantly leading to uncertainty. One is left confused as to whether the benefit of the contract has been achieved.


8.2.3 Difficulty of Defining the Meaning and Content of Good Faith in a Vacuum

One reason for the difficulty in defining the meaning of good faith is that it cannot be expressed in a vacuum. In *Asia Pacific Resources Pty Ltd v Forestry Tasmania*, Wright J commented that:

‘Good faith’ is incapable of abstract definition and can only be assessed as being present or absent if the relevant facts are known or are capable of being known.

Holmes argued that ‘there is a problem in describing the content of good faith where the language and even philosophy are vague’. In contrast with the duty of cooperation whereby the content of the duty is clearly established, it is argued that good faith is only able to be determined in the context of the agreement. In *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd*, Templeman J held that:

In reaching my conclusion as to the proper construction of the term ‘good faith’ in this contract, I have had regard to a number of authorities and articles which I have been referred to. In particular, I have considered the decision of Gummow Judge in *Service Stations Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 45 FCR 84 which contains a helpful analysis of many of these materials. But in the end, the term must be construed in the context of the agreement in which it appears.

In *Hudson Resources Limited v Australian Diatomite Mining Pty Limited & Anor*, Einstein J likewise held that good faith is determined based on the context and circumstances of the agreement. His Honour stated that:

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17 See Chapter Two for further discussion.
The proper construction of the agreement requires to be determined in the light of the context provided by the agreement as a whole and the circumstances in which the agreement was made.\textsuperscript{19}

Good faith is a broad concept and its meaning is changeable in nature. It is ultimately difficult to determine good faith without a context. This is because without knowledge of the context of a specific agreement, good faith is meaningless. For example, if good faith is based in the context of an agreement during the negotiation process, surrounding factors not related to the negotiation process in the agreement should be ignored. This is to ensure the expected benefit of the contract is achievable without interruption of other factors that will hinder the success of the contract.

8.2.4 The Experience of One Other Jurisdiction

The US is the only common law country that has legislated a general obligation of good faith, in the \textit{Uniform Commercial Code}\textsuperscript{20} and \textit{Restatement (Second) of Contracts}. Article 1 (General Provisions) of the \textit{Uniform Commercial Code} clearly mentions the role of good faith in the contract. This is clearly illustrated in s 1-203 of the \textit{Uniform Commercial Code} which provides that ‘Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement’. S 1-201 (19) (General Definitions and Principles of Interpretation) defines ‘good faith’ as ‘honesty in fact in the conduct or transaction concerned’. A special definition of good faith concerning merchants is provided in Article 2(Sales), s 2-103 (1) (b) of the \textit{Uniform Commercial Code}, which provides that ‘…good faith in the case of merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade’. S 205 of the \textit{Restatement (Second) of Contracts} provides that ‘Every contract imposes upon

\textsuperscript{19} [2002] NSWSC 314 [127].

\textsuperscript{20} The \textit{Uniform Commercial Code} is divided into eleven substantive articles. For the purpose of this discussion, the content of this chapter is almost exclusively dealing with Article 1, (General Provisions) and Article 2 (Sales) that discussed good faith.
each party a duty of good faith and fair dealing in its performance and its enforcement’.

In the *Uniform Commercial Code*, good faith has two different meanings depending on the status of the contracting parties. The status of the contracting parties is divided into merchant or non-merchant. A merchant is one who regularly trades in goods. A person who sells his car through an advertisement in the classifieds is not considered a merchant. However, if that person sells a car every week through the classifieds, for the purpose of *Uniform Commercial Code*, he or she is considered a merchant because he or she regularly deals in goods of a particular kind. Under the *Uniform Commercial Code*, any store that sells merchandise is considered a merchant.

Article 1 (General Provisions) of the *Uniform Commercial Code* refers to non-merchants. Under the ‘honesty in fact’ definition, good faith is determined based on the intent or state of mind of the party. According to Robert Braucher, this is called the ‘pure heart empty head’ approach, which solely considers the actual belief of the party and not the reasonableness of that belief.\(^{21}\) Article 2 (Sales) of the *Uniform Commercial Code* refers specifically to merchants. Under the broader definition, an objective standard applies which includes the actual belief of the party along with the reasonableness of the belief and conduct.

Although good faith is clearly mentioned in the Codes, there is no specific or precise definition of good faith. One of the main problems is the difficulty of a specific or precise definition of good faith due to the uncertainty of the concept. In *Watseka First International Bank v Ruda*, the Illinois Supreme Court held that:

...what the term [good faith] means…remains somewhat of a mystery. Its meaning, moreover may change, depending upon the context in which it is used.22

The Illinois Supreme Court described good faith as a ‘mystery’ because the meaning of good faith is based on the circumstances of the case. Although it was clearly legislated, there are comments from the legal scholars in the US who did not agree with the definition of good faith as stated in the Code and Restatement. Farnsworth commented that the definition of good faith in Article 1 (General Provisions) of the Uniform Commercial Code as ‘too restrictive’ because the conduct of the contracting parties is based solely on honesty. In contrast to Article 2 (Sales) of the Uniform Commercial Code, in the case of merchants, the requirement of good faith includes honesty and reasonableness.23 Farnsworth commented that ‘limiting good faith to an inquiry into actual honesty would frustrate this use’.24 Farnsworth based his critique on the ‘rationale for a court to imply contract terms [good faith] is necessary to secure the expected benefits of the contract to a party or to protect reasonable expectations’.25

Summers, one of the early legal commentators on good faith, agreed with the critique by Farnsworth. Summers commented that ‘if an obligation of good faith is to do its job, it must be open-ended rather than sealed off in a definition’.26 He claimed that good faith should be conceptualised as an ‘excluder’.27 In this context, good faith as an ‘excluder’ is defined as a ‘phrase without general meaning (or meanings) of its own and serves to exclude a wide range of heterogeneous forms of bad faith’.28 Summers asserted that it is important to

24 Ibid.
25 Ibid.
27 Dubroff, above n 23, 592.
define bad faith because the outcome of the cases depends on how the doctrine is conceptualised.

Summers’ analysis of the term ‘excluder’ had an influence on Robert Braucher, the section’s principal drafter, who did not attempt to define good faith opting instead to use the ‘excluder’ approach. In Comment (a) to s 205 of the Restatement (Second) of Contracts, Robert Braucher acknowledged that:

[T]he phrase ‘good faith’ is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract...excludes a variety of types of conduct characterised as involving ‘bad faith’ because they violate community standards of decency, fairness and reasonableness. 30

Comment (d) to s 205 of the Restatement (Second) of Contracts proceeded to define good faith by providing an example of bad faith which includes ‘evasion of the spirit of the bargain, lack of diligence and slacking off, wilful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party’s performance.’

In short, as outlined above, the conflicting interpretations of good faith show that American jurisprudence has yet to develop a coherent theory of good faith. Lucke pointed out that there is an overwhelming variety of meanings and ‘observed that the very fact of there being such an array of interpretations shows that American jurisprudence has not yet developed a coherent theory of good faith’. 31 Despite various attempts to define good faith, American jurisprudence has not yet managed to define the meaning.

Despite these criticisms and problems pertaining to the definition of good faith, some judges and scholars are endeavouring to determine the meaning and actual content of good faith as discussed in Chapter 8.3 by means of a taxonomy of the ‘families of meaning’ of good faith. The database from which this taxonomy is drawn derives from a survey of all the attempts thus far made to define the meaning to the concept.

8.3 GOOD FAITH FAMILIES

The definitions or meanings of good faith examined in this study were collected from a variety of books and articles supported by a review of the database comprising of 104 cases. Figure 8.1 illustrates the cases that define good faith by year. The years are divided into three phases: ‘Introduction Phase 1992-1998’, ‘Development Phase 1999-2003’ and ‘Consolidation Phase 2004-2009’ with the aim to detect the evolution of the cases which defined good faith. Out of 104 cases, 19 defined good faith as illustrated in Figure 8.1 below:

**Figure 8.1: Overall Cases which Define Good Faith**


*Introduction Phase*

During the ‘Introduction Phase’, namely from 1992 to 1998, there were two instances in which good faith was defined as illustrated in 1992 and 1997. From 1993 to 1996 and in 1998, there were no cases in which good faith was defined.
This means that two out of the eight identified cases in which good faith was mentioned sought to define good faith. One interpretation that can be drawn from this is that Australian judges lacked confidence in regards to defining the meaning of good faith as it was a fairly new concept in Australia.

**Development Phase**

In the ‘Development Phase’, namely from 1999 to 2003, it is surprising to note that there is a sudden interest in the concept of good faith as shown by the number of cases that attempted to define its meaning. 11 out of the 55 identified cases that raised good faith attempted its definition. The distribution of the cases by year include two cases in 1999, two cases in 2000, two cases in 2001, four cases in 2002 and one case in 2003 in which these cases attempted to define its meaning. The highest number of identified cases determining the meaning of good faith is in 2002, wherein four cases were identified. This situation resonates with the highest number of cases reported in the same year, wherein 16 cases raised the issue of good faith. This suggests that the level of confidence in applying the concept of good faith increased. It seems that with the turn of the 21st century, Australian judges have become more open to the concept of good faith as indicated in 2002. This is a positive indication of the development of the meaning of good faith during this period.

**Consolidation Phase**

It was expected that in the ‘Consolidation Phase’, namely from 2004 to 2009, there would be an increase in the acceptance and recognition of the term ‘good faith’ and its meaning. However, the empirical data shows a different pattern. During this period, there were fewer attempts to define the concept with only six out of 41 identified cases attempting a definition of its meaning. The distribution of the cases by year that attempted to define its meaning are as follows; three

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32 See Figure 6.1: Cases Which Raised Good Faith as an Issue (Per Year), 154.
33 See Figure 6.1: Cases Which Raised Good Faith as an Issue (Per Year), 154.
34 See Figure 6.1: Cases Which Raised Good Faith as an Issue (Per Year), 154.
cases in 2004, two cases in 2005 and one case in 2008. No attempts were made to define the term in 2006, 2007 and 2009. One presumption that could be drawn from this is that in 2006, 2007 and 2009, the judges showed no interest in attempting its definition. Although there were active attempts at its definition between 2004 and 2005, whereby five cases were identified, with one case identified in 2008, the significant gap between 2006 and 2009 shows that the judges were becoming less certain of the definition of good faith. One conclusion that could be drawn from this data is that after having once supported the idea (i.e. ‘Development Phase 1999-2003’), its translation into real practice highlighted the difficulties of defining the concept of good faith.

Figure 8.2 identifies good faith defined by jurisdiction during the review period. It aims to identify support by jurisdiction in Australia. By jurisdiction, the states were divided into NSW, Victoria, Federal and Other States. For the purpose of this study, ‘Other states’ refers to Western Australia.35

![Figure 8.2: Good Faith Defined by Jurisdiction](image)

Note: ‘Others’ comprises the jurisdictions of WA

There are 10 cases in NSW, two cases in Victoria, one Federal case and five cases in Other States which have attempted to determine the meaning of good faith. It is

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35 During the review of the cases, no empirical data was detected from ACT, Western Australia, Tasmania and Queensland.
interesting to note that the identified cases that have attempted to determine the meaning of good faith have mostly come from NSW, comprising 10 out of 18 cases. In Western Australia, five out of 18 cases attempted definitions of good faith. In Victoria, two out of 18 cases attempted definitions one of which was in the Federal Court. There are two presumptions that could be drawn from the data; firstly, judges in NSW actively support the idea that the concept of good faith should be defined, and secondly, the many attempts by judges in NSW to define the concept of good faith is a sign of its ambiguity due to its limited practice and acceptance.

The next section discusses the several families of meaning for good faith that emerge from analysis of prior literature and as supported by the above database of 104 cases. The collected definitions or meanings of good faith were analysed and similar expressions or terminologies were grouped together as a ‘family’ based on their similarity. Definitions were categorised in ‘single’ and ‘multi-category’ groupings. In the ‘single’ category, only one element expresses the meaning of good faith, while instances in the ‘multi-category’ involve a combination of more than one element in the expression of the meaning of good faith.

The objective of this chapter is to analyse prior literature and commentary on the concept of good faith to develop a robust synthesis or taxonomy comprising a limited number of cohesive ‘families of meaning’. Based on this analysis, a list of nine categories of good faith definitions were identified as illustrated in Table 8.1 below.

<table>
<thead>
<tr>
<th>Label</th>
<th>Theme</th>
</tr>
</thead>
<tbody>
<tr>
<td>Label 1</td>
<td>Honesty</td>
</tr>
<tr>
<td>Label 2</td>
<td>Reasonableness</td>
</tr>
<tr>
<td>Label 3</td>
<td>Fairness</td>
</tr>
<tr>
<td>Label 4</td>
<td>The Standard of Appropriate Behaviour</td>
</tr>
</tbody>
</table>
The next section discusses the several families of meaning for good faith that emerge from analysis of prior literature and as supported by the database of 104 cases.

### 8.3.1 Labels of the Meaning of Good Faith

There are many expressions for the concept of good faith proposed by judges and scholars. This is because of the nature of the concept of good faith which is susceptible to changes in meaning which in turn, makes it difficult to determine its specific and precise meaning. The labels are derived from the cases and are supported by literature. The labels are expressed as a ‘single category’. In a ‘single category’, good faith is expressed by one element. However, in some cases, the definition of good faith consists of more than one element. Such definitions are classified as ‘multi-category’. The above nine labels are supported by empirical data classified by year and jurisdiction to detect the frequency of the definition of good faith defined. By year, the review period is divided into three phases, namely ‘Introduction Phase 1992-1998’, ‘Development Phase 1999-2003’ and ‘Consolidation Phase 2004-2009’ with the aim to trace the evolution of the concept of good faith. By jurisdiction, the state is divided into NSW, Victoria, Federal and Other States. For the purpose of this study, ‘Other States’ refers to Western Australia.\(^\text{36}\)

Good faith finds expression in the following nine main labels:

<table>
<thead>
<tr>
<th>Label 5</th>
<th>Parties’ Reasonable Expectation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Label 6</td>
<td>Cooperation</td>
</tr>
<tr>
<td>Label 7</td>
<td>Loyalty</td>
</tr>
<tr>
<td>Label 8</td>
<td>Having Regards to the Other’s Interest</td>
</tr>
<tr>
<td>Label 9</td>
<td>Excluder</td>
</tr>
</tbody>
</table>

\(^{36}\) During the review of the cases, no empirical data was detected from ACT, Western Australia, Tasmania and Queensland.
Label One: Honesty

The first category identifies good faith as honesty. Honesty is a moral concept. The essence of honesty is ‘truth and moral rectitude’. In any commercial contract, honesty is a vital requirement for the contracting parties to ensure the success of the contract. Paterson claimed that it is generally agreed among legal scholars that the minimum content of the duty of good faith requires honesty from contracting parties. Beyond honesty, there is no generally accepted explanation of the meaning that should be attributed to the duty of good faith performance as found in common law.

Among the cases that support the meaning of honesty in good faith are Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd, for which Templeman J held that:

In addition, I think that the obligation of good faith requires the parties to deal honestly with each other.

In Linfox v Ellul & Ors, Studdert J held that:

The exercise of good faith necessarily imports the requirement of adherence to a standard of honest behaviour by a contractor in the discharge of his contractual obligations.

The above cases interpret good faith as honesty. Although honesty falls under the ‘single category’, in certain occasions, a ‘single category’ like honesty, can be combined with another ‘single category’ like reasonableness, to constitute ‘multi-categories’. Therefore, no issue arises when good faith is expressed by way of

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39 Ibid.
41 [2004] NSWSC 276 [55].
‘multi-categories’. This is clearly demonstrated in *Tomlin v Ford Credit Australia*, in which McDougall J claimed that:

The content of an implied duty to perform obligations and exercise contractual rights in good faith could be said to consist of an obligation to act honestly and reasonably.\textsuperscript{42}

Figure 8.3 illustrates good faith defined as honesty by year, while Figure 8.4 illustrates good faith defined as honesty by jurisdiction.

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**Figure 8.3: Good Faith defined as Honesty by Year**

<table>
<thead>
<tr>
<th>Year</th>
<th>1998</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
</tr>
</thead>
<tbody>
<tr>
<td>Qty</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

*Introduction Phase*

No data was found from 1992 until 1998.

*Development Phase*

There are two instances in which good faith is defined as honesty as demonstrated in 1999 and 2002. No such instances were found in 2000, 2001 and 2003.

\textsuperscript{42} [2005] NSWSC 540, 540.
Consolidation Phase

During this phase, there are two instances in which good faith is defined as honesty as illustrated in 2004 and 2005. No such data was found in 2006, 2007, 2008 and 2009.

Overall, the empirical data shows that between 1992 until 2009 good faith was defined as honesty on four occasions.

Figure 8.4: Good faith defined as honesty by jurisdiction

There are three cases from NSW and one case from Other States as illustrated in Figure 8.4. No such cases were found in Victoria and at the Federal level. This means that good faith defined as honesty received support from NSW. Much of the literature and the empirical data as illustrated in Figures 8.3 and 8.4 claim that honesty is a concept associated with good faith. Sometimes the term good faith and reasonableness are used interchangeably. Therefore, it is argued that the least controversial aspect of good faith is that it requires the parties to act in honesty.\footnote{Andrew Terry and Cary Di Lernia, ‘Franchising and the Quest for the Holy Grail: Good Faith or Good Intentions’ (2009) 33 Melbourne University Law Review 542, 558.}
Label Two: Reasonableness

Priestley J in Renard discussed the commonality of meanings between the terms of fairness and reasonableness. His Honour commented that:

In ordinary English usage, there has been constant association between the words fair and reasonable. Similarity, there is a close association of ideas between the terms unreasonableness, lack of good faith, and unconscionably.44

Among the cases that support good faith as reasonableness are Burger King Corporation v Hungry Jack's Pty Ltd, in which Sheller JA, Beazley JA and Stein JA held that:

It is worth noting that the Australian cases make no distinction of substance between the implied term of reasonableness and that of good faith.45

In Alcatel Australia Ltd v Scarcella, Giles JA supported the proposition that:

An obligation of good faith and reasonableness in the performance of a contractual obligation or the exercise of a contractual power may be implied as a matter of law as a legal incident of a commercial contract’.46

This type of expression of good faith was supported by Homes, who explained that the key to understanding good faith lies in the word ‘reasonableness’. He further stated that:

The requirement of good faith invokes notions of unselfishness and impartiality…Bad faith refers to unreasonable conduct wrongfully depriving the other party of the benefits of the agreement…The good faith standard requires a

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45 [2001] NSWCA 187[169].
46 (1998) 44 NSWLR 349, 368.
party to seek a fair mean, to try to strike an equitable balance when a conflict of interests appears.\textsuperscript{47}

Cole argued that attempts to define reasonableness will naturally meet with difficulty due the difficulties inherent in defining its meaning and determining the standard of expectation by various parties.\textsuperscript{48} In \textit{Armstrong v State of Victoria (No.2)}, Taylor J commented:

But reasonableness, alone, is an abstract concept and does not by itself provide a test for determining what charges may or may not be made; it is a useful guide if, and only if, we are aware of the various matters which must be considered when the necessity arises of determining whether particular charges are or are not reasonable\textsuperscript{49}

Despite the difficulties inherent in the definition of the concept of reasonableness, the court has recognised its existence and importance in the law of contract. In \textit{Biotechnology Australia Pty Ltd v Pace}, Hope JA commented:

The law has filled innumerable lacunae in the contractual arrangements of parties by applying a doctrine of reasonableness.\textsuperscript{50}

Figure 8.5 illustrates how good faith has been defined as reasonableness by year, while Figure 8.6 illustrates attempts to define it as reasonableness by jurisdiction.


\textsuperscript{49} (1957) 99 CLR 28, 88-89.

\textsuperscript{50} (1988) 15 NSWLR 130, 145.
Introduction Phase
In 1992, one case defines good faith as reasonableness. No such cases were found in 1993, 1994, 1995, 1996, 1997 and 1998.

Development Phase
Two instances of good faith defined as reasonableness were found in 2000 and 2001. No such data was found in 1999, 2002 and 2003.

Consolidation Phase
During this phase, two cases defined good faith as reasonableness, both from 2004. No such data was found in 2005, 2006, 2007, 2008 and 2009.

Overall, the empirical data shows that from 1992 until 2009, there was a total of five (5) attempts to define good faith as reasonableness.
Four attempts to define good faith as reasonableness were reported in cases from NSW and one attempt from a case in Victoria as illustrated in Figure 8.4. No other cases were found attempting this definition in Federal and Other States. This means that good faith defined as reasonableness received support from NSW.

The concept of good faith as reasonableness also received support from the literature and the empirical data as illustrated in Figures 8.5 and 8.6. The empirical data illustrated that five (5) attempts were made to define good faith as reasonableness which indicates strong support. However, it is argued here that as a concept, reasonableness cannot stand alone; it must be associated with other concepts to ensure the clarity of its meaning. In explaining the concept of reasonableness, ‘the courts have sought to explain the concept by reference to other concepts, equally uncertain such as fairness, good faith or absence of unconscionable conduct’.51

Label Three: Fairness

The notion of fairness is based on the nature of the agreement along with the duty of cooperation to ensure the performance of the contract. The notion of fairness

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51 Cole, above n 48, 10.
was mentioned in the landmark case of *Interfoto Picture Library v Stiletto Visual Programmes Ltd*, where Bingham L J stated:

> Acting in good faith does not simply mean that [parties] should not deceive each other…its effect is perhaps most aptly conveyed…as ‘playing fair’, ‘coming clean’ or ‘putting one’s cards face upwards on the table’. It is in essence a principle of fair and open dealing.\(^{52}\)

Among the cases that support the meaning of good faith as fairness is *Commonwealth Bank of Australia v Spira*, where Gzell J held that:

> The obligation of good faith requires a party to exercise rights and obligations under the contract fairly and, it would seem, reasonably. It does not require anything else.\(^{53}\)

In ‘multi categories’, it is also found that the expression of good faith as fairness combines with the expression of ‘not to act capriciously’ as illustrated in *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* where Finkelstein J held that:

> In my view, a term of a contract that requires a party to act in good faith imposes an obligation upon that party not to act capriciously. It would not operate so as to restrict actions designed to promote the legitimate interests of that party. That is to say, provided the party exercising the power acts reasonably in all the circumstances, the duty to act fairly and in good faith will ordinarily be satisfied.\(^{54}\)

Hillman claims that the concept of good faith takes on many different meanings in different contexts because at the base, it is nothing more than a requirement of

\(^{52}\) [1989] QB 433, 439.
\(^{53}\) [2002] NSWSC 905 [176].
\(^{54}\) (1999) ATPR 41-703, 43 014.
fairness. Farnsworth offers some general remarks on the concept of good faith in *Restatement* 208. He suggests that:

This duty is based on fundamental notions of fairness, and its scope necessarily varies according to the nature of the agreement. Some conduct such as subterfuge and evasion, clearly violates the duty. However the duty may not only proscribe undesirable conduct, but may require affirmative action as well. A party may be under a duty not only to refrain from hindering or preventing the occurrence of conditions of the party’s own duty or performance of the other party’s duty, but also to take some affirmative steps to co-operate in achieving these goals.

Figure 8.7 illustrates attempts to define good faith as fairness by year, while Figure 8.8 illustrates good faith defined as fairness by jurisdiction.

**Figure 8.7: Good Faith as Fairness by Year**

<table>
<thead>
<tr>
<th>Introduction Phase</th>
<th>Development Phase</th>
<th>Consolidation Phase</th>
</tr>
</thead>
</table>

**Introduction Phase**

No attempts were made to define good faith as fairness from 1992 to 1997.


Development Phase
There are two cases in which good faith is defined as fairness in 1999 and 2002 respectively. No such data was found in 2000, 2001 and 2003.

Consolidation Phase
No such data was found from 2004 to 2009.

Overall, the empirical data depicts that there are two (2) instances in which good faith is defined as fairness from 1992 to 2009.

Figure 8.8: Good Faith as Fairness by Jurisdiction

In NSW, there was one reported instance in which good faith was defined as fairness and one such case in the Federal court as illustrated in Figure 8.8. No such cases were found in Victoria and Other States. This means that good faith defined as fairness received support from NSW.

Good faith as fairness is a fundamental expression as illustrated by the above literature. The empirical data shows that there are two cases that defined good faith as fairness, indicating little support. It is argued that fairness is too abstract and poses a problem to the expression of good faith as fairness. It is difficult to determine what is fair. Fairness varies in different contexts and cannot possibly be
viewed consistently. Fairness is often associated with justice. Justice is subjective depending on the context. Given the ambiguity of the term, there is potential for unreasonable opinions based predominantly on an individual’s values and beliefs.\footnote{Hillman, above n 55, 877.}

*Label Four: Standard of Appropriate Behaviour*

Label Four defines the meaning of good faith as a standard of appropriate behaviour determined by reference to community standards. Reiter argued that the best approach to determine good faith is by determining the standard of appropriate behaviour from the perspective of the community. Reiter argued:

> When I speak of good faith here, I refer to standards of appropriate behaviour relevant in the community… The good faith I consider is not necessarily the relevant community’s view of what the most moral and other-regarding contractor would do, though this is certainly a part of good faith more broadly defined. Rather, what interests me here is that community’s view of what range of conduct is appropriate. The ‘appropriate’ range will include the ‘very best’ behaviour, but will also incorporate less virtuous conduct. It is a circumstances-bound concept that will, in many cases be reducible to the notion of fairness and reasonableness in the circumstances.\footnote{Reiter, above n 5, 706.}

Reiter based his statement on the notion that social groups practise a certain standard of behaviour that corresponds to the views and practices widely shared by the same community.\footnote{Ibid.} For example, in leasing transactions, good faith is defined as going beyond a mere state of mind on the part of the percentage lessee and requires an inquiry into what type of business conduct conforms with community standards of fairness, decency and reasonableness in performance and enforcement.\footnote{R. Thigpen, ‘Good Faith Performance under Percentage Leases’ (1981) *Mississippi Law Journal*, 315, 320.} Hutchison stated that:

What emerges quite clearly from recent academic writings and from some of the leading cases, is that good faith may be regarded as an ethical value or controlling principle, based on community standards of decency and fairness, that underlies and informs the substantive law of contract. It finds expression in various technical rules and doctrines defines their form, content and field of application and provides them with a moral and theoretical foundation. Good faith thus has a creative, a controlling and a legitimating or explanatory function.62

Furthermore, Hutchinson commented that good faith operates in conjunction with individual autonomy and responsibility but not dominating the outline of the contract law. The most important issue commented on by Lubbe and Murray is:

It will ensure just results only if judges are alert to their task of testing existing doctrines and the operation of particular transaction against the constantly changing mix of values and policies of which bona fides is an expression.63

O’Connor claimed that good faith has to conform to currently acceptable behaviour in the community. It is important to identify which community is to determine the best behaviour. This is described through the provisional meaning adopted:

The principle of good faith in English Law is a fundamental principle derived from the rule of pacta sunt servanda (agreements are to be kept) and other legal rules, distinctively and directly related to honesty, fairness and reasonableness prevailing in the community which are considered appropriate for formulation in new or revised legal rules.64

63 Ibid.
It is argued here that as the standard of appropriate behaviour, good faith is meaningless. It is difficult to establish the standard of appropriate behaviour in the community. The appropriate behaviour of one group may differ from another based on their understanding, beliefs, customs or mutual agreement. It is claimed that there is no judicial support from this concept from the case law databases.

*Label Five: Parties’ Reasonable Expectations*

Paterson, Robertson and Heffey proposed that good faith can be measured based on the parties’ reasonable expectations. The parties’ reasonable expectations approach focuses on how the contractual parties themselves may have expected their contract to be performed based on the probable intentions at the time the contract was made. A commercial contract is designed for a specific purpose and with a clear objective. It is expected that the parties to the contract understood the terms of the contract as the contract is drafted by the parties themselves.

A contract commonly contains contractual provisions including express or implied contractual provisions. For example, there may be an express exclusion clause designed to protect a particular contractual party from the risk of harmful implied contractual terms. In such a case, the court will give priority to the express terms of the contract or the parties’ reasonable expectations as produced by the contractual relationship.

There is one case that supports the notion that good faith should be based on the reasonable expectations of the contracting parties. In *Hughes Aircraft Systems International v Airservices Australia*, Finn J, a proponent of the duty of good faith, commented:

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It may well be that, on analysis, [good faith] would be found to advance little the standard that presently may be extracted from contracting parties by other means.\textsuperscript{68}

Figure 8.9 illustrates the attempts made to define good faith as parties’ reasonable expectations by year, while Figure 8.10 illustrates such attempts by jurisdiction.

\textit{Figure 8.9: Good faith defined as Parties’ Reasonable Expectations}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure89.png}
\caption{Good faith defined as Parties’ Reasonable Expectations}
\end{figure}

\textit{Introduction Phase}

In 1997 one case attempted to define good faith as parties’ reasonable expectations.

\textit{Development Phase}

No such data was found from 1999 to 2003.

\textit{Consolidation Phase}

No such data was found from 2004 to 2009.

Overall, the empirical data shows that only one (1) attempt was made to define good faith as parties’ reasonable expectations.

\textsuperscript{68} (1997) 146 ALR 1, 37.
There is only one reported case from the Federal court defining good faith as the parties’ reasonable expectations. No such cases were found in NSW, Victoria and Other States. This means that good faith defined as parties’ reasonable expectations received support only from the Federal court.

The empirical data illustrated in Figures 8.9 and 8.10 shows that only one case supported good faith as parties’ reasonable expectations. It is argued here that good faith as parties’ reasonable expectations is logical because the expectation of the contract is determined by the parties themselves. For example, two business operators running a similar kind of business are measured by standard business measures of a similar group of business operators to establish reasonable expectations. On the other hand, it is argued here that it is difficult to ascertain the reasonable expectations of the parties and how they are to be determined. The expectations of the parties themselves are difficult to ascertain because in some contracts, the intention of the parties is not properly spelled out.

*Label Six: Cooperation*

Good faith defined as cooperation means that both parties are required to cooperate to secure the expected benefit of the contract. The duty of cooperation
has been accepted as part of the law as early as 1881. In *Mackay v Dick* the duty to cooperate was found to be part of the obligation of good faith. Lord Blackburn stated:

Where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances.\(^69\)

A duty of cooperation is imposed to the extent that it is necessary to make the contract workable for both parties. This definition received support in *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd*, wherein the court in Western Australia was faced with a dispute over a mining contract that contained a clause which stated that:

The successful operation of this contract requires that both parties agree to act in good faith in all matters relating both to carrying out the works, derivation of rates and interpretation of this document.\(^70\)

In this case, the Full Court of Western Australia interpreted the above clause as to mean that there is an obligation of good faith where:

The parties were obliged to agree on rates in advance of work done and they were required to co-operate in the establishment of rates based as far as reasonably possible on actual costs.\(^71\)

\(^{69}\) (1881) 6 App Case 251, 263.
\(^{70}\) [2000] WASCA 102 [22].
\(^{71}\) [2002] WASCA 102 [33].
Farnsworth claimed that good faith performance has always required the cooperation of one party where it was necessary so that the other might secure the expected benefit of the contract.\textsuperscript{72} The standard for determining what cooperation was required has always been an objective standard based on decency, fairness and reasonableness in the business community and not on the individual’s own belief as to what might be decent, fair or reasonable. Both common sense and tradition dictate an objective standard for good faith performance. Peden also claimed that ‘often co-operation is seen as equivalent to good faith’.\textsuperscript{73} She argued that cooperation is analogous to good faith:

‘Cooperation’ is sometimes seen as equivalent to ‘good faith’, and this seems appropriate. The effect of requiring cooperation often overlaps with what is trying to be achieved by the newly created obligation of ‘good faith’. Cooperation (or good faith if that term is preferred) basically must embrace a duty to act honestly and a duty to have regard to the legitimate interests of the other party.\textsuperscript{74}

It is unnecessary to imply an obligation of good faith where the same result is achieved by considering the parties’ intentions via the duty of cooperation as illustrated by Griffith CJ in Butt v McDonald:

It is a general rule applicable to every contract that each party agrees, by implication, to all such things as are necessary on his part to enable the other party to have the benefit of the contract.\textsuperscript{75}

This statement was reaffirmed in the High Court decision in Secured Income Real Estate (Australia) Ltd v St Martin’s Investments Pty Ltd, which held that:

\textsuperscript{72} Farnsworth, above n 56, 672.
\textsuperscript{74} Ibid.
\textsuperscript{75} (1996) 7 QLJ 68,70-71.
But it is common ground that the contract imposed an implied obligation on each party to do all that was reasonably necessary to secure performance of the contract.\textsuperscript{76}

Moreover, when Sir Anthony Mason formulated the definition of good faith, his Honour defined good faith from three notions: honesty, regards to the interests of the parties and cooperation/loyalty (that is loyalty to the contract where contract is treated as a promise).\textsuperscript{77} This definition affirms Peden’s view that good faith is analogous to the duty to cooperate.\textsuperscript{78}

Figure 8.11 illustrates good faith defined as cooperation by year, while Figure 8.12 illustrates good faith defined as cooperation by jurisdiction.

![Figure 8.11: Good Faith defined as Cooperation by Year](image)

\textit{Introduction Phase}

No data was found from 1992 to 1997 concerning good faith defined as cooperation.

\textsuperscript{76} (1979) 144 CLR 596, 607-608 per Mason J.
Development Phase
In 2000, one case defined good faith as cooperation. No such cases were found in 1999, 2001, 2002 and 2003.

Consolidation Phase
In 2005, one case defined good faith as cooperation. No such cases were found in 2004, 2006, 2007, 2008 and 2009.

Overall, the empirical data shows that there were two attempts to define good faith as cooperation.

There are two cases in which good faith was defined as cooperation, both of which was found in Other States as illustrated in Figure 8.12. No such cases were found in NSW, Victoria and the Federal court. This means that good faith defined as cooperation received support from Other States.

The empirical data as illustrated in Figures 8.11 and 8.12 shows that two cases supported good faith as the duty to cooperate. This indicates low support. The duty to cooperate is a general duty expected by both parties to the contract in
which the expected benefit should be reaped. It is argued here that the duty to cooperate has a similar task to good faith. Therefore, it is claimed that there is no need to associate good faith with the duty to cooperate as it is sufficiently comprehensive to ensure a workable contract. Although vague, it is well established in common law and enjoys a clear foundation when compared to good faith.

Label Seven: Loyalty

Lucke claimed that good faith is defined as loyalty. When good faith is defined as loyalty, there is an expectation that both parties in the contract have to be loyal to each other to secure the benefit of the contract. According to him, good faith as loyalty is a useful definition because good faith serves as an implied term to ensure an effective contract. The expression good faith itself means loyalty, which is the expected expectation from the contracting parties. He further explained:

Many rules of our existing contract law can quite plausibly be seen as manifestations of good faith as loyalty. Example are those rules of construction, and those rules providing for the implication of terms and for the severance of ineffective terms, which serve to give business efficacy to contracts. Good faith as loyalty finds an even simpler and more fundamental expression in the recognition of a legal duty to perform contractual undertakings; pacta sunt servanda. Furthermore, reading loyalty into good faith amounts to a generous, even an expansive interpretation, but it does not seem forced or artificial from a linguistic point of view. ‘Faith’, according to the Oxford English Dictionary, means inter alia, ‘loyalty’ or ‘fidelity’. There is no linguistic reason why we should not regard this as the core meaning of the whole phrase.79

It is argued here that good faith as loyalty is a fundamental expression. Loyalty is the expected standard of behaviour of the contracting party to ensure an effective

79 Lucke, above n 31, 162.
contract. However, no judicial support was received due to the expansiveness of the interpretation of good faith.

Label Eight: Having Regard to the Other’s Interests

Among the cases that support good faith as having regards to other’s interests are Automasters Australia Pty Ltd v Bruness Pty Ltd & Anor, in which his Honour claimed:

The term ‘good faith’ imports a duty to have due regard to the legitimate interests of both parties in the enjoyment of the fruits of the contract.  

In ‘multi categories’, the element of having regards to other’s interests combines with the elements of cooperation and honesty. This definition was given recognition in Central Exchange Ltd v Anaconda Nickel Ltd, where Parker J held that:

It is submitted for the applicants that the implication of a term of good faith requires, at least, that the parties be bound to ‘the spirit of the bargain’ and not to render illusory contractual entitlements ... [which reflects the discussion of the three notions of good faith as explained below by Mason]. On the assumption for the purposes of this decision, that an obligation of good faith is to be implied into this Deed and that by virtue of this the defendant may not render illusory the contractual entitlements of the plaintiff, and is to co-operate with the plaintiff in achieving the contractual objects, and is to act honestly and reasonably having regard to the respective interests of the parties.  

Mason J argued that good faith embraces three notions: an obligation on the parties to cooperate in achieving the contractual objects (loyalty to the promise itself); compliance with honest standards of conduct; and compliance with standards of conduct which are reasonable, having regard to the interests of the

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80 [2002] WASC 286 [388].
parties. Peden also suggested that the true meaning of good faith must be a requirement to have regard to the interests of the other party, which includes loyalty to the contract and subjective honesty. This definition has recently been given strong support by Barrat J in *Overlook v Foxtel*, where his Honour stated:

> It must be accepted that the party subject to the obligation is not required to subordinate the party’s own interests, so long as pursuit of those interests does not entail unreasonable interference with the enjoyment of a benefit conferred by the express contractual terms so that the enjoyment becomes (or could become) nugatory, worthless or, perhaps, seriously undermined’…the implied obligation of good faith underwrites the spirit of the contract and supports the integrity of its character. A party is precluded from cynical resort to the black letter. But no party is fixed with the duty to subordinate self-interest entirely which is the lot of the fiduciary…The duty is not a duty to prefer the interests of the other contracting party. It is, rather, a duty to recognise and to have due regard to the legitimate interests of both the parties in the enjoyment of the fruits of the contract as delineated by its terms.

Figure 8.13 illustrates good faith defined as having regards to the other’s interests by year, while Figure 8.14 illustrates the same data by jurisdiction.

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82 Mason, above n 77, 69.
83 Elisabeth Peden, ‘The Meaning of Contractual Good Faith ‘(2002) 22 Australian Bar Review 235, 237.Peden agreed with two of the definitions proposed by Sir Anthony Mason which are cooperation or loyalty and honesty.
84 (2002) ATPT (Digest) 46-219: Aust Contract R 90-143 [67]. See also Einstein J’s ‘essential or core content’ of the obligation to mediate or negotiate in good faith in *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236, 262.

(1) to undertake to subject oneself to the process of negotiation or mediation (which must be sufficiently precisely defined by the agreement to be certain and hence enforceable)
(2) to undertake un subjecting oneself to that process, to have an open mind in the sense of:
   (a) a willingness to consider such options for the resolution of the dispute as may be propounded by the opposing party or by the mediator, as appropriate
   (b) a willingness to give consideration to putting forward options for the resolution of the dispute He specifically excluded from this any requirement: (a) to act for or on behalf or in the interests of the other party; (b) to act otherwise than by having regard to self-interest.’
Introduction Phase
No cases defined good faith as having regards to other’s interests from 1992 to 1998.

Development Phase
There is one case in 2001 and three cases in 2002 where good faith is defined as having regards to other’s interests. No such cases were found in 1999, 2000 and 2003.

Consolidation Phase
No such data was found from 2004 to 2009.

Overall, the empirical data shows that there are four (4) attempts to define good faith as having regards to the other’s interests.
There is one case from NSW and three cases from Other States where good faith is defined as having regards to the other’s interests as illustrated in Figure 8.14. No such cases were found in Victoria and Federal court. This means that good faith defined as having regards to other’s interests received most support from Other States.

The empirical data as illustrated in Figures 8.13 and 8.14 shows that there were four attempts to define good faith as having regards to the other’s interests, which shows strong support. It is argued here that good faith as having regards to the other’s interests enjoys a broader scope than other definitions by means of the following three elements, namely, cooperation, honesty and having regards to the others’ interests. Undeniably, the expression of cooperation and honesty are the most common expression of good faith as explained above.

**Label Nine: Excludes Any Forms of Bad Faith or ‘Excluder’**

Label Nine defines good faith from a negative perspective, that is, where it excludes any form of bad faith. This is known as the ‘Excluder’ approach. Summers proposed the idea of good faith as an ‘excluder’ of bad faith behaviour and claimed that:

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It is a phrase which has no general meaning or meanings of its own, but which serves to exclude many heterogeneous forms of bad faith.\textsuperscript{86}

Summers identified four broad categories of bad faith, namely bad faith in contract negotiation and formation, bad faith in performance, bad faith in raising and resolving contract disputes and bad faith in taking remedial action (see Table 8.2).\textsuperscript{87}

\textbf{Table 8.2: Good Faith and Bad Faith according to Summers}

<table>
<thead>
<tr>
<th>Form of bad faith conduct</th>
<th>Meaning of Good Faith</th>
</tr>
</thead>
<tbody>
<tr>
<td>seller concealing a defect in what he is selling</td>
<td>Fully disclosing material facts</td>
</tr>
<tr>
<td>builder wilfully failing to perform in full, through otherwise substantially performing</td>
<td>Substantially performing without knowingly deviating from specifications</td>
</tr>
<tr>
<td>contractor openly abusing bargaining power to coerce an increase in the contract price</td>
<td>Refraining from abuse of bargaining power</td>
</tr>
<tr>
<td>hiring a broker and then deliberately preventing him from consummating the deal</td>
<td>Acting cooperatively</td>
</tr>
<tr>
<td>conscious lack of diligence in mitigating the other party’s damages</td>
<td>Acting diligently</td>
</tr>
<tr>
<td>arbitrarily and capriciously exercising a power to terminate the contract</td>
<td>Acting with some reason</td>
</tr>
<tr>
<td>adopting an overreaching interpretation of contract language</td>
<td>Interpreting contract language fairly</td>
</tr>
<tr>
<td>harassing the other party for repeated assurances of performance</td>
<td>Accepting adequate assurances</td>
</tr>
</tbody>
</table>

In \textit{PRP Diagnostic Imaging Pty Limited (in its capacity as trustee for the Pittwater Radiology Trust) \& Ors v Pittwater Radiology Pty Limited}, Einstein J held that:

In many ways, the implied obligation of good faith is best regarded as an obligation to eschew bad faith. This is borne out by the following succinct

\textsuperscript{86} Ibid.
statement by Lord Scott of Foscote in Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd [2001] 2 WLR 170, a case concerning the duty of good faith in the insurance context:
Unless the assured has acted in bad faith, he cannot, in my opinion, be in breach of a duty of good faith, utmost or otherwise.\textsuperscript{88}

In Tymshare Inc v Covell, Scalia J held that:

The doctrine of good faith performance is a means of finding within a contract an implied obligation not to engage in the particular form of conduct which, in the case at hand, constitutes 'bad faith'.\textsuperscript{89}

Understood as excluder, good faith has received much criticism. Atiyah explained that good faith is difficult to define or even summarise although it is often easy to recognise examples of bad faith.\textsuperscript{90} In Summers’ view, good faith as excluder could be used flexibly by judges so as to do justice and do it according to the law.\textsuperscript{91} Priestley J agreed with the explanation of Summers when he said:

The typical judge who uses this phrase is primarily concerned with ruling out specific conduct and only secondarily, or not at all, with formulation of the positive content of a standard.\textsuperscript{92}

However, this approach fails to provide a clear idea of what observance of the standard of good faith is actually required. Bridge commented that:

[I]t seem tantamount to saying that the good faith duty is breached whenever a judge decides that it has been breached…[which] hardly advances the cause of intellectual inquiry and provides absolutely no guide as to the disposition of

\textsuperscript{88} [2008] NSWSC 701 [68].
\textsuperscript{89} 727 F2d 1148 (1984).
\textsuperscript{91} Summers, above n 85, 196.
\textsuperscript{92} Ibid 202.
future cases except to the extent that they may be on all fours with a decided case.93

Figure 8.15 illustrates good faith defined as an ‘Excluder’ by year, while Figure 8.16 illustrates the same data by jurisdiction.

**Figure 8.15: Good Faith defined as an ‘Excluder’ by Year**

<table>
<thead>
<tr>
<th></th>
<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
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</tr>
<tr>
<td>1993</td>
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<td>0</td>
</tr>
<tr>
<td>1998</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

**Introduction Phase**
No cases were identified from 1992 to 1998 that define good faith as an ‘Excluder’.

**Development Phase**
No such data was found from 1999 to 2003.

**Consolidation Phase**
In 2008, only one case defined good faith as ‘Excluder’.

Overall, the empirical data shows that there was one attempt to define good faith as ‘Excluder’.

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NSW it the only jurisdiction to have attempted a definition of good faith as ‘Excluder’. No such cases were found in Victoria, Federal and Other States. This means that good faith defined as ‘Excluder’ only received support from NSW.

The empirical data as illustrated in Figures 8.15 and 8.16 shows that there was only one case in which good faith was defined as an ‘Excluder’, thus indicating low support. It is argued here that this meaning completely differs from the other meanings included in this chapter because it stands alone. It is a loose interpretation containing a phrase which has no meaning of its own, that is, any behaviour which is bad faith is by definition not good faith and thus leads to an undesirable lack of certainty in a contract.

8.4 THE PROPOSED TAXONOMIC SOLUTION

Based on the analysis in 8.3 above, a list of nine categories of good faith definitions were identified as illustrated in Table 8.3. Table 8.3 summarises the labels based on the above empirical data according to frequency and jurisdiction.

Table 8.3: Summary of Labels, Including Frequency and Jurisdiction
The frequency of the distribution of the labels are as follows: Label 1: Honesty (4), Label 2: Reasonableness (5), Label 3: Fairness (2), Label 5: Parties’ Reasonable Expectations (1), Label 6: Cooperation (2), Label 8: Having Regards To the Other’s Interests (4) and Label 9: Excluder (1). No frequency was detected for Label 4: The Standard of Appropriate Behaviour and Label 7: Loyalty. The above empirical data reveals that the most frequent labels detected are honesty (4), reasonableness (5) and having regards to the other’s interests (4). These three labels received most support from jurisdictions as illustrated above in Table 8.3. The attempt made by each of the jurisdictions to define good faith indicates good faith is capable of being defined.

This section, proposes a solution to the current problematic approaches to the meaning of good faith. Table 8.4 reveals that some of the expressions have a similar scope of expression and could together form a meaningful definition. Most of the expressions are standalone because the expression does not belong to any specific group. This is because good faith is a concept ‘protean’ in nature; therefore, it has many ways of expressing its meaning. Sometimes the expression is based on the context or circumstances which lead to difficulties in attaching its meaning or definition. These nine categories are reorganised into seven main types or forms of definitions of good faith.
Table 8.4: Seven General Groupings of Good Faith from the Identified Label:

<table>
<thead>
<tr>
<th>Group</th>
<th>Theme</th>
<th>Label</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Moral Values</td>
<td>Label 1:Honesty, Label 6:Cooperation and Level 7:Loyalty</td>
</tr>
<tr>
<td>2</td>
<td>Reasonableness</td>
<td>Label 2:Reasonableness</td>
</tr>
<tr>
<td>3</td>
<td>Having Regards to the Other's Interests</td>
<td>Label 8:Having Regards to the Other's Interests</td>
</tr>
<tr>
<td>4</td>
<td>Fairness</td>
<td>Label 3:Fairness</td>
</tr>
<tr>
<td>5</td>
<td>The Standard of Appropriate Behaviour</td>
<td>Label 4: The Standard of Appropriate Behaviour</td>
</tr>
<tr>
<td>6</td>
<td>Parties’ Reasonable Expectations</td>
<td>Label 5:Parties’ Reasonable Expectations</td>
</tr>
<tr>
<td>7</td>
<td>Excluder</td>
<td>Label 9:Excluder</td>
</tr>
</tbody>
</table>

8.4.1 Group 1: Honesty, Loyalty and Cooperation and Group 2: Reasonableness

Group 1 consists of honesty, loyalty and cooperation. These are considered moral values. Group 2 consists of reasonableness. From the empirical study, the label most commonly used in relation to good faith is ‘honesty and reasonableness’. Between the two expressions, ‘honesty’ is the least controversial concept to define good faith. In *Aiton Australia Pty Ltd v Transfield Pty Ltd*, Einstein J stated that: ‘Parties are subject to a universal duty to act honestly in any case’.94 This statement gained recognition in *Insight Oceania Pty Ltd v Philips Electronics Australia Ltd*, where Bergin J held that ‘The duty to act in good faith seems to me to subsume the obligation to act honestly’.95

While ‘honesty’ is universally recognised, ‘reasonableness’ is a more difficult concept where a reasonable expectation approach seems to be broad enough to include reference to norms of the relationship as designated by the contract. In *The Mogul Steamship Co Ltd v McGregor, Gow & Co*, Bowen L J commented on the concept of reasonable standards for commercial contracting. His Lordship held that:

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I myself should deem it to be a misfortune if we were to attempt to adopt some standard of judicial ‘reasonableness’... to which commercial adventurers, otherwise innocent, were bound to conform.96

Peden observed that equating good faith with reasonableness is more ‘confusing than instructive’ and commented that:

There is no precise meaning given, but rather a repetition of well-worn phrase and quotes, without explanation of how and why they fit together. There is furthermore, no explanation of why ‘reasonableness’ is a justified inclusion in the meaning of good faith, and why it is considered identical to ‘good faith’.97

In *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust)*, Finkelstein J commented that acting reasonably was seen as central to acting fairly and in good faith. His Honour stated that:

…provided the party exercising the power acts reasonably in all the circumstances, the duty to act fairly and in good faith will ordinarily be satisfied.98

Both expressions are standalone definitions,99 but this does not preclude them being used in combination. For example, both expressions are found in *Tomlin v Ford Credit Australia*, where McDougall J claimed that ‘The content of an implied duty to perform obligations and exercise contractual rights in good faith could be said to consist of an obligation to act honestly and reasonably.’100

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96 (1889) 23 QBD 598, 620.
97 Peden, above n 73, 176.
98 [1999] FCA 903 [37].
99 See section 8.3 above.
100 [2005] NSWSC 540 [116].
8.4.2 Group 3: Having Regards to the Other’s Interests

Group 3 consists of the label ‘Having regards to the Other’s Interests’. It is also another common expression in relation to good faith where the interests of the contracting parties are given due consideration. This kind of expression has received judicial recognition. In Central Exchange Ltd v Anaconda Nickel Ltd, Parker J held that:

It is submitted for the applicants that the implication of a term of good faith requires, at least, that the parties be bound to ‘the spirit of the bargain’ and not to render illusory contractual entitlement…. On the assumption for the purposes of this decision, that an obligation of good faith is to be implied into this Deed and that by virtue of this the defendant may not render illusory the contractual entitlements of the plaintiff, and is to cooperate with the plaintiff in achieving the contractual objects, and is to act honestly and reasonably having regard to the respective interests of the parties.101

The duty is not to prefer the interests of the other contracting party but rather a duty to recognise and to have due regard to the legitimate interests of both parties.102 In Overlook v Foxtel, Barrett J further commented that the obligation does not require subordinating the party’s own interests. His Honour further stated that the paramount consideration is that:

….so long as pursuit of those interests does not entail unreasonable interference with the enjoyment of a benefit conferred by the express contractual terms so that the enjoyment becomes (or could become) nugatory, worthless or, perhaps, seriously undermined’…the implied obligation of good faith underwrites the spirit of the contract and supports the integrity of its character.103

102 See Automasters Australia Pty Ltd v Bruness Pty Ltd & Anor [2002] WASC 286 (Unreported, Hasluck J, 4 December 2002) [388].
In the context of a franchise, the duty of good faith must have regard to the legitimate interests of both franchisor and franchisee to ensure a successful relationship of the business. This is supported in *JF Keir Pty Ltd v Priority Management Systems Pty Ltd (administrators appointed)*, where it was held that:

A franchisor is required to act reasonably and honestly (to an objective standard), not to act for an ulterior motive, to recognize and have regard to the legitimate interest of both parties in the enjoyment of the fruits of the contract, and to avoid rendering the franchisee’s interest under the agreement nugatory or worthless or seriously undermining it.\(^{104}\)

Hence, it is illustrated that the requirement of ‘Having regards to the Other’s Interests’ is important to ensure the successful relationship between the parties where the legitimate interests of the parties are recognised, with the duty not to subordinate one’s own interests.

### 8.4.3 Group 4: Fairness

Fairness is an abstract concept. It is difficult to define fairness because different individuals perceive it differently. Fairness is often associated with justice. In this context, it is difficult to determine justice when fairness is difficult to determine and is susceptible to an individual’s perspective of justice.

### 8.4.4 Group 5: The Standard of Appropriate Behaviour

The standard of appropriate behaviour of an individual or a community is difficult to determine. The perspective of the standard of appropriate behaviour is inconsistent. The standard of appropriate behaviour may be influenced by understandings, beliefs, customs or mutual agreement among the group. Hence, it is meaningless in expressing the definition of good faith.

\(^{104}\) (2007) NSWSC 789[27].
8.4.5  Group 6: Parties’ Reasonable Expectations

It is difficult to ascertain the parties’ reasonable expectations and how they are to be determined in a contract. This is because in some contracts the expectations of the parties are not properly spelled out or are different from those that are stated in a contract.

8.4.6  Group 7: Excluder

‘Excluder’ is a vague expression of good faith because it is defined by means of what is not, i.e. bad faith. It is an expression that lacks a definite meaning.

Figure 8.17 shows the three labels which have the potential to serve as the definition or meaning of good faith:

Figure 8.17: The Three Labels which have the Potential to serve as the Definition or Meaning of Good Faith
Overall, the literature and empirical observations suggest that the three labels are best suited to serve as the definition or meaning of good faith.

8.5 A PROPOSED DEFINITION OF GOOD FAITH

Formulating a new definition of good faith is a difficult task. It is the biggest impediment to the acceptance of the concept. To propose a definition is obviously ambitious, however, it is the intention of this study to propose a workable definition. The discussion in 8.4 suggests that there are three labels that serve as potential definitions or meanings of good faith, as illustrated in Figure 8.3 above.
These are a) honesty, b) reasonableness, and c) having regards to the other’s interests. They are commonly used in reference to the concept of good faith as discussed in chapter 8.4.

The findings of this discussion are also supported by the empirical data as illustrated in Table 8.5, which demonstrated the summary of labels including frequency and percentage from the case law databases.

Table 8.5: Frequency and Percentage of the Good Faith Labels

<table>
<thead>
<tr>
<th>Theme</th>
<th>Label 1: Honesty</th>
<th>Label 2: Reasonableness</th>
<th>Label 3: Fairness</th>
<th>Label 5: Parties’ Reasonable Expectation</th>
<th>Label 6: Cooperation</th>
<th>Label 8: Having Regards to the Other’s Interest</th>
<th>Label 9: Excluder</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Frequency</td>
<td>4</td>
<td>5</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>4</td>
<td>1</td>
<td>19</td>
</tr>
<tr>
<td>Percentage</td>
<td>21%</td>
<td>26%</td>
<td>11%</td>
<td>5%</td>
<td>11%</td>
<td>21%</td>
<td>5%</td>
<td>100%</td>
</tr>
</tbody>
</table>

The frequency and percentage of the distribution of the labels are as follows: Label 1: Honesty (4) which is equivalent to 21 percent, Label 2: Reasonableness (5) which is equivalent to 26 percent, Label 3: Fairness (2) which is equivalent to 11 percent, Label 6: Cooperation (2) which is equivalent to 11 percent, Label 8: Having Regards to the Other’s Interests (4) which is equivalent to 21 percent and Label 9: Excluder (1) which is equivalent to 5 percent. Hence, the empirical data demonstrated that Label 1: Honesty (4) which is equivalent to 21 percent, Label 2: Reasonableness (5) which is equivalent to 26 percent and Label 8: Having Regards to Other’s Interest (4) which is equivalent to 21 percent received the most support from the rest of the identified labels which amounts to 68 percent from the total percentage. This data suggests a strong support for the three labels which received more than half of the total support.

The above findings are consistent with the definition of good faith proposed by the *Competitive Foods Australia Pty Ltd* in its submission to a Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Franchising*. 
Code of Conduct, in September 2008,\textsuperscript{105} which proposed a ‘multi categories’ definition:

Good faith in relation to conduct by a franchisor or a franchisee means that the party has acted:

a) honestly and reasonably; and
b) with regard to the interests of the other parties to the franchise.

This definition was supported by a list six factors which may be taken into account by a court in determining whether or not conduct by a franchisee or franchisor has been in good faith as follows:

c) the commercial and business objects of the franchise;
d) the legitimate business interests of each of the parties, and what is reasonably necessary for the protection of those interests;
e) the respective financial and non-financial contributions made by each of the parties to the establishment and conduct of the franchised business;
f) the risks taken by each of the parties in the establishment and conduct of the franchised business;
g) the alternative courses of action available to the parties in respect of the matter under consideration; and
h) the usual practices in the industry to which the franchise relates.

From the proposed definition of good faith, ‘honesty’ is an obvious example that is commonly associated with good faith.\textsuperscript{106} In Aiton Australia Pty Ltd v Transfield Pty Ltd, Einstein J stated that: ‘Parties are subject to a universal duty to act honestly in any case’.\textsuperscript{107} Even though honesty falls under the ‘single category’, it can be combined with another ‘single category’ to constitute a ‘multi-categories’

\textsuperscript{105} A draft model amendment was included in Competitive Foods Australia, Submission No.22 to Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into Franchising Code of Conduct, 2008.


\textsuperscript{107} (1999) 153 FLR 236, 262
definition. Therefore, combining two or more ‘single category’ definitions is not a problem. The advantages of having a ‘multi categories’ definition is that it will assist in comprehensively encapsulating the concept of good faith. *Tomlin v Ford Credit Australia* provides an illustration of a ‘multi-categories’ definition of good faith whereby McDougall J claimed that:

> The content of an implied duty to perform obligations and exercise contractual rights in good faith could be said to consist of an obligation to act honestly and reasonably.\(^{108}\)

The ‘multi-category’ approach to the definition of good faith is consistent with certain influential legal texts in Australia. The ‘multi-categories’ definitions given by Peden and Mason J were referred to as the two principal texts for the definition of good faith. Peden claimed that:

> …it is suggested that the true meaning of good faith must be a requirement to behave honestly and to have regard to the interests of the other party without subordinating one’s own interest.\(^{109}\)

Mason J’s definition of good faith is more detailed whereby good faith is defined in relation to three notions: a) an obligation on the parties to cooperate in achieving the contractual objects (loyalty to the promise itself), b) compliance with honest standards of conduct; and c) compliance with standards of contract which are reasonable and have regard to the interests of the parties.\(^{110}\) The definition formulated by Mason J has been cited in a number of cases including *Burger King Corporation v Hungry Jack’s Pty Ltd*\(^{111}\) and in *Hughes Aircraft Systems International v Airservices Australia*.\(^{112}\)

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\(^{111}\) (2001) 69 NSWLR 558, 570.

\(^{112}\) (1997) 146 ALR 1, 37.
Nevertheless, good faith is a difficult concept to define. The advantages of expressing the definition of good faith in a ‘multi-categories’ form is that it provides flexibility of definition as illustrated by the two prominent scholars Peden and Mason J. The Small Business Commissioner of South Australia also supported a ‘multi-categories’ approach to the definition of good faith and submitted that ‘good faith can be defined in plain English to mean acting fairly, honestly, reasonably and cooperatively’. These definitions resonate with what the courts have held to be the underlying duties of parties and the integral conduct imposed by the courts to a commercial contract.

Based on the above discussion, the researcher proposes that good faith should be defined by a ‘multi-categories’ approach. The empirical observation reveals that there are three popular notions of good faith: a) honesty b) reasonableness, and c) having regard to the other’s interests.

8.6 CONCLUSION

In this chapter, nine definitions or meanings of good faith were found in the literature and identified cases as illustrated in Table 8.1. Out of nine, three of the definitions or meanings of good faith were found to have received greater support compared to other definitions. The three potential meanings or themes are: a) honesty, b) reasonableness and c) having regard to the other’s interests as illustrated by Figure 8.17. These three thematic terms are also supported by empirical evidence as illustrated by Table 8.3. The proposed definitions of good faith.

faith are consistent with the definition proposed by Competitive Foods Australia in its submission to a Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Franchising Code of Conduct*, September 2008.\(^{115}\) The proposed definition of good faith is by way of ‘multi-categories’ and the definition is assessed by reference to a ‘non-discretionary reference criteria’ which provides that:

Good faith in relation to conduct by a franchisor or a franchisee means that the party has acted:

a) honestly and reasonably; and
b) with regard to the interests of the other parties to the franchise.

This definition was supported by a list of six factors which may be taken into account by a court in determining whether or not conduct by a franchisee or franchisor has been in good faith as follows:

c) the commercial and business objects of the franchise;
d) the legitimate business interests of each of the parties, and what is reasonably necessary for the protection of those interests;
e) the respective financial and non-financial contributions made by each of the parties to the establishment and conduct of the franchised business;
f) the risks taken by each of the parties in the establishment and conduct of the franchised business;
g) the alternative courses of action available to the parties in respect of the matter under consideration; and
h) the usual practices in the industry to which the franchise relates.

\(^{115}\) A draft model amendment was included in Competitive Foods Australia, Submission No.22 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Franchising Code of Conduct*, September 2008.
The proposed definition which is ‘multi-categories’ received strong support in this study as demonstrated by the literature and the empirical evidence discussed in sections 8.3 and 8.4. These definitions also received robust support from the prominent experts in the area of good faith, namely Peden and Mason J. Based on these findings, good faith may be best defined through a ‘multi-categories’ approach: a) honesty and reasonableness; b) having regard to the other’s interest.

The proposed workable definition of good faith is supported by ‘multi-categories’ which assists in the definition of good faith. It also provides a wider room of flexibility for an abstract concept like good faith which needs guidelines in determining its meaning. In addition, the ‘multi-categories’ approach is also significant to lawyers, judges and scholars as it provides a workable solution to the unsettled issue of the definition of good faith.
Chapter 9 examines the possibility of legislating a good faith obligation in Australia. To date, there remains no High Court decision that has decided on its application and definition of good faith. Despite its uncertain status, good faith has nevertheless played an important role in Australian contract law. The concept of good faith has recently received much attention in Australia by way of an attempt to enshrine it in legislation. In the specific context of franchising, there is a move to legislate good faith which was proposed to curb the unethical exploitative conduct of franchisors towards the franchisees. Suggestions have also been made to legislate good faith as a general obligation similar to the civil law codes model. In civil law codes model, good faith is not defined but instead requires judicial interpretation. This chapter argues that good faith can be legislated in contractual performance similar to the experience in the context of franchising which provides an opportunity to legislate good faith. Doubtless, the presence of an authoritative definition of good faith will resolve the issue of uncertainty. It is anticipated that this approach to the legislation of a good faith obligation will do away with the reservations arising from the issue of uncertainty.

9.1 INTRODUCTION

In Australia, the issue of good faith is important, relevant and fast gaining recognition despite the absence of a definitive High Court decision regarding its application and definition. Good faith is an uncertain concept. It is a mutable concept as it ‘means different things at different times and in different moods at different times and in different places.’

legislated as a general obligation, there is a preliminary discussion revolving
around reforming Australian contract law by way of codification, which provides
the opportunity to legislate good faith in a manner similar to civil law code
models. In this context, good faith is not defined but its interpretation is left to
the judges. Instead of a definition of good faith, there are other approaches of
defining good faith similar to the concept of unconscionability. Both
unconscionability and good faith share the similar feature of being difficult to
define. However, unconscionability was given a legislative effect in s 22 of
Australian Consumer Law as stated in schedule 2 of Competition and Consumer
Act2010 (Cth). Unconscionability is not defined but was instead understood in a
manner of ‘non-discretionary reference’. The approach of ‘non-discretionary
reference criteria’ provides legislative guidance to the judges. Therefore, because
good faith is just as broad a concept like unconscionability, a legislative guideline
is suitable to encapsulate such a concept.

In regards to the specific obligation, there has been a move to legislate an express
obligation of good faith in the specific businesses contexts, such as franchising.
Franchising is a popular business model in Australia. However, franchising has
suffered problems due to the unethical behaviour franchisors toward franchisees
by taking advantage of any imbalance of bargaining power between both parties.
This has caused problems in the franchisor-franchisee relationships. In this
context, the previous Australian government commissioned Wein, an experienced
franchisor operator and small business advisor, to conduct a Review of the
Franchising Code of Conduct. Wein recommended that the Franchising Code be
amended to include an express obligation for both franchisees and franchisors (as
well as prospective franchisees) to act in good faith in pre-franchise agreement
negotiations, in performance of the franchise agreement and disputes. Wein

2 Australian Government, Business Law Branch Attorney-General’s Department, Improving Australia’s Law
and Justice Framework: A Discussion Paper Exploring The Scope for Reforming Australian Contract Law,
2012.
Committee on Corporations and Financial Services-Opportunity Not Opportunism: Improving Conduct in
Australian Franchising (2009).
proposed that such an obligation of good faith should not be defined; instead, good faith should be incorporated in a manner similar to the unconscionable conduct prohibition set out in s 22 of the Australian Consumer Law. This means that good faith is understood by an assisted ‘non-discretionary reference criteria’ which provides a legislative guideline to the judges.

This chapter seeks to determine the possibility of legislating a good faith obligation in Australia by way of a general obligation or as a specific obligation. Chapter 9.2 assesses the possibility of enacting a general obligation of good faith as part of the current discussion concerning reformation of contract law by way of codification, which provides the opportunity to consider including the concept of good faith. Chapter 9.3 reviews the introduction of an express obligation of good faith in the Franchising Code of Conduct to curb the unethical conduct of the franchisor towards the franchisee by taking advantage of any imbalance of bargaining power between them. Chapter 9.4 concludes the chapter with an evaluation of the challenges of legislating a good faith obligation in Australia.

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9.2 A GENERAL OBLIGATION OF GOOD FAITH

In Australia, there had been suggestions from time to time to legislate good faith as a general obligation similar to civil law codes model. In civil law countries, good faith is recognised as a general and pervasive principle. Good faith serves as a guideline for contractual behaviour of the parties. Most European civil codes mention good faith. Despite its broad recognition in civil law countries, there is a lack of definition of good faith. The interpretation of good faith depends on the facts of each case, which requires judicial interpretation.

In 2012, a discussion paper was issued by the Australian Attorney General’s Department on the possibility of reforming Australian contract law to make improvements which would be of the greatest benefit to users of contract law and the economy as a whole. One of the aims of the reform would be to improve certainty in those areas of contract law that are unsettled or unclear. In this regard, the concept of good faith was suggested as offering a number of benefits to contracting parties such as allowing contracting parties to allocate risk more efficiently, lessening the risk of disputation between the contracting parties, and reducing costs for both parties and for the government. In addition, when the legal consequences of actions or omission are clear and predictable, individuals and businesses have the information they need to make informed choices and to develop long-term plans.

In view of its broad usage but lack of an agreed definition, the Discussion Paper recognised that the existence and content of an implied obligation of good faith is a controversial issue in Australia. It was suggested that codification may allow for

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5 See Chapter Three for further details.
greater emphasis to be placed on good faith, especially in facilitating ‘long term contracts’. Many submissions were made in response to the reform proposal to codify and include good faith in Australian contract law. Some commentators support the codification of contract law and the inclusion of good faith because of the benefits it offers to both legal practitioners and users of contract law. The Australian Corporate Lawyers Association agreed that an ‘implied contractual duty of good faith’ should be examined as part of any reform proposal in order to bring a degree of uniformity to Australian contract law. This is because Australian contract law differs between Australian jurisdictions in several areas due to the existence of non-uniform Commonwealth, State and Territory statutes. Therefore, having a codified contract law system will reduce the risk and costs associated with cross border transaction. In the business context, many Australian business partners such as China, Japan and Korea have codified contract law systems. In the codified contract law systems, good faith is an important element to the contracting parties. Uniformity of the contract law system helps to align better business deals with business partners.

Commentators who opposed codification of contract law and the inclusion of statutory good faith did so on the basis that it could potentially increase uncertainty and costs. For example, the peak professional body, the Law Council of Australia, argued that there would be uncertainty and inconsistency as to how a contractual obligation to exercise good faith should be interpreted, and the circumstances in which an obligation of good faith may be implied into a contract. Good faith is an uncertain concept. It is a mutable concept because it ‘means different things at different times and in different moods at different times.

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8 For example franchising contract.
and in different places’.\textsuperscript{11} It has many meanings. Most of which are confusing and contradictory. The definition of good faith depends on its particular context. McDougall J of the NSW Supreme Court commented that the definition of good faith should ‘look at the particular contract, to see what might be comprehended as a particular expression of the general concept of good faith, and then to enquire whether that particular term, or a term having that particular content, should be implied, or whether is excluded by express term or necessary implication from them’.\textsuperscript{12}

The Chief Justice of the NSW Supreme Court, Honourable T F Bathurst has observed that although a number of courts have recognised an implied duty of good faith, ‘its existence has not been finally decided’.\textsuperscript{13} As the \textit{CPA Australia} policy adviser on environment, sustainability and governance has commented, ‘codification in and of itself does not mean legal certainty, nor does it result in the end of the development phase’.\textsuperscript{14} Purcell emphasised the importance of the role of the judges in seeking out the legislative’s objective.’\textsuperscript{15} This comment is aligned with the nature of codification itself. In its general sense, codification is the ‘systematic collection or formulation of the law, reducing it from a disparate mass into an accessible statement which is given legislative rather than merely judicial or academic authority’.\textsuperscript{16} In this context, the Code contains only broad statements at a high level of abstraction that leaves a need for judicial interpretation to give meaning to the relevant provisions and to apply the meaning to the relevant situation. One obvious problem is that the broad statements will be of limited

\footnotesize{\begin{itemize}
\item \textsuperscript{11} Michael Bridge, \textit{Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith’} (1984) 9 \textit{Canadian Business Law Journal} 385, 408.
\item \textsuperscript{13} Honourable T F Bathurst, Submission to Attorney-General’s Department \textit{Improving Australia’s Law and Justice Framework: A Discussion Paper Exploring The Scope for Reforming Australian Contract Law}, 20 July 2012.
\item \textsuperscript{14} John Purcell, ‘Codifying Australia’s Contract Law is a Step in the Wrong Direction’, \textit{Intheblack} (Sydney), 30th July 2012. <http://www.itbdigital.com/opinion?t=legal
\item \textsuperscript{15} John Purcell, ‘Codifying Australia’s Contract Law is a Step in the Wrong Direction’, \textit{Intheblack} (Sydney), 30th July 2012. <http://www.itbdigital.com/opinion?t=legal
\item \textsuperscript{16} Bruce Donald, ‘Codification in Common Law System’ (1973) 47 \textit{The Australian Law Journal} 160, 161.
\end{itemize}}
utility as a guide in a specific situation. Therefore, if the concept of good faith is to be adopted in a contract law code, it will cause uncertainty in two ways. Firstly, good faith will not be defined in the code, and secondly, when the interpretation of good faith is left in the hands of judges, many definitions will be produced because different judges will interpret the concept differently based on the peculiar circumstances of their respective cases.

Such were the concerns of Honourable T F Bathurst, who expressed his view that codification is not the appropriate mechanism to explain a broad and general concept like good faith. His Honour is of the view that ‘the implication of a general duty of good faith into commercial contracts will be worked out on a case-by-case basis where the extent of its operation and its interaction with equitable doctrines such as unconscionability can be considered. Codification will not achieve this.’

The attempt of the draft code to replace the entire Australian contract law will not help to achieve the aim to reduce complexity and ambiguity that exists in the existing contract law. Damian, a partner of Freehills commented that ‘…it is, however, the stuff of pure fantasy to believe that those 29 sentences could govern the meaning of contracts, and future decisions on those few pages would be ignored and would have no influence on other decisions’. To insert a general and broad concept like good faith in the code will lead to an undesirable lack of certainty in the contract.

*CPA Australia* argued that ‘there is an absence of compelling evidence that Australian business are disadvantaged by the current scheme—a highly prescriptive codification may in fact be costly and counterproductive generating a lengthy

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period of judicial interpretation." An extreme submission from the *Australian Copyright Council* argued that at this stage, it is not necessary to reform Australian contract law as the current contract law is sufficient to handle any disputes pertaining to contract law issues.

The current debate in Australia shows that there is no unanimous support to codify contract law, and as such, the opportunity to legislate good faith through this means is uncertain. In this context, legislating good faith as a general obligation similar to the civil law codes model leads to uncertainty due to the lack of definition of good faith. Furthermore, there is difficulty of formulating the appropriate judicial method under codified law, where each interpretation is based on a case-by-case basis which also leads to uncertainty. Without a legislative guideline, the judges will draw their own personal discretion, experience and knowledge in interpreting good faith. This situation may be costly, counterproductive, and generate a lengthy period of judicial interpretation.

There is another approach of legislating good faith as a general obligation without having a definition. This approach is similar to the case of legislating unconscionability. Unconscionability is a concept similar to good faith and has become one of the significant themes in the Australian law of contract in relation to harsh and unfair contracts. It is not a new concept in Australia and has been a feature of many cases in the country for years. Among the features it shares with good faith is that both concepts are difficult to define.

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21 Bruce Donald, ‘Codification in Common Law Systems’ (1973) 47 *The Australian Law Journal* 160,176. In *Renard*, Priestley J stated that ‘there is a close association of ideas between the terms unreasonableness, lack of good faith and unconscionability’ (1992) 26 NSWLR 234, 265. This statement by Priestley J confirmed that there is a relationship between the concept of good faith and unconscionability.
In Antonovic v Volker, Mahoney JA suggested that the concept of unconscionability was better described than defined because the principle is stated in very general terms. Similarly for good faith: ‘it would be preferable not to define the term exhaustively; any attempt to do so will result in exceptions and unsatisfactory outcomes in unusual situations’.

Due to the problems surrounding the definition of unconscionability, attempts were made to codify unconscionability similar to the civil law codes approach. In this approach, unconscionability is not defined but the interpretation of the concept is left to the judges. The issue of codification of contract law was tabled for consideration in a Discussion Paper in 1982 by the Victorian Law Reform Commission to provide a comprehensive and authoritative statutory framework similar to civil law code models. The realisation of this goal was premised on it being possible to achieve three basic features for the code: its level of generality, its lack of definitions, and a central role for unconscionability.

The concept of unconscionability was considered an ‘overriding article’ in the draft Code. The Victoria Law Reform Commission (VLRC) focused on unconscionability because the concept was becoming more frequently raised in contract disputes. One of the weaknesses of the concept of unconscionability however, is the difficulty of legislating such a wide and vague concept. The VLRC contract code did not define unconscionability. Article 27 stated that ‘a person may not assert a right or deny an obligation to the extent that it would be unconscionable to do so’. It is argued that in this form, Article 27 simply encourages unnecessary litigation about the meaning of these new concepts. Therefore, the Kennett government rejected the proposal of codifying contract law which gives the opportunity to legislate unconscionability. Rather than minimising

23 (1986) 7 NSWLR 151, 196.
24 Dr Elizabeth Spencer and Mr Simon Young, Submission to Federal Government of Australia Review of the Federal Franchising Code of Conduct, 14th February 2013, 19.
uncertainty and complexity, it was determined that codifying contract law which gives the opportunity to legislate unconscionability would add to uncertainty and result in additional expenses, which are both similar concerns to those raised in reference to the codification of good faith.

Currently, the concept of unconscionability is given a legislative effect in the form of the Australian Consumer Law. The unconscionability provisions are contained in s 20, 21 and 22 of the Australian Consumer Law as prescribed in Schedule 2 of Competition and Consumer Act 2010 (Cth) which came into effect on 1st January 2011. S 20 prohibits unconscionable conducts which enshrine the equitable concept. In this context, it means that actions relating to unconscionable conduct, which is a concept that has developed in the common law and the principle of equity may be commenced under the Australian Consumer Law. S 21 is a new and more liberal statutory regime which simply prohibits unconscionability. In this context, unconscionability is not defined but in relation to which judges can have regard to ‘non-discretionary reference criteria’, assists its meaning as prescribed in s 22.

The precedent to the current Australian Consumer Law was the Contracts Review Act 1980 (NSW). The Contracts Review Act 1980 (NSW) had introduced the ‘non discretionary reference criteria’ to determine unconscionability instead of providing a definition. The Contracts Review Act 1980 (NSW) is a significant legislation in handling the issue of harsh and unconscionable contracts of general application to consumer contract. This legislation was based on the ‘Report on Harsh and Unconscionable Contracts’ (hereinafter referred to as the Peden Report). In October 1976, a series of reforms to the law of contract in New South Wales were recommended in a report commissioned by the Minister for Consumer Affairs and authored by Professor John Peden of Macquarie University. The Peden Report claimed that there was no remedy available in common law and statutory law for dealing with the issue of harsh and unconscionable contracts,
resulting in significant potential for abuse in both consumer and other transactions.

Therefore, it is the aim of the *Contracts Review Act 1980* (NSW) to provide a wider power to the court in granting relief in respect of harsh and unconscionable contracts. This is to ensure that the judges are given necessary flexibility to ensure justice by granting appropriate relief.\(^26\) S 7(1) provides the Supreme Court of NSW, and subject to its jurisdictional limit, relief to the District courts in respect of certain contracts found to be unjust in the circumstances relating to the contract at the time it was made. The term ‘unjust’ has a wider interpretation as expressed in s 4. The term ‘unjust’ includes unconscionable, harsh or oppressive [conduct], and injustice is to be construed in a corresponding manner.

The *Contracts Review Act 1980* (NSW) is more promising because the legislation sets out the specific criteria to be considered in determining unconscionability.\(^27\) The *Contracts Review Act 1980* (NSW) assists the judges to achieve certainty in their judgment. The precedent legislation to the *Contracts Review Act 1980* (NSW) i.e. the consumer credit legislation (moneylending, hire purchase and credits sales legislation) suffered from a use of language that is too general and a lack of legislative guideline for a workable doctrine of unconscionability\(^28\) which lead to uncertainy. Due to the lack of a legislative guideline, the judges are reluctant to use unconscionability provisions in the consumer credit legislation.

Concerning the concept of unconscionability, a similar problem was experienced by the US in s 2.302 of the *Uniform Commercial Code* dealing with unconscionable consumer contract. S 2.302 of the *Uniform Commercial Code* provided that a court can grant relief from a contract or any term of a contract


found to be unconscionable at the time it was made. However, it was argued that
the general provision of unconscionability rendered the provision ambiguous.
Moreover, it lacked suitable guidelines for the judges to determine its application.
Therefore, s 2.302 of the Uniform Commercial Code was largely considered to be
ineffective because of the absence of a ‘specific unconscionability guideline’ to
guide the judges in interpreting the definition of unconscionability.\textsuperscript{29}

The need to reform the previous legislation to the Contracts Review Act 1980
(NSW) was raised by the Peden Report to ensure that the judges do fairly in
‘exercising broad discretions and making value judgements.’\textsuperscript{30} Therefore, ‘a
structured doctrine of unconscionability taking account of elements of substantive
and procedural fairness in the context of the commercial setting does not threaten
the fabric of commerce and offers greater opportunity for an ordered and uniform
development of the law than the present haphazard common law developments.’\textsuperscript{31}

S 9 expresses NSW’s unconscionability doctrine. This NSW’s unconscionability
doctrine resulted from the Peden Report recommendation to introduce a general
formula consisting of distinctive criteria that determine unconscionability,
otherwise known as the ‘non-discretionary reference criteria’. The ‘non-
discretionary reference criteria’ is a general guideline to identify
unconscionability by identifying its integral components. This assists the court by
specifying ‘guidance criteria’,\textsuperscript{32} which must be referred to by the court when
determining whether a contract is unjust. The matters specified in s 9(2) provide a
definite direction to the court based on the extent of their relevance to the
circumstances of the case. By identifying the specific components of
unconscionability, it is better suited to meet modern circumstances as opposed to a

\textsuperscript{29} John R.Peden, \textit{Report on Harsh and Unconscionable Contracts} (October, 1976) Macquarie University,
NSW, 20.
\textsuperscript{30} John R.Peden, \textit{Report on Harsh and Unconscionable Contracts} (October, 1976) Macquarie University,
NSW, 12.
\textit{Australian Business Law Review} 311, 324.
\textsuperscript{32} NSW Parliamentary Debates 1980, 5894.
repetition of the general law or previous ‘harsh and unconscionable’ formula.\textsuperscript{33} Such a guideline facilitates greater consistency by providing a uniform framework for judges to identify and decide on unconscionability which will result in greater certainty in commercial transactions and planning.\textsuperscript{34} Terry, in his article, argued that the approach to unconscionability by way of ‘non-discretionary reference criteria’ provides a better way in understanding a broad concept like unconscionability. He states that ‘this approach to unconscionability provides the flexibility that a workable doctrine of unconscionability demands while establishing the guidelines under which the individual matters specified can be organised and analysed’.\textsuperscript{35}

As a whole, legislating good faith obligation without a definition similar to the civil law concept will cause uncertainty due to two reasons. The first reason is that codification of good faith will not produce a definition, as the nature of the civil law code does not consist of a definition. The code contains only broad statements at high levels of abstraction that leaves a need for judicial interpretation. Secondly, it gives a wider power to the judges to define its meaning which is based on a case-by-case basis. Judges’ interpretations will undeniably be broad and flexible without a legislative guideline. This will lead to further uncertainty when the judges use their own understanding and knowledge in interpreting the definition.

Therefore, legislating good faith by way of ‘non-discretionary reference criteria’ similar to unconscionability as illustrated in s 22 of the \textit{Contract Review Act 1980} (NSW) is an intelligent manner that strategically avoids the problems associated with its definition. Hence, legislating good faith by way of s 22 of the \textit{Contract Review Act 1980} (NSW) ‘may promote rather than impede the cause of

contractual certainty’. The similar argument of endorsing contractual certainty was put forcefully by Harland, in the submission of his draft of legislation of the *Contract Review Act 1980* (NSW) which states that:

> ‘It is, in fact, strongly arguable that one result of requiring the courts to consider explicitly the policy issues involved, instead of manipulating traditional rules for purposes for which they were never designed, will be in time to increase certainty’.

This was achieved by ensuring that its key features are considered by judges in their judicial rulings by means of ‘non-discretionary reference criteria.’

The approach of ‘non-discretionary reference criteria’ provides a legislative guideline to identify good faith, which the judge can refer to and ensure some degree of uniformity in the content and direction of the interpretation of good faith. In addition to the benefit of the legislative guideline to identify good faith, it also yields certainty where it provides a definite direction to the court based on the extent of its relevance to the circumstances of the case. Terry, in his article, strongly supported the ‘non-discretionary reference criteria’ approach because the ‘structure provides the necessary frameworks under which the individual factors specified in the ‘shopping list’ can be analysed and applied and serves to advance the causes of both justice and certainty.’ Therefore, this study supports the ‘shopping list’ approach by way of suggesting a ‘multi-categories’ approach in proposing a workable definition of good faith.

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37 NSW Parliamentary Debates 1979, 3057.
9.3 A GOOD FAITH OBLIGATION IN A SPECIFIC BUSINESS CONTEXT

Rather than legislating generally, a narrower ‘context specific’ approach can be attempted by legislating good faith in a specific business context like franchising. This is similar to the approach already taken by the common law in regards to insurance contracts. In a specific business context like insurance, good faith is a well-known concept. The concept of good faith and its relationship in the insurance contract was recognised for more than 250 years from the case of *Carter v Boehm*.\(^{39}\) It is a fundamental principle of insurance law that both insurer and insured must observe a duty of utmost good faith towards each other. Later, the concept of utmost good faith was given statutory recognition in s 13 of the Insurance Contracts Act 1984 (Cth) where it is stated that:

> A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.

The acceptance of the concept of utmost good faith in insurance is well-established and is a relatively uncontroversial due to the long engagement of the subject. Good faith in insurance contract law is not defined but it is a well-known expectation of behaviour that both parties, namely the insurer and the insured, must possess in disclosure information to each other. Due to its long engagement, it is considered a norm in the insurance contract law to ensure a successful insurance contract law.

The good faith experience in the insurance context offers some comfort for legislating a good faith obligation in the franchising context. In Australia,

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\(^{39}\) (1766) 3 Burr 1905, 1910.
franchising has proved a very popular business model.\textsuperscript{40} A call for good faith in franchising is due to the allegations of unethical behaviour by franchisors taking advantage of any imbalance of bargaining power between franchisor and franchisee. The form of opportunistic behaviour is as follows:

Franchisee opportunism may take the form of free riding, unauthorised use of franchisor’s intellectual property rights, underperformance, or failure to accurately disclose income. However, the franchisor’s control over the provisions in the contract enables franchisors to address opportunistic behaviour of this kind by enforcing the terms of the franchise agreement. Franchisor opportunism has been described as ‘predatory conduct’ and strong-arm tactics by franchisors’ involving the exploitation of a pre-existing power relationship between the franchising parties, which makes the franchisee ‘vulnerable’ or economically captive to the demands of the franchisor. There is an inherent and necessary imbalance of power in franchise agreements in favour of the franchisor, but abuse of this power can lead to opportunistic practices including encroachment, kickbacks, churning, non-renewal, transfer, termination at will, and unreasonable unilateral variations to the agreement.\textsuperscript{41}

Franchising is recognised as a special kind of contract. In \textit{Dymocks Franchise System (NSW) Pty Ltd v Todd},\textsuperscript{42} the Privy Council recognised that franchising was not an ordinary commercial contract; ‘These were not ordinary commercial contracts but contracts giving rise to long-term mutual obligation in pursuance of what amounted in substance to a joint venture and therefore dependent upon coordinated action and cooperation’.\textsuperscript{43} In this context, franchising may be regarded as a relational contract. A relational contract is a kind of contract which is exposed to the risk of uncertainty and unforeseen factors due to the long engagement between the parties. Spencer describes the characteristics of a...


\textsuperscript{41} \textquote{The Opportunity Not Opportunism Report}, 101.

\textsuperscript{42} [2004] 1 NZLR 289.

\textsuperscript{43} [2004] 1 NZLR 289, 63.
relational contract as follows:

Relational contracts are defined by features of incompleteness and longevity. Relational contracts must be flexible, sometimes to the point of being vague. There is often a high level of discretion accorded to the parties, and such contracts therefore rely heavily on reciprocity and on trust that develops over time between the contracting parties.\textsuperscript{44}

Franchising is considered to be a special kind of contract because it ‘is a continuous commercial relationship’ between the franchisor and franchisee.\textsuperscript{45} The relationship between the franchisor and the franchisee is imbalanced due to the inequality of bargaining power between them. The existence of inequality of bargaining power lies in the structure of the franchising contract itself. The franchising contract is drafted by the franchisor and offers a one-sided agreement ‘benefiting the franchisor and providing the franchisees with few options to protect its own interest’.\textsuperscript{46} Unlike other business formats, it is the right of the franchisor to protect his business interest and the consistency of the business format.\textsuperscript{47} For example, in the buyer-seller relationship, the success of the relationship is based on the consensual transactions in an agreement to buy as well as an agreement to sell. Sometimes, the drafted agreement made by the franchisor is unreasonable and causes injustice by not taking into account the interests of the franchisee. This reason is based on the financial strength and the ability to access information and legal service by the franchisor, which the franchisee will most likely not have. Apart from the structure of the franchising agreement, the franchisee is highly dependent on the franchisor. The franchisee is often an inexperienced businessperson while the franchisor is usually experienced. This means that when the franchisee agrees to the franchising agreement, the franchisor

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\textsuperscript{44} Dr Elizabeth Spencer, Submission to the Parliamentary Joint Committee Inquiry into Franchising December 2008.
\textsuperscript{46} Ibid, 1436.
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has provided the franchisee ‘a package of corporate services, a product with a proven track record and the advantages of a common trademark’.\textsuperscript{48} Spencer comments that the nature of the franchising contract contributed to the uncertainty of the contract and allocates risk to the franchisee. Spencer further states that ‘because franchise contracts employ flexible, open-ended terms and discretion to accommodate the longer term and relational nature of the relationship, uncertainty is closely related to flexibility in the contract, grants of discretion to a franchisor and concomitantly high levels of risk to a franchisee.’\textsuperscript{49} This situation inevitably causes the franchisee to follow the franchisor’s directives in light of his business experience and knowledge.

In Australia, three parliamentary inquiries in Western Australia,\textsuperscript{50} South Australia,\textsuperscript{51} and at the Federal level recommended that an obligation to act in good faith is to be imposed on franchisors and franchisees.\textsuperscript{52} At the Federal level, the report-\textit{Opportunity not Opportunism: Improving Conduct in Australian Franchising} prepared by the Federal Parliamentary Joint Committee on Corporations and Financial Services,\textsuperscript{53} stated the view that there is concern in the franchise sector about the absence of an explicit overarching good faith standard of conduct for parties to a franchise agreement. The Joint Committee argued that the optimal deterrent against opportunistic conduct in the franchising sector is to explicitly incorporate, in its simplest form, the existing and widely accepted

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\textsuperscript{50} Government of Western Australia, Inquiry into the Operation of Franchise Businesses in Western Australia-Report to the Western Australian Minister for Small Business, April, 2008.
\textsuperscript{52} For the purpose of this thesis, discussion is focused at the Federal level-the report \textit{Opportunity not Opportunism: Improving Conduct in Australian Franchising} prepared by the Federal Parliamentary Joint Committee on Corporations and Financial Services 2008 until the current accepted recommendation by Wein Report 2013.
\end{flushright}
implied duty of parties to a franchise agreement to act in good faith. The Joint Committee recommended that the following new clause be inserted into the *Franchising Code of Conduct*:

> Franchisors, franchisees and prospective franchisees shall act in good faith in relation to all aspects of a franchise agreement.

This clause was intended to provide a standard of conduct for franchisors, franchisees and prospective franchisees to ‘act in good faith’ in relation to all aspects of a franchise agreement. It was intended that this standard would permeate all stages of the franchisee and franchisor relationship from pre-contractual arrangements to disputes. The Joint Committee made it clear that an express good faith obligation is likely to curb opportunistic conduct by the franchisor taking advantage of any imbalance of bargaining power between franchisors and franchisees.

Many submissions were made in the debate regarding the introduction of an express statement of good faith obligation in a franchising context. In this context, the express statement of good faith means that good faith is not defined in the *Franchising Code of Conduct*. Support for the inclusion of an express statement of good faith obligation in the *Franchising Code of Conduct* was expressed by Zumbo, who endorsed the idea of a statutory duty of good faith as promoting ethical business conduct. Zumbo further explained that ‘Indeed, this [good faith] is readily apparent from the growing judicial attention and support given to an implied duty of good faith in commercial contracts, especially in New South Wales. Such a statutory duty of good faith should operate generally within the franchising relationship, including requiring the parties to resolve dispute in good

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54 The *Opportunity Not Opportunism Report* 114.
faith. Piccolo, who has been a long-time advocate for franchisee rights, shared the same view with Zumbo. He claimed the inclusion of an express term of good faith obligation in the *Franchising Code of Conduct* will provide clarity to the parties in a franchise agreement to act in good faith and would also promote ‘business integrity and ethics’. In addition, The *Motor Trades Association of Australia* claimed that express statement of good faith obligation is consistent with the objective of the Code. Hence, the proponents of an express statement of a good faith obligation claimed that there are many benefits that good faith would bring to the ethical standards of the contracting parties, which is that it provides clarity of the expected behaviour of the contracting parties and it fulfils the objective of the franchising code.

Opponents of the inclusion of an express statement of good faith in the *Franchising Code of Conduct*, including the *Australian Competition and Consumer Commission*, opposed it on the basis that it would potentially increase disputes and conflict due to the difficulty in defining its meaning. This is because good faith ‘has not just one meaning but many meanings’ which renders the concept abstract and vague depending on the circumstances and context of the case. The *National Retail Association* argued that good faith is a difficult concept that depends ‘on the circumstances of the case and the context of the contract as a whole’. Similarly, DLA Philips, a law firm with a strong franchising practice, commented that introducing express statement of good faith obligation in a

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franchising context is ‘unnecessary but an unfortunate legislative indication that good faith has different meanings as currently understood, applied and continually further developed by our Court.’

There will be a negative impact on the franchising parties when good faith is not defined. Franchisor and franchisee will encounter problems of uncertainty and confusion about their rights and responsibilities which may potentially increase controversy among franchising participants. In the context of franchising, the relationship between the franchisor and the franchisee is in a state of imbalance because of the inequality of bargaining power between them. The uncertainty makes it more likely that the franchisor and franchisee will have a different opinion whether certain conduct was in good faith or not. In addition, it also makes it more difficult for franchisors and franchisees to know precisely what is required of them to comply with the law. This leads to an undesirable lack of certainty in commercial arrangements like franchising. In *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL*, Warren CJ, Buchanan JA and Osborn AJA commented that ‘If good faith is not readily capable of definition then that certainty is undermined.’

Hence, the opponents of the express statement of good faith obligation in a franchising context claimed that such legislation would introduce many problems; particularly the issue of uncertainty when good faith is not defined. At this point in time, these debates show there is no unanimous support to legislate good faith in the franchising context.

On 5 November 2009, the previous Australian government released its response to the *Opportunity Not Opportunism Report* almost a year after the report was submitted. The previous Australian government rejected the recommendation of the Joint Committee to introduce an express statement of good faith obligation in

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a franchising context. The government was concerned that uncertainty would increase by an express statement of good faith obligation in a franchising context. The government commented that there are several problems with the suggested approach;

The law on good faith is still evolving. The scope of the requirement is unclear. From a commercial perspective, uncertainty would be increased by an express statement of the requirement in the Franchising Code. Neither franchisors nor franchisees would be certain of the occurrence of a breach. Indeed it would require court proceedings to establish that.

From an economic perspective, in any given situation it is almost certain that the franchisor’s perspective on the scope of the concept will differ from that of the franchisee. While the franchisor may have ready access to legal service on what good faith means, a franchisee will not, so that there will be an information gap.

The extra uncertainty created by the inclusion in the Franchising Code of a general, undefined good faith obligation could be expected to have adverse commercial consequences for franchisees. Franchisors would seek compensation for the extra risk they faced through larger franchise fees and more onerous terms and conditions in other parts of the agreement. And banks and other financiers would be more reluctant to provide credit to the franchisees and franchisors in these more likely risky commercial circumstances.64

The previous Australian government’s response to the Joint Committee’s recommendation regarding good faith was to perform the following four acts: a) amend the Code to deal specifically with end-of-term arrangements for all new franchising agreements entered into after the commencement of the amendments; b) amend the Code to include a list of necessary and desirable behaviours to encourage parties to approach a dispute resolution process in a reconciliatory

manner; c) refer specific behavioural issues to an expert panel for advice on whether further specific amendments to the Code are required to address those behaviours; and d) amend the Code to provide that nothing in the Code limits any common law requirement of good faith in relation to a franchise agreement to which the Code applies thereby explicitly preserving and drawing attention to the parties’ potential ability to take action as a pursuant to the common law relating to good faith.65

Rather than introducing a general but uncertain solution, the previous Australian government appointed an Expert Panel to inquire and report on the need to introduce measures into the Franchising Code of Conduct to prevent specific behaviours that are not appropriate in a franchising agreement. Addressing the specific types of behaviour that had caused problems to franchising provides more certainty than an express obligation of good faith, which may cause ambiguity to the parties. Based on consultations, these specific types of behaviour that are not appropriate in a franchising agreement relate to; end-of-term arrangements, dispute solutions, unforeseen capital expenditure, unilateral contract variation, attribution of legal costs, confidentiality agreements, and changes to franchise agreements when a franchisee is trying to sell the business.66 The Expert Panel supported the decision of Australian government to not introduce a specific definition of good faith but recommended an express statement into the Franchising Code of Conduct providing that ‘nothing in the Code limits any common law requirement of good faith’.67 In this context, it will allow the common law principles to continue to develop. There has been a mixed reaction to the introduction of clause 23A to the Franchising Code in 2010 which stated that:

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Nothing in this Code limits any obligation imposed by the common law applicable in a State or Territory, on the parties to a franchise agreement to act in good faith.

Proponents argued that there are many benefits to the introduction of a common law obligation of good faith in the *Franchising Code of Conduct*. According to submissions of *Competitive Foods Australia Pty Ltd*, there has been a ‘major step forward’ in the debate since 2008, with both franchisors and franchisees acknowledging a duty to act in good faith. In addition, the reference to ‘the obligation to act in good faith’ has changed the general culture within franchising where many franchisors and franchisees were open minded to accept that good faith is a fundamental part of the franchising relationship.

Law firm Minter Ellison submitted that clause 23A of the *Franchising Code of Conduct* is ‘sufficient and effective at addressing concerns regarding conduct that would breach an obligation of good faith. As it is intended, clause 23A highlights to franchisors and franchisees that there is an obligation at common law of good faith that could apply. It also operates to alert parties to their ability to seek address should they consider there has been a breach. However, it does not state (quite correctly) that good faith will apply equally in all cases or encourage parties to act without considering their commercial position, their legal rights or seeking appropriate advice’.

The opponents of the introduction of clause 23A to the Code in 2010 were sceptical to the common law evolution to good faith. The *Law Society of South Australia* doubts the effectiveness of clause 23A of the *Franchising Code of Conduct* due to the fact that ‘common law does appear to be moving towards a

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69 Ibid.

general principle of good faith in contractual relationship, this will inevitably be
determined on a case by case basis.\textsuperscript{71} Competitive Foods Australia Pty Ltd, was
concerned about the undefined good faith which leads to the fact that ‘the
franchisor will be more able than the franchisees to pay for legal advice about
what the unwritten law says in relation to good faith, the undefined nature of any
obligation to act in good faith presents a ‘lawyers picnic’ because parties have to
get legal advice about what it means.’\textsuperscript{72}

The previous Australian government reviewed the efficacy of the 2008 and 2010
amendments to the Franchising Code as part of their response to the Joint
Committee report. The Australian government appointed Wein, an experienced
franchisor operator and small business advisor, to conduct a review of the
Franchise Legislation and Franchising Code of Conduct, under terms of reference
which required Wein to make recommendations as to the efficacy of the current
Franchising Code of Conduct and legislation in Australia. The terms of reference
for the review focused on the 2008 and 2010 amendments to the Code, which
were a) good faith in franchising, b) the rights of franchisees at the end of the term
of their franchise agreements and c) provisions for enforcement of the Code. For
the purpose of this chapter, discussion is focused on a) good faith in franchising.
Many submissions were received.

Of particular interest is the shift of views by the Franchise Council of Australia
since the ‘Opportunity Not Opportunism Report’. Previously, the Franchise
Council of Australia strongly opposed such an amendment. Currently, however,
the Franchise Council of Australia is prepared ‘to contemplate an amendment to
the Franchising Code to expressly incorporate the current common law duty of

\textsuperscript{71} Law Society of South Australia, Submission to Federal Government of Australia Review of the Federal
Franchising Code of Conduct, 21\textsuperscript{st} February 2013, 5-6.
\textsuperscript{72} Competitive Foods Australia Pty Ltd, Submission to Federal Government of Australia Review of the
Federal Franchising Code of Conduct, 15\textsuperscript{th} February 2013, 12-14.
good faith into all franchise agreements." The rules of good faith in common law are consistent with the industry code and previous Australian government policy in which codes set out clear obligations rather than aims or ideals. The Franchise Council of Australia also believes that the concept of good faith is not well understood. Therefore, when the concept of good faith as it would be interpreted by the courts is carefully considered, it will no longer suffer from the problem of uncertainty.

The Law Society of South Australia supported the definition of good faith as assessed by way of ‘non-discretionary reference criteria’. This approach was argued to be better than leaving its evolution under the common law which will cause uncertainty, take too much time, and cost franchisee litigants who often ill afford such debates. One franchisor, Bakers Delight Holdings Ltd, supports the introduction of a statutory definition of good faith and clearly defined with examples what constitutes a lack of good faith to both franchisor and franchisee. A clear duty of good faith to both franchisor and franchisee is important to ensure the successful relationship of both parties. Currently, Bakers Delight Holdings Ltd suffers ‘a severe disadvantage from former disgruntled franchisees who extensively use social media, traditional media outlets and local, state and federal politicians to influence their position prior to, leading up to, and throughout the mediation period. For this reason, good faith obligation must be imparted to both the franchisor and the franchisee’.

The proponents claim that there are many benefits of the statutory definition of good faith that will help overcome the issue of uncertainty to ensure a successful relationship between the franchisor and franchisee and facilitate successful business operations.

Opponents against the inclusion of a statutory good faith obligation in a franchising context argued that uncertainty is the main problem to the concept. Spencer, an associate professor from Bond University and Young, a legal practitioner, commented that ‘good faith has not been embraced by the courts or the legislatures of Australia. Whilst good faith is part of broad contracts and commercial codes in jurisdictions such as the United States and Germany, it is not part of the legal traditions of the UK or Australia.’\textsuperscript{77} The \textit{Shopping Centre Council of Australia} was concerned that the uncertainty of good faith will bring problems to the business activity in Australia. This is well translated in their statement that:

‘Good faith is a concept which is generally impossible to define and is therefore not a legal standard suitable for insertion as a statutory provision. In neither Australia, nor elsewhere is there a clearly defined well-understood, statutory doctrine of ‘good faith’. This can only add to business uncertainty and put the conduct of many business affairs into the hands of the courts, therefore adding to the cost of doing business in Australia.’\textsuperscript{78}

Opponents to the statutory definition of good faith fear the problem of uncertainty that would develop around the understanding of the concept itself and businesses at large. Despite the contradictory views from the proponents and opponents of the statutory definition of good faith, the weight of opinion supports the inclusion of such an obligation of good faith in the \textit{Franchising Code of Conduct}.\textsuperscript{79} Such obligation of good faith is not defined instead good faith should be incorporated in a manner similar to unconscionable conduct prohibition set up in s 22 of the \textit{Australian Consumer Law}.

\textsuperscript{77} Dr. Elizabeth Spencer and Mr. Simon Young, Submission to Federal Government of Australia \textit{Review of the Federal Franchising Code of Conduct} (2013) 14\textsuperscript{th} February 2013, 18.


\textsuperscript{79} Alan Wein, Submission to Federal Government of Australia \textit{Review of the Federal Franchising Code of Conduct}, 30\textsuperscript{th} April 2013, 81.
On 24 July 2013, the previous Australian government released its response to the review of the Franchising Code of Conduct by Wein.\textsuperscript{80} The report was presented to the government on 30\textsuperscript{th} April 2013 and made various recommendations. One of the recommendations was that the government accepts that the \textit{Franchising Code of Conduct} to be amended in order to include an express obligation to act in good faith. Wein recommended that the Franchising Code be amended to include an express obligation for franchisees and franchisors (as well as prospective franchisees) to act in good faith in pre-franchise agreement negotiations, in performance of the franchise agreement and disputes. According to Wein, such an obligation of good faith should not be defined; instead, good faith should be incorporated in a manner similar to that of the unconscionable conduct prohibition set out in s 22 of the \textit{Australian Consumer Law}.\textsuperscript{81} S 22 of the \textit{Australian Consumer Law} prohibits unconscionable conduct in connection with the supply of goods or services, or the acquisition of goods or services in business transactions. This means that the concept of unconscionable conduct in s 21 and s 22 of the \textit{Australian Consumer Law} is not bound by the common law and equitable principles. However, while courts may consider any relevant matters as illustrated in a list of twelve factors to assist the meaning of unconscionability, the \textit{Australian Consumer Law} established a list of twelve factors that are ‘non-discretionary reference criteria’ factors which the court may take into account or as a guideline in determining whether conduct is unconscionable or not as illustrated in the \textit{Australian Consumer Law} s 21 and s 22.

In the context of franchising, the Australian government made the major decision to accept the recommendation by Wein to legislate good faith in dealing with the allegations of unethical behaviour by franchisors taking advantage of any imbalance of power between franchisor and franchisee. The franchising debate simply provides a relevant contemporary opportunity to legislate good faith in the


context of contractual performance. Therefore, it is argued here that legislating good faith in a franchising context offers some comfort to legislate good faith in contractual performance.

9.4 THE CHALLENGES OF LEGISLATING A GOOD FAITH OBLIGATION

The challenges of legislating a good faith obligation either as a general obligation or as an obligation in a specific context such as franchising, rests in the uncertainty associated with its definition. Despite the difficulty of legislating a specific and precise definition of good faith, good faith can be defined. In *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL*, Warren CJ, Buchanan JA and Osborn AJA commented that ‘If good faith is not readily capable of a definition then that certainty is undermined.’ For example, in the absence of an authoritative definition, ‘uncertainty and disputation are inevitable and the relationship between the franchisor and franchisee will be placed under stress.’ Due to the long relationship, unforeseen situations may cause problems to the franchisor-franchisee relationship. Inserting a definition of good faith however, will help reduce uncertainty to regulate the potential conflict in franchise relationships.

Defining good faith is controversial due to its many meanings. Most of the meanings identified are complex, contradictory, and unclear. Some of the

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83 See Chapter Eight for details discussion.


expressions of good faith are a ‘single category’ and some of the expressions are ‘multi-categories’. In the ‘single category’, only one element expresses the meaning of good faith, while instances in the ‘multi-categories’ involve a combination of more than one element in the expression of the meaning of good faith. The empirical data in this study proved that good faith can be defined by way of ‘multi-categories’ in order to have a workable definition of good faith. The proposed ‘multi-categories’ definition of good faith in this study includes a) honesty; b) reasonableness; c) having regard to the other’s interests. The ‘multi-categories’ approach is a more productive approach because it provides a guideline in understanding such a broad and abstract concept like good faith.

It is noteworthy to mention that, honesty is the least controversial definition in defining good faith. Generally, honesty is widely accepted to be a general requirement when acting in good faith. This is the reason why honesty is the most cited term when defining good faith. In Aiton Australia Pty Ltd v Transfield Pty Ltd, Einstein J stated that: ‘Parties are subject to a universal duty to act honestly in any case’. In certain instances, honesty as a ‘single category’ can be combined with another ‘single category’, to constitute a ‘multi-categories’ definition. This is clearly demonstrated in Tomlin v Ford Credit Australia, in which McDougall J claimed that:

The content of an implied duty to perform obligations and exercise contractual rights in good faith could be said to consist of an obligation to act honestly and reasonably.

This proposed definition of good faith by way of ‘multi-categories’ is similar to the approach given by Peden and Mason J. The definitions given by Peden and

86 See Chapter 8 for details discussion.
88 Mason, above n 92, 69.
89 (1999) 153 FLR 236, 262
Mason J is of a ‘multi-categories’ definition and was referred to as the two principle texts for the definition of good faith in Australia. Peden claimed that:

‘…it is suggested that the true meaning of good faith must be a requirement to behave honestly and to have regard to the interests of the other party without subordinating one’s own interest’.91

Mason J’s definition of good faith is more detailed and is defined in relation to three notions: a) an obligation on the parties to cooperate in achieving the contractual objects (loyalty to the promise itself); b) compliance with honest standards of conduct; and c) compliance with standards of contract which are reasonable and have regard to the interests of the parties.92 The definition formulated by Mason J has been cited in a number of cases including Burger King Corporation v Hungry Jack’s Pty Ltd93 and in Hughes Aircraft Systems International v Airservices Australia.94

The advantage of expressing the definition of good faith in a ‘multi-categories’ form is that it provides flexibility and provides a comprehensive definition. Good faith is a broad concept and as such, requires guidance in expressing the definition in order to encapsulate the underlying principle of good faith that all parties to the contract owe a duty to each other beyond those expressly provided by the terms of the contract. In this context, it is expected that the contracting parties take into account other parties’ interests when exercising their contractual rights.95 This approach gained support from the Small Business Commissioner of South Australia who supported a ‘multi-categories’ approach to the definition of good faith and submitted that ‘good faith can be defined in plain English to mean acting

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93 [2001] NSWCA 169 [187].
94 (1997) 146 ALR 1, 37.
fairly, honestly, reasonably and cooperatively’.96 A ‘multi-categories’ approach to the definition of good faith is found to be clear and easier to understand. These definitions also resonate with what the courts have held to be the underlying duties of parties and the integral conduct imposed by the courts on parties to a commercial contract.97

9.5 CONCLUSION

Legislating a good faith obligation is a highly debated issue in Australia. As discussed, there are two attempts of legislating a good faith obligation either as a general obligation or as a specific obligation. As a general obligation, legislating good faith similar to civil law codes model where good faith is not defined but judges are given a wider power to determine its meaning without any legislative guideline. This approach is not productive because the judicial interpretation without any legislative guideline in interpreting the meaning will cause uncertainty of the definition of good faith. Nevertheless, legislating good faith as a general obligation without a definition but by way of a ‘non-discretionary reference criteria’ similar to legislation of unconscionability as illustrated in s 22 of Australian Consumer Law is much more productive and clearer as the process of interpreting the meaning of good faith is guided by uniform features that ensure a good degree of uniformity of any interpretation of good faith thereby, mitigating the issue of uncertainty surrounding the concept. Therefore in this study, the proposed workable definition of good faith by way of ‘multi-categories’ gives greater certainty and justice. This is because a ‘multi-categories’ approach acts like a ‘shopping list’ in which it serves as a guideline in understanding the definition of a broad concept like good faith.

The recent major decision by the previous Australian government in the context of franchising signifies a shift in their view to the concept of good faith. It indicates that there is a strong support of using good faith in dealing with specific issues in the franchising context. Therefore, it is argued here that the experience of good faith in the franchising context provides a valuable precedent for its consideration to be similarly legislated in the context of contractual performance.
10 CONCLUSION

This thesis set out to explore the role and impact of the concept of good faith in contractual performance in Australia. Despite the absence of a High Court decision regarding its application and definition, the concept of good faith is gaining increased recognition and continues to have an increasing influence on many types of contracts in many contexts.

In regards to its origin, the concept of good faith is rooted in civil law countries, but it is nevertheless, gaining recognition in common law countries. The reception of good faith in both civil and common law countries is analysed to provide a clear understanding to the concept of good faith in both legal systems (Chapter 3). In addition, the reception of good faith at the international level was discussed whereby good faith is recognised in many international trade instruments (Chapter 3). The subsequent discussion is focused on understanding the concept of good faith in Australia from its initial introduction by means of the obiter comments of Priestley J in the Renard case in 1992. The emergence and historical development of good faith in Australia was discussed to provide an overall overview. The discussion revolved around the watershed decision case of Renard, the issue of ‘Implication’ and ‘Construction’, and the current developing position of good faith in Australia (Chapter 4). The thesis contended that the doctrinal discussion (Chapter 4) is not sufficient for a comprehensive view of how the concept of good faith has been received in Australia by the Australian judiciary and its role in contract law. As such, the thesis consisted of an empirical analysis of data collected for a period consisting of two decades (1992-2009) (Chapter 5). From here, an empirical overview of good faith was developed in Chapter 6 that offers a detailed review of the ‘landscape’ of cases decided based on the issue of good faith in contractual performance which was accompanied with tables and graphs to aid in the understanding of the discussion. The attitude of Australian judges was gauged by using a four point Likert-type scale to measure judicial support.
order to show the reliability and validity of the data, the basic statistical analysis ‘average and standard deviation’ is used (Chapter 7).

There are numerous meanings of good faith in contract law. Most of the identified meanings are complex, contradictory and unclear. The wide range of meanings support the argument made in this thesis that the concept of good faith has no specific or precise meanings. Given the problems associated with the definition of good faith, Chapter 8 proposed a taxonomic solution to its definition. This exercise concluded that a workable definition of good faith can be defined by way of ‘multi-categories’ wherein the multiple elements that make up the concept are included, thus ensuring that the fundamental components of its meaning are not ignored. This new approach to the definition of good faith assists judicial interpretation by ensuring that the necessary components that make up the concept are maintained in any interpretation while allowing some room for flexibility and certainty.

In regards to the legitimate acceptance of the concept of good faith within a legal framework, the previous Australian government accepted the recommendation by Wein, an experienced franchise operator and small business advisor, to include an express obligation to act in good faith in franchise agreement. Calls for good faith in franchising are due to the allegations of unethical behaviour by franchisors and franchisee. Wein contended that an obligation of good faith should not be defined; but instead, good faith should be incorporated in a manner similar to the prohibition of unconscionable conduct set out in s 22 of the Australian Consumer Law.¹ Such an obligation of good faith is not defined instead good faith is understood by way of ‘non-discretionary reference criteria’ to assist its meaning. The approach of ‘non-discretionary reference criteria’ will eliminate uncertainty due to the legislative guideline given to facilitate the judges in interpreting such a broad concept. The current development of good faith in the context of franchising showed that there are substantial amount of support from the previous

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Australian government for the concept of good faith in dealing with specific issues in the franchising context. Moreover, this may be seen as a legal precedent for its inclusion in contractual performance which has motivated this research to seek for the possibility of legislating good faith in contractual performance. (Chapter 9)

This chapter, Chapter 10, is a summary of the main themes addressed by this thesis. Chapter 10.1 summarises the major contentions of the research and the findings thereof. Chapter 10.2 discusses the implication of this research. Chapter 10.3 elaborates the limitations of the research, and Chapter 10.4 discusses future research directions.
10.1 MAJOR RESEARCH CONTENTIONS

10.1.1 Judicial Attitudes Towards Good Faith

The judicial attitude of Australian judges towards good faith is based on the empirical observation conducted in 104 cases by year and jurisdiction from 1992 to 2009. Over the past two decades, the empirical data indicated that there is still inconsistency of judicial support from the Australian judges. It seems apparent that NSW judges are still the major supporters of good faith. Despite still not having any High court decision in regards to its application and definition, none of the Australian judges have rejected the concept of good faith. Perhaps this is due to the fact that the concept was first proposed in the Australian legal system and introduced into the judicial agenda by Priestley J in his Honour’s obiter comments in the Renard case in the NSW Court of Appeal.

Despite being a new concept in Australia, Figure 7.1 illustrates that the good faith received most support at Level 1 (88 cases), where a case was a first instance decision by a single judge in a state Supreme Court or Federal Court compared to Level 2 (16 cases), where a case is heard by a State Court of Appeal or by the Full Court of the Federal Court of Australia. This indicates that when good faith was pleaded at Level 1, there is higher chance that the judge will decide based on good faith. This is especially true for NSW wherein 40 cases as seen in Level 1 were decided based on good faith. The obiter comments have become the ratio decidendi in many NSW cases. Most of the cases in NSW referred to the obiter comments in Renard case as ratio decidendi to decide the case. This means that the obiter comments exerted a greater influence for courts lower in the judicial hierarchy in NSW. Under the theory of precedent, good faith should exercise greater influence by means of greater legitimacy on judges hearing the issue of good faith at Level 1.
Attitudes of the judges at both first instance and at the appellate level are measured through four levels of support. A four point Likert-type scale was constructed for each of the 104 cases. The four point Likert-type scale consisted of the following: Support Level 1 = total support, Support Level 2 = qualified support, Support Level 3 = qualified rejection and Support Level 4 = outright rejection. The four point Likert-type scale is used to access the support level to avoid any bias as compared to a five point Likert-type scale, which would suggest a neutral option that would not be suitable to review the support level of judges as there should not be a neutral option in regards to decision making.

Table 7.1 illustrates the percentage of overall level of judicial support for a good faith obligation. At Support Level 1, NSW shows the most support encompassing 20 cases of the overall 104 cases studied which is equivalent to 63 per cent of the overall level of judicial support for a good faith obligation. This is considerably a large support compared to Victoria, Federal Court and Other States which reported 12 cases only which is equivalent to 38 percent. This indicates that the support received by NSW judges is greater than 50 percent, thus indicating full support. Table 7.1 reported that there is inconsistent support at Support Level 2 and Support Level 3.

Another significant result is that despite the differences in support level, the concept of good faith appears to be positively regarded by the Australian judiciary in that they have yet to reject the concept as illustrated in Table 7.1. As illustrated in Figures 7.3 and 7.4, the comparison between the average support level between the first instances and appeal level shows inconsistency in support. In NSW, the confidence level at the appeal level is higher than at first instance. At the first instance, most of the data ranges from Total Support to Qualified Rejection, whereas at the appeal level, the data ranges from Total Support to Qualified Support. What this means is that the concept of good faith was generally positive.

\[2\] See 7.3.1: Level of Judicial Support for further details.
However, in Victoria, there is insufficient data for meaningful interpretation. At the Federal level, confidence at first instance is higher. It ranges from Total Support to Qualified Support, whereas at the appeal level, it ranges from Qualified Support to Total Rejection. In Other States, confidence levels are similar. However, at the appeal level, the confidence level is slightly higher as compared to NSW and Victoria. In both instances, the confidence levels range from Total support to Qualified Support. A conclusion that can be drawn from this is that the obiter comments of Priestley J in the Renard case set a strong precedent in NSW. Other factors that influenced the higher level of confidence in NSW include the fact that many cases were decided in NSW, the state with the biggest population in Australia. The fact that many cases were decided in NSW would have positively influenced the confidence levels of judges due to the higher frequency of the judges dealing with the issue of good faith. Thus, the higher confidence levels of NSW appeal judges influenced other judges at the appeal level in other states.

The empirical data revealed that it has taken almost two decades for Australian judges to decide their stance towards the concept of good faith. This is because legislating such an abstract and broad concept like good faith will require a lot of time before it can be accepted as part of a legal concept. The duty of utmost good faith in insurance was recognised for more than 250 years from the case of Carter v Boehm. Later, the concept of utmost good faith was given a statutory recognition in s 13 of Insurance Contracts Act 1984 (Cth). Figure 7.6 illustrated that the overall support for all cases by three phases are moving towards Qualified Support. The three phases refer to the ‘Introduction Phase 1992-1998, Development Phase 1999-2003 and Consolidation Phase 2004-2009’. The three mentioned phases above are organised as such in order to better capture the changes in support level.

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3 (1766) 3 Burr 1905, 1910.
4 Section 13 of the Insurance Contracts Act 1984 (Cth) stated that ‘A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith’. 
As for the support score by jurisdiction, data revealed that good faith is a popular concept in NSW as illustrated in Figure 7.8. The overall support level in NSW over the three phases indicates that during the Introduction Phase, the judges in NSW showed more support compared to both the Development Phase and Consolidation Phase as illustrated in Figure 7.8. The standard deviation is higher in the Consolidation Phase compared to the Development Phase. While the standard deviation in the Introduction Phase is irrelevant due to the low number of cases. This increase of standard deviation shows how the judges in NSW have decided their stance towards the concept. This affirms that the obiter comments of Priestley J in Renard had set up a precedent in NSW. The average support levels generally centre on Qualified Support, which supports the notion that the concept of good faith is popular in NSW. However, the popularity of good faith in NSW had little effect in Victoria as illustrated in Figure 7.10. In Commonwealth courts and Other States however, the precedent set in NSW had no effect as illustrated in Figures 7.13 and 7.14.

Despite being a new concept in Australia, a number of individual judges share the belief that there is a need to explore good faith to ensure that the expected benefit of the contract is achievable. The empirical data as illustrated in Figure 7.16 reveals that in the 104 cases, six out of 91 judges produced the greatest volume of decisions to the concept of good faith.\(^5\) Out of the six judges, four judges are from NSW, namely; Einstein J of the Supreme Court of NSW who produced the most decisions, with nine identified decisions; McDougall J of the Supreme Court of NSW; Sheller J of the Full Court of the Supreme Court of NSW and Bergin J of the Supreme Court of NSW produced four good faith decisions each in the period under review. Three out of the four judges were NSW judges who produced the most decisions. This implies that the obiter comments of a well-known and highly

\(^5\) This study only concentrates on the judges who showed support for the concept of good faith. For example, at the appeal level, out of three judges, only one showed support. Only the judges who showed support is counted but not the other two judges who did not show support. This is in line with the aim of the section to focus on the judges who showed support for the concept of good faith.
regarded judge like Priestley J carried weight in influencing other members in the same judicial hierarchy. This is likely to do so because the obiter comments are only persuasive, not binding. This is also in line with the number of cases that raised good faith by jurisdiction as illustrated in Table 6.1, whereby NSW had the biggest identified cases, which accounts for two thirds of all cases.6

Another significant result is that despite the absence of a High Court decision on good faith, the obiter comments of Priestley J, which started at the state level, influenced a federal level judge like Finn J of the Federal Court of Australia, who produced five decisions. Finn J is familiar with good faith at the international level. According to his Honour, good faith is a universal concept that exists in ‘international and transaction developments already in train.’7 A year after the Renard case, Finn J expressly showed his support for good faith in his Honour’s most often cited decision, Hughes Aircraft Systems International v Airservices Australia, in which his Honour recognised a duty of good faith by ruling that there was an implied term in a tender contract that the party calling for tenders (refer to the Civil Aviation Authority) would conduct its evaluation fairly and in a manner that would ensure a fair tender.8 Finn J also claimed that good faith should be recognised as a general obligation in all contracts in Australia.9 The judicial attitude showed by Finn J reflected the ‘bold spirits’ attitude as discussed by Lord Denning,10 where his Lordship paved way for other judges to explore the concept of good faith. Moreover, opportunity to discuss good faith provides flexibility to reform the law.

It is interesting to note that the data in Figures 7.1611 and 7.1712 provides the impression that there is an association between the volume of good faith decisions

6 See Table 6.1: Percentage of Cases in Which Good Faith Raised as an Issue (by Jurisdiction), 157.
8 (1997) 146 ALR 1, 47.
9 Finn, above n 7, 418.
11 See Figure 7.16: Top Six Judges by Decision Volume, 222.
12 See Figure 7.17: Average Support Level of Six Good Faith Judges, 224.
made and the degree of support for the issue of good faith in contractual performance. Both figures illustrate that the volume of decisions does not correlate with the support level. For example, even though Einstein J of the Supreme Court of NSW produced the highest volume of decisions, his Honour’s average support score is 2.1, which is Qualified Support, compared to Finn J of the Federal Court of Australia who produced five decisions, but has an average support score of 1.6. Figure 7.18 shows the relationship between the frequency of good faith decisions made by the judges and the average support type. The data shows that the level of confidence of the judges who produced more than three decisions were confident in the concept of good faith. The support levels do not depend on the frequency of the decision, but are based on the level of familiarity to the concept. The more good faith decisions are made, the greater the confidence of judges toward the concept.

10.1.2 The Meaning of Good Faith

The meaning of good faith remains a controversial issue. Good faith is not only a concept that raises uncertainty but it is also an unpredictable concept as it ‘means different things at different times and in different moods at different times and in different places.’ To define it exhaustively is difficult as it has many meanings. Most of the meanings are contradictory and inconsistent. This is mostly because it is a broad and abstract concept. Many judges and scholars are sceptical of the concept of good faith due to the inherent difficulty in establishing a specific or precise meaning of good faith. Despite the current lack of consensus regarding its meaning, judges and scholars remain interested in the concept of good faith and continue to invest time and effort in the subject. To date, many judges and scholars from various countries have written on the meaning of good faith in the context of contracts, yet no consensus has been reached concerning the fundamental step towards a workable definition

Devising a definition of good faith is undeniably an arduous task. Even though proposing a definition may seem ambitious, the intention of this study is to propose a workable definition. Despite the struggle to come up with a definition of good faith, the empirical data in this study shows that defining the concept is in fact possible. Figure 8.1 illustrates that out of 104 cases, 19 cases defined good faith. From these attempts, a list of nine categories of good faith can be derived as illustrated in Table 8.1. The multiple expressions for the concept of good faith proposed by judges and scholars is largely due to the nature of the concept in that it is susceptible to changes in meaning thus making it difficult to determine its specific and precise meaning. The labels are expressed as a ‘single category’. As a ‘single category’, good faith is expressed by one element. However, in some cases, the definition of good faith consists of more than one element. Such definitions are classified as ‘multi-categories’.

From the list of nine categories of good faith, some of the expressions have a similar scope and could be combined to form a meaningful definition. Most of the expressions are standalone because the expression does not belong to any specific group. These nine categories are recognised into seven general groupings of good faith as illustrated in Table 8.4. Out of seven general groupings of good faith, three general groupings can serve as the potential definition. Figure 8.17 illustrated the three labels, which have the potential to serve as the definition or meaning of good faith, namely a) honesty, b) reasonableness, and c) having regards to the other’s interests. Table 8.5 shows the three most popular definitions by frequency and percentage. Honesty (4) is equivalent to 21 percent; Reasonableness (5) is equivalent to 26 percent and Label 8: Having regards to the other’s interests (4) is equivalent to 21 percent of total used meanings/interpretations. These groupings are in line with the definition proposed by the Competitive Foods Australia in its submission to a Parliamentary Joint

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14 See Figure 8.1: Overall Cases which Define Good Faith, 240.
Committee on Corporations and Financial Service, Inquiry into *Franchising Code of Conduct*, which provides that;

Good faith in relation to conduct by a franchisor or a franchisee means that the party has acted:

a) honestly and reasonably; and

b) with regard to the interests of the other parties to the franchise.

Honestly seems to be the least controversial definition of good faith. In *Aiton Australia Pty Ltd v Transfield Pty Ltd*, Einstein J stated that ‘Parties are subject to a universal duty to act honestly in any case.’ This statement gained recognition in *Insight Oceania Pty Ltd v Philips Electronics Australia Ltd*, where Bergin J held that ‘The duty to act in good faith seems to me to subsume the obligation to act honestly.’ ‘Honesty’ is generally an accepted term in the concept of good faith. ‘Reasonableness’ on the other hand, is a more challenging concept. This is because reasonableness seems to be broad enough to include reference to norms of the relationship as designated by the contract. In *The Mogul Steamship Co Ltd v McGregor, Gow & Co*, Bowen L J commented on the concept of reasonable standards for commercial contracting. His Lordship stated that ‘I myself should deem it to be a misfortune… if we were to attempt to … adopt some standard of judicial ‘reasonableness’ …to which commercial adventurers, otherwise innocent, were bound to conform.’

Similarly, Peden observed that equating good faith with reasonableness is more ‘confusing than instructive.’ Peden commented that ‘there is no precise meaning given, but rather a repetition of well-worn phrase and quotes, without explanation of how and why they fit together. There is furthermore, no explanation of why

18 (1889) 23 QBD 598, 620.
‘reasonableness’ is a justified inclusion in the meaning of good faith, and why it is considered identical to ‘good faith.’ Finkelstein J on the other hand commented in *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust)* that, acting reasonably was seen as central to acting fairly and in good faith. His Honour stated that ‘…provided the party exercising the power acts reasonably in all the circumstances, the duty to act fairly and in good faith will ordinarily be satisfied.’ Even though both expressions are standalone (honestly and reasonableness), this does not mean that the terms are inhibited from being used as a combination. For example, both expressions are found in *Tomlin v Ford Credit Australia*, where McDougall J claimed that ‘The content of an implied duty to perform obligations and exercise contractual rights in good faith could be said to consist of an obligation to act honestly and reasonably.’

Another phrase that has received significant judicial recognition in defining good faith is the phrase ‘having regards to the other’s interests’. Such an expression takes into account the interests of the contracting parties and received judicial recognition. In *Central Exchange Ltd v Anaconda Nickel Ltd*, Parker J held that:

> It is submitted for the applicants that the implication of a term of good faith requires, at least, that the parties be bound to ‘the spirit of the bargain’ and not to render illusory contractual entitlement…. On the assumption for the purposes of this decision, that an obligation of good faith is to be implied into this Deed and that by virtue of this the defendant may not render illusory the contractual entitlements of the plaintiff, and is to cooperate with the plaintiff in achieving the contractual objects, and is to act honestly and reasonably having regard to the respective interests of the parties.

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21 See section 8.3 above.
From this case, it is clear that the focus on keeping good faith is the duty to acknowledge and have due regard to both contradicting parties’ legitimate interests. In Overlook v Foxtel, Barrett J further commented that the obligation does not require subordinating the party’s own interests. His Honour further stated that the paramount consideration is that:

…so long as pursuit of those interests does not entail unreasonable interference with the enjoyment of a benefit conferred by the express contractual terms so that the enjoyment becomes (or could become) nugatory, worthless or, perhaps, seriously undermined’…the implied obligation of good faith underwrites the spirit of the contract and supports the integrity of its character.

Defining good faith using a ‘multi-categories’ approach is less difficult than using a ‘single category’ approach. Peden and Mason J provide definitions that were both referred as the two principal texts for defining good faith. Peden claimed that,

…it is suggested that the true meaning of good faith must be a requirement to behave honestly and to have regard to the interests of the other party without subordinating one’s own interest.

On the other hand, Mason J gave a more thorough definition in which good faith is defined according to three notions: a) an obligation on the parties to cooperate in achieving the contractual objects (loyalty to the promise itself); b) compliance with honest standards of conduct; and c) compliance with standards of contract which are reasonable and have regard to the interests of the parties. The definition formulated by Mason J has been cited in a number of cases including

24 See Automasters Australia Pty Ltd v Bruness Pty Ltd & Anor (2002) WASC 286 (Unreported, Hasluck J, 4 December 2002) [388].
Burger King Corporation v Hungry Jack’s Pty Ltd\textsuperscript{28} and in Hughes Aircraft Systems International v Airservices Australia\textsuperscript{29}

The advantages of expressing the definition of good faith in a ‘multi-categories’ form is that it provides a guideline in understanding such a broad and abstract concept. Therefore, good faith needs such an intricate definition in order to fully capture the underlying principle of good faith that all parties to the contract must owe a duty to each other beyond what is expressly provided by the terms of the contract.\textsuperscript{30}

10.1.3 Legislating a Good Faith Obligation in Australian Contract Law

Legislating a good faith obligation is a highly debated issue in Australia. Despite its uncertain status, good faith has nevertheless played an important role in Australian contract law. Uncertainty is the main issue in legislating a good faith obligation. In Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL, Warren CJ, Buchanan JA and Osborn AJA commented that ‘If good faith is not readily capable of definition then that certainty is undermined.’\textsuperscript{31} Despite the issue of uncertainty, there is an attempt to enshrine good faith in legislation either by way of a specific obligation or general obligation.

There is a discussion paper issued by the Australian Attorney General’s Department in 2012 on the possibility of reforming Australian contract law which has given rise to the opportunity to consider introducing the good faith obligation in Australian contract law.\textsuperscript{32} A suggestion was made to legislate good faith in a similar manner to civil law codes where good faith is not defined but its

\textsuperscript{28} (2001) 69 NSWLR 558,569.
\textsuperscript{29} (1997) 146 ALR 1, 37.
\textsuperscript{31} [2005] VSCA 228 (Unreported, 15 September 2005).
interpretation is left in the hands of the judges. This suggestion did not receive support because of the fear that because good faith cannot be defined, it would most probably cause uncertainty due to two reasons. The first reason is that codification of good faith will not produce a definition, as the nature of the civil law code does not consist of a definition. Furthermore, the code contains only broad statements at high levels of abstraction that leaves a need for judicial interpretation. Secondly, it gives wider power to the judges to define its meaning, on a case-by-case basis. The judges’ scope for interpretation will be broad and will likely to cause uncertainty.

It is suggested that there is another approach that may be more effective which adopts the modes used in legislation for the concept of unconscionability. Unconscionability is a concept similar to the concept of good faith in terms of its difficulty in defining the concept. In *Antonovic v Volker*, Mahoney JA suggested that the concept of unconscionability was better described than defined because the principle is stated in very general terms.33 Instead of being defined, unconscionability is explained by way of ‘non-discretionary reference criteria’. Currently, the concept of unconscionability was given a legislative effect in s 22 of *Australian Consumer Law*, as prescribed in schedule 2 of *Competition and Consumer Act 2010* (Cth), which came into effect on 1st January 2011.

The approach of ‘non-discretionary reference criteria’ was also used in the *Contract Review Act 1980* (NSW) to determine the meaning of unconscionability. S 9 expresses NSW’s unconscionability doctrine. The ‘non-discretionary reference criteria’ specified in s 9(2) provide a definite direction to the court based on the extent of their relevance to the circumstances of the case. This approach is far better than having no direction to the judges as its limits to the scope of interpretation. The ‘non-discretionary reference criteria’ approach has evidently been a positive step towards ensuring the positive and controlled impact of the

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33 In *Antonovic v Volker*, (1986) 7 NSWLR 151, 196, Mahoney JA suggested that the concept of unconscionability was better described than defined because the principle is stated in very general terms.
concept of good faith in the Australian legal system. Terry, among others, has supported the ‘non-discretionary reference criteria’ approach because the ‘structure provides the necessary frameworks under which the individual factors specified in the ‘shopping list’ can be analysed and applied and serves to advance the causes of both justice and certainty.’

In a specific context like franchising, there has been a move to legislate an express obligation of good faith to regulate the unethical behaviour of franchisors toward franchisees by taking advantage of any imbalance of bargaining power between both parties. Franchising is a relational contract which is exposed to the risk of uncertainty and unforeseen factors due to the longevity of the relationship. Legislating a good faith obligation in the franchising context will help to regulate the potential conflict in franchise relationships. The previous Australian government supported the recommendation made by Wein, an experienced franchisor operator and small business advisor, to introduce an express obligation of good faith for both the franchisor and franchisee in order to curb the unethical conduct that is the cause of major problems in the franchising context. The current support by the previous Australian government to franchising provides a platform to legislate an obligation of good faith good faith in the context of contractual performance.

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10.2 IMPLICATIONS OF THIS RESEARCH

10.2.1 Implications for Theory

Very little progress has been made since Renard. There remains no High Court decision deciding the application and definition of good faith in Australia. In *Royal Botanic Gardens and Domain Trust v South Sydney City Council*, the High Court did not use the opportunity to discuss good faith but Kirby J held that: ‘Whilst the issues respecting the existence and scope of a ‘good faith’ doctrine are important, this is an inappropriate occasion to consider them.’\(^{36}\) Previous research has nevertheless focused on the status and evolution of good faith in Australia. Despite the fact that past definitions of good faith have caused undesirable problems and tension, there remain many definitions of good faith.\(^{37}\) This is perhaps due to the shortcomings of the single category approach to understanding good faith, which fails to encompass the breadth of the concept thus resulting in greater reservations in its use due to increased uncertainty.

This research has contributed to the literature on the definition of good faith by way of proposing a workable definition. The proposed taxonomic solution to the definition of good faith is a ‘multi-categories’ definition of good faith.\(^ {38}\) This solution is supported by empirical observation as discussed in Chapter Eight where a rigorous thematic analysis of the meaning of good faith was conducted. The advantages of defining good faith by way of a ‘multi-categories’ approach is that it is a more comprehensive approach compared to the ‘single category’, which fails to encompass the breadth of the term. Furthermore, defining good faith in this manner eliminates uncertainty. The proposed definition of good faith will be of particular interest to parties in the litigation, lawyers, and judges in their continuous debate over the issue of definition.

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\(^{36}\) (2002) 186 ALR 289, 312.

\(^{37}\) See Chapter Eight for further details.

\(^{38}\) See 8.4: The Proposed Taxonomic Solution for further details.
10.2.2 Implications for Practice

This research has provided implications for practice, particularly in solving the issue of the definition of good faith. It has developed a workable definition of good faith by way of a ‘multi-categories’ approach which provides a clear guideline that offers increased certainty by ensuring uniformity in the constituting factors of an understanding of the concept. The experience in the context of unconscionability that has been legislated by way of ‘non-discretionary reference criteria’ as prescribed in s 20 of Australian Consumer Law, paves the way for the ‘multi-categories’ approach in defining good faith to be implemented in contractual performance. This approach provides a legislative guideline in understanding a broad concept like good faith and at the same time it offers greater certainty and justice.

This approach will benefit the parties to the litigation, lawyers, and judges by offering greater confidence and certainty. It will assist their interpretation of good faith by providing guidelines for its definition. Parties in the litigation will have the option to argue on the grounds of good faith based on the clear understanding offered by the ‘multi-categories’ approach. Lawyers are also set to benefit through greater clarity of the concept. Since there is no High Court decision, now it is the legislature’s task to legislate good faith in the Australian contract law. Waiting for judges can be a lengthy, costly, and counterproductive process that some parties may ill afford. Instead of assuming greater certainty when good faith is defined by way of ‘multi-categories’, it offers greater certainty, confidence and clear guidelines for the parties in the litigation, lawyers and judges.
10.3 LIMITATIONS OF THE RESEARCH

As in all research, this study has limitations that must be acknowledged. This research has been constrained by a number of factors, which may be addressed in future research. Firstly, the size of the case database. The survey only covers 104 cases from 1992 to 2009. The year 1992 is chosen as the starting year of the research because this was the year when the issue of good faith was first raised in Australia in the case of Renard.\(^{39}\) The year 2009 is chosen as the end of the research period as the PhD research started in 2009. Therefore, further research is needed that covers a larger period in order to obtain more recent views on the concept of good faith in Australia. Secondly, there is a limitation in the scope of the cases collected. Cases collected are limited to cases on contractual performance only. Therefore, this study represents the understanding of good faith on contractual performance cases only. Thirdly, there are other contexts that could be observed for a further understanding of the landscape of good faith in Australia for example, who often raised the issue of good faith, either the plaintiff or defendant. However, this study concentrated only on the judicial attitudes of the judges, the definition of good faith, and the prospect of legislating good faith in Australian contract law.

10.4 FUTURE RESEARCH DIRECTIONS

In addition to addressing the limitations outlined in chapter 10.3, further research on good faith in contractual performance could be conducted over a longer period for further insight on the direction of good faith in contractual performance in Australian contract law. Further research could be conducted in specific instances such as in a long term contract. For example, in the context of franchising and joint venture contract to provide another perspective to the concept of good faith.

\(^{39}\) At the time of writing, Renard was cited in at least 225 cases from 1992 to 2010 and 71 law journal articles referred to this case.
Other research methods such as interviews could be employed for further understanding. In this regard, an interview with Priestley J, who introduced good faith into the judicial agenda in Australia, would be another step forward toward a better understanding of his Honour’s position on good faith despite his obiter comments. Furthermore, other judges who shared his Honour’s view could be interviewed as part of the research.

Another interesting line of research would be a comparative analysis of the concept of good faith under Islamic law, which may offer a different perspective and new insights. Under Islamic law, the requirement of good faith is considered a vital concept and operates as fundamental behavioural etiquette in all aspects of human activities including contract law. In the context of contracts, it is expected that all contracts are to be performed in good faith by default because good faith is considered an important element in every contract. A comparative analysis may provide further insight in understanding the concept of good faith.
Bibliography

A Articles/Books/Reports

Abdullah Alwi Haji Hassan, *Sales and Contracts in Early Islamic Commercial Law* (Kitab Bharan, 1997)


Augus, David, 'Abuse of Rights in Contractual Matters in the Province of Quebec' (1962) 8 *McGill Law Journal* 150


Baron, Adrian, 'Good Faith' and Construction Contracts-From Small Acorns Large Oaks Grow' (2002) 22 *Australian Bar Review* 1


Bridge, Michael, 'Doubting Good Faith' (2005) 11 *New Zealand Business Law Quarterly* 426

Bristow, David I. and Reva Seth, 'Good Faith in Negotiations' (2000) 55 *Dispute Resolution Journal* 16

Brownsword, Roger, 'Two Concepts of Good Faith' (1994) 7 *Journal of Contract Law* 197

Brownsworth, Roger, Hird, Norma J., and Howells, Geraint (eds), Good Faith in Contract, Concept and Context (Ashgate, 1999)


Burton, Steven J., 'Good Faith in Articles 1 and 2 of the U.C.C: The Practice View' (1994) 35 William and Mary Law Review 1533


Burton, Steven J., Judging in Good Faith (Cambridge University Press, 1992)


Cairns, Bernard, Australian Civil Procedure (Thomson Law Book Co, 7th ed, 2007)

Cane, Peter and Herbert M. Kritzer (eds), *Empirical Legal Research* (Oxford University Press, 2010)


Carr-Gregg, John F. C., 'The Coal Cliff Collieries Pty Limited v Sijehama Pty Limited' 10 *AMpla Bulletin* 209


Cassels, Jamie, 'Good Faith in Contract Bargaining: General Principles and Recent Developments' (1993) 15 Advocates' Quarterly 56

Cassidy, Julie, Concise Corporations Law (The Federation Press, 1995)

Cassidy, Julie, Corporations Law Text and Essential Cases (The Federation Press, 2005)


Chenguang, Wang and Zhang Xianchu (eds), Introduction to Chinese Law (Sweet & Maxwell Asia, 1997)


Crawford, James, *Australian Courts of Law* (University Press, 1982)


Duncan, W. D., 'Non-Derogation from Grant and Tenant Mix' (1998) 6 Australian Property Law Journal 2

Donald, Bruce, ‘Codification in Common Law System’ (1973) 47 The Australian Law Journal 160


Eisenberg, Rusell A., 'Good Faith Under the Uniform Commercial Code-A New Look at an Old Problem' (1971) 54(1) Marquette Law Review 1


Finn, Paul (ed), Essays on Contract (The Law Book Co, 1987)


Finn, Paul, 'Unconscionable Conduct' (1994) 8 Journal of Contract Law 37


Fitzgerald, P. J., 'Are Statutes Fit For Academic Treatment' (1970) Journal of Society of Public Teachers of Law 142


Gifford, Donald, Understanding the Australian Legal System (Cavendish Publishing (Australia) Limited, 1997)


Harrison, Reziya, Good Faith in Sales (Sweet & Maxwell, 1997)


Healey, Deborah and Andrew Terry, Misleading or Deceptive Conduct (CCH Australia Limited, 1995)


Hopper, Samuel G., 'Landlord's Implied Covenant Not to Derogate from the Grant' (2008) 16 Australian Property Law Journal 157


Hutchinson, Terry, *Researching and Writing in Law* (Lawbook Co., 2010)


Lando, Ole and Hugh Beale (eds), The Principles of European Contract Law, Part I: Performance, Non-Performance and Remedies (Martinus Nijhoff Publishers, 1995)

Lee, R.W., The Elements of Roman Law (Sweet & Maxwell, 3rd ed, 1952)

Lee, Simon, Judging Judges (Faber and Faber, 1988)


Litvinoff, Saul, 'Good Faith' (1997) 71 Tulane Law Review 1645


McKerchar, Margaret, Design and Conduct of Research in Tax, Law and Accounting (Lawbook Co., 2010)


Meagher, Douglas, 'Will Good Faith Falter in the High Court?' LexisNexis Professional Development Conference, Melbourne, 7th March 2006


Moss, Giuditta Cordero, 'International Contracts Between Common Law and Civil Law: Is Non-State Law to be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith' (2007) 7 Global Jurists 1


Mulcahy, Linda, Contract Law in Perspective (Routledge-Cavendish, 5th ed, 2008)


O'Byrne, Kathleen Shannon, 'Good Faith in Contractual Performance: Recent Developments' (1995) 74 *Canadian Bar Review* 71


Paul Baron, Robyn Carroll and Aviva Freilich, 'Implied Terms:Central Exchange Ltd v Anaconda Nickel Ltd' (2003) 31 Western Australian Law Review 293

Peck, Roxy and Jay Dore, Statistics The Exploration and Analysis of Data (Thomson, 6th ed, 2008)


Peden, Elisabeth, 'Implicit Good Faith-or Do We Still Need an Implied Term of Good Faith' (2009) Journal of Contract Law 50


Pynt, Grey, Australian Insurance Law (LexisNexis Butterworths, 2008)


Rickett, Charles E. F., 'Some Reflections on Open-Textured Commercial Contracting' (2001) AMLA 374


Slapper, Gary and David Kelly, *The English Legal System* (Cavendish, Routledge, 8th ed, 2006)


Seddon, Nicholas, 'Australian Contract Law: Maelstrom or Measured Mutation?' (1994) 7 Journal of Contract Law 93


Singleton Jr., Royce A., Bruce C. Straits and Margaret Miller Straits, Approaches to Social Research (Oxford University Press, 5th ed, 1993)

Slapper, David and David Kelly, The English Legal System (Cavendish, 8th ed, 2006)


Stepleton, Jane, 'Good Faith in Private Law' (1999) 52 Current Legal Problems 1


Svantesson, Dan, 'Codifying Australia's Contract Law-Time for a Stocktake in the Common Law Factory' (2008) 20 *Bond Law Review* 1

Svantesson, Dan Jerker B., 'Unconscionability in Consumer ecommerce' (2011) *Commercial Law Quarterly* 8


Terry, Andrew, 'Franchising, Relational Contracts and the Vibe' (2005) 33 Australian Business Law Review 289


Terry, Andrew and Cary Di Lernia, 'Franchising and the Quest for the Holy Grail: Good Faith or Good Intentions?' (2009) 33 Melbourne University Law Review 542


Tucker, Kay, and Sue Milne, A Practical Guide to Legal Research (Law Book Co., 2010)


Wang Chenguang and Zhang Xianchu (eds), *Introduction to Chinese Law* (Sweet & Maxwell Asia, 1997)


Zimmermann, Reinhard and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press, 2000)

B Cases

Aiton Australia Pty Ltd v Transfield Pty Ltd (1999) 153 FLR 236
Aldin v Latimer Clark, Mairhead & Co [1984] 2 Ch 437
Ansett Transport Industries v Commonwealth (1977) 139 CLR 54
Antonovic v Volker (1986) 7 NSWLR 151
Archibald Barr Motor Company Ltd & Anor v ATECO Automotive New Zealand (High Court, Auckland, CIV 2007-404-5797, 26 October 2007)
Armstrong v State of Victoria (No. 2) (1957) 99 CLR 28
Asia Pacific Resources Pty Ltd v Forestry Tasmania (Unreported, Supreme Court of Tasmania, 4 September 1997)
Asia Television Ltd v Yau’s Entertainment Pty Ltd [2000] FCA 254
Auag Resources Ltd v Waihi Mines Ltd [1994] 3 NZLR 571
Australia Pty Ltd v Bruness Pty Ltd (2002) WASC (Unreported, Hasluck J, 4 December 2002)
Australian Competition & Consumer Commission v CG Berbatis Holdings (2003) 214 CLR 51
Australis Media Holdings Pty Ltd v Telstra Corporation Ltd (1998) 43 NSWLR 104
Biotechnology Australia Pty Ltd v Pace (1988) 15 NSWLR 130.
Birmingham Dudley & District Banking Company v Ross (1888) 38 Ch D 295
Blomley v Ryan (1956) 99 CLR 362
Bobux Marketing Ltd v Raynor Marketing Ltd [2002] 1 NZLR 506
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266
Breen v Williams (1996) 186 CLR 71
Bryne Australia v Australia Airlines Ltd (1995) 185 CLR 410
Butt v McDonald (1896) 7 QLJ 68
Carter v Boehm (1766) 3 Burr 1905
Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd (1987) 10 NSWLR 468
Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337
Commercial Bank of Australia v Amadio (1983) 46 ALR 402
Comunale v Traders & General Insurance Co. 50 Cal.2d 653, 328 P.2d (1958)
Dalton Constructions Pty Ltd v State Housing Commission (1998) 14 BCL 477
Director General of Fair Trading v First National Bank [2000] 1 All ER 97
Eastwood v Magnox Electric Plc [2005] 1 AC 503
Gibbons Holdings Ltd v Wholesale Distributors Ltd [2008] 1 NZLR 277
Harmer v Jumbil (Nigeria) Tin Areas Ltd [1921] 1 Ch 200
Helmore v Smith (1886) 35 ChD 436.
Hospital Products Ltd v United States Surgical Corporation (1984) 55 ALR 417
Hurley v McDonald's Australia (2000) ATPR 41-741
Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433
James Spencer & Co Ltd v Tame Valley Padding Co. Ltd (Court of Appeal, 8th April 1998)
JLCS Pty Ltd v Squires Left City Steakhouse Pty Ltd 78 IPR 319
Kelly v New Zealand Insurance Co Ltd (1993) 7 ANZ Insurance Case 61-197
Kirke La Shelle Co v Paul Armstrong Co 188 NE 163
Kiwi Gold NL v Prophecy Mining NL (Unreported, 18th July 1991, Court of Appeal, CA/30/91)
Liverpool City Council v Irwin [1977] AC 239
Livingstone v Roskilly [1992] 3NZLR 230
Macan Shipping (London) Ltd v Polish Steamship Co (1989) @ Lloyd’s Rep 138
Mackay v Dick (1881) 6 App Cas 251
Mesa Operating Ltd Partnership v Amoco Canada Resources Ltd (1994), 149 A.R 197 (C.A)
Molton Builders Ltd v City of Westminster London Borough Council (1975) 30 P & CR 182
Mona Oil Equipment Co v Rhodesia Railways Ltd [1949] 2 All E.R 1014
Narni Pty Ltd v National Australia Bank [2001] VSCA 31
New Zealand Shipping Co.Ltd v A.M Satherwaite & Co Ltd [1975] Q.B 154
Nuclear Tests Case (Australia v France) 1974 ICI REP.253
Saxby Bridge Mortgages Pty Ltd v Saxby Bridge Pty Ltd [2000] NSWSC 187
Secured Income Real Estate (Australia) Ltd v St Martin’s Investments Pty Ltd (1979) 144 CLR 596
Shelianu Inc v Print Three Franchising Corporation (2003) 64 OR (3d) 533
Shepherd v Felt &Textiles of Australia Ltd (1931) 45 CLR 359
Shirlaw v Southern Foundries [1939] 2 KB 206
Simonius Vischer & Co v Holt & Thompson [1979] 2 NSWLR 322
State Bank of New South Wales Ltd v Currabubula Holdings Pty Ltd (2001) 51 NSWLR 399
Tarmac Canada Inc. v Hamilton Wentworth (Regional Municipality) O.J. 3273 (1999)
The Mogul Steamship Co Ltd v McGregor, Gow & Co (1889) 23 QBD 598
Union Eagle Ltd v Golden Achievement Ltd [1997] AC 514
United Dominions Corporation Ltd v Brian Pty Ltd (1985) 157 CLR 1
Walford v Miles [1992] 2 AC 128
Wallace v United Grain Growers [1997] 3 SCR 701
Watseka First International Bank v Ruda 135 3d 140 (III, 1990)
Wessex Dairies Limited v Smith [1935] 2 KB 80.
Wheeldon v Burrows (1879) 12 Ch D 31
Wood v Lucy,Lady Duff- Gordon 222 NY 88, 118 NE 214 (1917)
C Legislation

*Competition and Consumer Act 2010 (Cth)*
*Competition and Consumer Legislation Amendment Act 2011 (Cth)*
*Corporations Act 2001 (Cth)*
*Insurance Contracts Act 1984 (Cth)*
*Trade Practices Act 1974 (Cth)*

**New South Wales**

*Contracts Review Act 1980 (NSW)*

**United Kingdom**

*Unfair Terms in Consumer Contracts Regulations 1994 (UK)*
*Unfair Terms in Consumer Contracts Regulations 1999 (UK)*

**New Zealand**

*Employment Relations Act 2000 (NZ)*

**Code Material**

*Contract Law of the People’s Republic of China*
*Dutch Civil Code*
*French Civil Code*
*German Civil Code*
*Greek Civil Code*
*Italian Civil Code*
*Quebec Civil Code*
*Swiss Civil Code*
*Uniform Commercial Code (US)*
*Restatement (Second) of Contracts (US)*
Other International Material

Principles of European Contract Law


The Vienna Convention on the Law of Treaties

ICC Arbitral Award No 8611 of 1997, URL:
http://cisgw3.law.pace.edu/cases/978611i1.htm


D Other Materials

Government Documents


Andrew Terry, Submission No 91 to Parliamentary Joint Committee in Corporations and Financial Services, Parliament of Australia, Opportunity Not Opportunism: Improving Conduct in Australian Franchising, 2008

Australian Competition and Consumer Commission, Submission No 60 to Parliamentary Joint Committee in Corporations and Financial Services, Parliament of Australia, Opportunity Not Opportunism: Improving Conduct in Australian Franchising, September 2008

Australian Copyright Council, Submission to Attorney-General’s Department, Improving Australia’s Law and Justice Framework: A Discussion Paper Exploring The Scope for Reforming Australian Contract Law, 20 July 2012


Dr Elizabeth Spencer and Mr Simon Young, Submission to Federal Government of Australia, *Review of the Federal Franchising Code of Conduct*, 14th February 2013

Dr Elizabeth Spencer, Submission to the Parliamentary Joint Committee, *Inquiry into Franchising*, December 2008

Expert Panel (Professor Bryan Horrigan, Mr David Lieberman, Mr Ray Steinwall), Parliament of Australia, *Strengthening Statutory Unconscionable Conduct and the Franchising Code of Conduct*, Canberra, February 2010


Government of Western Australia, *Inquiry into the Operation of Franchise Businesses in Western Australia-Report to the Western Australian Minister for Small Business*, April, 2008


Motor Trades Association of Australia, Submission No 90 to Parliamentary Joint Committee in Corporations and Financial Services, Parliament of Australia,
Opportunity Not Opportunism: Improving Conduct in Australian Franchising, 12th September 2008

Mr Tony Piccolo MP, Economics and Finance Committee, Parliament of South Australia, Proof Committee Hansard, Melbourne, 2008

National Retail Association, Submission No 109 to Parliamentary Joint Committee in Corporations and Financial Services, Parliament of Australia, Opportunity Not Opportunism: Improving Conduct in Australian Franchising, 12th September 2008


Peter Abetz, Submissions to the Australian Government, Review of the Franchising Code of Conduct, February 2013


Newspaper Articles

Tony Damian, ‘Contract Code No Answer to Contract Law Reform’, *The Australian* (Sydney), 20 July 2012,

John Purcell, ‘Codifying Australia’s Contract Law is a Step in the Wrong Direction’, *Intheblack* (Sydney), 30 July 2012.
<http://www.itbdigital.com/opinion?t=legal

Internet Materials

Australian Bureau of Statistics, Dec 2011
Appendix A: Database case law

ACI Operations Pty Ltd v Berri Ltd (2005) VSC 201

Advanced Fitness Corp Pty Ltd v Bondi Diggers Memorial & Sporting Club Ltd [1999] NSWSC 264

Alcatel Australia Ltd v Scarcella (1998) 44 NSWLR 349

ANZ Bank Ltd v Ciavarella [2002] NSWSC 1186

Apple Communications Ltd v Optus Mobile Pty Ltd (2001) NSWSC 635

Arrowcrest Group Pty Ltd v Ford Motor Company of Australia Ltd [2002] FCA 1450

Australian Co-operative Foods Ltd v Norco Co-operative Ltd (1999) NSWSC 274

Australian Hotels Association (NSW) v TAB Ltd [2006] NSWSC 293

Australian Style Pty Ltd v .au Domain Administration Ltd [2009] VSC 422

Automasters Australia Pty Ltd v Bruness Pty Ltd & Anor [2002] WASC 286 (Unreported, Hasluck J, 4 December 2002)

Bamco Villa Pty Ltd v Montedeen Pty Ltd [2001] VSC 192 (Unreported, Mandie J, 20 June 2001)

Biscayne Partners Pty Ltd v Valance Corp Pty Ltd [2003] NSWSC 874

Burger King Corporation v Hungry Jack’s Pty Ltd (2001) 69 NSWLR 558


Cathedral Place Pty v Hyatt of Australia & Ors [2003] VSC 385


Central Exchange Ltd v Anaconda Nickel Ltd [2001] WASC 128

Central Exchange Ltd v Anaconda Nickel Ltd (2002) WASCA 94
Commonwealth Bank of Australia v Renstel Nominees Pty Ltd [2001] VSC 167
Council of City of Sydney v Goldspar Australia Pty Ltd (2006) 230 ALR 437
Cubic Transportation Systems Inc v State of NSW [2002] NSWSC 656
Cugg Pty Ltd v Gibo Pty Ltd [2001] NSWSC 297
De Pasquale v The Australian Chess Federation [2000] ACTSC 94
Dickson Property Management Services Pty Ltd v Centro Property Management (Vic) Pty Ltd (2000) 180 ALR 485
Dockpride Pty Ltd v Subiaco Redevelopment Authority [2005] WASC 211
Dong v Monkiro Pty Ltd [2005] NSWSC 749
East Van Villages Pty Ltd v Minister Administering the National Parks and Wildlife Act [2001] NSWSC 559
Eden Productions Pty Ltd v Southern Star Group Ltd [2002] NSWSC 1166
Edensor Nominees Pty Ltd v Anaconda Nickel Ltd [2001] VSC 502
Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL [2005] VSCA 228 (Unreported, Warren CJ, Buchanan JA and Osborn AJA, 15 September 2005)
Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL [2004] VSC 477
Far Horizons Pty v McDonald’s Australia Ltd [2000] VSC 310 (Unreported, Byrne J, 18 August 2000)
Forklift Engineering Australia Pty Ltd v Powerlift (Nissan) Pty Ltd [2000] VSC 443
Francis v South Sydney District Rugby League Football Club Ltd [2002] FCA 1306
Garrott v Tote Tasmania Pty Ltd [2007] TASSC 101
Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd (1999) ATPR 41-703

GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd (2003) 128 FCR 1

Gilsan v Optus [2004] NSWSC 1077

Golden Sands Pty Ltd v Davegale Pty Ltd [2003] VSC 458

Gough & Gilmour Holdings Pty Ltd v Caterpillar of Australia Pty Ltd [2009] FCA 1429

Grubb v Toomey [2003] TASSC 131

GSA Group Pty Ltd v Siebe Plc (1993) 30 NSWLR 573

Howtrac Rentals Pty Ltd v Thiess contractors (NZ) Ltd & Anor [2000] VSC 415

Hudson Resources Ltd v Australian Diatomite Mining Pty Ltd [2002] NSWSC 314

Hughes Aircraft Systems International v Airservices Australia (1997) 146 ALR 1

Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Anor (1993) 31 NSWLR 91

Hume Computers Pty Ltd v Exact International BV [2006] FCA 1439


Hunter Valley Skydiving Centre Pty Ltd v Central Coast Aero Club Ltd [2008] NSWSC 539 (Unreported, Brereton J, 3 June 2008)

Ingot capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd [2003] NSWSC 1012

Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets (no.6) [2007] NSWSC 124

Jetstar Airways Pty Ltd v Free [2008] VSC 539

JF Keir Pty Ltd v Priority Management Systems Pty Ltd (administrators appointed) (2007) NSWSC 789

K & S Freighters Pty Ltd v Linfox Transport (Aust) Pty Ltd [1999] FCA 1325

Kellogg Brown & Root Pty Ltd v Australian Aerospace [2007] VSC 200

Lactos Fresh Pty Ltd v Finishing Services Pty Ltd [2006] Q Conv R 54-647

Lay v Alliswell Pty Ltd (2001) V ConV 54-651

Linfox v Ellul & Ors [2004] NSWSC 276

LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd [2001] NSWSC 886

Luce Optical Pty Ltd v Budget Specs (Franchising) Pty Ltd (2005) FCA 1486 (Unreported, Greenwood J, 20 October 2005)

Maitland Main Collieries Pty Ltd v Xstrata Mt Owen Pty Ltd [2006] NSWSC 1235

Mangrove Mountain Quarries Pty Ltd v Barlow [2007] NSWSC 492

Meridian Retail Pty Ltd v Australian Unity Retail Network Pty Ltd (2006) VSC 223 (Unreported, Dodds-Streeton J, 21 June 2006)

Mobile Innovations Limited v Vodafone Pacific & Ors (2003) NSWSC 166

Nauru Phosphate Royalties Trust v Business Australia Capital Mortgage Pty Ltd (in liq) [2008] NSWSC 916

Network Ltd v Speck [2009] VSC 235

News Ltd v Australian Rugby Football League (1996) 135 ALR 33

Novacoal Australia Pty Ltd v Macquarie Generation Ltd [1999] NSWSC 929

Optus Networks Pty Ltd v Telstra Corp Ltd [2001] FCA 1798

Orica Investments Pty Ltd v McCartney [2007] NSWSC 645

Overlook v Foxtel [2002] Aust Contract Reports ¶90-143
Pacific Brands Sport & Leisure Pty Ltd and Others v Underworks Pty Ltd (2006) FCAFC 40

Pacific Brands Sport & Leisure Pty Ltd and Others v Underworks Pty Ltd [2005] FCA 288

Panasonic Australia Pty Ltd v Broadtel Communications Ltd [2007] VSC 273

Pioneer Park Pty Ltd (in liquidation) v Australia and New Zealand Banking Group Ltd [2006] NSWSC 883

Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd (2003) HCA 10

Playcorp Pty Ltd v Taiyo Kogyo Ltd [2003] VSC 108

PRP Diagnostic Imaging Pty Ltd v Pittwater Radiology Pty Ltd [2008] NSWSC 701

R & J Lyons Family Settlement Pty Ltd v 155 Macquarie Street Pty Ltd [2008] NSWSC 310

Reliance Developments (NSW) Pty Ltd v Lumley General Insurance Ltd [2008] NSWSC 172

Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234

RHG Mortgage Securities Pty Ltd v Elektra Purchase No 19 Ltd [2009] NSWSC 258

Rimcost v Alarm Monitoring & Anor (2003) 179 FLR 398

Royal Botanic Gardens and Domain Trust v South Sydney City Council (2002) 186 ALR 327

Service Stations Association Ltd v Berg Bennett & Associates Pty Ltd (1993) 45 FCR 84

South Sydney District Rugby League Football Club Ltd v News Ltd (2000) 177 ALR 611

State of NSW v Banabelle Electrical Pty Ltd (2002) 54 NSWLR 503
Sundararajah v Teachers Federation Health Ltd [2009] NWSC 1443

Telestra Corporation Limited v Optus Networks Pty Ltd (2002) FCAFC 296

Thiess Contractors Pty Ltd v Placer (granny Smith) Pty Ltd [1999] WASC 1046

Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd [2000] WASCA 102

Tomlin v Ford Credit Australia [2005] NSWSC 540

Topseal Concerete Services Pty Ltd v Sika Australia Pty Ltd [2008] WASC 57

Tote Tasmania Pty Ltd v Garrott (2008) TASSC 86

Varangian v OFM Capital Limited [2003] VSC 444


Vroon BV v Foster’s Brewing Group Ltd [1994] 2 VR 32

Walker & Anor v ANZ Banking Group Ltd (No.2) (2001)39 ACSR 557

Wenzel v Australian Stock Exchange [2002] FCAFC 400

Wenzel v Australian Stock Exchange [2002] FCA 95

Witham & Anor v Hough & Anor [2009] QSC 101