'Good Faith in Commercial Agreements – From Elusive Concept to Transactional Practice (An Update)'

By Professor Bryan Horrigan (Dean, Faculty of Law, Monash University)[1]

Presentation for the Bar Association of Queensland Annual Conference 2016, *Reflecting on the Past Looking to the Future*, 27 February 2016

Overview

> (F)or a number of reasons, some to do with the work of legislators, some to do with judicial law-making, and some to do with the temper and spirit of the times, we can no longer say that, in all but exceptional cases, the rights and liabilities of parties to a written contract can be discovered by reading the contract.
>
> --- Chief Justice Murray Gleeson, 1995[2]
>
> Nothing truer can be said of the duty of "good faith" in contract law.
>
> --- Chief Justice Marilyn Warren, 2010[3]

The Commercial Transactional Significance of Good Faith

Imagine that a clause in a commercial agreement that you are drafting, litigating, or advising upon simply says that '[Your client] can [unilaterally, you think] do X'. Now imagine that the clause in question is at risk of being read by an opposing lawyer and later by an arbitrator or court to mean in reality that '[Your client] can [only] do X provided that [your client] is acting honestly, cooperatively, with fidelity to the mutual bargain, non-arbitrarily, non-capriciously, bona fide for proper contractual purposes, without ulterior motives, and reasonably [whatever that means!]'.[4]

How close is the current state of Australian law to that scenario, is there anything a commercial drafter can do about it either way, and what avenues of argument does it open up for commercial litigators, advocates, arbitrators, and judges? The latest developments in the common law world and also in

---

[1] Contact: bryan.horrigan@monash.edu; 0421 702 059. Along with significant new material prepared for the conference at which this paper was originally presented, this paper also expands upon and updates some material from the author's earlier published work on this topic: see Bryan Horrigan, 'New Directions in How Legislators, Courts and Legal Practitioners Approach Unconscionable Conduct and Good Faith', in John McKenna and Helen Jeffcoat (eds), *Queensland Legal Yearbook 2012* (Supreme Court Library Queensland, 2012).

[2] Murray Gleeson, 'Individualised Justice – The Holy Grail' (1995) 69 *Australian Law Journal* 421 at 428 ('*Gleeson 1995*').

[3] Marilyn Warren, 'Good Faith: Where Are We At?' (2010) 34(1) *Melbourne University Law Review* 344 at 344 ('*Warren 2010*').

[4] I am grateful for this description to my co-presenter, Mr Ben Hubble QC, Head of Chambers at Four New Square, at a seminar on good faith developments at The Inner Temple in mid-2015 for clients of Four New Square, entitled 'Good Faith in Commercial Agreements and Dispute Resolution – A Comparative and Transactional Perspective'. The powerpoint presentation accompanying this conference paper is based upon and updates what was jointly presented at that seminar. All views expressed here are my own. I am also grateful for the assistance provided by my Research Assistant, Mr James Campbell, in preparing this paper.

Australian judge-made and statutory law affecting good faith and commercial agreements have considerable practical, tactical, drafting, and pleading ('work-related') significance for commercial lawyers (including the commercial bar), commercial clients, commercial judges and arbitrators, and other commercial regulators ('the commercial community').

Since it is true that 'whole forests have been felled to produce judicial and academic writing on the meaning of good faith in contract law',[5] from the outset it is important to locate this topic squarely in the heart of judicial and legal practice, especially given the recent case law on this topic in the jurisdiction of the conference for this paper.[6] However, as this paper proceeds to show, good faith in commercial agreements is a topic whose development cannot be approached simply as a matter of strict legal doctrine and legal practice alone.

To this point, judicial and academic commentary on the topic of good faith remains overwhelmingly dominated *and* unnecessarily limited by a wholly doctrinal lens of analysis, focused largely upon the concepts and norms of contract law as a self-contained body of judge-made law. However, the legal and practical realities of good faith in commercial agreements are no longer limited to the boundaries of contract law alone. Increasingly, for example, the judge-made law and responsive legal practice on contractual good faith is being overtaken by supervening legislative norm-shaping of commercial morality through the medium of standards of good faith in business, consumer, franchising, and leasing contexts.

In other words, good faith is increasingly regulated by standards that contractual parties are not freely able to avoid or even exclude by private agreement. Any legal practitioners who approach drafting, advice, and pleadings about good faith in commercial agreements for their clients with an outdated or otherwise limited mindset – namely, that this is just a matter of contract law generally and implied terms in particular – put their professional reputations and indemnity policies at risk.

This paper provides an update and analysis of recent Australian and comparative developments on the law of good faith in commercial agreements ('legal doctrine') and the transactional implications of those developments for the various arms of the commercial community.[7] The aim is to do so with some sensitivity to considerations of jurisprudential theory ('legal theory'), regulatory policy ('legal policy'), precedential directives ('legal precedent'), judicial politics ('legal politics'), commercial/courtroom tactics ('legal strategy'), lawyerly reasoning ('legal technique'), and practical reality ('legal practice'). In other words, this paper illustrates the limits of understanding and working with legal doctrine on good faith in commercial agreements without a sufficiently nuanced appreciation of how that body of law reflects and relates to such considerations.

---

[5] *Warren 2010* at 345.

[6] Eg *AMCI (IO) Pty Ltd v Aquila Steel Pty Ltd* [2010] 2 Qd R 101; *Baldwin v Icon Energy Ltd* [2015] QSC 12; and *Gramotnev v QUT* [2015] QCA 127.

[7] Much has happened on Australian and comparative fronts even in the two short years since Professor John Carter presented a paper on this topic to the same conference in 2014: see John Carter, 'Good Faith in Contract: Why Australian Law is Incoherent' (Paper presented at the Bar Association of Queensland 2014 Annual Conference, 8 March 2014). In addition, there are significant transactional and legislative dimensions of this topic that are worthy of integrated consideration.

The Commercial Community's Main Dilemma About Good Faith

Few commercial lawyers, clients, judges, or arbitrators (if any) can avoid confronting issues of good faith in commercial agreements at some point in their work. Every day, lawyers who draft, advise, or litigate on commercial contracts confront issues of good faith, one way or another. The other side and their lawyers might want or alternatively resist good faith's explicit inclusion in negotiating an agreement. Arguments might arise in the course of dealings or formal dispute resolution about whether any contractual rights can only be acted upon in good faith, and not simply in one party's absolute self-interest. Solicitors, barristers, and judges in litigation mode look for ways to construe contractual provisions in ways that are duly sensitive to the contemporary nuances of the law on contractual good faith in commercial contexts.

Having known and worked with many legal practitioners over 25 years in commercial practice, my personal experience is that the best legal practitioners understand and work with and around the everyday reality that absolute certainty in commercial law and practice through having only fixed and determinate rules is unrealistic,[8] parties' rights can never be made completely foolproof and locked up in a commercial contract anymore,[9] many statutory and non-statutory standards in commercial law have value-based elements that draw upon broader business and societal norms, and ethical business and legal behaviour is an expected norm in commercial legal practice. All of this is a given.

Still, legal practitioners sometimes rightly complain about the loose way in which some court decisions deploy concepts like 'community values' and 'commercial morality', analyse and develop inherently value-laden concepts such as unconscionable conduct and good faith in ways that are far from uniform in the quality of their reasoning or outcomes, and express conclusions about such concepts in terms that, however much they make sense of the law and its application with the dual benefit of hindsight and authority, do not translate as well as they might to the task of advising a client in the case at hand or beyond.

For too long, Australian judges and academics have been unable to speak with one authoritative voice about matters as commercially fundamental as the presence, sources, tests, elements, and limits of good faith in contract law, let alone its transactional and other work-related implications for commercial lawyers and their clients. The Chief Justice of the jurisdiction of the law school that it is my privilege to lead has referred to 'a bewildering array of authorities and academic views on the topic'.[10] Together, judicial overreach on many aspects of contractual good faith and academic fixation on doctrine over practice have combined to produce correlative reactions (some would say overreactions) from

[8] *Paciocco v Australian and New Zealand Banking Group Limited* [2015] FCAFC 50, [266] (Allsop CJ, Besanko J and Middleton J agreeing) ('the *Paciocco* case'): 'Certainty is a quality sometimes posited as a reason for removing from the expression of rules to govern conduct (in particular in regard to commercial conduct) standards, values and norms that lack precise definition, or that involve the application of values, or that apply or operate in contestable fields or with contestable results. But no sophisticated legal system, or society, seeks intellectual refuge in the proposition that rules alone are the guardians of the security of certainty.'

[9] A former Chief Justice of Australia has admitted as much, extra-judicially, in the quotation at the start of this paper: see *Gleeson 1995*.

[10] *Warren 2010* at 345.

commercial lawyers and clients in their approaches to the negotiation and drafting of commercial agreements.

One of the chief criticisms of Australian judicial overreach in developing the law of implied terms of good faith is that courts have extended the content of good faith beyond its proper bounds, by introducing reasonableness and other notions into the equation.[11] The gist of this criticism is contained in the proposition that, because good faith is intrinsic to contract law and its interpretation, any implied term of good faith is either 'redundant' or imposing 'a more onerous requirement' (eg reasonableness) than the concept of good faith properly bears as a matter of doctrinal law ('the Carter-Peden view').[12]

As this paper evidences, the state of precedent and commentary on this topic makes it clear that good faith's relevance to commercial agreements is not necessarily confined to the meaning of express terms, implication of additional terms, and exclusion of terms, with clear repercussions for anyone who drafts and litigates or advises on good faith issues. For example, if good faith is relevant to commercial agreements via routes that lie outside the boundaries of express and implied terms, a standard exclusion clause that is worded in a way that focuses upon exclusion of additional unwritten terms will not necessarily cover all of the ways in which good faith could be relevant in the construction of commercial agreements. Moreover, even the best exclusion clause in the world cannot completely shield a commercial client from adverse regulatory attention and other legal consequences if their conduct surrounding a business or consumer contract is in bad faith and constitutes unconscionable business conduct under more than one piece of Australian legislation at national and state levels.

The transactional significance of bad faith in exercising contractual rights or in the conduct surrounding contracts is therefore taken to another level by the inclusion of good faith as a relevant factor in statutory unconscionability in two of the most significant pieces of Commonwealth legislation regulating the Australian economy – namely, the *Competition and Consumer Act* (for business-to-business ('B2B') and business-to-consumer ('B2C') dealings) and the *Australian Securities and Investments Commission Act* (for financial services). Since 2012, this transactional significance of legislated standards of good faith now extends to conduct towards both other businesses *and* consumers that is surrounding, preceding, or even without a concluded contract. In addition, the *Franchising Code of Conduct* now imposes a mandatory and non-excludable mutual obligation of good faith in all franchising contracts, whose content is determined under judge-made law.

A New Wave of Comparative Good Faith Test Cases and Transnational Standard-Setting

Emerging only in the last few years, a new wave of case law and commentary on good faith in the UK, Canada, and elsewhere in the common law world offers possible outcomes and arguments for consideration and possible translation to Australian conditions in future 'test case' legal advice, dispute resolution, and litigation in Australia and abroad. For example, recently Canada's highest court not only accepted the viability of good faith as an organising principle in Canadian contract law, but also

[11] John Carter and Elisabeth Peden, 'Good Faith in Australian Contract Law' (2003) 19 *Journal of Contract Law* 155 at 155 ('*Carter and Peden 2003'*).
[12] *Carter and Peden 2003* at 163.

mandated a non-excludable obligation of good faith of specific minimum content in the performance of *all* contracts (ie not just commercial agreements).[13]

Australian judge-made developments and correlative commentary on contractual good faith (including the Carter-Peden view) have demonstrably influenced courts and commentators in other common law countries. In that sense, Australian judicial decisions and academic commentary in this field of law and practice both shape and reflect this broader body of transnational common law. Considered from a systemic perspective, all of this has correlative practical implications not only for those arms of the legal profession involved in contractual drafting, dispute resolution, and litigation, but also for those arms of the legal profession who appear in court, write judgments, and administer and reform legislation and other regulation affecting good faith in commercial contexts.

Beyond Anglo-Australian common law systems, in the domain of international and transnational contracting, norms of good faith and fair dealing are becoming central elements of landmark instruments of 'hard' and 'soft' law, to the point where good faith arguably deserves recognition 'as an attribute of modern international commercial law, as it was of the law merchant', according to Federal Court of Australia Chief Justice James Allsop.[14] Relevant trends here include good faith's acceptance in contract law in Europe, North America, China, and other countries, its enshrinement in the *Uniform Commercial Code* and *Restatement (Second) of Contract* in the USA, and its use in international commercial instruments such as the *UNIDROIT Principles of International Commercial Contracts* and *UN Convention of Contracts for the International Sale of Goods*.

The political movement towards reform of Australian contract law to reflect transnational developments and standards concerning good faith appears stalled, at least for the moment.[15] Still, any residual reluctance within the Australian judiciary to normalise good faith is increasingly out of step with comparative common law developments, and also faces ongoing pressure in an increasingly globalised legal world, with its growing transnational movement towards good faith in judicial, legislative, and other forms of regulatory standard-setting.[16]

Long-standing scepticism in the common law world in the wake of the landmark *Walford v Miles* case[17] about the certainty and enforceability of contractual requirements to negotiate in good faith has now been overcome in Australia, Singapore, and the UK, not least where that requirement is contained in a pre-existing agreement and is time-bound and otherwise facilitates genuine resolution of disputes. Australia's position as an emerging site of excellence for international dispute resolution in competition

[13] *Bhasin v Hrynew* 2014 SCC 71 ('the *Bhasin* case').
[14] Justice James Allsop, 'Good Faith and Australian Contract Law: A Practical Issue and a Question of Theory and Principle' (2011) 85 *Australian Law Journal* 341 at 355 ('*Allsop 2011*').
[15] Eg Commonwealth Attorney-General's Department, *Review of Australian Contract Law* (2012).
[16] Eg Justice Paul Finn, 'Internationalisation or Isolation: The Australian Cul de Sac? The Case of Contract Law' (Address to the 20th Anniversary Symposium, *The Internationalisation of Law: Legislating, Decision-Making, Practice and Education*, Bond University, 2009); *Allsop 2011*; and Bill Dixon, 'Can the Common Law Obligation of Good Faith Be Contractually Excluded?' (2007) 35 *Australian Business Law Review* 110.
[17] [1992] 2 AC 128; cf *Emirates Trading Agency v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm); *United Group Rail Services v Rail Corporation NSW* [2009] NSWCA 177 ('the *United Group Rail* case'); *HSBC Institutional Trust Services (Singapore) v Toshin Development Singapore* [2012] SGCA 48; and *North East Solution Pty Ltd v Masters Home Improvement Australia Pty Ltd and Woolworths* [2016] VSC 1 ('the *Woolworths* case').

with London, Hong Kong, Singapore, and others turns in part upon the extent to which Australian judges and arbitrators applying Australian law as the governing law of contracts produce outcomes that are in sync with the treatment of good faith in international and foreign ('transnational') commercial law.

Commercial lawyers and clients with transnational business operations need to know how standards of good faith potentially regulate the formation, performance, enforcement, and dispute resolution of commercial agreements, whether such activity arises in a civil law or common law jurisdiction, as well as any differences in the treatment of good faith across jurisdictions. Lawyers and clients from a civil law background benefit from knowing how their counterparts from a common law background might approach good faith issues, and vice versa.

In short, commercial lawyers who are coming to grips with the current state of the law and practice in this economically significant field of regulation must additionally come up to speed in accommodating recent developments in the common law world, legislative regulation, transnational standard-setting, and scholarly debate surrounding good faith in commercial agreements. All of these developments affect the negotiation, formation, enforcement, arbitration, and adjudication of commercial agreements where good faith is implicated.

Five Flawed Propositions

In practice, many commercial lawyers and their clients would have a basic working view of good faith in commercial agreements that broadly corresponds with the following propositions. Alternatively, at the very least, they would perhaps desire the law to reflect these five propositions:

(1) *Proposition 1*: Good faith can readily be understood and handled for work-related purposes as a matter of *legal doctrine* and *legal practice*, and perhaps also *legal precedent* and *legal technique* (ie 'working the rules'), without being bothered too much (or at all) by 'academic' (in the pejorative sense) considerations of *legal theory*, *legal policy*, *legal politics*, and *legal strategy*;

(2) *Proposition 2*: Good faith is not automatically part of a commercial contract and its interpretation unless the parties make it part of the contract – in other words, the starting point for contractual interpretation is that good faith is not present or relevant unless the parties have actively done something to include it;

(3) *Proposition 3*: Good faith is made part of a contract only (or at least mainly) via the two routes of explicit terms or implied terms, in the sense of being additional terms that are either in or out of the contract;

(4) *Proposition 4*: If parties want to prevent notions of good faith affecting their contractual rights and performance, they can do so effectively through an appropriate combination of drafting devices, including one or more of 'sole discretion', 'entire agreement' and 'exclusion' clauses; and

(5) *Proposition 5*: Legal advice about negotiation, performance, enforcement, arbitration, and litigation of contracts that is consistent with the first four propositions is professionally sound advice.

For the reasons that follow in this paper, all five propositions have some basic flaws. The treatment of these five propositions provides a structure for the remainder of this paper, after a short summary of the current state of play in this field and an analysis of the elements and limits of good faith.

Current Doctrinal Position on Good Faith in Commercial Agreements

Australian law and commentary is moving closer than ever before towards acceptance of the following ten broad propositions about good faith in the context of commercial agreements, as a reference point for the remainder of this paper:

(1) *Internalising Good Faith*: Good faith of some kind is part of Australian contract law, and commercial agreements must be interpreted against that baseline of good faith, subject of course to how and particular contract deals with it;
(2) *Nature of Good Faith*: Good faith operates in contract law as an 'informing' or 'organising' principle, mediated through specific legal doctrines and norms of construction, which frame the basis for ascertaining the contractual parties' legal intent in striking their bargain, as a matter of legal interpretation and not at large;
(3) *Multiple Good Faith Routes*: Good faith manifests itself in a variety of ways in contract law, across the spectrum of implication and construction, through routes that are not limited to express or implied terms of good faith;
(4) *Implied Terms of Good Faith*: Good faith is not automatically implied as a matter of law in all commercial agreements, although it is now mandated expressly as a non-excludable obligation in all franchising contracts;
(5) *Elements of Good Faith*: Good faith's possible elements include but also extend beyond the core element of honesty, with a penumbra of other elements according to context, from a limited set that includes cooperation (also a separate but related duty), mutual fidelity to the bargain, non-subversion of interests and benefits secured by the contract, fair dealing, and – more controversially – reasonableness of some kind;
(6) *Reasonableness and Good Faith*: To the extent that reasonableness is associated in some way with good faith, this sense of reasonableness is not at large and imposed on contractual parties as a free-standing and additional source of obligations, external to the contract as interpreted under contract law;
(7) *Tests and Limits of Good Faith*: 'Necessity' is now the overarching criterion for all avenues of implied terms of good faith,[18] but no implied term of good faith can override what the contract explicitly or implicitly provides, prevent a party from pursuing their legitimate commercial self-interest, or rise to the level of a fiduciary obligation requiring one party to sacrifice their own interest for the sake of another;

[18] *Commonwealth Bank of Australia v Barker* [2014] HCA 32 at [28]-[29] ('the *Barker* case').

(8) *Cross-Regulatory Good Faith Standards*: Standards of good faith now apply under statutory and judge-made law in a variety of business, consumer, financial services, commercial leasing, and franchising contexts, so that contract law's position on good faith needs to be considered alongside good faith's treatment under other relevant laws too, with clear implications for work-related responsibilities of commercial lawyers and their clients;

(9) *Negotiation in Good Faith*: Obligations to negotiate in good faith under pre-existing agreements are enforceable under the right legal conditions, especially in time-bound dispute resolution clauses, with an absence or breach of good faith in negotiating a contract now also forming part of pre-contractual conduct that could constitute unconscionable business conduct in both B2B and B2C contexts;

(10) *Exclusion of Good Faith*: At least some (and perhaps all) elements of good faith are capable of exclusion or other conditioning by agreement between the parties (although never by a simple 'entire agreement' clause on its own), except where such exclusion offends contract law's own rules (eg contracts and terms that offend public policy) or where such an outcome is contrary to what is mandated by supervening legislation (eg non-excludable obligations of good faith in franchising contracts, and standards that make the absence or breach of good faith an indicator of unconscionable business conduct).

Meaning, Elements, and Limits of Good faith

Honesty and Good Faith

Good faith means different things to different people in different circumstances across different locations. So, at the outset, it helps to have a common understanding of what elements might be packed into contractual good faith. Its central element is not in doubt. Courts and commentators across common law jurisdictions have reached a consensus on honesty being a core component of good faith, even where they otherwise disagree about whether it is intrinsic to contract law and what tests should be used for implying good faith.[19]

Australian, UK, and Canadian law, for example, all now accept honesty as the core element in contractual good faith, although there is no monolithic interpretation and application of the requirements of honesty across jurisdictions. This is not surprising, given that the treatment of good faith is heavily value-laden, context-dependent, contract-sensitive, and multi-dimensional. In none of those jurisdictions is an obligation of honesty completely co-extensive with full disclosure to one party of everything known by another party, although honesty can require some disclosure under the right circumstances.[20] It might readily prevent a party from knowingly providing false information upon which

[19] Eg *Carter and Peden 2003* at 156-157; Nicholas Seddon and Manfred Paul Ellinghaus, *Cheshire & Fifoot: Law of Contract* (LexisNexis, 9th Australian ed, 2008) at [10.44] ('*Seddon and Ellinghaus*'); *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222, [61] per Pullin JA (Newnes JA concurring) ('the *Strzelecki Holdings* case'); and the *United Group Rail* case, [71] per Allsop P (Ipp JA and Macfarlan JA concurring).

[20] The *Woolworths* case raises issues of disclosure pursuant to an express obligation to negotiate reasonably and in good faith.

another party could be expected to rely,[21] and wilfully misleading another party about a party's own contractual performance.[22]

In this context, honesty means more than simply not being actively dishonest, deceitful, or fraudulent, and of course there can be overlaps between conduct that breaches such standards of honesty and conduct that might offend the prohibitions on misleading, deceptive, and unconscionable conduct under major Australian economic regulation. Conceived more broadly in terms of 'honest adherence to the bargain', honesty conditions how contractual parties deal with one another, exercise their contractual powers and discretions, and otherwise take account of one another's respective interests under the agreement they have struck.[23] Honest intentions in exercising contractual powers and discretions, honest formation of conforming opinions for contractual purposes,[24] honest attempts to negotiate or meet other contractual requirements, and honest disclosure of essential information for mutual contractual purposes all raise different considerations under the general rubric of honesty.

Depending upon the drafting and context, good faith can have cognate or overlapping content with obligations to cooperate or use best endeavours, which historically have been more likely than good faith to find favour with courts across common law jurisdictions as enforceable obligations. In the right circumstances, honesty might also go to questions of bona fide, non-capricious, non-arbitrary, and even rational exercises of contractual power.

The latter context for good faith introduces one of its possible connections with reasonableness, which at this point in discussion is limited to avoiding irrational exercises of contractual power. This is one of various possible notions of reasonableness, and one that raises judicially flagged questions at the intersection of private and public law, as we shall see.

Semantically, obligations of honesty can be understood and worded in ways that touch upon reasonableness too, 'in the sense that a requirement of honest conduct must exclude conduct which no reasonable person could regard as reasonable in the circumstances.'[25] More controversially, some courts and commentators connect or imbue good faith with other (and different) possible notions of reasonableness. This development is controversial. It needs further unpacking, as well as recasting and reform.

Reasonableness and Good Faith

Possible Meanings of 'Reasonableness' in Contract Law

As a basic concept, 'reasonableness' has more than one possible meaning. It manifests itself in various guises in the law, including contract law. In any particular contractual context, it is important to ask

[21] *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 ('the *Yam Seng* case').
[22] The *Bhasin* case.
[23] Elisabeth Peden, '"Implicit Good Faith" – or Do We Still Need an Implied Term of Good Faith?' (2009) 25 *Journal of Contract Law* 50 at 51 and 53 ('*Peden 2009*').
[24] Eg *Braganza v BP Shipping Ltd* [2015] UKSC 17 ('the *Braganza* case').
[25] *Carter and Peden 2003* at 168.

what meaning of 'reasonableness' is in play – merely avoiding irrationality, meeting a requirement of objective reasonableness (eg obtaining market value), doing what is reasonable as framed by the contract, acting reasonably as mediated through specific contractual doctrines (eg not unreasonably withholding approval, giving reasonable notice, or construing an ambiguous contract to avoid unreasonable results), or something else?

Expert commentators differ in their view of good faith's connection with reasonableness.[26] The inclusion or association of reasonableness of some kind with good faith has attracted both judicial support and academic criticism. The set of possible implied obligations in addition to good faith includes not only an implied duty of cooperation but also, according to some academic commentary and case law, an obligation to act reasonably in contractual discretions, approvals, and performance.[27] Hence, one set of academic experts in Australian contract law suggests that obligations such as '(a)n implied obligation to act reasonably in the performance and enforcement of a contract' are of a kind that 'can without difficulty, and perhaps should, be subsumed within the duties to cooperate and to act in good faith, thus preventing the useless proliferation of categories'.[28]

Another view (eg the Carter-Peden view) is that reasonableness is an unnecessary addition to the content of good faith, even more so when comprised in an unnecessary implied term of good faith, given that good faith is already intrinsic to contract law.[29] A corollary of that view is that judicial references to reasonableness in implications of good faith are more properly viewed as references to other elements of good faith and related obligations.[30] Accordingly, the different possible senses of reasonableness in this context are of ongoing relevance in the evolution of good faith jurisprudence.

Judicial and Legal Practice on Intermingling Reasonableness and Good Faith

Recent Australian judicial expressions of good faith's content define it in terms of one or more of honesty, cooperation, mutual fidelity, non-subversion, reasonableness, and fair dealing. At a conceptual level, the collective jurisprudence of the Australian judiciary therefore associates good faith with at least some sense of reasonableness. For example, the former President of the NSW Court of Appeal (Allsop P) crystallised good faith's contemporary meaning in *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* in these terms:[31]

> The usual content of the obligation of good faith that can be extracted from [leading NSW authorities] is as follows:
> (a) obligations to act honestly and with a fidelity to the bargain;

[26] Eg *Carter and Peden 2003* and Elisabeth Peden, 'When Common Law Trumps Equity: the Rise of Good Faith and Reasonableness and the Demise of Unconscionability' (2005) 21 *Journal of Contract Law* 226 ('*Peden 2005*'); cf *Seddon and Ellinghaus* at [10.48].
[27] *Seddon and Ellinghaus* at [10.48].
[28] *Seddon and Ellinghaus* at [10.48].
[29] *Carter and Peden 2003*.
[30] Jeannie Paterson, 'Good Faith – Drafting, Performing and Enforcing Commercial Contracts' (Paper presented at the Supreme Court of Victoria *Commercial Court Seminar*, Melbourne, 2012).
[31] [2010] NSWCA 268 at [12] ('the *Macquarie International* case').

(b) obligations not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for;
(c) an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.

This statement overlaps and corresponds to a significant degree with the essentially word-for-word adoption by the other two appellate judges of Sir Anthony Mason's landmark crystallisation of good faith, as follows:[32]

> Writing extra-curially, Sir Anthony Mason has argued that a contractual obligation of good faith embraces no less than three related notions:
> (1) An obligation on the parties to cooperate in achieving the contractual objects;
> (2) Compliance with honest standards of conduct; and
> (3) Compliance with standards of conduct that are reasonable having regard to the interests of the parties.

To the extent that Sir Anthony Mason's three-pronged encapsulation of good faith captures its content under Australian contract law, what is 'reasonable having regard to the [legitimate] interests of the parties' under the third prong is 'informed by the identification of the "contractual objects" and the scope of the obligation "to cooperate in achieving [those] objects"' under the first prong.[33] This reinforces the point that the enterprise is not one in which courts 'substitute the interpretation and application of a predetermined and external formula for the process of construction of the terms of the contract'.[34]

In his extra-judicial writings, Chief Justice Allsop argues that notions of good faith and reasonableness operate from inside the contract, as distinct from importing standards and values that are outside the contract:[35]

> [Good faith is] intrinsically tied to, and constrained by, the contract entered and to the honest and fair performance of what has been agreed, rather than the superimposition of moral values having their source and legitimacy outside the contract, and operating beyond the agreement of the parties … This is the proper scope and reach of reasonableness in good faith and fair dealing: the element of commercial reasonableness and fairness in behaving with a faithfulness or fidelity to the bargain.

In the 2015 *Paciocco v ANZ Banking Group* ('the *Paciocco* case') appeal, the two other Federal Court of Australia judges agree with the following statement by Chief Justice Allsop, distilling three basic elements of contractual good faith, and replicating his earlier NSW Court of Appeal comments, as follows:[36]

---

[32] The *Macquarie International* case at [146] per Hodgson JA (with Macfarlan JA concurring).
[33] The *Strzelecki Holdings* case at [92] per Murphy JA.
[34] The *Strzelecki Holdings* case at [92] per Murphy JA.
[35] *Allsop 2011* at 347 and 349.
[36] The *Paciocco* case at [288] per Allsop CJ (Besanko J and Middleton J agreeing). Special leave to appeal to the HCA was granted in September 2015 and the decision was reserved by the HCA in early February 2016: see *Paciocco v ANZ Banking Group Limited* [2016] HCATrans 10.

> The usual content of the obligation of good faith that can be extracted from [NSW] cases … is [1] an obligation to act honestly and [3] with a fidelity to the bargain; [3] an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and [4] an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.

Under the special precedential instructions from the High Court ('HCA') in *Farah Constructions v Say-Dee*[37] ('the *Farah* case'), this statement of good faith's common basic elements, as now endorsed by two intermediate appellate courts, arguably must be taken as the starting point for consideration of contractual good faith by other Australian courts, until the HCA itself rules otherwise. The statement also shows that Australian intermediate appellate courts are viewing Sir Anthony Mason's touchstone for good faith as one whose interactive elements are tied as much as possible to the contract's commercial construction and context, as distinct from supervening externalities and standards.[38] This refinement of reasonableness makes an implied term of good faith and reasonableness less threatening to commercial parties than some commentators and legal practitioners suppose, whatever disagreement remains about the correct sources, methods, and content of implications of good faith.

Everything therefore turns on the sense of reasonableness that is engaged. Indeed, notions of reasonableness are often associated with the implied obligation of cooperation, as illustrated by the HCA's acceptance of 'the general principle of construction according to which parties are taken to agree to do all that is reasonably necessary to secure performance of their contract'.[39] However, the HCA's acceptance of an implied obligation to act reasonably when giving or withholding approval does not entertain the idea of reasonableness at large. Rather, it is inextricably tied to being 'required to act reasonably, having regard to the legitimate interests … which the requirement of approval was there to protect'.[40]

In that sense, the HCA's own treatment of reasonableness, at least in one context, shows that it is not wholly imported as an external and abstract standard from outside the contract, but instead takes its point and character from the contractual circumstances, purpose, and intention of the parties. Such views of reasonableness as articulated by the HCA offer hope that its ultimate resolution of this area of the law will unequivocally confirm that reasonableness is mediated through the parties' bargain *and* has relevance in contractual interpretation beyond the proper content and scope of an implied term of good faith.

If so, the distance is narrowed (without being fully bridged) between this contemporary conception of reasonableness and how Professors Carter and Peden view its connection to good faith in contract law. Their view is that 'reasonableness must be seen as an element of honesty and not as an additional requirement', so that 'conduct which no reasonable person could regard as permissible in the

[37] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 ('the *Farah* case').
[38] The *Strzelecki Holdings* case at [61]-[62] per Pullin JA (Newnes JA concurring) and at [92] per Murphy JA.
[39] *Park v Brothers* [2005] HCA 73 at [38] per Gleeson CJ and Gummow, Hayne, Callinan, and Heydon JJ.
[40] *Park v Brothers* [2005] HCA 73 at [39] per Gleeson CJ and Gummow, Hayne, Callinan, and Heydon JJ.

circumstances is not permitted', with the problem being that 'the recent cases apply a far more onerous standard which requires conduct which is "objectively reasonable" in the circumstances'.[41] According to Professor Peden, for example, the doctrinally correct relationship between reasonableness and good faith is that 'reasonableness, when used in the context of good faith, should be seen as [an] element of honesty or good faith, rather than importing an objective standard of behaviour'.[42] As highlighted in this paper, there has been considerable judicial reinterpretation and finessing of reasonableness in connection with good faith, to the point where the importation of broader and unmediated notions of reasonableness into commercial agreements is increasingly out of favour.

Of course, nothing will shift some lawyers and commentators from the view that even this circumscribed notion of reasonableness allows too much leeway to judges under cover of commercial construction. However, such views reflect underlying value-positions and associated perceptions of legal and practical certainty, which themselves reflect other dimensions in this debate (eg legal politics). To the extent that even these fears have validity, they simply reinforce the need for a more nuanced and sophisticated approach than what can be achieved through addressing the twin questions of 'is good faith just a matter of express or implied terms as additional terms of a commercial agreement?' and 'can we completely exclude dealing with good faith by clever drafting?' (The short answers to these questions are 'No' and 'No', respectively).

Unsurprisingly, in the wake of such possibilities and uncertainties, a fair criticism from the commercial community about this trend is that judicial over-reach on the content of good faith to extend good faith's coverage to include reasonableness has required a more defensive position in contractual negotiation, drafting, and dispute resolution than might otherwise have been necessary. At the same time, a fair criticism of this defensive reaction in commercial and legal practice is that it understates the extent to which any such excesses can be addressed through exclusion clauses,[43] underemphasises those aspects of good faith that are immanent in contract law to the advantage of all parties,[44] overestimates both the achievability of foolproof legal certainty generally and the threat posed to legitimate commercial interests by a proper understanding of contractual good faith in particular, and overstates where the law has ultimately landed on this point.

---

[41] *Carter and Peden 2003* at 168.

[42] *Peden 2005* at 248.

[43] For clarity, what I mean by this point is that, in the absence of a firm consensus that some implied terms are so fundamental to contract law that their exclusion lies outside the scope of what the parties can affect by private agreement, the practical reality is that any incorporation of objective reasonableness as an additional component of good faith can be effectively neutralised by a suitably drafted exclusion clause, at least for the purpose of the law of implied terms of good faith as additional terms of a written contract. The Canadian Supreme Court's decision in the *Bhasin* case suggests the contrary, but only in relation to a non-excludable minimum standard of honesty in contractual performance, and its suitability for Australia contractual conditions has already been doubted judicially. None of this goes to the broader and important practical point advanced in this paper that contractual parties cannot by private agreement fully neutralise the consequences of commercial clients engaging in conduct that amounts to an absence or breach of good faith for the purpose of the Australian law of statutory unconscionability.

[44] For clarity, what I mean by this point is that commercial lawyers and their clients cannot have their cake and eat it too. For every supposed disadvantage for commercial leviathans of judicially imposed implied terms of good faith as additional terms of a contract, other aspects of good faith in contract law are available to their advantage, whether or not those aspects are conventionally characterised in terms of 'good faith'. Here, as elsewhere in commercial law, the traffic is not all one-way, and what matters is the substance of a standard or norm, rather than the form (or name) that it is given.

Reasons to Recast the Judge-Made Connection Between Reasonableness and Good Faith

Importantly, the analysis to this point shows that there is a discernible judicial trend towards winding back the excesses of earlier judicial treatment of contractual good faith in ways that left open the importation of standards of objective reasonableness. In addition, there is an emerging and important debate about the translation of notions and standards of reasonableness from public law to contract law. The Australian judge-made law on reasonableness in contractual good faith therefore needs both reconsideration and recasting, with a view to circumscribing its operation as specifically as possible, if not abandoning it completely for implied terms of good faith, in accordance with the Carter-Peden view. Any such move must be accomplished within the framework of precedential directives from the HCA to other courts.

At the very least, an expansive meaning for reasonableness in the context of contractual good faith has become untenable, for numerous reasons. First, reasonableness has multiple possible meanings, and it matters which meaning is in play. Secondly, some of the case law in earlier phases that infuses good faith in the context of implied terms with notions of reasonableness does so by mediating and hence conditioning the meaning of reasonableness through its association with good faith, so reasonableness is neither abstract nor at large.

Thirdly, the undisputed fact that Anglo-Australian contract law has never imposed a general requirement that all contractual power must be exercised reasonably has not prevented that body of law from developing discrete doctrines that condition and limit particular exercises of contractual power through 'implications of honesty, reasonableness and good faith', with numerous examples littered throughout contract law.[45] In other words, this species of good faith in contract is mediated through specific doctrines of contract law, for discrete sets of circumstances in which something approaching reasonableness is required, whatever nomenclature is used to describe such requirements (eg using reasonable endeavours, not unreasonably sacrificing a mortgagor's interests, exercising powers within their proper boundaries to avoid abuse of power, etc).

The presence of such discrete requirements of reasonableness within the body of contract law at least lessens and possibly removes the need to include reasonableness as a component of an implied term of good faith, with all of the legal consequences that follow from breaching such a term.

Fourthly, the courts in later phases of Australian contract law's development have reinterpreted both academic commentary and precedent associating good faith and reasonableness to constrain its relevance in the jurisprudence of implied terms to reasonableness under the contract, as distinct from reasonableness based upon standards beyond the strict terms of the parties' bargain.

Fifthly, recent high-level judicial attention in the UK and Australia to the relevance of public law notions of reasonableness in contractual good faith offers another vantage point for stripping the law on this issue of its earlier excesses. Future 'test case' advice and litigation will need to resolve the potential

[45] *Allsop 2011* at 351; *Allsop 2012* at 16; and *Carter and Peden 2003* at 155.

incorporation or association with any applicable notions of reasonableness of requirements that go to questions of *propriety* (eg *Wednesbury*[46]-type considerations), questions of *process* (eg reference to relevant and irrelevant considerations[47]), questions of *purpose* (eg bona fide exercises of contractual power for the purposes conferred), questions of *policy* (eg the various legal policy considerations that inform the post-*Barker* test of necessity for implied terms, and the impact of an expansive notion of good faith on aspects of tort or statutory law), and questions of *public v private law* (eg transposition of reasonableness requirements from judicial review in public law to commercial construction under contract law).[48]

Sixthly, the listing of statutory indicators of unconscionable conduct towards businesses and consumers alike, in terms that include notions of good faith, fairness, reasonableness, and legitimate commercial expectations, provides further justification for revisiting the judge-made law on contractual good faith, not least to ensure coherence between the meaning and limits of good faith in each of contract law and statutory unconscionability. In particular, the association of too expansive a notion of reasonableness with good faith under the jurisprudence of implied terms has knock-on effects for commercial agreements and transactions, given that there are limits to the parties' capacity by private agreement to exclude or modify such enhanced requirements of commercial conduct under legislated standards.

Seventhly, the *Franchising Code of Conduct* now has a carve-out of franchising contracts from the normal position of good faith under contract law, with the result that too expansive an obligation of good faith under judge-made law becomes a non-excludable obligation under franchising contracts.

Eighthly, if different senses of reasonableness are engaged in each of contractual good faith and good faith under statutory unconscionability, anomalies will result. This simply reinforces the need for clarity about their relationship and contextual differences despite the common terminology. It would be commercially unwieldy from a transactional perspective to have different meanings for good faith in each context, especially if reasonableness could be excluded by private agreement as part of an expanded meaning of contractual good faith, but would be incapable of exclusion as part of a legislated standard of unconscionable conduct.

Finally, for the reasons articulated in the Carter-Peden view of contractual good faith, reasonableness has not been a comfortable companion or composite concept with good faith, assessed against the broader landscape of commercial implication and construction, including doctrines of reasonableness elsewhere in contract law. In short, the case for review and reconfiguration of the legal relationship between good faith and reasonableness is overwhelming. Accordingly, future cases on contractual good faith (and ultimately the HCA) will need to revisit and resolve the precise relationship between reasonableness (in any sense) and good faith.

---

[46] *Associated Provincial Pictures Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1, as discussed by Edelman J in *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2015] FCA 825 at [1012] ('the *Mineralogy* case').

[47] For a recent discussion of reasonableness in this context, see Croft J's analysis in the *Woolworths* case.

[48] For discussion of some of these different aspects of reasonableness, although not this alliterative system of classification, see, eg, Elisabeth Peden, *Good Faith in the Performance of Contracts* (LexisNexis Butterworths, 2003); *Allsop 2015*; and the *Mineralogy* case.

Limits of Good Faith

All courts and commentators across common law jurisdictions are consistent in saying that an obligation of good faith does not rise to the level of a fiduciary obligation and has other limits, such as the fact that an implied obligation of good faith cannot override a contrary indication in the contract (expressly or by necessary implication) and does not prevent a party from acting in that party's own legitimate commercial self-interest. However, this simply means that good faith sits somewhere on the spectrum between absolute self-interest (eg a sole and absolute discretion) and sacrificing a party's self-interest for the sake of another party (eg a fiduciary obligation).

The critical point is that acting in one party's legitimate self-interest under the contract does not necessarily or completely preclude also having an obligation to some degree to take account in some way of another party's interests under the same contract, given the nature of a contract as a mutual bargain struck between them. 'The duty of good faith, unlike the duty imposed upon a fiduciary, is not a duty to prefer the interests of the other contracting party, but rather to have due regard to the interests of both parties and the benefits afforded by the contract', as the Victorian Court of Appeal affirmed in 2005.[49]

Despite the simplicity and correctness of that dividing line, concerns remain in commercial practice about the occasions, extent, and requirements of this obligation of other-centredness. Once the door is open even part of the way to anything more than an absolute right to do what one contractual party believes is in its own commercial interests, it becomes a much more complex equation to assess what it actually means to take account of another's interests, how that is demonstrated by evidence in the event of later litigation, where it is required in one or more places in the contract, and how far it goes. However, other-centredness is hardly a new requirement in this or other relevant areas of law, and parties who find it inconvenient in a particular instance also benefit systemically from other ways in which the doctrines and norms of contract law support trust and cooperation between parties who have committed to mutual bargains under law.

Proposition 1: Good Faith – Legal Doctrine v Legal Theory, Legal Politics, Legal Precedent, and Legal Tactics

> The question whether a standard of good faith should be applied generally to contracts has not been resolved in Australia.
>
> --- Justice Susan Kiefel, 2014, in *Commonwealth Bank of Australia v Barker*[50] ('the *Barker* case')

The Significance of the Choice of Approach in Conceptualising Good Faith

[49] *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228 at [29] per Buchanan JA (Warren CJ and Osborn AJA concurring) ('the *Esso* case').
[50] [2014] HCA 32.

If you asked many commercial lawyers in Australia about their working approach to contractual good faith in practice, a common response would be that good faith is either included in the contract explicitly or else added where it satisfies relevant tests (and unless effectively excluded) as an implied (and additional) term, but is not otherwise applicable or imported in a contract as a starting point in its interpretation. So, how are we to make sense then, of the following extra-judicial observation in late 2015 by the present Chief Justice of the Federal Court of Australia:[51]

> Is it worth saying then that an obligation of good faith or fair dealing exists, as an informing norm, *but not as a separate implied term*? Yes, because it does … Yes, because it denies the proposition to any observer of our law that our law is devoid of underpinning principles of fairness. Yes, because it can then be used to prevent the confusion and difficulty in the implication of stand-alone terms of good faith. Yes, because it will give a more likely satisfactory approach to implication and construction of contractual terms.

Here, what does it mean for an obligation of good faith to be recognised for contractual purposes, without it being written down explicitly from the outset, if good faith is not properly to be regarded as an implied and extra term? How else does good faith factor into contractual implication or construction, and are those two aspects of interpretation the same thing in nature or result?

In practice, what kind of combination of drafting devices (if any) will make all of this uncertainty about good faith go away, at least for parties who might mutually want all relevant rights locked up clearly and explicitly in their contract as much as possible? The modern reality, of course, is that we are long beyond the time (if ever) when all or most legal rights of parties could be found plainly somewhere in (and only in) their contract.

Answering such questions seems to go beyond the strictest of 'black letter law'-analysis, at least in terms of a purely doctrinal understanding and application of the five-fold test for implied terms enunciated in cases such as *BP Refinery (Westernport) v Shire of Hastings*[52] ('the *BP Refinery* case'). In any case, such an analysis cannot be conducted now (if ever) simply against the background of a common traditional Anglo-Australian scepticism towards good faith in contract, and maybe in search of an elusive watertight drafting solution to any (or at least commonplace) client-based issues in practice concerning good faith. As this paper demonstrates below, the nature and limits of such scepticism must be revisited in light of present moves to reconceptualise good faith and the judicial choice-making involved at the threshold of approaches to good faith.

In his important extra-judicial speech on good faith in late 2015, Chief Justice Allsop goes on to suggest that the conceptual approach taken to good faith can make a crucial difference to the ultimate result in practice, thereby once again reinforcing the theory-practice nexus:[53]

> There is importance in the legal technique employed. If a term must be implied as a free-standing obligation, it must mean that without the implication, the duty is absent from the contract. The arguments about business efficacy and consistency with other contractual terms take place in a

[51] *Allsop 2015* at 24-25; emphasis added.
[52] *BP Refinery (Westernport) Pty Lyd v Shire of Hastings* (1977) 180 CLR 266.
[53] *Allsop 2015* at 25.

> framework of insertion of a term and the contract not otherwise being imbued with any honest dealing. This approach might see a clause not implied because the contract can 'work' in some fashion, presumably surrounded by sharp practice (that could (should?)) have been anticipated and provided for by an additional written term … On the other hand, if the processes of construction, interpretation and implication assume such a standard, the bargain is to be construed, interpreted and supported by, and business necessity includes, the need for the contract to work in a way that conforms to that standard.

Once again, what is really going on here? How can the legal answer using the test of 'necessity' for implications of good faith be different, depending upon the starting conceptual approach, and what kind of choice of conceptualisation is really involved here? Unfortunately, Australian judge-made law on contractual good faith faces a number of forks in the road, only one of which is the question of 'legal technique' posed above by Chief Justice Allsop.

The fundamental point of difference in how good faith is conceptualised as part of Australian contract law, and the stark choices that must be made in the future recasting of Australian law on contractual good faith, are each outlined clearly in late 2015 by Chief Justice Allsop, in his twin endorsement of good faith as an 'organising principle' for Australian contract law and attempted rehabilitation of the *Renard Constructions v Minister for Public Works*[54] ('the *Renard* case') approach to good faith, as follows:[55]

> The most crucial distinction to be drawn out is between the recognition of good faith as being an independent *implied term* of the disputed contract, and the recognition of good faith as an implied duty or principle, in the sense that it becomes part of the 'orthodox techniques of solving contractual disputes' and is applicable to the performance and enforcement of all contracts and dealings. While the content and meaning of the phrase 'good faith' may be the same in both scenarios (to act honestly and with a fidelity to the bargain; and to act reasonably and fairly in dealings), the implications and connotations are fundamentally different. If good faith is simply a term implied in fact (which can itself be construed and applied, and found a separate head of damages), then the concern of various courts as to whether the principles of *BP Refinery* have been satisfied, or whether 'entire agreement' clauses operate to the exclusion of good faith, can be understood. If however good faith is recognised as an informing but binding principle or duty – a means by which the courts can recognise and give effect to an expected standard of behaviour (linked, but not limited, to honesty) – then there is no debate as to whether or not the principle is applicable; it is simply a basic assumption of all contractual dealings … However in Australia the majority of case law on good faith appears to have focused on the first understanding [and] Australian doctrine on good faith [has] characterised good faith as an implied term, capable of being excluded by express or by inconsistent provisions, rather than as a legal standard that underpins the bargain. It will be necessary to address this fundamental distinction before any unity in Australian contract law on good faith or fair dealing can be achieved.

The challenge posed by Chief Justice Allsop has immediate judicial and practical significance. For example, what difference (if any) does it make to the negotiation and drafting of commercial agreements – and, most significantly, to the operation of exclusion clauses – if one or the other of the postulated conceptualisations of good faith is ultimately accepted? After all, contracts drafted in years

[54] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 ('the *Renard* case').
[55] *Allsop 2015* at 22-23, quoting the *Renard* case; original emphasis.

past or for years hence might be interpreted down the track at a point where the courts have worked through towards a resolution of the challenge posed by Chief Justice Allsop.

In the end, those arguing and deciding cases on contractual good faith from here onwards are at least on notice from Chief Justice Allsop's 2015 extra-judicial analysis (and the academic commentary to similar effect) that Australian judge-made law on contractual good faith has inherent limitations as well as opportunities for redevelopment. Is there a way open for courts below the HCA to reframe contractual good faith as a broader matter of implication and construction, both within and beyond the framework of implied terms and the all-encompassing test of necessity as now regulated by the *Barker* case, and consistently with the precedential treatment of good faith as an implied term by intermediate appellate courts as now regulated by the *Farah* case? That is the question.

In coming to grips with the various forks in the road that are becoming increasingly apparent, and the revisiting and recasting of judge-made law that they invite, it is helpful to take account of broader consideration of *legal theory*, *legal politics*, *legal precedent*, and *legal tactics*, beginning with the nature of legal interpretation as applied to contractual construction.

A Jurisprudential Lens – Commercial Construction and Legal Interpretation

All legal text (including a legal document) needs construing as an exercise of legal interpretation. Constitutions, legislation, and contracts are all examples of legal instruments that need interpretation to ascertain their meaning. In other words, the broad domain of legal interpretation includes sub-domains of constitutional, statutory, and contractual interpretation.

In a series of cases, the HCA has identified both similarities and differences between statutory interpretation and contractual interpretation. One commonality that has emerged is that neither sub-domain of legal interpretation is engaged in a search for the actual and subjective intentions of the relevant authors at the time of a legal instrument's creation, whether they are the people and constitutional conventions at federation (in the case of the Australian Constitution), legislators (in the case of statutory interpretation) or contractual parties (in the case of contractual interpretation). Instead, the relevant meaning of a legal instrument is the meaning *attributed* to its creators *according to* the accepted norms and methodologies for interpreting it, as an exercise of legal interpretation, whatever the individual or collective expectations of those creators at the time about how it might be interpreted down the track.

So, ideas about meeting the legitimate commercial expectations of the parties, implications of terms to give effect to the parties' bargain as a matter of business efficacy or otherwise out of necessity, ascertaining the parties' contractual intent, commercial construction of a contract, and so on are not focused upon what the parties actually say they intended, individually or together, at a particular point in time in the formation and execution of a commercial agreement. Rather, the focus in legal interpretation of contracts is upon what the parties' contract means according to the legal system's ways of interpreting words used in a contract and filling in its gaps where necessary for its operation. This broader impulse informs debate in authorities such as the *BP Refinery* case and *Attorney General of*

Belize v Belize Telecom[56] ('the *Belize* case') about not treating the various postulated tests for implied terms too individualistically and clinically, when the overall aim is for what the parties must be taken to have intended as a matter of overall construction. In that sense, the relevant legal intention of the parties to an agreement is an *ascribed* intention.

Blind Spots in Commentary, Pleadings, Advocacy, and Judgment-Writing on Good Faith

Much doctrinal scholarship and judgment-writing about contractual good faith suffers from one or more blind spots. One blind spot is the treatment of the topic in a way that takes contractual doctrines and norms as givens, isolated from the politics of adjudication. However, as respected UK contract scholar Professor Hugh Collins notes, judges have institutional roles that prompt them to 'political and policy-motivated denials' (sometimes to themselves, but at least to others) that they are implying terms into contracts through the importation of standards beyond the parties' expectations and enshrined in their agreement, arguing instead that any implication is 'strictly confined by legal tests such as necessity or business efficacy that rule out any general power to rewrite contracts on the ground of fairness'.[57] The politics of adjudication have a correlative influence upon the politics of contractual negotiation and the politics of advocacy, as discussed further below.

Another blind spot is the tendency to treat legal categories and criteria as determinative of answers via an appropriate legal method, rather than productive of a number of competing and equally permissible outcomes under the law, with the choice between them turning upon deeper considerations of legal theory and legal politics, for example, than many judges are comfortable to admit in their judgment-writing. A most recent example of this occurs in the *Barker* case's reconfiguration of the overarching test of necessity (and its constituent range of considerations for different categories of implied terms). The majority judgment of French CJ and Bell and Keane JJ affirms necessity as the central criterion for implications of various kinds, treats what is necessary for business efficacy as simply one application of this criterion, and makes explicit that an implication will not meet the criterion of necessity simply by being reasonable.

'The broad concept of "necessity" … may be defined by reference to "what the contract itself implicitly requires", according to the majority judgment.[58] The application of such a criterion is more open-ended than it appears at first glance, although not completely at large. Moreover, the extra-judicial comments by Chief Justice Allsop referred to earlier in this paper make it clear that there is a threshold question about a choice of approach to the conceptualisation of good faith that is a strong (perhaps determinative) influence on any judgment about satisfying the criterion of necessity.

In any case, Justice Gageler's judgment in the *Barker* case bells the cat on the true nature and operation of a criterion of necessity in this context. 'Couching the ultimate evaluation in terms of necessity serves usefully to emphasise this and no more: that a court should not imply a new term other than by

[56] *Attorney General of Belize & Ors v Belize Telecom Ltd & Anor (Belize)* [2009] UKPC 10 ('the *Belize* case').
[57] Hugh Collins, 'Implied Terms: The Foundation in Good Faith and Fair Dealing' (2014) 67 *Current Legal Problems* 297 at 307 ('*Collins 2014*').
[58] The *Barker* case at [36], quoting earlier authority.

reference to considerations that are compelling', he says.[59] So, in the end, necessity is yet another example of what Professor Julius Stone described as 'categories of illusory reference'. As a result, there will be different views on when an implied term is necessary, and those different views will not always turn on conventional doctrinal analysis alone. A threshold choice of interpretative approach is also necessary and critical, about the presence, nature, and manifestations of good faith in contract law.

A third blind spot is the understandable tendency for courts and advocates alike to resolve a case on the narrowest basis needed, without also resolving and often glossing over meaningful differences that matter for future test case advice and litigation. Judges have a luxury in their judgment-writing in conflating, rendering irrelevant, or dismissing key differences about contractual good faith that is not available to solicitors and barristers, whose earlier drafting or sign-off opinion might retrospectively come under microscopic and withering scrutiny by an opposing lawyer or presiding judge. Those key differences are differences between:

(1) different modes of contractual implication;
(2) contractual implication and contractual construction;
(3) implication of terms and other forms of contractual implication;
(4) terms implied by law and terms implied in fact;
(5) (perhaps) implied terms and inferred terms;[60] and
(6) different elements of good faith.

The HCA's various judgments in the *Barker* case, for example, slide across more than one of these sets of differences, understandably rendering the distinctions between them irrelevant for the purpose of the case at hand, but leaving much unsaid that matters in ongoing test cases advice and litigation. In general terms, a spectrum of institutional responsibility exists in which this adjudicative approach is entirely in order in the strictest legal terms, (and even understandable given how advocates frame issues for determination on the best basis possible for their respective clients), at one extreme, and productive of unhelpful guidance on matters of critical importance for mass numbers of people and whole systems (eg the national economy), at the other.

Other examples of judicial issue-avoiding techniques here include saying that the same result follows regardless of whether or not a term of good faith is implied or even the mode of implication, because its standards have not been breached, or that referring to an implied term of good faith and reasonableness rather than simply good faith matters little in the circumstances because the outcome does or does not offend either standard anyway. However, something more than semantic word games and practically irrelevant differences is in play in other contexts if, for example, the application of the test of necessity for implied terms turns on a choice of how to conceptualise good faith within contract law, or an exclusion clause that clearly nullifies any implied terms is not sufficient to preclude all avenues through which good faith might be implied into contracts.

A fourth blind spot is the common academic failure to proceed from criticism of judicial inconsistency, overreach, and ambiguity on contractual good faith, if true, to a follow-up analysis of the correlative

[59] The *Barker* case at [114].
[60] Eg the *Woolworths* case.

options that such a state of affairs opens up in urging a court in one direction or another, depending upon what favours a lawyer's client. This point goes to what even doctrinal analysis needs for a more complete accommodation of the legal choices, techniques, and tactics available to various participants in this field of regulation. In this field, perhaps more so than others, because of the value-laden, open-textured, and context-dependent nature of the concepts and norms of construction involved, considerations of legal doctrine, legal technique, legal precedent, and legal practice are inextricably mixed with considerations of legal theory, legal politics, legal policy, and legal strategy.

A fifth and related blind spot is the absence of any analysis or appreciation of the upshot of what a theoretical, conceptual, and doctrinal critique of contractual good faith really means in practice for a range of practical needs, such as contractual negotiating and drafting, advice on contractual interpretation, pleadings and court submissions, and other strategic work-related aspects. This point goes to a fuller treatment of legal doctrine's transactional significance in commercial practice.

For example, recent cases demonstrate the need to consider pleading breach of good faith in contract alternatively with breach of good faith as an indicator of unconscionable business conduct. The relatively new law on the latter means that good faith can no longer be considered simply in terms of the former. In addition, the number of cases pleading the presence of an implied term of good faith far outweighs the number of cases where the courts have accepted that implication, by one route or another. Similarly, the number of cases successfully pleading the presence of an implied term of good faith generously exceeds the number of cases where courts have agreed that there has been such a breach.

The final blind spot lies in analysis that fails to connect the dots between all dimensions of good faith concerning commercial agreements. This occurs when considerations of legal politics, legal precedent, and judicial choice-making are ignored, for example, or when a discussion of exclusion clauses simply as a matter of contract law does not take account of the inability of contractual devices to safeguard an offending contracting party against the consequences of conduct that is contrary to legislative standards of statutory unconscionability, because of an absence or breach of good faith. This blind spot is also apparent in failures of advocacy and judgment-writing in not revisiting the inter-relationship and elements of good faith in both contexts, in terms of analogical development of law. The *Paciocco* appeal judgment, for example, is a rare and welcome exception, whatever its outcome on appeal to the HCA.

The point here is not that every single article on this topic has to avoid all six blind spots and cannot offer valuable insights unless they are all covered. Rather, the point is that the six blind spots collectively reveal areas of possible follow-up analysis and real need for the commercial community that a preponderance of articles on this topic ignores.

A Precedential Lens on Good Faith

The statutory and non-statutory law on good faith concerning commercial agreements is also affected by the HCA's recent tightening of precedential control over other courts in the Australian judicial hierarchy. Yet, the precedential dimension of Australian case law on good faith and commercial

agreements receives relatively little attention in judicial, academic, and professional debates, at least relative to the attention afforded in detail (however necessary) to its doctrinal dimension.[61]

At least six precedential issues arise concerning the current state of Australian judicial treatment of good faith in commercial agreements, as follows. First, what sense can be made of extra-judicial statements suggesting that different judges in different jurisdictions favour different approaches to implying terms of good faith, given that there is only one national common law of contract? Secondly, how do the HCA's precedential directions to trial and intermediate appellate court judges in the *Farah* case apply to the myriad of trial and intermediate appellate court decisions on good faith, both before and after the *Farah* case? Thirdly, what analogous use can and should be made of supervening legislative developments promoting fairness and justice in contracts generally and legislated standards of good faith in commercial dealings in particular, in shaping the trajectory of the common law's treatment of good faith in contract, especially the relationship between good faith and reasonableness?[62]

Fourthly, what does the latest case law on good faith in contract in other common law jurisdictions offer by way of comparative precedential guidance in addressing unresolved issues in the Australian law of contract, and how does the body of evolving Australian precedent interact with and even influence it? Fifthly, how does the HCA's decision in the 2014 *Barker* case frame and constrain what other Australian courts might do in working through the relevance of good faith in contracts? Finally, is there a precedentially sound way for Australian courts to wind back or at least reinterpret some of the perceived overreach in earlier judicial development of the scope of obligations and elements of good faith in contract? Only some of those precedential issues are canvassed below, to illustrate the significance of broader and nuanced considerations of legal precedent in this field, and even then only in terms of some of the latest developments concerning them.

The HCA has instructed all intermediate appellate courts and trial judges to follow the lead set by other intermediate appellate courts on questions of interpreting Commonwealth legislation, uniform national laws, and the common law of Australia, unless the earlier precedent is demonstrably incorrect. After its earlier precedential instruction to lower courts in *Australian Securities Commission v Marlborough Gold Mines*,[63] the HCA issued a follow-up precedential instruction in the *Farah* case in these terms:[64]

> Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong. Since there is a common law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law.

[61] The recent article by John Carter, Wayne Courtney, Elisabeth Peden, Joellen Riley and GJ Tollhurst, 'Terms Implied in Law: "Trust and Confidence" in the High Court of Australia' (2015) 32 *Journal of Contract Law* 203 ('*Five professors*') is a welcome exception.

[62] The interplay between statutory and judge-made law on this topic throws up a range of issues – eg bringing the meaning of good faith into alignment in both contexts, using the plethora of statutory schemes of regulation involving good faith as a brake on ready imposition of implied terms of good faith, and so on.

[63] [1993] HCA 15; (1993) 177 CLR 485.

[64] The *Farah* case at [135]; (2007) 230 CLR 89 at 151-152.

In the present context, this precedential directive clearly extends to the general law affecting contracts as well as statutory unconscionability (including its treatment of good faith). Indeed, it has already been applied explicitly or substantively at intermediate appellate court level in relation to both statutory unconscionability[65] and contractual good faith.[66] A similar and judicially self-imposed rule of precedent can apply to situations where issues of good faith are raised in commercial matters involving the interpretation of legislation that is modelled closely on legislation in another Australian jurisdiction.[67]

In their critique of the *Barker* case,[68] John Carter, Wayne Courtney, Elisabeth Peden, Joellen Riley and Geoffrey Tolhurst ('the five professors') argue that all Australian intermediate appellate courts are bound by precedent to follow the decision of the NSW Court of Appeal in *CGU Workers Compensation (NSW) Ltd v Garcia*[69] ('the *CGU* case') in their approach to implied terms of good faith in commercial contracts. Such an argument rests on the twin propositions that, at least from 2007 onwards (ie in decisions that postdate the *Farah* case and its precedential instruction to other courts), intermediate appellate courts must follow one another's decisions in the absence of a controlling HCA decision, unless the previous decision is demonstrably wrong, and that the operative intermediate appellate court decision for others to follow is the *CGU* case. However, focusing just on the *CGU* case and only on its aspect of unresolved good faith questions does not illuminate the broader and complex precedential landscape on good faith in commercial agreements, covering both statutory and non-statutory sources of requirements of good faith.

There is high-level judicial authority for the view that different trial and intermediate appellate courts in different Australian jurisdictions favour different approaches to implying terms of good faith, although there are dangers in reading too much into such general characterisations. For analytical purposes, the differences in judicial approach across jurisdictions are summarised by the current Chief Justice of Victoria as follows:[70]

> Generally speaking, recent decisions at first instance and by intermediate courts of appeal (particularly the New South Wales Court of Appeal) have recognised that an obligation of good faith in the performance and execution of contractual obligations and powers 'may be implied as a matter of law as a legal incident of a commercial contract'. Alternatively, other decisions at first instance, and by the Victorian Court of Appeal, have approached the issue as one of implication of fact.

Such point-in-time assessments are themselves subject to the waxing and waning of good faith's acceptance and use by courts in NSW and elsewhere.[71] However, as there is only one national common

[65] *CGU Workers Compensation (NSW) v Garcia* [2007] NSWCA 193 at [61] per Mason P ('the *CGU* case').
[66] Eg the *CGU* case, following the *Esso* case in VCA, and explaining away *Alcatel Australia Ltd v Scarcella & Ors* (1998) 44 NSWLR 349, *Burger King Corporation v Hungry Jack's* (2001) 69 NSWLR 558 and *Vodafone Pacific Ltd & Ors v Mobile Innovations Ltd [2004] NSWCA 15* ('the *Vodafone* case'); and *Androvitsaneas v Members First Broker Network* [2013] VSCA 212, following *Specialist Diagnostic Services Pty Ltd v Healthscope Ltd* [2012] VSCA 175 and the *Esso* case from earlier VCA and *Tote Tasmania v Garrott* [2008] TASSC 86 from Tas.
[67] Eg *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2010] QCA 119 at [72]-[73].
[68] *Five professors*.
[69] [2007] NSWCA 193.
[70] *Warren 2010* at 348.
[71] Eg see the phases in the development of good faith in Australian contract law suggested in *Dixon 2007.*

law and not a fragmentation of Australian common law into a common law of each Australian jurisdiction,[72] such perceptions have their clear legal limits. Strictly speaking, the acceptance in all Australian jurisdictions of the available modes of implying terms of good faith might still allow for different jurisdictional preferences for particular modes of implication.

This development might simply mean that, until the HCA hears the right test case on good faith, no other Australian court can depart from the lowest common denominator accepted in earlier intermediate appellate court decisions. On this view, for example, all trial judges and intermediate courts arguably must accept for the present the preponderance of intermediate appellate court authority throughout Australia on six relevant propositions, as follows:

(1) obligations of good faith are *not* automatically implied into every commercial contract as a matter of law (ie by reference to particular categories of contracts);[73]
(2) obligations of good faith *can* be implied into commercial contracts in appropriate circumstances, including as a matter of fact, whatever judicial disagreement otherwise exists about the content of good faith and its modes of implication or exclusion;
(3) good faith is part of the law of performance of contracts;[74]
(4) good faith can comprise at least notions of honesty, mutual fidelity to the contract, and reasonableness of some kind, depending upon the context and the circumstances;[75]
(5) an agreement in a pre-existing contract to negotiate in good faith to resolve disputes arising under that contract is not inherently uncertain and unenforceable;[76] and
(6) good faith is at least an 'organising principle' of some kind in contract law.[77]

In practice, these precedential implications give commercial litigators and advocates an additional reason for taking into account intermediate court rulings beyond the jurisdiction in which their litigation is conducted. For example, the five professors argue that it is open to a court below the HCA to deny that implied terms of good faith arise as a matter of law, as the CGU case does. They also argue that, '(e)ven if *CGU* had not been decided, the announcement in *Barker* of the criterion that the good faith term must satisfy in order to justify "judicial law-making" would have ended the debate for lower courts'.[78] For reasons given elsewhere in this paper, their conclusion on this latter point is not without an opposing view, at least so far as the application of the test of necessity is concerned. The HCA's precedential directive also needs practical measures to implement and manage it in the everyday work of appeals to intermediate appellate courts, as evidenced by a NSW Court of Appeal Practice Note that

[72] *PGA v The Queen* [2012] HCA 21 at [25] per French CJ, and Gummow, Hayne, Crennan, Kiefel, and Bell JJ.
[73] The five professors argue that this result follows from the *Farah* case's consequence of requiring other Australian intermediate and appellate courts to fall into line with the NSWCA's decision to this effect in the *CGU* case, but this trend was already evident before then in NSWCA in the *Vodafone* case at [191], and the *CGU* case itself followed the VSCCA's earlier decision to similar effect in the *Esso* case.
[74] As affirmed by at least four NSW Court of Appeal decisions in the post-*Renard* period: see the *United Group Rail* case at [61] per Allsop P (Ipp JA and MacFarlan JA agreeing).
[75] The *United Group Rail* case and the *Paciocco* case.
[76] Eg the *United Group Rail* case and *Con Kallergis Pty Ltd v Calshonie Pty Ltd* (1998) 14 BCL 201. For recent Queensland consideration and endorsement of this position in a similar context (ie dispute resolution machinery under a pre-existing contract), see: *AMCI (IO) Pty Ltd v Aquila Steel Pty Ltd* [2010] 2 Qd R 101.
[77] The *Paciocco* case.
[78] *Five professors* at 229.

requires notice of challenges to the correctness of its decisions and those of other Australian intermediate appellate courts.[79]

To a large degree, equity and statute have taken over ground that might otherwise have been occupied by a more extensive good faith jurisprudence in Australian contract law, as a number of commentators have indicated. Justice/Professor Paul Finn's view is worth repeating on the potential possibilities for alignment of contractual good faith with good faith and related notions under statutory unconscionability, given clear indications from the HCA about the analogical use of legislative developments in shaping and recasting relevant common law, and with a call to arms about the responsibility of the commercial bar in pushing and testing these boundaries in court:[80]

> The High Court has on some number of occasions acknowledged the possibility of the common law adapting itself to a 'consistent pattern of legislative policy'. The Trade Practices Act and the Australian Consumer Law, and their State and Territory equivalents, surely provide just such a pattern. It is more than likely that with these statutory analogues so close to hand, *and with the Bar slowly awakening to this matter*, our equity [and common law] jurisprudence will continue to mutate in ways that are consistent with the policy of fair dealing in commercial and consumer dealings which is fundamental to that legislation.

Other commentators have referred to the broad sweep of Australian statutes that now incorporate reference to good faith in commercially relevant contexts, such as the duty of utmost good faith in insurance contracts, the incorporation of good faith in directors' duties, and good faith negotiations under fair work and native title laws, for example. However, the net does not need to be cast so wide to provide a discrete body of relevant legislation for analogous use of statutes in reframing and developing contractual good faith in commercial agreements. The most directly relevant body of regulation for this purpose consists of the following important pieces of national economic regulation:

(1) the *Australian Consumer Law* ('*ACL*'), where a breach or absence of good faith is (since 2012) an indicator of unconscionable business conduct in both business *and* consumer contexts;
(2) cognate provisions in the *ASIC Act*, where a breach or absence of good faith is an indicator of unconscionable business conduct in financial services;
(3) cognate (but not always updated) provisions in state commercial leasing laws, where a breach or absence of good faith is an indicator of unconscionable conduct in commercial or retail tenancies;
(4) cognate (but now superseded) provisions in state fair trading laws about unconscionable business conduct towards consumers (and the surviving body of precedent on their interpretation and application); and
(5) the *Franchising Code of Conduct*, which introduces special rules governing obligations of good faith in franchising contracts.

A Tactical Approach to Court Pleadings and Submissions on Good Faith

[79] Supreme Court of NSW, Practice Note No. SC CA 1 (27 March 2009) section 38.
[80] Paul Finn, 'Common Law Divergences' [2013] 37(2) *Melbourne University Law Review* 509.

The jurisprudential insights on this topic canvassed above mean that even doctrinal arguments and litigation can usefully be framed with an eye to legal theory. In the light of the current state of the law on this topic, interactions by solicitors and barristers with judges in court also need to be conducted skilfully and simultaneously as matters of legal politics and legal tactics, as well as legal doctrine.

In terms of legal politics, the explicit warning from the HCA in the *Barker* case about the perils of judicial law-making in this doctrinal field means that other Australian courts will be even more finely attuned than usual to the need for the reality and appearance of legitimacy in any further development of the law of contractual good faith. The desire of those courts to stay and be seen to stay within proper institutional, precedential, and doctrinal bounds provides a powerful motivation for the kind of legal politics and judicial ducking and weaving on implied terms described by authoritative commentators, given the reality that the unresolved issues in this field leave judges with much room to move.[81]

In terms of legal tactics, Professor Hugh Collins offers a fourfold typology of tactical scenarios as 'various strategies of arguments' for advocates to put to courts, and for courts to adopt in their judgments, which is paraphrased and recast in this paper with a view to Australian conditions, as follows:[82]

(1) Where a judge is urged to imply good faith as 'a standard incident for a type of contract', but wants to resist that outcome with good legal justification, the judge can use one or more of the following approaches: (i) rely on the presumed intention of the parties as precluding the applicability of implied terms in fact or in law; (ii) define any relevant category of contract so broadly that a particular requirement will be unlikely as a standard feature of all such contracts; (iii) deny that the contract in question falls within a readily identifiable category of contracts for the purpose of implied terms; and (iv) frame and apply the post-*Barker* test of necessity in a way that sets a high bar for what is truly needed for a contract's workability;

(2) Where a judge is urged to imply good faith as such a standard incident and wants to do so with good legal justification, but without appearing to be engaging in judicial legislation, the judge can use one or more of the following approaches: (i) claim that the position is already covered by precedent; (ii) cast the relevant category of contracts as narrowly as possible for the purpose of implied terms in law, 'so that the legislative character of the decision to create a standardised term is masked and its potential unforeseen ramifications are to some extent avoided'; (iii) imply the term in fact for the particular contract, with full realisation that such a decision will still have some precedential effect for future cases (as done in the landmark case of *Yam Seng v International Trade Corporation*[83] ('the *Yam Seng* case')); and (iv) frame and apply the post-*Barker* test of necessity in a way that associates necessity with a notion of good faith and fair dealing as an underpinning expectation for contractual parties;

(3) Where a judge is urged 'to create an adjustment of the terms of a particular contract', but wants to resist that outcome with good legal justification, the judge can use one or more of the following

[81] *Collins 2014* at 307.
[82] *Collins 2014* at 307-309.
[83] *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 ('the *Yam Seng* case').

approaches: (i) characterise any suggested implied term in law as one that would inappropriately amount to judicial legislation (in breach of the *Barker* warning against undue judicial law-making on implied terms); and (ii) apply the overarching test of necessity in a very strict way; and

(4) Where a judge is urged to create such an adjustment and wants to do so, but without appearing to engage in judicial legislation, the judge can use one or more of the following approaches: (i) for any implied terms in law, frame the relevant category of contracts as narrowly as possible and bolster this by reference to precedent supporting the implication; (ii) characterise what is being done as something required simply from interpreting the contract as a matter of commercial construction, without the need to imply any terms or make any other contractual adjustments; (iii) appeal to precedent on the test of necessity for implied terms and apply it in a liberal way; (iv) construe any contractual devices (including 'sole discretion' and exclusion clauses) as narrowly as possible, leaving untouched other routes by which good faith conditions contractual actions.

One advantage of this example of scholarly analysis is that it offers practical strategies for both advocates and judges. Another advantage is that it works with legal doctrine in a way that is sensitive to the considerable opportunities for choice-making that are available at various points to advocates and judges alike. In doing so, it marries considerations of legal doctrine, legal precedent, and legal politics with considerations of legal tactics in particular, all to significant practical effect.

Proposition 2: Good Faith as a Baseline Norm in Contract Law

Good Faith as an 'Organising' or 'Informing' Principle

The traditional Anglo-Australian scepticism towards contractual good faith is best understood as a reluctance to accept a *particular* concept of good faith, in which it operates as an overarching and automatic source of obligations, independently superimposed upon the parties' expectations and agreement (ie from the outside in). However, such scepticism does not preclude all manifestations and functions of contractual good faith. In particular, it is not an absolute rejection of all senses of good faith as a natural part of Anglo-Australian contract law.

There is a growing body of judicial, extra-judicial, and academic support in Australia, and elsewhere in the common law world, for reconceptualising good faith as an 'organising principle' in contract law, in ways that have tangible legal consequences for contractual parties under conditions that are workable for the commercial community. Conceived in this way, a stand-alone notion of good faith, with an expansive and open-ended meaning, as a direct and self-activating source of legally binding contractual requirements, imposed on contractual parties by reference to standards or values outside their contract, unmediated by conventional doctrines and norms of contractual interpretation, and incapable of complete regulation by contractual parties as a matter of private agreement is a very different proposition from contemporary conceptions of good faith as an 'organising principle'.

Much like Justice Priestley's judgment in the *Renard* case did for Australian contract law, the 2013 decision by a very well-respected judge in the Queen's Bench Division in the *Yam Seng* case sparked a

new wave of academic and judicial engagement with the law on contractual good faith in the UK, with the case becoming a touchstone for pleadings and argument in multiple subsequent cases.[84] A new battle between good faith 'evangelists' and good faith 'sceptics' is now being fought by judges within and across different levels of the UK judicial hierarchy.[85]

The *Yam Seng* judgment turned on its head the widely presumed antagonism of UK law to a general doctrine of good faith in contract law. Instead, Justice Leggatt saw 'nothing novel or foreign to English law in recognising an implied duty of good faith in the performance of contracts'.[86] Citing the *Yam Seng* case in support of its position, Canada's highest court later identified for Canadian contract law 'an organising principle of good faith that underlies and manifests itself in various more specific doctrines' – an 'organising principle' whose operation 'is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily'.[87]

The time is ripe for Australian law similarly to recognise explicitly the value and manifestations of good faith as some kind of 'organising principle',[88] 'informing principle',[89] 'general norm and operative principle',[90] or 'normative standard' underlying contract law,[91] according to the present Chief Justice of the Federal Court of Australia. Writing extra-judicially as President of the NSW Court of Appeal and before his elevation to being Chief Justice of the Federal Court of Australia, Chief Justice James Allsop identified the disparate parts of the body of contract law that reflect elements of good faith, as well as the noticeable absence of good faith being recognised as 'an expressed norm reflecting its presence as an informing principle'.[92] He supported 'the open recognition of good faith and fair dealing as a general norm and operative principle which underpins the assessment of the formation (including implication of terms), interpretation and performance of contracts'.[93]

In more recent extra-judicial writings, Chief Justice Allsop describes good faith 'as an informing or organising principle around, or presently binding duty within, the formed bargain', which operates as a 'context or framework' within which 'the contract is interpreted, terms are implied and performance is evaluated'.[94] As an organising principle that informs contractual interpretation, good faith reflects commercial practice and expectations, according to Chief Justice Allsop. In that sense, good faith

---

[84] Eg *Hamsard 3147 Ltd v Boots UK Ltd* [2013] EWHC 3251 (Pat); the *Mid Essex Hospital* case; *Bristol Groundschool v Intelligent Data Capture* [2014] EWHC 2145 (Ch); *TSG Building Services v South Anglia Housing* [2013] EWHC 1151 (TCC); *Emirates Trading Agency v Prime Mineral Exports Private Ltd* [2014] EWHC (Comm); *Acer Investment Management v Mansion Group* [2014] EWHC 3011 (QB); *Greenclose Ltd v National Westminster Bank* [2014] EWHC 1156 (Ch); *Myers v Kestrel Acquisitions* [2015] EWHC 916 (Ch); *MSC Mediterranean Shipping Co v Cottonex Anstalt* [2015] EWHC 283 (Comm); *Portsmouth City Council v Ensign Highways Ltd* [2015] EWHC 1969 (TCC); and the *Braganza* case.

[85] I am also grateful for this description to my co-presenter, Mr Ben Hubble QC, Head of Chambers at Four New Square, at a seminar on good faith developments at The Inner Temple in mid-2015 for clients of Four New Square, entitled 'Good Faith in Commercial Agreements and Dispute Resolution – A Comparative and Transactional Perspective'.

[86] The *Yam Seng* case at [145].

[87] The *Bhasin* case at [63].

[88] *Allsop 2015* at [43] and [69].

[89] *Allsop 2011* at 352 and 356-357.

[90] *Allsop 2011* at 360.

[91] The *Paciocco* case at [290], per Allsop CJ, (Besanko and Middleton JJ agreeing).

[92] *Allsop 2011* at 352.

[93] *Allsop 2011* at 360.

[94] *Allsop 2015* at [38].

informs the actual expectations of business people in their dealings with one another, as a practice that informs what judges recognise and use to inform ideas in contractual interpretation about the legitimate commercial expectations of contractual parties.[95] It can operate as an expected and binding standard of behaviour with discrete legal manifestations within the existing enterprise of contractual interpretation, and without importing additional requirements from outside that enterprise through the means of 'a separate free-standing obligation'.[96]

For Chief Justice Allsop, and also importantly for those arguing cases before his court at least, this notion of good faith sits within a broader statutory and non-statutory legal landscape of 'working through what a modern Australian commercial, business or trade conscience contains and requires, in both consumer and business contexts', given the undeniable reality that 'commercial law … is infused with norms and values in its rules and principles', of which unconscionability and good faith are just examples.[97] Referring to the Supreme Court of Canada's landmark recent jurisprudence on good faith, Chief Justice Allsop notes that jurisdiction's acceptance of good faith 'as an "organising principle"; that is, a requirement of justice from which more specific legal doctrines may be derived [and] not a free-standing term but a standard that underlies more specific legal doctrines and is context specific'.[98] The idea of good faith as an 'organising principle' therefore has growing acceptance amongst the judiciary in recent case law in Australia, the UK, and Canada.

Propositions 3: Good Faith Within and Beyond Express and Implied Terms

> Good 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.
>
> --- Carter, Peden and Tolhurst, 2007, at [2-01][99]

The Australian and comparative law on good faith in commercial dealings still faces considerable challenges in conceptualisation, standardisation, and operationalisation, although some thematic principles and patterns of outcomes are emerging across common law jurisdictions of late, especially concerning the nature of good faith as something that is natural rather than foreign to contract law. To recap for what follows: contractual good faith manifests itself in various forms of contractual interpretation (ie express terms, implied terms, other modes of implication, and additional doctrines and norms of contractual construction) and its meaning is sensitive to context and the form of good faith in question.

So, the first part of a growing and necessary shift in mindset sees good faith as a fundamental part of contract law. Accepting that first part of a reframed mindset still leaves important questions about the true nature and operation of contractual good faith. What follows from this shift in mindset about contractual good faith is the abandonment of the view that good faith forms no part of contractual

[95] *Allsop 2015* at [42].
[96] *Allsop 2015*.
[97] *Paciocco* at [295]-[296], per Allsop CJ (Besanko and Middleton JJ agreeing).
[98] The *Paciocco* case at [43].
[99] John Carter, Elisabeth Peden, and GJ Tolhurst, *Contract Law in Australia* (LexisNexis Butterworths, 2007) at [2-01].

interpretation unless the parties have expressly accepted it or it meets the stringent tests for implied terms, with the parties otherwise being free and unconstrained by anything in contract law to condition how they exercise their contractual rights.

This important shift in mindset for the commercial community about the nature of good faith in contractual law is stimulated by a number of recent and authoritative judicial, extra-judicial, and scholarly analyses of contractual good faith. 'The true ground for implying terms into contracts is always good faith and fair dealing', according to a leading UK contract law scholar.[100] '(G)ood faith is not an independent concept as much as something which is *inherent in contract law itself* and therefore a concept which must be taken into account when interpreting a contract, determining the scope of contractual rights and so on', according to the Carter-Peden view.[101]

The point here is not that all of the judicial, extra-judicial, and scholarly comments canvassed in this paper express unanimity about the precise nature of good faith and its various manifestations, sources, and consequences, but rather that a critical mass of them supports the view that a proper understanding of contract law sees a crucial role for good faith as part of it, notwithstanding lingering Anglo-Australian scepticism about the presence of good faith in contract law. Moreover, they are all united in opposition to the notion that contractual good faith is reducible solely or even largely to a matter of express or implied terms of good faith, with the Carter-Peden view going on to deny that an implied term of good faith is even necessary or desirable in contract law, notwithstanding Australian judicial practice to the contrary. One of the themes of this paper is that an up-to-date and nuanced appreciation of such developments needs to be part of the working knowledge of commercial lawyers, because in practice they leave open a variety of sophisticated ways of drafting and attacking commercial agreements, or else running arbitrations and litigation about such agreements.

The acceptance of an implied term of good faith and reasonableness in contractual performance in the landmark decision of *Renard* has been followed in many cases, but also criticised by other courts and academic commentators on multiple doctrinal and evidence-based grounds.[102] Some judges and academic commentators believe that the traditional mechanisms of the general law and equity could have supplied an answer to the problem raised in the *Renard* case, without stimulating the rise of implied terms of good faith and reasonableness.[103] Prominent academic experts in this debate argue that subsequent cases relying upon the *Renard* case 'have led Australian contract law into a potentially disastrous situation'.[104]

---

[100] *Collins 2014* at 301.
[101] *Carter and Peden 2003* at 156; emphasis added.
[102] Eg *Carter and Peden 2003*; Elisabeth Peden, *Good Faith in the Performance of Contracts* (LexisNexis Butterworths, Sydney, 2003); Tyrone Carlin, 'The Rise (and Fall?) of Implied Duties of Good Faith in Contractual Performance in Australia' (2002) 25 *University of New South Wales Law Journal* 99; and Tyrone Carlin, 'Good Faith in Contractual Performance – Smoke Without Flame?' (2005) 4(2) *Journal of Law and Financial Management* 18.
[103] Eg *Carter and Peden 2003* at 155-156, 165 and 168-170; and Geoffrey Kuehne, 'Implied Obligations of Good Faith and Reasonableness in the Performance of Contracts: Old Wine in New Bottles?' (2006) 33 *University of Western Australia Law Review* 63 at 107.
[104] *Carter and Peden 2003* at 165.

Members of this widely respected set of academic commentators characterise the Australian judge-made law on contractual good faith as being 'unsettled and … in a state of flux [and] utter confusion', to the point of generating 'much confusion and uncertainty' and even being 'incoherent'.[105] To a significant extent, these academic criticisms are correct as a matter of history and doctrine, although the jury is still out on how successful they will be in convincing courts to alter or at least reconfigure and rationalise the significant body of Australian case law on contractual good faith at all judicial levels that points in contrary directions.

In short, for a long period of developmental flux stemming from the *Renard* case and its judicial progeny, justified fears were held by authoritative commentators and legal practitioners alike that Australian judge-made law was approaching a point of readily giving effect to unclear, uncertain, and unnecessary applications of good faith, in multiple commercial contexts, via incorrect routes, and with an expansive content, way beyond what the concept of good faith could bear on a full review of the body and history of contract law. In particular, those fears focused upon the perceived eagerness of some Australian courts and commentators to propel the law towards accepting the fivefold result of implying good faith in most or all contracts, through the mechanism of implied terms, with a content that goes beyond honesty to embrace reasonableness of some kind, under an assumption that reasonableness is intrinsic to implications of good faith, and with restrictions on the capacity of contractual parties to exclude good faith as a matter of private agreement.[106]

At the time of articulating these fears, there would also have been greater uncertainty about the enforceability of obligations to negotiate in good faith, more pervasive judicial resistance than now to good faith as some kind of organising principle for contract law, and the early presence of good faith in statutory prohibition of unconscionable business conduct towards small businesses. While the first fear has not been fully realised more than a decade since it was postulated, the other four fears remain hard to put to rest, and the final one can never be put to rest completely, not least because some standards of good faith are no longer regulated by contract law alone.

A comparative lens provides additional support for this outcome. None of Australian, UK, or Singaporean law has ultimately embraced the proposition that good faith is an automatically implied obligation in all or most commercial contracts, let alone contracts generally (although Canadian law now has a limited exception), despite some early and now relatively isolated judicial indications to the contrary. Instead, as outlined above, there is emerging judicial acceptance, but not yet a firm judicial consensus, around the notion that good faith operates as some kind of organising principle in contract law, although of a nature and with consequences that remain hotly contested.

[105] On these descriptions of the state of the law on contractual good faith, see: *Carter and Peden 2003* at 155; and John Carter, 'Good Faith in Contract: Why Australian Law is Incoherent' (Paper presented at the Bar Association of Queensland 2014 Annual Conference, 8 March 2014).
[106] *Carter and Peden 2003* at 155-156.

After an initial keenness by some trial judges and intermediate appellate courts in the immediate post-*Renard* phase to find implied obligations of good faith in commercial agreements,[107] courts at those levels have become more circumspect in doing so,[108] although there are notable exceptions.[109] In the period from mid-2005 onwards, intermediate appellate courts in more than one Australian jurisdiction have come down firmly against the automatic implication of good faith generally or in commercial contracts in particular. To this point, the HCA has not provided adequate guidance on such an important topic for the commercial community, despite a couple of opportunities to do so, most recently in the 2014 *Barker* case.

The HCA's reluctance to take contractual good faith head on until it has a test case of its choosing has not prevented the HCA in the *Barker* case from setting out a framework for implied terms generally that will control its future approach to implied terms of good faith in particular, but in a way that produces little practical guidance on that topic in the interim, because its postulated framework glosses over some important differences between different forms of implication and aspects of construction. The HCA's ultimate take on implications of contractual good faith, as well as contractual good faith's inter-relationship with good faith under statutory unconscionability and the *Franchising Code of Conduct*, both await the right test cases in the HCA's eyes.

More recently, the Carter-Peden view has been reinforced in a highly critical assessment of the HCA's *Barker* case by the five professors.[110] They describe the HCA's 2014 *Barker* case on implied terms variously as making 'important contributions' of 'doubtful' utility, providing a 'problematic' and 'incomplete' taxonomy for implied terms, making 'unconventional' and even 'puzzling' statements of principle, lacking a necessary and clear enunciation on 'the role of construction in implication', and offering a 'perplexing' account of the *Belize* case on implication of terms.[111] The five professors offer a post-*Barker* view of the test of necessity for implied terms and its outcomes that, in the author's view, is at least partly contingent upon the threshold question and choice of conceptualisation alluded to by Chief Justice Allsop in the extracts from his recent extra-judicial writings on good faith, as discussed in this paper.

The practical implications of this vast and diverse body of law and commentary are difficult to reduce to sufficiently trustworthy guidance for legal practitioners. In short, the judicial, extra-judicial, and academic commentary on contractual good faith generates more heat than light, at least for commercial lawyers and their clients who must translate the ongoing fluctuation and instability of this area of the law into a workable understanding for the practical purposes of contractual negotiation and drafting,

[107] Eg the *Renard* case; *Hughes Aircraft Systems International v Airservices Australia* [1997] FCA 558; *Alcatel Australia Limited v Scarcella* (1998) 44 NSWLR 349; *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] FCA 903; and *Burger King Corporation v Hungry Jack's Pty Ltd* [2001] NSWCA 187.

[108] Eg the *Esso* case; the *CGU* case; *Tote Tasmania Pty Ltd v Garrott* [2008] TASSC 86; the *United Group Rail* case; the *Strzelecki Holdings* case; *Trans Petroleum (Australia) Pty Ltd v White Gum Petroleum Pty Ltd* [2012] WASCA 165*; Androvitsaneas v Members First Broker Network* [2013] VSCA 212; and *Gramotnev v QUT* [2015] QCA 127. See also *Allsop 2011* at 341.

[109] Eg *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49 at [596] per Bleby J ('I consider that [good faith] is a term to be implied in *every* commercial contract, despite doubts expressed in some earlier cases that it was to be applied unequivocally as a universal term'; emphasis added).

[110] *Five professors*.

[111] *Five professors* at 203, 204, 209, 230, 209, 215 and 216 respectively.

commercial dispute resolution, and ultimately litigation-focused legal advice, pleadings, submissions, and judgment-writing.

Proposition 4: The Limits of Contractual Devices in Dealing with Good Faith

> The worry is that 'good faith' may become another rule of public policy that operates outside the contract itself … *A clear clause will embarrass the judiciary into submission.*
>
> --- Warren Grover QC, 1985[112]

The Commercial Drafting Context

The key problems for commercial parties from a negotiating and drafting perspective are as follows. Good faith is one of those legal concepts that has an agreed core of meaning (eg honesty) and a penumbra of other possible meanings, but which is difficult to define conclusively and apply across all of its possible meanings. To the extent that good faith underpins much or all of contract law, as suggested by leading commentators,[113] it affects construction of contracts and exercises of contractual powers and discretions in ways that go beyond simply adding or deleting extra terms under the jurisprudence of implied obligations of good faith. So, commercial parties are left at the mercy of what courts do with contract law's doctrines and principles in commercial construction of their agreements, unless parties take steps in their agreements to optimise their control of how good faith relates to them.

Limits of 'Entire Agreement' Clauses

Commercial agreements commonly include an 'entire agreement' clause. In its simplest form, an 'entire agreement' clause identifies the operative agreement between the parties. It is a boilerplate clause in a contract that identifies the relevant documents that constitute the final agreement, disregarding all previous agreements, draft agreements, past conduct, prior representations, and anything else other than what is meant to constitute the ultimate bargain between the parties.

The 'entire agreement' clause in *Vodafone Pacific v Mobile Innovations*[114] ('the *Vodafone* case') is a typical example: 'This Agreement contains the entire agreement of the parties with respect to its subject matter [and] sets out the only conduct relied on by the parties and supersedes all earlier conduct by the parties with respect to its subject matter'. As the purpose of such a clause is to identify the relevant *documents* that make up the parties' ultimate and binding agreement, it says nothing one way or the other about the particular *terms* explicitly *or implicitly* contained in that agreement as documented.

In that form, a simple 'entire agreement' clause is clearly insufficient by itself to exclude any implied term of good faith. This proposition is supported by a considerable body of cross-jurisdictional authority

[112] Warren Grover, 'A Solicitor Looks at Good Faith in Commercial Transactions' in *Commercial Law: Recent Developments and Emerging Trends (Special Lectures of the Law Society of Upper Canada)* (Law Society of Upper Canada, 1985); emphasis added.
[113] *Carter and Peden 2003* at 156.
[114] [2004] NSWCA 15.

and commentary.[115] As early as 1910, there is HCA authority pointing out this limitation of 'entire agreement' clauses.[116] Academic commentators confirm that a survey of case law reveals that, absent a truly effective exclusion clause, 'it should not be assumed that a "sole discretion" clause or an "entire agreement" clause will alone be sufficient'.[117] The Carter-Peden view of entire agreement clauses is to similar effect: 'A simple entire agreement clause is not an exclusion clause and should not therefore be interpreted as such [and] the mere fact that the document contains an entire agreement clause does not prevent the implication of a term'.[118]

In 2003 in *GEC Marconi Systems v BHP Information Technology*[119] ('the *GEC Marconi* case'), Justice Finn concluded that 'I consider the law in this country to be that an "entire agreement" clause does not preclude implications ad hoc' (ie terms implied as a matter of fact) and also that 'I find arresting the suggestion that an entire agreement clause is of itself sufficient to constitute an "express exclusion" of an implied duty of good faith and fair dealing where that implication would otherwise have been made by law'.[120] The 2014 Canadian case of *Bhasin v Hrynew*[121] ('the *Bhasin* case') involved an 'entire agreement' clause that said there were no 'agreements, express, implied or statutory, other than expressly set out' in the contract and, in reliance in part on Justice Finn's position in the *GEC Marconi* case, the Supreme Court of Canada concluded that such a clause could not exclude implied duties of honest performance.

As a result, can there really be any lingering doubt about the incapacity of a simple 'entire agreement' clause to exclude implied terms and any other obligations involving good faith? In 2014, the Victorian Court of Appeal needed to correct an erroneous holding by a Victorian trial judge that a simple 'entire agreement' clause excluded implied terms of good faith. The relevant clause in that case was as follows:

> [11c] (T)his … Agreement is the entire agreement between the parties about its subject matter. Any previous understandings, agreement, representation or warranty relating to this subject matter is replaced by this agreement and has [no] further effect.

The rationale of the appeal judgment on this point is enough to put this issue to bed once and for all, both on its merits (even allowing for its clause-specific circumstances) and with the additional significance afforded to intermediate appellate court rulings under the HCA's precedential instruction to other Australian courts in the *Farah* case:[122]

---

[115] In Australia, see, eg, *Hope v RCA Photophone of Australia Pty Ltd* (1937) 59 CLR 348; [1937] HCA 90; *Hart v MacDonald* (1910) 10 CLR 417; [1910] HCA 13; *GEC Marconi Systems Pty Limited v BHP Information Technology Pty Limited* [2003] FCA 50 ('the *GEC Marconi* case'); and *Forty Two International Pty Ltd v Barnes* [2014] FCA 85 at [425].
[116] *Hart v McDonald* (1910) 10 CLR 417.
[117] *Dixon 2007* at 121.
[118] Elisabeth Peden and John Carter, 'Entire Agreement – and Similar – Clauses' (2006) 22 *Journal of Contract Law* 1 at 9.
[119] [2003] FCA 50.
[120] The *GEC Marconi* case at [922].
[121] 2014 SCC 71.
[122] *Vakras v Cripps* [2015] VSCA 193 at [422], per Warren CJ, Ashley JA and Digby AJA. Every case of course is contract-specific, and precedential guidance must be applied accordingly. Nevertheless, the wording used in this case is commonplace, and so the underlying rationale has broader application.

> We respectfully disagree with his Honour's conclusion that the implication of a good faith term was inconsistent with the express terms of cl 11c of the agreement. That sub-clause was in the nature of an entire agreement clause. It was reflective of the parties' intent to exclude the contractual effect of previous understandings, agreements, representations or warranties and to render them of no contractual effect in relation to the agreement. The language of the clause went no further. It did not seek to address terms which might properly be implied into the agreement. In our view, the sub-clause should not be understood as in any way modifying or limiting the implication of terms arising on a proper construction of the terms of the agreement itself. Absent some precise exclusion to that effect, the implication of a term is analogous to the discovery of a previously unidentified term. That is, the implication of a term is as much a part of a contract as any term couched in express words.

Interestingly, the 2016 case of *North East Solution v Masters Home Improvement and Woolworths*[123] ('the *Woolworths* case') raises the issue of the capacity of an 'entire agreement' clause in a later agreement to preclude obligations implicitly translating across (and being inferred) from an earlier agreement. At the very least, such an exercise has aspects that turn upon considerations other than those that apply to implied terms simpliciter.

Changes to Statutory Unconscionability and Its Connection to Good Faith

Since January 2012, the *ACL* has an amended set of provisions on statutory unconscionability[124] whose amplified significance for any discussion of good faith in commercial agreements is slowly percolating through the work of commercial lawyers and courts, of which the *Paciocco* case is a stark reminder. For some time, astute commercial lawyers have been examining issues of good faith in commercial contexts through the twin prisms of good faith in contract law and absence or breach of good faith as a statutory indicator of unconscionable business conduct.

Three changes made from 2012 directly impact upon the legal relevance and reach of standards of good faith in commercial contexts. First, there are new principles of interpretation that apply just to statutory unconscionability, including good faith as a statutory indicator. Secondly, there are additional statutory indicators and changes of wording to some of the statutory indicators. Both of these changes have implications for the relationship between good faith and pre-contractual business conduct, including negotiations towards a concluded agreement. Finally, the set of statutory indicators of unconscionable conduct has been harmonised for both B2B and B2C conduct. Put another way, this final change means that good faith is now relevant in assessing business conduct towards consumers, as well as business conduct towards other businesses.

The fact that the provisions on statutory unconscionability in the *ACL* are mirrored in the provisions on statutory unconscionability in the *ASIC Act* for regulating the financial services industry, as well as in state commercial leasing laws (eg Queensland's *Retail Shop Leases Act 1994*), means that good faith in

[123] [2016] VSC 1.

[124] For full transparency, the author was one of the three expert panel members charged by the Australian Government with reviewing these provisions in a 2010-2011 inquiry, whose recommendations were fully accepted and introduced into legislation, with an operation commencing in January 2012. The views expressed here about the implications of those reforms are personal views.

connection with statutory unconscionability is embedded in major regulation for the Australian economy. Whatever doctrinal or conceptual differences exist between good faith and unconscionability in theory, the two notions have been combined in statutory unconscionability by force of legislation. Two of the key unresolved questions that matter in practice concern the degree of correlation in the meaning of good faith under both guises and the nullifying impact of supervening legislated standards of good faith on boilerplate exclusion and 'sole discretion' clauses.

As a result, from a transactional standpoint, the regulation of good faith in commercial agreements, and their formation, performance, dispute resolution, and termination, for some time has been a matter of both contract law and supervening legislative standards. Is it any wonder then that, in 2013, after more than 20 years of post-*Renard* case law and commentary, and many years after good faith's initial inclusion in the statutory unconscionability regime, as eminent a judge and academic commentator as Justice/Professor Paul Finn could therefore 'ask … whether, despite our agonising over the justifications for, and scope of, a duty of good faith and fair dealing in contract law, we already have the essence of such a duty in s 21 of the *Australian Consumer Law* [ie statutory unconscionability]?'.[125]

The Capacity of Exclusion Clauses to Preclude Good Faith

Both judicial authority and academic commentary overwhelmingly support the view that implied terms of good faith can be excluded by appropriately drafted agreements. Accordingly, in the absence of drafting that offends because it makes the contract and any of its terms uncertain or illusory, contrary to public policy, void for illegality, or otherwise inconsistent with the law, commercial parties and their legal drafters still have considerable room to move in modifying or excluding any of good faith's perceived excesses.[126] As one Canadian commentator has remarked, '(p)roviding then that the "opting out" clause in question is precise, specific, not antithetical to the entire purpose or intent of the remainder of the contract, and is not unconscionable or contrary to public policy, it ought to be enforceable'.[127]

At a conceptual level, the doctrinal jurisprudence of implied terms requires resolution of the theoretical basis on which implied terms can be excluded or not. The status of honesty as an element of good faith and its capacity for exclusion, at least as part an implied term if not otherwise, has immense practical significance, even if no governmental or business party would ever seek to negotiate an explicit right to act without honesty in contractual dealings. After all, some legal effect needs to be given to exclusion clauses that preclude implied terms, including implied terms of good faith, which have elements of honesty at their core. If honesty is an element that cannot effectively be covered by an exclusion clause, even in theory, then there are inherent limits to what the parties can do by private agreement

[125] Paul Finn, 'Common Law Divergences' (2013) 37(2) *Melbourne University Law Review* 509.
[126] For general discussion of these outer legal boundaries on what is practically possible in the context of good faith, see: W Grover, 'A Solicitor Looks at Good Faith in Commercial Transactions', in *Commercial Law: Recent Developments and Emerging Trends (Special Lectures of the Law Society of Upper Canada)* (Law Society of Uper Canada, 1985) at 106-107; Shannon O'Byrne, 'Good Faith in Contractual Performance: Recent Developments' (1995) 74 *Canadian Bar Review* 70 at 96 ('*O'Byrne 1995*'); Jeannie Paterson, 'Limits on a Lender's Right to Repayment on Demand: Construction, Implication and Good Faith?' (1998) 26 *Australian Business Law Review* 258 at 280; and *Dixon 2007* at 121.
[127] *O'Byrne 1995* at 96. For Australian endorsement of this view, see: *Dixon 2007* at 120-121.

concerning implied terms, at least from the standpoint of the range of elements of good faith that are amenable to exclusion. Of course, this conceptual difficulty is itself another pointer towards the flaw in judge-made law treating non-explicit good faith as a matter of implied terms in the first place.

Courts and commentators alike struggle with the notion that parties could exclude requirements of honesty in their contractual dealings. In a series of extra-judicial passages that show his sensitivity to the level of guidance that the commercial community needs from the judiciary on such issues, the present Governor and former Chief Justice of the state in which the conference for this paper was held once described the limits of exclusion clauses in addressing various elements of good faith, as follows:[128]

> My present feeling is that an attempt contractually to exclude the duty to act honestly would fail. But what foolhardy entity would be prepared to contract on that basis anyway? It would fail, as would an attempt to exclude an obligation to cooperate to ensure the performance of the contract, because those obligations are essential to its being a contract: they are inherent, necessary characteristics of a contract in the sense that absent those obligations, there would be no contract. The same could be said of the obligation to act reasonably in the *Wednesbury* sense: that equates to an obligation to act rationally – though not necessarily with perfect reasonableness as may objectively be assessed.
>
> On the other hand, the possibility of contractually excluding an obligation to act reasonably in the latter objective sense is much more arguably open … I should qualify what I have said about excluding inherent obligations to act in good faith by referring to "sole discretion" clauses. There is a recent example where such a provision was held to exclude even an obligation to act in good faith. It is *Theiss Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* (2000) 16 BCL 255 …

In the *Bhasin* case, the Supreme Court of Canada remarked that '(a)ny interference by the duty of honest performance with freedom of contract is more theoretical than real [as] (i)t will surely be rare that parties would wish to agree that they may be dishonest with each other in performing their contractual obligations'.[129] In the landmark 2013 UK *Yam Seng* case, Justice Leggatt identified expectations of honesty and trust as standard business expectations rarely made explicit in commercial contracts, so that 'if a party in negotiating the terms of a contract were to seek to include a provision which expressly required the other party to act honestly, the very fact of doing so might well damage the parties' relationship by the lack of trust which this would signify'.[130]

So, the debates about contractual good faith and its proper conceptualisation cannot be dismissed by anyone as mere 'academic' debates. The practical risk for legal practitioners and their commercial clients can be crystallised in one simple question: Is a standard exclusion clause of the kind used by many lawyers, which simply excludes all implied terms and any other additional obligations (at least to the extent permitted by law), sufficient to exclude all of the ways in which good faith could affect a contract through terms implied in fact, terms implied in law, other means of implication embodying

[128] De Jersey, Paul, 'Good Faith in Contracts in Financial Services' (Paper presented at the 26th Annual Banking and Financial Services Law and Practice Conference, Gold Coast, 31 July 2009).
[129] The *Bhasin* case at [81].
[130] The *Yam Seng* case at [135].

good faith, norms of commercial construction, and any other legally relevant standards affecting the formation, performance, dispute resolution, and termination of contracts?

The answer to that fundamental question for legal practitioners hinges firstly upon convincing a court that matters of construction generally and matters of implication of various kinds that both concern good faith are all caught by the relevant exclusion clause. Armed with precedential authority to read exclusion clauses strictly rather than expansively, a judge who is inclined against your client on the merits could well decide that a particular exclusion clause is limited to additional terms that are implied as a matter of fact or law, even if the judge otherwise accepts that all instances of good faith are potentially excludable by the right contractual wording.

In her criticism of Australian contract law's willingness to include reasonableness of some kind as part of (or co-extensive with) an implied term of good faith, Professor Peden outlines the practical implications for commercial parties and their lawyers of judicial over-reach in adding unclear notions of reasonableness into the good faith equation, as follows:[131]

> Commercial parties are now faced with the question of whether they dare to suggest in negotiations that they are not prepared to perform 'in good faith' as that may require reasonableness on their part. Alternatively, should they expressly state that they will not behave reasonably, or will that be a 'deal-breaker'?

What seems to be beyond all reasonable doubt is that contractual parties should at least be able to exclude elements at the outer reaches of judge-made law on good faith, such as reasonableness. On the Carter-Peden view, for example, 'it is unthinkable that a contracting party should be prohibited by the common law from agreeing to a term which is inconsistent with the standard of reasonableness that good faith is said to involve [and] to suggest that despite a clear intention to the contrary, the parties could not exclude or modify an obligation to perform in good faith is contrary to the current state of law'.[132]

However, because of supervening legislation that 'trumps' any private agreement to the contrary, an exclusion clause cannot exclude mandatorily imposed obligations of good faith in all Australian franchising contracts or unconscionable business conduct towards other businesses and consumers under the *ACL*, *ASIC Act* (for financial services), and at least some state commercial leasing laws (eg Queensland's *Retail Shop Leases Act 1994*). For that reason alone, the debate about the capacity of contractual parties to exclude standards of good faith is an increasingly sterile one. Moreover, for the reasons that follow, the standard kind of exclusion clause used by many lawyers has other serious limitations in dealing with good faith, in the light of the issues explored in this paper.

The Vodafone Example – A Multi-Pronged Approach to Neutralising Good Faith

[131] *Peden 2009* at 60.
[132] *Carter and Peden 2003 at* 163-164.

Take as a reference point the exclusion clause used in the *Vodafone* case: 'To the full extent permitted by law and other than as expressly set out in this agreement, the parties exclude all implied terms, conditions, and warranties'. The *Vodafone* case provides recent and authoritative confirmation that an effective 'negation of implied terms' clause can be used to exclude implied terms (such as good faith), even those implied by law, although the judgment also suggests that the 'sole discretion' clause in dispute would have been a sufficient contractual indication to the contrary on its own.[133] This result is consistent with the principle that terms cannot be implied where 'implication by law is precluded by expression of contrary intent', whether this arises from 'exclusion by express provision or inconsistency with the terms of the contract on their proper construction'.[134] In other words, implied terms can be excluded expressly or by necessary implication from other terms in the agreement.

This form of drafting is better able to deal with possible *additional* terms that are not explicitly written into the contract than it is able to deal with other ways in which good faith might arise as a matter of implication or construction. It is always easier to draft around something that is not already part of the contract *and* the rules for interpreting contracts than it is to draft around something that is intrinsically part of the contract as interpreted unless it has been effectively removed in all senses. For this reason, an exclusion clause might be read strictly against the party relying upon it and confined by a judge to a barrier to adding additional terms by implication, without touching other ways in which good faith might condition the exercise of contractual power.

Indeed, even the *Vodafone* case itself reserved for another day the different situation of a contractual power that has clearly been exercised irrationally, capriciously, or arbitrarily, even though the contract in question had an exclusion clause that effectively removed implied terms. Again, this outcome reinforces a conceptual foundation for good faith in contract law in which context-sensitive sources of good faith arise through express and implied terms, other forms of contractual implication, and contractual construction more generally.

'Implicit Good Faith' – An Excludable Implied Term or Not?

In two recent UK Court of Appeal decisions and one UK Supreme Court decision,[135] UK law reinforces the role of what it calls 'implicit good faith'. In *Socimer International Bank v Standard Bank*[136] ('the *Socimer* case') in 2008, the UK Court of Appeal recognised that, where a contract gives one party a discretion that can affect both parties, the exercise of that power can be conditioned (and hence abuse of that discretionary power prevented), 'as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality'. This notion of implicit good faith is treated as an implied term in UK law.[137]

[133] The *Vodafone* case at [184]-[185], [188] and [198]-[200] per Giles JA (Sheller and Ipp JJA concurring).
[134] The *Vodafone* case at [188] per Giles JA (Sheller and Ipp JJA concurring).
[135] *Socimer International Bank Ltd v Standard Bank Ltd* [2008] EWCA Civ 116 ('the *Socimer* case'); the *Mid Essex Hospital* case; and the *Braganza* case.
[136] [2008] EWCA Civ 116.
[137] The *Socimer case*; the *Mid Essex Hospital* case.

Whatever the distinctions or overlaps between implied terms and other forms of implication (or even construction), the need for careful and precise drafting around such issues is heightened. In *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland*[138] ('the *Mid Essex Hospital* case'), where the UK Court Appeal reinforced the doctrine of implicit good faith, the relevant exclusion clause contained wording that 'all other terms, conditions or warranties other than any terms, conditions or warranties implied by law in favour of the Trust or the Beneficiaries are excluded from the agreement between the Trust and the Contractor unless expressly accepted in writing by the Trust's Representative'. The Court thought that such a clause would not be sufficient to exclude, if it otherwise met the tests for implied terms, an implied term not to exercise a discretion 'in an arbitrary, capricious or irrational manner.'[139]

This case also confirms that such a term 'is extremely difficult to exclude', although 'it is [not] utterly impossible to do so',[140] which means in theory that its exclusion can be achieved by a clause with sufficiently precise wording to that effect. Standard exclusion clauses of the kind commonly used in Australian legal precedents might not be sufficient to preclude such ways of conditioning the exercise of contractual powers and discretions. At the very least, these and other drafting and transactional points in this paper highlight the need for continuous review of standard commercial precedents and their treatment of good faith one way or another, by law firms, in-house counsel, and others in the commercial community.

This notion of implicit good faith applies in Australia too,[141] although not necessarily as an implied term in the strictest sense.[142] Obviously, any reference to 'irrationality' raises questions about the interplay between notions of good faith and fair dealing, on one hand, and different possible senses of reasonableness, on the other. Australian law is yet to settle conclusively whether and how notions of reasonableness in public law and statutory construction of powers of judicial review might condition commercial construction of contractual powers and discretions.[143]

Professor Peden argues that, if Australian courts accepted the notion of 'implicit good faith' and rejected the 'implied obligation of good faith and reasonableness' as invented by some Australian courts, commercial construction could proceed according to a more discrete notion of good faith, applied to the parties' agreement and context as an expression of their contractual intention.[144] 'The standard of behaviour required by good faith would only be honesty, loyalty to the contract and, perhaps, a requirement to consider the interests of the other party', she adds.[145] For the reasons canvassed in this paper, all of the following – the nature of good faith as a fundamental organising principle for contract

[138] [2013] EWCA Civ 200.
[139] The *Mid Essex Hospital* case at [83] per Jackson LJ (Lewison LJ and Beatson LJ agreeing).
[140] The *Mid Essex Hospital* case.
[141] See, eg, Edelman J's discussion in this context in one of the cases involving Clive Palmer's companies, the *Mineralogy* case; and Allsop CJ's extra-judicial reference to it in: *Allsop 2011* at 351; *Allsop 2012* at 16-17; and *Allsop 2015* at 25.
[142] *Peden 2009*.
[143] The HCA left open this question and the related question about implied terms of good faith in its landmark judgment about implied terms in the *Barker* case at [42] per French CJ, Bell and Keane JJ. For subsequent flagging of the significance of this unresolved issue, see: the *Mineralogy* case at [1020]-[1025]; and *Bartlett v ANZ Banking Group Limited* [2014] NSWSC 1662 at [142].
[144] *Peden 2009* at 61.
[145] *Peden 2009*. For convenience, this is referred to in this paper as contractual honesty, fidelity, and other-centredness.

law, the recent judicial reinterpretation of reasonableness within the confines of a contract, the inter-relationship between good faith in contract law and statutory unconscionability, and the largely undeveloped analogical use of relevant legislation on good faith in recasting contractual good faith – point in the same general direction, namely the ultimate rejection or at least confinement of reasonableness in association with good faith within commercially acceptable bounds.

Drafting Implications

Boilerplate Clauses

What does all of this mean for drafting (or attacking the drafting) of a commercial agreement? Where good faith potentially conditions the contract's commercial construction in ways beyond simply inserting or precluding additional terms, the most that can legally be done to minimise or mediate that effect is to broaden the scope of exclusionary provisions beyond simple rejection of additional terms. This can be attempted through carefully worded exclusion clauses or additional clauses that minimise the imposition of additional obligations or dilution of contractual rights through commercial construction of the agreements or by operation of law. For example, one of the operative clauses considered in *Ingot Capital Investments v Macquarie Equity Capital Markets [No 6]* said that 'nothing in this agreement qualifies the exercise or non-exercise of the rights of Macquarie under the Underwriting Agreement in any way',[146] and this was interpreted as being one factor against implications of good faith terms.

Arguably, as such a clause extends beyond the subject matter of implied terms, it has other work to do in commercial construction and conditioning of contractual rights by reference to other implications of good faith. Even then, contrary arguments could still be made about notions of good faith that are inherent to the exercise of powers for their proper purpose in meeting the parties' mutual expectations as a matter of commercial construction. The overriding point is that drafting to impose or exclude good faith is more nuanced and sophisticated than some past precedents, formal opinions, and judicial decisions might otherwise suggest.

The insertion of mutual or individual obligations of good faith only in some parts of the contract is a strong contractual indication against their implication in other parts. In addition, sole or absolute discretion clauses buttress the ability of one party to exercise contractual discretions in their legitimate commercial self-interest without additional need to inform or consult other parties or otherwise take their interests into account beyond what the contract requires for its full effect. However, careful drafting beyond standard exclusion clauses is needed to achieve this effect, as the *Mid Essex Hospital* case shows.

Additional protection can be gained through discrete clauses that indicate expressly that particular kinds of obligations are not to be imported by implication or other means. For example, there might be acknowledgements by some or all parties that nothing in their agreement obliges a particular party to

[146] [2007] NSWSC 124 at 595.

do anything else, including matters such as consultation, disclosure, and advice. As with exclusion clauses, the form of wording is crucial. Drafting formulae such as 'except as expressed in this agreement' (see the *Vodafone* case) can still lead to question-begging arguments about their effectiveness in precluding all implications, on the basis that the terms 'expressed' in an agreement include both explicit and implicit terms.

Drafting Limits of Statutory Unconscionability

Next, the limits of exclusion clauses are now defined by more than what contract law says. As the *Paciocco* case demonstrates, good faith notions embedded in contract law are joined more recently by good faith notions in the law of statutory unconscionability, with both sets of notions being part of a business conscience as regulated by standards under the law. The *Paciocco* case signals the start of a necessary judicial journey from here in exploring the inter-relationship between good faith in contract law and good faith in statutory unconscionability, with important consequences for commercial drafting devices and their limits.

A number of major considerations are in play simultaneously on this point, in the future development of the law on this topic. Considered from a transactional standpoint, it would be anomalous if, in assessing business conduct surrounding a commercial agreement, a different meaning for good faith applied for the purpose of interpreting the agreement under contract law than for the purpose of evaluating conduct surrounding the contract according to standards of good faith mandated under statutory unconscionability regimes for business generally (ie *ACL*), financial services (ie *ASIC Act*), and commercial leasing (eg state leasing laws).

In harmonising the two meanings of good faith, there are also opportunities for recasting and redeveloping contractual good faith by reference to the analogous influence of statutory law. After all, even in the absence of recent Australian case law accepting the enforceability of obligations to negotiate in good faith, the same issue would have been forced upon courts eventually after recent amendments to the law of statutory unconscionability, because of the interplay between legislated principles of interpretation and indicators of unconscionable conduct that implicate good faith in pre-contractual and extra-contractual conduct.[147]

Moreover, the interplay between good faith in contract law and good faith in statutory unconscionability provides a new angle from which to resolve the problem caused by judicial overreach in this field of law of the kind highlighted by the Carter-Peden view, firstly in the over-emphasis on the jurisprudence of implied terms, and then in compounding the problem by importing elements of reasonableness of some kind into the content of contractual good faith. Considered from the standpoint of the interplay between statutory unconscionability and contract law, there are two significant problems with importing reasonableness into implied terms of good faith. Reasonableness in one form or another appears elsewhere in the list of statutory indicators of unconscionable conduct and, while that fact alone does not prevent good faith from also having an element of reasonableness, it is relevant

[147] The *Paciocco* case.

in deciding the scope of good faith in statutory unconscionability, with correlative implications for reinterpreting the content of contractual good faith.

In addition, parties cannot by private agreement contract away standards that are imposed by supervening force of legislation. One of the most commonly cited examples is the law of misleading and deceptive conduct. An exclusion clause cannot immunise a party from liability for misleading or deceptive conduct, although it might go some way towards otherwise undercutting the legitimacy of someone relying on such conduct to their detriment. As recently as 2009, a HCA majority judgment of Gummow, Hayne, Heydon, and Kiefel JJ emphasised that 'neither the inclusion of an entire agreement clause nor the inclusion of a provision expressly denying reliance upon pre-contractual representations will necessarily prevent the provision of misleading information before a contract was made constituting a contravention of the prohibition against misleading or deceptive conduct by which loss or damage was sustained'.[148]

By analogy, neither an entire agreement clause nor a clause purporting to nullify claims arising from conduct surrounding a commercial agreement are likely to be effective in protecting a commercial party from liability under statutory unconscionability. Essentially, this is because the standards of conduct enshrined in statutory unconscionability are like the standards of conduct legislatively enshrined in directors' duties, in the sense that neither can be simply excluded by private agreement,[149] although something in such an agreement might still have some bearing upon the legal obligations in play.[150]

Unlike the standards in legislated directors' duties, however, which if unmet automatically result in a breach of directors' duties (unless there is an applicable defence), a breach or absence of good faith as a standard of conduct does not automatically result in a finding of unconscionable business under statutory unconscionability. So, that is a difference to be taken into account in assessing the capacity of exclusion clauses and other provisions to preclude obligations of good faith.

At the same time, the indicator concerning good faith appears within a legislative framework that does mandate an overall standard against unconscionable conduct, and it will be difficult for a commercial party to resist an overall finding of unconscionable conduct where the evidence shows clear problems with good faith, notwithstanding any exclusion clause. If a commercial client has a potential problem because of its conduct falling short of the standards of good faith, it has a problem under contract law as well as under statutory law.

Recent Cases – the *Barker* Case and the *Woolworths* Case

The Barker Case

The HCA's 2014 decision in the Barker case is relevant to any court (including the HCA itself) that grapples with implications of good faith of whatever kind from now. At its simplest doctrinal level, the

[148] *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25 at [130].
[149] *Spies v The Queen* [2000] HCA 43.
[150] *Angas Law Services Pty Ltd (in liquidation) v Carabelas* [2005] HCA 23.

Barker case rejects an implied term of mutual trust and confidence in employment contracts, because of such an implied term's failure to meet the fundamental test of 'necessity'. So, on one level, it represents another fork in the road of comparative common law jurisprudence, where the HCA yet again diverges from the position in the UK and elsewhere.

However, from the standpoint of future good faith jurisprudence, the *Barker* is problematic on a number of levels. Two passages from the majority judgment of French CJ and Bell and Keane JJ are worth highlighting here, for the purpose of the future development of the law of contractual good faith. First, the majority judgment outlines a fourfold framework (with its own taxonomy)[151] on 'the bases for the implication in law of contractual terms', as follows:[152]

> Courts have implied terms in contracts in a number of ways:
>
> - in fact or ad hoc to give business efficacy to a contract;
> - by custom in particular classes of contract;
> - in law in particular classes of contract; or
> - in law in all classes of contract.
>
> Contractual terms implied in law may be effected by the common law or by statute. If effected by the common law they may be displaced by the express terms of the contract or by statute.

In passing, it is important to note the majority judgment's unqualified acceptance that contractual terms implied in law can be excluded by contrary indication of the parties.

Secondly, the majority judgment expressly reserves two questions for another day and case – namely, 'the question whether there is a general obligation to act in good faith in the performance of contracts' and 'the related question whether contractual powers and discretions may be limited by good faith and rationality requirements analogous to those applicable in the sphere of public law'.[153] The latter reserved question has connections with doctrines of implicit good faith as well as public law.

The five professors identify multiple flaws, ambiguities, and imprecisions in the majority judgment's framework and taxonomy for implied terms in general,[154] as well as foreshadow what such a framework and taxonomy now require of subsequent courts in approaching issues of contractual good faith.[155] In light of their forensic analysis of the majority judgment, it is hard to disagree with their basic criticism that collapsing into this framework based upon implied terms a number of relevant things in this context about implication and construction is 'incomplete', 'unconventional', 'puzzling', and otherwise 'problematic'.[156]

---

[151] The five professors call it 'a taxonomic framework': *Five professors* at 209.
[152] The *Barker* case at [20]-[21].
[153] The *Barker* case at [42]. For post-*Barker* illustrations of the relevance of this potential intermingling of public law and contract law, see: *Bartlett v ANZ Banking Group Limited* [2014] NSWSC 1661 at [142]; and the *Mineralogy* case at [1010]-[1015].
[154] *Five professors*.
[155] *Five professors* at 227-229.
[156] *Five professors* at 230 and 209, respectively.

At the very least, the *Barker* case as a whole presents a use of nomenclature in discussing implied terms, whether of trust and confidence (as ratio) or of good faith (as obiter), that makes it hard to articulate differences between each of: (i) a 'standard', a 'duty', and an 'obligation'; (ii) 'implied terms', as distinct from other forms or modes of 'implication'; (iii) 'implication' (in any sense) as distinct from 'construction'; and (iv) 'implied "terms" of universal application', 'universal implications', and other kinds of 'implied terms'. What legal practitioners and courts below the HCA are meant to make of all of this in addressing the law and practice of good faith in commercial agreements is left for another day – an institutional indulgence that the HCA but not the commercial community can afford for much longer.

All Australian courts that are now asked to find implied terms of good faith in commercial agreements must approach that exercise under the framework and test for implied terms as reconfigured by the HCA in the 2014 *Barker* case. The *Barker* case gives the criterion of 'necessity' a broad meaning and also makes it the overall criterion for determining whether or not to accept a new implied term of any kind within that case's postulated framework for implied terms. At face value, the HCA seems to set a high bar for an implied term to meet the requisite overall standard of 'necessity', going to 'the futility of the transaction absent the implication', and with the reasonableness of an implication being insufficient to make it necessary.[157]

Citing the requirement for implying terms in a category of contracts (such as commercial contracts) as a matter of law, the five professors conclude that, '(g)iven the number of contractual disputes resolved without regard to a good faith term, it would seem rather unlikely that the criterion [of necessity] could be satisfied'.[158] Such a result is not a fait accompli. On another view, good faith's pervasive presence throughout contract law – in one form or another, whatever nomenclature is used, and whatever its amenability to exclusion by contrary agreement between the parties – might mean that '"necessity" or "necessary" for business efficacy inheres in fair dealing and vice versa', with the result that a degree of 'circularity … can attend rejection of an implication of good faith because of the need to show necessity for business efficacy'.[159]

Leading contract scholarship in the UK doubts the acceptability of necessity as the operative 'touchstone' for implications of good faith.[160] Whatever the ultimate resolution of how necessity works as a gateway for all implied terms in post-*Barker* jurisprudence, there are still other ways in which good faith might figure in contract law through implication and construction, beyond the sub-domain of implied terms. It also leaves untouched the unanswered question of what good faith means under statutory unconscionability and its relation back to contractual good faith.

The Woolworths Case

> It is the position … that the good faith obligation has been the subject of extensive judicial and academic analysis and that there does remain considerable debate regarding the proper definition and scope of the

[157] The *Barker* case at [28]-[29] and [36], per French CJ and Bell and Keane JJ.
[158] *Five professors* at 229.
[159] *Allsop 2012* at 29.
[160] *Collins 2014* at 315-316.

> obligation. Moreover, it is clear from the authorities that the content of the obligation is context-dependent and moulded according to the relevant circumstances.
>
> --- Justice Croft, in the *Woolworths* case, judgment delivered 28 January 2016[161]

Justice Croft delivered a major recent judgment on contractual good faith in the *Woolworths* case on 28 January 2016. The treatment of good faith in the judgment reveals much about the state of play in Australian jurisprudence on good faith, with lessons for future advice and litigation, whether the decision is ultimately appealed and overturned or not. For a Queensland audience in the jurisdiction of the conference where this paper was presented, the judgment cites a number of Queensland cases on contractual good faith.[162]

The *Woolworths* judgment covers a range of important issues and points on contractual good faith, not all of which are appeal-worthy. In this context, important issues covered include: relevant principles of commercial construction of contracts; the inter-relationship between such principles and statutory unconscionability; the current state of the law on implied terms; a suggested difference between 'inferred' and 'implied' terms (based on the crucial inter-relationship between the two relevant documents); the post-*Barker* position on 'necessity' as a test for implied terms; the scope of 'entire agreement' clauses; the enforceability of provisions that regulate an agreement to negotiate in good faith; the helpfulness of academic and extra-judicial insights in understanding the nuances of this area of law; what the *Paciocco* case offers to the law on good faith; the inter-relationship between notions of reasonableness and notions of good faith in an express composite clause covering both notions; how good faith regulates reference to relevant and irrelevant considerations when negotiating in good faith; how good faith conditions negotiations by reference to proper contractual purposes; and what an obligation to negotiate in good faith might require by way of disclosure of information to another party.

At its simplest level, the *Woolworths* case offers a stark choice of characterisation in its outcome. As with many cases, the ultimate choice of characterisation is a question of judgment and unlikely to be capable of resolution wholly from within the body of contract law purely as a matter of legal doctrine, even allowing for the choice-making opportunities that a doctrinal approach offers to judges when interpreting, developing, or applying the law. Is it a case where the parties are inevitably committed to fund a mutual development project, subject only to negotiation in good faith about its final cost or, alternatively, is it a case where commitment to the project and its funding remains contingent upon reaching agreement reasonably and in good faith, but allowing for the possible contractual outcome that it might not proceed?

The agreement for lease contained a number of provisions that explicitly required the parties to act 'reasonably and in good faith' concerning the crucial costs estimate. One important question concerned whether and the extent to which the ordinary norms of commercial construction conditioned these

[161] The *Woolworths* case at [57].
[162] Eg *Memery v Trilogy Funds Management Ltd* [2012] QCA 160; *Elderslie Property Investments No 2 Pty Ltd v Dunn* [2008] QCA 158; and *AMCI (IO) Pty Ltd v Aquila Steel Pty Ltd* [2010] 2 Qd R 101.

provisions in the agreement for lease by reference to an earlier letter of offer, particularly its requirements for a design brief for a new store site.

Here, the inter-relationship between two relevant documents – a letter of offer and an agreement for lease – is critical to the ultimate question of characterisation, especially given the significance that Justice Croft continually places in his judgment upon particular parts of the letter of offer and their transposition to (and regulation of) matters under the agreement for lease. On this case-turning issue, Justice Croft comes down on the side of characterising the contractual context as 'a commitment to act reasonably and in good faith in an attempt to resolve differences in relation to a cost estimate', as distinct from merely a commitment to negotiate 'free from any constraints' as to the point or ultimate outcome of the negotiation.[163] In the light of that characterisation, Justice Croft goes on to conclude that the negotiations about the cost estimate breached the relevant standards of good faith and reasonableness.

Proposition 5: Consequences for Legal Practitioners

The Commercial and Practical Contexts

What are the key transactional dimensions of good faith in commercial agreements? At the 'front end' of commercial transactions, legal practitioners characteristically focus upon such matters as the client's options for negotiation stances and drafting approaches, advice on the contents and limits of agreements, advance guidance on contractual risk and performance, and assessment of related legal liabilities and obligations in addition to what is covered by relevant contracts. At the 'back end' of commercial transactions, legal practitioners characteristically focus upon giving counsel on legal liability and obligations arising from contractual performance and other conduct surrounding contracts, assistance in resolving contractual disputes and lawfully terminating contracts, and help with pleadings, formal submissions, and settlements arising from litigation or other forms of dispute resolution arising from contracts.

Commercial lawyers and litigators want their clients to avoid becoming the next test case for the issues that occupy much academic and judicial commentary on this topic. What commercial parties seek to avoid is uncertainty or risk that cannot be priced or otherwise factored into contractual negotiations and drafting measures. This legitimately includes minimising the potential time, cost, and prospect of other contracting parties exerting leverage in the event of contractual disputes and relationship breakdowns by raising issues that cannot easily be dismissed as being factually or legally precluded by something clearly written in the parties' agreement. The current predicament confronting commercial parties is a widespread perception that there is too much uncertainty about when and how good faith will be judicially implied and with what range of elements, compounded by a lack of clarity about how far contractual parties can go in dealing with implications of good faith as a matter of private agreement.

[163] The *Woolworths* case at [82].

Accordingly, business and governmental parties are cautious about the potential importation into their commercial dealings of broader standards and value-judgments of fairness, reasonableness, and consideration of others' interests than what they are prepared to accept as common industry expectations, crystallise in their formal agreement, obey as legislatively imposed standards of conduct, and tolerate as a necessary part of commercial construction according to established legal principles of contract and equity. At a broader conceptual level, this common client-focused stance reflects a jurisprudential stance by commercial parties on 'one of the perennial points of debate about good faith – is it a post hoc imposition of some generalised sense of fairness and reasonableness by judges or does the concept have a clear meaning within the context of the particular deal struck by the parties?'[164]

The advocacy of such views is often contingent as much upon context, circumstances, and tactical interests as it is upon jurisprudential positions. Even well-resourced 'commercial leviathans' with detailed transaction documents drafted by law firms will argue for implied terms of good faith when it suits them,[165] notwithstanding high-level judicial suggestions that implied terms jurisprudence has limited use in such contexts.[166] In addition, some commercial parties use their bargaining leverage to create less than a level playing field between the parties on express and implied terms of good faith and reasonableness.

None of contractual drafting, legal advice, litigation, and other dispute resolution in commercial practice can proceed with a view to good faith under the general law of contract alone. Lawyers who advise or litigate on good faith in commercial contexts and who do not consider the potential relevance of both good faith under contract law and good faith under statutory unconscionability are potentially negligent. This risk is just as palpable as the risk undertaken by any lawyer who now advises clients on good faith issues under franchising contracts simply by reference to the general law of contract (including judge-made law on franchising contracts), without also factoring into their advice the implications of good faith's treatment under the *Franchising Code of Conduct*.

Tactical Options

Accordingly, a nuanced understanding of the ongoing academic and judicial debates over implication and construction of good faith in contract offers opportunities and advantages for lawyers in negotiating or arguing with opposing lawyers. If the other side demands that an express term of good faith is included in the agreement, and your client's interests are against its inclusion, this can be resisted on the basis that it is unnecessary to include an express term of good faith because good faith is implicit in contract law already, in ways that are not limited to express or implied terms. Conversely, if the other side insists on this inclusion and your client is happy ultimately to entertain it, you can argue that an express term of good faith should only be included if its meaning and scope is defined in the contract,

[164] H Hunter, 'Good Faith and the Construction of Terms in Commercial Contracts: The American Perspective' (2009) 25 *Journal of Contract Law* 39 at 39.
[165] Eg *Overlook v Foxtel* [2002] NSWSC 17; *Telstra Corporation Ltd v Optus Networks Pty Ltd* [2002] FCAFC 296; the *Esso* case; and *Bell Group Ltd (In Liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239 (on appeal *Westpac Banking Corporation v Bell Group (in Liq) [No 3]* [2012] WASCA 157 and special leave granted to appeal to the HCA in *Westpac Banking Corporation v Bell Group Ltd* [2013] HCATrans 49).
[166] The *Esso* case at [4] per Warren CJ.

because of the demonstrated tendency of courts to read more into good faith than is conventionally needed.

Similarly, suppose that the other side is in a stronger bargaining position or otherwise presents your client with a standard agreement with an exclusion clause, on the supposition that it precludes all implied terms including good faith. Your client can always agree to it and still argue down the track that even the best exclusion clauses usually only preclude implied terms, but not necessarily other ways in which good faith arises in contract as a matter of construction, and also have little or no effect in protecting the stronger party from the consequences of their own conduct, if that conduct amounts to a breach of good faith under statutory unconscionability.

Even if reasonableness is implicitly included as part of an obligation of good faith, it is still open to argue in the right context that it is confined to guarding against irrationality in the context of exercising contractual powers and discretions with implicit good faith, or otherwise stops short of an imposition of external or market standards beyond those set by the parties' agreement. In other words, from a tactical and pleading perspective, the loose and open-ended way in which some courts have combined obligations of good faith and reasonableness, and the different possible meanings of reasonableness in its own right under different parts of contract law, can be exploited according to circumstance and context to argue for a more limited or expansive interpretation, depending upon the client-related need.

Moreover, the qualifying nature of a requirement of reasonableness in whatever form can cut both ways. For example, where a party is required to act reasonably towards another contractual party, in the sense of taking reasonable steps when exercising contractual rights to preserve another party's interests or opportunities under the contract, the point can still be reached where reasons of cost, delay, risk, or inconvenience take the matter beyond what can reasonably be required of one party towards another.[167] In other words, if the suggested action is an unreasonable one to expect under the contract, reasonableness operates as a limit as well as a requirement.

Concluding Remarks

The Australian law on good faith in commercial agreements remains conceptually and doctrinally messy but still legally navigable and commercially workable. Whatever its faults, inconsistencies, and unresolved issues, this body of judge-developed law has more nuance and clarity now than a decade ago. Commercial law and practice is steeped in good faith, and the concept is here to stay, in one form or another, whatever the HCA ultimately does to good faith as an implied term.

The law on good faith in commercial agreements has entered another and new phase of development on multiple fronts. For all courtroom participants and observers, much can be gained in this continually developing field of law from scholarly and extra-judicial analyses, cross-jurisdictional precedent within Australia, transnational developments, and relatively recent supervening legislative standards.

[167] *Allsop 2012* at 16. This dual operation of reasonableness potentially applies to critique of the *Woolworths* case.

In practice, the acknowledged variety of routes by which good faith arises in commercial agreements and their interpretation requires a sophisticated understanding and response in terms of negotiating approaches and drafting techniques. The cases and analysis in this paper highlight how difficult it is to draft around good faith, and how impossible it is to achieve a legally complete and foolproof drafting solution in any case.

For law firms and other legal organisations, this is a topic that requires periodic review of standard internal guidance notes for precedents, standard opinion and transactional precedents, practice group and whole-of-firm legal training, and working assumptions from partner to graduate lawyer about the treatment of good faith in commercial law and practice. For everyone in court from instructing solicitor and barrister to associate and judge, this is a fluid area of law that requires attention to Australia-wide precedent on judge-made and statutory law concerning good faith, transnational judicial and regulatory developments, and scholarly and extra-judicial analysis from leading figures in the common law world. It also requires attention increasingly in legal practice to considerations of legal doctrine, legal technique, legal precedent, and legal strategy that are duly sensitive to considerations of legal theory, legal politics, legal policy, and legal strategy.

In conclusion, the range of issues that need resolving by courts including the HCA from here include the following ten issues:

(1) the completeness and application of the post-*Barker* framework on implied terms for all of the ways in which good faith is relevant in commercial agreements and their interpretation;
(2) the application of the overarching test of necessity to implied terms of good faith;
(3) the precedential treatment under the *Farah* case's directives of existing intermediate appellate court decisions on various issues concerning contractual good faith and statutory unconscionability;
(4) the normalising of good faith as a fundamental underlying norm of contract law, in the sense articulated by Chief Justice Allsop in the *Paciocco* appeal and extra-judicially;
(5) the inter-relationship between the elements of contractual good faith and the elements of good faith under statutory unconscionability, and the analogical relevance of legislative standards of good faith for future development of contractual good faith, not least from a transactional perspective;
(6) the effectiveness of a variety of boilerplate clauses in addressing good faith, including 'sole discretion', 'entire agreement', 'negation of implied terms', and other kinds of exclusion or limiting clauses;
(7) the future status and meaning of reasonableness as an aspect of express or implied terms of good faith;
(8) the applicability of notions of reasonableness from public law to any notion of reasonableness under contractual good faith;
(9) the conditions under which obligations to negotiate in good faith are sufficiently certain, enforceable, and workable, especially in the context of dispute resolution; and
(10) how the concepts and arguments of non-Australian courts and legal academics as addressed in Australian and foreign judgments on contractual good faith bear upon all of these issues.

Cases

AMCI (IO) Pty Ltd v Aquila Steel Pty Ltd [2010] 2 Qd R 101
Acer Investment Management v Mansion Group [2014] EWHC 3011 (QB)
Alcatel Australia Ltd v Scarcella & Ors (1998) 44 NSWLR 349
Alstom Ltd v Yokogawa Australia Pty Ltd (No 7) [2012] SASC 49
Androvitsaneas v Members First Broker Network [2013] VSCA 212
Angas Law Services Pty Ltd (in liquidation) v Carabelas [2005] HCA 23
Associated Provincial Pictures Houses Ltd v Wednesbury Corporation [1947] EWCA Civ 1
Attorney General of Belize & Ors v Belize Telecom Ltd & Anor (Belize) [2009] UKPC 10 ('the *Belize* case')
Australian Securities Commission v Marlborough Gold Mines [1993] HCA 15
Baldwin v Icon Energy Ltd [2015] QSC 12
Bartlett v ANZ Banking Group Limited [2014] NSWSC 1662
Bell Group Ltd (In Liq) v Westpac Banking Corporation (No 9) [2008] WASC 239
Bhasin v Hrynew 2014 SCC 71 ('the *Bhasin* case')
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266
Braganza v BP Shipping Ltd [2015] UKSC 17
Bristol Groundschool v Intelligent Data Capture [2014] EWHC 2145 (Ch)
Burger King Corporation v Hungry Jack's (2001) 69 NSWLR 558
Campbell v Backoffice Investments Pty Ltd [2009] HCA 25
Commonwealth Bank of Australia v Barker [2014] HCA 32 ('the *Barker* case')
Con Kallergis Pty Ltd v Calshonie Pty Ltd (1998) 14 BCL 201
CGU Workers Compensation (NSW) Limited (ACN 003 181 002) v Garcia [2007] NSWCA 193 ('the *CGU* case')
Elderslie Property Investments No 2 Pty Ltd v Dunn [2008] QCA 158
Emirates Trading Agency v Prime Mineral Exports Private Ltd [2014] EWHC (Comm)
Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL [2005] VSCA 228 ('the *Esso* case')
Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22 ('the *Farah* case')
Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd [1999] FCA 903
GEC Marconi Systems Pty Limited v BHP Information Technology Pty Limited [2003] FCA 50 ('the *GEC Marconi* case')
Gramotney v Queensland University of Technology [2015] QCA 127
Greenclose Ltd v National Westminster Bank [2014] EWHC 1156 (Ch)
Hamsard 3147 Ltd v Boots UK Ltd [2013] EWHC 3251 (Pat)
HSBC Institutional Trust Services (Singapore) v Toshin Development Singapore [2012] SGCA 48
Hughes Aircraft Systems International v Airservices Australia [1997] FCA 558
Ingot Capital Investments v Macquarie Equity Capital Markets [No 6] [2007] NSWSC 124
Memery v Trilogy Funds Management Ltd [2012] QCA 160
Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service [2010] NSWCA 268 ('the *Macquarie International* case')
Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest) [2013] EWCA Civ 200 ('the *Mid Essex Hospital* case')
Mineralogy Pty Ltd v Sino Iron Pty Ltd [2015] FCA 825 ('the *Mineralogy* case')

MSC Mediterranean Shipping Co v Cottonex Anstalt [2015] EWHC 283 (Comm)
Myers v Kestrel Acquisitions [2015] EWHC 916 (Ch)
Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd [2010] QCA 119
North East Solution Pty Ltd v Masters Home Improvement Australia Pty Ltd and Woolworths [2016] VSC 1 ('the *Woolworths* case')
Overlook v Foxtel [2002] NSWSC 17
Paciocco v Australian and New Zealand Banking Group Limited [2015] FCAFC 50 ('the *Paciocco* case')
Park v Brothers [2005] HCA 73
PGA v The Queen [2012] HCA 21
Portsmouth City Council v Ensign Highways Ltd [2015] EWHC 1969 (TCC)
PTE Ltd v International Trade Corporation Ltd [2013] EWHC 11 (QB)
Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234 ('the *Renard* case')
Socimer International Bank Ltd v Standard Bank Ltd [2008] EWCA Civ 116 ('the *Socimer* case')
Specialist Diagnostic Services Pty Ltd v Healthscope Ltd [2012] VSCA 175
Spies v The Queen [2000] HCA 43
Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd [2010] WASCA 222 ('the *Strzelecki Holdings* case')
Tote Tasmania v Garrott [2008] TASSC 86
TSG Building Services v South Anglia Housing [2013] EWHC 1151 (TCC)
United Group Rail Services v Rail Corporation NSW [2009] NSWCA 177 ('the *United Group Rail* case')
Vakras v Cripps [2015] VSCA 193
Vodafone Pacific Ltd & Ors v Mobile Innovations Ltd [2004] NSWCA 15 ('the *Vodafone* case')
Walford v Miles [1992] 2 AC 128
Yam Seng Pte Ltd v International Trade Corporation Ltd [2013] EWHC 111 ('the *Yam Seng* case')

References

Allsop, James, 'Conscience, Fair-dealing and Commerce – Parliaments and the Courts' (Paper presented at *Finn's Law: an Australian justice – A conference in honour of Professor Paul Finn*, Canberra, 25 September 2015) ('*Allsop 2015*')

Allsop, James, 'Good Faith and Australian Contract Law: A Practical Issue and a Question of Theory and Principle' (2011) 85 *Australian Law Journal* 341 ('*Allsop 2011*')

Allsop, James, 'Some Reflections on Good Faith in Contract Law' (Paper presented to the Oxford University Obligations Group, Oxford University, February 2012) ('*Allsop 2012*')

Carlin, Tyrone, 'Good Faith in Contractual Performance' (2005) 4(2) *Journal of Law and Financial Management* 18

Carlin, Tyrone, 'The Rise (and Fall?) of Implied Duties of Good Faith in Contractual Performance in Australia' (2002) 25 *University of New South Wales Law Journal* 99

Carter, John, 'Good Faith in Contract: Why Australian Law is Incoherent' (Paper presented at the Bar Association of Queensland 2014 Annual Conference, 8 March 2014)

Carter, John, Peden, Elisabeth and GJ Tolhurst, *Contract Law in Australia* (LexisNexis Butterworths, 2007)

Carter, John and Elisabeth Peden, 'Good Faith in Australian Contract Law' (2003) 19 *Journal of Contract Law* 155 ('*Carter and Peden 2003*')

Carter, John, Wayne Courtney, Elisabeth Peden, Joellen Riley and GJ Tolhurst, 'Terms Implied in Law: "Trust and Confidence" in the High Court of Australia' (2015) 32 *Journal of Contract Law* 203 ('*five professors*')

Collins, Hugh, 'Implied Terms: The Foundation in Good Faith and Fair Dealing' (2014) 67 *Current Legal Problems* 297 ('*Collins 2014*')

Commonwealth Attorney-General's Department, *Review of Australian Contract Law* (2012)

De Jersey, Paul, 'Good Faith in Contracts in Financial Services' (Paper presented at the 26th Annual Banking and Financial Services Law and Practice Conference, Gold Coast, 31 July 2009)

Dixon, Bill, 'Can the Common Law Obligation of Good Faith Be Contractually Excluded?' (2007) 35 *Australian Business Law Review* 110 ('*Dixon 2007*')

Finn, Paul, 'Common Law Divergencies' (2013) 37(2) *Melbourne University Law Review* 509

Finn, Paul, 'Internationalisation or Isolation: The Australian Cul de Sac? The Case of Contract Law' (Address to the 20th Anniversary Symposium, *The Internationalisation of Law: Legislating, Decision-Making, Practice and Education*, Bond University, 2009)

Gleeson, Murray, 'Individualised Justice – The Holy Grail' (1995) 69 *Australian Law Journal* 421 ('*Gleeson 1995*')

Grover, W, 'A Solicitor Looks at Good Faith in Commercial Transactions' in *Commercial Law: Recent Developments and Emerging Trends (Special Lectures of the Law Society of Upper Canada)* (Law Society of Upper Canada, 1985)

Horrigan, Bryan, 'New Directions in How Legislators, Courts and Legal Practitioners Approach Unconscionable Conduct and Good Faith' in John McKenna and Helen Jeffcoat (eds), *Queensland Legal Yearbook 2012* (Supreme Court Library Queensland, 2012).

Hunter, H, 'Good Faith and the Construction of Terms in Commercial Contracts: The American Perspective' (2009) 25 *Journal of Contract Law* 39

Kuehne, Geoffrey, 'Implied Obligations of Good Faith and Reasonableness in the Performance of Contracts: Old Wine in New Bottles?' (2006) 33 *University of Western Australia Law Review* 63

Mason, Sir Anthony, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 *The Law Quarterly Review* 66

O'Byrne, Shannon, 'Good Faith in Contractual Performance: Recent Developments' (1995) 74 *Canadian Bar Review* 70 ('*O'Byrne 1995*')

Paterson, Jeannie, 'Good Faith – Drafting, Performing and Enforcing Commercial Contracts' (Paper presented at the Supreme Court of Victoria *Commercial Court Seminar*, Melbourne, 2012)

Paterson, Jeannie, 'Limits on a Lender's Right to Repayment on Demand: Construction, Implication and Good Faith?' (1998) 26 *Australian Business Law Review* 258

Peden, Elisabeth, *Good Faith in the Performance of Contracts* (LexisNexis Butterworths, 2003)

Peden, Elisabeth, '"Implicit Good Faith" – or Do We Still Need an Implied Term of Good Faith?' (2009) 25 *Journal of Contract Law* 50 ('*Peden 2009*')

Peden, Elisabeth, 'When Common Law Trumps Equity: the Rise of Good Faith and Reasonableness and the Demise of Unconscionability' (2005) 21 *Journal of Contract Law* 226

Peden, Elisabeth and Carter, John, 'Entire Agreement – and Similar – Clauses' (2006) 22 *Journal of Contract Law* 1

Seddon, Nicholas and Manfred Paul Ellinghaus, *Cheshire & Fifoot: Law of Contract* (LexisNexis, 9th Australian ed, 2008) ('*Seddon and Ellinghaus*')

Supreme Court of NSW, Practice Note No SC CA 1 (27 March 2009)

Warren, Marilyn, 'Good Faith: Where Are We At?' (2010) 34(1) *Melbourne University Law Review* 344 ('*Warren 2010*')