

Finding Unexpressed Good Faith in a Commercial Contract in Australia

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Good faith is one of the doctrines in contract law. The *Renard Constructions (ME) Pty Ltd v Minister for Public Works* ('*Renard Constructions*') case in 1992 is acknowledged as the watershed of the good faith doctrine in Australia. However, it is well known that good faith's existence and position in Australian contract law is uncertain. The source of this uncertainty is because even though a lot of courts support the existence of good faith in commercial contracts, the High Court of Australia is still reluctant to elucidate this issue. Moreover, the good faith obligation is used on many occasions, which leads to the difficulty to formulate such a duty. Therefore, this paper will discuss how Australian courts do find the duty of good faith, especially when such duty is not expressly stipulated in the contract. In answering this issue, this paper has used a case-based approach. The researchers found that the courts incorporate good faith through implication in fact, implication in law, and in construction methods. However, each court has its own perspective in using these methods to find good faith in a contract.

Key words: *Good faith doctrine, Commercial contract, Contract law in Australia*

INTRODUCTION

The duty of good faith is an important concept in contract law (Naris & Thomas, 2015, p. 62; Waddams, 1995, p. 55). However, good faith is used in many contexts and situations (Waddams, 1995, p. 56; Warren, 2010, p. 348), making it difficult to formulate (Robertson, 2012, p. 10). There are many views on the concept of good faith, such as whether it means honesty or if it embraces the concept of reasonableness (Gray, 2015, p. 365). Nonetheless, it is suggested that any mature contract law system must have the objective 'to promote the observance of good faith and fair dealing in the conclusion and performance of contracts' (Steyn, 1991, p. 131). This proposition, given by Steyn, is supported by Carter and Peden, who argue that every aspect of contract law should be aligned with good faith (Carter & Peden, 2003, p. 158). In Australia, it is suggested that the possibility of recognising such duty has been increasing (J. M. Paterson, 2001, p. 270).

In general, there are two ways to incorporate the term good faith into a contract, either by an expressed term or unexpressed term (Peden, 2001, p. 223). Incorporating good faith through an expressed term can be done by expressly stipulating such duty, or else incorporated intentionally in the contract by the parties (Peden, 2001, p. 223). However, when such duty is not expressly stipulated in the contract by the parties, the court may find and enforce the good faith duty through three legal mechanisms (Hoffman & Dias, 2012, p. 24; Warren, 2010, p. 357). These legal mechanisms consist of finding good faith as ‘a term implied by law, a term implied by fact, or as a rule of construction of the express terms of the contract’ (Hoffman & Dias, 2012, p. 24; Warren, 2010, p. 357). This paper is primarily concerned with incorporating good faith through an unexpressed term.

Although courts have recognised a duty of good faith in situations where there is no explicit reference in the contract, a great deal of academics and practitioners argue that the position of good faith in Australian contract law remains unsettled and uncertain (Dixon, 2011, pp. 235–237; Fredericks, 2018, p. 19; Gray, 2015, p. 358; Hoffman & Dias, 2012, p. 23; Naris & Thomas, 2015, p. 62; Viven-Wilksch, 2019, p. 276). It has been almost thirty years since the decision for the *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (‘*Renard Constructions*’) case in 1992, which serves as a fundamental turning point of good faith obligations in contracts in Australia (Fredericks, 2018, p. 20; Hoffman & Dias, 2012, p. 23). However, the High Court still seems reluctant to elaborate on the concept of good faith, its precise meaning, or its position in Australian contract law (Gray, 2015, p. 358; Warren, 2010, p. 345). There are several cases wherein the High Court could have given definitive authorities on good faith, but the High Court has declined to do so (Gray, 2015, p. 358). On the other hand, the High Court ‘disfavoured lower courts establishing new principles or re-interpreting old ones’ in the law of obligations (*Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, 2007, p. 149; Gray, 2015, pp. 358–359). The impact of such behaviour by the High Court leads to the position of good faith in Australian contract law being uncertain.

Nonetheless, it is claimed that Australian law is concerned with fairness and justice (Peden, 2002, p. 242), wherein fairness is suggested as an aspect of good faith (Baron, 2002, pp. 54–55). Although good faith includes an element of fairness, it is argued that exploitation and injustice could be prevented by the current common law doctrines of equity in contract making, causing good faith to be unnecessary (Capuano, 2005, p. 43). Indeed, there are already several legal principles in Australian contract law which aim to promote justice and fairness (Peden, 2002, p. 242). However, Mason suggests that recognising good faith ‘would bring greater coherence and unity to the varied array of principles which are presently available in the area of contract performance’ (Mason, 2000, p. 94). It can be seen that Mason perceived good faith as a necessity in Australian contract law. Therefore, whether good faith is necessary or not in Australian contract law is unclear.

It is said that one of the confusions of good faith in Australia is the uncertainty of how the duty might arise (Warren, 2010, p. 348). Moreover, it is argued that the existence of good faith in a contract is often perceived to undermine commercial certainty (Davies, 2019, p. 6), particularly when good faith is an unexpressed term in a contract. Should a contract fail to expressly stipulate the said duty, leaving the court to find such terms, it could undermine the certainty of the contract. Therefore, this paper will consider how Australian courts find and enforce a duty of good faith on a commercial party who has not expressly agreed to such a duty. In answering this question, this paper shall examine jurisprudential perspectives on good faith. This paper finds that Australian courts have a different perspective on finding the duty of good faith when it is not expressly stipulated in the contract. Accordingly, before assessing this question further, it is fundamental to understand the good faith status quo in Australia.

GOOD FAITH DOCTRINE IN AUSTRALIA

It is established in the previous section that the position of good faith in Australian contract law is uncertain. Nonetheless, the existence of good faith is acknowledged, until the legislature or the High Court says otherwise (McDougall, 2006, pp. 29, 36). Moreover, it is held that while good faith 'has not been the subject of consideration by the High Court, neither has it been condemned' (*Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)*, 2012, p. [594]). Therefore, it is intriguing to see how the Australian trial and appellate courts perceive the existence of the duty of good faith.

In New South Wales, it is suggested that there is a clear contractual duty of good faith (Fredericks, 2018, p. 25; McDougall, 2006, p. 29). *Renard Constructions*, as stated previously, is acknowledged as the watershed of good faith doctrine consideration in Australia (Fredericks, 2018, p. 20; Hoffman & Dias, 2012, p. 23), particularly in New South Wales. One year after the New South Wales Court of Appeal decision in *Renard Constructions*, the court affirmed this decision in *Hughes Bros Pty Ltd v Trustees of Roman Catholic Church Archdiocese of Sydney ('Hughes Bros')*. Moreover, following *Renard Constructions* and *Hughes Bros*, Sheller JA's decision in *Alcatel Australia Ltd v Scarcella ('Alcatel')* concluded that:

The decisions in *Renard Constructions* and *Hughes Bros* mean that in New South Wales a duty of good faith, both in performing obligations and exercising rights, may by implication be imposed upon parties as part of a contract. There is no reason why such a duty should not be implied as part of this lease (*Alcatel Australia Ltd v Scarcella*, 1998, p. 369).

In respect to these authorities, it can be concluded that the New South Wales court supports the notion of good faith in a contract. However, the remaining unsettled issue in New South Wales is the limit of such duty (McDougall, 2006, p. 29), in other words, the question about what such duty requires.

In other jurisdictions such as Victoria (e.g., *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL*, 2005, p. [25]), Western Australia (e.g., *Trans Petroleum (Australia) Pty Ltd v White Gum Petroleum Pty Ltd*, 2012, p. [152]), and South Australia (e.g., *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)*, 2012, p. [585]), it seems that the duty of good faith in contracts is also acknowledged. The Federal Court of Australia, too, acknowledged the obligation of good faith. This can be concluded from their decision in several cases that promote such duty, such as *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* ('*GEC Marconi*'), *Hughes Aircraft Systems International v Airservices Australia (No 3)* ('*Hughes Aircraft*'), *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* ('*Pacific Brands Sport*') and *Paciocco v Australia and New Zealand Banking Group Ltd* ('*Paciocco*').

However, the High Court of Australia does not seem to provide any clarity towards the existence, position, or scope of good faith in their cases despite the potential opportunities (Gray, 2015, p. 358). For instance, in 2002 the High Court had the opportunity to elucidate on the uncertainty of good faith in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* ('*Royal Botanic Gardens*'). The majority stated that in addition to the conclusion there were two further matters that should be noted, one of them being:

[the] matter concerns the debate in various Australian authorities concerning the existence and content of an implied obligation or duty of good faith and fair dealing in contractual performance and the exercise of contractual rights and powers ... whilst the issues respecting the existence and scope of a "good faith" doctrine are important, this is an inappropriate occasion to consider them (*Royal Botanic Gardens and Domain Trust v South Sydney City Council*, 2002, p. [40]).

The High Court has indeed acknowledged the existence of uncertainty and confusion in Australia, despite their lack of clarification towards the matter. Similarly, in 2014, through *Commonwealth Bank of Australia v Barker* ('*Barker*'), the High Court was presented with another opportunity to address the matter of good faith, but still refused. Kiefel J in *Barker* referred to *Royal Botanic Gardens* and acknowledged that the dispute on good faith has not been settled (*Commonwealth Bank of Australia v Barker*, 2014, p. [107]). Nonetheless, her Honour argued that in the proceedings, the issue of the obligation of good faith was not raised and thus the court was not obliged to elaborate further on such duty (*Commonwealth Bank of Australia v Barker*, 2014, p. [107]). Consequently, good faith in Australia is still encountered with confusion to this day.

GOOD FAITH: WHAT DOES IT MEAN?

Is there a precise definition of good faith?

It is suggested that there is no precise definition of ‘good faith’ in Australia (Peden, 2003, p. 189). Good faith is used in many contexts, where it has very different meanings in each (Waddams, 1995, p. 56; Warren, 2010, p. 348). Supporting this notion, Robertson suggests that good faith is used in a wide variety of situations, making it complex and difficult to formulate (Robertson, 2012, p. 10). Indeed, there has been a plethora of attempts to define good faith. Warren even claims that ‘since *Renard* ... whole forests have been felled to produce judicial and academic writing on the meaning of good faith in contract law’ (Warren, 2010, p. 345). In respect to this statement, it is not an exaggeration that the questionable definition of good faith is acknowledged as: ‘bedevilled by uncertainty over a long period’ (Gray, 2015, p. 365). Although the definition of good faith is ‘bedevilled by uncertainty’, the High Court of Australia has remained reluctant in giving definitive authority on good faith’s definition as well as its position in Australian contract law (Gray, 2015, p. 358; Piercy, 2017, p. 168; Warren, 2010, p. 345). Mason argued extra-curially that the application of specific good faith duties might advance the interests of justice (Mason, 2000, p. 94).

Nonetheless, we could try to define good faith from cases with an express duty of good faith, such as *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd*. The Memorandum of Understanding in this case contained a clause that the parties will ‘deal with each other in good faith’ (*Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd*, 2010, p. [45]). Pullin JA, in defining the phrase ‘good faith’, made the following conclusion:

The phrase “in good faith” is not yet a term of art because a term of art is a word or phrase used in a precise sense in a particular subject or field. The precise meaning or sense of the word has not yet been worked out. The natural and ordinary meaning of the phrase “good faith” means honesty of purpose (*Macquarie Dictionary*) or honesty of intention in entering in engagements (*Oxford English Dictionary*) (*Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd*, 2010, p. [47]).

It can be established then that Pullin JA defined good faith as honesty. Another case with an expressed term of good faith is *Thompson v Geminder Holdings Pty Ltd* (*Thompson*). The lease contract in *Thompson* contained an express clause of good faith, in which it was defined as acting ‘bona fide in all matters concerning the implementation of this lease’ (*Thompson v Geminder Holdings Pty Ltd*, 2016, p. [365]). However, the court does not discuss further what “bona fide” means or contains. Therefore, currently, it is satisfactory to acknowledge that ‘nothing conclusive can be said about the breadth of good faith’ (Niemann, 2002, p. 110). Accordingly, it is beneficial to discuss pursuant to the contents of the duty of good faith.

What does a duty of good faith contain?

The High Court's reluctance to give a definitive authority on good faith has had an impact on trial and appeal courts, that is, the courts attempting to define good faith. The attempts in defining good faith in Australia have brought a diverse view point towards the scope of good faith along with its definition: whether good faith solely means honesty (narrow sense) or if it embraces the concept of reasonableness (broad sense) (Gray, 2015, p. 365). It is suggested that 'honesty and fidelity to the parties' bargain' are the key aspects of good faith (Davies, 2019, p. 11). There is some case law that supports this notion that good faith should be equated to honesty (Gray, 2015, p. 368), an example being the New South Wales Court of Appeal decision in *United Group Rail Services Ltd v Rail Corp New South Wales* ('*United Group Case*'). In the *United Group Case*, there was a contract containing a clause for the parties to negotiate in good faith vis-à-vis dispute resolution. The Court explained good faith as follows:

What the phrase "good faith" signifies in any particular context and contract will depend on that context and that contract ... that accepted, honest business people who approach a dispute about an existing contract will often be able to settle it. This requires an honest and genuine attempt to resolve differences by discussion and, if thought to be reasonable and appropriate, by compromise, in the context of showing a faithfulness and fidelity to the existing bargain (*United Group Rail Services Ltd v Rail Corp New South Wales*, 2009, p. [70]).

From the *United Group Case* paragraph above, it can be established that the court referred to good faith as honesty and fidelity to the bargain. This is similar to *Thompson*, which equated good faith with honesty. Moreover, it is also suggested that legislation often refers to good faith as honesty (Peden, 2002, pp. 238–239; Sale of Goods Act, 1923). However, it is also argued that there are some authorities that consider good faith to embrace reasonableness (Gray, 2015, p. 366), such as *Renard Constructions, Burger King Corp v Hungry Jack's Pty Ltd* ('*Burger King*') and *Esso*.

In *Renard Constructions*, there was a certain building contract that contained a clause that conferred power to the principal to take over the whole or any part of the work or to cancel the contract if the contractor failed to comply with any guidance given by the principal. The court in *Renard Constructions* held that this power needs to be exercised reasonably (Mason, 2000, p. 2), where Priestley JA claimed that 'the kind of reasonableness I have been discussing seems to me to have much in common with the notions of good faith' (*Renard Constructions (ME) Pty Ltd v Minister for Public Works*, 1992, p. 263).

In *Burger King*, the court uses the term 'implied terms of reasonableness and good faith' (*Burger King Corp v Hungry Jack's Pty Ltd*, 2001, p. [186]). However, the court did not explain any further whether there is more than one implied term (Carter & Peden, 2003, pp. 167–168). It is suggested that the Court does not distinguish reasonableness and good faith (*Burger King*

Corp v Hungry Jack's Pty Ltd, 2001, p. [169]). Thus, it could be perceived that the Court is of the view that the duty of good faith equates with an implied duty of reasonableness, but Peden argues that equating the two obligations is misconceived (Peden, 2002, p. 242). Therefore, it is hard to conclude as to whether 'reasonableness and good faith' is one or two implied terms (Carter & Peden, 2003, p. 168).

Peden suggests that in Australian cases, reasonableness is regarded as the main component of good faith (Peden, 2009, p. 59). Mason also argues that good faith embodies both honesty and reasonableness. He then determines good faith in the following fashion:

1. an obligation on the parties to cooperate in achieving the contractual objects (loyalty to the promise itself);
2. compliance with honest standards of conduct; and
3. compliance with standards of conduct which are reasonable having regard to the interests of the parties (Mason, 2000, p. 69).

The above description of good faith given by Mason is claimed by Peden to be approved by some courts (Peden, 2003, p. 189), although Fredericks says otherwise, that Mason's description was not adopted by courts (Fredericks, 2018, p. 20). It should be noted that Fredericks's article is more recent than Peden's. Therefore, it could be perceived that there is a shift of perspective on the definition of good faith adopted by the courts.

Nonetheless, akin to Mason's description of good faith, the Federal Court of Australia describes good faith in *Paciocco* by referring to authorities such as *Renard Constructions*, *Burger King*, *United Group Case*. Good faith is described as:

an obligation to act honestly and with a fidelity to the bargain; 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 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 (*Paciocco v Australia and New Zealand Banking Group Ltd*, 2015, p. 288).

This definition is also used by several courts, such as in *Knights Quest Pty Ltd v Daiwa Can Company*, *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* and *Sentinel Robina Office Pty Ltd v Clarence Property Corporation Ltd*.

All in all, it should be acknowledged that in the present moment, there is no precise definition of good faith, nor its scope. However, it can be established that good faith somewhat encompasses either honesty or reasonableness. It can also be identified that good faith is usually associated with notions of fairness, fair conduct and decency (Baron, 2002, pp. 54–55).

Nonetheless, it is beyond the scope of this paper to give a precise definition of good faith or to further discuss its relation with honesty and reasonableness. The guidance of the High Court, along with their elucidation, is hoped for and is to be expected in addressing the said matter. Until then, ‘the uncertainty generated around the utilisation of good faith will remain’ (Hill, 2013, p. 1). It is then interesting to discuss how in such uncertain circumstances the courts would find good faith when the parties did not expressly agree to such duty.

FINDING UNEXPRESSED GOOD FAITH IN AUSTRALIA

In Australia, as stated in the previous section, it is suggested that good faith could be incorporated into a contract either by an express term or an unexpressed term (Peden, 2001, p. 223). It is argued that it is better for the parties to incorporate expressly good faith terms into a contract, one of the benefits is the flexibility of determining the scope of the party’s duty (McDougall, 2006, p. 33). However, if there is an express term of good faith in a contract but the duty is not clearly expressed by the parties, the court may construe that provision in accordance with the related authorities (Naris & Thomas, 2015, p. 63). Nonetheless, if such duty is expressly stipulated in a contract, the drawback would be the difficulties for the parties to imply additional obligation (McDougall, 2006, p. 33). Therefore, it is understandable if some parties choose not to expressly stipulate a duty of good faith in their contract.

It is established in the previous section that there are three sources for incorporating good faith when it is not expressly stipulated in a contract, namely through implication by fact, implication by law, or as a rule of contraction (Hoffman & Dias, 2012, p. 24; Warren, 2010, p. 357). A term implied in fact (or implication ad hoc) only makes good faith applicable to a particular contract in dispute to alter the allocation of risks (Collins, 2014, p. 302). Conversely, a term implied by law applies to a certain category of contract whenever it is used (Collins, 2014, p. 302; Viven-Wilksch, 2019, p. 277), rather than only to a particular contract. Lastly, the rule of construction takes good faith as a principle that applies generally to all contracts (Peden, 2001, p. 230), thus making this rule the broadest rule among the others. It is suggested that good faith does not exist independently from these legal mechanisms (Warren, 2010, p. 349), and the distinction of the three is not always easy to identify (McDougall, 2006, p. 30).

Good Faith Implied in Fact

A term implied in fact indicates the presumed unexpressed intentions of the parties (Dixon, 2011, p. 233). However, for a term to be implied in fact, it needs to pass the *BP test* (Dixon, 2011, p. 235; Peden, 2001, pp. 224, 230). This test for the implication in fact originates from *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*, wherein the Privy Council sets out 5 cumulative criteria, which may overlap, as follows:

- (1) it must be reasonable and equitable;
- (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
- (3) it must be so obvious that 'it goes without saying';
- (4) it must be capable of clear expression; and
- (5) it must not contradict any express term of the contract (*BP Refinery (Westernport) Pty Ltd v Shire of Hastings*, 1977, p. 283)

One of the authorities supporting good faith to be implied in fact is the case of *Esso*. The *Esso* case involves the particular joint venture between Esso, Southern Pacific Petroleum ('SPP'), and Central Pacific Minerals ('CPM') in Queensland to produce shale oil. Seventeen years later, SPP merged with CPM, where CPM became a SPP subsidiary. However, a year later, SPP experienced financial difficulty and an administrator was appointed to the company, wherein the interest of SPP and CPM in the joint venture with Esso was not secured by charges. Afterwards, two draft deeds of the company arrangement, which provided for the disposition of SPP and CPM interests in the joint venture, were approved by the creditors. Esso argued that SPP 'was in breach of an implied obligation of good faith as a consequence of the provision in the draft deed of company arrangement that SPP would be wound up' (*Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL*, 2005, p. [19]). Buchanan JA, in answering this contention, suggested that in order to protect a vulnerable party it was appropriate to import good faith, which '[i]mplication in this fashion is perhaps ad hoc implication meeting the tests laid down in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*, rather than implication as a matter of law creating a legal incident of contracts of a certain type' (*Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL*, 2005, p. [25]).

It seems that McDougall is in similar views with Buchanan JA. He suggested that a duty of good faith should take account of the parties' intentions (McDougall, 2006, p. 36), thus it can be perceived that he is also in the view that good faith should be implied in fact. This can be seen from his following statement, which argues that good faith: 'is not, however (at least in New South Wales), a duty that is imposed in all contracts, or in all contracts of a particular class; far less is it a duty that is imposed regardless of the intention (objective, not subjective) of the parties' (McDougall, 2006, p. 36).

Good Faith Implied in Law

It is well known that a term implied in law is a term that applies to a certain class of contracts (Collins, 2014, p. 302). In the context of commercial contracts, it should be noted that the Court do not establish the commercial contract as a class of contract that has an implied obligation of good faith. For example, Buchanan JA in *Esso* was reluctant to establish commercial contracts as a class of contracts which carries an implied term of good faith (*Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL*, 2005, p. [25]). Giles JA, in *Vodafone Pacific Ltd v*

Mobile Innovations Ltd ('Vodafone'), is of the same notion and said that his Honour did '[n]ot think the law has yet gone so far as to say that commercial contracts are a class of contracts carrying the implied terms as a legal incident, and the width and indeterminacy of the class of contracts would make it a large step' (*Vodafone Pacific Ltd v Mobile Innovations Ltd*, 2004, p. [191]). Supporting this notion, Bergin J in *Maitland Main Collieries Pty Ltd v Xstrata Mt Owen Pty Ltd ('Maitland')* expressly stated that 'commercial contracts are not a class of contracts that have an implied obligation of good faith' (*Maitland Main Collieries Pty Ltd v Xstrata Mt Owen Pty Ltd*, 2006, p. [56]).

Peden suggests that the Court is cautious in implying a new term in law (Peden, 2001, p. 229). The underlying argument is that: 'because legislation covers many important areas and probably partly because courts are wary of creating new obligations that will catch a vast number of contracts' (Peden, 2001, p. 229). Nonetheless, in the present day, this does not seem to be an issue, considering that some courts have already concluded good faith to be a term implied by law. For instance, the Court in *Vodafone*, which referred to *Alcatel* as well as *Burger King* in supporting their proposition (*Vodafone Pacific Ltd v Mobile Innovations Ltd*, 2004, p. [125]). The Court then unanimously agreed that an obligation of good faith may be implied in law as a legal incident of a commercial contract 'in the performance of a contractual obligation or the exercise of a contractual power' (*Vodafone Pacific Ltd v Mobile Innovations Ltd*, 2004, p. [1], [125], [342]). The Court in *Pacific Brands Sport* shares the same idea that good faith should be implied in law rather than an implied term in fact (*Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd*, 2005, p. [64]). Therefore, it can be acknowledged that in the present day, there are a lot of authorities that support good faith to be implied in law.

However, Warren, by referring to the High Court decision in *Breen v Williams* (*Breen v Williams*, 1996), suggests that there is a requirement for a term to be implied in law (*Warren, 2010, p. 351*). The requirement is 'that the new term must be necessary for the reasonable or effective operation of the contract, for the type of contract before the court, taking into account the policy considerations relevant to that type of contract' (*Warren, 2010, p. 351*). Supporting this, Peden argues that 'the test for implication in law of a new term is that the term is necessary for the type of contract' (Peden, 2001, p. 230). It can be seen that this requirement is similar to one criterion in the *BP* test, namely the term 'must be necessary to give business efficacy to the contract' (*BP Refinery (Westernport) Pty Ltd v Shire of Hastings*, 1977, p. 283), which, without this term, the contract would not be effective.

Good Faith as a Tool of Construction

Peden argues the Court should 'construe all contracts on the basis that there is an expectancy of good faith in all terms', which applies generally to all contracts (Peden, 2001, p. 230). It is suggested that the process of construction 'involves ascertaining the meaning of words used in the context in which they are used' (McDougall, 2006, p. 31; Viven-Wilksch, 2019, p. 277).

However, in cases such as *Hughes Aircraft* or *Burger King*, it is suggested that good faith is described as an implied term, though often implied in law (Collins, 2014, p. 330; J. Paterson et al., 2012, pp. 330–337). For example, Mason suggests that Finn J in *Hughes Aircraft* perceived good faith to be implied by law in all contracts (Mason, 2000, p. 67), where Finn J made a statement that his Honour ‘consider[s] a virtue of the implied duty to be that it expresses in a generalisation of universal application, the standard of conduct to which all contracting parties are to be expected to adhere throughout the lives of their contracts’ (*Hughes Aircraft Systems International v Airservices Australia (No 3)*, 1997, pp. 192–193). Subsequently, his Honour reaffirmed this statement that good faith should apply to all contracts, in *GEC Marconi (GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd*, 2003, p. [920]).

Finn J’s statement in *Hughes Aircraft* considers the duty of good faith to be “implied” generally to all contracts, however His Honour did not expressly say that it was implied in law. Therefore, the more appropriate way to consider Finn J’s proposition is not as ‘implied by law in all contract’, but rather as construction, since it generally applies to all contracts. This can be seen from Finn J’s statement in *GEC Marconi*, wherein his Honour clearly stated his stance on the matter:

Some, myself included: see *Hughes Aircraft Systems International* at 192-193; consider that the duty of good faith and fair dealing should apply to *all* contracts. Others are prepared for the moment to see it as a legal incident of particular classes of contract ... (*GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd*, 2003, p. [920]).

It can be established from this statement that Finn J is of the view that good faith be applied in “all contracts”, rather than as a legal incident of particular classes of contract (implication in law), which is adopted by other courts. The Court in *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* (*Alstom*) also agreed with this proposition given by Finn J that good faith should apply to all contracts rather than implication in law (*Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)*, 2012, p. [585]). Moreover, the Court held that without an obligation of good faith, the contract would not be able to be performed effectively (*Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)*, 2012, p. [598]). Thus, it can be perceived that Finn J is of the view of incorporating good faith through construction, rather than implication in law.

Implication v Construction

Priestley JA in *Renard Constructions* suggests that good faith can either be implied in fact or in law (Piercy, 2017, p. 166; *Renard Constructions (ME) Pty Ltd v Minister for Public Works*, 1992, p. 263). However, Peden, in her article titled ‘Incorporating Terms of Good Faith in Contract Law in Australia’, argues that the appropriate approach to incorporate the duty of good faith into a contract when it is not expressly agreed in the contract, is by way of using good faith ‘as a principle or tool of construction’ (Peden, 2001, p. 230). The reason for such is

that it is challenging for good faith as an implied term by fact to pass the *BP* test, seeing that the contract works effectively without it (Peden, 2001, p. 230). As for a term implied by law, Peden argues that it is inconceivable to imply such a term to every type of commercial contract, because each contract type has different policy consideration (Peden, 2001, p. 230). Supporting this, it is suggested that in *CGU Workers Compensation (NSW) Ltd v Garcia*, the Court is reluctant to acknowledge an implication in law of good faith in every contract (*CGU Workers Compensation (NSW) Ltd v Garcia*, 2007, p. [131]-[132]; Fredericks, 2018, p. 21).

Conversely, Davies argues that if all contracts were to contain the duties of good faith, this would ‘undermine the parties’ ability to set the terms of the contract and impair the freedom of contract doctrine (Davies, 2019, p. 30). Indeed, the struggle is to find the right way to apply such duty while maintaining consistencies with the common law that respect the self-interest of the parties to the contract (Viven-Wilksch, 2019, p. 276). This has been a challenge for Australian Courts for the past thirty years (Viven-Wilksch, 2019, p. 276). Moreover, it is fundamental to keep the balance between values such as fairness and justice (which could be promoted through good faith) with the freedom of contracts (Capuano, 2005, p. 45).

Davies seems to prefer to incorporate good faith through implication in fact rather than in law. He has the view that since a contract only binds its parties, the parties’ intentions should be paramount (Davies, 2019, p. 20). Implication in fact, as discussed before, indicates the presumed unexpressed intentions of the parties (Dixon, 2011, p. 233). Therefore, implication in fact did not neglect the party’s intention. Davies thus made the following statement in respect of implication in law:

Terms implied in fact reflect the (unexpressed) intentions of the parties, but not terms implied at law. Implying a term at law therefore means that the relevant term might not correspond to the intentions of the parties. There are good reasons to be cautious of an intrusive term of good faith implied by law. The risk of self-seeking or opportunistic behaviour may simply be priced in to the contract from the outset, and implying terms may disturb a careful equilibrium crafted by the parties in the terms of the contract (Davies, 2019, p. 26).

All in all, it can be seen that there are diverse opinions and preference in utilising these legal mechanisms from the judges and commentator, in order to incorporate good faith into a commercial contract. Indeed, each mechanism has its own pros and cons. However, as argued before, good faith’s objective is to promote fairness. Thus, it may be acknowledged that any mechanism used by the Court to find and enforce good faith should promote fairness.



CONCLUSION

The High Court of Australia has yet to provide any clarity towards the existence, definition, scope, and position of the good faith obligation in Australian contract law, thereby allowing it to remain in a state of uncertainty. However, it can be established that good faith somewhat encompasses either honesty or reasonableness. It seems that a lot of courts already acknowledge the existence of such obligation in Australia. The courts found unexpressed duty of good faith through implication in law, implication in fact, and construction. However, the Court finding and enforcing the duty of good faith that has not been agreed by the parties could potentially threaten contract certainty. Therefore, the Court needs to be vigilant in incorporating such duty in this circumstance.

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