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Recent Aspects of Good Faith

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(2002) 18 BCL 103

Good faith has continued its development as an ubiquitous legal concept at quite a pace. Its development has seen it influence a broad range of law, from construction to franchising. As its influence gathers momentum, so does the desire of academics, practitioners and lay persons to understand the nature of this concept and its potential boundaries.

What is meant by "Good Faith"

Good faith, as a general duty on parties to a contract, was recognised in English common law as early as 1766 when Lord Mansfield stated that "good faith was the governing principle ... applicable to all contracts and dealings".¹ This was followed by Lord Kenyon in *Mellish v Motteux (1792) 170 ER 113*, where his Honour said: "In contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith".

Consequently, it was subsequently highlighted that "good faith is not a new concept to English or Australian law, it derives from the obligation to keep agreements – *pacta sunt servada* (contracts must be observed)".²

Despite this early recognition, the development of the fundamental principles of contractual law during the 19th century favoured the paramountcy of freedom of contract over any general concept of good faith. In recognition of the apparent unfairness that this strict approach often produced, equity developed principles and solutions which supplemented or imposed some limitation on freedom of contract. These principles included promissory estoppel, unjust enrichment, restitution, fiduciary obligations, constructive trusts, unconscionable conduct, undue influence, economic duress, the rule which provides relief against forfeiture and the rule invalidating penalty clauses.

However, notwithstanding the early development of good faith, there appears to be no current consensus as to what the concept involves.

In the English Court of Appeal decision of *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway*³ the court said that "Even on a more expansive approach to good faith it may be that no more [than to act honestly, fairly and reasonably] is required in the performance of a contract".⁴ Further, in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*,⁵ it was said of good faith that it:

does not simply mean that [the parties] should not deceive each other ...; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as "playing fair", "coming clean" or "putting one's cards on the table". It is in essence a principle of fair and open dealing.

In Australia, Priestley JA in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*⁶ noted that "people generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations".⁷

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Therefore, it seems apparent that good faith can be understood as having both a subjective aspect (requiring honesty in fact) and an objective aspect (requiring compliance with standards of fair dealing). Moreover, Priestley JA expressed the view that there was a considerable degree of interchangeability between the expressions "fairness" and "good faith" and that:

there is a close association of ideas between the terms "unreasonableness", "lack of good faith" and "unconscionability". Although they may not be always co-extensive in their connotations, partly as a result of the varying senses in which each expression is used in different contexts, there can be no doubt that in many of their uses, there is a great deal of overlap in their content.⁸

In the more recent decision of *Aiton Australia Pty Ltd v Transfield Pty Ltd*,⁹ Einstein J agreed with Priestley JA's view, acknowledging that "good faith" is not synonymous with "reasonableness" and concurring with commentary that a requirement to satisfy a standard of reasonable behaviour is more demanding than the requirement of good faith.¹⁰

This can be compared to the recent NSW Court of Appeal case of *Burger King Corporation v Hungry Jack's Pty Ltd*¹¹ where it was stated that "it is worth noting that the Australian cases make no distinction of substance between the implied term of reasonableness and that of good faith".¹² This is supported by *Garry Rodgers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd [1999] FCA 903*, where Finkelstein J commented that:

provided the party exercising the power acts reasonably in all the circumstances, the duty to act fairly and in good faith will ordinarily be satisfied.¹³

Sir Anthony Mason summarised it well by saying that he thought that the concept of good faith imported at least three related notions:

- an obligation on the parties to co-operate in achieving the contractual objects (loyalty to the promise itself);
- compliance with honest standards of conduct; and
- compliance with standards of conduct which are reasonable having regard to the interests of the parties.¹⁴

Given that there is practical difficulty in arriving at a positive description of what is "good faith", some academics have approached the issue by describing good faith in negative terms and by highlighting what does not constitute good faith or what is "bad faith". For example, one USA academic¹⁵ has isolated decisions in which judges have recognised behaviour as not being in good faith, including:

- evasion of the spirit of the deal;
- lack of diligence and slacking off;
- wilful rendering of only substantial performance (that is, deliberately doing less than required);
- abuse of a power to determine compliance; and
- interference with, or failure to co-operate in, the other party's performance.

Priestley JA applauded one academic's statement that "the typical judge when examining good faith is primarily concerned with ruling out specific conduct, and only secondarily, or not all, with formulating the positive content of a standard".¹⁶

Other commentators indicate that it is simply not possible to give a single definition of good faith. Professor Waddams has suggested that "good faith is a multifarious concept, capable of enlarging or restricting contractual obligations, as the occasion may require".¹⁷ This is supported by Einstein J's view that "reference to what good faith is not, does not adequately give content to the obligation at any particular stage,"¹⁸

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although His Honour did agree that determination of bad faith did provide some guidance.

Whilst the United States is somewhat different from other common law countries, in that its contract law has explicitly recognised an obligation of good faith upon contracting parties in the performance of contracts (through the Uniform Commercial Code and the Restatement of Contracts, Second), it is interesting to note that the doctrine of good faith in the USA has been cast widely with it generally being recognised that:

In every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of a contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.¹⁹

However, it seems to be accepted, at least in Australia, that to act in good faith does not require a party to completely abandon its own interests.²⁰ According to Einstein J, when reviewing obligations to negotiate and mediate in good faith, such obligations do not oblige a party:

- to act for or on behalf of or in the interests of the other party; or
- to act otherwise than by having regard to self-interest.²¹

Despite this, though, Einstein J accepted that the "good faith doctrine comprises standards/obligations/considerations that seek to temper the deliberate pursuit of self-interest in situations where the conscience is bound".²² Examples of these situations included:

- the party being dishonest;
- the party conducting itself contrary to its word or undertaking in the sense of contradict; and
- the party exploiting a position of dominance or power over a person who is vulnerable relative to it.

The better approach, according to Einstein J, to defining good faith was not to define good faith, although this was not to suggest that "there may not be general, overarching 'core' principles of 'good faith' which may provide a framework for the 'common sense and experience of the judge or jury after consideration of all the relevant circumstances'." ²³ Instead, his Honour was of the view that:

The good faith concept acquires substance from the particular events that take place and to which it is applied. As such, the standard must be fact-intensive and is best determined on a case-by-case basis using the broad discretion of the trial court.²⁴

Similar comments were made by Wright J in *Asia Pacific Resources Pty Ltd v Forestry Tasmania* ²⁵ where his Honour likened the abstractness of good faith to the definition of proximity, saying that:

The novel "good faith" concept, ... whilst capable of statement with beguiling simplicity can never be a pure question of law ... because even its most ardent proponents appear to recognise that "good faith" is incapable of abstract definition and can only be assessed as being present or absent if the relevant facts are known or are capable of being known – a little like proximity in the law of negligence.²⁶

Implication of good faith

Whilst good faith is gradually being introduced as a legal caveat on a party's ability to exercise its rights and perform its obligations under a contract, the law has recognised for many years that

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limitations already exist. These limitations, which are ordinarily implied into contracts, include:

- an obligation on a party to a contract not to hinder or prevent fulfilment of the other party's purpose;²⁷
- a term that neither party to a contract will prevent the other from performing the contract;²⁸
- a duty on each party to co-operate whenever it is reasonably necessary to enable the other party to perform its obligations under a contract;²⁹
- an obligation on each party to a contract to do all such things necessary to enable the other party to have the benefit of the contract;³⁰
- a term that, where both parties have agreed that something shall be done, which cannot be effectively done unless both concur in doing it, each agrees to do all that is necessary to be done on its part for the carrying out of that thing;³¹ and
- a duty to act honestly.³²

In addition to these limitations implied at law, good faith-type obligations have manifested themselves statutorily. These statutory limitations, which may also impact upon contractual arrangements between parties, include:

- ss 51AA, 51AC and 52 of the Trade Practices Act 1974 (Cth) (corporations must not, in trade or commerce, engage in conduct which is unconscionable or misleading or deceptive);
- ss 181 and 184 of the Corporations Act 2001 (Cth) (directors must exercise their powers and discharge their duties in good faith);
- s 13 of the Insurance Contracts Act 1984 (Cth) (each party to an insurance contract to act with utmost good faith);
- s 31 of the Native Title Act 1993 (Cth) (negotiating parties must negotiate in good faith in respect of native title agreements);

- s 11 of the Farm Debt Mediation Act 1994 (NSW) (creditor and farmer to mediate farm debt disputes in good faith); and
- s 481 of the Local Government Act 1993 (Qld) (local governments must have regard to fair dealing and ethical behaviour when entering into contracts).

It is in consideration of these limitations and principles that courts find themselves reviewing the common law approach to a duty of good faith. Certainly the courts recognise that it is these types of limitations which generate the community's expectation and requirement that courts apply "standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance".³³ The result is that it is these expectations that underlie the induction of good faith principles as part of the general standards of commercial contractual arrangements. Accordingly, some courts have been prepared, in respect of a duty to act in good faith, to adopt the view that: "It is now established that such a term may be implied in contracts and that such duty applies to both performing obligations and exercising rights."³⁴

However, notwithstanding clear support for some form of contractual obligation of good faith to be recognised, these comments do not go so far as to recognise a general law duty of good faith in every contract. Caution is obviously being exercised by the courts given that, as Einstein J has noted, "the law in this area can not, however, be regarded as settled".³⁵ As Finn J recently reflected: Australian law has not yet committed itself unqualifiedly to the proposition that every contract imposes on each party a duty of good faith and fair dealing in contract performance and enforcement.³⁶

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There are many reasons which may explain why this reflection holds true.

First, there appears to be little by way of High Court authority which would effect a settlement of the law on this area although indicative trends are shown. For example, the joint judgment of Mason and Dawson JJ in [Commonwealth v Amann Aviation Pty Ltd](#) (1991) 66 ALJR 123 points to approval of notions reflecting good faith obligations.

Secondly, some judges take the view that obligations of good faith are not necessary in light of the principles of law, remedies and statutory protection available. As Gummow J in [Service Station Association Ltd v Berg Bennett & Associates Pty Ltd](#)³⁷ noted:

Equity has intervened in matters of contractual formation by the remedy of rescission ... It has restrained freedom of contract by inventing and protecting the equity of redemption, and by relieving against forfeitures and penalties. To some extent equity has regulated the quality of contractual performance by various defences available to suits for specific performance and for injunctive relief. In some, but not all, of this, notions of good conscience play a part. But it requires a leap of faith to translate these well-established doctrines and remedies into a new term as the quality of contractual performance, implied by law.

Similarly, Giles J in [Westpac Banking Corp v Bowden & Kathlig Pty Ltd](#)³⁸ commented that:

a duty of good faith in negotiation of a contract would be unnecessary and unduly disruptive of commercial life, given statutory (eg Trade Practices Act 1974, Contracts Review Act 1980 (NSW)), common law (innocent and fraudulent misrepresentation) and equitable (eg undue influence, unconscionability) principles and the ubiquitous estoppel.³⁹

As a matter of "comity" Finn J would have adhered to the view of Gummow J.⁴⁰ However, his Honour's personal view inclined to that of Priestley JA in [Renard Constructions](#).⁴¹

Finally, there is some hesitation in readily importing community expectations as wider obligations in contracts. As Gummow J highlighted: "Invocation of 'community standards' may be no more than an invention by the judicial branch of government of new heads of 'public policy', something long ago regarded as a risky enterprise."⁴²

Moreover, the distinction between whether obligations of good faith are implied ad hoc (from the facts of the particular contract and based on court's view of the actual intention of the parties) or at law (as a legal incident of a particular class of contract) also needs to be reflected in judicial decision-making. It would seem that, apart from implication ad hoc according to the rules set out in [Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales](#),⁴³ there is an increasing acceptance that implication of good faith obligations tend to take the form of being implied by law.⁴⁴ For example, it was noted by Finkelstein J that:

Recent cases make it clear that in appropriate contracts, perhaps even in all commercial contracts, such a term will ordinarily be implied; not as an ad hoc term (based on the presumed intention of the parties) but as a legal incident of the relationship.⁴⁵

This is more readily implied when the courts are reviewing standard form contracts (which are prevalent in the construction industry), particularly where the contract has powers, rights or obligations that may have a serious affect on the benefit of the contract if improperly or capriciously used or

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complied with. This flows from the matters required to be satisfied to imply a term by law, namely that the term is necessary (that is, without which the contract or the benefit to be obtained by it would be rendered worthless or nugatory) and reasonable. However, even if a standard form of contract is not under consideration having one-off transactions it "may nevertheless not be a fatal objection to implying, as a matter of law, an obligation of reasonableness".⁴⁶

Despite the differences between implication ad hoc and at law, Priestley JA has commented that the sharp distinction between the two kinds of implication may, at least in some cases, be more a matter of form than substance.⁴⁷ Clearly an example of this situation would be the Hughes Aircraft case.

Obligations of good faith

It is apparent that much is yet to be decided about the parameters of good faith concepts. Courts, practitioners and the community continue to grapple with the concepts of reasonableness, fair dealing and good faith and their implication for contracting parties. To assist this, we look to the manner in which these terms have been used in previous decisions. Whilst not an exhaustive review, set out briefly below are some recent decisions which have reviewed obligations of good faith:

- Competitive commercial tendering "process" contracts (at least those in respect of tenders which involve the expenditure of public funds) have been held to import an obligation to deal fairly in the performance of the contract (including conducting evaluations fairly and in a manner which would ensure equal opportunity for the tenderers): Hughes Aircraft Systems International .⁴⁸ The reason for this was, as Finn J observed:
If the purpose of a tender process contract is to be accomplished, if contractor-tenderers are to be given an effective opportunity to enjoy the fruits of the bid and not to have that opportunity destroyed by the unfair dealing of the other party to the contract, a duty such as I have described would appear to me to be a presupposition of such a contract.⁴⁹
- Selection "process" contract (a contract somewhat akin to the tender process contract) would probably have been subject to an implied duty of good faith and fair dealing in its performance: South Sydney District Rugby League Football Club .⁵⁰
- Einstein J was of the view that "a notion of good faith is implicit in any alternative dispute resolution procedure, as without it there is no chance of reaching a mutually satisfactory outcome"⁵¹ and that the very nature of the words "good faith" "must go toward the conduct of the parties involved in the agreed dispute resolution procedure".⁵² Einstein J found support for this from the decision in Allco Steel (Qld) Pty Ltd v Torres Strait Gold Pty Ltd ,⁵³ where it was found that the dispute resolution procedure contained an implied term that any attempt to conciliate disputes be made "bona fide".
- When a party to a contract has the obligation to value variations "in its sole discretion", such obligation is fettered by the need to act honestly, bona fide and reasonably: WMC Resources Ltd v Leighton Contractors Pty Ltd (2000) 16 BCL 53. As Ipp J stated: "the mere fact that a party to a contract is appointed as a valuer of a thing, which is to pass as consideration under the contract, does not mean that the party is at large to determine any value it wishes."⁵⁴
- Where a party is invested (albeit by contract) with the power to rule on its own and the other party's rights and obligations, it may be subject to a duty of good faith substantially more demanding than that customarily recognised in

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English contract law: Balfour Beatty Civil Engineering Ltd v Docklands Light Railway .⁵⁵ It was held that this would at least be a duty to act honestly, fairly and reasonably, even where no such obligation was expressed in the contract.

- As a legal incident of franchises, each party should exercise the powers conferred upon it (including the power to terminate) in good faith and reasonably and not capriciously or for some extraneous purpose: [Bamco Villa Pty Ltd v Montedeen Pty Ltd \[2001\] VSC 192](#) and [Far Horizons Pty Ltd v McDonald's Australia Ltd \[2000\] VSC 310](#).
- A principal must act reasonably when considering whether, in a show cause procedure clause, cause was shown and whether to exercise the power to take over the work or terminate the contract: [Renard Constructions](#) .⁵⁶ As Priestley JA stated: "For the principal, in such circumstances, to be able to ... exclude the contractor from the site and/or cancel the contract [upon the contractor failing to show cause for a trivial default] would be, in my opinion, to make the contract as a matter of business quite unworkable."⁵⁷
- A principal must act reasonably when exercising its contractual power to take over the work or terminate upon insolvency: [Hughes Bros Pty Ltd v Trustee of the Roman Catholic Church for the Archdiocese of Sydney](#) (1993) [31 NSWLR 91](#) ^[PDF]. However, given the practical need to do so when a contractor becomes insolvent (so as to allow the work to be completed as quickly and economically as possible), it was held that this obligation would not be difficult ordinarily for a principal to fulfil.
- Termination pursuant to "termination for convenience" clauses may only be exercised in good faith and fairly and not capriciously or arbitrarily or for an extraneous purpose: [Apple Communications](#) .⁵⁸
- This can be compared to [Thiess Contractors Pty Ltd v Placer \(Granny Smith\) Pty Ltd](#) .⁵⁹ In this case, the contract allowed the principal to terminate the contract "at its option, at any time and for any reason it may deem advisable". The contract also contained an express good faith clause. Rejecting the contractor's argument that the good faith obligation required the principal to terminate for reasonable reasons, the court said that the right was "clear and unambiguous" and provided the principal with "an absolute and uncontrolled discretion which it was entitled to exercise for any reason it might deem advisable".⁶⁰
- In the [Burger King](#) decision⁶¹ it was found that a Development Agreement between Burger King and Hungry Jack's was subject to implied terms of reasonableness and good faith. This included requiring Burger King to act in good faith and reasonably in giving approvals to Hungry Jack's which were in Burger King's "sole discretion".

Conclusion

No doubt it can be said that the concept of "good faith" will continue to forge a path of balance in contractual arrangements or, at the very least, temper the interests of contracting parties where the conscience of the parties are bound. As the Court of Appeal in [Alcatel Australia](#) ⁶² noted: If a contract confers power on a contracting party in terms wider than necessary for the protection of the legitimate interests of that party, the courts may interpret the power as not extending to the action proposed by the party in whom the power is vested or, alternatively, conclude that the powers are being exercised in a capricious or arbitrary manner or for an extraneous purpose.⁶³

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At this stage, nothing conclusive can be said about the breadth of good faith, although there are clear indications that the express recognition and acknowledgment of an implied covenant of good faith in Australia is on the horizon. It is a growing force and only time will tell as to whether the community's expectations of fair play and reasonableness will become universally implied in commercial contracts of all kinds. Certainly, construction industry participants will need to take careful note of good faith concepts and their development, particularly as the industry is established upon standard form contracts, the likes of which have already been reviewed by prominent cases such as [Renard Constructions](#) .⁶⁴

Even if a duty of good faith is implied, the real test for the legal profession and the courts will be the establishment of a workable definition of good faith which is easily applicable in practice without creating the vagueness and uncertainty which is currently complained of.

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¹ [Carter v Boehm \(1766\) 3 Burr 1905](#).

² [Cole J](#) , "Law – All in Good Faith" (1994) 10 BCL 18 at 19.

- 3 [1996] 78 BLR 42.
- 4 Balfour Beatty Civil Engineering Ltd v Docklands Light Railway , n 3, at 58.
- 5 [1989] 1 QB 433 at 439.
- 6 (1992) 26 NSWLR 234.
- 7 Renard Constructions (ME) Pty Ltd v Minister for Public Works , n 6, at 268.
- 8 Renard Constructions (ME) Pty Ltd v Minister for Public Works , n 6 at 268.
- 9 (2000) 16 BCL 70.
- 10 Aiton Australia Pty Ltd v Transfield Pty Ltd , n 9, at paras [133] and [134].
- 11 (unreported, NSW Sup Ct, CA, 21 June 2001).
- 12 Burger King Corporation v Hungry Jack's Pty Ltd , n 11, at para [169].
- 13 [Garry Rodgers Motors \(Aust\) Pty Ltd v Subaru \(Aust\) Pty Ltd \[1999\] FCA 903](#).
- 14 A F Mason , "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000) 116 LQR 66 at 69.
- 15 R S Summers , "The General Duty of Good Faith – its Recognition and Conceptualisation" (1982) 67 Cornell Law Review 810 at 813.
- 16 [Renard Constructions \(ME\) Pty Ltd v Minister for Public Works](#) (1992) 26 NSWLR 234^[PDF].
- 17 S M Waddams , "Good Faith, Unconscionability and Reasonable Expectations" (1995) 9 JCL 55 at 57.
- 18 Aiton Australia Pty Ltd v Transfield Pty Ltd (2000) 16 BCL 70.
- 19 Kirke La Shelle Co v Paul Armstrong , 263 NY 79 (1993).
- 20 See, for example, [South Sydney District Rugby League Football Club Ltd v News Ltd \[2000\] FCA 1541](#); Burger King Corporation (unreported, NSW Sup Ct, CA, 21 June 2001) and [Garry Rodgers Motors \(Aust\) Pty Ltd v Subaru \(Aust\) Pty Ltd \[1999\] FCA 903](#).
- 21 Aiton Australia Pty Ltd v Transfield Pty Ltd (2000) 16 BCL 70.
- 22 Aiton Australia Pty Ltd v Transfield Pty Ltd , n 21, at paras [133] and [134].
- 23 Aiton Australia Pty Ltd v Transfield Pty Ltd , n 21, at para [130].
- 24 Aiton Australia Pty Ltd v Transfield Pty Ltd , n 21, at para [129].
- 25 (unreported, Tas Sup Ct, Full Ct, 4 September 1997).
- 26 Asia Pacific Resources Pty Ltd v Forestry Tasmania , n 25, at para [12].
- 27 [Shepherd v Felt & Textiles of Australia Ltd](#) (1931) 45 CLR 359^[PDF].
- 28 William Cory & Son Ltd v London Corporation (1951) 2 KB 476.
- 29 London Borough of Mereton v Stanley Hugh Leach (1985) 32 BLR 51.
- 30 [Butt v McDonald](#) (1896) 7 QLJ 68 and [Secured Income Real Estate \(Australia\) Ltd v St Martins Investments Pty Ltd](#) (1979) 144 CLR 596^[PDF].
- 31 Mackay v Dick [1881] 6 App Cas 251 and Ford v Coteworth (1868) 4 QB 127.
- 32 [Meehan v Jones](#) (1982) 149 CLR 571^[PDF] and Aiton Australia Pty Ltd v Transfield Pty Ltd (2000) 16 BCL 70.
- 33 [Renard Constructions \(ME\) Pty Ltd v Minister for Public Works](#) (1992) 26 NSWLR 234^[PDF].

- 34 [Apple Communications v Optus Mobile \[2001\] NSWSC 635](#). See also [Alcatel Australia Ltd v Scarcella](#) (1998) [44 NSWLR 349](#)^[PDF] and [Elfic Ltd v Macks \[2000\] QSC 18](#).
- 35 [Aiton Australia Pty Ltd v Transfield Pty Ltd](#) (2000) [16 BCL 70](#).
- 36 See also [South Sydney District Rugby League Football Club Ltd v News Ltd \[2000\] FCA 1541](#); [Central Exchange Ltd v Anaconda Nickel Ltd \[2001\] WASC 128](#) and [Dorrough v Bank of Melbourne](#) (*unreported, Fed Ct of Aust, Cooper J, 29 September 1995*) where Cooper J stated that: "Nor is there in this jurisdiction any general principle by which a duty of good faith is implied in every contract."
- 37 (1993) [45 FCR 84](#) at 96.
- 38 (*Unreported, NSW Sup Ct, 13 December 1993*).
- 39 [Westpac Banking Corp v Bowden & Kathlig Pty Ltd](#), *n 38, at para [35]*.
- 40 [Hughes Aircraft Systems International v Airservices Australia](#) (1997) [76 FCR 151](#)^[PDF].
- 41 [Renard Constructions \(ME\) Pty Ltd v Minister for Public Works](#) (1992) [26 NSWLR 234](#)^[PDF].
- 42 [Service Station Association Ltd v Berg Bennett & Associates Pty Ltd](#) (1993) [45 FCR 84](#)^[PDF].
- 43 (1982) [149 CLR 337](#).
- 44 See [Burger King Corporation](#) (*unreported, NSW Sup Ct, CA, 21 June 2001*) at paras [159] and [164].
- 45 [Garry Rodgers Motors \(Aust\) Pty Ltd v Subaru \(Aust\) Pty Ltd \[1999\] FCA 903](#).
- 46 [Renard Constructions \(ME\) Pty Ltd v Minister for Public Works](#) (1992) [26 NSWLR 234](#)^[PDF].
- 47 [Renard Constructions \(ME\) Pty Ltd v Minister for Public Works](#), *n 6, at 263*.
- 48 [Hughes Aircraft Systems International v Airservices Australia](#) (1997) [76 FCR 151](#)^[PDF].
- 49 [Hughes Aircraft Systems International v Airservices Australia](#), *n 40, at 194*.
- 50 [South Sydney District Rugby League Football Club Ltd v News Ltd \[2000\] FCA 1541](#).
- 51 [Aiton Australia Pty Ltd v Transfield Pty Ltd](#) (2000) [16 BCL 70](#).
- 52 [Aiton Australia Pty Ltd v Transfield Pty Ltd](#), *n 9, at para [92]*.
- 53 (*unreported, Qld Sup Ct, Master Horton QC, 12 March 1990*).
- 54 [WMC Resources Ltd v Leighton Contractors Pty Ltd](#) (2000) [16 BCL 53](#).
- 55 [Balfour Beatty Civil Engineering Ltd v Docklands Light Railway](#) (1996) [78 BLR 42](#).
- 56 [Renard Constructions \(ME\) Pty Ltd v Minister for Public Works](#) (1992) [26 NSWLR 234](#)^[PDF].
- 57 [Renard Constructions \(ME\) Pty Ltd v Minister for Public Works](#), *n 6, at 258*.
- 58 [Apple Communications v Optus Mobile \[2001\] NSWSC 635](#). See also [Commonwealth Bank of Australia v Renstell Nominees Pty Ltd \[2001\] VSC 16](#) where Byrne J held that where the Bank reserves itself the right to cancel an overdraft at its discretion, this right may be exercised only reasonably and in good faith. However, in the exercise of its discretion it was entitled to have regard to its own legitimate commercial interests even if they were inimical to those of the borrower.
- 59 (2000) [16 BCL 130](#).
- 60 [Thiess Contractors Pty Ltd v Placer \(Granny Smith\) Pty Ltd](#), *n 59, at 170-171*.
- 61 [Burger King Corporation v Hungry Jack's Pty Ltd](#) (*unreported, NSW Sup Ct, CA, 21 June 2001*).
- 62 [Alcatel Australia Ltd v Scarcella](#) (1998) [44 NSWLR 349](#)^[PDF].

63 *Alcatel Australia Ltd v Scarcella*, n 62, at 368.

64 *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234^[PDF].

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Aiton Australia Pty Ltd v Transfield Pty Ltd

Alcatel Australia

Alcatel Australia Ltd v Scarcella (1998) 44 NSWLR 349^[PDF]

Allco Steel (Qld) Pty Ltd v Torres Strait Gold Pty Ltd

Apple Communications

Apple Communications v Optus Mobile [2001] NSWSC 635

Asia Pacific Resources Pty Ltd v Forestry Tasmania

Balfour Beatty Civil Engineering Ltd v Docklands Light Railway

Bamco Villa Pty Ltd v Montedeen Pty Ltd [2001] VSC 192

Burger King

Burger King Corporation (unreported, NSW Sup Ct, CA, 21 June 2001)

Burger King Corporation v Hungry Jack's Pty Ltd

Butt v McDonald (1896) 7 QLJ 68

Carter v Boehm (1766) 3 Burr 1905

Central Exchange Ltd v Anaconda Nickel Ltd [2001] WASC 128

Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales

Commonwealth Bank of Australia v Renstell Nominees Pty Ltd [2001] VSC 16

Commonwealth v Amann Aviation Pty Ltd (1991) 66 ALJR 123

Dorrrough v Bank of Melbourne (unreported, Fed Ct of Aust, Cooper J, 29 September 1995)

Elfic Ltd v Macks [2000] QSC 18

Far Horizons Pty Ltd v McDonald's Australia Ltd [2000] VSC 310

Ford v Coteworth (1868) 4 QB 127

Garry Rodgers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd [1999] FCA 903

Hughes Aircraft

Hughes Aircraft Systems International

Hughes Aircraft Systems International v Airservices Australia (1997) 76 FCR 151^[PDF]

Hughes Bros Pty Ltd v Trustee of the Roman Catholic Church for the Archdiocese of Sydney (1993) 31 NSWLR 91^[PDF]

Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd

Kirke La Shelle Co v Paul Armstrong, 263 NY 79 (1993)

London Borough of Mereton v Stanley Hugh Leach (1985) 32 BLR 51

Mackay v Dick [1881] 6 App Cas 251

Meehan v Jones (1982) 149 CLR 571^[PDF]

Mellish v Motteux (1792) 170 ER 113

Renard Constructions

Renard Constructions (ME) Pty Ltd v Minister for Public Works

Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596^[PDF]

Service Station Association Ltd v Berg Bennett & Associates Pty Ltd

Shepherd v Felt & Textiles of Australia Ltd (1931) 45 CLR 359^[PDF]

South Sydney District Rugby League Football Club

South Sydney District Rugby League Football Club Ltd v News Ltd [2000] FCA 1541

Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd

Westpac Banking Corp v Bowden & Kathlig Pty Ltd

William Cory & Son Ltd v London Corporation (1951) 2 KB 476

WMC Resources Ltd v Leighton Contractors Pty Ltd (2000) 16 BCL 53

Legislation Cited | [Top](#)

Contracts Review Act 1980 (NSW)
Corporations Act 2001 (CTH)
Farm Debt Mediation Act 1994 (NSW)
Insurance Contracts Act 1984 (CTH)
Local Government Act 1993 (QLD)
Native Title Act 1993 (CTH)
Renard Constructions
Restatement of Contracts
Trade Practices Act 1974 (CTH)
Uniform Commercial Code