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New Directions in How Legislators, Courts, and Legal Practitioners Approach Unconscionable Conduct and Good Faith

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Summary of Paper

The law and practice surrounding unconscionable business conduct and good faith in commercial contexts is a controversial topic at the best of times. This topic is especially relevant for an audience comprising solicitors, barristers, judges, and academics who respectively litigate, advocate, adjudicate, and educate in this field of commercial activity. Recent legislative reform initiatives, test case litigation, and other regulatory developments have significant practical implications for advice, transactions, and judgments in both consumer and business contexts.² For some time, these developments and implications have occupied the attention of federal and state legislatures, courts at all levels throughout Australia, barristers' chambers and law firm offices, and various business and industry sectors.

Unfortunately, current debates in this field of law and practice often generate more heat than light. Major controversies of the present or recent past include the following: (i) differentiating unconscionable conduct's different meanings under statutory and non-statutory law; (ii) legislatively defining 'unconscionable conduct' and 'good faith'; (iii) introducing legislative principles or examples of unconscionable conduct; (iv) universalising good faith in the franchising industry and other business sectors; (v) accommodating good faith through appropriate contractual drafting techniques; (vi) unpacking the relationship between good faith in contract and good faith as a listed indicator in statutory unconscionability; and (vii) the treatment of unconscionable conduct and good faith within broader moves towards a national contract law regime.

The relationship between good faith and unconscionable conduct in commercial agreements now operates on at least six different levels. First, both good faith in contract and statutorily proscribed unconscionable conduct are chief vehicles through which legal notions of fair play are translated into business and consumer dealings. Secondly, from the transactional standpoint of a commercial drafter, litigator, or judge, there are issues to be explored in grappling with the range and limits of contractual devices in dealing with both unconscionable business conduct and deficiencies in good

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² Here, the main emphasis is upon business contracts and conduct (ie business-to-business (B2B) transactions), with some reference along the way to relevant parallels and implications in consumer contexts (ie business-to-consumer (B2C) transactions).

faith. Thirdly, and still from a transactional standpoint, there is now a need to explore the intersection between good faith and unconscionable conduct from the perspective of good faith deficiency as a listed indicator of statutory unconscionability in two of the most important pieces of economic regulation in this country – namely the Competition and Consumer Act 2010 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth). The incorporation of both good faith and unconscionable conduct in these regulatory schemes for statutory unconscionability must now be understood and applied in the wake of recent and significant amendments to statutory unconscionability affecting both Acts.

Fourthly, claims in pleadings might be framed alternatively in terms of breach of an implied/express term of good faith, breach of good faith as an indicator of statutory unconscionability, and fulfilment of other indicators of statutory unconscionability. Recent cases illustrate the possibility of pleading good faith and unconscionable conduct in the alternative or in connection with one another.³ Fifthly, in terms of a holistic approach to rationalising or even recasting some discrete but related areas of law in this field, more attention must now be paid to both the vertical and horizontal dimensions of the doctrines and principles underpinning good faith in contract law, statutory and non-statutory unconscionability (including reference to good faith), and otherwise unconscionable and unconscientious exercises of contractual rights (especially where proprietary interests are at stake). Finally, both good faith and statutory unconscionability figure in the landmark national review and possible reform of contract law by the Australian Government.⁴

In short, the combination of recent reforms to statutory unconscionability, multi-tiered drafting approaches and client-focused options on good faith, and ongoing ‘test case’ litigation and action from corporate, financial, and consumer regulators in this area requires everyone to have a more sophisticated approach to the law and practice of unconscionable conduct and good faith in commercial transactions than might have prevailed until fairly recently. The multiplier effect of ongoing litigation in a variety of related contexts, recent governmental reform of statutory unconscionability, and enhanced enforcement powers for official regulators results in a smorgasbord of untested issues for advice, litigation, and other regulatory action. Accordingly, this area is likely to maintain a trajectory that is not universally welcomed by big business and those who advise or represent them, while also providing more argumentative and litigious opportunities for small business, consumers, and their legal representatives.

Ongoing and Future Litigation and Regulatory Action – A Brief Guided Tour

³ See, for example, the interplay between good faith in contract and the lack or breach of good faith as an indicator of statutory unconscionability in: *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] FCA 903; *Automasters Australia Pty Ltd v Bruness Pty Ltd* [2002] WASC 286; *Clough Engineering Limited v Oil and Natural Gas Corporation Limited* [2008] FCAFC 136; *Weimann v Alpbones Retail Pty Ltd* [2009] FCA 673; *Alpbones Retail Pty Ltd v Hoy Mobile Pty Ltd* [2009] FCAFC 85; *ACCC v Seal-A-Fridge Pty Ltd* [2010] FCA 525; *N A Retail Solutions Pty Ltd v St George Bank Limited* [2010] FCA 259; *Oliver v CBA (No 1)* [2011] FCA 1440; and *NAB v McCall* [2011] QSC 25.

⁴ Commonwealth Attorney-General’s Department, *Improving Australia’s Law and Justice Framework – A Discussion Paper to Explore the Scope for Reforming Australian Contract Law*, 2012.

Overview of Recent, Ongoing, and Potential Litigation

Hardly a week or month goes by without yet another significant decision about one or both of unconscionability and good faith.⁵ For recent and local evidence of this trend, we need look no further than 2011-2012 court decisions on these topics in the jurisdiction where this presentation is being given.⁶ In the wake of the global financial crisis (GFC), cases have worked their way through the courts on unconscionable conduct and related issues in the class action on bank fees against the ANZ Bank,⁷ the ‘margin call’ litigation in the *Goodridge* case and others,⁸ the Storm litigation and regulatory action,⁹ the practices of asset lending and ‘low-doc’ loans, the improper brokering of business loans that avoid consumer protections,¹⁰ and various other drivers in an environment of volatile markets, corporate failures, reforms directed at responsible lending, tighter financing and credit conditions, and heightened regulatory attention to the preconditions for competitive and fair markets. Might some pre-GFC/post-GFC recalibration of credit and financing conditions come into view here, for example, at least where concessions are extracted that fall outside legitimate commercial interests and the preconditions for statutory unconscionability are otherwise met?

Even major corporate deals in takeovers and due diligence contexts need to assess risks associated with regulation of unconscionable conduct and bad faith. Arguments grounded in either or both of those notions might piggy-back an official ruling that confirms a company’s market power,¹¹ in claims that such market power has been used in unconscientious advantage-taking or exploitation of bargaining power, non-disclosure of essential information, or the exercise of rights with mixed motives.¹² While a corporate acquirer might not have any problems of its own from these twin risks, a corporate target might have unexposed risks of unconscionability or bad faith buried in its agreements, procedures, and past behaviour towards its own contractors, which is not as easily discoverable in due diligence as other matters. A competitive bid process might be conducted in a way that risks being characterised as unconscionable or in bad faith, such as encouraging an illusory bidding war that incurs additional costs for bidders and inflates bidding prices, in circumstances where one bid is clearly the best one all along.

⁵ Eg *Andrews v Australia and New Zealand Group Ltd* [2012] HCA 30; *Beerens v Bluescope Distribution Pty Ltd* [2012] VSCA 2009; *Tenth Vandy Pty Ltd v Natwest Markets Australia Ltd* [2012] VSCA 103; *Kakavas v Crown Melbourne Ltd* [2012] VSCA 95; *Alstom Ltd v Yokogawa Australia Pty Ltd* [2012] SASC 49; *Technology Leasing Ltd v Lenmar Pty Ltd* [2012] FCA 709; *ASIC v Australian Lending Centre Ltd (No 3)* [2012] FCA 43; and *Westpac v Bell Group* [2012] WASC 157.

⁶ Eg *Coronis v Jilt Pty Ltd* [2012] QCA 66; *Agripay Pty Ltd v Byrne* [2011] QCA 85; *Thomas v Balanced Securities Ltd* [2011] QCA 258; *Dowdle v Pay Now For Business Pty Ltd* [2012] QSC 272; *ACN 096 278 483 Pty Ltd v Vercorp Pty Ltd* [2011] QCA 189; and *NAB v McCall* [2011] QSC 25 (drawing upon *Kendell v Sweeney* [2005] QSC 64).

⁷ *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30.

⁸ *Goodridge v Macquarie Bank Limited* [2010] FCA 67 (on appeal *Leveraged Equities Limited v Goodridge* [2011] FCAFC 3); and *Imobilari Pty Ltd v Opes Prime Stockbroking Ltd* [2008] FCA 1920.

⁹ Eg *ASIC v Bank of Queensland Ltd* [2011] FCA 1361; and *Oliver v CBA (No 1)* [2011] FCA 1440.

¹⁰ Eg *ASIC v Australian Lending Centre Ltd (No 3)* [2012] FCA 43.

¹¹ Such as an ACCC clearance or undertaking for mergers and acquisitions, authorisation of anti-competitive conduct, or access ruling.

¹² Eg ‘Capping Creeping Acquisitions: Is It a Pandora’s Box for Australian Merger Laws?’ Johnson Winter & Slattery, 2009.

Is a Wealth-Creating Shareholding Investment Business or Personal? – The Goodridge Case

If someone takes a margin loan to invest in shares as a long-term investment to cover their retirement needs, is that best characterised as a business investment or something that is personal or domestic in nature? This question was crucial to the outcome in one of the early test cases on statutory unconscionability in the context of margin calls on investments in the share market.¹³

The case of unconscionable conduct was pleaded as case grounded in general statutory unconscionability or, alternatively, B2C statutory unconscionability. The trial judge found it unnecessary to decide whether a ‘special disadvantage’ existed that would come under the relevant general law on unconscionable conduct that is picked up also by general statutory unconscionability. Instead, the trial judge decided that B2C statutory unconscionability is broader than general statutory unconscionability and that its requirements justified a finding of unconscionable conduct. In particular, the trial judge considered that the narrow timeline and other demands associated with forced sale of the shares were invalid, in pursuit of an interest that the assignee was not legitimately entitled to protect in taking that action. ‘Leveraged Equities thus misused its power of sale unconscientiously without any right to do so’, concluded Rares J.¹⁴

On appeal to the Full Federal Court in *Leveraged Equities Limited v Goodridge*,¹⁵ the trial judge’s finding of unconscionable conduct based upon B2C statutory unconscionability was rejected on two bases. First, the statutory provision relied upon by Mr Goodridge only applied to financial services of a ‘personal, domestic, or household’ kind (ie section 12CB(5)). The consideration that he signed something attesting to the funds being used for business or investment needs trumped his evidence that the funds were directed towards personal retirement needs. Secondly, on its own ‘there is nothing unconscionable in a margin lender enforcing its legal rights to protect itself against a fall in the value of its security’.¹⁶ Interestingly, in terms of future litigation, the High Court’s rejection of special leave to appeal from the Full Federal court decision included the following important caveat by Justice Gummow on behalf of himself and Justice Hayne: ‘However, we express no view as to the correctness of the conclusions expressed by the Full Court of the Federal Court as to the construction and application of section 12CB of the Australian Securities and Investments Commission Act 2001 (Cth)’.¹⁷ This judicial caveat might be important in other cases being fought under the old provisions.

One potentially important difference in the litigious landscape since the *Goodridge* outcome is the subsequent harmonisation of the listed indicators of B2C and B2B statutory unconscionability. At

¹³ *Goodridge v Macquarie Bank Limited* [2010] FCA 67; on appeal *Leveraged Equities Limited v Goodridge* [2011] FCAFC 3.

¹⁴ *Goodridge v Macquarie Bank Limited* [2010] FCA 67 at [207].

¹⁵ [2011] FCAFC 3.

¹⁶ [2011] FCAFC 3 at [417].

¹⁷ *Goodridge v Leveraged Equities Limited; Goodridge v Macquarie Bank Limited* [2011] HCATrans 154; see also *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 at [296]-[298].

the time of the *Goodridge* litigation, B2C statutory unconscionability for financial services of a personal, domestic, or household nature had a more limited list of indicators than now. Although it did not make any direct difference in the circumstances of the *Goodridge* case, because of the trial judge's reliance on the indicators in force at the time to make a finding of unconscionable conduct, and the appellate court's decision on appeal that an essential precondition for B2C statutory unconscionability was not met, it might make a difference in other circumstances now to have a broader set of indicators of unconscionable financial services conduct to argue or plead. In addition, newly legislated principles of interpretation for statutory unconscionability now further condition the meaning of unconscionable financial services conduct according to such listed indicators. However, this will not necessarily assist other 'test case' litigants involved in GFC-related margin calls in the 2008-2009 period and beyond, because the necessary legislative amendments were not in force until early 2012.

Can Companies Claim Victimhood on Unconscionability Grounds?

In the wake of the decades-long *Bell Group* litigation, we are still to witness a successful invocation of unconscionability by a corporate entity or those through whom it acts. For example, there might be unconscientious exploitation of financially stressed companies without complete freedom to act in their own interests (eg because of interlocking shareholdings and directorships), where nervous financiers are extracting additional security, engineering work-out situations for financially troubled corporate borrowers, and refinancing corporate group debts in ways that involve disproportionate security burdens, an absence of corporate benefit for corporate security-providers, and possibly even a known or suspected breach of directors' duties, thereby disempowering an outsider (such as a financier) from relying upon the statutory presumptions known as the 'indoor management' rule.¹⁸

What kinds of unconscionability-based arguments might be made in this context? Individual corporate directors might claim that they have been the victims of unconscionable conduct by financiers or other corporate group members, through being forced to go along with a 'take it or leave it' course of action for the company or in providing security for other members' debts. A corporate borrower might face claims of unconscionability about how it has wielded its control and influence to compel finance and security arrangements that might not be to the benefit of particular security-providing companies. A corporate guarantor might claim that it is the victim of unconscientious advantage-taking, coercion, and other unfairness in being forced to provide security against its own best interests. Finally, a financier involved in such finance and security arrangements might face claims that its conduct is unconscionable or that it is visited with the consequences of unconscionable conduct by others in its orbit because of its knowledge or the benefit it gains.

The possibility of corporations claiming that they are victims of unconscionable conduct in these or other circumstances remains hypothetical but not fanciful. It has been tried unsuccessfully to this

¹⁸ Corporations Act, sections 128-129.

point in a number of Australian cases.¹⁹ None of them represents the last word on raising unconscionability in corporate contexts. The results of the cases to date have been influenced by available relief on other grounds; the unconscionability claim has been grounded largely in conventional notions of ‘special disadvantage’; the courts involved have exhibited scepticism about big business invoking unconscionability claims; and heavy reliance has been placed on the availability of legal advice to the corporate entity. However, at least one current and high-ranking member of the High Court (albeit at an earlier stage of his judicial career) is on record with a view that legal advice might not be fatal for what he calls ‘situational’ forms of special disadvantage, as discussed later in this paper. More significantly, statutory unconscionability extends the regulatory reach over unconscionable conduct beyond its archetypical *Amadio*-style form (involving ‘special disadvantage’²⁰) and *Garcia*-style form (involving equity’s historical protection of wives as guarantors²¹). In other words, the cases to date have not exhausted the avenues of argument available in corporate contexts.

Next, anything that focuses upon imbalances of information, less than full disclosure, mixed motivations for the exercise and triggering of rights, undue benefits at someone else’s expense, and clawbacks from previous representations or commitments as circumstances change lends itself to characterisation in terms of the indicators of statutory unconscionability. The commercial or financial contexts could be as varied as: (i) attempted withdrawal from a public and unqualified commitment to a life-saving deal because of subsequent information not known to all parties;²² (ii) heavy-handed extraction of additional security or more bank-friendly financing constraints as a collateral negotiating precondition; (iii) conduct of a financier’s corporate customers that is sheeted home to the financier because of its transactional knowledge or benefit; and (iv) inadequate prior communication and consultation before exercising rights in the triangular relationships between investors, banks, and brokerage firms in margin lending arrangements for share portfolios.

Nor are the greenfield areas of unconscionability litigation limited to circumstances where one corporation claims this protection for itself against another corporation. Legal policy questions arise when the driving minds behind small businesses and big businesses alike invite courts to pierce the corporate veil, as when directors who guarantee corporate finance arrangements seek to invoke unconscionability doctrines to extract themselves from the enforcement of those security commitments.²³ Additional interactions between unconscionability-based arguments and corporate law are also possible, in ways that call into play some of the basic legal safeguards relied upon by financiers in the execution of finance and security documents. These interactions between corporate law and notions of unconscionability remain to be explored fully, and in some cases it is likely that

¹⁹ Eg *Commonwealth Bank of Australia v Ridout Nominees Pty Ltd* [2000] WASC 37; *Optus Networks Ltd v Telstra Corporation Ltd (No 3)* [2009] FCA 728; *Weston v Publishing and Broadcasting Ltd* [2011] NSWSC 433; and *The Bell Group Ltd (In Liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239 (on appeal *Westpac v Bell Group* [2012] WASCA 157).

²⁰ *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

²¹ *Garcia v National Australia Bank Ltd* [1998] HCA 48.

²² Cf *GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd* [2001] FCA 1761.

²³ As discussed generally in Pascoe, 2003.

corporate law as presently constructed will be unable to carry the burden of an infusion of unconscionability-related arguments.

As the High Court has already made clear, the context of corporate third party securities is one that inherently calls into question whether or not a security-giving company is receiving adequate benefit in return, and the proliferation of third party corporate securities is not enough on its own to weaken judicial application of legal rules to such everyday corporate and financial activity.²⁴ At the same time, another reality-check is needed here. The idea that financiers and corporate group controllers are inherently taking unconscientious advantage of their superior positions vis-à-vis security-giving companies in all conventional third party corporate security arrangements seems fanciful. Considered from the standpoint of good legal policy, there is no reason why legitimate mechanisms of corporate influence and control cannot be used to produce interlocking finance and security commitments between corporations that are beneficial and proportionate for all concerned. Nothing said here is intended to suggest that they are all suddenly open to attack in terms of unconscionability.

However, there must be room for at least some doubt where corporate benefit is lacking, and where a corporation's decision to commit itself to finance and security arrangements is an artificially engineered rather than meaningful one. In such circumstances, a more discrete and viable attack upon finance and security arrangements might combine 'situational' forms of special disadvantage, relevant indicators of statutory unconscionability, and particular corporate law doctrines (eg corporate benefit), to run arguments along the lines of what the court articulated as the core complaint in very different contexts and across multiple legal bases in the settled *Opes Prime* litigation: 'the banks knew (or ought to have known) [what was legally wrong] and actively went along with it'.

Still, another sobering reality-check on such possibilities appears in recent authoritative commentary and judicial analysis of such prospects. The authors of *Ford's Principles of Corporations Law* express the view that allowing corporations to invoke the doctrine of unconscionable dealing and its element of 'special disadvantage' faces considerable legal obstacles and raises acute questions of legal policy in its ripple effects for directors' duties and other aspects of corporate law.²⁵ Moreover, further legal obstacles to this outcome were identified by Justice Ward in *Weston v Publishing and Broadcasting Ltd* in 2011.²⁶ At the same time, it must be remembered that small-to-medium corporate enterprises can avail themselves of the statutory unconscionability regime, whose reach extends beyond the limits of the 'special disadvantage' doctrine and its applicability to corporations.

Enhanced Attention to Unconscionability from Official Regulators

²⁴ Eg *Northside Developments Pty Ltd v Registrar-General (NSW)* [1990] HCA 32; compare and contrast with other judges' approach to commercial reality and third party securities more recently in *Angas Law Services Pty Ltd (in liquidation) v Carabelas* [2005] HCA 23.

²⁵ At [14.170].

²⁶ *Weston v Publishing and Broadcasting Ltd* [2011] NSWSC 433.

Numerous factors combine to pave the way for the next wave of official ‘test case’ advice and litigation surrounding unconscionable conduct. The ACCC’s relative lack of successful outcomes earlier this decade in litigating test cases on statutory unconscionability²⁷ is now tempered by the ACCC’s subsequent successes in court and through its other regulatory measures, as noted in later public inquiries and expert commentary.²⁸ Earlier this year, ACCC Chairman Rod Sims made the pursuit of unconscionable conduct an enforcement priority, in these terms:²⁹

Unconscionable conduct between businesses is another area of attention this year and one of particular concern to small business. In the past small business has sometimes felt their concerns were not given sufficient weight, and these feelings may well have had justification. Proving unconscionable conduct is, of course, a high hurdle, but where it occurs the ACCC will not hesitate in taking action.

Still, two decades after the introduction of statutory unconscionability in Commonwealth law, Australian courts are yet to decide definitively the full set of unconscionability-related doctrines embraced by statutory unconscionability, let alone precisely how conventional legal doctrines of unconscionability are spread throughout or even transcended by the various statutory unconscionability provisions. The latest amendments to statutory unconscionability in the ASIC Act and the Competition and Consumer Act provide the ACCC and ASIC with new opportunities to test the content and boundaries of statutory unconscionability. This was also one of the recommendations from the Expert Panel whose recommendations the Australian Government accepted in ushering in these reforms, as follows:³⁰

Regulators should pursue further test cases to inform their guidance material, over time. These test cases should draw on conduct in diverse industries, and should also be used to assist in the understanding of any interpretative principles introduced for the provisions.

A Refresher on Statutory and Non-Statutory Unconscionable Conduct

For those who need a refresher, the basic position on unconscionable conduct under statutory and non-statutory law is as follows. Unconscionable conduct is regulated under the general law by a variety of doctrines, including (but not necessarily limited to) the doctrines surrounding unconscionable dealings. Its classic formulation focuses upon unconscionable bargains and dealings, as exemplified in both *Amadio*-style and *Garcia*-style unconscionable conduct.

²⁷ M. Sharpe and C. Parker, ‘A Bang or a Whimper?: The Impact of ACCC Unconscionable Conduct Enforcement’ (2007) 15 TPLJ 139.

²⁸ *Strengthening Statutory Unconscionable Conduct and the Franchising Code of Conduct*, Australian Government (The Treasury and Department of Innovation, Industry, Science and Research), February 2010; and B. Baxt, ‘New Challenges Face Competition Regulators’, *The Australian Financial Review*, 8 October 2010.

²⁹ ACCC Chairman Rod Sims, ‘Enduring Perspectives and 2012 Objectives’, Speech to the Australia-Israel Chamber of Commerce, 2012.

³⁰ Expert Panel Report, *Strengthening Statutory Unconscionable Conduct and the Franchising Code of Conduct*, Australian Government, 2010, at p 41, Finding 2.7.

Whatever its true scope, this meaning of unconscionable conduct under the general law is picked up and applied under general prohibitions of unconscionable conduct in three major pieces of national economic regulation – expressly in equivalent provisions in the Competition and Consumer Act (relating to commercial activity in general) and the Australian Securities and Investments Commission Act (relating to financial services), and implicitly in the Corporations Act (relating to financial services licensees). Section 991A(1) of the Corporations Act provides:

Financial services licensee not to engage in unconscionable conduct

991A (1) [Unconscionable conduct] A financial services licensee must not, in or in relation to the provision of a financial service, engage in conduct that is, in all the circumstances, unconscionable.

For ease of reference, what used to be section 51AA of the Trade practices Act now appears in section 20 of the Second Schedule to the Competition and Consumer Act, as follows:

- (1) A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

- (2) This section does not apply to conduct that is prohibited by section 21.

This primary provision of statutory unconscionability reveals three things. It picks up the judge-made law on unconscionable conduct (ie ‘the unwritten law’). Its contraventions can result in regulatory action of various kinds (eg pecuniary penalties). It does not apply where B2B and B2C statutory unconscionability apply, which necessarily points to some commonality between them.

In addition, other provisions in the ASIC Act and the Competition and Consumer Act regulate unconscionable conduct in B2C and B2B contexts. These additional provisions cover but also extend beyond the notion of unconscionable conduct under the general law. They contain a non-exhaustive list of statutory indicators of unconscionable conduct. For ease of reference here and throughout this paper, the list of 12 indicators from section 22(1) of the Second Schedule to the Competition and Consumer Act is as follows, with characterisations supplied by the author in brackets:

- (a) **[relative bargaining positions]** ‘the relative strengths of the bargaining positions of the supplier and the customer’;
- (b) **[beyond legitimate commercial interests]** ‘whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier’;
- (c) **[understanding of documents]** ‘whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services’;

- (d) [**undue influence, unfair tactics, and duress**] ‘whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services’;
- (e) [**equivalent pricing and circumstances**] ‘the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier’;
- (f) [**equivalent treatment**] ‘the extent to which the supplier’s conduct towards the customer was consistent with the supplier’s conduct in similar transactions between the supplier and other like customers’;
- (g) [**code compliance I**] ‘the requirements of any applicable industry code’;
- (h) [**code compliance II**] ‘the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code’;
- (i) [**non-disclosure**] ‘the extent to which the supplier unreasonably failed to disclose to the customer:
 - (i) any intended conduct of the supplier that might affect the interests of the customer; and
 - (ii) any risks to the customer arising from the supplier’s intended conduct (being risks that the supplier should have foreseen would not be apparent to the customer)’;
- (j) (j) [**contractual terms, progress, and conduct**] ‘if there is a contract between the supplier and the customer for the supply of the goods or services:
 - (i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and
 - (ii) the terms and conditions of the contract; and
 - (iii) the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and
 - (iv) any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract’;
- (k) [**unilateral variation**] ‘without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services’; and
- (l) [**good faith**] ‘the extent to which the supplier and the customer acted in good faith’.

In deference to the non-exhaustive nature of this list, guidance from the ACCC on avoiding unconscionable business conduct adds a final catch-all factors as follows: ‘Any other factor indicating that the stronger party acted with little or no regard to conscience’.³¹

Expert commentators characterise the set of statutory indicators of unconscionable conduct towards small business as one comprising a sub-set of indicators that can be grouped together and

³¹ ACCC, *Business Snapshot: Unconscionable Conduct*, published 12 September 2012.

characterised in terms of good faith and fair dealing,³² and the same characterisation can be extended to the equivalent set of statutory indicators of unconscionable conduct towards consumers since the harmonisation of these two sets of legislative provisions occurs. For example, Justice Finn characterises the listed indicators of statutory unconscionability as heading ‘in the direction of proscribing unfair dealing and unfair trading’, especially ‘unfair dealing in relational contracts’.³³ In his view, this is confirmed by ‘considerations that focus on possible discrimination, industry codes and standards, good faith etc’.³⁴ The set of listed indicators having that character is joined by another set of indicators, which focus more directly upon exploitation of vulnerability through avenues of advantage-taking and coercion.³⁵

The ultimate question concerns the range of doctrines and causes of action concerning unconscionable conduct that are picked up by statutory unconscionability. A further question now arises as to whether recent reforms to statutory unconscionability clearly arm courts with the potential to drive the law of statutory unconscionability in a direction that does not simply cover all potential doctrines and causes of action associated with unconscionable conduct under the general law on all of the relevant levels of analysis, but rather opens up the possibility of developing a law of statutory unconscionability that goes beyond what has been developed under the general law.

As we shall see, there have been major reforms to statutory unconscionability upon introduction of the Australian Consumer Law *and* since then too. These reforms have been driven, in part, by perceptions from governmental and other stakeholders about the reticence of courts to amplify statutory unconscionability beyond its constraints under the general law.

At the same time, the most recent reforms to the statutory prohibition of unconscionable conduct must be assessed against the background of high-level judicial guidance on these provisions still remaining at a relatively early stage of development, at least in terms of authoritative High Court guidance on them. All that is currently known from the High Court’s piecemeal treatment of statutory unconscionability (including these provisions) is as follows. Whatever else might be covered by the generic statutory prohibition of unconscionable conduct, it at least covers the equitable doctrine of unconscionable conduct relating to the exploitation of a weaker party’s ‘special disadvantage’.³⁶ The character of the statutory provision governing B2B unconscionability relates to imposed norms of conduct, as distinct from establishing liabilities or causes of action, with failure to

³² On good faith and fair dealing in this context, see: P. Finn, ‘Unconscionable Conduct?’, UNISA Trade Practices Workshop, 2006.

³³ Justice Finn, above at pp 14-15. Beyond this statutory context, the relational nature of the commercial agreement considered in *Macquarie International Health Clinic Pty Ltd v Sydney West Area Health Service* [2010] NSWCA 268 significantly informed the findings of the court concerning the content of an express term of utmost good faith: see, particularly, at [144] per Hodgson JA (Macfarlan JA concurring).

³⁴ Justice Finn, above at p 15.

³⁵ Justice Finn, above at pp 11 and 15.

³⁶ *ACCC v CG Berbatis Holdings Pty Ltd* [2003] HCA 18.

meet the statutorily prescribed norm of conduct attracting statutory consequences that are not to be limited necessarily by the nature of claims and remedies under the general law.³⁷

An overly rigid translation of common law notions on causation to the broader purposes, forms of conduct, and remedial consequences covered by the Trade Practices Act (now the Competition and Consumer Act) is inappropriate, including in relation to statutory unconscionability.³⁸ Finally, the statutory indicators of B2C and B2B unconscionability relating to reasonableness and legitimate interests are one manifestation of the ways in which the law uses notions of ‘reasonable necessity’.³⁹ So, there is much still for the High Court to explore and settle on statutory unconscionability, just as there is much still for the Court to address on good faith in contract.

Good Faith as a Listed Indicator in Statutory Unconscionability

For more than a decade, a lack or breach of good faith has counted as an indicator of unconscionable conduct under Commonwealth trade practices and financial services laws. This area of operation covers the supply and acquisition of goods and services. Such preconditions for its operation mean that statutory unconscionability will not necessarily catch all commercial arrangements. Still, it covers a wide variety of commercial dealings and industries.

The emerging law of statutory unconscionability therefore provides a legislative dimension that complements the doctrinal dimension of good faith’s treatment under the laws of contract and equity. This relationship between good faith in contract and statutory unconscionability affects commercial drafting, advice on commercial transactions, and pleadings and submissions in ‘test case’ advice and litigation on good faith.

At the same time, there are relevant differences between these two good faith contexts. For example, as the focus of these statutory prohibitions of unconscionable business activity is upon *conduct* rather than *contract*, secondary reference to contractual content and behaviour is sometimes necessary as part of a primary characterisation of unconscionable conduct. Moreover, what might be possible in limiting or excluding good faith in contract does not translate automatically into an equivalent capacity to exclude statutorily imposed standards of conduct under such legislation. Other relevant differences include any variances between contractual and statutory remedies, and the potential involvement of a corporate regulator in investigating and enforcing the statutory unconscionability regime.

Until recently, good faith’s operation in statutory unconscionability was confined to B2B transactions, primarily in protecting small businesses from unconscionable business conduct by

³⁷ *Master Education Services Pty Limited v Ketchell* [2008] HCA 38.

³⁸ *I and L Securities v HTW Valuers* [2002] HCA 41 at [69] and [104]; and *Henville v Walker* [2001] HCA 52 at [96].

³⁹ *Thomas v Mowbray* [2007] HCA 33 at [22].

other businesses. However, the landscape surrounding statutory unconscionability has changed significantly with recent regulatory reforms.

Expert Commentary on Good Faith Under Contract Law and Statutory Unconscionability

In her landmark analysis of good faith in Australian contract law, Professor Peden contrasts good faith in contract with statutory and non-statutory unconscionability, as follows: ⁴⁰

To suggest a close correlation between good faith and unconscionability is also more confusing than constructive. ... The concept of good faith, as it is developing, is being used to implement the parties' agreements, ensuring they remain true to their original agreement and have regard to the interests of the other party. In contrast, unconscionability is used in a variety of ways ...

More recent legislation in the form of ss 51AA and 51AC Trade Practices Act 1974 (Cth) does extend legislative remedies to common law unconscionability in certain business contexts. However, there is no common understanding of the meaning of 'unconscionability' in these sections yet. Furthermore, the fact that s 51AC lists 'good faith' as a factor to be taken into account in deciding whether there has been a breach does not mean that there is suddenly a close analogy between the concepts of good faith and unconscionability. *The use of 'good faith' in s 51AC could just mean 'honesty', as in many other pieces of legislation.* A further distinction is that many judges feel an obligation of good faith can be imposed in all contracts, or all commercial contracts, whereas for unconscionability to operate there usually needs to be some vulnerability, such as a special disability in the *Amadio* sense, or a presumed weakness (such as the weaker position of a consumer in many pieces of legislation), which limits the operation of the principle.

Perhaps the closest that unconscionability comes to the operation of good faith is where the exercise of contractual rights is restricted in cases where it would be unconscionable to allow the party to exercise those rights ... To say a party has behaved unconscionably is more difficult than to show the party has behaved in breach of an obligation of good faith. However, if good faith is taken to require objective 'reasonableness', then this would catch even more conduct than a test of 'unconscionability'.

On this view, good faith in statutory unconscionability is primarily associated with honesty. Still, the differences between contractual good faith and unconscionability that Professor Peden highlights in this passage draw heavily upon the general law, especially the strands of unconscionability jurisprudence associated with the equitable doctrine of special disadvantage and the unconscientious exercise of contractual rights. The latest reforms of statutory unconscionability take another step towards disconnecting it from its limitations under the general law.

Similarly, the anomalous relation identified here between good faith, reasonableness, and unconscionability is also grounded in their use under the general law, as framed through the Carter-Peden view of implicit good faith and its baseline of honesty. As outlined above, statutory

⁴⁰ Peden, above at [7.7]; emphasis added.

unconscionability (including its use of good faith) has a legislated scheme and operation of its own that might yet transcend these origins. The Commonwealth Parliament has undeniably linked the notions of good faith and unconscionability in statutory unconscionability, to which some legal effect must be given, especially under the High Court's modern approach to the primacy of statutory language over preconceived notions based upon the general law. Given that a transactional approach to commercial agreements focuses as much upon their content as the conduct surrounding them, it would make sense if the content of good faith in contract could be aligned to some degree with the content of good faith in statutory unconscionability.

The Recent Reforms in a Nutshell

What are the main changes to statutory unconscionability that progressively took effect in 2011 and 2012? In particular, four recent changes to trade practices and financial services laws affect the operation of good faith as an indicator in statutory unconscionability, as well as statutory unconscionability more generally.

First, new principles of interpretation have been inserted from 2012, to guide courts in interpreting, developing, and applying the law of statutory unconscionability. These interpretative principles apply to the provisions of statutory unconscionability that include reference to good faith. Secondly, the listed indicators of statutory unconscionability have been reformed, in ways that sharpen the focus upon contractual content and behaviour. Thirdly, the respective lists of indicators for B2C and B2B statutory unconscionability have been harmonised from 2012. So, test cases and judicial analysis of good faith in B2C and B2B contexts can now inform each other. Finally, assessments of unconscionable business or financial conduct now provide opportunities for pecuniary penalties, infringement notices, and other regulatory responses, which means that consideration of such questions is no longer confined solely to outcomes in court.

At the same time, statutory unconscionability is characterised by the following difficulties, all of which have a compounding effect. 'Unconscionability' has more than one meaning across various departments of law. The boundaries of its specific meanings in the statutory and non-statutory law of unconscionable conduct remain undetermined under Australian law.⁴¹ There is a range of equitable and other doctrines that draw upon specific ideas associated variously with conduct that is

⁴¹ Here, primary statutory unconscionability corresponds to the general prohibition on unconscionable corporate conduct in statutory provisions such as section 51AA of the Trade Practices Act 1974 (Cth) on trade practices generally (now section 20 of Schedule 2) and the equivalent section 12CA of the Australian Securities and Investments Commission Act 2001 (Cth) on financial services in particular; B2C and B2B statutory unconscionability corresponds to the prohibitions on unconscionable conduct in provisions such as sections 51AB and 51AC of the Trade Practices Act 1974 (Cth) and the equivalent sections 12CB and 12CC of the Australian Securities and Investments Commission Act 2001 (Cth). Note that the structure and content of these old sections 51AB, 51AC, 12CB, and 12CC is different from the structure and content of the latest versions of 12CB and 12CC of the ASIC Act and sections 21 and 22 of Schedule 2 of the Competition and Consumer Act respectively, after the harmonisation of listed indicators of statutory unconscionability in B2C and B2B contexts.

unconscionable and against ‘good conscience’, although legally the term ‘unconscionable conduct’ has a more discrete conventional meaning.

Statutory unconscionability is one of a number of areas of statutory law whose interpretation and application successive legislatures have decided should be characterised by bounded discretion according to a matrix of unweighted indicative factors, and hence left largely in the hands of the judicial branch of government. Equitable notions of unconscionable conduct in general and the strand of unconscionable conduct associated with ‘special disadvantage’ in particular have to this point arguably exerted an overly strong gravitational pull upon the starting approach of courts to statutory unconscionability.⁴² The new principles of interpretation for statutory unconscionability in both the ASIC Act and the Competition and Consumer Act clearly send the law of statutory unconscionability in a different direction, although its full potential is yet to unfold in ‘test case’ regulatory action, litigation, and court decisions.

Interim Note

The first fourteen and a half pages of this paper give a telescopic synopsis of the major themes, developments, and issues that surround good faith and unconscionable conduct in commercial transactions. This paper could end there. However, for those who need more than this for study or work purposes, the remainder of this paper explores these things in more detail. It commences next with an outline and analysis of good faith in its contractual and commercial contexts, followed by an analysis of contemporary drafting devices and client-focused options on good faith, and then ends with the current position on unconscionable conduct under the general law and major economic legislation.

Good Faith in Commercial and Transactional Contexts

Major Questions Surrounding Good Faith

For much of the last decade, the Australian law and practice of good faith in commercial contracts has been preoccupied with six major questions that remain controversial.⁴³ How pervasive is good faith in the construction of commercial contracts? Can good faith be implied in all commercial contracts? Are obligations of good faith co-extensive or otherwise interactive with related obligations of cooperation and fidelity to the mutual bargain? Under what conditions is good faith implied in commercial contracts? What are the elements and limits of good faith in this context? Can such obligations of good faith be modified or excluded by agreement?

⁴² Eg F. Zumbo, ‘Commercial Unconscionability and Retail Tenancies: A State and Territory Perspective’ (2006) 14 *Trade Practices Law Journal* 165; and Zumbo, 2006b. For an example of an intermediate appellate court finding a similar fault in a trial judge’s approach to statutory unconscionability, at least in a discrete aspect of a common law approach, see: *ASIC v National Exchange Pty Ltd* [2005] FCAFC 226 at [30].

⁴³ Another question – namely, whether or not obligations to negotiate in good faith are enforceable – is no longer controversial, after the decision in *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177.

Four additional questions immediately arise for future ‘test case’ advice and litigation. In transactional terms, what are the implications for drafting and pleading purposes of the potential operation and interplay of two separate sources of obligations of good faith – namely, good faith in contract law and good faith’s absence or breach as a statutory indicator of unconscionable conduct? In terms of client-based options that are sensitive to both sources of obligations of good faith, what legally effective approaches to good faith are available, beyond simply attempting to negate it? In precedential terms, to what extent are courts meaningfully bound by existing intermediate appellate court authority on good faith in each context, in light of the High Court’s direction to all other Australian courts in *Farah Constructions Pty Ltd v Say-Dee*?⁴⁴ Finally, in terms of both statutory and non-statutory interpretation, to what extent can the statutory association of good faith and unconscionable conduct influence further judicial development of the proper content and scope of good faith in contract, and vice versa?

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 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,⁴⁵ 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.

Residual questions remain about the optimal terminology and combination of clauses for achieving the exclusionary effect, the impact of different routes of implication of terms upon their excludability, and the possible existence of a limited set of good faith elements that are fundamental to the nature of all contracts and hence beyond exclusion. There are limits to what can be done by contract in any case, given the interplay between four factors. Those factors are: (i) contract law’s in-built limits upon contracts that are illegal or offend public policy; (ii) the current use of good faith as an indicator of statutory unconscionability; (iii) the broad range of statutory and non-statutory regulatory measures that condition unconscionable and unconscientious abuse of contractual rights and powers; and (iv) the inherent difficulty of trying to avoid by private agreement the consequences of breaching a standard of business conduct that is prescribed by legislation.

In some industry domains, a coalition of consumers, small business, and other stakeholders has pushed for law reform that results in explicit recognition of universal obligations of good faith and

⁴⁴ [2007] HCA 22.

⁴⁵ Eg J. Carter and E. Peden, ‘Good Faith in Australian Contract Law’ (2003) 19 JCL 155 at 156.

fair dealing, particularly in the franchising industry.⁴⁶ Notwithstanding widespread implicit acceptance of a norm of good faith in franchising arrangements as found in particular cases,⁴⁷ considerable opposition still remains politically and within some industry quarters to embedding that norm explicitly in legislation or the Franchising Code of Conduct.

At the same time, the Australian Government has recently opened the way for the eventual acceptance of a suitably defined notion of good faith under the common law that could apply to franchising arrangements. This is reflected in section 23A of the Franchising Code of Conduct, as follows: ‘Nothing in this code limits any obligation imposed by the common law, applicable in a State or Territory, on the parties to a franchise agreement to act in good faith’. As indicated by the expert panel reporting to the Australian Government in early 2010 on statutory unconscionable conduct reform and particular franchising industry behaviours, ‘good faith ... is intrinsically relevant to unconscionable conduct (due to its presence as a statutory indicator) and, less overtly, to the [identified] franchising behaviours’.⁴⁸

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 President James Allsop of the NSW Court of Appeal.⁴⁹ 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. Indeed, the collective reluctance of the Australian judiciary to embrace good faith as such an organising principle 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.⁵⁰ These global developments in good faith jurisprudence are significant drivers of the current impetus for national contract law reform being steered by the Australian Attorney-General.

Recently, the President of the NSW Court of Appeal noted Australian law’s failure to this point to recognise ‘an expressed norm reflecting [good faith’s] presence as an informing principle’ and

⁴⁶ Eg F. Zumbo, ‘Commercial Unconscionability and Retail Tenancies: A State and Territory Perspective’ (2006) 14 *Trade Practices Law Journal* 165; and A. Terry and C. D. Lerna, ‘Franchising and the Quest for the Holy Grain: Good Faith or Good Intentions?’ (2009) 33 *Melbourne University Law Review* 542.

⁴⁷ Eg *Far Horizons Pty Ltd v McDonald’s Australia Ltd* [2000] VSC 310; and *J F Keir Pty Ltd v Priority Management Systems Pty Ltd (administrators appointed)* [2007] NSWSC 789 at [24]-[26] per Rein AJ.

⁴⁸ Expert Panel Report, *Strengthening Statutory Unconscionable Conduct and the Franchising Code of Conduct*, 2010, Australian Government, at p 85. In the interest of transparency, the author discloses that he was a member of this expert panel.

⁴⁹ Justice 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.

⁵⁰ Eg Justice 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; Justice Allsop, above; and B. Dixon, above.

explored the preconditions for good faith becoming ‘a generally expressed norm’ of contract law.⁵¹ We do not have a definitive High Court ruling on any of this as yet. The future articulation of a coherent framework for good faith also needs to accommodate bodies of High Court jurisprudence beyond those dealing with implied terms generally and the implication of good faith and related obligations in particular. This jurisprudence includes the High Court’s ready acceptance of obligations relating to one or more of good faith, reasonableness, and unconscionability (whatever the differences between them) across different departments of law in conditioning the exercise of contractual and other legal rights (especially affecting property),⁵² together with the High Court’s contemporary approach to construction of commercial agreements.⁵³

In short, legal practitioners and their clients therefore confront drafting, transactional, and statutory implications of good faith in commercial dealings that go beyond the guidance and focus of much current judicial guidance and academic legal commentary. This now includes a menu of contractual drafting options and client-based standpoints on good faith in commercial contracting that is more nuanced than the simple binary choice between imposing or negating implications of good faith. The transactional significance of bad faith in exercising contractual rights or in the conduct surrounding contracts is 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 and the Australian Securities and Investments Commission Act.

Good Faith as an Ongoing Work-in-Progress

The Australian law on good faith in contract has waxed and waned over the last decade or so, with a readiness by some courts to imply terms of good faith ad hoc or by law being replaced generally by a more cautious judicial approach. ‘The development of the law relating to good faith has travelled an almost full circle’, to echo the Chief Justice of Victoria’s assessment in one of Victoria’s leading cases on good faith in contract.⁵⁴ The acceptance of an implied term of good faith and reasonableness in contractual performance in the landmark decision of *Renard Constructions (ME) Pty Ltd v Minister for Public Works*⁵⁵ has been followed in many cases, but also criticised by other courts and academic commentators on doctrinal and evidence-based grounds.⁵⁶ Indeed, two prominent

⁵¹ The Hon. J. Allsop, ‘Good Faith and Australian Contract Law: A Practical Issue and a Question of Theory and Principle’ (2011) 85 *Australian Law Journal* 341 at 342 and 352.

⁵² Eg *Meehan v Jones* [1982] HCA 52; and *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* [1982] HCA 53.

⁵³ Eg *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; and *International Air Transport Association v Ansett Australia* [2008] HCA 3; see also J. Carter and E. Peden, ‘Good Faith in Australian Contract Law’ (2003) 19 *JCL* 155 at 157; F. Douglas, ‘Modern Approaches to the Construction and Interpretation of Contracts’ (2009) 32 *Australian Bar Review* 158; The Hon. M. Warren, ‘Good Faith: Where Are We At?’ (2010) 34 *344* at pp 349-351; and The Hon. J. Spigelman, ‘Contractual Interpretation: A Comparative Perspective’ (2011) *ALJ*

⁵⁴ *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228 at [2].

⁵⁵ (1992) 26 *NSWLR* 234.

⁵⁶ Eg J. Carter and E. Peden, ‘Good Faith in Australian Contract Law’ (2003) 19 *Journal of Contract Law* 155; E. Peden, *Good Faith in the Performance of Contracts*, 2003, LexisNexis Butterworths, Sydney; T. Carlin, ‘The Rise (and Fall?) of

academic experts in this debate argue that subsequent cases relying upon *Renard Constructions* ‘have led Australian contract law into a potentially disastrous situation’.⁵⁷

To a considerable extent, equity and statute have taken over ground that might otherwise have been occupied by a more extensive good faith jurisprudence in Australian law, as a number of commentators have indicated. Put another way, ‘our legal system normally achieves the result that parties should act fairly in performing a contract even if the common law does not imply a term that they act in good faith explicitly in every contract’, according to the Queensland Supreme Court’s Justice James Douglas.⁵⁸ This assessment by an Australian judge is consistent with the following pithy assessment of Anglo-Commonwealth approaches to good faith from a European perspective: ‘The mistrust of Anglo-Saxon jurists for the general concept of good faith is equalled only by the imagination which they put towards multiplying particular concepts which lead to the same results’.⁵⁹ It is also consistent with the view of some judges and commentators that the traditional mechanisms of the general law and equity could have supplied an answer to the problem raised in the landmark *Renard Constructions* case, without stimulating the rise of implied terms of good faith and reasonableness.⁶⁰

In the absence of a comprehensive and universally accepted obligation of good faith that applies to commercial agreements, the safeguards for vulnerable commercial parties reside in the grounds for intervening in contractual matters under equity and common law, together with available statutory protection.⁶¹ At the same time, the emerging law on enforcing express or implied obligations to negotiate in good faith⁶² might need to take at least some account of legal regulation of negotiation in good faith in other contexts,⁶³ in the interest of overall coherence of the law across its various departments.

The judge-made law on good faith in contract law exhibits nuanced differences in judicial approaches across Australian jurisdictions. Express obligations of good faith in contract have

Implied Duties of Good Faith in Contractual Performance in Australia’ (2002) 25 *UNSW Law Journal* 99; and T. Carlin, ‘Good Faith in Contractual Performance – Smoke Without Flame?’ (2005) 4(2) *Journal of Law and Financial Management* 18.
⁵⁷ Carter and Peden, above at 165.

⁵⁸ Justice Douglas, ‘Exploring the Recent Uncertainty Surrounding the Implied Duty of Good Faith in Australian Contract Law: The Duty to Act Reasonably – Its Existence, Ambit and Operation’, LexisNexis Contract Law Master Class, 2006, at [43]. On the interplay between common law, equity, and legislation producing this outcome, also see: F. Douglas, ‘Modern Approaches to the Construction and Interpretation of Contracts’ (2009) 32 *Australian Bar Review* 158; and L. Brown, ‘The Impact of Section 51AC of the Trade Practices Act 1974 (Cth) on Commercial Certainty’ (2004) 28 *Melbourne University Law Review* 589.

⁵⁹ Quoted in the article by Justice Douglas, above.

⁶⁰ Eg Carter and Peden, above at 155-156, 165, and 168-170; and G. 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.

⁶¹ Douglas, above at 171.

⁶² Eg *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177 and *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222; cf *Jobern Pty Ltd v Breakfree Resorts (Victoria) Pty Ltd* [2007] FCA 1066.

⁶³ Eg requirements for (a) native title negotiations in good faith under the Native Title Act 1993 (Cth) and (b) bargaining in good faith for enterprise agreements under the Fair Work Act 2009 (Cth).

featured in a number of cases this decade before intermediate appellate courts and even the High Court.⁶⁴ After an initial keenness by some trial judges and intermediate appellate courts in the last decade or so to find implied obligations of good faith in commercial agreements,⁶⁵ courts at those levels have become more circumspect in doing so,⁶⁶ although there are notable exceptions.⁶⁷ Even where obligations of good faith are implied in commercial agreements, courts do not readily find that those obligations are breached.⁶⁸

Whatever its content, good faith cannot be implied in a way that is expressly or implicitly inconsistent with other contractual provisions, or which requires a party to subjugate their own legitimate commercial interests to those of the other party, although it can at least oblige one party to take proper account of another party's interests and benefits under their contract. '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 2005.⁶⁹ Despite the simplicity and correctness of that contractual dividing line, concerns remain in commercial practice about the occasions, extent, and requirements of this obligation of other-centredness.

Australian good faith jurisprudence therefore remains a work-in-progress. At the turn of the century, former Chief Justice of Australia Sir Anthony Mason urged that 'recognition of good faith and fair dealing concepts would bring greater coherence and unity to the varied array of principles which are presently available in the area of contract performance'.⁷⁰ Almost 10 years later, he maintained the need for 'a more precise concept of good faith and an identification of its role in contract construction', not least so that 'we can work out the relationship, if any, between good faith and reasonableness'.⁷¹

⁶⁴ Eg *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177; *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268; *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222; and *Placer (Grany Smith) Pty Ltd v Thiess Contractors Pty Ltd* [2003] HCA 10; 196 ALR 257.

⁶⁵ Eg *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *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.

⁶⁶ Eg *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228; *CGU Workers Compensation (NSW) Limited v Garcia* [2007] NSWCA 193; *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177; and *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222; see also Justice Allsop, above at 341.

⁶⁷ 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).

⁶⁸ Eg *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228; *CAN 096 278 483 Pty Ltd v Vercorp Pty Ltd* [2011] QCA 189 at [73]; Chief Justice Warren, 'Good Faith: Where Are We At?' (2010) *Melbourne University Law Review* 344 at 348; and N. Seddon and M. Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 9th Australian edition, 2008, at [10.43].

⁶⁹ *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228 at [29] per Buchanan JA (Warren CJ and Osborn AJA concurring).

⁷⁰ Sir Anthony Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 *Law Quarterly Review* 66 at 94.

⁷¹ Sir Anthony Mason, 'Opening Address' (20th Anniversary Journal of Contract Law Conference) (2009) 25 *Journal of Contract Law* 1 at 5.

However, the fact that good faith jurisprudence is an ongoing work-in-progress does not mean that it is in a satisfactory state. Nor does it mean that its unanswered questions can be addressed purely as matters of legal doctrine. Almost 20 years ago, former Chief Justice of Australia Murray Gleeson (while still Chief Justice of the NSW Supreme Court) contrasted the trend in law away from ‘principled application of general rules’ and towards ‘individualised, discretionary solutions ... tailored to the justice of the particular case’, in terms that have a chilling or at least sobering effect upon anyone who drafts or advises on commercial agreements:⁷²

In the result, for a number of reasons, some to do with the work of legislatures, 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.

‘Nothing truer can be said of the duty of “good faith” in contract law’, according to Chief Justice Marilyn Warren of the Victoria Supreme Court, reflecting on this quoted passage in her assessment of contemporary Australian law in this field.⁷³ She has also declared judicially that while ‘there has been clear recognition of the doctrine of good faith’, it sets a ‘nebulous’ standard.⁷⁴ More than 25 years ago, a North American academic commentator on good faith famously described it as ‘a concept which means different things to different people in different moods at different times and in different places’.⁷⁵ However, recent Australian judicial treatment of good faith is considerably more refined than that loose conception suggests.

Almost a decade after his promulgation of a much-cited touchstone on good faith in contract, Sir Anthony Mason recently cautioned that good faith’s ‘emerging problem ... is that it is now so all-embracing as to be at risk of becoming amorphous and lacking in precision’.⁷⁶ So, it is unsurprising to find Australian judges declaring that the present state of this area of law is ‘bewildering’, in light of the ‘variety of opinions in the authorities and commentaries as to the implication of terms as to reasonableness and good faith in commercial contracts’.⁷⁷

Four Basic Propositions on Good Faith in Contract Law

⁷² M. Gleeson, ‘Individualised Justice – The Holy Grail’ (1995) 69 *Australian Law Journal* 421 at 428.

⁷³ Chief Justice Warren, above at 344.

⁷⁴ *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228 at [2]-[3].

⁷⁵ M. Bridge, ‘Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?’ (1984) 9 *Canadian Business Law Journal* 385 at 407.

⁷⁶ Sir Anthony Mason, above at 5.

⁷⁷ *Council of the City of Sydney v Goldspar Australia Pty Ltd* [2006] FCA 472 at [166] per Gyles J, referred to approvingly in *Insight Oceania Pty Ltd v Phillips Electronics Australia Ltd* [2008] NSWSC 710 at [168] per Bergin J.

Having characterised Australian contract law earlier this decade as possibly being ‘in a state of utter confusion’ about good faith, two of Australia’s leading academic contract lawyers - Professor John Carter and Professor Elisabeth Peden - crystallised its development to that point, as follows:⁷⁸

(I)t would appear that Australian contract law is rapidly moving towards three propositions.

First, in most contracts (perhaps all contracts) a requirement of good faith must be implied, at least in connection with termination pursuant to an express term of the contract, but perhaps more generally.

Second, where it is present, the source of the implied requirement of good faith is an implied term of the contract.

Third, the implied requirement of good faith is satisfied by a party who has acted:

- honestly; and
- reasonably.

A fourth proposition might be added to that list, given that ‘it has even been suggested that the law should go further than the three propositions require; for example, by treating the implied term as “entrenched”, that is, non-excludable’.⁷⁹

Professor Carter and Professor Peden reject the prevailing Australian judicial practice of incorporating reasonableness into implied contractual obligations of good faith. They associate good faith’s central requirement of ‘honesty’ with a wide range of possible requirements, as follows:⁸⁰

(W)hat is the content of the good faith requirement? Our thesis here is simply that this depends on the scope of ‘honesty’ as a concept. One reason why the law is currently in such a confused state is, in our view, because of a failure to appreciate that ‘honesty’ means much more than a requirement that parties not act fraudulently towards each other ... On analysis it will be found that characteristics which conduct must have to be honest will necessarily include:

- (1) not acting arbitrarily or capriciously;
- (2) not acting with an intention to cause harm; and
- (3) acting with due respect for the intent of [the] bargain as a matter of substance not form.

Because it is not a fixed concept, good faith may, in particular cases, embrace other things as well. In the context of contract performance and the exercise of discretions and rights, the presence of good faith will be felt in the process of interpretation. Depending on the term in question, good faith may include:

- (1) acting for a proper purpose;
- (2) consistency of conduct;

⁷⁸ Carter and Peden, above at 155.

⁷⁹ Carter and Peden, above at 156.

⁸⁰ Carter and Peden, 2003.

- (3) communication of decisions;
- (4) cooperation with the other party; or
- (5) consideration of the interests of the other party.

Absent from these lists is a requirement of 'reasonableness'. With respect to those who think otherwise, we do not think it even arguable that for a party to a contract to act in good faith it must discharge a positive obligation to act 'reasonably'. Therefore, to the extent that good faith is a general requirement applicable to all contracts it does not include a requirement of reasonable conduct.

As we will explain, the most important device for ensuring that good faith considerations are upheld in the application of contract rules and principles to particular contracts is 'commercial construction'. The recent cases rely heavily on the implication of a term of good faith, but in our view the better approach is to give effect to the intention of the parties. Properly applied, commercial construction will achieve a result which is consistent with the underlying requirement of good faith. It is, moreover, a technique that has been in use for some time. As we will explain, it usually makes recourse to term implication quite unnecessary.

At the same time, there is an emerging judicial appreciation of the interplay between good faith jurisprudence, commercial construction, and the doctrines of contract law,⁸¹ creating more entry points in contract law for elements of good faith and related obligations than simply implied terms of good faith alone. In other words, good faith in contract is not reducible to a simple matter of adding or deleting particular implied terms in a contract, although that is one aspect of it. As crystallised by the current Chief Justice of Victoria, 'good faith as a doctrine does not exist independently of the rules surrounding the construction and interpretation of contracts, or the rules of implication [and there] may be a merging of the two processes (interpretation and implication) in the arena of good faith'.⁸²

The academic debate about the source, meaning, and methodological implication of good faith has migrated to the arguments of litigation lawyers and judgments of courts in this crucial area of commercial law and practice.⁸³ In other words, all arms of the legal profession are actively engaged with one another in determining and developing the law of good faith in this country. The debate presently has two divided camps.

⁸¹ Eg *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15; Chief Justice Warren, above; Justice Allsop, above; and Chief Justice de Jersey, 'Good Faith in Contracts in Financial Services', 26th Annual Banking and Financial Services Law and Practice Conference, 2009.

⁸² Chief Justice Warren, above at 349.

⁸³ See, for example, the judicial debate surrounding the views of leading academic experts on good faith in contract law (such as Professors Peden and Carter) and the extra-judicial comments of senior Australian judges (such as Sir Anthony Mason) on this topic, especially in recent trial and intermediate appellate court judgments, such as: *Overlook Management BV v Foxtel Management Pty Ltd* [2002] NSWSC 17; *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15; *Council of the City of Sydney v Goldspar Australia Pty Ltd* [2006] FCA 472; *CGU Workers Compensation (NSW) Limited v Garcia* [2007] NSWCA 193; *Insight Oceania Pty Ltd v Phillips Electronics Australia Ltd* [2008] NSWSC 710; *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177; *Macquarie International Health Clinic Pty Ltd v Sydney West Area Health Service* [2010] NSWCA 268; *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222; and *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49.

One camp reflects the orthodox judicial position in Australia, which accepts the legitimacy of implied terms of good faith and reasonableness in at least some circumstances. The problem that many commercial parties and their lawyers have with this position is that it too readily implies obligations of good faith that are too broad in scope, compounded by too much uncertainty about how much of good faith (if any) can be excluded by private agreement.

Advocates of the Carter-Peden view of good faith in contract occupy the other camp. Under this view, good faith of a minimalist but important kind is intrinsic to contract law as a whole. As a result, there is no need to imply terms of good faith or to extend their reach to reasonableness of some kind. This view of good faith is crystallised in one of Australia's leading contract law texts as follows: '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'.⁸⁴

In brief, the Carter-Peden view follows the route of 'implicit good faith'.⁸⁵ While circumventing the need for implied terms of good faith, this route still achieves the effect of conditioning contractual powers and discretions by reference to considerations implicit in contract law's doctrines and principles of construction, such as those associated with notions of honesty, non-arbitrariness, proper purposes, and rationality. In the UK *Socimer* case, the Court of Appeal indicated as much, as follows:⁸⁶

Implications of good faith and rationality, and lack of arbitrariness or perversity, are standard, for they represent the very essence of business (and other) relationships. Once one goes beyond them, however, the matter becomes much more uncertain.

Such a view from the UK dovetails with the view recently expressed by Professor Peden, as follows. She 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.⁸⁷ '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.⁸⁸

Whatever the doctrinal and normative advantages of this view, one published criticism is that it creates its own demarcation problems. These problems arise in 'defining the point at which regard for the interests of the other party and the right to have regard to a party's own interests end', and in

⁸⁴ Carter, Peden, and Tolhurst, above at [2-01].

⁸⁵ E. Peden, "'Implicit Good Faith' – or Do We Still Need an Implied Term of Good Faith?" (2009) 25 JCL 50 at 52.

⁸⁶ [2008] EWCA Civ 116 at [106] (Lloyd LJ and Laws LJ agreeing).

⁸⁷ Peden, above at 61.

⁸⁸ Peden, above at 61. For convenience, this is referred to in this article as contractual honesty, fidelity, and other-centredness.

reconciling ‘how the requirement to have regard to the interests of the other party is materially different from the established implied obligation on each contracting party to cooperate in achieving the objects of the contract’.⁸⁹ There is much force in both criticisms from practical, drafting, and litigious standpoints. However, these weaknesses might simply come with the territory of good faith under the law. For example, the demarcation of interests in the former criticism is inherent to a range of legal doctrines and statutory standards that inhibit purely self-interested exercises of rights without adequate regard to the impact upon others in close relationships, while the latter criticism goes to the separation, assimilation, or reformulation of good faith and related obligations as an ongoing judicial work-in-progress.

Beyond the basic platform of implicit good faith underlying all contracts on the Carter-Peden view, commercial parties might seek to enshrine additional obligations explicitly or argue in litigation for ‘a more extensive implied limitation’, as part of the two-track approach to implications of terms and other obligations that is evident from the *Socimer* case.⁹⁰ In that case, argument about an implied term centred around a requirement of reasonableness to obtain an objective valuation at market value. In other words, this was an implied term whose content went beyond what was already covered by implicit good faith. The court rejected such an implied term on the grounds of necessity and certainty.⁹¹

Is this all a storm in a teacup to some degree, at least from a transactional perspective? The divergent academic and judicial views on good faith in contract, although academically interesting, are less problematical in practice than might appear at first glance. If the Carter-Peden view of implicit good faith is normatively correct or ultimately prevails in the courts, there is a minimalist baseline of good faith in contracts with which most businesses can probably live, whether or not any of it is excludable by agreement. This is because it is directed towards giving full effect to all contracts *and* does not import higher external standards into commercial agreements. Anything beyond this core obligation as an implied term is excludable by agreement, within the outer limits of what is permissible under heads of public policy, illegality, and statutory override.

Conversely, if the Carter-Peden view is wrong or does not persuade the Australian judiciary as a whole, there is little doubt that reasonableness and other enlarged aspects of implied terms of good faith are excludable by the right combination of drafting devices. ‘The only implied terms that cannot be excluded are those incorporated by legislation which expressly or impliedly prohibits exclusion, and terms which it would be contrary to public policy to exclude’, according to Professor Carter and Professor Peden.⁹² In any case, lately Australian courts are moving away from importing open-ended external notions of reasonableness into commercial agreements.⁹³

⁸⁹ Thompson, above at p 18.

⁹⁰ [2008] EWCA Civ 116 at [67] (Lloyd LJ and Laws LJ agreeing).

⁹¹ [2008] EWCA Civ 116 at [108] (Lloyd LJ and Laws LJ agreeing).

⁹² Carter and Peden, above at 163.

⁹³ Eg *Macquarie International Health Clinic Pty Ltd v Sydney West Area Health Service* [2010] NSWCA 268; and *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222.

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 High Court’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’.⁹⁴ However, the High Court’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’.⁹⁵ In that sense, reasonableness is not wholly imported as an external and abstract standard beyond the contract, but instead takes its point and character from the contractual circumstances, purpose, and intention of the parties.

All of this is located firmly within the boundaries of the general law of good faith. Other ‘test case’ issues also loom into view. For example, where both good faith in contract and good faith under statutory unconscionability are relevant in a particular transaction, how does any reference to reasonableness under the former sit with other listed indicators involving reasonableness under the latter? Moreover, does the applicability of good faith in both contexts not only require good faith to have a similar meaning in each context, but also provide justification to strip away from good faith’s content some of the broader senses of reasonableness judicially attached to it?

What Might the High Court Do To and With Good Faith?

This field of law still awaits authoritative settlement by the High Court.⁹⁶ Earlier this century, in the High Court’s official reservation of its position on implied terms of good faith in *Royal Botanic Gardens and Domain Trust v South Sydney City Council*,⁹⁷ some of its past members flagged a mix of theoretical and doctrinal issues that await determination as part of final resolution of the place of good faith in Australian contract law. These stated issues include the status of good faith as ‘a general implied contractual term in its own right’, the compatibility of implied terms of good faith with the doctrine of caveat emptor and principles of ‘economic freedom’, the consistency of implied terms of good faith with other parts of the existing law on implied terms and the bases for their implication, and whether ‘a duty of good faith might deny a party an opportunistic or commercial exercise of an otherwise lawful commercial right’.⁹⁸ Cumulatively, these expressed reservations do

⁹⁴ *Park v Brothers* [2005] HCA 73 at [38] per Gleeson CJ and Gummow, Hayne, Callinan, and Heydon JJ.

⁹⁵ *Park v Brothers* [2005] HCA 73 at [39] per Gleeson CJ and Gummow, Hayne, Callinan, and Heydon JJ.

⁹⁶ While accepting that ‘the issues respecting the existence and scope of a “good faith” doctrine are important’, the High Court expressly declined to address the status, content, and limits of good faith under Australian contract law in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5 at [40] per Gleeson CJ and Gaudron, McHugh, Gummow, and Hayne JJ. No suitable test case for revisiting such issues had reached the High Court by the third quarter of 2012.

⁹⁷ [2002] HCA 5.

⁹⁸ *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5 at [86]-[87] per Kirby J and at [155] per Callinan J.

not suggest that the High Court will easily or inevitably embrace the innovations in good faith developed at other judicial levels in Australia.⁹⁹

The relative scarcity of High Court pronouncements on good faith still leaves the Court with considerable room to move in developing this area of doctrine in one direction or another. The High Court has already ruled upon agreements that expressly refer to good faith or related obligations. This set of cases includes interpreting a contract with an express obligation of good faith, in the context of a party being bound by that obligation in calculating charges under a contract by reference to ‘bona fide estimates of costs’,¹⁰⁰ and also ruling on the additional obligations implied by a party’s express agreement to use their best endeavours.¹⁰¹ Early in its history, the High Court also considered the exclusionary impact of particular kinds of clauses (such as ‘whole agreement’ or ‘entire agreement’ clauses) upon implied terms.¹⁰² In other areas of law dealing with implied obligations, the High Court is already accustomed to examining whether implied obligations include aspects of reasonableness in addition to honesty.¹⁰³

In one set of cases, the High Court has accepted a set of implied obligations that all relate to promoting and not obstructing contractual parties’ fidelity to the contract and fulfilment of its respective and mutual benefits for them.¹⁰⁴ A second set of cases raises aspects of fair treatment related more broadly to good faith and fair dealing, in the context of exercising termination and other contractual rights.¹⁰⁵ Another High Court case of relevance to this topic¹⁰⁶ has provoked debate about its proper characterisation as a case based upon good faith or alternatively the proper bounds of contractual powers.¹⁰⁷ Whatever the correct characterisation, this case too has relevance in identifying and perhaps recasting the constituent aspects of good faith and related obligations, and the methodological basis for construing commercial agreements in light of them.

Some High Court dicta suggest a latent appreciation of underlying aspects of good faith in contract law, together with other bases for restricting the exercise of contractual rights, such as the recognition that trying to use a trivial breach of contract as a convenient excuse for termination might ‘violate the dictates of fair dealing or would amount to unconscionable conduct’.¹⁰⁸ Both conceptually and doctrinally, this raises questions about good faith as a matter of contractual

⁹⁹ The Hon. J. Douglas, ‘Exploring the Recent Uncertainty Surrounding the Implied Duty of Good Faith in Australian Contract Law: The Duty to Act Reasonably – Its Existence, Ambit and Operation’, LexisNexis Contract Law Master Class, 2006, at [21] and [23].

¹⁰⁰ *Placer (Grany Smith) Pty Ltd v Thiess Contractors Pty Ltd* [2003] HCA 10.

¹⁰¹ *Shepherd v Felt & Textiles of Australia Ltd* [1931] HCA 21.

¹⁰² *Hart v MacDonald* [1910] HCA 13.

¹⁰³ *Meehan v Jones* [1982] HCA 52.

¹⁰⁴ *Shepherd v Felt & Textiles of Australia Ltd* [1931] HCA 21; *Peters (WA) Ltd v Petersville* [2001] HCA 45; and *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* [1979] HCA 51.

¹⁰⁵ Eg *Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54.

¹⁰⁶ *Carr v JA Berriman Pty Ltd* [1953] HCA 31.

¹⁰⁷ E. Peden, ‘Implicit Good Faith’ – or Do We Still Need an Implied Term of Good Faith? (2009) 25 JCL 50 at 59-60; cf Sir Anthony Mason, ‘Opening Address’ (20th Anniversary Journal of Contract Law Conference) (2009) 25 JCL 1 at 5.

¹⁰⁸ *Sunbird Plaza v Maloney* [1988] HCA 11 at [29] per Mason CJ (with Deane, Dawson, and Toohey JJ concurring).

construction, the conditioning of contractual rights by reference to considerations of fair dealing, and the relation between good faith and unconscionability.

A handful of decisions on implied terms sets down markers for the Court's general approach to implied terms of various kinds, together with alternative pathways for implying terms.¹⁰⁹ In particular, High Court judges have emphasised that the test for implying terms to give effect to the parties presumed intention as a matter of business efficacy, as outlined by the Privy Council,¹¹⁰ 'has been approved and applied in numerous decisions of this Court'.¹¹¹ Implying terms of good faith and fair dealing must fit within this framework, which provides ample room for confining such implication ad hoc to exceptional circumstances where it is truly essential for a commercial agreement's effective operation – a benchmark that might be set higher than the point at which it has been set in some trial judgments and intermediate appellate court rulings on implied terms of good faith. This higher-level benchmark for implying terms of good faith accommodates the accepted judicial distinction between situations 'where an obligation of good faith in contractual performance is imposed by law' and situations 'where an obligation to act reasonably and in good faith is implied as a term to give business efficacy to a contract which otherwise would be apt to fail for uncertainty [or must be] saved from classification as an illusory promise by the addition of an implied term'.¹¹²

*Byrne v Australia Airlines Ltd*¹¹³ opens up some interesting avenues for wrestling with the interplay between implied terms, contractual construction, and underlying doctrines of contract law. Having implicitly endorsed another judicial view that 'the classes of contracts in which the law will imply terms are not closed', the joint judgment of McHugh and Gummow JJ suggests that '(s)ome implied terms are perhaps more usefully identified as rules of construction applied to the express terms of the contract', before settling on the position that 'the more modern and better view is that these rules of construction are not rules of law so much as terms implied, in the sense of attributed to the contractual intent of the parties, unless the contrary appears on a proper construction of their bargain'.¹¹⁴

In a crucial passage for future 'test case' advice and litigation about the nature of terms implied by law and the capacity to exclude them, McHugh and Gummow JJ explicitly reject the opinion of one of the judges in the court below that an employment term 'imported independently of the intention of the parties' cannot be excluded by agreement because it is a necessary incident of such contracts and derives from statute. Instead, they offer the following analysis:¹¹⁵

¹⁰⁹ Eg *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* [1979] HCA 51; *Codelja Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; *Byrne v Australian Airlines Ltd* [1995] HCA 24; and *Breen v Williams* [1996] HCA 57 at [10] per Gaudron and McHugh JJ.

¹¹⁰ *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* [1977] HCA 40.

¹¹¹ *Byrne v Australian Airlines Ltd* [1995] HCA 24 at [42] per McHugh and Gummow JJ.

¹¹² [1993] FCA 445 at [40]-[41] per Gummow J.

¹¹³ [1995] HCA 24.

¹¹⁴ *Byrne v Australian Airlines Ltd* [1995] HCA 24 at [70]-[71] per McHugh and Gummow JJ.

¹¹⁵ *Byrne v Australian Airlines Ltd* [1995] HCA 24 at [65] and [71]-[72] per McHugh and Gummow JJ.

There is force in the suggestion that what now would be classified as terms implied by law in particular classes of case had their origin as implications based on the intention of the parties, but thereafter became so much a part of the common understanding as to be imported into all transactions of the particular description ... This understanding of the matter is consistent with the proposition that terms of this kind, although treated as implied by law, may be excluded by express provision made by the parties and also as a result of inconsistency with terms of the contract. The result is that, even if treated as rules of law, they only apply in the absence of an expression of contrary intent ... The reference [by the judge below] to the implied condition he favoured being insusceptible of exclusion by express agreement is at odds with the weight of authority.

Understood in this way, it is possible that the different routes for implications of good faith might be viewed as different roads to the same destination. Commercial construction of contracts uses principles and doctrines of contract law (including the jurisprudence surrounding implied obligations) in ascertaining the legal intent of the parties. Here, the different modes of implication of good faith ultimately fold in upon one another, in a way that is substantive and not merely rhetorical, at least according to the NSW Court of Appeal in the landmark *Vodafone* case. Having quoted Professor Peden's view of good faith as an obligation based properly upon construction rather than implication, the NSW Court of Appeal proceeds as follows:¹¹⁶

As so often in the law, it is necessary to make sure that words are the servants, not the master. If it is said that, in determining the full import of [the sole discretion clause], as a matter of law the power conferred on Vodafone must be exercised in good faith and reasonably, and if that is described as *a process of construction*, so be it. But it is not construction by regard to the ordinary meaning of the words used in the agreement. There is *an imposition of law*, as explained by McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd* by *attribution of a contractual intent* to the parties, and the rule of construction to which their Honours refer is a rule for imposing in law a meaning on the parties. I have no difficulty in using, in that situation, the accepted description of *a term implied by law*.

This crucial rationale of Justices McHugh and Gummow (as interpreted by the NSW Court of Appeal in the *Vodafone* case) has five important implications for the present discussion. It provides an evolutionary relation between implication ad hoc and implication by law that is useful in dissolving any differences that might otherwise result because of the mode of implication. It ties implication to the terms of the contract and the intention of the parties in a discrete way, which keeps the focus upon what the contract provides and away from the importation of external norms that supervene upon what the parties have agreed. It provides a justifiable basis for excluding all implied terms that is comprehensive and enforceable, which thereby removes residual doubts and conceptual difficulties surrounding the possibility of some non-excludable terms as a matter of contract law. Its approach to implied terms still leaves room for a baseline of good faith that is intrinsic to contract law and not properly covered by implied terms jurisprudence, which instead is

¹¹⁶ *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15 at [205] per Giles JA (Sheller JA and Ipp JA concurring); emphasis added.

reserved for the imposition of additional obligations above and beyond the contractual honesty, cooperation, and fidelity upon which any contract depends. Finally, it would not prevent some degree of assimilation of ‘implicit good faith’ and implied terms jurisprudence, together with the doctrines that condition unconscientious and unreasonable exercises of contractual rights over property, if the High Court ever perceives that the content and scope of good faith warrants this development.

Multiple Drafting Devices and Client-Focused Options on Good Faith

Framing the Commercial Context

Commercial lawyers and litigators want their clients to avoid becoming the next test case for the issues that occupy much academic thinking on this topic. Commercial contract negotiators and drafters face a bewildering morass of cases and literature on good faith in contract that still leaves questions about ‘whether to take the implied term path or the implicit and fundamental and underpinning approach which is favoured academically [and] (i) if the former will it be implied as a matter of fact or law and is it implied into all commercial contracts or only a particular class and then will it apply broadly (ie at all times and in doing all things) or narrowly such as in the exercise of discretions or exercise of significant powers such as termination?’.¹¹⁷

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.

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

¹¹⁷ Leighton O’Brien, ‘Contract Law Masterclass: Good Faith’, Allens Arthur Robinson, 2010.

reasonableness by judges or does the concept have a clear meaning within the context of the particular deal struck by the parties?¹¹⁸

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,¹¹⁹ notwithstanding high-level judicial suggestions that implied terms jurisprudence has limited use in such contexts.¹²⁰ 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.

Some commercial parties and their lawyers also exaggerate the uncertainty and unworkability of a universal norm of good faith in business regulation and practice, especially one whose content is confined to implicit good faith and excludable enlargements of obligations (eg external reasonableness) beyond that baseline. Moreover, the supervening imposition of a norm of good faith through statutory unconscionability further limits what can be done or excluded by contract anyway.

The practical dilemma of good faith in commercial drafting, a pragmatic approach to dealing with it, and a prescient awareness of ongoing matters of commercial concern are all crystallised in Warren Grover QC’s prescient advice to legal practitioners almost 20 years ago:¹²¹

Whether you characterise the question as one of ‘good faith’ or of the court believing that it has more wisdom than the parties to determine what is *reasonable*, the practitioner has a problem. With common sense and some sensitivity to his client’s plight, a careful solicitor can normally rely on the enforceability of a properly drafted clause. The courts are not ready to read down freedom of contract explicitly if you can avoid the illegality and public policy arguments and your client does not have the status of [a] fiduciary. *A clear clause will embarrass the judiciary into submission* ... It is my belief that ‘good faith’ normally remains within the contract and can be avoided by proper drafting. *The worry is that ‘good faith’ may become another rule of public policy that operates outside the contract itself.*

Basic Practical Approaches and Step-by-Step Templates

Faced with what on any view is an unsatisfactory state of the law on good faith in contract, commercial practice in Australia has evolved an array of drafting measures for handling good faith.

¹¹⁸ H. Hunter, ‘Good Faith and the Construction of Terms in Commercial Contracts: The American Perspective’ (2009) 25 *Journal of Contract Law* 39 at 39.

¹¹⁹ Eg *Overlook v Foxtel* [2002] NSWSC 17; *Telstra Corporation Ltd v Optus Networks Pty Ltd* [2002] FCAFC 296; *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228; and *The Bell Group Ltd (In Liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239 (on appeal *Westpac v Bell Group* [2012] WASCA 157).

¹²⁰ *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228 at [4] per Warren CJ.

¹²¹ 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)*, 1985, at 106-107; emphasis added.

No 'one size fits all' solution on good faith is available for commercial clients, as the appropriate negotiating and drafting stance must be informed by a range of considerations. The choice and combination of measures is driven by factors as various as relative negotiating power, client preferences, sectoral considerations, industry expectations and norms, applicable sector-specific legislation, and drafting practices and precedents in different law firm practice groups.

Accordingly, a step-by-step template for transactional analysis of good faith in commercial agreements for negotiating or pleading purposes must include at least the following levels of analysis:

- (1) Is good faith already an expectation or standard for these parties or this industry/sector?;
- (2) What is in the commercial client's best interests on the issue of good faith (having regard to the variety of negotiating and drafting stances and devices outlined in this paper)?;
- (3) Where the chosen stance is to exclude implications of good faith, what combination of clauses is optimal to prevent good faith or related obligations from being implied as an additional term, as a matter of contract?
- (4) Are there other ways in which contract law and related laws might condition the exercise of contractual rights and discretions, by reference to related notions of unfair, unreasonable, and unconscientious exercise of rights?; and
- (5) Whatever the outcome on contractual grounds, are there tangible risks in these circumstances of pre-execution or post-execution conduct that amounts to a breach of good faith as an indicator of statutory unconscionability?

The client-based options and their drivers are therefore more nuanced than a simple bipolar choice between wholly embracing or completely negating judge-implied obligations of good faith. Generally speaking, there are five basic approaches to good faith from the transactional viewpoint of negotiating and drafting commercial agreements, some of which are overlapping. Those five approaches are:

- (1) choosing a governing law for the contract that accords with the parties' expectations on good faith;
- (2) remaining silent on good faith (and leaving it to later implication by courts);
- (3) expressly imposing an undefined and general obligation of good faith on all parties;
- (4) expressly defining and confining obligations of good faith on some or all parties (eg by reference to particular contractual rights and stages); and
- (5) expressly excluding implications of good faith to the extent lawfully permissible, using the right combination of drafting devices.¹²²

¹²² The present discussion focuses simply upon good faith, for illustrative purposes. Of course, the negotiating and drafting options also need to embrace cognate and related obligations, such as obligations to cooperate, use best endeavours, avoid frustrating the bargain, and so on.

Commercial lawyers seek to avoid their clients becoming involved in the next judicial test case unless that is the best or only commercially feasible option available. So, the availability and limits of contractual safeguards in this area are important to commercial lawyers and their clients. Both groups prefer the presumed convenience and certainty of having all relevant rights at stake clearly expressed and largely (if not wholly) locked up in a contract. However, the law no longer works that way, if it ever did. In light of the current state of the law on good faith and its remaining uncertainties, legal practitioners need to adopt a more sophisticated mindset for negotiating and drafting commercial agreements (and updating standard precedents for them) than one that views good faith simply as a matter of contract, involving a term that is either in the contract or not (whether expressly or implicitly), and fully amenable to being excluded by private agreement in all circumstances.

In a nutshell, the leading academic criticism of how Australian courts currently treat good faith is that there has been judicial overreach in too readily finding implied terms of good faith and too expansively defining the elements of good faith. Whether this normative criticism of the present state of the law is right or not, the stakes are raised for commercial parties from a drafting perspective, because it is clear that some Australian courts are prepared to imply good faith terms in commercial agreements in at least some circumstances, with elements that include some notion of reasonableness. If commercial parties do not want to be at risk of courts too eagerly implying good faith terms whose content is too broad for commercial comfort, it makes it even more important than otherwise to know whether such terms and any other good faith implications can effectively be excluded by contract and to use the right combination of appropriately drafted provisions in doing so.

First Approach – Using the Choice of Governing Law as a Default Setting on Good Faith

In an era of transnational business agreements and cross-border transactions for multinational companies, the law of a governing jurisdiction on good faith in contract is increasingly an important consideration in selecting an appropriate ‘choice of law’ (or ‘governing law’) clause.¹²³ For example, if an Australian company and an American company make New York law the governing law of the contract, different rules on good faith might be applicable, although that jurisdictional gap in treatment (if any) might not be as large as once envisaged.¹²⁴ The range of countries and

¹²³ The Hon J. Allsop, ‘Good Faith and Australian Contract Law: A Practical Issue and a Question of Theory and Principle’ (2011) 85 *Australian Law Journal* 341 at 354. The same ‘choice of law’ issue arises within Australia too, in choosing the law of a governing jurisdiction. In theory, one factor influencing the choice of governing law for the contract could be the perceived approach of courts in a particular jurisdiction (say, NSW) to particular contractual issues of importance to the parties (say, implications of good faith and reasonableness). However, there are considerable factors against this too. It is only one factor, and some perceptions are more apparent than real. Non-statutory differences in the content of the common law across Australian jurisdictions are intolerable under conditions of one Australian common law, although subtle underlying differences of judicial approach under localised conditions might be more tolerable, pending the ultimate settling of this area of law by the High Court.

¹²⁴ See the recent comparative discussion of American and Australian law on good faith in contract, for example, in: *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177; and *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268.

international forms of regulation that involve recourse to some notion of good faith in commercial contexts has a number of ripple effects. Those effects include fostering transnational consensus and expectations concerning good in business dealings, increasing the number of jurisdictions available for ‘choice of governing law’ purposes whose contract law includes good faith, developing enhanced comparative and international bodies of law deploying good faith across a range of commercial areas (eg trade, investment, and sale of goods), and informing official moves towards a national contract law in Australia.

For agreements covered by the law of an Australian jurisdiction, one factor in this context is the attitude displayed by courts of that jurisdiction to questions of good faith in contract law. Members of the legal profession commonly refer to the distinctive attitudes exhibited by the courts of a particular jurisdiction to matters concerning good faith, especially the lead taken by NSW judges in pushing the boundaries of the law of good faith in contract. For example, commentators suggest that ‘it is probably correct to say that, currently, in NSW at least, courts are likely to imply in law a term of good faith performance into commercial contracts (unless this is inconsistent with the contract)’,¹²⁵ and that ‘(t)he proposition that a duty of “good faith and fair dealing” should be recognised as an inherent feature of contracts is routinely now accepted by the New South Wales Court of Appeal, and by some other courts, at least in connection with the exercise of contractual rights’.¹²⁶

Indeed, 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:¹²⁷

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.¹²⁸ However, as there is only one national common law and not a common law of each Australian jurisdiction, such perceptions have their clear legal limits. In practice, it might still be relevant to have in the back of one’s mind as a contractual drafter or negotiator that some courts might be more willing than others to imply

¹²⁵ Peden, above at 226.

¹²⁶ A. Stewart and J. Carter, ‘The High Court and Contract Law in the New Millennium’ (2003) 6 *Flinders Journal of Law Reform* 18. See also *Burger King Corporation v Hungry Jack’s Pty Ltd* [2001] NSWCA 187 at [159].

¹²⁷ Chief Justice Warren, above at 348.

¹²⁸ Eg see the phases in the development of good faith in Australian contract law suggested in Dixon, above .

obligations of good faith or to use such considerations in conditioning the exercise of contractual rights and discretions.

Second Approach – Remaining Silent on Good Faith

In terms of Australian contract law and practice generally, the option of remaining silent leaves many issues of good faith to the courts in the event of litigation. This would occur against the background of any relevant industry norms (eg possibly franchise arrangements and certainly mining joint ventures) or sectoral expectations (eg public sector contracting and tendering). The problem with this approach is two-fold. It leaves everything to a court in the event of litigation, at a point when the relationship between the parties has broken down. In addition, it has the added risk that Australian courts are applying ‘implied terms’ approaches and elements of ‘reasonableness’ that commercial parties might find troubling. On the other hand, leaving both parties’ to the fate of what a court decides about implications of good faith might also be a conscious choice in a circuit-breaking sense, if one party wants an express obligation of good faith either included or excluded, the other party takes the opposite stance, and neither will move from that position.

Third Approach – Imposing a General, Mutual, and Undefined Obligation of Good Faith

Much the same applies to the third approach of expressly imposing but otherwise not defining and regulating good faith within the contract. For example, the express obligation of good faith considered by the NSW Court of Appeal in *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* applied throughout the contract to its duties, powers, and other dealings, and the breadth of this obligation mattered to the question of good faith disclosure in that case.¹²⁹ The express good faith clause in a number of operative documents in that case was as follows: ‘Without limiting the generality of any other provision of this [deed/lease] the parties agree that in the performance of their respective duties and the exercise of their respective powers under this deed and in their respective dealings with each other, they shall act in the utmost good faith’.

For parties who wish to embrace mutual obligations of good faith in their agreement, there are the options of defining what good faith means for their contract, and then indicating its applicability to various parts of the contract and phases of the contractual relationship. For example, the express good faith clause in the *Thiess Contractors* case in the High Court stated that ‘(t)he successful operation of this Contract requires that [Thiess Contractors] and [Placer] agree to act in good faith in all matters relating to carrying out the works, derivation of rates and interpretation of this document’.¹³⁰ While not directly relevant as an issue in the Thiess Contractors appeal, the wording of this clause alternates between confining good faith to particular contractual activities and leaving it at large to influence construction of the whole contract.

¹²⁹ *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268 at [144] and [155] per Hodgson JA (Macfarlan JA concurring).

¹³⁰ *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* [2003] HCA 10.

Fourth Approach – Defining and Confining Good Faith’s Contractual Operation

Even a cursory glance at the commercial precedents used by large law firms reveals clauses in different precedents in different practice areas that expressly incorporate obligations of good faith. In context, of course, such references either place these obligations upon other parties or else accept them as mutual obligations, sometimes confined to a particular contractual contingency or step rather than applying throughout the contract as a whole.

Some commercial agreements expressly insert more discrete obligations of good faith in a variety of situations. These include disclosure and use of information in good faith, negotiation in good faith towards dispute resolution, taking contractual steps with due diligence and in good faith, certifying and warranting material elements in good faith, making acquisitions and transfers in good faith, and forming opinions and valuations in good faith. The commercial transactions and sectoral contexts where such issues arise include boilerplate provisions in standard commercial agreements (eg schemes of arrangement, and business/share sale agreements), finance and security agreements, joint venture agreements (eg mining joint ventures), project and construction agreements, native title agreements, and public sector contracts.

Some commercial agreements in some industries and sectors impose and define a general obligation of good faith mutually upon the parties. The range of matters included within the content of an obligation of good faith matters as much in accepting such obligations as in trying to negate them within the limits allowed by law. In each situation, the content of the obligation accepted or purportedly negated still needs to be identified. Consider, for example, one recently litigated example in a construction context. The relevant contract expressly imposed a general and mutual obligation of good faith, with a non-exhaustive definition of its meaning, as follows:¹³¹

The parties warrant that they shall perform all duties and act in good faith.

Acting in good faith includes:

- (a) being fair, reasonable, and honest;
- (b) doing all things reasonably expected by the other party and by the Subcontract; and
- (c) not impeding or restricting the other party’s performance.

Such a clause captures in some form the trilogy of honesty, cooperation, and reasonableness that characterises contemporary judicial exposition of good faith in Australia. It also captures well-accepted terms implied by law, such as implied obligations of cooperation and non-hindrance in meeting contractual needs. It is a mutually accepted obligation and may well represent industry expectations. As a non-exhaustive definition of good faith, it leaves room for courts to include other aspects of good faith, and to give meaning to terms such as ‘fair’ and ‘reasonable’, as qualified and

¹³¹ *Multiplex Constructions Pty Ltd v Abigroup Contractors Pty Ltd* [2005] QCA 61.

used in their contractual context. At the same time, it uses terms that are relatively open-ended in their meaning and application, especially in the absence of a universally accepted obligation and taxonomy of good faith.

Defining and confining good faith's operation allows the parties to exercise more control over good faith's application to their circumstances, especially in contractual phases involving negotiation, dispute resolution, and termination. For example, the parties might expressly accept a mutual obligation of good faith, but confine its operation to negotiation to resolve disputes, so that it does not apply to disclosure obligations once the parties' commercial relationship has broken down and they are heading towards litigation.

As a matter of commercial construction, the inclusion of an express obligation of good faith in one part of the contract is a factor tending towards its non-adoption by the parties and hence non-implication in other parts of the contract that make no express mention of it. Alternatively, the parties might define what good faith or related obligations means for them in their commercial circumstances. For example, obligations upon governmental parties in major project and infrastructure agreements can be defined to acknowledge and avoid the problems associated with advance fettering of public powers and discretions, often as a quid pro quo for the express acceptance of such obligations. Indeed, official guidelines on commercial principles (CPs) for public-private partnerships (PPPs) provide drafting guidance along these lines.¹³²

Fifth Option – Excluding Good Faith Terms and Related Obligations

The General Scope and Limits of Exclusion

In terms of the fourth proposition on good faith in contract, there are various obstacles to limiting good faith's operation to whatever is allowed expressly by private agreement. In some governmental and business contexts,¹³³ obligations of good faith are expected or even expressly incorporated. Considerations of statutory illegality, public policy, or fundamentality under contract law might preclude the exclusion of some aspects of good faith simply by private agreement, although the latter source of limits remains to be tested fully in the courts. Good faith can inform the preconditions for contractual parties seeking equitable relief, beyond common law remedies for breach of contract.¹³⁴ Since the landmark *Vodafone* case,¹³⁵ it is also clear that the optimal way of excluding implied terms is to use a package of measures, including at least 'entire' agreement' clauses, 'negation of implied terms and other obligations' clauses, and 'sole discretion' clauses.¹³⁶

¹³² *National Public Private Partnership Guidelines (Volume 3: Commercial Principles for Social Infrastructure)*, CP 1.6.1 and CP 1.6.5.

¹³³ Such as public sector contracting, mining joint ventures, construction and development agreements, and perhaps franchising arrangements.

¹³⁴ Eg *Coghlan v Pyoanee Pty Ltd* [2003] QCA 146 at [16].

¹³⁵ *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15.

¹³⁶ [cross-refer to 2nd article and citations there].

Both judicial authority and academic commentary support the view that implied terms of good faith can be excluded by appropriately drafted agreements.¹³⁷ Accordingly, in the absence of drafting that offends because it makes the contract 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.¹³⁸ 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'.¹³⁹

However, ultimate resolution of this debate is also tied to resolution of the debate about good faith's pervasiveness and precise content. In an argument that ties together criticism of the Carter-Peden view of implicit good faith with its implications for the excludability of good faith through drafting, Justice Douglas frames this aspect of the debate as follows:¹⁴⁰

There is also an argument that 'good faith' is inherent in all common law contractual principles and that an attempt to imply an independent term requiring good faith is unnecessary. The authors who propound that theory argue that good faith is inherent in all aspects of contract law because good faith is the essence of contract. ... It is an interesting argument but not one that convinces me, partly because of the debate as to whether the law requires both honesty and reasonableness in performing obligations under a contract or merely honesty. If those authors are correct, however, then the argument against the ability to exclude such an obligation of good faith would be stronger.

If, however, the obligation is one found to arise only in particular contracts or by implication from particular facts then there should be no reason in theory why such an implied implication might not be excluded just as fiduciary obligations that might otherwise arise may be excluded by agreement.

High-level judicial support can be found for this mix of views. Sir Anthony Mason has commented on the failure thus far of the Carter-Peden view of 'implicit' good faith to take hold amongst the judiciary, as well as noting a residual role for at least some notions of reasonableness in commercial

¹³⁷ Eg *Byrne v Australian Airlines Ltd* [1995] HCA 24; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50; *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15; B. Dixon, 'Can the Common Law Obligation of Good Faith Be Contractually Excluded?' (2007) 35 ABLR 110 at 119-120; N. Seddon and M. Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 9th Australian edition, 2008, at [10.49]; Chief Justice Paul de Jersey, 'Good Faith in Contracts in Financial Services', 26th Annual Banking and Financial Services Law and Practice Conference, 2009; and A. Terry and C. D. Lernia, 'Franchising and the Quest for the Holy Grain: Good Faith or Good Intentions?' (2009) 33 *Melbourne University Law Review* 542.

¹³⁸ 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)*, 1985, at pp 106-107; S. O'Byrne, 'Good Faith in Contractual Performance: Recent Developments' (1995) 74 *Canadian Bar Review* 70 at 96; J. 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 B. Dixon, above at 121.

¹³⁹ O'Byrne, above at 96. For Australian endorsement of this view, see: B. Dixon, above at 120-121.

¹⁴⁰ Justice Douglas, above at [36].

construction.¹⁴¹ 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.¹⁴² This 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’.¹⁴³ In other words, implied terms can be excluded expressly or by necessary implication from other terms in the agreement.

Even contemporary cases that imply obligations of good faith in commercial agreements by law (and not simply ad hoc) recognise that such implications of good faith can be excluded by either route. Two notable examples here include Justice Finkelstein’s view that ‘the duty of good faith is an incident (not an ad hoc implied term) of every commercial contract, *unless the duty is either excluded expressly or by necessary implication*’,¹⁴⁴ and Justice Finn’s view that, while the treatment of good faith in other jurisdictions might render it non-excludable simply by private agreement, ‘as a matter of legal doctrine in this country it must be accepted that, *as an implied term, it is capable of being excluded by express or by inconsistent provision*’.¹⁴⁵ Understood in this context, Justice Finn’s additional statement 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’ simply highlights the incapacity of simple entire agreement clauses to achieve this exclusionary effect on their own.¹⁴⁶

The agreement in the *Vodafone* case contained a ‘negation of implied terms’ clause as follows: ‘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’. However, even such a simple, clear, and ultimately effective clause has limits and lessons for future drafting purposes. First, it targets a range of implications and not just good faith in particular. Secondly, its preclusion of terms ‘other than as expressly set out in this Agreement’ created some leeway for the trial judge to interpret the exclusion clause in a way that precluded extraneous matters, but which left intact whatever express or implied terms were contained in the agreement. Despite the superficial appearance of the clause as one opting out of implied terms, the trial judge seized upon the word, ‘expressly’, in the phrase, other than as expressly set out in this Agreement’, in concluding that ‘the implied terms ... are embodied

¹⁴¹ Sir Anthony Mason, ‘Opening Address for the 20th Anniversary *Journal of Contract Law* Conference’ (2009) 25 *Journal of Contract Law* 1 at 4-5.

¹⁴² *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15 at [184]-[185], [188], and [198]-[200] per Giles JA (with Sheller JA and Ipp JA concurring).

¹⁴³ *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15 at [188] per Giles JA (with Sheller JA and Ipp JA concurring).

¹⁴⁴ *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2005] FCA 288 at [64] (emphasis added), followed by Greenwood J in *Luce Optical v Budget Specs (Franchising)* [2005] FCA 1486 at [59].

¹⁴⁵ *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50 at [920].

¹⁴⁶ *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50 at [922].

in the [contract] just as effectively as if they were written there in express language [and] spring out of the bargain discernible from the [contract]'.¹⁴⁷

Thirdly, it is predicated on whatever exclusion is permissible by law, which tacitly accepts that not everything that the law imposes can be excluded by private agreement. For example, there is a possible baseline of implications of good faith and related obligations whose elements are so necessary to secure fundamental contractual obligations that they cannot properly be excluded by private agreement.¹⁴⁸ This would be because they are intrinsic to the constituent qualities of a contract as known and construed under our law, and not necessarily because of any higher-order public interests or other external standards that supervene in contractual bargains. This still leaves open the twin possibilities that some implied terms (eg cooperation) could be excluded in their application to non-fundamental contractual obligations and opportunities to secure contractual benefits, and that some elements of good faith as found by Australian courts (eg reasonableness) are not inherent to contract law and hence more easily excludable as elements of implied terms than others (eg honesty).¹⁴⁹

Fourthly, it is directed at implied terms and therefore might not necessarily preclude all possible routes of implication and construction deploying good faith, including those grounded in what is intrinsic to contract law and the nature of an agreement, such as honesty and cooperation in maintaining the integrity of the bargain intended by the parties. This raises the additional question of the relative cost-benefit assessment for commercial parties of trying to negate particular elements associated with good faith. In short, the 'front end' advantages in securing agreement to negate good faith might not be worth the 'back end' risks and consequences of doing so.

Moreover the need for such contractual devices may disappear altogether if good faith is limited to a commercially acceptable minimum of contractual honesty, cooperation, and fidelity, backed by long-standing doctrines that regulate exercises of contractual powers and discretions that are unconscionable or unconscientious, arbitrary or capricious, unreasonable in light of the agreement, or otherwise an abuse or excess of contractual power. If, in addition, suitable drafting devices are available to define away or otherwise preclude external standards of objective reasonableness, what else of legitimate commercial concern about good faith is left to exclude or modify?

Finally, the *Vodafone* case also provides a further reminder of the potential limits to the exclusion of good faith and related obligations. The NSW Court of Appeal expressly disclaimed deciding 'whether or when an implied term of good faith so far as it precludes arbitrariness, capriciousness or abuse of a power can be excluded'.¹⁵⁰ This raises the question of whether at least some elements that are intrinsic to implications of good faith are not capable of being excluded by private agreement.

¹⁴⁷ *Mobile Innovations Limited v Vodafone Pacific Limited* [2003] NSWSC 166 at [728].

¹⁴⁸ N. Seddon and M. Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 9th Australian edition, 2008, at [10.49].

¹⁴⁹ N. Seddon and M. Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 9th Australian edition, 2008, at [10.49].

¹⁵⁰ *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15 at [194] per Giles JA (with Sheller JA and Ipp JA concurring).

Implications of good faith that are made as a matter of fact cannot withstand an express exclusion clause, because implicit obligations cannot override or contradict the contract's express terms. At least one commentator on this area suggests that '(i)t is perhaps only a matter of time before those drafting commercial documents seek to exclude (expressly or impliedly) a contractual term implied by law'.¹⁵¹ Commercial lawyers do not commonly differentiate between modes of implication in standard exclusion clauses, although they might use language designed to exclude all possible avenues of implication to the limits of the law. For example, commercial parties might include two reinforcing clauses as follows – one clause that expressly excludes any implied terms or other obligations generally, to the extent permissible by law, and another focused more particularly on expressly excluding any obligation of good faith (or any related obligation) arising in the performance of duties and obligations or in the exercise of powers or discretions under the contract, either generally or in particular contexts.¹⁵² In any case, there is adequate judicial authority for excluding even obligations implied as a matter of law, although there are also some judicial dicta to the contrary.¹⁵³

Conceptually, however, the source or mode of implication cannot be a definitive basis for allowing exclusion of implied terms of good faith in some circumstances but not others. The suggestion in one case¹⁵⁴ that the difference lies in public policy's acceptance of the need for implications of good faith in all contracts of a particular kind is itself undermined if, as two High Court judges suggested in *Byrne v Australian Airlines Ltd*,¹⁵⁵ terms implied by law are terms once implied ad hoc that achieve a level of common acceptance. If so, the particular public policy consideration that recognises the commonality of a term in practice over time is different from the particular public policy consideration concerned with preventing otherwise unconscientious commercial behaviour. Neither public policy nor commercial morality is offended if particular parties freely decide that, in their circumstances, a term that is otherwise commonly included by implication is to be left out of their agreement. Of course, this is predicated on the agreement being at arm's length, because otherwise considerations of unconscionable conduct might also apply to the entry into such an agreement containing such a term.

A More Nuanced Approach to Exclusion of Good Faith

¹⁵¹ B. Dixon, 'Can the Common Law Obligation of Good Faith Be Contractually Excluded?' (2007) 35 *Australian Business Law Review* 110 at 111.

¹⁵² A. Hughes, 'Implied Term of Good Faith in Commercial Contracts – Why Not and How Do I Avoid It?', Commercial Court Seminar for the Victorian Supreme Court, 18 April 2012.

¹⁵³ Eg *CBA v Spira* [2002] NSWSC 905 at [147] per Gzell J. However, the force of this conclusion is weakened by the arguments canvassed here, the trial judge's acknowledgement that he was bound to decide to the contrary for precedential reasons, and his additional concession (at [144]) that this issue needed revisiting by an appellate court in light of developments surrounding the modes of implications of good faith.

¹⁵⁴ *CBA v Spira* [2002] NSWSC 905 at [147] per Gzell J.

¹⁵⁵ [1995] HCA 24 at [70]-[71] per McHugh and Gummow JJ.

At the same time, exclusion clauses that specifically target implied terms of good faith can be problematical on a number of levels, depending upon their wording. Singling out good faith begs the question of other implied terms. Targeting good faith in this way is not a workable industry outcome for many business and governmental parties. A multi-tiered combination of clauses of the right kind offers the best safeguard, although nothing is legally foolproof and every contractual negation device has its inherent limits. This point is neatly crystallised by one of my former law firm colleagues as follows:¹⁵⁶

If a term of good faith is implied in fact then it can be excluded by the presence of an express term, as an implied term cannot contradict the express terms of a contract. However ... the trend at least in the NSW courts is to imply terms of good faith by law. This requires a more complex approach to excluding good faith from contracts.

... Case law on this subject has not been consistent in Australia. Therefore, a four-tiered approach to excluding implied terms of good faith is recommended comprising clauses addressing the following:

- entire agreement;
- sole discretion;
- negation of implied terms; and
- no other/additional obligations.

An 'opting out' clause on its own may not be sufficient, as 'an attempt contractually to exclude the duty to act honestly would fail'¹⁵⁷ and it is unlikely that parties would contract on that basis in any case.

Even a combination of the four clauses above may not be foolproof. Obligations of honesty and non-arbitrariness may still be imposed. In particular, in areas where good faith is legislated for or in sectors where good faith is an expected norm (eg public sector tenders), it will be very difficult to exclude good faith completely.

So, to the extent that exclusion of implied terms of good faith and related obligations is legally achievable by contractual means, the optimal safeguard is a multi-tiered set of contractual provisions. As a basic safeguard, a simple entire agreement clause can work together with an effective exclusion clause to negate implied terms. However, more is often needed for optimal exclusionary effect. For example, a moratorium clause might be used to minimise the potential effect of any legislation being used to imply terms or other obligations where that is lawfully possible, and otherwise capping its effect on liability to what is legally mandated.

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

¹⁵⁶ Leighton O'Brien, 'Contract Law Masterclass: Good Faith', Allens Arthur Robinson, 2010.

¹⁵⁷ Quoting Chief Justice Paul de Jersey, 'Good Faith in Contracts in Financial Services', 26th Annual Banking and Financial Services Law and Practice Conference, 2009.

mediate that effect is to broaden the exclusionary provisions beyond simple exclusion 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’,¹⁵⁸ 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 implication of terms, it has other work to do in commercial construction and conditioning of contractual rights by reference to implications of good faith.

So, a ‘negation of implied terms’ clause might also be combined with a ‘no other/additional obligations’ clause or ‘no dilution of rights’ clause to greater overall effect in precluding implications of good faith through available legal routes. Such clauses have their legal limits because not everything can be regulated or excluded by private agreement alone. Threats to their enforceability can be lessened through in-built qualifications that recognise that they operate only to the extent that is legally permissible. Contrast in this context a simple exclusion clause that precludes ‘all terms (including conditions and warranties) that would otherwise be implied into this agreement’¹⁵⁹ with a more complex exclusionary clause that focuses not only upon implied terms and related provisions but also obligations more generally, with the double-up protection that none of these things apply unless specifically set out in the agreement and all of them are excluded to the maximum extent permitted by law.

The insertion of mutual or individual obligations of good faith only in some parts of the contract is a 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.

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 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’ 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.

¹⁵⁸ [2007] NSWSC 124 at 595.

¹⁵⁹ As in the relevant exclusion clause considered in *Solution 1 Pty Ltd v Optus Networks Pty Ltd* [2010] NSWSC 1060.

Nevertheless, all options aimed at excluding good faith face a number of basic obstacles. The capacity to address good faith primarily through contractual devices is further reduced by the two-track development of good faith in both contract law and statutory unconscionability. Good faith might not be completely excludable in all of its aspects as a matter of contract law, either because of some fundamental aspect of contract law or because of contract law's own exceptions for public policy and illegality. In addition, statutory standards incorporating reference to good faith are not easily avoidable by private agreement, with the result that there are few (if any) contractual safeguards that immunise commercial conduct amounting to an absence or breach of good faith under statutory unconscionability.

This parallels the accepted position that publicly enacted standards of conduct such as the proscription of misleading or deceptive conduct cannot be avoided or modified simply as a matter of private agreement between contractual parties. For example, as recently as 2009, a High Court majority judgment of Gummow, Hayne, Heydon, and Kiefel JJ emphasises 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'.¹⁶⁰

By analogy, neither an entire agreement clause nor a clause reporting 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,¹⁶¹ although something in such an agreement might still have some bearing upon the legal obligations in play.¹⁶²

The discussion of effective exclusion clauses needs to be grounded in commercial reality. Commercial or even governmental parties who seek to negate or limit obligations of good faith generally do not seek to do so because they want an unfettered right to treat other contractual parties unfairly, unreasonably, and in bad faith. Nor do they necessarily seek to avoid the baseline of honesty, trust, and mutuality between contractual parties that, on any view, is fundamental to much of contract and commerce alike. What they fear most are the twin contingencies of the supervening imposition of standards beyond the contract that are beyond their control and unjustified leverage for other parties for tactical or other purposes, in raising claims that are not absolutely foreclosed by something that can be pointed to in the agreement itself. Of course, these perceptions are highly subjective and fluid, so that they are easily dropped or changed if circumstances alter and the boot is on the other foot. They are also unrealistic at their extremes, not least because we are well beyond

¹⁶⁰ *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25 at [130].

¹⁶¹ *Spies v The Queen* [2000] HCA 43.

¹⁶² *Angas Law Services Pty Ltd (in liquidation) v Carabelas* [2005] HCA 23.

the time when all legal rights between commercial parties could be locked up or excluded in a contract, even allowing for the inherent uncertainties, imprecisions, and ambiguities of legal language.

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 as follows:¹⁶³

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'?

Taken too literally, such comments risk conflating a fanciful need to claim a right to treat other contractual parties in bad faith or unreasonably with the more realistic commercial intention of doing whatever is lawfully permissible to close off potential avenues for argument and hence leverage by other contractual parties as a commercial tactic, in raising arguable points that prolong disputes or provoke concessions that cannot easily be refuted on either side as a matter of law or evidence. Claims involving breach of implied good faith, unconscionable conduct, and misleading or deceptive conduct, for example, rely heavily upon relatively broad standards, value-judgments, and fact-sensitivity, which makes them easier to raise than to prove or disprove easily, simply by pointing to an unmistakably clear contractual term to that affect, for example. Similarly, other commentators contemplate drafting devices that target good faith specifically for express exclusion, reserve the right to withhold contractual approval or consent reasonably or otherwise, render discretions immune from the expectations of other contractual parties, and deem exercises of power and discretion to be in good faith.¹⁶⁴

In any case, targeting obligations of good faith or reasonableness in such a negative and isolated way has various downsides. Put bluntly, the game may not be worth the candle. It presents acute political and other risks for governmental clients. In addition, it risks falling short of the mark by singling out good faith alone amongst implied obligations, while it simultaneously risks overstepping the mark by triggering claims about unconscionably securing agreement to an unorthodox and unfair term. The same effect can usually be achieved without expressly singling out good faith. The need for such exclusion is less acute if the courts clearly detach reasonableness from good faith or at least constrain reasonableness within commercially acceptable bounds.

An air of artificiality can also surround debate about the possibility and validity of exclusion clauses that explicitly reserve one party's right to treat the other dishonestly, unreasonably, or in bad faith. What business organisation in the modern era of corporate social responsibility wants to be known

¹⁶³ E. Peden, "Implicit Good Faith? – or Do We Still Need an Implied Term of Good Faith?" (2009) 25 JCL 50 at 60.

¹⁶⁴ On these various drafting options, see: Dixon above; and O'Byrne above.

and shamed publicly for expecting honesty and good faith from others, while explicitly reserving the right not to do likewise? Moreover, securing another party's acceptance of such extreme clauses would trigger additional concerns based upon potential unconscionable conduct towards a vulnerable party.¹⁶⁵

A Baseline of Non-Excludable Good Faith Elements?

Whatever the outcome, there is a considerable body of academic, judicial, and extra-judicial commentary that cautions against commercial parties trying to use contractual devices to negate basic contractual obligations of honesty, cooperation, and faithful commitment to the parties' mutual bargain. Justice Finn has expressed the view in an important Federal Court case on good faith that the law on excluding implied terms has its limits, so that 'it is, perhaps, difficult to envisage an express provision authorising dishonesty'.¹⁶⁶

Extrapolating from leading Australian cases on implied terms of good faith and related obligations, the authors of one leading Australian contract law text express reservations about the capacity to exclude by contract those aspects of cooperation and good faith that 'constitute the core of nearly every contract'.¹⁶⁷ On this view, duties to cooperate might be excludable for non-fundamental but not fundamental contractual obligations, and duties of cooperation and good faith might be 'qualified' but not 'wholly negated', because exclusions authorising dishonesty or bad faith would be anathema to the law of contract.¹⁶⁸

Speaking extra-judicially on this topic, the present Chief Justice of Queensland once expressed the tentative view that '(m)y present feeling is that an attempt contractually to exclude the duty to act honestly would fail ... as would an attempt to exclude an obligation to cooperate to ensure the performance of a contract, *because those obligations are essential to its being a contract*'.¹⁶⁹ Having asked rhetorically 'what foolhardy entity would be prepared to contract on that basis anyway' in relation to the baseline of honesty, he nevertheless accepted that 'the possibility of contractually excluding an obligation to act reasonably in [the] objective sense is much more arguably open'.¹⁷⁰ This view holds considerable appeal as a combined matter of jurisprudence, doctrine, and commercial practice.

For those contract law experts who advocate the 'implicit good faith' theory, the position is clear-cut. Anyone who suggests that 'good faith is a universal term that cannot be excluded expressly by the parties' is mistaken, at least in relation to good faith's judicial expansion to include

¹⁶⁵ N. Seddon, 'Can Contract Trump Estoppel?' (2003) 77 ALJ 126.

¹⁶⁶ *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50 at [920].

¹⁶⁷ N. Seddon and M. Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 9th Australian edition, 2008, at [10.49].

¹⁶⁸ N. Seddon and M. Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 9th Australian edition, 2008, at [10.49].

¹⁶⁹ Similarly, in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1, Justice Handley included a duty of honesty along with fiduciary duties, *Hedley Byrne* relationships, and statutory prohibitions on misleading or deceptive conduct as part of the basic legal limits within which parties pursue their own interests in negotiating contracts.

¹⁷⁰ On both quoted statements, see: The Hon. P. de Jersey, 'Good Faith in Contracts in Financial Services', 26th Annual Banking and Financial Services Law and Practice Conference, Gold Coast, 2009, at [11]; emphasis added.

reasonableness of some kind or another ‘higher standard of good faith than the law otherwise requires’, for the following reasons:¹⁷¹

In relation to the cases which suggest that a term of good faith is implied in law, it is sufficient to say that such an implied term merely creates a default rule, and since that default rule already exists it is also an illegitimate implication. ... The only implied terms that cannot be excluded are those incorporated by legislation which expressly or impliedly prohibits exclusion, and terms which it would be contrary to public policy to exclude. ... (I)t 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. Therefore, 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 the law. It would also be a retrograde step to introduce this restriction.

The Limits of ‘Entire Agreement’ Clauses

Whatever combination of drafting devices is needed to exclude implications of good faith to the maximum extent permitted by law, it is clear that simple ‘entire agreement’ clauses are inherently incapable of achieving this effect by themselves. There is long-standing High Court authority to the effect that a simple ‘entire agreement’ clause is insufficient on its own to exclude implied terms,¹⁷² which has been followed and applied in other courts to the present day.¹⁷³ This judicial authority combines with academic and extra-judicial commentary that doubts the capacity of a simple ‘entire agreement’ clause alone to exclude implied terms of good faith, and which otherwise details their limitations in this context.¹⁷⁴

¹⁷¹ J. Carter and E. Peden, ‘Good Faith in Australian Contract Law’ (2003) 19 JCL 155 at 163-164.

¹⁷² *Hart v Macdonald* [1910] HCA 13.

¹⁷³ Eg *Etna v Arif* [1999] VSCA 99; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50; and *Alstom Ltd v Yokogawa Australia Pty Ltd* (No 7) [2012] SASC 49. The brief contrary view expressed by the trial judge (Justice Mansfield) in *NT Power Generation Pty Ltd v Power & Water Authority* [2001] FCA 334 at [387] is against the run of these authorities and was expressly rejected by Finn J in the *GEC Marconi Systems* case at [922]. Indeed, Justice Mansfield later concurred in a judgment on appeal in another matter that expressed a view of simple entire agreement clauses that is more consistent with the mainstream view of their relationship to the parol evidence rule: see *Branir Pty Ltd v Onston Nominees (No 2) Pty Ltd* [2001] FCA 1833 at [2], [277]-[278], [297], [413]-[414], [439]-[443], and [447]. The relevant passage in the *NT Power Generation* judgment offers no independent reasons for its conclusion and is wholly derived from the High Court’s decision in *Hope v RCA Photophone of Australia Pty Ltd* (1937) 59 CLR 348. Its apparent inconsistency with other authority is explained away by the Victorian Court of Appeal in *Etna v Arif* [1999] VSCA 99 at 46 per Batt JA (Charles JA and Callaway JA concurring). However, as outlined elsewhere in this article, the entire agreement clause in the *Hope* case needs to be considered on its terms and in the context of the particular warranty or condition sought to be implied. In short, all of these cases arguably support the broad proposition that while complex entire agreement clauses with additional and sufficiently worded exclusions might preclude implied terms (but also have counter-productive effects), simple entire agreement clauses that merely identify the operative agreement between the parties – whatever its (express and implied) terms – do not characteristically have this exclusionary effect.

¹⁷⁴ Eg E. Peden, *Good Faith in the Performance of Contracts*, 2003, LexisNexis Butterworths, Sydney, at [6.16]; N. Seddon, ‘Can Contract Trump Estoppel?’ (2003) 77 *Australian Law Journal* 126 at 128-130 and 134-135; E. Peden and J. Carter, ‘Entire Agreement – and Similar – Clauses’ (2006) 22 JCL 1 at 8-9 and 12-15; B. Dixon, ‘Can the Common Law Obligation of Good Faith Be Contractually Excluded?’ (2007) 35 ABLR 110 at 119-120; N. Seddon and M. Ellinghaus, *Cheshire and Fifoot’s Law of Contract*, 9th Australian edition, 2008, at [10.49]; A. Terry and C. D. Lernia, ‘Franchising and the Quest for the Holy Grail: Good Faith or Good Intentions?’ (2009) 33 Melbourne University Law Review 542 at 571-

The capacity and limits of ‘entire agreement’ clauses in dealing with issues of unconscionability, good faith, or both is now the subject of extensive academic, practical, and judicial scrutiny in Australia and elsewhere.¹⁷⁵ In their most basic form, ‘entire agreement’ clauses merely indicate that ‘the totality of the contract ... is to be found within the four corners of the document’, whatever else has transpired between the parties.¹⁷⁶ In other words, there is a key difference between what constitutes the operative agreement between the contractual parties and the set of terms (both express and implied) representing the content of that agreement as constituted and interpreted.

Notwithstanding some high-level extra-judicial doubt about reconciling different Australian cases on the relationship between ‘entire agreement’ clauses and implied obligations of good faith, the better view is that a simple ‘entire agreement’ clause is not capable of doing the work of negating implied terms and other obligations on its own. Indeed, cases such as *Vodafone v Mobile Innovations*¹⁷⁷ demonstrate that a multiple combination of contractual measures is necessary to optimise the extent of limitation or preclusion of good faith terms and other obligations that is lawfully permissible by contract, as evidenced by the significant collective impact of ‘entire agreement’, ‘sole discretion’, and ‘negation of implied terms’ clauses in that case.

The relevant ‘entire agreement’ clause in the *Vodafone* case was as follows:

This agreement contains the entire agreement of the parties with respect to its subject matter. It sets out the only conduct relied upon by the parties and supersedes all earlier conduct by the parties with respect to its subject matter.

574; The Hon. P. de Jersey, ‘Good Faith in Contracts in Financial Services’, 26th Annual Banking and Financial Services Law and Practice Conference, 2009, at pp 8-9; and The Hon. M. Warren, ‘Good Faith: Where Are We At?’ (2010) *Melbourne University Law Review* 344 at 356.

¹⁷⁵ The Hon Marilyn Warren AC, ‘Good Faith: Where Are We At?’, (2010) 34 MULR 344; The Hon Paul de Jersey AC, ‘Good Faith in Contracts in Financial Services’, (2009) 26th Annual Banking and Financial Services Law and Practice Conference, Gold Coast; B. Dixon, ‘Can the Common Law Obligation of Good Faith be Contractually Excluded?’, (2007) 35 ABLR 110; E. Peden and J W Carter, ‘Entire Agreement – and Similar – Clauses’, (2006) 22 *Journal of Contract Law*; A. Robertson, ‘The Limits of Voluntariness in Contract’, (2005) MULR 5: 29; M. Muscillo, ‘Observations on Standard Clauses in Resource Documents’, (2004) 2004 23 ARELJ 147; N. Seddon, ‘Can Contract Trump Estoppel?’ (2003) 77 ALJ 126; *Australian Medic-Care Company Ltd v Hamilton Pharmaceutical Pty Limited* [2009] FCA 1220 at [624]; *Kellogg Brown & Root Pty Ltd v Australian Aerospace Ltd* [2007] VSC 200; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at 209 at [916]-[922] (including Finn J’s comment at [922] 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’); *NT Power Generation Pty Ltd v Power and Water Authority* [2001] FCA 334 at [387]; *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833 at [440]; *Macdonald v Shinko Australia Pty Ltd* [1998] QCA 53; *Etna v Arif* [1999] VSCA 99 at [46]; *Hope v RCA Photophone of Australia Pty Ltd* [1937] 59 CLR 348 at 357-358 and 363; and *Hart v MacDonald* [1910] HCA 13.

¹⁷⁶ *Branir Pty Ltd v Owston Nominees (no 2) Pty Ltd* [2001] FCA 1833 at [440]

¹⁷⁷ *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15

In short, such simple ‘entire agreement’ clauses cannot do the work of excluding implied terms of good faith or anything else. Instead, they serve other purposes, principally in identifying the relevant documents that constitute the final agreement between the parties and precluding any earlier representations, discussions, and communications from being used as part of the total agreement between the parties, as distinct from background context or extrinsic material in commercial construction. However, identifying the document(s) constituting the contract is different from identifying the terms of that contract, whether express or implied. This result is clear from the High Court’s rationale in *Hall v Macdonald*.¹⁷⁸ A simple entire agreement clause in the form, ‘there is no agreement or understanding between us not embodied in this tender and your acceptance thereof’, has the effect that ‘(i)t excludes what is extraneous to the written contract: but it does not in terms exclude implications arising on a fair construction of the agreement itself, and in the absence of definite exclusion, an implication is as much a part of the contract as any term couched in express words’.¹⁷⁹

Of course, sophisticated ‘entire agreement’ clauses might do additional work, in recording a party’s agreement that their entry into the contract is based upon their own inquiries and advice, and even purporting to negate or minimise additional obligations. However, such substantive provisions simply reinforce the difference between simple and sophisticated ‘entire agreement’ clauses and their different legal effects. At the same time, there are legal traps in overcomplicating entire agreement clauses beyond their normal scope of operation. If an entire agreement clause extends beyond simple matters such as the merger of agreements and the parol evidence rule, and goes too far in trying to exclude terms and warranties, minimise reliance or liability concerning pre-contractual discussions, and limit the effect of representations that induce execution, it risks being susceptible to legal attack on grounds involving one or more of invalidity, misrepresentation, breach of statute or public policy, statutory unconscionable conduct (in both B2B and B2C contexts) and unfair contract terms (in B2C contexts). Accordingly, leading commentators advise that ‘the drafting of an entire agreement clause to include an exclusion now seems ill-advised in practice’¹⁸⁰ and that ‘the best approach would be to keep the entire agreement clause simple and remove from it reference to the exclusion of implied terms, pre-contractual representations and so on’.¹⁸¹

Special Considerations Involving Governmental Parties and Contractual Drafting and Litigation

Governmental clients often have different needs from business clients on questions of good faith and fair dealing. They also face a set of political and legal drivers that mediate obligations of good faith and fair dealing where governmental interests are concerned. Governments must meet public expectations as model citizens and litigants. Public sector contracting and tendering involves a category of contracts in which obligations of good faith and fair dealing are readily implied by

¹⁷⁸ [1910] HCA 13.

¹⁷⁹ [1910] HCA 13.

¹⁸⁰ E. Peden and J. Carter, ‘Entire Agreement – and Similar – Clauses’ (2006) 22 JCL 1 at 9.

¹⁸¹ R. Edel, ‘Boilerplate Clauses: Waiver, Variation and Entire Agreement’, *AMPLA Yearbook 2007*, at 203.

courts.¹⁸² Any department or agency that sought to impose an express right by contract to treat outsourcing providers unfairly or in bad faith would face criticism from their internal probity auditors, relevant public officials (eg auditors-general and ombudsmen), opposition members in parliament and its various committees, and media commentary, so workable drafting solutions never reach that extreme. Unresolved issues remain about the capacity of a governmental entity to have a commercial self-interest of its own¹⁸³ that counts in the interplay between legitimate commercial self-interest and good faith, and the extent to which considerations of good faith condition the exercise of all statutory powers and discretions.¹⁸⁴

Governmental parties are unlike ordinary commercial parties in other ways too. Government contracts commonly include a capacity for the governmental party to terminate for convenience, with the consequences of that termination also addressed in the contract, in recognition of the higher-order public interests that might sometimes prevail over the commercial needs of a particular contract. However, there is recognition even within government circles that courts might require a governmental party to exercise such termination rights in good faith,¹⁸⁵ and the general law on termination for convenience clauses is also heading in this direction.¹⁸⁶ Where a government contract does not contain a termination for convenience clause, a government party might still seek to end the contractual arrangement by invoking the doctrine of necessity, under which governmental interests trump commercial interests represented in the contract. However, breaking such a contract is unlikely to be costless for a government party in reputational and compensatory terms.¹⁸⁷

Even the invocation of the doctrine of necessity is potentially subject to legislative inroads in the form of section 64 of the Judiciary Act 1903 (Cth), which provides: ‘In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgement may be given and costs awarded on either side, as in a suit between a subject and subject’. This provision has been interpreted in a series of High Court cases to have a substantive operation, in terms of picking up relevant rights and obligations under the law,¹⁸⁸ although its application in this context remains undetermined. The question is whether any governmental invocation of the doctrine of executive necessity under the general law by reference to higher-order public interests can be trumped by the supervening application of section 64 of the Judiciary Act (and its state and territory counterparts in those jurisdictions) to equalise the substantive positions of governmental and non-governmental parties under the law of contract.

¹⁸² Eg *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50.

¹⁸³ *Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54.

¹⁸⁴ *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5 at [88] per Kirby J.

¹⁸⁵ H. Munro, ‘The “Good Faith” Controversy in Australian Commercial Law: A Survey of the Spectrum of Academic Legal Opinion’ (2009) 29(1) *University of Queensland Law Journal* 167 at 170, referring to *Commercial Notes No.6* (27 November 2002), Australian Government Solicitor, Canberra.

¹⁸⁶ *Kellogg Brown & Root Pty Ltd v Australian Aerospace Ltd* [2007] BSC 200; and *John Tumminello v TAB Limited* [2001] NSWSC 1639.

¹⁸⁷ *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* [1977] HCA 71; [1977] 139 CLR 54.

¹⁸⁸ *Commonwealth v Evans Deakin Industries Ltd* [1986] HCA 51; (1986) 161 CLR 254.

Another relevant statutory intrusion into general contractual relations comes in the form of the application of various parts of the Competition and Consumer Act to the business activities of government, with a differential application to the different levels of Australian government. In particular, governmental parties at the Commonwealth level of government can be liable for unconscionable conduct concerning their business activities, including circumstances that display an absence or breach of good faith under the relevant statutory indicators of unconscionable conduct.

In this context, the *National Public Private Partnership Guidelines* for public-private partnerships (PPPs) to develop major community infrastructure offer relevant guidance on good faith from a transactional viewpoint. The relevant commercial principles (CPs) for drafting agreements for PPPs set the jurisdiction-by-jurisdiction framework for good faith as follows:¹⁸⁹

In some jurisdictions any implied good faith obligations will be expressly excluded. In other jurisdictions government may agree to be subject to any implied good faith obligations that arise as a matter of law in commercial contracts. If this is the case, the project agreement will specifically disclaim that there is implied, whether from the concept of ‘partnership’ or from the PPP guidance materials or otherwise, any other general duties of good faith on the part of government towards the project or project parties, unless expressly assumed by government under the project agreement.

The apparent reference here to obligations implied by law does not leave out of consideration other routes for implications of good faith, given that the overall point of the discussion is to match contractual options to how each jurisdiction treats good faith as a matter of law. This is reinforced by the reference to obligations ‘expressly assumed by government under the project agreement’ in jurisdictions where obligations of good faith are implied by law. To the extent that implied terms of good faith are limited to a baseline of contractual honesty, cooperation, and fidelity by all parties, the exclusion of ‘any other general duties of good faith’ would tell against the imposition of at least some forms of reasonableness as supervening standards of conduct for the parties.

New Directions in Unconscionability Under Statutory and Non-Statutory law

Unconscionability, Unconscientiousness, and Related Doctrines

The confusion and uncertainty that is generated by conflating or otherwise associating the concepts of good faith and unconscionability is exacerbated by the ongoing inability of the courts to settle the boundaries of unconscionable conduct in both its statutory and non-statutory forms. Both academic commentary and case law leave open the possibility that unconscionable conduct might embrace a range of doctrines beyond those associated with unconscionable bargains and special disadvantage. While further refinement of this field of law remains a work-in-progress, there is an emerging appreciation of the differences and commonalities between the traditional confinement of unconscionable conduct to exploitation of special disadvantage and vulnerability, the range of

¹⁸⁹ *National Public Private Partnership Guidelines (Volume 3: Commercial Principles for Social Infrastructure)*, CP 1.6.6.

doctrines with unconscionability as an element for the purposes of statutory and non-statutory unconscionable conduct, and the regulation of unconscientious exercises of legal rights in proprietary and contractual contexts.

In a series of cases, for example, High Court judges have referred in different contexts to various doctrinal bases for constraining the unconscionable or unconscientious exercise of legal rights, especially where contractual rights affecting property are involved.¹⁹⁰ Behind Chief Justice Barwick's comment in a 1973 case that 'the vendor will not be allowed to use his contractual right if it would be unconscionable in the circumstances to do so'¹⁹¹ lies an entire jurisprudence in conditioning contractual powers and discretions against their unreasonable, unconscionable, or otherwise abusive exercise.

Whatever the discrete range of doctrines relating to unconscionable conduct in its statutory and non-statutory forms, cases such as *Tanwar Enterprises Pty Ltd v Cauchi*¹⁹² pave the way equally for divergence and convergence of the various streams of authority related to unconscionable conduct, on one hand, and the unreasonable, unconscientious, and bad faith exercise of contractual rights, on the other. In that case, the High Court differentiated between the doctrines associated with unconscientious and those associated with unconscionable conduct, but in a context that lent itself to the former, as follows:¹⁹³

The terms 'unconscientious' and 'unconscionable' are, as was emphasised in *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd*, used across a broad range of the equity jurisdiction. They describe in their various applications the formation and instruction of conscience by reference to well developed principles. Thus, it may be said that breaches of trust and abuses of fiduciary position manifest unconscientious conduct; but whether a particular case amounts to a breach of trust or abuse of fiduciary duty is determined by reference to well developed principles, both specific and flexible in character. It is to those principles that the court has first regard rather than entering into the case at that higher level of abstraction involved in notions of unconscientious conduct in some loose sense where all principles are at large.

The term 'unconscionable conduct' is used in authorities such as *Legione* and *Stern*. There is nothing new in this ... Cases of alleged undue influence and catching bargains [show that] the governing equitable principle in this field is concerned with the production by malign means of an intention to act. In that context, it is easy to speak of the conduct of the stronger party as unconscionable. But the phrase 'unconscionable conduct' tends to mislead in several respects.

¹⁹⁰ Eg *Pierce Bell Sales Pty Ltd v Frazer* [1973] HCA 13; *Legione v Hateley* [1983] HCA 11; *Stern v McArthur* [1988] HCA 51; and *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57.

¹⁹¹ *Pierce Bell Sales Pty Ltd v Frazer* [1973] HCA 13 at [28].

¹⁹² [2003] HCA 57.

¹⁹³ *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57 at [20]-[23], per Gleeson CJ and McHugh, Gummow, Hayne, and Heydon JJ.

This important passage in the High Court’s majority judgment is crucial for later testing, recasting, and even assimilation of doctrines in this field. In context, the judgment’s reference to unconscionable conduct simply draws a line between the circumstances that invoke doctrines of unconscientiousness and those associated with unconscionable conduct. It indicates that nothing of real substance turns on the use of terms such as ‘unconscientious’ and ‘unconscionable’, although it is better to use the right term in the right circumstances. What really matters is the context in which it is appropriate to use one or the other, each of which is grounded in its own set of ‘well developed principles’.

Finally, the identification of an overarching equitable principle related to unconscionable conduct that embraces at least undue influence and catching bargains suggests a thematic basis for the range of ‘well developed principles’ associated with unconscionable conduct to extend beyond *Amadio*-like situations of special disadvantage. Might it embrace a wider group comprising at least undue influence, unconscionable dealing (including both *Amadio*-style and *Garcia*-style unconscionable conduct), and even (economic) duress? If so, that outcome has consequences for the allocation of doctrines of unconscionable conduct across the spread of statutory unconscionability provisions. It also matches Justice Finn’s wider conception of the set of doctrines associated with advantage-taking and exploitation of vulnerability under the general law, and their distinction when enshrined in statutory unconscionability from a second set of doctrines associated with good faith and fair dealing.

The current Chief Justice of Australia indicated at an earlier stage in his judicial career that the general law of unconscionable conduct is ripe for possible reformulation. In his canvassing of the meaning and scope of unconscionable conduct in one of the ACCC test cases on this topic, Justice French accepted that unconscionability has a two-tiered operation across the law of equity as a whole and within particular categories of legal relief, with application to contexts ranging from ‘the disposition of property and the assumption of contractual obligations’ to equitable estoppel and relief from ‘the harsh and oppressive exercise of rights’ via the doctrines of penalties and forfeiture.¹⁹⁴

However, in a statement that is pregnant with possibilities for the High Court’s ultimate rationalisation of the statutory and non-statutory law of unconscionable conduct, (then) Justice French indicated that ‘the boundary defined by union of these classes of case is potentially unstable as the taxonomy of applications of unconscionable conduct may shift under the unwritten law to the level of a general unifying concept or be subsumed in the more accurate idea of “unconscientious” conduct’.¹⁹⁵ The possible assimilation or recasting of various doctrines related to unconscionability under the general law is relevant for ongoing ‘test case’ advice and litigation. It affects the scope of unconscionable conduct under both the general law and statutory unconscionability, as well as the spread of unconscionability doctrines picked up by different statutory unconscionability provisions.

¹⁹⁴ *ACCC v CG Berbatis Holdings Pty Ltd* [2000] FCA 2 at [23].

¹⁹⁵ *ACCC v CG Berbatis Holdings Pty Ltd* [2000] FCA 2 at [23].

High-Level Judicial Reflections on the Meaning of Unconscionable Conduct

Unconscionable conduct is an area of business and consumer regulation that is characteristically couched in broad classifications, bounded judicial discretions, unweighted statutory indicators, and non-particularised standards. In one of his laser-sharp asides on the contemporary imposition of legal policy choices and value-judgments upon judges by a range of Acts that leave much discretion to the courts, former Chief Justice of the High Court, the Honourable Murray Gleeson, pithily notes that '(e)ven a black-letter lawyer is compelled to respond when Parliament legislates in technicolour'.¹⁹⁶ All of this can also be located within even deeper transformational undercurrents in this field of law and others, described in jurisprudential terms of paradigm shifts towards 'individualised justice', 'discretionary remedialism', 'rights-conscious and individualistic' expectations, and even socio-ethical socialisation of business and the departments of law that regulate business.¹⁹⁷

We need to do no more to demonstrate the difficulty for legal advice and business practice in this field than to call in aid the judicial views on unconscionability of some eminent judges at all levels of the Australian judicial hierarchy. Referring directly to 'the principle of unconscionability', Gleeson CJ commented in 1995 that '(i)t has an alarming capacity to provoke judicial disagreement as to its application to the facts of even fairly straightforward cases', and warned that '(t)he concept of unconscionability could prove to be less than completely satisfactory for enabling courts or legal advisers to identify the circumstances in which assurances, representations of future intention, or gratuitous promises, will be regarded as binding'.¹⁹⁸ In a much-cited passage referring to 'moral obloquy', Spigelman CJ warned 10 years later against anything less than a well-ordered development of statutory unconscionability according to accepted categories and reasoning approaches, as follows:¹⁹⁹

Over recent decades legislatures have authorised courts to rearrange the legal rights of persons on the basis of vague general standards which are clearly capable of misuse unless their application is carefully confined. *Unconscionability is such a standard.*

Unconscionability is a well-established but narrow principle in equitable doctrine. It has been applied over the centuries with considerable restraint and in a manner which is consistent with the maintenance of the basic principles of freedom of contract. It is not a principle of what 'fairness' or 'justice' or 'good conscience' requires in the particular circumstances of the case ... Even if the concept of unconscionability [in the NSW Retail Leases Act] is not confined by equitable doctrine as the decisions under s51AC of the Trade Practices Act suggest, restraint in decision-making remains

¹⁹⁶ Gleeson, 2009: 27.

¹⁹⁷ See the references and discussion, for example, in Gleeson, 1995; Hayne, 2002; and Hayne, 2004. For further discussion of the latter shift, see Horrigan, 2004 (on Australian business-related laws generally) and Horrigan, 2009 (on law and regulation relating to corporate social responsibility in Australia and elsewhere).

¹⁹⁸ Gleeson, 1995: 426-427.

¹⁹⁹ *Attorney-General (NSW) v. World Best Holdings Ltd* [2005] NSWCA 261 [119]-[121]: emphasis added.

appropriate. *Unconscionability is a concept which requires a high level of moral obloquy.* If it were to be applied as if it were equivalent to what was ‘fair’ or ‘just’, it could transform commercial relationships ...

Hayne J has exhibited a similar degree of scepticism about unconscionability’s legal development and litigious use, as a recurring theme in some of his early 21st century conference addresses:²⁰⁰

No court proceeding is now thought to be respectable unless one or other party alleges contravention of the Trade Practices Act ... [Has] the search for what Gleeson CJ once called the Holy Grail of Individualised Justice ... led to such elaboration and refinement of applicable rules that we should consider altering those rules in some respects. So, to give but one instance of what I have in mind, do we need to devote more time and effort to articulating the criteria which we say are to be used in deciding whether, for example, conduct is unconscionable? ... (I)t is, I think, the common experience of judges sitting in commercial lists that expressions like ‘fiduciary’ and ‘unconscionable’ are sprinkled through pleadings or submissions much as caster sugar is sprinkled upon a bowl of strawberries in the hope that the consumer may find the dish more palatable ... Legislation like Pt IVA of the Trade Practices Act 1974 (Cth) and the Contracts Review Act 1980 (NSW) depends for its operation upon terms like ‘unconscionable, harsh or oppressive’. But the use of these terms in legislation leaves many questions to be answered. How are those principles to be applied? What is their content? Is their content sufficiently identified by saying that conduct is ‘unconscionable’ if it would ‘offend society’? Are these doctrines to be applied only in cases where there is some relevant disparity in bargaining power between parties? How is one to measure bargaining power?

I do not say that these are questions that cannot be answered but it is important to recognise that the broad and general specification of standards to be applied does not provide the answer to any inquiry – it presents the starting point for much deeper and more difficult inquiries requiring the articulation of what it is about a particular event or transaction that warrants the application of the relevant description.

A brief glimpse of statutory unconscionability’s relative value-dependence (compared to other interactions between socio-legal values and legal rules), relative imprecision (compared to other areas of statutory law), and relative promiscuity (given its proliferation in multiple Australian legislative schemes²⁰¹) can be gleaned from French CJ’s 2009 excursus on problems in judicial interpretation of legislation:²⁰²

Beyond the interpretation of statutes, the words used may require judges to make choices about the outcomes of particular cases according to legal standards rather than precise legal rules. There are many judge-made common law rules which use language such as ‘reasonable’ or ‘*unconscionable*’ or ‘foreseeable’ or ‘remote’ or ‘*good faith*’. The use of these words is not a new phenomenon. But they involve value judgments in their application to particular facts or circumstances.

²⁰⁰ Hayne, 2002; and Hayne, 2004.

²⁰¹ Eg trade practices laws, fair trading laws, financial services laws, consumer credit laws, unjust contracts laws, and commercial leasing laws.

²⁰² French, 2009: 5; emphasis added.

Similarly, some statutes lay down legal standards expressed in broad terms rather than legal rules. These involve the use of evaluative expressions such as ‘good faith’ which appears in over 160 Commonwealth Acts, ‘reasonable’ which appears in over 140, the ‘interests of justice’ which appears in at least 50 Acts and ‘unconscionable’ which appears in at least 12 ... Even in these cases the judge does not have free reign to indulge prejudices or predispositions or idiosyncratic values ... The entrusting by the legislature to judges of responsibility for developing the law within broadly stated guidelines is commonplace and has become more so over recent decades.

The State of Play on Unconscionability Under the General Law

Some important considerations frame how we approach the legislative reference to the ‘unwritten law’ for the purposes of statutory unconscionability. First, unravelling the precise meaning, scope, and application of this example of primary statutory unconscionability means coming to grips with the meaning, scope, and application of whatever is meant by ‘the unwritten law’ of ‘unconscionable conduct’. In the course of his assessment of the constitutionality of the equivalent provision in the Trade Practices Act in one of the ACCC test cases in primary statutory unconscionability earlier this century, the present Chief Justice of the High Court outlined the basic landscape of the non-statutory law of unconscionable conduct in this way:²⁰³

The fundamental principle according to which equity acts is that a party having a legal right shall not be permitted to exercise it in such a way that the exercise amounts to unconscionable conduct ... So it can be said that the overriding aim of all equitable principle is the prevention of unconscionable behaviour – a term which can be seen to encompass duress, undue influence and ‘unconscionable dealing as such’ ... This is not to say that unconscionable conduct within the meaning of the unwritten law, as it presently stands, is any conduct which attracts the intervention of equity. Too broadly defined it may become in the words of Professor Julius Stone a ‘category of meaningless reference’ ...

Australian case law has been concerned about unconscionable conduct within the framework of specific doctrines identifying particular classes of conduct albeit their boundaries tend to be blurred by the generality of the notion of unconscionability in equitable doctrine. One such class of conduct is the unconscientious exploitation by one person of the serious disadvantage of another to secure the disposition of property or the assumption of contractual or other obligations by the weaker party. The kind of disadvantage which will attract equity’s intervention in such cases may have many faces. Their variety is so great that they elude satisfactory classification ... A distinction has been drawn between unconscionable dealing in this context and undue influence on the basis that the former looks to the conduct of stronger party in attempting to enforce or retain the benefit of a dealing while the latter looks to the quality of consent or assent of the weaker party ... It is, however, only a small step to classify both under the rubric of unconscionable conduct.

As other courts have noted, this exposition of unconscionable conduct by French J as the trial judge in *Berbatis* was made in the course of his pre-trial determination of the constitutionality of section

²⁰³ *ACCC v Berbatis Holdings Pty Ltd* [2000] FCA2 at [14]-[15].

51AA of the Trade Practices Act. Technicalities of ratio and obiter aside, there is much here that repays careful reading for future arguments and litigation. It paves the way for assimilation of various species of unconscionable conduct in the genus of unconscionable conduct reflected in primary statutory unconscionability. In turn, such a step might itself form part of a wider reorganisation and recasting of the various principles and doctrines relating to unconscionability and unconscientiousness, although French J's immediate focus is upon the former step in his exposition. In addition, it lays the groundwork for the various possibilities explored later in this section of the paper about the meaning of 'the unwritten law' of unconscionable conduct.

Secondly, as there is one national common law, and primary statutory unconscionability picks up this body of law, the High Court's precedential instructions to other Australian courts on statutory and non-statutory law has a double effect here. Unconscionable conduct is an area of law where the High Court is already on record in holding intermediate appellate courts to account on precedential grounds for reform of judge-made law within a legal zone reserved for the High Court alone, especially concerning the precedential status of doctrines enunciated in the individual judgments of High Court judges.²⁰⁴ The High Court has instructed all intermediate appellate courts and trial judges to follow the lead of the first intermediate appellate court decision on questions of interpreting Commonwealth legislation, uniform national laws, and the common law of Australia, unless the earlier decision is demonstrably wrong. Following on from its earlier precedential instructions to lower courts in *Australian Securities Commission v Marlborough Gold Mines*,²⁰⁵ the High Court issued this follow-up precedential instruction in *Farah Constructions Pty Ltd v Say-Dee*.²⁰⁶

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.

While some commentators view such a high-level precedential instruction as signifying no more than an orderly approach to judicial precedent, others see it as having a dampening effect on common law development below the level of the High Court.²⁰⁷ Indeed, this possibility is reinforced by the High Court's other admonitions to intermediate appellate courts to leave it to the High Court to revisit doctrines that might have been undermined or superseded by subsequent developments and insights within Australia or overseas.²⁰⁸ Such criticisms highlight the precedential constraints

²⁰⁴ *Garcia v National Australia Bank Ltd* [1998] HCA 48.

²⁰⁵ [1993] HCA 15.

²⁰⁶ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [135].

²⁰⁷ K. Mason, 'President Mason's Farewell Speech' (2008) 82 *Australian Law Journal* 768 at 769; cf N. O'Bryan and C. Young, 'A View from Outside the Vortex on Keith Mason's Retirement Speech and the Australian Doctrine of Judicial Precedent' (2008) 82 *Australian Law Journal* 771 at 771.

²⁰⁸ *Garcia v National Australia Bank* [1998] HCA 48 at [17]; (1998) 194 CLR 395 at 403 per Gaudron, McHugh, Gummow and Hayne JJ; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5 at [39]; (2002) 240 CLR 45 at 62-63 per Gleeson CJ and Gaudron, McHugh, Gummow and Hayne JJ; *Byrnes v Kendle* [2011] HCA 26 at [99] (note

imposed by a High Court conception of a unified national common law that minimises the different legislative, geographical, and economic conditions across different Australian jurisdictions.²⁰⁹

At the very least, this latest precedential instruction is capable of applying to intermediate appellate court rulings on the non-statutory law of unconscionable conduct, all forms of statutory unconscionability (including good faith as an indicator of statutory unconscionability), and the law of contract relating to good faith. One complication for precedential purposes is that intermediate appellate courts in NSW, Victoria, and elsewhere have already adjudicated on key aspects of the common law of good faith in contract, including decisions made before the High Courts' precedential directive in the *Farab Constructions* case. By the end of this century's first decade, for example, intermediate appellate courts in at least five Australian jurisdictions had ruled on aspects of express or implied terms of good faith in various contexts.²¹⁰ In any case, there are already intermediate appellate court decisions on statutory unconscionability that submit themselves to this High Court edict.²¹¹ Does this mean that, until the High Court rules otherwise, the default or presumptive precedential position on the scope of primary statutory unconscionability is set by the Full Federal Court's ruling in *ACCC v Samton Holdings*, while the equivalent position on tertiary statutory unconscionability is set by the Full Federal Court in *ASIC v National Exchange*?

The position is not as clear-cut as that,²¹² which of course is one of the operational difficulties in implementing what the High Court has instructed. Whatever the jurisprudential difficulties surrounding a characterisation that a previous judgment is 'plainly wrong',²¹³ or the limits of applying the High Court's precedential directive to similarly worded legislation,²¹⁴ subsequent decisions of trial

135); (2011) 243 CLR 253 at 285 (note 155) per Heydon and Crennan JJ; and *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45 at [4]-[5] per Gummow, Heydon, and Bell JJ.

²⁰⁹ Justice Finn, 'Statutes and the Common Law: The Continuing Story', above at 59-60.

²¹⁰ Eg *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15; *United Group Rail Services Ltd v Rail Corporation NSW* [2009] NSWCA 177; and *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268 (all in NSW); *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228 (in Victoria); *Central Exchange Ltd v Anaconda Nickel Ltd* [2002] WASCA 94; and *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222 (both in WA); *Tote Tasmania Pty Ltd v Garrott* [2008] TASSC 86 (in Tasmania); and *Wenzel v Australian Stock Exchange Ltd* [2002] FCAFC 400; and *Telstra Corporation Ltd v Optus Networks Pty Ltd* [2002] FCAFC 296 (in federal jurisdiction). At the appellate level in Queensland, there is also some discussion of implied terms of good faith and related obligations as well as the distinguishing limitations of the *Renard Constructions* case respectively in *Laurelmount Pty Ltd v Stockdale & Leggo (Queensland) Pty Ltd* [2001] QCA 212 at [40]-[46] per Dutney J (McPherson JA and Williams JA agreeing) and *Gold Coast Waterways Authority v Salmead Pty Ltd* [1994] QCA 538 at . For relevant Queensland trial court authorities, see: *Kendell v Sweeney* [2005] QSC 64; *Orchard Capital Investments Ltd v Ross Neilson Properties Pty Ltd* [2010] QSC 340; and *NAB v McCall* [2011] QSC 25; but see also the extensive extra-judicial views on good faith in contract in speeches by the present Chief Justice of Queensland (ie Chief Justice de Jersey, 'Good Faith, Commercial Morality and the Courts', 22nd Annual Banking and Financial Services Law and Practice Conference, 2005, Cairns; and Chief Justice de Jersey, above .

²¹¹ *Canon Australia v Patton* [2007] NSWCA 246; and *Kowalczyk v Acorn Finance* [2008] NSWCA 343.

²¹² Eg *Kowalczyk v Acorn Finance* [2008] NSWCA 343 at [214]-[215] and [348]-[350].

²¹³ Horrigan, 1992.

²¹⁴ This limitation is particularly relevant to the present topic, given the similar wording of some of the statutory indicators of unconscionable conduct and unfair contract terms in both Commonwealth and State legislation.

Australian trial judges illustrate the complex precedential nuances that can arise in implementing the High Court's precedential directive.²¹⁵

Thirdly, one basis for narrowing the interpretative scope of primary statutory unconscionability is for courts or legislators to confine its focus to equitable doctrines of unconscionability. At first glance, that does not work, because unconscionability resonates in the common law too. 'The notion of unconscionability underlies some common law doctrines as well as equity', confirms Sir Anthony Mason.²¹⁶ At second glance, it does not work either, because primary statutory unconscionability is conceived in terms of what is unconscionable under 'the unwritten law', which embraces both equity and the common law. So, as 'the unwritten law' is a shorthand reference to judge-made or non-statutory law, it includes both equitable and common law doctrines associated with unconscionability. In other words, primary statutory unconscionability is not necessarily limited to traditional equitable doctrines of unconscionability in general or to the equitable doctrine of unconscionable dealings in particular. At the same time, it is clear that the unwritten law of unconscionable conduct that is picked up by primary statutory unconscionability is not legislatively changed in that process.²¹⁷

Fourthly, given that section 51AA(2) of the Trade Practices Act, its ASIC Act equivalent, and their successors preclude the operation of primary statutory unconscionability where the relevant conduct is prohibited by another of the statutory unconscionability provisions, in theory those other provisions at least include much (if not all) of what is covered by primary statutory unconscionability, whatever they might otherwise do in extending primary statutory unconscionability beyond its judicially set boundaries in equity and the common law. Finally, all of this leaves us with the bottom line that we still do not know precisely how the various equitable and other doctrines related to unconscionability are distributed throughout the different types of statutory unconscionability, let alone amplified by them.

The High Court of Australia chose not to give more guidance than was strictly necessary about primary statutory unconscionability in its *Berbatis* ruling, just as the Court also chose not to give more guidance than was strictly necessary about non-statutory unconscionability in its *Garcia* ruling.²¹⁸ So, there is much in this field of law and practice upon which the High Court is yet to rule.

²¹⁵ Eg *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd (no 2)* [2008] FCA 810 at [95]-[108] see also: Justice Steven Rares, 'The Role of the Intermediate Appellate Court after *Farab Constructions*' (FCA) [2008] FedJSchol 29.

²¹⁶ Mason, 1994: 239.

²¹⁷ *ACCC v Samton Holdings* [2002] FCAFC 4.

²¹⁸ This choice of judicial approach does not match other situations in which the Court has gone further than necessary for the case at hand to provide guidance for everyone, given that the Court is not only deciding a dispute between particular litigants but also laying down the law applicable to all. Nor does it match the willingness of other ultimate national appellate courts to provide guidance for commercial parties in this field of law and practice, as the House of Lords attempted to do in *Barclays Bank v O'Brien*, for example. Of course, the matter of judicial approach is a long-standing jurisprudential debate, but the present point is that it *is* a choice, it is not pre-determined in the positive law, judges who make it are accountable as institutional actors for making that choice, and they cannot excuse it away by saying that their choice and its effects are each determined by 'the law'.

Accordingly, Justice Finn crystallises four possible meanings for primary statutory unconscionability, as follows:²¹⁹

The fundamental question raised by [section 51AA of the Trade Practices Act] – which the High Court so far has eschewed answering ... - is what is comprehended by the description ‘conduct that is unconscionable within the meaning of the unwritten law’? There is a number of possible views that can be taken of its compass: first, it refers merely to the unconscionable dealings doctrine exemplified by *Amadio*’s case; secondly, it embodies a composite of that doctrine, undue influence and the common law of duress; thirdly, it encompasses *all those equitable doctrines that are conditioned upon the explicit finding of unconscionable conduct in the person against whom they are invoked*, eg estoppel or unilateral mistake; and fourthly, it extends to those many rules and doctrines of equity which are informed in some way by the concern to prevent unconscionable conduct, eg the rules as to stipulations as to time and notices to complete ...

Building upon Justice Finn’s elucidation of four possible levels of meaning for unconscionability under ‘the unwritten law’,²²⁰ six possibilities present themselves as follows:

- (1) Unconscionability as the underlying touchstone of the law of equity as a whole;
- (2) Unconscionability as the underlying policy rationale for areas of both equity and common law that are predicated upon some notion of unconscionability or unconscientiousness;
- (3) Unconscionability as a free-standing and direct basis for intervention in its own right, unmediated by any conventional equitable or common law doctrines;
- (4) Unconscionability as an essential element or finding for particular equitable and common law actions and bases of relief in which adverse conduct by one party is characterisable as unconscionable, with derivative questions about how many candidates meet this description (eg undue influence, unconscionable dealings, estoppel, relief against forfeiture, unilateral mistake, the doctrine of penalties, and economic duress);²²¹
- (5) Unconscionability as a unifying label for the discrete collection of equitable and common law doctrines that are grounded in the law’s protection of legally vulnerable groups from unconscientious exploitation and advantage-taking, including all of unconscionable dealings, undue influence, and economic duress; and
- (6) Unconscionability as a ground of action or relief in its own right according to settled law, manifested in the specific forms of unconscionable conduct associated with unconscionable dealings, including at least the ‘special disadvantage’ doctrine (eg *Amadio*) and the ‘special equity for wives’ doctrine (eg *Yerkey v Jones*, and *Garcia v NAB*).

Nobody in the cases or the literature in this field seriously entertains the first three possibilities as sources for primary statutory unconscionability. They are included in this list for completeness as

²¹⁹ Finn, 2006: 9; emphasis added.

²²⁰ Finn, 1994:38-39; and Finn 2006: 9-13.

²²¹ See also the list of possibilities in *ACCC v Samton Holdings Pty Ltd* [2002] FCAFC 4, outlined below.

well as for the exclusionary analytical work they do in pointing to the only realistic candidates, which are the last three items in the list above. Each of those three items has at least some support in the case law and surrounding literature. What remains judicially undecided is the extent to which statutory unconscionability in both B2C and B2B contexts extends not only beyond the unconscionable dealings doctrine and other doctrines associated with unconscionable exploitation of vulnerability (such as undue influence and duress), but also beyond the discrete causes of action and relief under the unwritten law that have unconscionability as a distinct element.²²²

We know that the sixth item in this paper's list of possibilities is at least included in primary statutory unconscionability, although we do not yet know whether that exhausts its meaning. Justice Finn has expressed an extra-judicial preference for the fourth item in that list. In short, according to Justice Finn, 'the option of interpreting s 51AA [of the Trade Practices Act] as capturing all of those equitable doctrines the application of which are premised upon affording relief against conduct which is, in the circumstances, unconscionable ... is, in my view, the one having the most to commend it'. Justice Finn's preferred meaning of general statutory unconscionability is described by him as embracing 'all those equitable doctrines that are conditioned upon the explicit finding of unconscionable conduct in the person against whom they are invoked, eg estoppel or unilateral mistake' - in other words, a meaning grounded in 'the precondition that the [unconscionable] conduct itself must, apart from the section, be capable of attracting equitable relief', instead of relying upon 'some disembodied notion of unconscionable conduct', divorced from the equitable pigeon-holing of unconscionability-based findings.²²³ On this view, primary statutory unconscionability is further limited by its own statutory preconditions, so that it only applies to corporate conduct in the domains of trade and commerce generally or financial services in particular.²²⁴

In his former judicial role as a member of the Federal Court, French CJ is on the public record with comments in two ACCC test cases on statutory unconscionability – namely - *Berbatis* and *Samton Holdings* - that arguably range across all three of the items in the bottom half of the list, which effectively means choosing the fourth item (as it subsumes the other two). As the High Court has not yet formally ruled on this important issue, clearly, there is still much potential here for transactional advice, legal opinions, alternative pleadings, and written court submissions in 'greenfield' unconscionability litigation.

What is highlighted above is enough on its own to suggest that momentum is building towards reading primary statutory unconscionability in line with the fourth option in the list above. Even if

²²² For a recent argument that would confine general statutory unconscionability based upon the unwritten law to the specific doctrine of unconscionable conduct associated with special disadvantage and unconscionable dealings, with the listed indicators of B2B statutory unconscionability being confined to other areas of equitable doctrine that invoke a doctrinally recognised elements of unconscionability, see: P. Strickland, 'Rethinking Unconscionable Conduct Under the Trade Practices Act' (2009) 37 *Australian Business Law Review* 19 at 39-40.

²²³ Finn, 2006: 9 and 13.

²²⁴ TPA, s 51AA and ASICA, s 12CA respectively.

that proves to be the result, there is still much to be argued and litigated about the full catalogue of unconscionability-based actions falling within its scope. Moreover, there remains the possibility of the High Court rationalising the range of unconscionability-related doctrines, and relating them to the different forms of statutory unconscionability, if and when the right vehicle for doing so presents itself to the Court. For example, existing High Court dicta from a number of cases on unconscionability in general or unconscionable conduct in particular at least leave open the possibility of such a rationalisation.²²⁵ In the meantime, the first judicial cab off the rank at intermediate appellate court level on any of the various statutory and non-statutory issues of unconscionability yet to be determined sets the pace for other Australian courts, under the influence of the High Court's precedential edict in *Farah Constructions v Say-Dee*.

One basis for narrowing the scope of unconscionability through judicial interpretation or legislative intervention is to limit general statutory unconscionability to what is conventionally associated with the doctrine of unconscionable dealing. As Sir Anthony Mason explains, even this interpretation is underpinned by a principle of potentially wider application than protecting expectant heirs and drunken adults:²²⁶

Relief against unconscionable bargains is granted when a transaction, considered in the light of the circumstances in which it was entered into, is so unconscionable that it cannot be allowed to stand. The power to grant relief on this ground was in the past largely confined to cases in which the party seeking relief was a person suffering from some special distinct disability or disadvantage, eg the expectant heir, or the inebriated plaintiff in *Blomley v Ryan* who was incapable of forming a rational judgment. But the principle according to which relief is granted is not so limited. What is required is that there be an unconscientious taking advantage of the disability or disadvantage of the person in the weaker bargaining position by procuring or retaining the benefit in question in a way that is both unreasonable and oppressive²²⁷... Whether a plaintiff is entitled to relief on the ground of unconscionable conduct in the sense described above is very largely a question of fact and of value judgment. The cases provide little in the way of specific guidance, offering only very wide general expressions.

As might be gathered from discussion in this paper to this point, there are pros and cons of limiting primary statutory unconscionability to the equitable doctrine of special disadvantage. The arguments in favour of this limitation can be crystallised as follows. First, this is the only option associated conventionally with unconscionable conduct as an entire cause of action or basis for relief in its own right (eg unconscionable dealing), as distinct from being an essential element or finding but simply as part of another ground of relief (eg estoppel, breach of fiduciary obligations etc). Secondly, it not only has express support in the extrinsic parliamentary material for interpreting legislation but is referred to there specifically as the archetype of primary statutory unconscionability. Thirdly, it allows for a natural symmetry in the progressive outward expansion of statutory unconscionability

²²⁵ Eg *ACCC v CG Berbatis Holdings Pty Ltd* [2003] HCA 18; *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57; and *Bridgewater v Leahy* [1998] HCA 66.

²²⁶ Mason, 1994: 248-249.

²²⁷ *Commercial Bank of Australia v Amadio* (1983): 151 CLR 447.

from its primary form through to its secondary form. Finally, it has some support in the cases and legal literature.²²⁸

At the same time, there are formidable arguments against limiting primary statutory unconscionability to *Amadio*-like situations of special disadvantage. First, the *Garcia* doctrine has not yet been subsumed within the *Amadio* doctrine of special disadvantage, although the two are close relations. This might mean no more than that there are distinct strands of legal intervention grounded in unconscionable dealings and related doctrines as the lynchpin of unconscionable conduct as a distinct basis of legal intervention on its own. However, the point remains that the doctrine of special disadvantage alone does not exhaust what is covered by unconscionable conduct as a recognised basis of recovery as a whole. The court made this clear, for example, in *Leslie v GE Commercial Corporation (Australia) Pty Ltd*,²²⁹ as follows:

The primary Judge's focus on the equitable doctrine of unconscionability was too narrow. The principle in *Yerkey v Jones*, although closely related to, is distinct from that doctrine. The High Court in *Garcia* held that the principle in *Yerkey v Jones* continues to apply and has not been subsumed by the decision in *Commercial Bank v Amadio*. In *Garcia* a married woman signed a number of guarantees at the request of her husband. The guarantees related to loans made by a bank to, *inter alia*, a company. The wife was a director of the company. The trial Judge found the wife was not directly involved in the company and in fact obtained no real benefit from entering into the transaction and was thus a volunteer. The trial Judge also found that the husband had assured his wife that there was no risk involved; that the wife did not understand the guarantee to be secured by a mortgage she had given over the matrimonial home; and that the bank did not explain the effect of the guarantees to her. The High Court held that it would have been unconscionable for the bank to enforce the guarantee against the wife as:

- (a) she did not understand the purport or effect of the transaction;
- (b) she was a volunteer because she did not obtain any financial benefit from the transaction;
- (c) the bank was taken to have understood that, as a wife, the appellant may have reposed trust and confidence in her husband in matters of business and therefore to have understood that the husband may not have fully and accurately explained the purport and effect of the transaction to the appellant;
- (d) the bank took no steps to explain the purport and effect of the transaction to the wife or to ascertain whether the effect of the transaction had been explained to her by a competent, independent and disinterested stranger.

These are not essential elements of a claim for breach of the principle in *Yerkey v Jones*. Whether or not the appellant received any financial benefit may not be determinative if there are other relevant factors such as, for example, unconscionability in the terms of the guarantee. In any event, the

²²⁸ Eg *GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd* [2001] FCA 1761 (although arguably superseded by later cases favouring more expansive views of primary statutory unconscionability), and Buckley, 2000.

²²⁹ [2007] WASCA 65 at [38]-[39].

evidence does not enable a determination of the extent of Brevtex's alleged breaches or the appellant's benefit. In my view there is an arguable case that GE breached the principle in *Yerkey v Jones*. In the circumstances it is unnecessary to consider the appellant's defence under s 51AC of the TPA.

Secondly, such a limitation would not necessarily allow undue influence and economic duress to join unconscionable dealing within primary statutory unconscionability, contrary to the natural symmetry between these doctrines in curing exploitation of legal vulnerability, whatever the transactional context (eg securing agreement, exercising contractual rights, or retaining ill-gotten gains). If, as academic contract scholars indicate, contractual exploitation overwhelmingly revolves around the poles of (special) disadvantage and coercion, it seems both conceptually and operationally artificial to constrain primary statutory unconscionability's meaning in this way, instead of allowing it to capture at least undue influence and duress along with unconscionable dealing.²³⁰

Thirdly, as Justice Finn argues, there are textual reasons in the provisions of primary and secondary statutory unconscionability themselves for extending their reach beyond the limits expressly identified as archetypes of the doctrines in play in the extrinsic parliamentary material. For example, the relationship specified in section 51AA(2) of the Trade Practices Act, section 12CA(2) of the ASIC Act, and their successors between primary statutory unconscionability and other forms of statutory unconscionability, and the characterisation of the non-exhaustive indicators of secondary statutory unconscionability as matters concerned largely with 'exploitation', 'advantage-taking', and 'coercion' of vulnerable parties, together suggest a broader and interactive interpretation of these two forms of statutory unconscionability, with a further extension into the realm of good faith, fair dealing, and the integrity of the mutual commercial bargain for parties at arm's length in the additional indicators of tertiary statutory unconscionability.²³¹

Fourthly, as Justice Finn and other judicial colleagues note, the evolution of unconscionability's meaning over time is explicitly built into the elements of primary statutory unconscionability (ie 'from time to time'), with the result that what those making legislation might have contemplated about unconscionability at the time (ie 1992) when primary statutory unconscionability was introduced into law does not drive its meaning forevermore. Finally, there is now a considerable body of single instance and intermediate appellate court authority against a strictly confined reading of primary statutory unconscionability. The high-water mark of the possible equitable doctrines concerning unconscionable conduct captured by primary statutory unconscionability is illustrated by the five distinct categories of conduct mentioned in the ACCC test case, *ACCC v Samton Holdings Pty Ltd*, as follows:²³²

Under the rubric of unconscionable conduct, equity will:

²³⁰ Finn, 2006: 11-12. However, note that this is not Finn's ultimately preferred meaning: see Finn, 2006: 13.

²³¹ Finn, 2006: 11-12.

²³² *ACCC v Samton Holdings Pty Ltd* [2002] FCAFC 4 at [48].

- (i) Set aside a contract or disposition resulting from the knowing exploitation by one party of the special disadvantage of another. The special disadvantage may be constitutional, deriving from age, illness, poverty, inexperience or lack of education – *Commercial Bank of Australia Ltd v Amadio*. Or it may be situational, deriving from particular features of a relationship between actors in the transaction such as the emotional dependence of one on the other – *Louth v Disprose; Bridgewater v Leahy* [1998] HCA 66; (1998) 194 CLR 457.
- (ii) Set aside as against third parties a transaction entered into as the result of the defective comprehension by a party to the transaction, the influence of another and the want of any independent explanation to the complaining party – *Garcia v National Australia Bank Ltd* [1998] HCA 48; (1998) 194 CLR 395.
- (iii) Prevent a party from exercising a legal right in a way that involves unconscionable departure from a representation relied upon by another to his or her detriment – *Waltons Stores (Interstate) Limited v Maher; The Commonwealth v Verwayen*.
- (iv) Relieve against forfeiture and penalty – *Legione v Hateley* [1993] HCA 11; (1983) 152 CLR 406; *Stern v McArthur*.
- (v) Rescind contracts entered into under the influence of unilateral mistake – *Taylor v Johnson*.

The Scope and Limits of Guidance from Extrinsic Material

The problems with the search for the meaning of primary statutory unconscionability start with the Explanatory Memorandum and Second Reading Speech accompanying the introduction of section 51AA into the Trade Practices Act by the Trade Practices Legislation Amendment Bill 1992 (Cth). In short, this extrinsic material reveals the following:

- (1) the government of the day postulated – wrongly, according to some subsequent judicial and extra-judicial comments - that there was a single ‘doctrine’ of unconscionability in equity, although the government of the day also correctly recognised that there were various ‘principles of unconscionable conduct’ in equity;
- (2) the government of the day located the content of section 51AA squarely and perhaps even wholly in the particular manifestation of the unconscionable dealings doctrine identified with landmark High Court decisions on special disadvantage in *Blomley v Ryan*²³³ and *Commercial Bank of Australia v Amadio*;²³⁴
- (3) at the same time, the government of the day not only contemplated that legal interpretation of unconscionable conduct might develop over time beyond its 1992 state of development, but also explicitly built this capacity into the operative provisions by making the state of non-statutory unconscionability ‘from time to time’ the touchstone for primary statutory unconscionability; and

²³³ (1956) 99 CLR 362.

²³⁴ (1983) 151 CLR 447.

- (4) the government of the day envisaged in 1992 that secondary statutory unconscionability extended beyond the equitable origins of unconscionability, thus paving the way for tertiary statutory unconscionability to be framed in even broader terms.

Here, the operative parts of the Explanatory Memorandum are as follows:

The provision embodies the equitable concept of unconscionable conduct as recognised by the High Court in *Blomley v Ryan* (1956) 99 CLR 362 and *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 ... Section 51AA is not intended to extend the principles of unconscionable conduct beyond those recognised by the courts of this country under the laws of equity. The advantages of providing a statutory prohibition for conduct which is already dealt with by equity lie in the availability of remedies under the Principal Act, the potential involvement of the Commission including the possibility of representative actions, and the educative and deterrent effect of a legislative prohibition in the Principal Act ... Subsection 51AA(2) provides that section 51AA does not apply to conduct which is within the ambit of section 51AB (old section 52A). Section 51AB prohibits unconscionable conduct involving goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption. Section 51AA will deal with conduct involving other forms of goods or services, and will thus apply to a greater range of commercial settings. The insertion of section 51AA is not intended to modify the operation of section 51AB, or to imply that section 51AB has a meaning which differs from the current meaning of section 52A ... To the extent that section 51AB may diverge from the equitable principles of unconscionable conduct, its interpretation will not affect the interpretation of section 51AA.

The relevant Second Reading Speech closely tracks this line of thought, as follows:

Unconscionability is a well understood equitable doctrine, the meaning of which has been discussed by the High Court in recent times. It involves a party who suffers from some special disability or is placed in some special situation of disadvantage and an 'unconscionable' taking advantage of that disability or disadvantage by another ... The new provision will not extend the equitable principles of unconscionability beyond their current limits ... All transactions covered by the new provision are already covered by the equitable doctrine.

However, even at this point in time in the evolution of equitable concepts of unconscionability, the particularised concept of 'unconscionable conduct' was already associated at the highest Australian judicial levels with two distinct levels of meaning. This is exemplified in Sir Anthony Mason's two-tiered account of 'unconscionable conduct' in the *Amadio* case, as follows:²³⁵

Historically, courts have exercised jurisdiction to set aside contracts and other dealings on *a variety of equitable grounds*. They include fraud, misrepresentation, breach of fiduciary duty, undue influence and *unconscionable conduct*. In one sense they all constitute species of unconscionable conduct on the part of a party who stands to receive a benefit under a transaction which, in the eye of equity, cannot be enforced because to do so would be inconsistent with equity and good conscience. But relief on *the*

²³⁵ (1983) 151 CLR 447 at 461; emphasis added.

ground of 'unconscionable conduct' is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage.

This analysis dovetails with French J's two-tiered treatment of unconscionable conduct in the course of the *Berbatis* litigation – one of the ACCC test cases on statutory unconscionability earlier this century. He frames his analysis in terms that (i) mark out the territory for his subsequent decision on the merits, (ii) affirm the weakness of a mono-dimensional approach to unconscionable conduct, and (iii) signal the potential for rationalisation of various unconscionability-related streams of doctrine by the court that he now leads, as follows:²³⁶

The concept of unconscionability is arguably to be found at two levels in the unwritten law. There is a generic level which informs the fundamental principle according to which equity acts. There is the specific level at which the usage of 'unconscionability' is limited to particular categories of case. The Explanatory memorandum suggest that it is the latter sense that was intended – defined by reference to *Blomley v Ryan* and *Commercial Bank of Australia v Amadio*. The reference to these two cases, however, does not map out the full extent of the second 'limited' application of unconscionability. For even in that 'limited' sense it may be applied not only to the disposition of property and the assumption of contractual obligations but also to equitable estoppel and the harsh and oppressive exercise of rights attracting relief from penalties and forfeitures. Moreover the boundary defined by union of these classes of case is potentially unstable as the taxonomy of applications of unconscionable conduct may shift under the unwritten law to the level of a general unifying concept or be subsumed in the more accurate idea of 'unconscientious' conduct.

The statutory unconscionability provisions have been individually introduced and amended over time, and their interpretation and application today must make sense of them alone and as part of the whole to which they belong. Again, as some judges have emphasised in judicial and extra-judicial comments about unconscionability, what was said about one of these provisions at the time of its introduction in a secondary source such as an explanatory memorandum cannot control forever what it is and how it relates to subsequently introduced and amended provisions. The Full Federal Court took this line of approach to a constrained use of the extrinsic parliamentary material in the *ACCC v Samton Holdings* test case on primary statutory unconscionability:²³⁷

(T)he words of the section and the extrinsic material indicate that it was not intended to extend the categories of unconscionable conduct in respect of which relief could be granted. Its object is to attract, to cases of unconscionable conduct to which it applies, the remedies available under the Trade Practices Act and to allow for those remedies to be pursued by the Commission. That having been said, the reference in the Explanatory Memorandum to the equitable concept of unconscionable conduct as required by the High Court in *Bromley v Ryan* and *The Commercial Bank of Australia Limited v Amadio* [1983] HCA 14; (1983) 151 CLR 447 does not require that the concept be read down to the classes of fact situation with which those cases were concerned. The section is not

²³⁶ *ACCC v CG Berbatis Holdings Ltd* [2000] FCA 2 at [23].

²³⁷ [2002] FCAFC4 at [44].

to be read as if it imported the words of the Explanatory Memorandum or the Second Reading Speech. It speaks of the unwritten law ‘from time to time’.

In one of his extra-judicial expositions of the law of unconscionable conduct this century, Justice Finn suggests that this is one occasion on which judicial interpretation of primary statutory unconscionability must diverge from the boundaries seemingly placed upon courts by the conception of parliamentary intention expressed in the extrinsic material quoted above. Even the most conservative judges could embrace this conclusion, because it is consistent not only with conventional canons of statutory construction but also accords with the fundamental emphasis placed upon the words of the statute, as distinct from either judicial exposition or parliamentary explanation of the statutory language. Justice Finn’s conclusion here is as follows.²³⁸

This, I would respectfully suggest, is one instance in which we might wish to show some reserve in too ready an embrace of Parliamentary explanatory materials to read down the language of s 51AA. No cogent reason is there given for the selection of the unconscionable dealings doctrine alone for legislative reinforcement. What equally is clear is that these materials do not betray any informed understanding of what is comprehended by unconscionable conduct in equity jurisprudence. *A species is described as if it were a genus.*

The crucial distinction between *the* ‘genus’ and *a* ‘species’ of unconscionable conduct is a recurring theme and also the crux of the argument in unravelling the meaning of general primary statutory unconscionability and its statutory equivalents. The majority judgment in another landmark High Court unconscionability case picks up on the distinction between a general ‘genus’ and a specific ‘species’, in the context of a discussion about how undue influence and unconscionable dealings are each a ‘species’ of a wider ‘genus’ of equitable intervention grounded in unconscionability, as follows:²³⁹

In addition to the distinction between the doctrine of undue influence as understood in courts of probate and courts of equity, it is appropriate to emphasise the distinction between the equitable doctrines concerned with undue influence and *unconscionable dealings or conduct*. On occasion, both doctrines may apply in the one case. Each doctrine may be seen as a species of that genus of *equitable intervention to refuse enforcement of or to set aside transactions with which, if allowed to stand, would offend equity and good conscience*.

These are amongst the starting points for any future rationalisation and assimilation of doctrines of unconscionability and possibly unconscientiousness too.

Is There Still Any Scope for ‘Situational’ Forms of ‘Special Disadvantage’?

²³⁸ Finn, 2006:12; emphasis added.

²³⁹ *Bridgewater v Leahy* [1998] HCA 66 at [73] emphasis added.

In theory, the door is still left open to ‘situational’ forms of special disadvantage, at least of some kind, although there are considerable obstacles and limits to its expansionary potential too. Conventionally, the relevant special disadvantage is *personal*, and it must also affect the capacity of the weaker party in a transaction to make a truly informed decision about what is in their best interests. In the *Berbatis* litigation, French J introduced the possibility that the element of special disadvantage might also be *situational* (as a product of circumstances) rather than simply *personal* (as a product of individual characteristics). Speaking of the situation of shopping centre tenants who needed to sell their business and required the landlord’s consent to a new lease to make an incoming tenant’s investment worthwhile, and who were pressured to drop a legitimate dispute against the landlord as the price for obtaining this consent, French J characterised their situation as one involving a ‘situational’ rather than ‘personal’ form of special disadvantage, as follows:²⁴⁰

The [tenants] suffered what might be called a ‘situational’ as distinct from a ‘constitutional’ disadvantage. That is to say it did not stem from any inherent infirmity or weakness or deficiency. It arose out of *the intersection of the legal and commercial circumstances* in which they found themselves. That disadvantage, not being constitutional in character, was *not* able to be mitigated by the fact of legal representation which they had available to them at all material times.

Notwithstanding the way in which the High Court in the *Berbatis* appeal and other courts have approached this novel suggestion, it remains to be seen precisely how the scope and content of ‘situational’ disadvantage will be addressed by the High Court with Chief Justice French at its helm.

Legal practitioners who are looking to exploit the ‘test case’ issues here on ‘situational’ disadvantage for transactional advice or litigation purposes might pause to consider the following factors. First, as situational disadvantage is circumstantial rather than personal, legal advice might not necessarily be an effective safeguard, as French J decided in the *Berbatis* litigation, although other judges seem to view the availability of high-level legal advice to corporate giants as a factor tending against unconscientious exploitation of both personal and ‘situational’ forms of disadvantage.²⁴¹

Secondly, as the High Court reiterated in *Berbatis*, the hallmark of any form of special disadvantage is that it disables or impairs a vulnerable party’s capacity to make a decision about what is in their own best interests, as distinct from being able to act in their own best interests and ‘to get their own way’, which is a considerable brake on the impact of ‘situational’ disadvantage upon commercial dealings. However, there is much still to be explored about the disabling effect of any special disadvantage within the bounds of existing doctrinal development. Imbalances in the resources, information, and other relative circumstances of commercial parties could well produce a disabling effect of the kind conventionally understood, in terms of limiting the full informational and circumstantial base informing a party’s assessment of their commercial interests relative to the other party, and hence affecting their assessment of their own best interests.

²⁴⁰ *ACCC v CG Berbatis Holdings Pty Ltd* [2000] FCA 1376; emphasis added.

²⁴¹ Eg see the arguments and judicial observations in *Optus Networks Ltd v Telstra Corporation Ltd* (No 3) [2009] FCA 728; and *The Bell Group Ltd (in Liq) v Westpac Banking Corporation* (No 9) [2008] WASC 239.

Thirdly, the seemingly lukewarm reference to ‘situational’ disadvantage by those High Court judges who mentioned it in passing in *Berbatis* is reinforced by a seemingly diluted reference to ‘situational’ disadvantage by the Full Federal Court (including French J as a member) in another ACCC test case on statutory unconscionability, illustrating it by reference to emotional relationships of trust and confidence. So, we are yet to see whether or not French CJ’s new judicial position results in ‘situational’ disadvantage being given a renewed lease of life.²⁴²

Fourthly, the situation in *Berbatis* pre-dated the introduction of other forms of statutory unconscionability in the Trade Practices Act. Accordingly, it was litigated in terms of unconscionable conduct as enshrined in primary statutory unconscionability. In other words, similar circumstances involving commercial tenants, franchisees, and other small businesses of the kind arising in the ACCC test case of *Berbatis* might also fall for consideration now under the wider statutory indicators of B2B unconscionability. Importantly, the statutory indicators of tertiary statutory unconscionability are clearly more relational and situational in nature than what can be associated with the notion of a special disadvantage that is personal in nature according to conventional judge-made criteria. So, future test cases can be fought on a wider battlefield than that available in *Berbatis*, especially with the removal of the monetary limits for statutory unconscionability that might otherwise have precluded some transactions. Indeed, recent cases evidence a trend towards embracing ‘situational’ forms of special disadvantage based upon circumstantial factors rather than simply personal qualities,²⁴³ although the High Court is yet to rule definitively on it.

Finally, this also brings into play the possibility of further judicial innovation through analogous development of the non-statutory law of unconscionable conduct by reference to the increasingly dominant statutory law in this field.²⁴⁴ In theory, the judge-made law on special disadvantage that is either personal or situational could itself be informed and developed by reference to correlative statutory indicators of unconscionability, although the Full Federal Court in *ACCC v Samton Holdings* addressed a suggestion that section 51AA broadens the equivalent unwritten law, as follows:²⁴⁵

The sense and structure of the section is quite contrary to the notion that somehow it directly affects the unwritten law. It may be that as a result of the enactment of s 51AA the concept of unconscionable conduct under the unwritten law will be invoked in circumstances of commercial dealings in which it has not previously frequently been invoked. And it may be that through repeated

²⁴² For other judicial references to ‘situational’ forms of unconscionable conduct, see: *Manday Investments Pty Ltd v Commonwealth Bank of Australia* [2011] FCA 681; *Perpetual Trustees Australia Limited v Schmidt* [2010] VSC 67; *Board Solutions Australia Pty Ltd v Westpac Banking Corporation* [2009] VSC 474; and *Kakavas v Crown Melbourne Limited* [2009] VSC 559 (on appeal, *Kakavas v Crown Melbourne Ltd* [2012] VSCA 95).

²⁴³ *Manday Investments Pty Ltd v Commonwealth Bank of Australia* [2011] FCA 681; *Perpetual Trustees Australia Limited v Schmidt* [2010] VSC 67; *Board Solutions Australia Pty Ltd v Westpac Banking Corporation* [2009] VSC 474; and *Kakavas v Crown Melbourne Limited* [2009] VSC 559 (on appeal, *Kakavas v Crown Melbourne Ltd* [2012] VSCA 95).

²⁴⁴ On the broader dimension of analogous development of the common law by reference to legislative developments, see: Finn, 2005.

²⁴⁵ *ACCC v Samton Holdings Pty Ltd* [2002] FCAFC 4 at [54].

applications of the unwritten law to new circumstances, that law itself will be developed. But that will be by way of judicial decision-making not by operation of the statute upon its content.

A recent example of how ‘situational’ forms of special disadvantage might be claimed in B2B transactions also brings into play the correlative issue of the capacity of corporations – as distinct from individuals – to invoke such protective doctrines. In *Optus Networks Ltd v Telstra Corporation Ltd (No 3)*, Edmonds J framed the case as pleaded by Optus in these terms:²⁴⁶

Specifically, Optus contended that the unconscionable conduct arises by reason of the following circumstances apparent on the evidence:

(a) Telstra was both a carrier of telecommunications traffic generated by Optus’ customers and a competitor of Optus as a provider of telecommunications services to customers including members of the public.

(b) In its capacity as a carrier of telecommunications traffic generated by Optus’ customers, Telstra had access to Optus’ traffic information which was confidential.

(c) Such information was capable of being used by Telstra in its capacity as a competitor of Optus for the purpose of Telstra’s marketing, promotional and related activities and, consequently, to the benefit of Telstra as a competitor of Optus and to the detriment of Optus’ business interests.

(d) Optus was unaware as to the nature of the use that Telstra was or may have been making of the information and, consequently, for the impact or potential impact of such use on Optus’ business interests.

(e) Telstra unreasonably failed to inform Optus of the above matters and, specifically, of the nature of the use that Telstra was making or may have been making of the information in question; but set about to keep its use of Optus’ information and Telstra’s breach of contract secret.

(f) In these circumstances, Optus was under a special disadvantage in dealing with Telstra such that there was an absence of any reasonable degree of equality between them in relation to Telstra’s continuing access to and use of the information, and Optus was unable to make any reasonable judgment as to what was in its business interests as regards Telstra’s continuing access to and use of the information.

(g) The above matters were known to Telstra or ought reasonably to have been sufficiently evident to Telstra as to make it unfair or unconscientious that Telstra use and continue to use the information for the purposes referred to above.

Optus was unsuccessful in raising these arguments before Edmonds J, who decided that: (i) Optus knew that Telstra would see the Optus traffic information; (ii) Optus also had any resulting disadvantage ameliorated by restrictions on what Telstra could do with that information; and (iii)

²⁴⁶ *Optus Networks Ltd v Telstra Corporation Ltd (No 3)* [2009] FCA 728 at [11].

Telstra did not commit unconscionable conduct merely by breaching those restrictions. This case was framed in terms of section 51AA, and more room is available to make arguments based on ‘situational’ and relational factors under section 51AC (and its equivalent for financial services) in the right circumstances. The failure of these arguments and pleadings to convince the judge takes nothing away from the more general point that such things are clearly arguable and not easily dismissed out of hand, with a ripple effect in terms of the time and money spent by legal advisers and commercial parties in considering their clients’ positions in such terms, raising these points in correspondence between the parties and their legal representatives, and finally litigating them in pleadings and submissions to courts, as part of the cost of doing business. For all of the emphasis given to the conceptual and doctrinal state of the law in this field, this operational aspect is part of the terrain of statutory unconscionability too, and it is a part of immense concern in terms of the precision and cost of legal advice in this field.

The State of Play on Statutory Unconscionability

A few basic propositions have emerged from the case law and commentary on the standard of statutory unconscionability and its framework of indicators prior to the recent reforms. First, this standard of unconscionable conduct goes beyond the meaning of unconscionable conduct under the unwritten law.²⁴⁷ Australian intermediate appellate court authority is coalescing around the position that statutory unconscionability transcends the judge-made law of unconscionable conduct.²⁴⁸

Secondly, the relevant conduct must be of a character that would be denounced for its ‘moral obloquy’ to justify a finding of unconscionable conduct,²⁴⁹ so that honest but mistaken actions would not meet this threshold. Those cases endorsing such a threshold point to the commercial unworkability of setting the bar too low, where simply catching unfair business conduct would rewrite the law and practice of commerce.²⁵⁰ Moreover, this characterisation of ‘moral obloquy’ cannot be free-standing or otherwise at large, detached from the statutory framework for unconscionable conduct and the unwritten law from which it draws, because that would render judgments of unconscionable conduct susceptible to judicial subjectivity and idiosyncrasy, unmediated by legal doctrine and identifiable criteria.²⁵¹

Thirdly, the listed indicators must be interpreted and applied with a view to the framework within which they operate. As indicated above, that framework transcends existing doctrines of unconscionable conduct. This is illustrated by the explicit linking of unconscionable conduct and an

²⁴⁷ *ASIC v National Exchange Pty Ltd* [2005] FCAFC 226; *ANZ Banking Group v Karam* [2005] NSWCA 344; and *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389.

²⁴⁸ *ASIC v National Exchange Pty Ltd* [2005] FCAFC 226 at [30].

²⁴⁹ *Attorney General of NSW v World Best Holdings Ltd* [2005] NSWCA 261 at [121]; *Lopwell Pty Ltd v Clarke* [2009] NSWCA 165 at [40]; and *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 at [291].

²⁵⁰ Eg *Attorney General of NSW v World Best Holdings Ltd* [2005] NSWCA 261.

²⁵¹ *Canon Australia Pty Ltd v Patton* [2007] NSWCA 246 at [4] per Basten JA.

indicator concerning good faith, given the different focus and work of the doctrines surrounding good faith in contract and unconscionable conduct under the unwritten law.

Fourthly, the listed indicators of statutory unconscionability might apply independently or in combination, depending upon their nature and the circumstances. Mere inequality of bargaining power is insufficient alone to produce a finding of unconscionable conduct under the law relating to unconscionable bargains and special disadvantage.²⁵² So, it is unlikely that merely satisfying the listed indicator embodying inequality of bargaining power could lead to a finding of unconscionable conduct on its own.

Fifthly, some of the other listed indicators also have qualities that relate to good faith, thus raising questions about the interplay between them. The notion of a party's legitimate commercial interests is important in setting boundaries for good faith's operation in contract law, and also has a role to play in one of the listed indicators of statutory unconscionability. Similarly, some of the other listed indicators refer to notions of consistency of treatment, reasonable consideration of other parties' interests, and other aspects associated with doctrines of fair dealing.

One problem, to which the new principles of interpretation are directed, is that some courts have still viewed statutory unconscionability through the eyes of the general law on unconscionable conduct, including preconditions for its operation grounded in notions of vulnerability and special disadvantage. Australian courts are yet to develop a body of jurisprudence of its own for statutory unconscionability, framed around its outlined standards and indicators, as now informed by legislated principles of interpretation. Here, it is important to start with the structure and terms of the legislation itself, as distinct from any preconceived notions or limitations grounded in unconscionability under the general law – a primary injunction about statutory interpretation that the current High Court has made its forte in a succession of cases in the last decade or so.

Another problem is that advice and judgment about B2C and B2B unconscionability cannot be made simply by delineating any particular statutory indicator and assessing whether conduct breaches it. As the Full Federal Court warned in *ACCC v Oceana Commercial Pty Ltd*, 'it distorts the proper operation of [B2B statutory unconscionability] to search through the twelve criteria ..., find one that seems to fit the case in hand, and then move to a conclusion of unconscionable conduct'.²⁵³ Unfortunately, many pleadings and arguably even some court judgments confine themselves too narrowly to an indicator-by-indicator mode of analysis. This can be contrasted with treating the listed statutory indicators of unconscionable conduct as non-exhaustive factors and locating them in a suitable decision-making framework that is sufficiently context-sensitive and equally broader than notions of unconscionable conduct under the general law.²⁵⁴ As Buchanan J recognised in *Astram*

²⁵² *ACCC v CG Berbatis Holdings Pty Ltd* [2003] HCA 18 at [11]-[12] and [14]; (2003) 214 CLR 51 at 64 per Gleeson CJ.

²⁵³ [2004] FCAFC 174 at [181].

²⁵⁴ For an example of intermediate appellate court consideration (and rejection) of criticism of a trial judge's approach on such grounds, see: *Brighton v Australia and New Zealand Banking Group Ltd* [2011] NSWCA 152 at [131]-[133] (on appeal from *ANZ Banking Group Limited v Aldrick Family Company Pty Limited* [2010] NSWSC 1000). Similarly, for an example at

Financial Services Pty Ltd v Bank of Queensland Ltd,²⁵⁵ ‘a conclusion that conduct is unconscionable requires the identification of a standard of behaviour which is not to be equated merely with a list of factors to which a court may have regard’.

Finally, under these provisions there is an important connection between the content of a contract and conduct surrounding it. The recent bolstering of the applicability of these provisions to a contract’s content and performance significantly reinforces this connection. Moreover, this main focus upon conduct means that these provisions catch conduct even in the absence of a contract, as well as both pre-execution and post-execution conduct. This has implications for good faith on a number of levels. For example, as Justice Finn notes about the pre-harmonisation forms of B2C and B2B statutory unconscionability, ‘(b)oth sections would seem capable of remedying losses occasioned to an innocent party as a result, for example, of the other party having negotiated in bad faith a contract which does not eventuate’.²⁵⁶

Justice Finn’s crystal ball-gazing on how statutory unconscionability will unfold can be crystallised in these two propositions:

- (1) statutory unconscionability’s conventional use has placed heavy emphasis upon safeguarding against victimisation and exploitation of vulnerability, principally in the forms of ‘coercion’ and ‘advantage taking’,²⁵⁷ and
- (2) statutory unconscionability’s present trajectory ‘is in the direction of proscribing unfair dealing and unfair trading’, reinforced by statutory indicators of a like kind that concentrate upon discriminatory treatment, industry code compliance, and good faith.²⁵⁸

Speaking of the indicators of unconscionable conduct in B2C and B2B statutory unconscionability, before their harmonisation and with at least some indicators in common, Finn J signals where future litigation and judicial decision-making should look in exploring the parameters of statutory unconscionability, as follows:²⁵⁹

Given that the list in each section [ie sections 51AB and 51AC of the Trade Practices Act] is not all inclusive and prescriptive, it is of course open to the judges to give harmonious meanings and applications to the two sections. I anticipate that this will continue to happen. That harmony, though, must necessarily take account of *where s51AC’s list is pointing*. As I earlier suggested this is in the direction of *proscribing unfair dealing and unfair trading*. This may not be an altogether welcome development for some.

the trial judge level of the common problem of an acute judicial awareness of the need for more than an indicator-by-indicator assessment combined with pleadings by parties that largely proceed in such a fashion, see: *Astram Financial Services Pty Ltd v Bank of Queensland Ltd* [2010] FCA 1010.

²⁵⁵ *Astram Financial Services Pty Ltd v Bank of Queensland Ltd* [2010] FCA 1010 at [335].

²⁵⁶ P. Finn, ‘Unconscionable Conduct?’, Presentation to the 4th Annual University of South Australia Trade Practices Workshop, 2006, at pp 13-14.

²⁵⁷ Finn, 2006: 15.

²⁵⁸ Finn, 2006: 15.

²⁵⁹ Finn, 2006: 14; emphasis added.

The ‘some’ to which he refers might reasonably include those in one camp (including financiers and other major corporations on one side of B2C and B2B transactions) and those who advise them, who will necessarily face increasingly more nuanced unconscionability-based claims and arguments from those in the other camp (including consumers, small business, and even other large corporations on the other side of B2C and B2B dealings) and those who advise them too.

Combined with the High Court’s prime directive that statutory interpretation starts with the legislative text rather than any preconceptions from pre-existing common law and judicial decisions about it, as reinforced by new principles of interpretation in the latest form of statutory unconscionability, the way is now clear for Australian courts to chart a new course for statutory unconscionability in its own right. In short, the result is that courts are left with considerable discretion in making decisions about unconscionable conduct, bound only by a matrix of non-exhaustive, context-sensitive, and unweighted statutory indicators, without a baseline of pre-existing judge-made law covering all such indicators and only a nascent body of judicial interpretation of statutory unconscionability, and with many untested areas and issues for ‘greenfield’ unconscionability litigation.

First Recent Change to Statutory Unconscionability – Expanded Regulatory Powers

All Australian commercial lawyers know that we now have a Competition and Consumer Act instead of a Trade Practices Act, that the new law introduces an ‘unfair contract terms’ regime, and that it does not apply to B2B contracts. Of course, many commercial lawyers at the big end of town still need to advise corporate clients on how this regime applies to their standard contracts with consumers. However, some of the unconscionability-related changes are less well known. The first relevant change is an expansion in regulatory powers. In particular, the regime for pecuniary penalties and infringement notices applies to assessments of unconscionable conduct by official regulators, who are no longer limited to court action in this area of business regulation.

Second Recent Change to Statutory Unconscionability – Sharper Focus on Terms and Progress of Contracts

The Trade Practice Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth) adds to the list of statutory indicators of unconscionable conduct in B2B transactions in a significant way. Consistently with the Australian Government’s policy decision not to apply the new ‘unfair contract terms’ regime in all of its detail to B2B transactions, the Government looked at minor modifications to the statutory indicators of unconscionable business conduct instead. Building upon one of the pre-existing statutory indicators relating to contractual terms and conditions, the statutory unconscionability regime is broadened to include reference here to the terms and progress of relevant business contracts. In that more limited but still significant sense, substantive notions of unfairness associated with statutory unconscionability can be applied to the content and

performance of contracts, as well as to the process leading to their execution. Nevertheless, even this falls short of a full-scale ‘unfair contract terms’ regime for B2B contracts.

This new statutory indicator of unconscionable business conduct is in the following terms:

Without in any way limiting the matters to which the court may have regard for the purpose of determining whether a person [(the supplier/acquirer)] has contravened subsection (1) in connection with the [supply/acquisition or possible supply/acquisition] of goods or services [to/from] another person [(the small business supplier/the business consumer)], the court may have regard to : ...

... if there is a contract between the [supplier/acquirer] and the [business consumer/small business supplier] for the [supply/acquisition] of the goods or services:

- (i) the extent to which the [supplier/acquirer] was willing to negotiate the terms and conditions of the contract with the [business consumer/business supplier]; and
- (ii) the terms and conditions of the contract; and
- (iii) the conduct of the [supplier/acquirer] and the [business consumer/small business supplier] in complying with the terms and conditions of the contract; and
- (iv) any conduct that the [supplier/acquirer] or the [business consumer/business supplier] engaged in, in connection with their commercial relationship, after they entered into the contract

This recent amplification of the listed indicator of statutory unconscionability related to contractual provisions and surrounding conduct has a significance that should not be underestimated. In addition to providing further evidence that statutory unconscionability embraces both procedural unconscionability and substantive unconscionability, this amplified provision dovetails with one of the new principles of interpretation. It also reinforces that the statutory unconscionability regime now touches the content of agreements, the performance of them, and other conduct surrounding them. We are yet to see tested the full implications of this amplification and its correlative principle of interpretation, which importantly conditions all of the listed indicators of unconscionable conduct.

Second Recent Change to Statutory Unconscionability – New Principles of Interpretation for Statutory Unconscionability

For illustrative purposes, the new principles of interpretation for B2C and B2B forms of statutory unconscionability in the Competition and Consumer Act are as follows:

21 Unconscionable conduct in connection with goods or services

- (1) A person must not, in trade or commerce, in connection with:
 - (a) the supply or possible supply of goods or services to a person (other than a listed public company); or

- (b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);
- engage in conduct that is, in all the circumstances, unconscionable.

...

- (4) It is the intention of the Parliament that:
 - (a) this section is not limited by the unwritten law relating to unconscionable conduct; and
 - (b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and
 - (c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:
 - (i) the terms of the contract; and
 - (ii) the manner in which and the extent to which the contract is carried out;and is not limited to consideration of the circumstances relating to formation of the contract.

These new principles of interpretation in section 21(4) flow from the recommendations of the three-member expert panel appointed by the Australian Government in the wake of various parliamentary committee reports on statutory unconscionable conduct and problematic behaviours in the franchising industry.²⁶⁰ They govern the interpretation and application of the basic standard of unconscionable conduct outlined in section 21(1), as informed by the statutory indicators of unconscionable conduct in section 22, including a lack or breach of good faith.

Importantly, these principles of interpretation condition the approach to all of the listed indicators of statutory unconscionability. While that is their collective significance, each of the new principles has its own significance too. The first principle gives legislative force to the idea that constraints from the general law on unconscionable conduct are not to be imported into these forms of statutory unconscionability. The classic example is the abandonment of any requirement that someone has to show a special disadvantage to access these provisions. The second principle will make prosecution of unconscionable conduct cases easier for official regulators. The third principle reinforces the position that these forms of statutory unconscionability embrace substantive unconscionability as well as procedural unconscionability.

Third Recent Change to Statutory Unconscionability – Harmonisation of B2B and B2C Statutory Unconscionability

The newly harmonised statutory indicators of unconscionable conduct in both B2C and B2B contexts appear in section 22 of the Competition and Consumer Act's relevant schedule. These harmonised provisions governing statutory unconscionability in both B2C and B2B contexts replace

²⁶⁰ Expert Panel Report, above .

the old sections 22 and 23 of that schedule, which themselves supersede sections 51AB and 51AC of the Trade Practices Act respectively. Courts are authorised to have regard to an indicative list of factors, the last of which refers explicitly to good faith, as follows:

Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the **supplier** [/ **acquirer**]) has contravened section 21 in connection with the supply [/acquisition] or possible supply [/acquisition] of goods or services to [/from] a person (the **customer** [/ **supplier**]), the court may have regard to:

- (a) the relative strengths of the bargaining positions of the supplier [/acquirer] and the customer [/supplier]; and
- (b) whether, as a result of conduct engaged in by the supplier [/acquirer], the customer [/supplier] was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier [/acquirer]; and
- (c) whether the customer [/supplier] was able to understand any documents relating to the supply [/acquisition] or possible supply [/acquisition] of the goods or services; and
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer [/supplier] or a person acting on behalf of the customer [/supplier] by the supplier [/acquirer] or a person acting on behalf of the supplier [/acquirer] in relation to the supply [/acquisition] or possible supply [/acquisition] of the goods or services; and
- (e) the amount for which, and the circumstances under which, the customer [/supplier] could have acquired [/supplied] identical or equivalent goods or services from [/to] a person other than the supplier [/acquirer]; and
- (f) the extent to which the supplier's [/acquirer's] conduct towards the customer [/supplier] was consistent with the supplier's [/acquirer's] conduct in similar transactions between the supplier [/acquirer] and other like customers [/suppliers]; and
- (g) the requirements of any applicable industry code; and
- (h) the requirements of any other industry code, if the customer [/supplier] acted on the reasonable belief that the supplier [/acquirer] would comply with that code; and
- (i) the extent to which the supplier [/acquirer] unreasonably failed to disclose to the customer [/supplier]:
 - (i) any intended conduct of the supplier [/acquirer] that might affect the interests of the customer [/supplier]; and
 - (ii) any risks to the customer [/supplier] arising from the supplier's [/acquirer's] intended conduct (being risks that the supplier [/acquirer] should have foreseen would not be apparent to the customer [/supplier]); and
- (j) if there is a contract between the supplier [/acquirer] and the customer [/supplier] for the supply [/acquisition] of the goods or services:
 - (i) the extent to which the supplier [/acquirer] was willing to negotiate the terms and conditions of the contract with the customer [/supplier]; and
 - (ii) the terms and conditions of the contract; and
 - (iii) the conduct of the supplier [/acquirer] and the customer [/supplier] in complying with the terms and conditions of the contract; and

- (iv) any conduct that the supplier [/acquirer] or the customer [/supplier] engaged in, in connection with their commercial relationship, after they entered into the contract; and
- (k) without limiting paragraph (j), whether the supplier [/acquirer] has a contractual right to vary unilaterally a term or condition of a contract between the supplier [/acquirer] and the customer [/supplier] for the supply [/acquisition] of the goods or services; and
- (l) the extent to which the supplier [/acquirer] and the customer [/supplier] acted in *good faith*.²⁶¹

One of the clearest consequences of the harmonisation of B2B and B2C statutory unconscionability is that the same indicators are now available in both contexts. The immediate result is to broaden the range of indicators that are available in assessing unconscionable conduct in the context of B2C transactions. This includes making available in that context the full suite of indicators associated with what Justice Finn and other commentators have characterised as factors all relating to good faith and fair dealing, in contrast to the pre-existing indicators that the same commentators associate with exploitation of vulnerability and advantage-taking. The result is a significant improvement in consumer protection.

Concluding Remarks

As this paper details, there are numerous recent changes to the law and practice of unconscionable conduct and good faith in commercial transactions, as well as numerous issues for ‘test case’ advice, litigation and other regulatory action, and innovative drafting solutions. However, it is not ground zero. As this paper also reveals, there are clear ways to navigate between and around the residual reefs of uncertainty in this field, while also using the platform of existing law and guidance to develop standard documents, procedures, and behaviours that keep everyone on the right side of responsible business behaviour.

²⁶¹ Emphasis added for ‘good faith’.