"Good faith" as a requirement of an ADR clause

Statutory requirements of "good faith"

Essential or core content of an obligation to negotiate or mediate in good faith

85 I turn now to the related argument, that the concept of "good faith" is too vague and uncertain to be enforceable. This argument was forcefully put by Handley JA in Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd (1991) 24 NSWLR 1 at 41-42, where his Honour stated that there were no identifiable criteria by which the content of the obligation to negotiate in good faith could be determined. Handley JA pointed out that:

"Negotiations are conducted at the discretion of the parties. They may withdraw or continue; accept, counter offer or reject; compromise or refuse, trade-off concessions on one matter for gains on another and be as unwilling, willing or anxious and as fast or slow as they think fit"

86 Accordingly, his Honour concluded that "these considerations demonstrate that a promise to negotiate in good faith is illusory and therefore cannot be binding".

87 In Asia Pacific Resources Pty Ltd v Forestry Tasmania (unreported, Supreme Court, Tas, Full Court, FCA 6 of 1997, 4 September 1997), the Full Court considered "good faith" in the context of an implied term to negotiate in good faith. Wright J, in rejecting the implication of such a term at law, stated (at 12):

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

88 While there may be a vagueness about a "good faith" obligation, it is to be noted that there is a vagueness about many commercial contracts: see D Cremeen, "Agreements to Negotiate in Good Faith" (1996) 3 Commercial Dispute Resolution Journal 61 at 64. The author draws attention to the statement of Ormiston J in Vroon BV v Foster's Brewing Group Ltd [1994] 2 VR 32 at 67:

"... the courts should strive to give effect to the expressed agreements and expectations of those engaged in business, notwithstanding that there are areas of uncertainty and notwithstanding that particular terms have been omitted or not fully worked out."

89 Further, it is worthwhile remembering the observation of Barwick CJ (with whom McTiernan, Kitto and Windeyer JJ agreed) in Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd (1968) 118 CLR 429 at 436-437:

"But a contract of which there can be more than one possible meaning or which when construed can produce in its application more than one result is not therefore void for uncertainty. As long as it is capable of a meaning, it will ultimately bear that meaning which the courts, or in an appropriate case, an arbitrator, decides on its proper construction: and the court or arbitrator will decide its application. The question becomes one of construction, of ascertaining the intention of the parties, and of applying it ... so long as the language used by the parties, to use Lord Wright's words in Scammell (G) and Nephew Ltd v Ouston [1941] AC 251 is not 'so obscure and so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention', the contract cannot be held to be void or uncertain or meaningless. In the search for that intention, no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements. Thus will uncertainty of meaning, as distinct from absence of meaning or of intention, be resolved." (Emphasis added.)

90 I note that one submission made by Mr Rudge SC for the defendant is that the good faith requirements in cl 28 are satisfied by a party merely attending the stages of the dispute resolution procedure.

91 I do not think this can be correct.

92 The very nature of the words "good faith" must go toward the conduct of the parties involved in the agreed dispute resolution, as inclusion of those words connotes something more than mere attendance in the process.

93 I turn now to examine whether the words "good faith" in cl 28 have meaning of sufficient certainty to be enforceable.

94 In Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234, Priestley JA (at 263-268) closely examined the notions of good faith drawing extensively from developments in the United States, Canada, Australia and New Zealand. The analysis in its detail, context and conclusions draws together the several strands which argue strongly for the recognition in Australia of the implied obligation of good faith in the performance and enforcement of contracts as is clearly recognised in the United States. Priestley JA (at 263-264) remarked as follows in considering an implied obligation of good faith in contract:

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

95 His Honour continued (at 265) that:

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

96 An extract from the conclusions in the judgment of Priestley JA in Renard was referred to by Finn J in Hughes Aircraft Systems International v Air Services (1997) 76 FCR 151 at 191-193, who indicated that his own view inclined to that of Priestley JA. Finn J, when dealing with a suggested general implied duty of good faith and fair dealing, said:

"(a) Good faith and fair dealing

"The applicant's submission is that the proposed term is a manifestation of a general implied duty of good faith and fair dealing. I have, in consequence, been invited to embrace the conclusion of Priestley JA in Renard Constructions (ME) Pty Ltd v Minister for Public Works (at 268) that:

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

The primary basis upon which I was asked to make this implication was unrelated specifically to pre-award contracts in procurement cases. Rather as suggested in the Restatement of Contracts, Second, art 205, the implied duty existed in 'every contract'. I make this particular observation because, as later discussed, a duty to act fairly in some form appears to have been accepted in other Commonwealth jurisdictions in pre-award contract contexts: see Pratt Contractors Ltd v Palmerston North City Council [1995] 1 NZLR 469 at 478 and 483; Martselos Services Ltd v Arctic College (1994) 111 DLR (4th) 65; and see generally, N Seddon, Government Contracts: Federal, State and Local (1995) at 235ff.

The respondent in contrast has pressed upon me the judgment of Gummow J, then of this Court, in Service Station Association Ltd v Berg Bennett & Associates Pty Ltd (1993) 45 FCR 84; After considering North American jurisprudence's acceptance of an implied duty of good faith and fair dealing, his Honour observed (at 96):

'Anglo-Australian contract law as to the implication of terms has heretofore developed differently, with greater emphasis upon specifics, rather than the identification of a genus expressed in wide terms. Equity has intervened in matters of contractual formation by the remedy of rescission, upon the grounds mentioned earlier. It has restrained freedom of contract by inventing and protecting the equity of redemption, and by relieving against forfeitures and penalties. To some extent equity has regulated the quality of contractual performance by the various defences available to suits for specific performance and for injunctive relief. In some, but not all, of this, notions of good conscience play a part. But it requires a leap of faith to translate these well established doctrines and remedies into a new term as to the quality of contractual performance, implied by law. (Emphasis added.)"
Needless to say I have been asked to remain in Gummow J's company and not take that leap.

Other Australian authority on this duty is indecisive. Notably, in the Full Court of this Court in News Ltd v Australian Rugby Football League Ltd (1996) 64 FCR 410 at 511, it was found unnecessary to consider whether such a duty should be implied in that case. The court did not enter upon the question of whether our law recognised such an implication as a matter of law.

If the matter stood merely as one of choice between two conflicting views, I would, as a matter of comity, adhere to that of Gummow J: see Bank of Western Australia Ltd v Commissioner of Taxation (Cth) (1994) 55 FCR 233 at 255 on 'comity' and the cases referred to therein. This is an arena in which opinions, judicial and scholarly, differ often sharply: see, for example, I Renard, 'Fair Dealing and Good Faith' in Saunders (ed), Courts of Final Jurisdiction: The Mason Court in Australia (1996). And it is difficult to disagree with Gummow J's characterisation both of the methodology of Australian contract law while it remained subject to direct English control and of the role assumed by equity in regulating contract formation and performance.

Having said this, it is also appropriate to indicate that my own view inclines to that of Priestley JA. Of that inclination I would say only this. Fair dealing is a major (if not openly articulated) organising idea in Australian law. It is unnecessary to enlarge upon that here. More germane to the present question, the implied duty is, as is well-known, an accepted idea in the contract law of the United States and, probably, of Canada: see E A Farnsworth, 'Good Faith in Contract Performance' in J Beatson and D Friedmann (eds), Good Faith and Fault in Contract Law (1995); for a convenient collection of some of the voluminous literature in the United States debating the meaning of the implied duty; see Farnsworth on Contracts (1990) vol 2, par 7.17a; for an English view, see for example, Right Honourable Lord Justice Staughton, 'Good Faith and Fairness in Commercial Contract Law' (1994) 7 Journal of Contract Law 1993; and see Livingstone v Roskilly [1992] 3 NZLR 230 at 237-238. Its status in civil law is well recognised: see, eg, H K Lücke, 'Good Faith and


I should add that, unlike Gummow J, I consider a virtue of the implied duty to be that it expresses in a generalisation of universal application, the standard of conduct to which all contracting parties are to be expected to adhere throughout the lives of their contracts. It may well be that, on analysis, that standard would be found to advance little the standard that presently may be exacted from contracting parties by other means: cf the standard applied in Conoco v Inman Oil Co 774 F2d 895 (1985) at 908. But setting the appropriate standard of fair dealing is, in my view, another matter altogether from acceptance of the duty itself.*

97 In Alcatel Australia Ltd v Scarcella (1998) 44 NSWLR 349, Sheller JA (with whom Powell and Beazley JJA agreed), stated (at 369) as follows:

"The decisions in Renard Constructions and Hughes Bros mean that in New South Wales duty of good faith, both in performing obligations and exercising rights, may by implication be imposed upon parties as part of a contract."(Emphasis added.)

98 It appears to be commonsense that as an obligation to act in "good faith" may, in principle, be legally recognised as an
implied or imputed obligation, there is no reason why it should be struck down as uncertain in cases where there is an express contractual term, as in the present case.

99 In *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* the majority of the Court of Appeal considered that a preliminary contract to negotiate in good faith was possible, although it was not made out on the facts (Mason P with whom Waddell A-JA agreed, Handley JA disagreeing on this point). Special leave to appeal was refused by the High Court: *Sijehama Pty Ltd v Coal Cliff Collieries Pty Ltd* (1992) 4 Leg Rep SL 2.

100 The law in this area can not, however, be regarded as settled, as while the reasoning of Handley JA found support in the House of Lords’ decision in *Walford v Miles*, the New South Wales Court of Appeal found it unnecessary to deal with the matter in *Australis Media Holdings Pty Ltd v Telstra Corporation Ltd* (1998) 43 NSWLR 104: see *Healey v Commonwealth Bank of Australia* [1988] NSWSC 678 per Giles JA.

101 In *Tobias v QDL Ltd* (unreported, Supreme Court, NSW, Simes J, No 1995 of 1996, 12 September 1997) the Court considered whether an alleged obligation to "review and negotiate in good faith" the terms of repayment of an amount outstanding under a mortgage to the satisfaction of both parties, gave rise to a binding legal obligation.

102 Simos J, who relied upon the reasoning of Handley JA in *Coal Cliff*, held that it did not, being of the opinion that "at least in the circumstances of the present case, the alleged obligation is illusory [being no more than an agreement to agree] and, accordingly did not relevantly exist".

103 To my mind, notwithstanding the unsettled status of law in this area, *Tobias*, like *Coal Cliff*, can be distinguished from the question presently before me. Both cases concern a clause requiring the negotiation in good faith of a substitute agreement. In the circumstances of each case, such a clause was said to be illusory (though the majority in *Coal Cliff* was prepared to countenance such an agreement in appropriate circumstances). In cl 28, however, the parties have made their agreement to follow a process of dispute resolution as a precondition to litigation ? the obligation of good faith relates to performance of the agreement, and is, therefore, quite different.

104 To my mind, the following comments of Simos J are instructive on this distinction:

"... in my opinion, there is significant difference between an obligation to 'act' in good faith, compliance with which obligation may, in certain circumstances, be capable of being assessed by reference to some appropriate legal and/or factual standard, on the one hand, and on the other hand, an alleged obligation to 'negotiate' in good faith to achieve an outcome 'satisfactory' to both parties, which, in my opinion, as I have said, is no more than an agreement to agree giving rise to no legally binding obligation."

105 There is clearly a difference between the obligations of good faith contained in cl 28 and the alleged obligation considered in *Tobias*. The former, being an obligation to "negotiate" in good faith in an endeavour to reach agreement, is not to be equated with the latter, being "an obligation to 'negotiate' in good faith to achieve an outcome satisfactory to both parties". The former is only an obligation to participate in a negotiating process which may, but not must, achieve an outcome, which if achieved, may, but not must, be viewed as satisfactory to both parties. The outcome may indeed be viewed as unsatisfactory by either or both parties, but as an outcome which, for whatever reason, both sides accept as resolving the dispute.

106 It is interesting to note how the words "good faith" have been treated in academic writings.

107 In Brownsword, Hird and Howells (eds), *Good Faith in Contract ? Concept and Context: Concept and Context* (1999), "good faith" is described (at 3) as an elusive idea, taking on different meanings and emphases in different contexts.

108 A question arises as to whether the law surrounding the notion of "good faith" as it relates to a general duty of good faith in the performance of a contract, can be imported to give content to the good faith requirement in cl 28.

109 The meaning of "good faith", as it relates to performance of contractual obligations, was comprehensively explored in a paper by Justice Cole: T R H Cole, "Law ? All in good faith" (1994) 10 *Building and Construction Law* 18.
noted (at 19) that there is "no shortage of possible definitions for the term 'good faith' but there does not appear to be one universally accepted definition". In his overview of academic analysis on the subject, Cole J drew attention to the myriad of possible definitions for the phrase. Similarly, P D Finn in comments that the "good faith issue" is both controversial and complex. It does not admit a simple (single) answer:


110 Notwithstanding the difficulties inherent in defining the concept, Cole J concludes that the experience overseas suggests that good faith is a concept that has independent meaning and substance (at 20).

111 Interestingly, many commentators, rather than attempting to affirmatively define good faith, approach the issue by highlighting what does not constitute good faith. For instance, in G Shalev, "Negotiating in Good Faith" in S Goldstein (ed), Equity and Contemporary Legal Developments, papers presented at the 1st International Conference on Equity, The Hebrew University of Jerusalem, Jerusalem (1992), the author states:

"The concept of good faith cannot be independently defined or reduced to rigid rules; it acquires substance from the particular events that take place and to which it is applied. The difficulty of defining the good faith principles results also from the fact that it is not intended to dictate certain modes of behaviour. It is hard to say when good faith exists in a factual setting; it is much easier, and more common, to point to its absence."

112 In K Kovach, "Good Faith in Mediation ? Requested, Recommended, or Required? A New Ethic" (1997) South Texas Law Review 575 at 612, the author includes the following as signs that a party is negotiating in bad faith: "... unexpected delays in answering correspondence; postponement of meetings; sending negotiators without authority to settle; repudiating commitments made during bargaining; shifting positions; interjecting new demands; insisting on a verbatim transcript of the negotiation; refusal to sign a written agreement; unilateral action; and withholding valuable information."

113 In Canada, it has been judicially observed that "good faith" cannot be defined except by providing modern examples of bad faith behaviour: Gateway Realty Ltd v Arton Holdings Ltd (No 3) (1991) 106 NSR (2d) 180 at 197; affirmed (1992) 112 NSR (2d) 180.

114 This approach is evident in Australian courts. For instance, it has been held that failure to co-operate at a mediation conference or adopting an obstructive attitude in regard to an attempt to narrow issues, may constitute a lack of good faith. Accordingly, this may lead to adverse costs orders being made against the unco-operative or obstructive party in later court proceedings: Capolingua v Phylum Pty Ltd (1991) 5 WAR 137. In Capolingua v Phylum, Ipp J held that where it was later shown that issues would otherwise have been narrowed, this was a relevant factor in awarding costs in respect of a later trial that had been unnecessarily extended.

115 To my mind, however, reference to what good faith is not, does not adequately give content to the obligation at any particular stage. In saying this, I recall the comments of Handley JA in Coal Cliff (at 43). With respect I do not, however, agree with Handley JA to the extent that his Honour remarks that determination of bad faith does not "even provide guidance" as to the "content of the obligation at any particular stage".

116 The following observations of Brownsword, Hird and Howells (at 4) go towards on an affirmative understanding of the good faith concept:

"It is commonplace that good faith can be read as having both a subjective sense (requiring honesty in fact) and an objective sense (requiring compliance with standards of fair dealing). [I interpolate to note the footnote reference to the UNIDROIT principles of International Commercial Contracts. Article 1.106(1) which provides that each party, in 'exercising his rights and performing his duties ... must act in accordance with good faith and fair dealing'. The authors point out that the Commission takes 'good faith' to mean 'honesty and fairness in mind, which are subjective concepts', and 'fair dealing' to
mean 'observance of fairness in fact which is an objective test'. It is also commonplace that the most troublesome aspects of good faith relate to its objective dimension. In particular, if good faith is understood as prescribing standards of fair dealing, who are the good-faith standard setters, by what authority do they set such standards, and what are the standards that they so set?"

117 In this context, it is instructive to examine the impact lexicon plays in our understanding of the notion of good faith.

118 In light of the interest generated by international instruments such as the UNIDROIT Principles of International Commercial Contracts prepared by the International Institute for the Unification of Private Law (Rome: UNIDROIT, 1994), which specifically refer to a requirement of "good faith" in contracts, the Quebec Research Centre of Private and Comparative Law at McGill University set about preparing partner dictionaries, in French and English, which set out the fundamental vocabulary of Quebec private law.

119 "Good faith" as it relates to contracts, was chosen by the editorial committee as the first term to be presented as a sample in a paper published in advance of the release of the dictionary. The editorial committee stated as follows:

"... the concept of good faith may now be thought of as one of the cannons of international contract law. Since the notion of good faith is seen as fundamental to understanding all aspects of the law of contract, civilians generally express surprise at how little place 'good faith' occupies as a formal construct in the common law tradition. This is not to say 'good faith' is absent in the common law ? on the contrary ? but its mode of expression is such that it may be buried in the cases of that tradition rather than expressed formally as an abstract principle. This is especially problematic when it comes to articulating 'good faith' in English, the language most commonly associated with common law parlance, in a document such as the UNIDROIT Principles. In this respect, the usage of good faith in English civilian parlance in Quebec is of particular interest.

It is often said that in civil law, 'good faith' is not only understood in a subjective manner but also objectively, whereas common lawyers tend to measure 'good faith' on a subjective basis corresponding essentially to a given actor's state of mind. In order to ensure the notions of 'good faith' and 'bonne foi' be taken as equivalents, the expression 'good faith and fair dealings' was chosen to underline the objective aspect of 'good faith' in the EUROPEAN Principles and the UNIDROIT Principles. In this choice of terms, there is a lingering sense that law's expression in French corresponds naturally to the civil law and that English and common law are also more natural partners. Yet, the English language may certainly be thought of as sufficiently elastic to express the civilian notion of good faith. English-speaking civilians in Quebec do not feel any need to add the expression 'fair dealings' in order to make the scope of the notion of good faith clearer.

120 Turning specifically to the proposition that the mode of expression of good faith is buried in the common law tradition: it may be that Australian courts have already developed a concept akin to the notion of good faith.

121 In United States Surgical Corporation v Hospital Products International Pty Ltd [1982] 2 NSWLR 766 at 800, McLelland J observed that the duty of good faith performance in contract law of New York/Connecticut was not materially different from the implied business efficacy principle. That is, where in a written contract it appears that both parties have agreed that something will be done, a court will imply a term that "each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect": Mackay v Dick (1881) 6 App Cas 251 at 263 per Lord Blackburn approved by the High Court in Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596.

122 In Secured Income Mason J (at 607-608) made clear that this rule of construction does more than oblige contracting parties to co-operate so that each may perform their obligations under the contract, rather, it ensures that contracting parties do all that is necessary to carry out the contract.
Further, parties are subject to a universal duty to act honestly: *Meehan v Jones* (at 580-581) per Gibbs CJ; per Mason J (at 589-590); per Wilson J (at 597-598).

To my mind, a notion of good faith is implicit in any alternative dispute resolution procedure, as without it there is no chance of reaching a mutually satisfactory conclusion. Indeed, literature on alternative dispute resolution frequently includes an explicit comment that good faith is part of the process: K Kovach, "Good Faith in Mediation ? Requested, Recommended, or Required? A New Ethic" (1997) *South Texas Law Review* 575.

Certainly, in *Allco Steel*, Master Horton appears to have taken as a given that the dispute resolution clause, cl 4.5.6 of the contract, contained an implied term that any attempt to conciliate disputes pursuant to that clause, be made "bona fide".

Certain comments made by Rogers CJ Comm D in *AWA Ltd v Daniels* suggest that his Honour reached this same conclusion. For instance, Rogers J observed, in answer to submissions that a court order for mediation would be futile in view of the reluctance of party participation, that successful mediation may be achieved if "the parties enter into in good faith, as they said they would, the skill of the mediator will be given full play to bring about consensus" (at 1) (emphasis added). Further, Rogers J cited the following passage from *Haertl Wolff Parker Inc v Howard S Wright Construction Co* (unreported, United States Dist Lexis 14756) a decision made, albeit at first instance, in the United States District Court in Oregon:

"A contract providing for alternative dispute resolution should be enforced, and one party should not be allowed to evade the contract and resort prematurely to the courts: *Southland Corporation v Keating* 465 US 1 (1984) at 7. The success of an alternative dispute resolution procedure will always depend on the good faith efforts of the parties, particularly where, as here, the outcome of the procedure is not binding. In this case, the disputes were referred to Oseran as required by the Partnership Agreement, but HWP abandoned the effort when practical difficulties arose. Oseran remains ready to consider the disputes. Therefore, the courts cannot say that it would be futile to refer the deadlocked issues to him. (Emphasis added.)"

To my mind, it is telling that Rogers J did not recoil from the parties’ concession that they would enter into mediation in "good faith" if required by the court to do so. Indeed, "good faith" was seen as a necessary concomitant of any attempt to mediate a dispute.

To my mind, the matter should be approached as a question of principle, it being undesirable to attempt to formulate a list of factual indicia suggesting compliance or non-compliance with the obligation to mediate in good faith per contra ? K Kovach, "Good Faith in Mediation ? Requested, Recommended, or Required? A New Ethic" (1997) *South Texas Law Review* 575 at 615.

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

In the realm of insurance law it is common to find an exclusion clause providing that a policy of insurance does not indemnify the assured "in respect of any liability brought about by the dishonest or fraudulent act or omission of the assured". There are numerous authorities seeking to define the word "dishonest", which do not make entirely clear what is the ambit of conduct which will be dishonest. In *McMillan v Joseph* (1987) 4 ANZ Insurance Cases 75,051, Casey J stated (at 75,056).

"I accept the appellant's submissions that 'dishonest' is used in the sense of deliberate conduct carrying out it's ordinary meanings (amongst others) of 'not straightforward' and 'underhand'. Like fraud, the term is of wide application in the almost infinite variety of human activity and whilst the general concepts it embodies are well understood, attempts to analyse or define them narrowly are fruitless. In any given case a decision on whether conduct is dishonest is best left to the commonsense and experience of the judge or jury after consideration of all the relevant circumstances."
To my mind, the comments in relation to fraud and dishonesty in the second and third sentences of the above extract, apply equally to the notion of good faith.

This is not to suggest, however, that there may not be general, overarching "core" principles of "good faith" which may provide a framework for the "commonsense and experience of the judge or jury after consideration of all the relevant circumstances".

This topic is dealt with by J Stapleton as follows in relation to "good faith" in performance of contract:

"Within the fashionable debate about good faith there is surprisingly little agreement about or even interest in what the 'core' principle of good faith might be. Even among radical advocates of good faith keen to establish its viability as an independent doctrine, the question of what is its core principle often seems swamped by an eagerness to advance a normative agenda. This agenda focuses on, what are allegedly and generally accepted to be, applications of the principle, typically in the fashionable context of contract: a new duty to disclose here; a new duty to co-operate there.

But this eclipse of the good faith principle by a variety of alleged applications of it is doubly regrettable. By focusing on the range of standards which might be generated by a good faith principle it can give the impression that the underlying principle is itself indefinite or contradictory; while at the same time deflecting attention from the search for a formulation of that core principle. But as I hope to show, it is possible to state a coherent structured principle for good faith....

Two major caveats should be noted before we examine the core principle of good faith.

First, we must free ourselves from the current focus on specific applications of good faith....

It does not make sense to focus only on those scattered applications of good faith which excite current interest, particularly since these tend to excite interest because they are located in the interstices of current rules. What if many of those rules could themselves plausibly be expressed in terms of a concern with 'good faith' as that term has traditionally been understood in connection with phrases such as the bona fide purchaser for value without notice? For example, whatever the precise formulation we use, intuitively it would seem possible to express in good faith terms specific rules such as the tort of deceit and large areas of well-settled equitable obligation. Indeed Professor (now Justice) Paul Finn describes all eight equitable obligations imposed on fiduciaries as 'duties of good faith'. It would not be sensible for us to ignore these areas in formulating the good faith principle, which should operate at such a level of generality that it is capable of capturing all the instances where we might deploy that term....

The second caveat in the search for a formulation of the core principle of good faith is that we should be alert to the fact that a principle might be described as a 'general principle' but only be recognised in law as giving rise to entitlements in selected situations. The negligence principle is a well-known example....

Across all the contexts in which the good faith idea is deployed I believe we can identify and enunciate a conceptual common denominator and it is one that fuses the notions of the advertent pursuit of self-interest and unconscionability. The principle of good faith restrains the deliberate pursuit of self-interest where this is judged unconscionable for certain specific reasons and these reasons can themselves be enunciated within the formulation of good faith. To be more precise:
The good faith doctrine comprises standards/obligations/considerations that seek to temper the deliberate pursuit of self-interest in situations where the conscience is bound.

Such unconscionable conduct may be constituted either by:

(a) the person being dishonest;

(b) the person conducting himself contrary to his word/undertaking in the sense of contradict; or

(c) the person exploiting a position of dominance or power over a person who is vulnerable relative to him.

To act in good faith requires that you do not act dishonestly, do not deliberately contradict yourself (these two limbs might loosely be termed the 'sincerity' dimension of good faith), or deliberately exploit a position of dominance over another.

The inter-relationship of and difference between good faith and reasonableness is subtle but of great importance. A requirement to satisfy a standard of reasonable behaviour is more demanding than the requirement of good faith....

This distinction becomes vital when we confront judicial statements that 'effect must be given to the reasonable expectations of honest people'. Left unqualified this statement is ambiguous. People have different types of expectations, among which are expectations of good faith (that is, honesty, sincerity and no deliberate exploitation) as well as expectations of objectively reasonable and 'fair' conduct. These two types of expectations are different from each other. It is for this reason that we cannot use phrases such as 'expectations of honest people' or 'expectations of reasonable conduct' as a surrogate by which covertly to introduce good faith concerns into the law. Because the ambiguity of such phrases allows them to reach beyond expectations of good faith to expectations of objectively reasonable conduct, they introduce a different and potentially much more demanding standard than intended."

(J Stapleton, "Good Faith in Private Law" (1999) Current Legal Problems 1 at 5-7.)

To my mind, this commentary is valuable in endeavouring to reach for an overarching framework in which to apply the good faith notion. In relation to the present case which of course deals with good faith in terms only of obligations to negotiate or mediate, it is not necessary for the Court to explicitly accept or reject the author's views. As the caselaw unfolds, that may become necessary.

Of particular note is Stapleton's acknowledgment that "good faith" is not synonymous with "reasonable behaviour". (This sits well with Priestley J's observations in Renard, as his Honour points out that while there is overlap in their content, reasonableness and good faith are not co-extensive in their connotations.)

Returning to the reservations as to the certainty of "good faith" expressed both by Giles J in Elizabeth Bay and Handley JA in Coal Cliff, I note that their Honours place significance on the ability of the parties to negotiate from a position of self-interest. Their Honours suggest that negotiation from a position of self-interest, in the face of the interests of the other party, is necessarily at odds with an obligation to maintain good faith in negotiation.

To my mind, the distance between the concepts of good faith and reasonableness accommodates the tension referred to by their Honours. The precise order, content or timing of offers and counter-offers that would ordinarily arise in the course of negotiation or mediation are unlikely to give rise to a situation where (to use Stapleton's language), a party's "conscience" is bound. In other words, such matters are unlikely to inform the Court in any decisive way as to the presence or absence of good faith.

Beyond the authorities referred to above, I have had regard to those dealing with certain statutory requirements of good faith where such requirements relate to the conduct of parties participating in a process.
Statutory requirements of "good faith"

139 Section 31(1)(b) of the *Native Title Act* 1993 (Cth) requires that negotiating parties "must" negotiate in good faith with a view to obtaining agreement of each of the native title parties. That obligation, to "negotiate in good faith", has been interpreted to be mandatory prior to the possible doing of a future act: *Walley v Western Australia and Western Mining Corporation Ltd* (1996) 67 FCR 366 at 381-382 per Carr J, applied in *Western Australia v Taylor (Njamal People)* (1996) 134 FLR 211 at 215.

140 There is no specific reference in the Act as to the meaning of the phrase "negotiate in good faith" other than what is stated in s 31 and in the preamble. The content of the obligation has, therefore, been approached on the basis that whatever might be regarded as the normal meaning of the expression, the meaning to be given to it must depend upon the context provided by the statute: *Njamal People* case per Member Sumner applying *Re Director-General of Health (Cth); Ex parte Thomson* (1976) 51 ALJR 180 at 181-182; *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* (1981) 147 CLR 297 at 319-320 per Mason and Wilson JJ.

141 The key point in the preamble is that future acts of this kind can only be done if "every reasonable effort has been made to secure the agreement of the native title owners through a special right to negotiate". The phrase "every reasonable effort" has thus been imported into the good faith requirement in s 31(1)(b): see *Njamal People* case (at 219).

142 In the *Njamal People* case, Member Sumner considered what was encompassed by the phrase "negotiate in good faith". His Honour looked to the ordinary meaning of the words "good faith".

143 In the first place, Member Sumner extracted dictionary definitions:


1. honesty of purpose or sincerity of declaration: to act in good faith;

2. expectation of such qualities in others: to take a job in good faith."

144 His Honour concluded (at 219) that:

"It is clear that if negotiations were being approached in a dishonest way or with a fraudulent intention then there would not be a negotiation in good faith. The more difficult question is whether more than sincere intentions on the part of those involved in the negotiation process is required. It is here that it becomes important to look at the words in the phrase as a whole taking account of the purposes to be achieved by the [*Native Title Act*]. In my view subjective honesty of purpose or intention and sincerity are essential, but not necessarily sufficient, ingredients of good faith negotiations. It is necessary to consider whether what is done is reasonable in the circumstances."

145 To further this inquiry, his Honour then turned to examine case law arising with respect to s 170QK(2) of the *Industrial Relations Act* 1988 (Cth) ? the "only Australian statutory provision in relation to negotiating in good faith which has been judicially considered".

146 His Honour noted the following comments of the Full Bench of the Industrial Commission in *Public Sector Professional Scientific Research, Technical, Communications, Aviation and Broadcasting Union v Australian Broadcasting Commission (ABC case)* AILR, vol 36, No 21 at 374:
"However, the determination of whether or not a negotiating party is 'negotiating in good faith' may depend on the conduct of the party when considered as a whole. For example if a party is only participating in negotiations in a formal sense, but not bargaining as such then they may not be 'negotiating in good faith'. Negotiating in good faith would generally involve approaching negotiations with an open mind and a desire to reach an agreement as opposed to simply adopting a rigid, pre-determined position and not demonstrating any preparedness to shift."

147 From the academic writings cited by his Honour, it would appear that the ABC case is in line with United States cases and commentary on the National Labour Relations Act 1935 (US). For instance, in National Labor Relations Board v Reed & Prince Manufacturing 118 F.2d 874,885 (1st Cir), cert denied, 313 US 595 (1941) at 885. It was held that the employer was required by statute to "negotiate sincerely ... with an open mind and a sincere desire to reach an agreement in a spirit of amity and co-operation". Further, in National Labor Relations Board v Boss Mfg Co 7 Cir, 118 F2d 187,189 it was stated that "mere pretended bargaining will not suffice". Such conduct renders the requirement futile. "The concept of 'good faith' was brought into the law of collective bargaining as a solution to this problem. One who merely went through the motions knowing that they were a sham could be said to lack good faith."

148 Sumner CJ cited Jeff Shaw QC MLC reproduced in 1996 ALLR (CCH) at 50, who sets out as follows, the principles discernible in the United States cases on "negotiation in good faith" in the labour relations context:

1. Good faith is an obligation of the parties to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement. A party will be bargaining in good faith if it has an open mind and a sincere desire to reach an agreement.
2. The duty to bargain in good faith does not require that either party must enter an agreement.
3. One test as to whether a party is acting in good faith depends upon how a reasonable person might be expected to react to the bargaining attitude shown by those participating.

149 Sumner CJ relevantly summarised points 4-6 as follows:

4. While point 3 is an objective test the American courts have placed some emphasis upon the 'state of mind of the parties' relying upon inferences drawn from the conduct of the parties as a whole.
5. Similarly, s 11 of the Farm Debt Mediation Act 1994 (NSW) requires that for a period after a creditor has given notice of enforcement action to a mortgagor, the creditor attempt to mediate in good faith.

150 That section was considered by Badgery-Parker J in State Bank of New South Wales v Freeman (unreported, Supreme Court, NSW, Badgery-Parker J, No CL 12670 of 1995, 31 January 1996) who (at 7), made plain that the Farm Mediation Act does not deal with the substantive rights of the parties. Rather, "what it does is to interpose, between default of a mortgagor and enforcement action by a mortgagee, a barrier which is, however, limited in duration".

151 To my mind, the following observations of Badgery-Parker J (at 11) are particularly pertinent to the matter before me:

"An undertaking to mediate in good faith no doubt connotes a willingness on the part of a party to consider such options for resolution of a dispute as are propounded by the mediator or the opposing party; but it does not appear to me than an inference of lack of good faith can be drawn from the adoption of a strong position at the outset and a reluctance to move very far in the direction of compromise, without more. (Emphasis added.)"

153 In my view, the authorities and academic writings referred to above demonstrate that while the content of any good faith requirement depends on context (statutory or otherwise) and the particular factual circumstances, it is possible to delineate an essential framework for the notion of "good faith" such that the requirement of "good faith" in cl 28 is sufficiently certain for legal recognition of the agreement.

Essential or core content of an obligation to negotiate or mediate in good faith

154 As already pointed out, the courts have always avoided hampering themselves by defining or laying down as a general proposition what shall be held to constitute fraud. Yet, however difficult it may be to define what fraud is in all cases, it is relatively easy to identify some of the elements which must necessarily exist.
In the same way the Court ought be wary in the extreme of hampering itself by defining in any exhaustive way or by laying down as a general proposition, the ambit of what will constitute a compliance with or failure to comply with an obligation to negotiate or mediate in good faith.

These are matters to be determined depending always on the precise circumstances of each individual case. But the "certainty" issue does require that the court spell out, even in non-exhaustive terms, the perceived essential or core content of an obligation to negotiate or mediate in good faith. To my mind, but without being exhaustive, the essential or core content of an obligation to negotiate or mediate in good faith may be expressed in the following terms:

1. To undertake to subject oneself to the process of negotiation or mediation (which must be sufficiently precisely defined by the agreement to be certain and hence enforceable);
2. To undertake in subjecting oneself to that process, to have an open mind in the sense of:
   a. A willingness to consider such options for the resolution of the dispute as may be propounded by the opposing party or by the mediator, as appropriate;
   b. A willingness to give consideration to putting forward options for the resolution of the dispute.

Subject only to these undertakings, the obligations of a party who contracts to negotiate or mediate in good faith, do not oblige nor require the party:

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

Referring Principles:
I.1.1 - Good faith and fair dealing in international trade