

7-1-1998

# Requiring good faith negotiation

David Spencer

---

## Recommended Citation

Spencer, David (1998) "Requiring good faith negotiation," *ADR Bulletin*: Vol. 1: No. 3, Article 1.  
Available at: <http://epublications.bond.edu.au/adr/vol1/iss3/1>

This Article is brought to you by [epublications@bond](mailto:epublications@bond). It has been accepted for inclusion in ADR Bulletin by an authorized administrator of [epublications@bond](mailto:epublications@bond). For more information, please contact [Bond University's Repository Coordinator](#).



Spencer: Requiring good faith negotiation

# The ADR *Bulletin*

*The monthly newsletter on dispute resolution*

## contents

VOLUME 1 NUMBER 3 JULY 1998

### Requiring standards in ADR

## Requiring good faith negotiation

*David Spencer*

*'That persons should behave in good faith is a minimal standard rather than a high ideal; yet, judging from the facts of litigated cases, contractual bad faith, in its many and varied forms, is a continuing problem.'*<sup>1</sup>

The above quote from Summers is as true today as when it was written some 31 years ago. Requiring good faith negotiation has caused a great amount of controversy in Australia. In fact, the courts have provided us with differing views, causing this area of the law to be in a state of flux. While Australia lacks a definitive answer on this issue, the courts of England have firmly rejected the enforceability of requiring good faith negotiation.

The issue of good faith can apply to both pre-contractual negotiations and negotiations undertaken in the performance of the contract. Summers was referring to contractual performance, where the parties may have agreed in the contract to negotiate in certain circumstances. Similar issues arise when discussing the requirement of good faith negotiation at a pre-contractual stage.<sup>2</sup> While these circumstances are different in nature, this article will not seek to distinguish between pre- and post-contractual good faith.

This article will firstly explore the controversy generated by the notion of good faith negotiation, then deal with defining good faith, and finally address

the issue of whether good faith is a requirement of negotiation.

### The controversy

The idea of enforcing good faith negotiation was settled in England in *Walford v Miles (Walford)*, where the House of Lords sat in judgment on the enforceability of a lock-out agreement, that is, an agreement to prevent a vendor from negotiating with anyone other than the original purchaser. The court found that a lock-out agreement supported by good consideration was enforceable, but that the appellant's assertion that a collateral agreement existed requiring the respondents to negotiate in good faith was not an agreement enforceable at law. Lord Ackner, delivering the judgment of the court, set out his repugnance thesis, when he stated:

How can a court be expected to decide whether, *subjectively* [sic], a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined 'in good faith'. However, the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks appropriate, to ➤



## Editorial Panel

**Tom Altobelli**

*Lecturer,  
Faculty of Law, University of  
Western Sydney, Macarthur*

**David Bryson**

*Conciliation Officer,  
WorkCover Conciliation Service,  
Victoria*

**Peter Condliffe**

*Executive Manager,  
Alternative Dispute Resolution Branch,  
Dispute Resolution Centre,  
South East Queensland*

**Shirli Kirschner**

*Resolve Advisors Pty Ltd,  
Sydney*

**Nadja Spegel**

*Senior Lecturer,  
Faculty of Law,  
University of Queensland*

**Sue Thaler**

*Principle Executive Officer,  
LEADR*

➤ threaten to withdraw from further negotiations or to withdraw in fact in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms.<sup>3</sup>

The rejection by the House of Lords of the enforceability of good faith negotiation has been disapproved, and subsequently approved, by the Supreme Court of NSW. In both cases, the issue has been incorrectly linked to the legal requirement of certainty of contract.

In Australia, the first substantial discussion of this issue took place in *Coal Cliff Collieries Pty Ltd & Anor v Sijehama Pty Ltd & Anor (Coal Cliff)*,<sup>4</sup> where the NSW Court of Appeal was required to decide the enforceability of an agreement to negotiate a complex coal mining joint venture which specified, in its heads of agreement, that the parties would, 'proceed in good faith to consult together upon the formulation of a more comprehensive and detailed Joint Venture Agreement'.<sup>5</sup> While the court found that the statement in the heads of agreement, referring to the formation of a more comprehensive agreement, was too illusory and vague to be enforced, the majority of the court concluded that a promise to negotiate in good faith may be enforceable depending on the precise terms of the contract. Kirby P (as he then was) stated:

I agree with Lord Wright's speech in *Hillas* that, provided there was consideration for the promise, in some circumstance a promise to negotiate in good faith will be enforceable, depending upon its precise terms. Likewise I agree with Pain J in *Donwin* that, so long as the promise is clear and part of an undoubted agreement between the parties, the courts will not adopt a general principle that relief for the breach of such promise must be withheld.<sup>6</sup>

Handley JA delivered a dissenting judgment, preferring Lord Ackner's reasoning in *Walford*, that parties are free to pursue their own interests, thereby preventing them from negotiating in good faith:

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 as slow as they think fit. To my mind these considerations demonstrate that a promise to negotiate in good faith is illusory and therefore cannot be binding.<sup>7</sup>

Handley JA went on to state that the other compelling reason for not recognising an obligation to negotiate in good faith was that while it may be possible to identify steps in the negotiation taken in bad faith, the courts cannot define the obligation of negotiating in good faith. This point will be dealt with in more detail below.

Four years later, the Common Law Division of the Supreme Court of NSW discussed good faith negotiation in the case of *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd (Elizabeth Bay)*.<sup>8</sup> The defendants filed a notice of motion to stay proceedings until mediation had taken place as agreed between the parties in the contract. The contract contained a mediation clause which required administration of the dispute through the Australian Commercial Disputes Centre (ACDC). The clause referred the parties to ACDC guidelines which in turn referred to a mediation appointment agreement which contained a clause committing the parties to '... attempt in good faith to negotiate towards achieving settlement of the dispute'.<sup>9</sup>

Giles J held against the defendant on two grounds, the second of which is important to this discussion. His Honour held that if the court were to order a stay of proceedings to mediate, it would be committing the parties to attempt in good faith to negotiate with a view to achieving settlement, which would require of them conduct which was of unacceptable uncertainty. While not bound to do so, his Honour followed the House of Lords decision in *Walford*. On this issue, his Honour stated:

It is difficult to regard the parties as having undertaken in 1993 to declare at a future time that they had (at the future time) a

continued on page 40 ➤



"... the NSW Court of Appeal in *Coal Cliff* recognised the enforceability of an agreement to negotiate in good faith, but the Common Law Division of the Supreme Court of NSW in *Elizabeth Bay* followed the English decision of *Walford* by rejecting such a notion."

➤ **continued from page 38**

commitment to good faith negotiations: first, other than being a laudable emotion the declaration itself would not advance the process of mediation, and secondly by the future time one or other of the parties may well not have had that commitment ... It is not easy to take a course requiring a party to assert a state of mind which it may well not have, and even less easy to take a course which compels a party to commit itself to the vagueness of attempting in good faith to negotiate with the other party to a dispute. The latter difficulty lies not so much in the ascertainment of the presence or absence of good faith, or even the uncertainty of attempting, but rather in the necessary tension between negotiation, in which a party is free to, and may be expected to, have regard to self-interest rather than the interests of the other party, and the maintenance of good faith ...'

So we are left with the rather unsatisfactory situation in Australia where the NSW Court of Appeal in *Coal Cliff* recognised the enforceability of an agreement to negotiate in good faith, but the Common Law Division of the Supreme Court of NSW in *Elizabeth Bay* followed the English decision of *Walford* by rejecting such a notion. We have no High Court of Australia decision to decide the issue. Interestingly, in both *Coal Cliff* and *Elizabeth Bay*, the courts were pre-occupied with the idea that good faith may or may not be enforced by reference to the adequacy or inadequacy of the certainty of the document which gives rise to the good faith requirement: that is, whether the agreement sets out, with sufficient certainty the behaviour between the parties, as to the requirement of good faith. In this respect, the courts have misunderstood the meaning of good faith and its requirement when negotiating.

**The meaning of 'good faith'**

Acting in good faith can be defined as meaning that persons should conduct themselves with 'propriety and honesty'.<sup>10</sup> The US, a jurisdiction seemingly comfortable with the notion, defines good faith in its Uniform

Commercial Code (UCC) as meaning, '... honesty in fact in the conduct or transaction concerned'.

One of the well-known treatises on the subject of good faith is by Professor Robert S Summers,<sup>11</sup> who defined good faith by exclusion. That is, he posed the question: 'What, in the actual or hypothetical situation, does the judge intend to rule out by his [*sic*] use of this phrase?'<sup>12</sup> He substantiates his theory by explaining the lack of meaning in the phrase itself:

If good faith had a general meaning or meanings of its own — that is, if it were either univocal or ambiguous — there would seldom be occasion to derive a meaning for it from an opposite; its specific uses would almost always be readily and immediately understood. But good faith is not that kind of doctrine. In contract law, taken as a whole, good faith is an *excluder* [*sic*].<sup>13</sup>

Summers sets out a table of 'excluders', which lists examples of bad faith and the corresponding meaning of good faith. A seller deliberately concealing facts from a purchaser is an example of bad faith. Its corresponding meaning of good faith is the full disclosure of material facts. Another example of bad faith is a person openly abusing his or her bargaining power to coerce a purchaser into agreeing to an unreasonable price. The corresponding good faith meaning is to refrain from abusing bargaining power.<sup>14</sup>

While many agree with Summers' 'excluder' theory, and most concede that a positive definition of good faith is difficult to express,<sup>15</sup> some criticise it as not accentuating the positive side of good faith.<sup>16</sup> Professor Burton offers the following definition of both good and bad faith in the context of performing a contract:

Bad faith performance occurs precisely when discretion is used to recapture opportunities forgone upon contracting — when the discretion-exercising party refuses to pay the expected cost of performance. Good faith performance, in turn, occurs when a party's discretion is exercised for any purpose within the reasonable ➤



➤ contemplation of the parties at the time of formation — to capture opportunities that were preserved upon entering the contract, interpreted objectively.<sup>17</sup>

Professor Charles Knapp provides another definition, which states that:

... good faith, which, in the case of a merchant (that is, a businessman in the conduct of his business), [sic] means not only 'honesty' but also 'the observance of reasonable commercial standards of fair dealing in the trade.'<sup>18</sup>

Finally, Professor Waddams suggests that the definition of good faith depends upon the context in which it is used.<sup>19</sup> In the context of pre-contractual negotiation, where there may be a duty to bargain in good faith, Waddams admits that the definition is not clear, but gives an important exclusionary principle:

It does not for example, exclude the frank and open pursuit of self-interest, because it is clear that a prospective seller may usually break off negotiations on the ground that the price offered is inadequate.<sup>20</sup>

The importance of this exclusionary definition brings us back to the controversy set out above. Both the English case of *Walford* and the Australian case of *Elizabeth Bay* provide authority for the proposition that parties cannot agree to negotiate in good faith as it unduly restricts their self-interest. Waddams puts the proposition that acting in good faith does not necessarily compromise a party's self-interest, a proposition overlooked by both English and Australian courts. This proposition is not a new one and is supported by academics in England, the USA and Australia. Professor Lucy Katz put forward a similar proposition in 1988, when she stated:

As long as all parties and the court recognize that to require good faith negotiation is not to require settlement, the futility argument loses much of its force.<sup>21</sup>

The futility argument referred to by Katz, is that enforcing alternative dispute resolution (ADR) clauses in contracts is futile because the philosophical base of ADR is its voluntary nature. In other words,

you should not force people into an ADR process by enforcing an ADR clause in a contract, because the philosophy of ADR is that the people to the dispute should attend voluntarily — not be forced to participate. Waddams and Katz provide us with the central proposition of requiring good faith negotiation, that is, if one accepts the definition of good faith as the requirement to act honestly and with propriety, then one can accept that it does not require a forfeiture of one's self-interest in the negotiation, nor that one is required to settle. This proposition has been affirmed by Brownsword, when he stated:

... the concept of good faith as the rule becomes the guiding ideal for co-operative dealing. Again, to avoid any misunderstanding, this does not mean that individuals may not pursue their own projects and purposes, nor that each contractor must altruistically endeavour to prioritise the interests of the other side; what it means is that each party must respect the legitimate interests of the other contracting party ...<sup>22</sup>

Finally, Australian academic, Dr Damien Cremean, draws the proposition together succinctly when he states:

Tension usually will exist between the maintenance of good faith and a party negotiating from a position of self-interest. But the two are not necessarily incompatible, maintenance of good faith may be in a party's best self-interest, and the law often has these conflicts in it ... Maintenance of good faith in a negotiating process is not inconsistent with having regard to self-interest. Good faith does not require a party to make concession upon concession. Good faith is not co-extensive with selflessness. Nor does good faith, to take up a point raised by Lord Ackner in *Walford v Miles*, forbid withdrawal from negotiations if appropriate. Indeed, in some circumstances, good faith may actually dictate withdrawal if, for example, a fraud would be committed by negotiations continuing.<sup>23</sup>

The confusion in understanding the application of good faith to negotiations is purely definitional. Courts have not ➤

## Subscription order form

**YES!** I wish to subscribe to **The ADR Bulletin** for one year at \$345.

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Organisation: \_\_\_\_\_

Address: \_\_\_\_\_

Postcode: \_\_\_\_\_

Tel: \_\_\_\_\_

Fax: \_\_\_\_\_

Please find my cheque/money order for \$\_\_\_\_\_ enclosed (payable to Prospect Media Pty Ltd)

OR  Please invoice me

OR  Please debit my:  Amex  Visa

Diners  Bankcard  Mastercard

Card No:


Cardholder: \_\_\_\_\_

Expiry date: / / Today's date: / /

Signature: \_\_\_\_\_

For a free sample issue of one of the following newsletters, please tick:

- Australian BANKING & FINANCE Law Bulletin
- Australian CONSTRUCTION Law Bulletin
- CONSTITUTIONAL LAW & POLICY Review
- EMPLOYMENT Law Bulletin
- Australian ENVIRONMENT Review
- FRANCHISING Law & Policy Review
- Australian HEALTH Law Bulletin
- INHOUSE COUNSEL
- INTERNET Law Bulletin
- Australian INSURANCE Law Bulletin
- Australian INTELLECTUAL PROPERTY Law Bulletin
- INVESTMENT & TAXATION Bulletin
- Australian PRODUCT LIABILITY Reporter
- Australian PROPERTY Law Bulletin
- PRIVACY LAW & POLICY Reporter
- RETIREMENT AND ESTATE PLANNING
- Australian SUPERANNUATION Law Bulletin
- TELEMEDIA
- Australian & NZ TRADE PRACTICES Law Bulletin

Send to:

**Nick O'Halloran**  
Prospect Media Pty Ltd  
Level 1, 71-73 Lithgow St,  
St Leonards NSW 2065.  
Fax: (02) 9439 4511





“There are at least two situations where good faith may be required when parties negotiate.

First, when good faith is expressly or impliedly agreed to in a contract and secondly, where good faith is a statutory requirement.”

➤ understood that good faith, in its simplest terms, means acting honestly. This simple notion is not inconsistent with the ability to act with self-interest. Parties to negotiations can pursue their own interests, yet still act with honesty, or in good faith, in their dealings with the other party. Had this understanding of the meaning of good faith been clear, then the House of Lords may well have decided *Walford* differently. In turn, the Supreme Court of NSW, may have decided *Elizabeth Bay* differently, at least on the issue of good faith.

### Requiring good faith negotiation?

Having defined good faith, it is now prudent to move on to assessing whether good faith is a requirement of negotiation. There are at least two situations where good faith may be required when parties negotiate. First, when good faith is expressly or impliedly agreed to in a contract and secondly, where good faith is a statutory requirement.

Dealing with the first, there is no need to discuss further the situation where parties expressly agree to negotiate in good faith. The cases clearly provide that currently in Australia, certainty of behaviour being expressed in the agreement is a stumbling block. As already discussed, this is an error on the courts' part regarding the definition of good faith. However, where good faith is implied in an agreement, Brownsword suggests that there is ample empirical evidence to support the proposition that, '... world-wide, many commercial contractors negotiate, perform, adjust, and enforce their contracts in good faith'.<sup>24</sup> He proffers the explanation that most parties to agreements think of long-term relationships rather than short-term ones and further, that many people think of their negotiations on moral terms which implies good faith.

Paterson<sup>25</sup> suggests that the component of 'honesty' required in good faith negotiations is implied by virtue of the voluntary nature of the negotiation. She states that such is the nature of the

implied term that a duty is created, which imposes an objective standard of conduct '... measured by reference to factors external to the individual parties' states of mind'.<sup>26</sup>

Common law has provided some guidance as to the implied nature of requiring good faith negotiation. Its manifestation is most notable in the area of insurance law. The principle of *uberrimae fidei* is the doctrine of utmost good faith. It requires an insured person to provide to the insurer all details of the risk that are material to the insurer making a decision to accept the risk. In Australia, up until 1984, the principle of *uberrimae fidei* was a common law doctrine which is now enshrined in legislation.<sup>27</sup> This requirement of good faith negotiation is based on the understanding that the insured has the advantage of knowing all the facts about the risk, whereas, the insurer knows nothing other than what is disclosed by the insured.

Burton recounts the common law foundation of good faith performance first articulated in 1933, in the case of *Kirke La Shelle Co v Paul Armstrong Co*,<sup>28</sup> where the court stated:

In every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.<sup>29</sup>

At least one Australian court has similarly recognised the existence of good faith performance of a contract. Priestley JA, in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*,<sup>30</sup> stated:

... 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.<sup>31</sup>

So it would seem that people have an expectation that agreements are made in good faith. Indeed, most agreements today not only set out the terms of the agreement, but also express a process for when disagreement arises. These clauses are present only to define an agreeable course of behaviour in the case of a dispute arising. It is generally the case that people assume good faith in the formation and performance of a contract, otherwise they would not bother to enter a contract with a person who they know will breach the contract at the first available opportunity.

The second situation is where there is a requirement to negotiate in good faith is where it is required by statute. Recently the Federal Court of Australia, remitted a case to the National Native Title Tribunal (the Tribunal), on the issue of enforcing a statutory right to negotiate. In *Walley v Western Australia*,<sup>32</sup> the Court found that under the *Native Title Act 1993* (Cth) (the Act), a State or the Federal Government has a duty to negotiate with native title party(ies) and grantee party(ies). In other words, the court held that the duty to negotiate in the Act was a condition precedent to a government party granting, for example, a mining licence. With this in mind, the court remitted the case to the Tribunal, the determining body, for hearing according to that duty.

The subsequent case, *Western Australia v Taylor*<sup>33</sup> (*Taylor's case*), not only dealt with the case according to the law stated in the Federal Court of Australia, but went on to define good faith negotiation in some detail. In the Tribunal, Member Sumner set out a list of indicia which defined good faith negotiation under the Act. Despite its length, it is beneficial to set out the full list of indicia:

- (i) unreasonable delay in initiating communications in the first instance;
- (ii) failure to make proposals in the first place;
- (iii) the unexplained failure to communicate with the other parties within a reasonable time;

- (iv) failure to contact one or more of the other parties;
- (v) failure to follow up a lack of response from the other parties;
- (vi) failure to attempt to organise a meeting between the native title and grantee parties;
- (vii) failure to take reasonable steps to facilitate and engage in discussions between the parties;
- (viii) failure to respond to reasonable requests for relevant information within a reasonable time;
- (ix) stalling negotiations by unexplained delays in responding to correspondence or telephone calls;
- (x) unnecessary postponement of meetings;
- (xi) sending negotiators without authority to do more than argue or listen;
- (xii) refusing to agree on trivial matters, for example, a refusal to incorporate statutory provisions into an agreement;
- (xiii) shifting position just as agreement seems in sight;
- (xiv) adopting a rigid non-negotiable position;
- (xv) failure to make counter proposals;
- (xvi) unilateral conduct which harms the negotiating process, for example, issuing inappropriate press releases;
- (xvii) refusal to sign a written agreement in respect of the negotiation process or otherwise;
- (xviii) failure to do what a reasonable person would do in the circumstances.

The Tribunal found that the government party, in this case WA, had breached a number of the Tribunal's indicia and therefore, had not negotiated in good faith under the Act. As a matter of interest, the Tribunal's list of indicia can be defined as being consistent with Sumner's exclusionary doctrine, discussed above. In this respect *Taylor's case* is of some importance, as it not only acts as a guide as to the statutory enforcement of good faith negotiation, but it also assists our understanding of what good faith negotiation means, by way of ➤

## Future Issues

Future issues of *The ADR Bulletin* will cover:

- Will ADR lead to private courts?
- A peak body for ADR?
- New trends in tenancy conciliations
- Conflict resolution in sport
- Complaints resolution in financial services
- The General Insurance Complaints Scheme
- International web sites for ADR practitioners
- Marketing options for ADR

## Forthcoming events

### Conferences, Workshops

#### 11-13 September

The Institute of Mediators and Arbitrators, Mediation Workshop, Melbourne

#### 28 September - 1 October

Mediate Today, Mediation Workshop and Evaluation, Sydney

#### 2-4 October

LEADR, 6<sup>th</sup> International Conference, Christchurch, New Zealand

#### 2-4 October

The Institute of Arbitrators and Mediators, Spring Conference, Adelaide

#### 3-5 December

Bond University, Mediation Workshop, Marriott Hotel, Gold Coast

*Organisations are invited to submit details of conferences and workshops for inclusion in the Bulletin where space allows.*



➤ excluding certain behaviour.

### Conclusion

This article has promoted the idea that good faith may be defined as behaviour which embraces honesty and propriety. It is not a concept linked with contractual certainty and, more importantly, it is not a course of conduct which requires the forfeiture of a person's self-interest. If the reader accepts this idea, then doubt is cast upon the court decisions that have been unable to recognise that people can agree to negotiate in good faith without compromising their position in relation to the formation and execution of the agreement. Moreover, the article has provided some examples of the implied and statutory requirements of good faith negotiation. People participating in trade and commerce in Australia will be well advised to take note, in particular, of the legislative trend to require good faith negotiation. It is a trend which goes hand in hand with the rise in non-adversarial solutions to disputes. As with ADR over the past two decades, when it comes to the requirement of good faith negotiation, we watch this space with some interest. ♦

*David Spencer, Solicitor of the Supreme Court of NSW and Lecturer in Law, University of Technology, Sydney.*

### Endnotes

1. Summers RS, 'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code (1968) 54 *Virginia Law Review* 195, p 195.
2. See for example, Brownsword R, 'Two Concepts of Good Faith' (1994) 7 *Journal of Contract Law* 197, p 199.
3. [1992] 1 All ER 453 at 460.
4. (1991) 24 NSWLR 1.
5. (1991) 24 NSWLR 1 at 1D.
6. (1991) 24 NSWLR 1 at 26E.
7. (1991) 24 NSWLR 1 at 41G-42A.
8. (1995) 36 NSWLR 709.
9. (1995) 36 NSWLR 709 at 714C.
10. *Butterworths Australian Legal Dictionary* (1997) Butterworths: Sydney.
11. Summers, *supra*.
12. *Ibid*, p 200.

13. *Ibid*, p 201. Summers acknowledges that the term 'excluder' comes from: Hall. 'Excluders' (1959) 20 *Analysis* 1.

14. *Ibid*, p 203.

15. Brown I, 'The Contract to Negotiate: A Thing Writ in Water?' [1992] *Journal of Business Law* 353, pp 359-361.

16. Brownsword, *op cit*, p 215 citing Burton SJ, 'More on Good Faith Performance of a Contract: A Reply to Professor Summers' (1984) 69 *Iowa Law Review* 497, p 508.

17. Burton SJ, 'Breach of Contract and the Common Law Duty to Perform in Good Faith' (1980) 94 *Harvard Law Review* 369, p 373.

18. Knapp CL, 'Enforcing the Contract to Bargain' (1969) 44 *New York University Law Review* 673, p 694.

19. Waddams SM, 'Good Faith, Unconscionability and Reasonable Expectations' (1995) 9 *Journal of Contract Law* 55.

20. *Ibid*, p 56.

21. Katz LV, 'Enforcing An ADR Clause — Are Good Intentions All You Have?' (1988) 26 *American Business Law Journal* 575, p 594.

22. Brownsword, *op cit*, p 214.

23. Cremean D, 'Agreements to Negotiate in Good Faith'. (1996) *Commercial Dispute Resolution Journal* 61, p 64-65.

24. Brownsword, *op cit*, p 197, citing Macaulay S, 'Non-Contractual Relations in Business' (1963) 28 *American Sociological Review* 55.

25. Paterson JM, 'The Contract to Negotiate in Good Faith: Recognition and Enforcement' (1996) 10 *Journal of Contract Law* 120, p 132.

26. *Id*.

27. See ss 13 and 14 *Insurance Contracts Act* 1984 (Cth).

28. 263 NY 79, 188 NE 163 (1933), cited in Burton, *op cit*, p 379.

29. *Id*.

30. (1992) 26 NSWLR 234.

31. (1992) 26 NSWLR 234 at 268.

32. (1996) 137 ALR 561.

33. (1996) 134 FLR 211.

"People participating in trade and commerce in Australia will be well advised to take note, in particular, of the legislative trend to require good faith negotiation."