THE STATUTORY ROLE OF GOOD FAITH IN FRANCHISING

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ABSTRACT

The recent incorporation of a statutory obligation of good faith in the Franchising Code of Conduct represents a significant development in the regulation of Australia's franchising industry, as well as the common law operation of good faith in franchising. This is because it provides a fresh opportunity to grasp the common law meaning of good faith – a protean precept with no precise definition. In addition, its incorporation is also significant because it gives rise to an opportunity to explore the effect that a statutory obligation of good faith might have, when compared to previous approaches under the common law. This paper explores these issues within the context of some common aspects of the franchisor-franchisee relationship. These include namely the pre-contractual negotiations of the parties, the performance of franchise agreements, their termination and how mediation is to be conducted to resolve a franchise-related dispute. In doing so, this paper also explores the future potential and effect a statutory obligation might have in further developing the common law doctrine of good faith.

I INTRODUCTION

A *Good faith and the Franchising Code of Conduct*

The incorporation in 2015 of a statutory obligation on franchisees and franchisors to act in good faith in the *Franchising Code of Conduct* ('the Code')[2] arose amidst hope that it might curb opportunistic and detrimental behaviour by franchisors towards franchisees.[3] Alongside this statutory inclusion of good faith arise a number of key questions as to its operation and future implications.

How might this new statutory obligation operate in the franchising industry in a way different to the

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[2] *Competition and Consumer (Industry Codes - Franchising) Regulation 2014* (Cth) sch 1 ('*Franchising Code of Conduct*'). This regulation is made under the *Competition and Consumer Act 2010* (Cth) s 51AE.
[3] Alan Wein, Submission to the Minister for Small Business and the Parliamentary Secretary for Small Business, Parliament of Australia, *Review of the Franchising Code of Conduct*, 30 April 2013, 63.

previous common law approach?[4] What is the nature of the interaction between the common law doctrine of good faith with that of the Code? Is there any potential for the Code to influence the further development of the common law doctrine of good faith in franchising?

The importance of understanding the statutory obligation is especially heightened in light of the recent proliferation of franchising disputes,[5] the recent parliamentary inquiry into the operation and effectiveness of the Code[6] and the surprising lack of jurisprudence to date surrounding how good faith in the Code is to be interpreted.

As aforementioned, the statutory obligation in the Code is relatively recent. Although a few years have passed since its incorporation, the nature of its application and impact remain largely untested. To understand how good faith in the Code might operate today, the main purpose of this paper is to explore the possible differences between the previous common law approach to good faith (in franchising), with that of the Code. This will be explored in a variety of contexts, including pre-contractual negotiations, the performance and termination of franchise agreements and the resolution of disputes through mediation. In addition, this paper will also explore the relationship between the Code and the common law and how they interact with each other. As statutory interpretation of good faith has historically assisted courts in developing the doctrine of good faith,[7] this paper will also explore the potential for statutory reforms to the Code to influence the further development of the doctrine at common law.

Before exploring these issues, it is important as a precursory matter and in order to understand how good faith operates today, to *first* explore the history of its common law development. This will

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[4] See also Emma Jervis, *What is Good Faith in Franchising?* (30 April 2015) LegalVision <https://legalvision.com.au/what-is-good-faith-in-franchising/>.

[5] See e.g. Liam Mannix, 'Nando's stares down revolt as franchisees fold over costly refit pressures', *The Sydney Morning Herald* (online), 30 January 2017 <http://www.smh.com.au/business/retail/nandos-stares-down-revolt-as-franchisees-fold-over-costly-refit-pressures-20170119-gtuh39.html>; ABC, 'Pizzas sold below cost claim Pizza Hut franchisees taking parent company to court', *7:30*, 27 August 2015 (Pat McGrath) <http://www.abc.net.au/7.30/content/2015/s4281839.htm>. See especially Emma Koehn, 'Marriage breakdowns and bankruptcies calls for inquiry into franchising sector after years of concerns from owners', *SmartCompany* (online), 13 December 2017 <https://www.smartcompany.com.au/business-advice/franchising/marriage-breakdowns-and-bankruptcies-calls-for-inquiry-into-franchising-sector-after-years-of-concerns-from-owners/>; Adele Ferguson and Sarah Danckert, 'Cup of sorrow: the brutal reality of Australia's franchise king', The Sydney Morning Herald (online), 9 December 2017 <http://www.smh.com.au/business/retail/cup-of-sorrow-the-brutal-reality-of-australias-franchise-king-20171207-h00lbl.html>.

[6] See generally Australian Parliament House, *The operation and effectiveness of the Franchising Code of Conduct* <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Franchising>.

[7] Elisabeth Peden, *Good Faith in the Performance of Contracts* (LexisNexis Butterworths, 2003) 162. See generally *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 60-3 [20]-[25] (Gleeson CJ, Gaudron and Gummow JJ).

serve as a helpful prelude to the comparison of the Code and the previous common law approach to good faith in franchising, where a statutory obligation had yet to be incorporated into the Code ('the pre-incorporation approach').

II HISTORY AND DEVELOPMENT OF GOOD FAITH IN THE COMMON LAW

The development of good faith in Australia's common law has occurred along the double carriageway of its connotation and reach – what does it mean and should it be implied as an incident of commercial (if not all) contracts?[8]

A *The conceptual basis of good faith*

The conceptual origins of good faith can most accurately be traced to early common law principles which together have merged and evolved into today's doctrine of good faith. In that sense, the modern conceptual basis of good faith is not derived from a singular normative principle, but rather a whole panoply of principles governing what it requires, and in some cases, what it prohibits.

One of the early approaches to understanding the concept of good faith was the 'excluder' approach.[9] This early (but enduring) approach stipulates that parties should avoid acting in bad faith, and can be traced as far back as the 1871 case of *Smith v Hughes*.[10] In that case, despite 'good faith' or 'bad faith' not expressly appearing in Blackburn J's judgement, allusive tinges of a developing good faith doctrine can be captured in his Lordship's reference to the proscriptive importance of avoiding 'fraud or deceit'.[11] Since then, the conceptual notion of avoiding fraud and deceit has evolved into the self standing concept of good faith, with Australian courts now explicitly referring to it rather than simply alluding to its formative principles.[12]

But what may have begun as a proscriptive duty to avoid characteristics implicit of bad faith[13] has evolved and proliferated into a 'bewildering' array of attempts to define what good faith requires in *both* a proscriptive and prescriptive context.[14] Although the discussion below is by no means comprehensive in reflecting the outcomes of this arduous search for a settled definition, it provides the thumbnail sketch necessary to understand the conceptual principles which give good faith its

[8] See generally Peden, above n 7, 159. See also Marilyn Warren, 'Good Faith: Where are we at?' (2010) 34 *Melbourne University Law Review* 344, 348.
[9] See Peden, above n 7, 159.
[10] (1871) LR 6 QB 597, 607 (Blackburn J).
[11] Ibid.
[12] See, eg, *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558, 566 [146].
[13] *Smith v Hughes* (1871) LR 6 QB 597, 607 (Blackburn J).
[14] See *Council of the City of Sydney v Goldspar Australia Pty Ltd* (2006) 230 ALR 437, 498-9 (Gyles J).

current common law meaning.[15] This preliminary understanding of its development over time is necessary before a modern comparison can be made to the meaning of good faith in the Code.

1 *The excluder approach*

One historical but enduring approach to defining good faith is to explore what would constitute 'bad faith'.[16] In other words, good faith might best be defined by prohibiting the parties from acting in bad faith.[17] This appears to have been the early approach taken above in *Smith v Hughes*.[18] Further development in modern cases has seen courts recognise arbitrary, capricious, unreasonable, reckless and oppressive behaviour as conduct characteristic of bad faith.[19] But like many other conceptual approaches to good faith, the excluder approach has been criticised as providing insufficient and unclear guidance.[20] While the marker words above appeal intuitively, they arguably fall short of the certainty demanded by parties in commercial dealings.[21]

2 *Honesty*

The opposite approach has involved developing prescriptive ideas of the sort of conduct that might amount to good faith. As Terry and Lernia argue, a requirement to 'act honestly' is 'perhaps the most uncontroversial proposition' concerning the requirements of good faith.[22] Stapleton has classed honesty as being essential to good faith,[23] while some jurists have called it a 'universal duty'.[24] In describing the conceptual meaning of good faith, Sir Anthony Mason has also included honesty as being foundational to it.[25]

3 *Cooperation*

Cooperation has also been said by Sir Anthony Mason to be an enduring and fundamental element of good faith,[26] with its development dating back to as early as the 19th century.[27] Implicit in this

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[15] See generally Chief Justice Susan Kiefel, 'Good faith in contractual performance' (2016) 13 *Judicial Review: Selected Conference Papers: Journal of the Judicial Commission of New South Wales* 41.
[16] Robert Summers, '"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54 *Virginia Law Review* 195, 199-207.
[17] Ibid.
[18] (1871) LR 6 QB 597, 607 (Blackburn J).
[19] See, eg, *Jobern Pty Ltd v BreakFree Resorts (Victoria) Pty Ltd* [2007] FCA 1066 (23 July 2007) [146] (Gordon J).
[20] Terry and Lernia, 'Franchising and the Quest for the Holy Grail: Good Faith or Good Intentions?" (2009) 33 *Melbourne University Law Review* 542, 557-8.
[21] Ibid.
[22] Ibid 558.
[23] Jane Stapleton, 'Good Faith in Private Law' (1999) 52 *Current Legal Problems* 1, 8.
[24] See, eg, *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236, 255 [123] (Einstein J).
[25] Sir Anthony Mason, 'Contract, Good Faith and Equitable Standards in Dealing' (2000) 116 *Law Quarterly Review* 66, 69.
[26] Ibid.
[27] See, eg, *Mackay v Dick* (1881) 6 App Cas 251.

idea of cooperation underpinning the concept of good faith is that the contracting parties will 'do all such things as are necessary…to enable the other party to have the benefit of the contract'.[28]

But as a conceptual principle to good faith, cooperation does not entail that good faith today requires a concession of one party's interests to the other.[29] As Barrett J emphasised in *Overlook Management BV v Foxtel Management Pty Ltd*,

> '…the implied obligation of good faith underwrites the spirit of the contract and supports the integrity of its character…But no party is fixed with the duty to subordinate self-interest entirely…The duty is not a duty to prefer the interests of the other contracting party. It is, rather, a duty to recognise and to have due regard to the legitimate interests of both the parties'.[30]

The more recent decision of the Western Australian Court of Appeal in *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* lends further credence to the words of Barrett J in relation to good faith not amounting to a concession of self-interest.[31] As Pullin JA observed (with Newnes JA agreeing):

> 'Parties must be given continued freedom to engage in self-interested behavior so long as they do so honestly…'[32]

4 *Loyalty*

This duty to recognise and to have due regard to the legitimate interests of both the parties also gives rise to an overlapping obligation of loyalty.

But like cooperation, loyalty in the good faith context is not to be conceptually equated with the loyalty a fiduciary owes to a principal, at least not today.[33] Recent judicial pronouncements have declared that a duty of cooperation as part of good faith does not fall within the equitable realm of a fiduciary duty.[34] As the above makes clear, it is to gravely misunderstand the very concept of good

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[28] *Butt v McDonald* (1896) 7 QLJ 68, 71 (Griffith CJ), endorsed in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607 (Mason CJ).
[29] See *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558, 573 [185]. See also *Cathedral Place Pty Ltd v Hyatt of Australia Ltd* [2003] VSC 385 (10 October 2003) [53] (Nettle J).
[30] [2002] NSWSC 17 (31 January 2002) [67] (Barrett J).
[31] (2010) 41 WAR 318, 339 [64] (Pullin JA).
[32] Ibid.
[33] J W Carter and M P Furmston, 'Good Faith and Fairness in the Negotiation of Contracts' (1994) 8 *Journal of Contract Law* 1, 6. See also Chief Justice Kiefel, above n 15, 49.
[34] See Peden, above n 7, 199.

faith to suppose that it demands the utmost fidelity or loyalty to the other party's interests.[35] As Lücke deftly points out, it does not require the 'complete abandonment' of one's interests.[36] Indeed, the modern development of good faith has been such that it merely requires that the other party's legitimate interests be considered.[37]

The current conceptual formulation of good faith thus lies in contrast to earlier authorities which characterised good faith as being akin to a fiduciary obligation. One such case in the development timeline was *Walford v Miles*, where Lord Ackner contended that good faith would hinder the parties from 'pursuing their own interests'.[38]

B *Towards an implied obligation*

In Australia, much of the development of good faith in commercial dealings has concerned debates about whether it should be implied as a term of contract, in the event of its express omission.[39] It has indeed been said that the most crucial unresolved issue in Australia's contract law is whether an implied obligation of good faith exists.[40] At present, the law in Australia does not consistently recognise a general and unqualified requirement for parties to a contract to act in good faith.[41]

This paper's discussion of the development of good faith will therefore be guided partly through the history of Australian courts answering: whether an implied obligation exists and if so, what its possible scope of operation may be. As the discussion below will demonstrate, the current state of play is that while Australian courts have long recognised the possibility of good faith being read into contracts as an implied term, there is still disagreement across the jurisdictions as to the circumstances in which that can occur.

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[35] P D Finn, 'The Fiduciary Principle' in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989) 1, 4. See, eg, *ACI Operations v Berri Ltd* (2005) VR 312, 328 [176] (Dodds-Streeton J).
[36] H K Lücke, 'Good Faith and Contractual Performance' in P D Finn (ed), *Essays on Contract* (Law Book Co, 1987) 155, 162. See also *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] 41 WAR 318, 339 [64] (Pullin JA).
[37] Ibid. See also *Masters Home Improvement Pty Ltd v North East Solution Pty Ltd* [2017] VSCA 88 (27 April 2017) [99] (Santamaria, Ferguson and Kayne JJA).
[38] [1992] 2 AC 128, 138 (Lord Ackner).
[39] See generally Elisabeth Peden, Incorporating Terms of Good Faith in Contract Law in Australia (2001) 23 *Sydney Law Review* 222, 222-234.
[40] J W Carter and A Stewart, 'Interpretation, Good Faith and the "True Meaning" of Contracts: The Royal Botanic Decision' (2002) 18 *Journal of Contract Law* 182, 190.
[41] See S A Christensen and W D Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 62. See especially *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, 214 [107] (Kiefel J).

Priestley JA's judgement in *Renard Constructions Pty Ltd v Minister for Public Works*[42] of the New South Wales Court of Appeal is traditionally held out as the seminal source for first acknowledging an implied obligation of good faith in Australia.[43] The issue in *Renard* concerned whether the Minister for Public Works in New South Wales had acted reasonably, in exercising a contractual power to terminate a building contract. Until *Renard*, judicial acceptance of good faith as an implied term had only been 'tentative'.[44] *Renard* did not however settle the notion of an implied obligation. In its immediate wake, the idea encountered some resistance.[45] In *Service Station Association Ltd v Berg Bennett & Associates* for example, the idea of an implied obligation of good faith was not looked at favourably by Gummow J, who considered its implication at the time as requiring a 'leap of faith'.[46] Reflecting much of the past commentary on the matter,[47] his Honour was of the particular view that existing equitable doctrines were already sufficient to ensure good conscience in the quality of contractual performance. But his Honour was not prepared at the time to translate these into a broader and implied principle of good faith.[48] As a general proposition, such resistance has since diminished over time.[49] In 1997 for instance, Finn J recognised good faith as being an 'implied duty' of Australian law.[50] This was followed by further decisions in New South Wales acknowledging good faith as an implied obligation of contract. For example, *Alcatel Australia Ltd v Scarcella*[51] saw Sheller JA approvingly refer to *Renard* merely a year after Finn J's comments in *Hughes*:

> 'The decisions in *Renard*…mean that in New South Wales a duty of good faith, both in performing obligations and exercising rights, may by implication be imposed upon parties as part of a contract'.[52]

Certainly, when compared with the more immediate cases post-*Renard*, the recent trend has been that courts in New South Wales have largely demonstrated a greater willingness to accept an

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[42] (1992) 26 NSWLR 234 (*'Renard'*).
[43] William Dixon, *An Examination of the Common Law Obligation of Good Faith in the Performance and Enforcement of Commercial Contracts in Australia* (LDSJD Thesis, Queensland University of Technology, 2005) 31 <http://eprints.qut.edu.au/16123/1/William_Dixon_Thesis.pdf>; Peden, above n 7, 186; Warren, above n 8, 345.
[44] *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558, 566 [146].
[45] See, eg, *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 117 ALR 393, 407 (Gummow J) ('*Service Station*'). See also Marcel Gordon, Discreet Digression: The Recent Evolution of the Implied Duty of Good Faith (2007) 19(2) *Bond Law Review* 26, 26.
[46] (1993) 117 ALR 393, 407 (Gummow J).
[47] See Lücke, above n 36, 158; Chief Justice Kiefel, above n 15, 47-49.
[48] *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 117 ALR 393, 407 (Gummow J).
[49] Dixon, above n 43, 40.
[50] *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1, 37 (Finn J) ('*Hughes*').
[51] (1998) 44 NSWLR 349.
[52] Ibid 369 (Sheller JA).

implied obligation in relation to commercial contracts (as a matter of law).[53] But this is to be contrasted with the lukewarm commentary in states such as Victoria and Tasmania, where superior courts have accepted the general New South Wales position, albeit hesitantly and with unclear qualification.

In *Specialist Diagnostic v Healthscope*, the Victorian Court of Appeal rejected the broad notion that an implied obligation in relation to commercial contracts be 'implied indiscriminately' as a matter of law.[54] Within the narrow scope of a commercial lease 'between commercial entities of equivalent bargaining power', the court seemed to suggest that good faith could only be implied where it would have been necessary to give business efficacy to its performance.[55] Regrettably, the court did not elaborate on what it would require for good faith to be implied in other forms of commercial contracts. It would appear that the current Victorian position is that the implied obligation may exist in relation to commercial contracts, but not as indiscriminately as it generally appears in New South Wales.

The Tasmanian Supreme Court's decision in *Tote Tasmania Pty Ltd v Garrott* also came to the same broad conclusion that good faith was not a 'necessary legal incident of all commercial contracts'.[56] Rather, the court was of the general view that in the absence of express agreement, an implied obligation would exist only if required under the principles of ad hoc implication.[57] These two examples of qualified views from Victoria and Tasmania clearly differ from the general approach in New South Wales, where the implication of good faith as a legal incident of commercial contracts has been met with wider (though not complete) acceptance.[58]

What these examples demonstrate is the inconsistency in position across Australian jurisdictions as to whether an implied obligation of good faith exists in commercial contracts.

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[53] See Geoffrey Kuehne, Implicit 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, 63. See, eg, *Far Horizons Pty Ltd v McDonald's Australia Ltd* [2000] VSC 310 (18 August 200); *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558. But see *Advance Fitness Corp Pty Ltd v Bondi Diggers Memorial & Sporting Club Ltd* [1999] NSWSC 264 (30 March 1999) [122] (Austin J); *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15 (20 February 2004) [191].

[54] [2012] VSCA 175 (8 August 2012) [86] (Buchanan, Mandie, Osborn JJ).

[55] Ibid [87], [91]-[93]. See also H K Lücke, above n 36, 161.

[56] (2008) 17 Tas R 320, 326 [16] (Tennent, Buchanan, Mandie JJ).

[57] Ibid.

[58] See, eg, *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15 (20 February 2004).

Notwithstanding this, what is consistent across Australia regarding an implied obligation of good faith is that no jurisdiction has been as optimistic to apply it consistently to *all* species of contract[59] (as Priestley JA had originally contemplated).[60] To date, the High Court has yet to decide this particular point.[61] When the opportunity arose in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* in 2002, and more recently in *Commonwealth Bank of Australia v Barker* in 2014, the High Court declined to consider it on both occasions.[62]

By way of contrast, the position in Australia stands opposite to that adopted by a recent unanimous decision of the Canadian Supreme Court. Interestingly, in *Bhasin v Hrynew*, the court formally recognised an implied obligation of good faith in *all* Canadian contracts.[63] One of the issues in *Bhasin* concerned whether one of the parties breached an implied obligation of good faith for misleading conduct. In its decision, good faith was held to be an implied obligation at law and as a general organising principle of the Canadian common law of contract.[64]

Whether the High Court of Australia would follow suit and adopt the same position remains to be seen.

III THE STATUTORY OPERATION OF GOOD FAITH IN THE CODE

Having considered the common law development of good faith to the point of its current status today, we can now explore how good faith is likely to operate in the Code – in order to ascertain any differences it may have with the pre-incorporation approach under the common law.

The Code ultimately has to be seen in the context of the idealism expressed by Blackburn J to the modern approach of inferring good faith into commercial contracts.

[59] Dixon, above n 43, 34.
[60] *Renard* (1996) 26 NSWLR 234, 268 (Priestley JA).
[61] Peden, above n 7, 129. See also *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, 214 [107] (Kiefel J).
[62] (2002) 240 CLR 45, 94 [156]; (2014) 253 CLR 169, 214 [107] (Kiefel J).
[63] [2014] 3 SCR 494 [63]-[66] (Cromwell J) ('*Bhasin*').
[64] Ibid.

As seen below, the Code requires both franchisor and franchisee to act 'with good faith, within the meaning of the unwritten law…in respect of any matter arising under or in relation to' both the franchise agreement and the Code ('the universal obligation').[65]

> 6 Obligation to act in good faith
>
> (1) Each party to a franchise agreement must act towards another party with good faith, within the meaning of the unwritten law from time to time, in respect of any matter arising under or in relation to:
> (a) the agreement; and
> (b) this code.
>
> This is the obligation to act in good faith.

The generality of these words imbues a duty of good faith into the exercise of *every* right and obligation under both the agreement and the Code. Of particular interest and significance is that this universal obligation is drafted to reflect 'the meaning of the unwritten law'.[66] The 'unwritten law' has been interpreted as being the common law.[67] With good faith only being a recent addition to the Code, how the 'unwritten law' is to be applied in its context remains to be seen.[68]

This part of the paper will therefore consider prospectively the extent to which good faith in the Code might reflect the previous pre-incorporation approach under the common law, in addition to the extent to which the Code might in fact alter the previous approach. This interaction between the common law and the Code will be explored within a selected range of important and common stages in the franchise relationship.

A *Pre-contract negotiations*

Ordinarily, commercial contracts represent the result of extensive negotiations between the parties. However, the very nature of franchising means that franchise agreements are based on standard form contracts prepared on behalf of the franchisor, which might be slightly varied from case to case. Consequently, standard form franchise agreements tend to lean heavily in the franchisor's favour.

Accepting that some variation to the standard form contract may still be negotiated, how, then,

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[65] *Franchising Code of Conduct* sch 1 cl 6(1).
[66] Ibid.
[67] *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 71 [38] (Gummow and Hayne JJ).
[68] See generally Stephen Giles, *Annotated Franchising Code of Conduct* (LexisNexis Butterworths, 2015) 3.

might the Code's obligation of good faith (with its meaning tied to the common law) be applied to the pre-contractual negotiations between a franchisor and a prospective franchisee? Correspondingly, and bearing in mind that the Code operates in an environment of federal legislation, how might its application under the Code affect the development of the concept under the common law?

1 The effect of the Code on the future common law scope of good faith in pre-contractual negotiations

Judicial debates surrounding the content and existence of an implied obligation of good faith have always confined their focus to what it requires in performing an *existing* contract.[69] But what about in circumstances where a franchise agreement has yet to be entered into? Even if the High Court were to confirm the existence of an implied obligation, it is arguable that the common law scope of good faith would not ordinarily encompass pre-contractual negotiations. This is because such negotiations do not form part of an existing contract, such as to fall within the ordinary common law scope of the implied obligation.

In contrast to the common law and as seen below, good faith under the Code expressly applies to pre-contractual negotiations.[70]

> 6 Obligation to act in good faith
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> (2) The obligation to act in good faith also applies to a person who proposes to become a party to a franchise agreement in respect of:
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> (a) any dealing or dispute relating to the proposed agreement; and
> (b) the negotiation of the proposed agreement; and
> (c) this code.

The inclusion of this specific obligation in the Code is remarkable because it extends the common law scope of good faith in franchising to conduct preceding the franchise agreement itself. The effect of the Code is likely to be that franchisees and franchisors must not only act in good faith with respect to the performance and termination of the agreement (as an implied obligation at common law ordinarily insists), but also to conduct prior to the execution of the agreement itself.

The Code's practical effect is therefore not merely to 'reflect the unwritten law' on good faith as the

[69] See, eg, *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558.
[70] *Franchising Code of Conduct* sch 1 cl 6(2)(b).

Code expresses,[71] but to supplement it by widening the common law umbrella of good faith to pre-contractual negotiations.

2 What standard of conduct is expected as a result of the Code's statutory requirement that parties negotiate a proposed franchise agreement in good faith?

The Code does not elaborate on the requisite conduct necessary to satisfy an obligation to negotiate a proposed franchise agreement in good faith. How, then, might the question be determined, of whether or not a pre-contractual negotiation was conducted in good faith? That answer, in the author's view, lies partly in what the Code prescribes but largely from what already exists in the common law.

With regard to both the universal obligation and the specific obligation to negotiate a proposed agreement in good faith, the Code only provides that the relevant factors 'may' include consideration of whether the parties have 'acted honestly and not arbitrarily',[72] and whether the parties have 'cooperated to achieve the purposes of the agreement' when entering it.[73]

> 6 Obligation to act in good faith
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> (3) Without limiting the matters to which a court may have regard for the purpose of determining whether a party to a franchise agreement has contravened subclause (1), the court may have regard to:
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> (a) whether the party acted honestly and not arbitrarily; and
>
> (b) whether the party cooperated to achieve the purposes of the agreement.

The relevant factors in considering whether a party has negotiated in good faith are not to be limited to these two considerations. Rather, it seems that Parliament has taken a broad view to what conduct might or might not amount to negotiating in good faith. This is evident by the Code's stipulation that the factors relevant in determining a breach are not to be limited to the two considerations above.[74]

As the Code is ultimately to reflect the common law,[75] this creates a statutory doorway for the common law to enter and influence the Code's application of good faith, by introducing *inter alia* other relevant considerations concerning whether a party has acted in good faith. In doing so, the Code's incorporation of good faith is not to be seen as being 'written on a *tabula rasa*, with all that

[71] Ibid sch 1 cl 6(1).
[72] Ibid sch 1 cl 6(3)(a).
[73] Ibid sch 1 cl 6(3)(b).
[74] Ibid sch 1 cl 6(3).
[75] Ibid sch 1 cl 6(1).

used to be there removed and forgotten'.[76] Rather than being reversed by the Code completely, the common law understanding of good faith continues to inform the Code, as if the Code was 'written on a palimpsest, with the old writing still discernible behind'.[77] In a separate case and in reference to the *Queensland Criminal Code* at the time, Windeyer J also conveyed the following:

> 'But it seems to me that when the Code employs words and phrases that had before its enactment… long been used to embody and express ideas deeply rooted in its history, we should read those words in the Code in their established meanings, unless of course they be displaced by the context'.[78]

In other words, the Code's relationship with the common law appears to be that the latter will exert a formative and continuing influence in developing and establishing the norms of good faith under the Code (to the extent of any inconsistency). This is notably distinct from the conventional statute-common law interaction where the common law does little more than to interpret a statute's meaning. Put simply, this remarkable interaction is analogous to that of the Code being a mere outline on a canvas, waiting for the common law to add 'colour' to it.

In addition to all this, and perhaps of more practical relevance to franchisees and franchisors, is that this interaction will go towards highlighting the future importance for both parties to remain abreast of continuing common law developments surrounding good faith.[79]

It follows therefore that any determinations of whether pre-contractual negotiations were conducted in good faith, will likely mirror to a large extent how that question might be dealt with in the common law. This is the practical effect of the statutory obligation in relation to pre-contractual negotiations.

The conceptual difficulty that remains however, is that the common law obligation of good faith has not traditionally been applied to pre-contractual negotiations. Indeed, the author has not been able to find any cases to illustrate past examples of applicable principles suggesting otherwise. However the Courts might decide this novel question, it appears evident that honesty and cooperation now set the baseline statutory standard required for good faith in pre-contractual negotiations - and as a result of the supreme authority of statute, the common law as well.

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[76] *Vallance v R* (1961) 108 CLR 56, 76 (Windeyer J).
[77] Ibid.
[78] *Mamote-Kulang v R* (1964) 111 CLR 62, 76 (Windeyer J).
[79] See Giles, above n 68, 35.

B *Performance and termination*

Once a franchise agreement is entered into, its performance must be carried out in good faith. That obligation subsists until and including the termination of the agreement.[80]

The underlying issues for our purposes is what good faith under the Code would require in the performance and termination of the franchise agreement, including what differences and impact the Code may have in relation to the pre-incorporation common law approach.

1 *Performance – what are the differences between the statutory operation of good faith and the pre-incorporation common law approach?*

In the 2014 and the pre-incorporation case of *Video Ezy International Pty Ltd v Sedema Pty Ltd*, a common law breach of good faith was found by the New South Wales Supreme Court.[81] The case concerned a license given by the franchisor ('VideoEzy') to the franchisee ('Sedema') to operate a video rental store over a particular territory. The license prohibited VideoEzy from engaging in business of a similar nature within that territory. It soon transpired that VideoEzy had sold DVDs online to customers in Sedema's territory. This consequently gave rise to the issue of whether doing so led VideoEzy to breach an implied obligation of good faith.

In finding that good faith was an implied term of the franchise agreement, Harrison AJ held that VideoEzy failed to 'comply with honest standards of conduct'.[82] Her Honour also held that VideoEzy failed to 'act reasonably in relation to the promise of exclusivity in the territories by… competing against Sedema'.[83] This was sufficient for the court to find a breach of good faith under the common law.[84]

With the Code now operative in regulating the performance of franchise agreements, it may be arguable that no material difference would arise between how a party's performance in good faith is regulated under the Code and the common law. Again, this refers back to the principle that the statutory obligation of good faith is intended to 'reflect the meaning of the unwritten law'.[85] It thus

[80] *Franchising Code of Conduct* sch 1 cl 6(1).
[81] [2014] NSWSC 143 (27 February 2014).
[82] Ibid 143 [72] (Harrison AJ).
[83] Ibid.
[84] Ibid.
[85] *Franchising Code of Conduct* sch 1 cl 6(1).

follows that a future case materially similar to *Video Ezy International Pty Ltd v Sedema Pty Ltd*[86] would be determined in almost the same way under the Code as it would under the common law.

Perhaps one difference though is that whereas the common law in the past has not prohibited parties from contracting out of the implied obligation in their franchise agreements,[87] this no longer applies in the franchising context where the Code now modifies the common law position by expressly prohibiting this (see below).[88]

> 6 Obligation to act in good faith
>
> (4) A franchise agreement must not contain a clause that limits or excludes the obligation to act in good faith, and if it does, the clause is of no effect.

With respect to performance, this appears to be one of the more significant impacts the Code will have on the common law approach to good faith in franchising.

Furthermore, it would seem apparent that the above statutory clause is also significant to the common law because it resolves the longstanding debate as to whether an implied obligation should be implied in law or in fact (ad-hoc), in the franchising context.[89] The fact that an implied obligation of good faith can no longer be excluded by words of contrary intention in a franchise agreement renders good faith in franchising as a term mandated by law, and thus of equal operative effect to a term implied in law.

2 *Termination – What impact does the Code's approach to good faith have in altering the common law approach to terminating a franchise agreement?*

Franchise agreements may be terminated in a variety of circumstances. Most are provided for in the agreement itself. Whatever method of termination is adopted by the agreement, the Code requires that its execution be in good faith.[90]

[86] [2014] NSWSC 143 (27 February 2014).
[87] See, eg, *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15 (20 February 2004). See also Christensen and Duncan, above n 41, 59.
[88] *Franchising Code of Conduct* sch 1 cl 6(4).
[89] See generally Gordon, above n 44, 29-36; Christensen and Duncan, above n 41, 64.
[90] *Franchising Code of Conduct* sch 1 cl 6(1).

In the absence of an unfettered contractual right to terminate (e.g. where the decision is made in a party's 'absolute discretion' or words of similar effect)[91] and where good faith has not been expressly excluded,[92] the author is of the view that the common law has generally been sympathetic to the existence of an implied duty to act in good faith when terminating a commercial contract.[93]

What likely impact will the Code have then on this common law approach, with respect to franchising specifically?

The Code prescribes the procedure that applies to termination.[94] While the procedure may differ from common law requirements, the author is of the view that the content of a good faith obligation when terminating, will essentially remain unchanged under the Code. For example, in relation to a power to terminate, the common law has held that where an implied obligation of good faith applies, it must be exercised 'reasonably, and not capriciously or for some extraneous purpose'.[95] It is likely that these common law aspects when terminating will also be recognised by the Code in its reflection of it.[96] Therefore, good faith when terminating under the Code would simply mirror what it requires for termination under the common law.[97]

Like good faith in the performance of contracts, the only material difference in good faith between terminating under the common law and under the Code is likely to be the parties' inability to exclude or limit the obligation under the Code.[98] In other words, it would be arguable that the Code's practical effect is to render void any termination for convenience clauses – such as those allowing a franchisor or franchisee to terminate at their 'absolute discretion'. This is because doing so would arguably *limit* the obligation to act in good faith and thus be contrary to what the Code expressly prescribes.[99]

Additionally, it must constantly be borne in mind that the doctrine of parliamentary supremacy

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[91] *Solution 1 Pty Ltd v Optus Networks Pty Ltd* [2010] NSWSC 1060 (17 September 2010) [61]-[63] (Hammerschlag J). Hammerschlag J recognises that in the context of a contract that provides a right of termination in one's absolute discretion, termination cannot be fettered by an implied obligation at common law to do so in good faith. This is because both terms would be 'inconsistent' with one another.
[92] See, eg, *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15 (20 February 2004). See also Christensen and Duncan, above n 40, 59.
[93] See Christensen and Duncan, above n 40, 108. See, eg, *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] FCA 903 (2 July 1999) [35] (Finklestein J).
[94] *Franchising Code of Conduct* sch 1 div 5.
[95] See *Far Horizons Pty Ltd v McDonald's Australia* [2000] VSC 310 (18 August 2000) [120] (Byrne J).
[96] *Franchising Code of Conduct* sch 1 cl 6(1).
[97] Ibid.
[98] Ibid sch 1 cl 6(4).
[99] Ibid.

plays a key role in altering the common law ability of the parties to exclude or limit good faith when performing and terminating a franchise agreement. As the prohibition on the limitation and/or exclusion of good faith now has a legislative basis,[100] its impact on the common law will likely be to reverse the previous common law position of allowing parties to a franchise agreement to exclude or limit good faith. It also reverses the previous common law position of giving priority to an unfettered express right of termination – over an implied obligation of good faith even where the former stands in conflict with the latter.

In addition to just reflecting the common law, this further demonstrates the Code's ability to modify and influence the further development of good faith in the common law.[101]

C *Mediation*

Mediation as a form of alternative dispute resolution has been said to represent a 'significant area of practice' in franchising.[102] Its general preference by parties over litigation is particularly noteworthy, given the ongoing nature of franchise relationships and hence the desirability of maintaining good relations.[103]

The Code's specific inclusion of a mediation clause outlining its procedural requirements is undoubtedly emblematic of Parliament's recognition of its significance in resolving franchise disputes. This clause mandates that the parties to a franchise-related mediation 'must try to resolve the dispute'.[104] The Code further states that 'a party is taken to be trying to resolve a dispute if it does so in a reconciliatory manner'.[105]

While the Code does not define 'reconciliatory manner', it provides a number of examples, including but not limited to…

[100] Ibid.
[101] Ibid sch 1 cl 6(1).
[102] Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 3rd ed, 2011) 431.
[103] Ibid 437.
[104] *Franchising Code of Conduct* sch 1 cl 39(5).
[105] Ibid sch 1 cl 36(1); See generally Tania Sourdin, 'Good Faith, Bad Faith? Making an Effort in Dispute Resolution' (2012) 2 *Victoria Law School Journal* 19, 23.

- 'making the party's intention clear, at the beginning of the process, as to what the party is trying to achieve…'[106] and

- 'attending and participating in meetings at reasonable times'.[107]

Interestingly, it is worth noting that the Code does not expressly deal with the opposite scenario - namely, when a party might be said to *not* be trying to resolve a dispute.

The first question therefore is how the universal obligation of good faith[108] might affect the above statutory prescription of how a franchise-related mediation should now be conducted. This includes consideration of what circumstances might constitute a scenario where a party might be said to not be trying to resolve a dispute.[109] The second question then is to determine any difference and impact the new approach under the Code may have with and on the common law respectively.

1 *The conduct of mediation – What impact does good faith in the Code have on the Code's general obligation to mediate clause?*

In *Aiton Australia Pty Ltd v Transfield Pty Ltd*, Einstein J held that the expected standard of conduct in complying with a common law obligation to mediate in good faith, would depend 'on the precise circumstances of each individual case'.[110] His Honour then outlined a list of considerations of the 'essential or core content of an obligation to…mediate in good faith'.[111] Without being exhaustive, they involved…

- a willingness by the relevant party to subject themselves to mediation[112] and

- a willingness to have an open mind by considering the options for the resolution of the dispute as may be propounded by the other party.[113]

[106] *Franchising Code of Conduct* sch 1 cl 36(1)(d)(i).
[107] Ibid sch 1 cl 36(1)(a).
[108] Ibid sch 1 cl 6(1).
[109] Ibid sch 1 cl 39(5).
[110] (1999) 153 FLR 236, 268 [156] (Einstein J).
[111] Ibid.
[112] Ibid.
[113] Ibid.

His Honour also characterised a party's 'mere attendance' at mediation as being insufficient by itself to comply with an obligation to mediate in good faith.[114]

As mediation in a franchising dispute now concerns a matter 'arising under or in relation to' the Code,[115] the universal obligation will likely bind all future franchise mediations with a duty to mediate in good faith.[116] In doing so, good faith will arguably become a key criterion in determining whether a franchise mediation was properly conducted in accordance with the Code. Indeed, the validity of a franchise mediation should not be restricted to the mere question of whether the parties have tried to resolve the dispute, [117] nor should the universal obligation be viewed in isolation and with no consideration of its effect on other clauses in the Code.[118] Rather, the court should consider whether the parties, in mediating, have tried to resolve their dispute in good faith.

As good faith under the Code is intended to reflect the common law,[119] the above approach adopted by Einstein J will likely be reflected onto any application of the Code's mediation clause.

For example, while attending and participating in mediation at a reasonable time[120] may appear sufficient to constitute a valid mediation, a failure to do so in good faith may arise if the extent of a party's 'participation' is its mere corporeal presence (as the common law points out).[121] This will probably not constitute a proper attempt to resolve a dispute in a reconciliatory manner[122] that is reflective of good faith, and may contribute to an overall finding that the parties have *not* tried to resolve the dispute within the meaning and spirit of the Code.[123] Furthermore, it may also contribute to a court's inclination to stay any further proceedings until the parties have engaged in mediation meaningfully.[124]

[114] Ibid [90]-[92] (Einstein J).
[115] See *Franchising Code of Conduct* sch 1 cl 39.
[116] Ibid sch 1 cl 6(1).
[117] Ibid sch 1 cl 39(5).
[118] Ibid.
[119] Ibid sch 1 cl 6(1).
[120] Ibid sch 1 cl 36(1)(a).
[121] *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236, 255 [90]-[92] (Einstein J). See also Lücke, above n 36, 164.
[122] *Franchising Code of Conduct* sch 1 cl 36(1).
[123] Ibid sch 1 cl 39(5).
[124] Christensen and Duncan, above n 41, 502.

A party's mere expression of their intention may also be viewed by itself as sufficient to constitute a valid mediation.[125] However, if the same party is not prepared to hear any 'options for the resolution of the dispute' proposed by the other party (so as to convey an 'open mind'),[126] that may evince an absence of good faith. A want of good faith here may then amount to an overall failure to properly mediate, notwithstanding the first party's expression of their intention.

The Code's overarching effect on good faith in mediation is that the Code's general requirement to try to resolve a franchise dispute in a reconciliatory manner, must be read subject to and in conjunction with the common law requirements of good faith in mediation, as well as the universal obligation to act in good faith. The latter is especially significant (in terms of altering the previous common law approach) because it now cloaks *every* franchise-related mediation with an obligation to mediate in good faith, irrespective of whether the parties have agreed to do so in their franchise agreements.

2 *What difference is there between the Code's approach to good faith in mediation, and that of the pre-incorporation common law approach?*

Unlike the common law (which in the past has allowed the exclusion of implied terms),[127] the Code prohibits the exclusion of an implied obligation to mediate in good faith.[128] In this way and in addition to reflecting the common law,[129] the Code could be seen as reversing the previous common law ability of the parties to exclude a duty to mediate in good faith, or more broadly a general obligation of good faith.[130] As aforementioned, whereas franchisees and franchisors could have excluded a duty to mediate in good faith in their agreements before good faith was incorporated into the Code, this is no longer possible.

It is this development that is probably the only significant difference in the previous common law approach to good faith in mediation – with that of the Code.

[125] *Franchising Code of Conduct* sch 1 cl 36(1)(d)(i).
[126] *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236, 268 [156] (Einstein J). See also Lücke, above n 36, 164.
[127] See, eg, *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15 (20 February 2004).
[128] *Franchising Code of Conduct* sch 1 cl 6(4).
[129] Ibid sch 1 cl 6(1).
[130] Ibid.

III FUTURE REFORMS TO THE CODE

A *A 'spirit of good faith' test that clarifies the elusive meaning of good faith*

For decades, and as the previous discussion might have indicated, a precise test for good faith in Australia has proved elusive.[131] The dilemma in what good faith means and what it requires arises partly from its contextual nature.[132] What constitutes good faith in one context might not necessarily be the case in another context.[133] Indeed, good faith has been said to turn on the facts of each case and 'is best determined on a case-by-case basis'.[134] In the same vein, the concept has also been described as one that 'means different things to different people in different moods at different times and in different places'.[135] It is perhaps unsurprising then, to see how attempts to elucidate a universally applicable definition often result in either a 'spiral into…vacuous generality' or 'restrictive specificity'.[136] As Gordon J opined in one case;

> 'The difficulty with the contextual standard or a "generalisation of universal application" …is to identify the precise boundaries of this standard'.[137]

With respect, the author is of the view that the very nature and purpose of a contextual standard is to eliminate the need to identify precise boundaries. Instead of identifying the perimeter of the obligation with absolute precision, the author's view is that any future reform to the Code should accept and embrace the existing contextual approach to good faith, by codifying it into a test of some kind. This test would include viewing a universal application of good faith as focusing on moulding itself to the particular circumstances of a case, as opposed to rigidly ruling things in or out in relation to its scope - in an effort to craft a universal definition. This is because of the infinite variety of circumstances that parties can find themselves in.

That is not to say that the core principles relating to good faith would become meaningless or redundant. The author's view is that there is indeed utility to the idea of a broad 'spirit of good faith' test in the Code itself, where decisions on the scope and operation of good faith in a particular

131 See generally Terry and Lernia, above n 20, 556.
132 *Jobern Pty Ltd v BreakFree Resorts (Victoria) Pty Ltd* [2007] FCA 1066 (23 July 2007) [138] (Gordon J).
133 Elisabeth Peden, 'Contractual Good Faith: Can Australia Benefit from the American Experience?' (2003) 15 *Bond Law Review* 186, 188.
134 *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236, 263 [129] (Einstein J).
135 Michael Bridge, Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith? (1984) 9 *Canadian Business Law Journal* 385, 407.
136 Summers, above n 16, 206.
137 *Jobern Pty Ltd v BreakFree Resorts (Victoria) Pty Ltd* [2007] FCA 1066 (23 July 2007) [141] (Gordon J).

case are guided more by indicators reflecting its bedrock traits, than an inflexible emphasis on fitting within a restrictive and universal category of conduct.

But how does one define an equally ambiguous concept such as a 'spirit' of good faith without returning to the same circular debate on what such a spirit would encompass? Sir Anthony Mason identifies three overarching principles of honesty, cooperation and reasonableness, as being foundational to good faith.[138] Considering that 'many courts'[139] have applied this test,[140] there should be little resistance to a more flexible application of good faith that pertains to these three guiding indicators of its spirit. What standard of conduct would fall within the 'spirit' should then be a discretionary question each judge would have to determine on the facts of each case.

Under the contextual operation that underpins the spirit, the judicial inquiry would not be whether certain conduct falls within a rigid universal definition (as current and past debates seem to strive unrealistically towards), but rather whether the conduct falls collectively within the broad spirit of honesty, cooperation and reasonableness appropriate to the circumstances of a given case. In a sense, this might well be of little substantive difference to the current and prevailing contextual approach to good faith. Indeed, some may criticise this approach as one that is as subjective and vague as the idea of good faith itself. But the author is of the view that it may be better to simply try and formulate a workable test for good faith, than to obsess over a concept that is inherently fluid and indefinite at its core. A statutory test for good faith defined by its spirit is but one meaningful attempt to do so, in an area that has long been paralysed by judicial uncertainty. In this sense, it may be that Parliament must accept the inevitability of the dilemma Aristotle identified long ago, namely that 'there are some cases for which it is impossible to lay down a law …For what is itself indefinite can only be measured by an indefinite standard'.[141]

If such an approach were successful under the Code, there would also be no reason why such a test could not be implemented at a level wider than the franchising sector through the power of statute. Even if one were to disagree with the merits of the above approach, it cannot be denied that the incorporation of good faith into the Code gives rise to the possibility of amendments being made to modify the common law doctrine of good faith. As this paper has demonstrated, it already has.

[138] Mason, above n 25.
[139] Peden, above n 133, 189.
[140] See, eg, *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558, [171]; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349, 367 (Sheller JA).
[141] Aristotle, *The Nicomachean Ethics* (H Rackham trans, Harvard University Press, 1926) 315.

IV CONCLUSION

The Code's incorporation of good faith is a significant recent development in the law of franchising in Australia for several reasons.

First, it removes the longstanding uncertainty of whether good faith operates as an implied obligation of contract in the franchising industry. Secondly, it also extends the common law operation of good faith in the franchising industry to pre-contractual dealings. Further, by force of statute, it confirms some of the fundamental features of the common law doctrine of good faith (such as honesty and cooperation).

The Code also evinces Parliament's recognition that the common law's application of good faith has not kept up with laissez-faire commercial practice, by demonstrating Parliament's willingness to step in when legislative reform is considered appropriate.

But the Code's design and likely operation also shows that Parliament has largely left it to the Courts to determine the scope and application of good faith. That, as past cases illustrate, is done contextually and on a case by case basis.[142] However, it does not adequately address the continuing uncertainty regarding what an obligation of good faith might require. To a large extent, the Code merely mirrors the continuing uncertainty in the common law. The author is not however of the view that this is necessarily a cause for concern. Instead, the view is taken that such uncertainty should perhaps be accepted as an inevitable aspect of an inherently vague concept, and that future reform to the Code can acknowledge this by formulating a broad workable test for good faith. It is clear from analysing the Code that it harbours the potential to modify the common law application of good faith. There is perhaps no reason then, why a reformative test such as a 'spirit of good faith' could not be incorporated into the Code as the statutory vehicle to further this objective.

Doing so would render the spirit to become part of the statutory doctrine of good faith, and through the doctrine of legislative supremacy, find acceptance into the common law as a touchstone of proper and binding conduct in commercial relationships.

[142] *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236, 263 [129] (Einstein J).