

# GOOD FAITH, BAD FAITH?

## MAKING AN EFFORT IN DISPUTE RESOLUTION

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*The behaviour of those engaged in negotiation and Alternative Dispute Resolution ('ADR') processes that are undertaken or required before or after litigation is increasingly the subject of legislative regulation. Recent case law has also more clearly articulated the characteristics of good faith as well as other standards such as 'genuine effort' and explored to a limited extent the behavioural indicators and approaches that could be used to determine the meaning and scope of these types of concepts. Arguably, the growth in mandatory (rather than voluntary) ADR may require the articulation of clearer conduct obligations as ADR participants may be disinclined to negotiate or may be relatively unsophisticated or unaware of their negotiation behaviour. This article explores the development of conduct obligations and notes that whilst the requirements need to be linked to the circumstances of each dispute, there are some clear differences in terms of how these requirements are more generally interpreted by lawyers and others.*

### I INTRODUCTION

The concept and meaning of good faith in negotiation and Alternative Dispute Resolution ('ADR') processes, together with an articulation of what actions are required to comply with a good faith obligation or to support good faith negotiation, can be best described as an evolving 'work in progress' in Australia. Compared with a decade ago however, good faith is a more settled and certain concept, and is increasingly being seen and applied as importing a standard of behaviour relevant to a range of participants in negotiation and ADR processes — disputants, lawyers, ADR practitioners, experts and even support people.

Good faith now features as the most widely used standard of conduct prescribed by federal and State/Territory legislation for those involved in ADR processes and negotiation. As noted by the National Alternative Dispute Resolution Advisory Council (NADRAC)<sup>1</sup> in 2009, while several federal and state laws impose good faith obligations on participants in ADR processes, there is limited legislative guidance on the meaning of the phrase in the ADR context.<sup>2</sup>

The extent to which good faith can be determined has generated discussion and debate within the courts for more than two decades. Initially, court cases focused on contract clauses that required parties to an agreement to: (a) negotiate in good faith; (b) engage in ADR in good faith; or (c) do both if a dispute arose.

Uncertainty regarding dispute resolution clauses and the meaning of good faith was the subject of comment in *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*<sup>3</sup> and *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*.<sup>4</sup> What constitutes good faith was also explored in *Aiton Australia Pty Ltd v Transfield Pty Ltd*.<sup>5</sup> These cases suggested that a lack of clarity may have existed regarding the elements<sup>6</sup> and definition of good faith, but in recent years, courts have increasingly enforced obligations that incorporate this standard.

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<sup>1</sup> The National Alternative Dispute Resolution Advisory Council is an independent advisory council that is set up and supported by the Commonwealth Attorney-General's Department. Council members are appointed by the Attorney-General and NADRAC has been providing policy advice in the ADR area since 1995. The author is a member of the Council.

<sup>2</sup> National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction: A Report to the Attorney General* (2009) 142–6.

<sup>3</sup> (1995) 36 NSWLR 709.

<sup>4</sup> (1992) 28 NSWLR 194.

<sup>5</sup> (1999) 153 FLR 236.

<sup>6</sup> See David Spencer, 'Defining an Operational Standard of Good Faith – Negotiation in the Performance of a Contract' (Paper presented at the Australasian Law Teachers' Association Conference, Port Vila, Vanuatu, July 2001).

Apart from the lack of legislative definition and the somewhat initially limited case law, there have been differences about the meaning of good faith between the States/Territories and policy bodies within Australia. For example, more than a decade ago, the Australian Law Reform Commission ('ALRC') appeared to have had little difficulty in accepting that this standard could be adopted. In focusing on lawyers and negotiation, it recommended that national model rules be developed in relation to lawyers participating in ADR processes that would require these practitioners to participate in good faith.<sup>7</sup> By contrast, the Victorian Law Reform Commission ('VLRC') noted in the *Civil Justice Review* report<sup>8</sup> that some submissions had expressed the view that a proposed obligation to act in good faith in civil litigation was 'nebulous'.<sup>9</sup>

Uncertainty regarding these obligations may be more of an issue in jurisdictions such as Victoria, where the term has not been used extensively in legislative settings. Consequently, there has not been much discussion within Victorian courts about the characteristics of good faith. As the VLRC has noted, the concept is now applied in a number of legislative settings outside Victoria, and in the context of contractual relationships, courts have considered for some years whether or not contracting parties have an obligation to act in good faith, either express or implied.<sup>10</sup> In discussing good faith and obligations to disclose, the VLRC considered that overriding obligations in respect of good faith could extend to settlement negotiations, mediation and other ADR processes.

This article explores recent developments in the context of a good faith standard and discusses the possible behavioural indicators and approaches that could be used to determine the meaning and scope of the concept.

## II GOOD FAITH APPROACHES – CASE LAW, CONTRACT AND LEGISLATION REQUIRING GOOD FAITH

A number of court judgments have helped to clarify what good faith in negotiation means. Much of the case law has concerned agreements that specify that good faith (in negotiation) is required in the context of overall negotiations or ADR. Courts have however, also considered and discussed the meaning of good faith in the statutory context. For example, in *Western Australia v Taylor*<sup>11</sup> the National Native Title Tribunal ('NNTT') considered how to identify good faith negotiation when the tribunal was dealing with specific legislation that was used in the native title area.

More recently, the NNTT was prepared to consider the circumstances of the negotiating parties.<sup>12</sup> This is partly because of an additional 'good faith requirement' introduced into the native title area in 2007 as a result of the *Native Title Claims Resolution Review*.<sup>13</sup> In the review, it was noted that 'there is a growing tendency for parties to mediation to exhibit a lack of good faith during mediation' and a suggestion was made that a requirement be imposed on all participants in mediation to act in good faith.<sup>14</sup> One recommendation of the review was that a code of conduct for everyone involved in mediation, including legal practitioners, be formulated.<sup>15</sup>

<sup>7</sup> Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000).

<sup>8</sup> See Spencer, above n 6.

<sup>9</sup> Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008).

<sup>10</sup> Ibid 167. Report referred to: *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349; *Burger King Corp v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558; *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15 (20 January 2004); *Eso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228 (15 September 2005); *Australian Mutual Provident Society v 400 St Kilda Road Pty Ltd* [1991] 2 VR 417; and *Central Exchange Ltd v Anaconda Nickel Ltd* (2002) 26 WAR 33.

<sup>11</sup> (1996) 134 FLR 211.

<sup>12</sup> See Sarah Burnside, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis' (2009) 4(3) *Land, Rights, Laws: Issues of Native Title* 1.

<sup>13</sup> Graham Hiley and Ken Levy, *Native Title Claims Resolution Review* (31 March 2006) <[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/PublicbySrc/Report+of+the+Native+Title+Claims+Resolution+Review+-+31+March+2006.pdf/\\$file/Report+of+the+Native+Title+Claims+Resolution+Review+-+31+March+2006.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/PublicbySrc/Report+of+the+Native+Title+Claims+Resolution+Review+-+31+March+2006.pdf/$file/Report+of+the+Native+Title+Claims+Resolution+Review+-+31+March+2006.pdf)>.

<sup>14</sup> Ibid 23. Previously the requirement had applied to only limited classes of matters.

<sup>15</sup> Ibid.

In the absence of any definition of good faith in the *Native Title Act 1993* (Cth) at the time that *Western Australia v Njamat People*<sup>16</sup> was decided, the NNTT noted that the only statutory definition it was aware of was that set out in s 170QK(z) of the (now repealed) *Industrial Relations Act 1988* (Cth). The tribunal accepted the ‘totality of circumstances’ test in that provision. The test provides that a single element of a party’s behaviour may not, of itself, indicate that a party has not negotiated in good faith, but an examination of the overall conduct of a party may indicate the absence of good faith.<sup>17</sup> Several native title cases have considered good faith and accepted that overall conduct and circumstances must be explored. However, evidence of a lack of good faith has been found in a party’s failure to make any counter-proposals such as adopting a ‘take it or leave it’ approach,<sup>18</sup> as well as a party actively engaging in misleading behaviour.<sup>19</sup>

In one case, the NNTT considered a situation where it was alleged that negotiations had not been conducted in good faith.

It was suggested that the lack of good faith was indicated by the following behaviour:

- During the negotiations over compensation [one party] kept, in effect, reducing the amount on offer ...
- It provided to the native title party an incomplete version of the ‘marked up’ version of the agreement which was patently misleading in that not all of the changes effected by the grantee party were disclosed ...
- It negotiated a heritage survey agreement but refused to apply its provisions to areas of the proposed tenement area within the outer boundaries of the Amangu native title determination application where native title had been extinguished ... and
- it rejected, without reason, the acceptance by the native title party of the grantee party’s compensation offer and then introduced late in the negotiations new issues relating to aboriginal heritage, which issues were unreasonable and manifested a specious attitude designed only to obtain a rejection from the native title party ...<sup>20</sup>

In that matter, the NNTT closely examined the behaviour of the party and concluded that there was no ‘dishonesty’ and also no lack of good faith. Other recent cases dealing with obligations imposed by legislation have considered whether or not parties who have failed to participate in good faith, or to take actions to support ADR processes, should be required to face a costs penalty<sup>21</sup> or be required to do more.<sup>22</sup>

The question of what constitutes good faith is likely to be the subject of close attention in the coming years as a result of the inclusion of more good faith requirements in various legislative schemes.<sup>23</sup> For example, the *Fair Work Act 2009* (Cth) has attempted to set out the requirements for good faith in section 228 as they apply to bargaining representatives in relation to an enterprise agreement:

1. The following are the good faith bargaining requirements that a bargaining representative for a proposed enterprise agreement must meet:
  - a. attending, and participating in, meetings at reasonable times;
  - b. disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
  - c. responding to proposals made by other bargaining representatives for the agreement in a timely manner;
  - d. giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative’s responses to those proposals;

<sup>16</sup> (1996) 134 FLR 211.

<sup>17</sup> Ibid 221.

<sup>18</sup> *Cosmos & Ors/ Alexander & Ors/ Western Australia/Mineralogy Pty Ltd* [2009] NNTTA 35 (22 June 2009).

<sup>19</sup> *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141.

<sup>20</sup> *Raymond Dann & Ors (Amangu People)/Western Australia/Empire Oil Company (WA) Limited* [2006] NNTTA 153 (24 November 2006) [56].

<sup>21</sup> See, eg, *Woodford v Bluescope Steel* [2007] NSWDDT 16 (31 July 2007).

<sup>22</sup> See also *Dann* [2006] NNTTA 153 (24 November 2006).

<sup>23</sup> There are numerous examples of ‘good faith’ in legislation. Much of this legislation however does not set out sanctions or the penalty for a lack of good faith; for example, the *Administrative Appeals Tribunal Act 1975* (Cth) provides in s 34A(5) that parties who are directed to participate in an ADR process must act in good faith, but does not impose a sanction. In addition, some legislation could conceivably import a similar standard. For example, the *Civil Dispute Resolution Act 2011* (Cth) requires a reasonable and genuine steps statement to be filed with a court and this may import a similar set of obligations.

- e. refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining; and
  - f. recognising and bargaining with the other bargaining representatives for the agreement.
2. The good faith bargaining requirements do not require:
- a. a bargaining representative to make concessions during bargaining for the agreement; or
  - b. a bargaining representative to reach agreement on the terms that are to be included in the agreement.

Good faith requirements in the fair work area were recently considered more closely by the Fair Work Commission<sup>24</sup> and the Federal Court.<sup>25</sup> In closely considering the legislative requirements and the history of negotiations in relation to enterprise agreement proposals, Justice Flick commented on the meaning of ‘bargaining’ and ‘good faith.’ His Honour concluded that there was some inherent difficulty in imposing a good faith standard in relation to bargaining as ‘there is an inevitable tension between imposing ... a “requirement” that [a party] “bargain” in “good faith” (sic.) and a prohibition upon imposing an obligation to make “concessions” or reach agreement as to terms.’<sup>26</sup>

In some circumstances however, statutory requirements for good faith cannot be considered in isolation from other obligations and requirements that may operate in relation to negotiations. Good faith requirements may also be supported by other legislative requirements. For example, those involved in negotiations may have their conduct regulated by section 18 of schedule 2 of the *Competition and Consumer Act 2010* (Cth) if the conduct is likely to mislead or deceive, in respect of unconscionable conduct and if unfair terms are reached. In addition, these requirements may support good faith even where there are no clear requirements to negotiate or mediate in good faith.

### III ENFORCING AGREEMENTS TO NEGOTIATE IN GOOD FAITH

In the context of agreements to negotiate in good faith (rather than obligations imposed by legislation) contractual obligations to negotiate in good faith have recently been found to be enforceable in a number of cases. In *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service*<sup>27</sup> and *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd*,<sup>28</sup> both the parties and the courts accepted that good faith clauses were enforceable and the primary question to be determined related to the meaning of the concept in context to the particular facts of each case. Similarly, in Queensland, good faith requirements contained in a dispute resolution clause were upheld in *AMCI (IO) Pty Ltd v Aquila Steel Pty Ltd*<sup>29</sup> and were found not to be illusory and could be considered within the particular circumstances of the dispute.

The concept of good faith had previously been explored in a number of cases in the context of dispute resolution clauses in contracts requiring parties to use an ADR process in good faith before litigation could be commenced. Uncertainty regarding dispute resolution clauses was the subject of comment in *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*,<sup>30</sup> *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*,<sup>31</sup> *Morrow v Chinadotcom Corporation*,<sup>32</sup> *New South Wales v Banabelle Electrical Pty Ltd*<sup>33</sup> and *The Heart Research Institute Ltd v Psiron Ltd*.<sup>34</sup>

<sup>24</sup> *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia* [2012] FWAFB 1891 (22 March 2012).

<sup>25</sup> *Endeavour Coal Pty Limited v Association of Professional Engineers, Scientists and Managers, Australia* [2012] FCA 764 (19 July 2012).

<sup>26</sup> *Ibid* [78]. His Honour also noted that the withdrawal of an offer may be part of a bargaining process and might not indicate a lack of good faith at 66.

<sup>27</sup> (2010) 15 BPR 28, 563.

<sup>28</sup> [2010] WASCA 222 (22 November 2012).

<sup>29</sup> [2009] QSC 139 (4 June 2009).

<sup>30</sup> (1995) 36 NSWLR 709.

<sup>31</sup> (1992) 28 NSWLR 194.

<sup>32</sup> [2001] ANZ ConvR 341. For a mediation clause to be enforceable, it has been suggested that all steps should be clearly set out and relevant rules and guidelines incorporated. See also Patrick Mead, ‘ADR Agreements: Good Faith and Enforceability’ (1999) 10 *Australasian Dispute Resolution Journal* 40.

<sup>33</sup> (2002) 54 NSWLR 503.

<sup>34</sup> [2002] NSWSC 646 (25 July 2002).

In *United Group Rail Services Ltd v Rail Corporation New South Wales*,<sup>35</sup> the New South Wales Court of Appeal held that a dispute resolution clause based on good faith, so long as sufficiently certain, was enforceable. Prior to this decision, some dispute resolution clauses were found to be uncertain because of their reliance on good faith as a necessary condition in the negotiations.<sup>36</sup>

In *Idoport Pty Ltd v National Australia Bank Ltd*,<sup>37</sup> Einstein J considered the concept of good faith in the context of Supreme Court legislation requiring parties to participate in good faith. His Honour noted his earlier comments in *Aiton Australia Pty Ltd v Transfield Pty Ltd*<sup>38</sup> and stated that:

notwithstanding the defendant's stated attitude to the application which is that a mediation would be futile, as the plaintiffs have pointed out, it is important to bear in mind the fact that following the making of an order for mediation there is imposed upon both parties a statutory obligation to mediate in good faith. Some examination of the case law and academic writings dealing with the statutory requirements and dealing with the essential or core content of an obligation to mediate in "good faith" was given in *Aiton Australia v Transfield Pty Ltd* (1999) 153 FLR 236.

That judgment at page 268 included the following:

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.<sup>39</sup>

Einstein J ordered mediation in accordance with the mandatory power under the then *Supreme Court Act 1970* (NSW),<sup>40</sup> and in doing so, explained what he considered were the fundamental tenets of good faith, citing his earlier comments in *Aiton*:

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 to 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.<sup>41</sup>

<sup>35</sup> (2009) 74 NSWLR 618.

<sup>36</sup> *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194.

<sup>37</sup> [2001] NSWSC 427 (23 May 2001).

<sup>38</sup> (1999) 153 FLR 236.

<sup>39</sup> *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 427 (23 May 2001) [47].

<sup>40</sup> Section 110K of the *Supreme Court Act 1970* (NSW) (now repealed) allowed for the referral of matters to mediation without the consent of the parties. Section 26(1) of the *Civil Procedure Act 2005* (NSW) provides for mandatory referral in similar terms.

<sup>41</sup> *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 427 (23 May 2001) [47].

In the leading case of *United Group Rail Services Ltd v Rail Corporation New South Wales*,<sup>42</sup> the concept of good faith was clearly supported and a contractual obligation to negotiate in good faith was found to be binding.

One of the available tools of dispute resolution is the obligation to engage in negotiations in a manner reflective of modern dispute resolution approaches and techniques – to negotiate genuinely and in good faith, with a fidelity to the bargain and to the rights and obligations it has produced within the framework of the controversy. This is a reflection, or echo, of the duty, if the matter were to be litigated in court, to exercise a degree of co-operation to isolate issues for trial that are genuinely in dispute and to resolve them as speedily and efficiently as possible.<sup>43</sup>

In both these cases, the courts have explored and commented on what the concept of good faith means and entails. In *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd*, the New South Wales Court of Appeal followed previous adoptions of Sir Anthony Mason’s ‘three related notions’ of good faith,<sup>44</sup> namely:

1. An obligation on the parties to cooperate in achieving the contractual objects (loyalty to the promise itself);
2. Compliance with honest standards of conduct;
3. Compliance with standards of conduct that are reasonable having regard to the interests of the parties.

While there have been suggestions that it may be easier to define ‘bad faith’ rather than good faith, and good faith is perhaps more readily defined by adopting an ‘excluder’ definition,<sup>45</sup> the central tenets of good faith (cooperation, honesty and reasonable conduct) do also appear to have been delineated and supported by the VLRC and other policy and reform bodies such as NADRAC.

#### IV GOOD FAITH AND ADR

Good faith obligations as they apply to participants in ADR processes have been the subject of expansion in recent years and are likely to be further expanded in future. This is partly because legislation and case law have now more clearly articulated the characteristics of good faith and also because of the growth in mandatory ADR (which may require the articulation of clearer conduct obligations).

In 2011, NADRAC discussed the issues relating to the imposition of a good faith requirement and decided that, on balance, such a requirement should be imposed so that: ‘the rule of law, and the public interest in the administration of justice, are better served by expressly recognising that participation in mandatory ADR should be undertaken in good faith.’<sup>46</sup> It did not reach a consensus view on the preferred formulation for this conduct obligation, but it did consider the two behavioural standards of ‘good faith’ and ‘genuine effort’ noting that:

‘Good faith’ appears to be the most widely prescribed conduct obligation in existing legislation (both in Federal and in State/Territory jurisdictions). Examples of its use can be found in the *Native Title Act 1993* (Cth), the *Administrative Appeals Tribunal Act 1975* (Cth) and the *Civil Procedure Act 2005* (NSW). There is extensive and authoritative case law interpreting ‘good faith’ standards, in a range of contexts, supporting the view that this

<sup>42</sup> (2009) 74 NSWLR 618.

<sup>43</sup> *United Group Rail Services Ltd v Rail Corporation New South Wales* (2009) 74 NSWLR 618, 640-1 [79].

<sup>44</sup> Anthony Mason, ‘Contract, Good Faith and Equitable Standards in Fair Dealing’ (2000) 116 *Law Quarterly Review* 66, 70.

<sup>45</sup> Elizabeth Peden, ‘The Meaning of Contractual “Good Faith”’ (2002) 22(3) *Australian Bar Review* 235, 235; referring to *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 266 and also noting that the approach in *Renard* was ‘mentioned (seemingly with approval) by the NSW Court of Appeal’ in *Burger King Corp v Hungry Jack’s Pty Ltd* [2001] NSWCA 187 (21 June 2001) [149].

<sup>46</sup> NADRAC, *National Alternative Dispute Resolution Advisory Council, Maintaining and Enhancing the Integrity of ADR Processes* (February 2011) 34, available at

<[http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/AboutNADRAC\\_NADRACProjects\\_IntegrityofADRprocesses](http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/AboutNADRAC_NADRACProjects_IntegrityofADRprocesses)>.

One salient feature of this recommendation is that it is proposed in relation to ‘mandatory’ ADR, which is an increasing feature of the Australian dispute resolution landscape (both within courts and tribunals and as a precondition to commencing litigation). It is possible that disputants who are required to attend an ADR process (rather than choosing to attend) may be less likely to attend and participate in good faith.

standard appears to be working satisfactorily. Equally, however, ‘genuine effort’ (which is the standard applying under the Family Law Act) appears to have worked well in that jurisdiction. It has appeal as a standard that focuses on subjective behaviour, and may therefore be particularly suited to the nuances of ADR processes. Ultimately, the majority view of NADRAC was slightly in favour of good faith.<sup>47</sup>

In attempting to articulate good faith by reference to ‘genuine effort’ NADRAC also noted that ‘[o]ne option is to define “good faith” in terms which also capture the essence of “genuine effort”. For instance, good faith could be defined as including a genuine effort to uphold various enumerated principles’<sup>48</sup> defined as follows:

1. People have a responsibility to take genuine steps to resolve or clarify disputes and should be supported to meet that responsibility.
2. Disputes should be resolved in the simplest and most cost-effective way. Steps to resolve disputes including using ADR processes, wherever appropriate, should be made as early as possible and both before and throughout any court or tribunal proceedings.
3. People who attend a dispute resolution process should show their commitment to that process by listening to other views and by putting forward and considering options for resolution.
4. People in dispute should have access to, and seek out, information that enables them to choose suitable dispute resolution processes that informs them about what to expect from different processes and service providers.
5. People in dispute should aim to reach an agreement through dispute resolution processes. They should not be required or pressured to do so if they believe it would be unfair or unjust. If unable to resolve the dispute people should have access to courts and tribunals.
6. Effective, affordable and professional ADR services which meet acceptable standards should be readily available to people as a means of resolving their disputes.
7. Terms describing dispute resolution processes should be used consistently to enhance community understanding of, and confidence in, them.<sup>49</sup>

Apart from considering the tenets of good faith and the overarching objectives of ADR (almost a public policy test) a critical issue in any analysis of good faith is how it can be determined that someone has acted in bad faith in ADR processes. This is particularly problematic in a confidential ADR process (as in most forms of mediation), and where evidence of what has transpired in an ADR process would not otherwise be admissible in court proceedings. These issues of confidentiality, admissibility and practitioner obligations require separate and close consideration.<sup>50</sup> There are now many examples where courts have considered a limited range of material about what has happened in otherwise confidential ADR processes to explore whether or not there has been good faith (or a lack of it).

As was noted in *Aiton Australia Pty Ltd v Transfield Pty Ltd*,<sup>51</sup> good faith requirements must be considered on a case-by-case basis<sup>52</sup> and the approach must be fact intensive. It may also be that in different sectors of the population, different approaches to negotiation and good faith requirements will operate. Articulating a ‘reasonable’ approach is therefore fraught with difficulties.<sup>53</sup> Without attempting to devise and then hopefully refine what may be involved in such an approach, there is little guidance for disputants and others involved in ADR, and it is for this reason that Table 1.1 below has been created. Clearly, different individuals will approach and consider it differently across a variety of disciplines and numerous jurisdictions.

The contents are drawn and devised from case law approaches and legislative exception areas and are presented here to generate discussion. In addition, the good faith behaviours that are set out are responsive to the good faith approach set out by collaborative practitioners who practise within that model.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid 35.

<sup>49</sup> National Alternative Dispute Resolution Advisory Council, ‘National Principles for Resolution of Disputes’ (29 April 2011) <[http://www.nadrac.gov.au/about\\_NADRAC/NADRACProjects/Pages/NationalPrinciplesandGuide.aspx](http://www.nadrac.gov.au/about_NADRAC/NADRACProjects/Pages/NationalPrinciplesandGuide.aspx)>.

<sup>50</sup> See Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters 4<sup>th</sup> ed, 2012) ch 12.

<sup>51</sup> (1999) 153 FLR 236.

<sup>52</sup> Ibid 263 [129].

<sup>53</sup> See John Lande, ‘Using Dispute Resolution System Design Methods to Promote Good Faith Participation in Court-Connected Mediation Programs’ (2002) 50 *UCLA Law Review* 69.

Interestingly, in developing this table and discussing it with postgraduate students and professionals alike, it is clear that some behaviours are viewed as more acceptable in some sectors than in others. For example, the values and approaches in the industrial relations context will tend to be more adversarial (oriented towards transactional bidding and possibly more supportive of bad faith, tactical negotiation)<sup>54</sup> than in the more collaborative, family dispute resolution sector where good faith approaches are fostered, supported and can be set out in a formal contract.

Table 1.1 *What Is Good Faith Negotiation? Options and Possible Indicators*

<b>Bad Faith?</b>	<b>May Be Bad Faith?</b>	<b>Good Faith?</b>
Turning up late repeatedly or not turning up at all	Being unprepared and not allowing sufficient time for meetings	Attending scheduled meetings on time
Not having authority	Not making authority enquiries	Having authority or raising authority issues as soon as possible
Bullying, aggressive or disinterested behaviour and uncooperative attitude	Posturing and disrespectful comments and behaviour	Respectful communication
Not listening to or discussing issues	Focusing on own case and not listening to others	Engaging and contributing to discussions about issues
Not considering settlement options	Not exploring alternatives and options and immediately evaluating and dismissing options	Discussing settlement options and comparing options to litigation alternatives and other alternatives
Reducing offer amounts	Not moving or not explaining why no movement is possible	Raising options and considering the other party perspectives
Dishonest behaviour	Posturing and suggesting that a court outcome is more favourable than it is or suggesting that legislation will be construed differently without adequate basis	Transparent behaviour
Omission and distortion of significant relevant material	Exaggeration and omission of non-relevant material	Drawing attention of parties to missing information that could be relevant

## V OBLIGATIONS APPLYING AS A RESULT OF ETHICAL OR OTHER REQUIREMENTS

Apart from obligations that apply to disputants as a result of statutory requirements, agreements or even implied obligations to negotiate in good faith, there may be other obligations imposed by ethical and other regimes. Government departments and agencies as participants in ADR, for example, may not only be bound by good faith, genuine effort and other legislative and contractual requirements but also may be required to adhere to other obligations, such as the specific obligations that apply to those in the Commonwealth dispute resolution area. The *Legal Services Directions 2005* (Cth) requires Commonwealth Government agencies to

<sup>54</sup> *Endeavour Coal Pty Limited v Association of Professional Engineers, Scientists and Managers, Australia* [2012] FCA 764 (19 July 2010).

act as ‘model litigants’.<sup>55</sup> As part of this framework of obligations, Commonwealth Government agencies are required to consider other methods of dispute resolution before commencing litigation.<sup>56</sup> When participating in ADR, these agencies must ensure that their representatives participate ‘fully and effectively’ and have authority to settle the matter (subject to some exceptions).<sup>57</sup> The definition of ‘litigation’ extends to ADR processes, so that Commonwealth Government agencies are required to observe model standards of conduct when participating in ADR.

State and Territory Government Departments and agencies operate under similar model litigant obligations. To demonstrate, model litigant principles in the State of Victoria, which are found in the standard legal services to government panel contract, are largely based upon the Commonwealth version. Additional requirements may be imposed by pledge; in 2010, a number of legal practitioners who wished to undertake State Government work were required to sign a pledge that included ADR obligations.

Other obligations may be specific to legal practitioners and schemes, and linked to ethical requirements. In 2006, a barrister involved in mediation as a representative was the subject of an action in the Queensland Legal Practice Tribunal in *Legal Services Commissioner v Mullins*.<sup>58</sup> In that case, the Legal Services Commissioner argued that the barrister was guilty of professional misconduct in relation to the mediation, concerning a claim for compensation for personal injuries. The barrister was said to have misled the insurer by failing to disclose information relating to his client’s reduced life expectancy. The facts suggested that shortly before the mediation, the barrister became aware that his client, a quadriplegic as a result of an accident, had cancer and a reduced life expectancy. The barrister indicated to his client that this information should be disclosed. After discussing the matter with senior counsel, he took the view that if he did not mislead the insurer, but did not disclose the information, he would be complying with his professional obligations. The Legal Practice Tribunal noted that the: Rules adopted by the Bar Association of Queensland then included:

51. A barrister must not knowingly make a false statement to the opponent in relation to the case (including its compromise).
52. A barrister must take all necessary steps to correct any false statement unknowingly made by the barrister to the opponent as soon as possible after the barrister becomes aware that the statement was false.<sup>59</sup>

It concluded that by continuing to rely on reports as to his client’s life expectancy, the barrister was guilty of professional misconduct but that:

in mitigation, there are many references from senior practitioners attesting to the respondent’s competence and good character. Despite the stance adopted in resisting this application, the references indicate that there is good reason for optimism that the respondent will not set about deceiving a colleague again. And his misconduct was not designed to derive a personal advantage: an anxiety to advance his client’s interests accounts for his grave misjudgement.<sup>60</sup>

The tribunal ordered that a public reprimand take place and the barrister pay an AUD 20 000 fine.<sup>61</sup>

*Legal Services Commissioner v Mullins* can be seen to have dealt with an alleged omission of information rather than a lie, as initially, the material exchanged about the plaintiff’s life expectancy was correct — it was only shortly before the conference that the prognosis of the plaintiff changed. In effect, the barrister failed to draw the other side’s attention to the change in circumstances. The case also raised many ethical issues for a legal practitioner who was highly regarded for his ‘integrity and fairness’.<sup>62</sup> Notably, a similar action was also successful against his instructing solicitor who had remained silent during the

<sup>55</sup> *Legal Services Directions 2005* (Cth) app B.

<sup>56</sup> *Ibid* app B cl 5.1.

<sup>57</sup> *Ibid* app B cl 5.2.

<sup>58</sup> [2006] LPT 012 (23 November 2006).

<sup>59</sup> *Ibid* [29].

<sup>60</sup> *Ibid* [33].

<sup>61</sup> *Ibid* [36].

<sup>62</sup> Kay Lauchland, ‘Secrets, Half-truths and Deceit in Mediation and Negotiation: Lawyers Beware!’ (2007) 9(6) *ADR Bulletin*, 97.

negotiations.<sup>63</sup> Misleading conduct in an ADR process may raise additional issues. In the 2006 case of *Legal Practitioners Complaints Committee v Fleming*<sup>64</sup> it was noted that:

[T]he conduct of a practitioner might be regarded as misleading because an affirmative statement is made in circumstances which required some qualification. In this context, misleading and unprofessional conduct might also be made out where a practitioner states a partial truth, or in the context of making statements of fact, omits relevant information. It might extend to statements which are literally true but where a qualification is called for, or where a statement initially true becomes false in the course of the negotiations. And in some circumstances the duty to not bring the legal profession into disrepute and fairness to an opponent may require that the practitioner draw attention to a particular matter, even where the opponent's misapprehension is not induced by that practitioner.<sup>65</sup>

In relation to ADR processes specifically, it was noted that:

The public interest is served by practitioners encouraging an early settlement of their client's dispute. Indeed, practitioners are under a duty to seek such a settlement ... But, just as in litigation a practitioner may not use dishonest or unfair means or tactics to hinder his opponent in the conduct of his case (*D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 [McHugh J at 111]), so he ought not do so in other areas of practice. Arguably perhaps, for a number of reasons, the proscription against such conduct is more important in settlement negotiations.<sup>66</sup>

A different set of issues might arise if a legal practitioner lies in an ADR process. While legal practice in Australasia is very different from legal practice in the United States, a recent study found that approximately 30 per cent of lawyers in the United States were willing to lie for their clients about a material fact, even though prohibited by the 'Model Rules of Professional Conduct'.<sup>67</sup> In the United States, lawyers are required to act in good faith in that 'an attorney may not employ the settlement process in bad faith'.<sup>68</sup> This has however, been interpreted to mean that bluffing about settlement authority, omitting and distorting information, and even making threats, would not necessarily create issues for lawyers in the United States who are engaged in ADR processes.<sup>69</sup> In Australasia, this type of conduct might not only found an action in deceit but also breach professional ethical requirements; other actions could also be made out under legislation, such as the *Australian Consumer Law*.<sup>70</sup>

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<sup>63</sup> *Legal Services Commissioner v Garrett* [2009] LPT 12 (1 May 2009).

<sup>64</sup> [2006] WASAT 352 (7 December 2006).

<sup>65</sup> *Ibid* [73].

<sup>66</sup> *Ibid* [74].

<sup>67</sup> Art Hinshaw and Jess K. Alberts, 'Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics' (2011) 16 *Harvard Negotiation Law Review* 95. The authors presented 734 lawyers in Arizona and Missouri with a hypothetical scenario that explored: (i) their reaction to an improper request from their client; and (ii) their understanding of their obligations under such circumstances.

<sup>68</sup> American Bar Association, *Ethical Guidelines for Settlement Negotiations* (2002) 49.

<sup>69</sup> See Bette Roth, *Ethical Considerations for Advocates in Mediation* (2004) RothADR <<http://www.rothadr.com/pages/publications/ethics%20reprint.pdf>>.

<sup>70</sup> *Competition and Consumer Act 2010* (Cth) sch 2.

The Law Council of Australia has also considered the issue of lawyers' behaviour in negotiations that are part of ADR processes. In its 2011 *Guidelines for Lawyers in Mediations*, the Law Council stated that lawyers should '[n]ever mislead and be careful of puffing'.<sup>71</sup> Furthermore, the Law Council's *Model Rules of Professional Conduct and Practice* requires all lawyers to behave in a certain way and has extended the definition of 'court' to include mediation and arbitration.<sup>72</sup> In September 2011, the *Legal Profession National Law*<sup>73</sup> draft legislation was released but it does not deal explicitly with the conduct of lawyers in negotiation or ADR processes more generally. It is envisaged, however, that these matters will be the subjects of new national rules to follow the introduction of the *Legal Profession National Law*. In this regard, it is anticipated that new conduct rules and other obligations will be articulated in 2012.<sup>74</sup> Interestingly, the proposed *Legal Profession National Law* establishes a mediation scheme for consumers who complain about lawyers; it explicitly states that those involved in the scheme must act in good faith.<sup>75</sup>

Lawyers, and others involved in negotiations alike, may be additionally constrained by section 18 of schedule 2 of the *Competition and Consumer Act 2010* (Cth). This law is directed at the conduct of a person in trade or commerce that is misleading or deceptive, or is likely to mislead or deceive. The definition of 'trade or commerce' states that it 'includes any business or professional activity (whether or not carried on for profit)'.<sup>76</sup> The types of conduct that could be covered by this legislative regime might include situations where a lawyer is silent or if there are not reasonable grounds for making a statement.<sup>77</sup>

The concept of good faith has also been explored, but to a limited extent, by the business community. Directors of companies have duties under the *Corporations Act 2001* (Cth) to act in good faith, which is usually equated with a requirement to act honestly.<sup>78</sup> The originating Australian Standard AS 4608-1999<sup>79</sup> adopted a broader 'business' definition of good faith after debate among members of the Standards Committee. That definition incorporated elements of commitment, trust, respect, flexibility and confidentiality and the notion that '[p]arties should be confident that they can rely on the others in the relationship to do the right thing by each other'.<sup>80</sup> Furthermore, it has recently been suggested that case law in Australia and in England has largely granted recognition to the concept of good faith in business contracts.<sup>81</sup> It has also been suggested that an explicit recognition of a doctrine of good faith for contractual business dealings would:

permit problems of bad faith to be dealt with in a more direct manner and enable judges to develop effecting and coherent way[s] of dealing with complaints of unfair dealing. It would also help in the protection of reasonable expectations of contracting parties, and contribute significantly to an environment of trust and co-operation that would enhance in the long run the autonomy of the parties.<sup>82</sup>

<sup>71</sup> Law Council of Australia, *Guidelines for Lawyers in Mediations* (August 2011) 7 [6.2] <[http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=239F3A6A-1E4F-17FA-D287-7EB4754A29A0&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=239F3A6A-1E4F-17FA-D287-7EB4754A29A0&siteName=lca)>.

<sup>72</sup> Law Council of Australia, *Model Rules of Professional Conduct and Practice* (March 2002) <[http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=01EC79F6-1C23-CACD-2252-D298393FBFA0&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=01EC79F6-1C23-CACD-2252-D298393FBFA0&siteName=lca)>.

<sup>73</sup> Attorney-General's Department, *Legal Profession National Law* (24 September 2011) <[http://www.ag.gov.au/Consultationsreformsandreviews/Pages/Archive/CouncilofAustralianGovernments\(COAG\)NationalLegalProfessionReform.aspx](http://www.ag.gov.au/Consultationsreformsandreviews/Pages/Archive/CouncilofAustralianGovernments(COAG)NationalLegalProfessionReform.aspx)>.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*, s 5.3.4. Notably, in the United Kingdom, there is some reference to mediation in the barrister's code of conduct as amended in 2005. Rule 708.1 of the *Code of Conduct of the Bar of England and Wales* provides that: '[a] barrister instructed in a mediation must not knowingly or recklessly mislead the mediator or any party or their representative.' However, the Solicitor's Regulation Authority in the United Kingdom, in its *Code of Conduct 2011*, has not addressed these issues despite requiring conduct 'in court'; there is no mention in either the solicitor's or the barrister's code of a requirement to negotiate or engage in ADR in good faith or to be cooperative.

<sup>76</sup> *Competition and Consumer Act 2010* (Cth) sch 2 s 2.

<sup>77</sup> See Robert Angyal, 'The Ethical Limits of Advocacy in Mediation' (Paper presented at the 11<sup>th</sup> LEADR Conference, Brisbane, Australia, 8 September 2011).

<sup>78</sup> *Corporations Act 2001* (Cth) s 181.

<sup>79</sup> Standards Australia, *Guide to the Prevention, Handling and Resolution of Disputes* 1999) s 2. The definition was not included in the updated version.

<sup>80</sup> *Ibid.* See also *Capolingua v Phylum Pty Ltd* (1991) 5 WAR 137.

<sup>81</sup> Francis N Botchway, 'Can the Law Compel Business Parties to Negotiate?' (2010) 3(3) *Journal of World Energy Law and Business* 286, 300-1.

<sup>82</sup> *Ibid.* 302.

## VI CONCLUSION

Obligations to act in good faith in respect of ADR processes are now present in many Australian jurisdictions, and attempt to support more constructive negotiations among those in dispute. This is increasingly important, as those who attend ADR processes may be required to do so mandatorily. Under such circumstances, it is arguably less likely that attendance incorporates an open and honest attitude.

It is unclear what the impact of imposing these types of obligations will be. On the one hand, they may create a normative environment and sponsor more collaborative engagement in ADR — even when it is mandated. These types of impacts and the cultural changes that accompany them are difficult to measure (at least in the short-term). They may also support ADR practitioners by creating clearer standards to support constructive negotiation (ADR practitioners may in any event use a range of strategies where disputants and others display difficult behaviours). On the other hand, these types of obligations may not reduce excessively adversarial behaviour, and in some cases they may enable litigants to use the obligations as another weapon in their gladiatorial armoury.

Ultimately, judges and legislators will determine the impact of these changes and will be required to consider what is reasonable and what is not (or what is good and what is bad) and it will be their approaches that extend understanding in this area. Fortunately, there is a sound and developing body of case law to assist in the consideration of these issues from a first principles basis. More case law, as well as discussion about these issues, will provide information about expected behaviours in ADR and thereby support good faith negotiations, better quality and effective negotiations, and the expanding ADR system.