Good Faith in Australian and European Contract Law

Theory, Comparison and Reform

by

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Thesis
Submitted to Flinders University
for the degree of

PhD (Law)

College of Business, Government and Law

17 January 2019

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Summary

This thesis compares the development of different applications of the doctrine of good faith in contractual relations in the EU and in Australia. In these two legal systems, good faith has been used to address pressing issues of economic development, but the two jurisdictions struggle to implement good faith as a broad principle applicable to all contracts. This thesis investigates the development of the doctrine of good faith in each of these two jurisdictions.

The research uses the comparative law methodology in order to identify core similarities between the two jurisdictions. The latter include their trade relations, their shared history and federal-like characteristics, as well as their common struggle in regulating contracts and fair dealing. It then moves on to compare the topical applications of good faith in contract law and to identify the foundations for such application.

The first finding of the research is that there is a clear difference in the way good faith is approached in these two jurisdictions. The EU is pushing the integration of good faith through a top-down approach, driven by EU institutions. In Australia, however, a bottom-up approach, driven by private stakeholders and contractual parties, has been developing. The second finding concerns the clear distinction between business-to-business and business-to-consumer contracts. The EU has used good faith mostly to strengthen consumer protection within the internal market while Australia has associated good faith with some commercial transactions. The third finding shows that in spite of different approaches, both jurisdictions are facing the same issue of fragmentation of the rules and the development of a specialised law of contracts. In the EU, topical applications of good faith in some directives are influencing member states and the domestic integration of good faith but only for certain contractual relations. In Australia, industry specific codes of conduct are being enacted that recognise the duty to act in good faith in particular commercial transactions. The thesis argues that this fragmentation of the general law of contract and the topical applications of the doctrine of good faith are counterproductive to the promotion of trade and cross border exchange, and create uncertainty.

The thesis challenges this trend by proposing to integrate good faith as a mandatory and enforceable principle applicable to all contracts no matter the identity of the parties or the

purpose of the transactions. The development of a model based on the experience in Australia and the EU indicates that this research promotes fair dealing. The thesis acknowledges that the success of the recognition of this principle is dependent on the will and drive of different actors through different legal instruments. This research defends the need for such competition of norms to occur to promote a cohesive approach to promote good faith as a general principle of contract law.

Declaration

I certify that this thesis does not incorporate without acknowledgment any material previously submitted for a degree or diploma in any university; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person expect where due reference is made in the text

Signature:……Jessica Viven…….. Date: …06./…01./2019….

Table of Acronyms

ACCC	**Australian Competition and Consumer Commission**
ACL	Australian Consumer Law
ADR	Alternative Dispute Resolution
ASIC	Australian Securities and Investment Commission
CESL	Common European Sales Law
CISG	Convention on the International Sale of Goods
CJEU	Court of Justice of the European Union
COAG	Council of Australian Governments
DCFR	Draft Common Frame of Reference
ECJ	European Court of Justice
EU	European Union
PECL	Principles of European Contract Law
PICC	Principles on International Commercial Contracts
SBC	Small Business Commissioner

Acknowledgements

I would like to express my sincere gratitude first and foremost to my supervisors Professor Simon Marsden and Dr Sulette Lombard. I originally approached them for both their work ethics and professional skills. Their consistent feedback, support and insights throughout my candidature have been exceptional. Their attention to detail and enthusiasm for this project helped me to continuously believe I could complete it.

I would like to thank the Australian Executor Trustees for awarding me the Joyner Scholarship in Law in 2012.

My thanks also go to the Postgraduate Coordinators at Flinders Law School, namely to Associate Professor Marinella Marmo for telling me to stop apologising, to Dr Maria Giannacopoulos for believing in me when I did not, to Dr Nerida Chazal for her advice and wonderful friendship.

I must extend my thanks to the Hon Paul Finn, Emeritus Professor Suzanne Corcoran and Professor Malcolm Feeley for their guidance and insights during the early stages of my candidature. Sincere thanks also go to Kate Leeson for for her diligent proofreading of this work.

Thanks also go my colleagues at Adelaide Law School for their support and encouragement in the late stages of this project. A special mention goes to Dr Colette Langos, a colleague and a friend whose ‘joie de vivre’ has kept me going even when I doubted myself.

I am grateful to have had such wonderful fellow PhD candidates with whom I shared laughs and tears throughout this endeavour. I would like to thank especially Miss Samantha Kontra for her support, hugs and soothing knitting skills; Mrs Danielle Misell for her smiles and listening skills; Miss Rhiannon Bandiera for her support and sharing of foodie adventures; Dr Claire Joachim for her motivation and encouragement.

Finally to my husband, Mr Thomas Wilksch and his family for enduring my mood swings and for being a constant support and source of love and comfort but also for ensuring the house was kept clean and meals were served when I was immersed in my project.

Introduction

> [R]ather than construing contracts to include good faith, it might be better to assume and expect that contracts incorporate such a doctrine as a basis for contracts in society, given their typically relational nature, as an expected norm of behaviour, rather than something considered on a case by case basis, or imputed into some classes of contracts in cases of "necessity", creating further hurdles to acceptance of something that people should be entitled to expect of those with whom they contract.[1]

This thesis presents a comparative analysis of the doctrine of good faith in contractual dealings in Australia and the EU. Both are debating the possible identification of the best place for the doctrine and its enforcement in contract law.[2] It will demonstrate that notions of fair dealing and recent law reform projects[3] place good faith at a crossroads between law and morals.[4] Through an analysis of the current uses of the doctrine of good faith within contract law in these jurisdictions, it is an original contribution to the field of comparative law and its methodology, domestic and international contract laws and the debate surrounding the doctrine of good faith in contracts.

Good faith has been at the heart of discussions on the possible reform of Australian contract law since the NSW Court of Appeal decided to bring good faith into the contractual landscape.[5] More recently, the discussion was brought to the foreground after it was acknowledged that 'Australian contract law is a little tired, a little inadequate to the world in which it now finds itself.'[6] In 2012, the Australian Attorney General's Department (AG Department) launched a discussion on the possible reform of Australian contract law.[7] An important part of the discussion related to the possible recognition of an explicit duty to act in good faith in Australian contract law, an issue that still divides lawyers, judges and legislators. Even though

[1] Anthony Gray, 'Good faith in Australian Contract Law after Barker' (2015) 43 *Australian Business Law Review* 358, 378.
[2] Chapter 4, I.
[3] *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* COM/2011/0635 final - 2011/0284 (11 October 2011); Australian Government, Attorney General's Department, *Improving Australia's Law And Justice Framework: A Discussion Paper To Explore The Scope For Reforming Australian Contract Law* (2012).
[4] Chapter 3, II, B.
[5] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.
[6] Paul Finn, 'The UNIDROIT Principles: An Australian Perspective' (2010) *Australian International Law Journal* 193, 193.
[7] Australian Government, Attorney General's Department, *Improving Australia's Law And Justice Framework: A Discussion Paper To Explore The Scope For Reforming Australian Contract Law* (2012).

legislative and judicial initiatives have introduced good faith into certain aspects of contract law, Australia has not clearly and explicitly recognised the doctrine as an enforceable duty in contract law. The lack of a Commonwealth initiative means that there are fragmented interpretations, illustrating the lack of a coherent approach throughout the nation state. To address the uncertainty as to the place of good faith in Australian contract law, industry codes have been produced and revised.[8] This has led to the recognition of good faith in some industry sectors, further contributing to the fragmentation of Australian contract law and the development of a law of contracts instead of a general law of contract.

In order to tackle the issue of the reform of contract law as prompted by the discussion paper, submissions referred to the need to internationalise contract law.[9] Such internationalisation 'generally involves harmonising one country's contract law with the contract law of other countries (for example, the country's trading partners) or with principles developed by international organisations.'[10]

In order to provide insights into where reform must occur in relation to good faith in contract law and how to resolve current issues of fragmentation, it is therefore necessary to determine whether Australia's contract law could benefit from harmonisation in line with that of its trade partners, and more especially good faith as a principle of contract law.[11] Indeed, the Australian situation is in stark contrast with principles of good faith in international law, as well as with the laws of some Australian trading partners.

Firstly, in the context of international law good faith is imposed in relation to the performance of an obligation laid out in treaties. International agreements made between states can be seen as contracts, hence calling states contracting parties. The *Vienna Convention on the Law of Treaties*[12] compels state parties to respect '*pacta sunt servanda'*. This principle has been

[8] *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth); *Competition and Consumer (Industry Codes—Horticulture) Regulations 2017* (Cth)*; Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Cth).

[9] This is also developed in the context of legal education, see CALD, *Internationalising the Law* curriculum, http://curriculum.cald.asn.au/example-contract-law/ (28 October 2015).

[10] AG's Department, Infolet 6-Should contract law be internationalised? (2 July 2012). http://www.ag.gov.au/Consultations/Pages/ReviewofAustraliancontractlaw.aspx, 1.

[11] Australian Government, Attorney General's Department, *Improving Australia's Law And Justice Framework: A Discussion Paper To Explore The Scope For Reforming Australian Contract Law* (2012), 11; AG's Department, 'Infolet 6-Should contract law be internationalised? (2 July 2012), <http://www.ag.gov.au/Consultations/Pages/ReviewofAustraliancontractlaw.aspx>.

[12] *Vienna Convention on the Law of Treaties* opened for signature 23 May 1969 1155 UNTS 331(entered into force

interpreted as meaning that treaties are binding upon the parties to them and that states must perform their obligations in good faith.[13] Secondly, Australian trade partners have recognised good faith. These include the two largest, China and Japan.[14] Japan has developed a concept based on the French perspective and integrated the duty of good faith as a fundamental principle applicable to the exercise of rights and the performance of obligations.[15] Chinese law goes further by not only imposing good faith on the exercise and performance of contractual obligations[16] but also in other legal disciplines, including trademark law.[17] Furthermore, good faith in contractual dealings is also mandated under the laws of other trade partners in Europe, such as France and Germany, or in North America including the USA and Canada.[18]

This introduction defines the scope of the research, its objective and structure. Section I highlights the context of the study. Section II sets out the problem, the research proposal and the questions that are addressed by this research. Section III develops the aim and scope of the thesis, while Section IV presents the significance of the study. Finally, Section V provides an overview of the study and demonstrates how it answers the research questions.

I. CONTEXT OF THE STUDY

Good faith has been under consideration in Australian contract law since 1992;[19] it was controversial then and still is today.[20] It is yet to be clarified, understood by the legal community and used by businesses in their agreements. Written submissions to the discussion paper on a reform of Australian contract law show a clear divide among concerned stakeholders, be they academics, practitioners or companies, as to whether Australian contract

27 January 1980) parties include: Australia, Canada, Germany, china, Japan, UK, USA. France famously refused to sign the convention and is not a party to it. See status of the Convention at https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en (28 April 2016).

[13] *Vienna Convention on the Law of Treaties* opened for signature 23 May 1969 1155 UNTS 331(entered into force 27 January 1980) art 26.

[14] Australian Government, Attorney General's Department, *Improving Australia's Law And Justice Framework: A Discussion Paper To Explore The Scope For Reforming Australian Contract Law* (2012), 11.

[15] *Civil code* (Japan) (1896) art 2.

[16] *Contract Law* (People's Republic of China), art 6.

[17] *Trademark Law* (People's Republic of China), art 7, 'the application for registration and the use of a trademark shall be made in good faith'; good faith is also found throughout the text of the law.

[18] This will be analysed further in Chapter 1, 61.

[19] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.

[20] See Chapter 4. I. D.

law should incorporate an explicit duty to act in good faith.[21] This divide can be found more broadly in the literature, which oscillates between two extremes either towards the recognition of good faith as a principle,[22] or a rejection of the doctrine in common law.[23] The lack of consensus as to what good faith means legally, to what situations it can be applied, and whether it is compatible with the Australian legal system, are some of the issues at the core of the discussion. While new legislative proposals have given a broader place to good faith in some contractual dealings, a cohesive national approach is yet to appear.[24]

This research provides a forum to analyse these issues while providing a comparative background to show that Australia is not the only jurisdiction to struggle with finding a place a principle of acting in good faith. The EU is facing a similar struggle. In this context it is important to note that both the EU and Australia have an internal market to regulate: the EU market formed by the sum of its member states,[25] the Australian market made up of its states and territories.[26] Such markets must be regulated in a way that will ensure fair trade between parties. Regulation of contracts has a direct role to play in this endeavour.[27] As such, the

[21] Hon TF Bathurst submission No55 to AG Department, *Improving Australia's Law And Justice Framework: A Discussion Paper To Explore The Scope For Reforming Australian Contract Law* 20 July 2012, 13: good faith on case by case basis; University of Sydney, Submission No31 to AG Department, *Improving Australia's Law And Justice Framework: A Discussion Paper To Explore The Scope For Reforming Australian Contract Law* 20 July 2012, 2: good faith may generate uncertainty; Philip H Clarke, Julie N Clarke, Submission No40 to AG department, *Improving Australia's Law And Justice Framework: A Discussion Paper To Explore The Scope For Reforming Australian Contract Law* 20 July 2012, 2: 'unpersuaded that a doctrine of good faith should be introduced into Australian law'; Bruno Zeller Submission, No2 to AG Department,, *Improving Australia's Law And Justice Framework: A Discussion Paper To Explore The Scope For Reforming Australian Contract Law* 20 July 2012, 2; Andrew Stewart, Submission No37 to AG Department,, *Improving Australia's Law And Justice Framework: A Discussion Paper To Explore The Scope For Reforming Australian Contract Law* 20 July 2012, 1-2*;* Luke Nottage, Submission No8 to AG Department,, *Improving Australia's Law And Justice Framework: A Discussion Paper To Explore The Scope For Reforming Australian Contract Law* 20 July 2012, 2.

[22] Roger Brownsword, 'Two Concepts of Good Faith' (1994) 7 *Journal of Contract Law* 197; Hugh Collins, 'Good faith in European Contract Law' (1994) 14 *Oxford Journal of Legal Studies* 229;Ole lando, 'The Common Core of European Private Law and the Principles of European Contract Law, (1997-1998) 21 *Hastings International and Comparative Review* 809; Angelo DM Forte, *Good Faith in Contract and Property* (1999); Elisabeth Peden, 'Incorporating Terms of Good Faith in Contract Law in Australia (2001) 23 *Sydney Law Review* 233; Ole Lando, Hugh Beale (eds), *Principles of European Contract Law, Parts I and II* (Combined and Revised) (Kluwer Law International,2000); Bruno Zeller, 'Good Faith - Is it a Contractual Obligation?' (2003) 15(2) *Bond Law Review* 215; Guillaume Busseuil, *Contribution à L'étude de la Notion de Contrat en Droit Privé Européen* (LGDJ, 2008); John Carter, 'Good Faith in Contract: Why Australian Law is Incoherent' (Legal Studies Research Paper No 14/38, Sydney Law School, 2014).

[23] Brendan Hoffman, Rohan Dias, '20 Years on from Renard Constructions- Is the Contractual Duty of Good Faith Any Clearer?' (2012) *Australian Construction Law Bulletin* 23; Noel McGrath, 'Good Faith: A Puzzle for the Commercial Lawyer' (UCD Working Papers in Law No 11, 2014).

[24] *Competition and Consumer (Industry Codes—Food and Grocery) 2015 Reg(Cth)*; *Competition and Consumer (Industry Codes—Franchising) 2014 Reg* (Cth); *Small Business Commissioner Act 2011* (SA).

[25] *Consolidated version of the Treaty on the Functioning of the European Union* 2012 OJ C 326/47.

[26] *Australian Constitution.*

[27] See Chapter 3.II.A.2.

situation in both jurisdictions makes it clear that any contract law reform would have to facilitate and promote not only cross border trade but also domestic trade. As part of this regulation, good faith is also important as it can regulate party behaviour in order to promote fair dealing.

There are some trends to support the development of international instruments that incorporate good faith.[28] This has over time created a new dynamic towards the domestic recognition of good faith.[29] Industry specific codes also provide for good faith,[30] further illustrating the need for a clear recognition of good faith in contractual dealings, may they be domestic or international.

In investigating the potential development of good faith, despite the need to take into consideration the so called internationalisation of contract,[31] it is important to look into the current state of 'domestic law'. Like the Australian Parliament, the European Parliament has regulated certain aspects of contract law. Good faith has been stipulated in European directives targeting specific areas of contract law.[32] The principle of good faith has also been used in academic European compilations and the efforts for recognition as an enforceable principle of European contract law is slowly gaining momentum.[33] This is part of a broader move to harmonise contract law in the EU, which is necessary for the establishment and flourishing of an internal market.[34] The involvement of the European institutions in contract law is also an example of the political will to develop a common European culture, with common values,[35]

[28] *Vienna Convention on the Law of Treaties* opened for signature 23 May 1969 1155 UNTS 331(entered into force 27 January 1980); *Unidroit Principles for International Commercial Contracts*, 2010.

[29] Bruno Zeller Submission, No2 to AG Department, *Improving Australia's Law And Justice Framework: A Discussion Paper To Explore The Scope For Reforming Australian Contract Law* 20 July 2012.

[30] See above n 8.

[31] Mary Keyes, 'The Internationalization of Contract Law' in Mary Keyes, Therese Wilson, *Codifying Contract Law: International and Consumer Law Perspectives* (Routledge 2014); Australian Government, Attorney General's Department, *Improving Australia's Law And Justice Framework: A Discussion Paper To Explore The Scope For Reforming Australian Contract Law* (2012).

[32] Bénédicte Fauvarque-Cosson (dir), *Terminologie Contractuelle Commune* (LGDJ 2008) 25; *Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours* [1990] OJ L 158/59 art 2(5); *Directive 97/7/EC of the European Parliament and of the Council on the protection of consumers in respect of distance contracts* [1997] O.J. L 144/19 art 2.

[33] *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* COM/2011/0635 final - 2011/0284 (11 October 2011).

[34] Commission, Communication to the Council and the European Parliament *on European Contract Law* 2001 398 O.J C 255; see discussion in Part Two of this thesis.

[35] See good faith presented as a general principle in Commission of the European Communities, *Green Paper on the Review of the Consumer Acquis* COM (2006) 744 final (February 2007) 17; Scott C Styles, 'Good faith: a principled matter' in Angelo DM Forte ,*Good Faith in Contract and Property* (1999) 157; Ole Lando, Hugh Beale (eds), *Principles of European Contract Law, Parts I and II* (Combined and Revised) (Kluwer Law

where good faith is to play a major role in the contract law program.[36]

Yet, in spite of EU institutions' efforts to develop such values of fairness in contractual dealings, they are facing numerous challenges. The first one is the reluctance of the UK to integrate good faith and its refusal to sign the *Convention on the International Sale of Goods* demonstrates the strong stance taken by this jurisdiction. [37] The second issue relates to the current state of EU contract law, its foundations and its current fragmented approach. While oscillating between use of directives and minimum harmonisation between member states' legislation to full harmonisation,[38] the EU debate also questions the apparent limitations of EU institutions to regulate EU contract law under European constitutional law.[39] In spite of this resistance, a closer analysis will show that it can be beneficial for both Australia and the EU to learn from each other's experience in order to move the debate on good faith in contract law forward.

To understand the issues faced by both Australia and the EU, it is necessary to situate the topic within the broader area of contract law. In addition to the requirements of offer and acceptance, a contract needs the intent of the parties to enter into a legally binding transaction.[40] This shapes the contractual framework governing the relationship and the contractual terms of the agreement. The behaviour of the parties, in formulating their intent to contract and in performing their obligations, forms the start of the argument of this thesis.[41] Chapter 3 will develop this connection between morals and law further through the example of good faith in contract. It is important to highlight that good faith in contract focuses on the relationship between the parties and their behaviour. The question turns to the need to determine the place of regulation in contract law where freedom of contract, through party autonomy, and the choice of the parties of the terms of the contract, is predominant.[42] The relationship between

International,2000); James Allsop, 'Good faith and Australian Contract Law: a Practical Issue and a Question of Theory and Principle' (2011) 85 *Australian Law Journal* 341; see Part Three of this thesis.

[36] *Council Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents* [1986] OJ L 382/17 art3-4; *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts* [1993] OJ L 95/29 Preamble and art 3.

[37] Nathalie Hofmann, 'Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe' (2010) 22 *Pace International Law Review* 145.

[38] See Chapter 5, 224.

[39] For a review of these limitations, see Kathleen Gutman, *The Constitutional Foundations of European Contract Law A Comparative Analysis* (OUP, 2014) 277.

[40] *Merritt v. Merritt* [1970] 1 WLR 1211, 1213; for EU Chapter 2, 103.

[41] Chapter 3.II B.

[42] See classical theory in, Jeannie Paterson, Andrew Robertson, Arlen Duke, *Principles of Contract Law* (Thomson Reuters, 4th ed, 2011) 4.

the parties is at the heart of legal efforts to regulate contract law.[43] The rationale for integrating good faith in contract law is to protect weaker parties and to take into account the needs of the other contractual party, to cooperate to achieve successful performance of the contractual obligations. However, the doctrine of good faith does have some boundaries as it does not extend to acting selflessly to one's own detriment,[44] but instead only asks one party to take into consideration the legitimate interests of the other.[45] Therefore, this differentiates the doctrine from fiduciary duties,[46] The express fiduciary duty is to act in the interest of another and because of this, this duty is not analysed by this thesis.[47]

In Australia, the question of reforming contract law brings the place of good faith in contract regulation back into the spotlight. Both Australia and the EU are currently considering reform options for all or a substantial or part of their contract law. In March 2012, the Attorney General's department's discussion paper on the possible reform of Australian contract law referred to good faith as an 'unclear'[48] principle. Later in 2012, short guidance documents called 'infolets', were released to supplement the paper and guide the discussion. These make express reference to good faith and the question of its explicit recognition in a common law country.[49] Meanwhile in the EU, a proposal presented the concept of good faith and fair dealing as a general principle.[50] On the one hand, the Australian Attorney General's Department's discussion paper on a reform of Australian contract law in 2012,[51] and, on the other hand, the European Union's proposal for a Common European Sales law (CESL)[52] have moved towards a broader regulation of their respective contract law. Even though both reforms have been shelved,[53] they represent an attempt at tackling contract law reforms and within it the role of

[43] Chapter 3.II.C.
[44] Chapter 3.II.C.1.
[45] Chapter 3.II.C.2.
[46] See John W Carter and Michael P Furmston, 'Good Faith and Fairness in the Negotiation of Contracts Part I' (1994) 8 *Journal of Contract Law* 1, 6; Paul Finn, 'The Fiduciary Principle' in TG Youdan *Equity, Fiduciary And Trusts* (1989) 1, 4 and reproduced in Andrew Terry, Cary Di Lernia, 'Franchising and the Quest for the Holy Grail: Good Faith or Good Intentions' (2009) 33 *Melbourne University Law Review* 542, 554.
[47] More reference to the difference will be made in Chapter 3.II.C.2.
[48] Australian Government, Attorney General's Department, *Improving Australia's Law And Justice Framework: A Discussion Paper To Explore The Scope For Reforming Australian Contract Law* (2012) 8.
[49] A full list of the questions and infolets can be found at <http://www.ag.gov.au/Consultations/Pages/ReviewofAustraliancontractlaw.aspx> (2 July 2012).
[50] *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* COM/2011/0635 final - 2011/0284 (11 October 2011) art 2.
[51] Australian Government, Attorney General's Department, *Improving Australia's Law And Justice Framework: A Discussion Paper To Explore The Scope For Reforming Australian Contract Law* (2012)
[52] *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* COM/2011/0635 final - 2011/0284 (11 October 2011).
[53] Lack of information on AG website; and for CESL see Chapter 4.II.C.

good faith since 2011. Further research is consequently required to understand these reforms and their fate, and inform future reforms. This thesis contributes to that research.

II. AIM AND SCOPE

The focus of this research is on good faith in contract law and the steps towards its recognition, and application in contract law in Australia and the EU. The thesis addresses the use of the doctrine in contractual dealings and the importance of the nature of the contractual relationship. It aims to demonstrate the reasons why good faith is used in some contractual dealings in spite of concerns about the doctrine being of civil law origin and uncertain. It therefore aims to address these concerns; it also examines how good faith already interacts with certain contractual dealings in Australia and the EU; and discusses who has been driving such interactions. The aim is ultimately to propose a mandatory and enforceable principle of good faith applicable to every contract, flexible enough to adapt to different applications but strong enough to ensure fairness in contractual dealings, be they domestic or international.

The focus of this thesis is on the analysis of the development of good faith in contract law at the European Union and federal Australian levels. Therefore, while it may refer to state and territories' decisions in Australia and member states' regulations in the EU as topical examples, the focus is on federal Australian law and EU laws. Furthermore, even though good faith is used in different areas, from international law to employment law[54] the focus of the research is on the application of good faith in contract law. This research takes an overarching approach and tries to determine the need for and possible framework of a cohesive and broader approach to good faith in contractual dealings.

[54] *Vienna Convention on the Law of Treaties* opened for signature 23 May 1969 1155 UNTS 331(entered into force 27 January 1980); *Commonwealth Bank of Australia v Barker* [2014] HCA 32.

III. PROBLEM STATEMENT

A The problem

Good faith is a concept that creates uneasiness and confusion due to the lack of precision of the doctrine in law, whether among academics,[55] parliamentarians[56] or judges.[57] Good faith is a "chameleon" doctrine.[58] The adaptability of the doctrine is seen as synonymous with uncertainty.[59] The doctrine of good faith is facing much criticism due to its lack of definition. For instance, Bridge stated that '[g]ood faith means different things to different people in different moods at different times and in different places.'[60] Furthermore, good faith is often qualified as a civil law based concept which is particular to civil countries such as France and Germany and this in itself is a ground to reject the recognition of the concept in a common law country such as Australia.[61] The research in this thesis explores and exposes these criticisms and demonstrates the uncertainty created by the lack of clear stance on the recognition of good faith in contractual dealings and the apparent discrepancies between law and practice in this

[55] Ole Lando, Hugh Beale (eds), *Principles of European Contract Law, Parts I and II* (Combined and Revised) (Kluwer Law International, 2000); James Allsop, 'Good faith and Australian Contract Law: a Practical Issue and a Question of Theory and Principle' (2011) 85 *Australian Law Journal* 341; Mary Arden, 'Coming to Terms with Good Faith' (2013) 30(3) *Journal of Contract Law* 199; Jack Beatson and David Friedmann (eds), *Good Faith and Fault in Contract Law*, (Clarendon Press, Oxford, 1995); Penny Brooker, 'Mediating in Good Faith in the English and Welsh Jurisdiction: Lessons from Other Common Law Countries' (2014) 43 *Common Law World Review* 120; John Carter, 'Good Faith in Contract: Why Australian Law is Incoherent' (Legal Studies Research Paper No 14/38, Sydney Law School, 2014); William M. Dixon,'Good Faith in Contractual Performance and Enforcement: Australian Doctrinal Hurdles' (2011) 39(4) *Australian Business Law Review* 227; Jeannie Marie Paterson, 'The Contract to Negotiate in Good Faith: Recognition and Enforcement' (1996) 10 *Journal of Contract Law 1*20; Elisabeth Peden, 'Incorporating Terms of Good Faith in Contract Law in Australia (2001) 23 *Sydney Law Review* 233; Raphael Powell, 'Good Faith in Contracts' (1956) 9 *Current Legal Problems* 17; Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11.

[56] See for instance Parliamentary Debate on inclusion of good faith in Small Business Commissioner Act 2011 (SA) 'South Australia, *Parliamentary Debates*, House of Assembly, 14 September 2011, 4968-79 (Tony Piccolo)'.

[57] *Yam Seng PTE Ltd v International Trade Corp Ltd* (2013) EWHC 111 (QB); *Group UK and Ireland Ltd (as Medirest) v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200; *Compass Group v Mid-Essex NHS Trust* [2013] EWCA Civ 200; *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289.

[58]Travaux de l'Association Henri Capitant, *La bonne foi* (Litec,1994) 8.

[59] Michael Bridge, 'Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith' (1984) 9(4) *The Canadian Review Business Law Journal* 385; Clayton P. Gilette, 'Limitations on the Obligation of Good Faith' (1981) *Duke Law Journal* 619; University of Sydney, Submission No 31 to Attorney General's Department, *Improving Australia's Law And Justice Framework: A Discussion Paper To Explore The Scope For Reforming Australian Contract Law*, 20 July 2012.

[60] Michael Bridge, 'Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith' (1984) 9(4) *The Canadian Review Business Law Journal* 385, 407.

[61] Reinhard Zimmermann and Simon Whittaker (ed), *Good Faith in European Contract Law* (Cambridge, 2000) 15; Roger Brownsword, Norma J. Hird, Geraint G. Howells, *Good Faith in Contract: Concept and Contex*t (Ashgate,1999).

area.

Despite this lack of definition and these criticisms, good faith is said to be present in more than 150 Australian statutes.[62] Therefore Australian law is unsettled since good faith is already stipulated in a large array of topics including trademarks,[63] consumer protection,[64] and native title.[65] It is used, either as a defence,[66] as a statutory obligation,[67] or as a requirement through its implication as a matter of fact or of law.[68] Yet, there is no explicit recognition of good faith in Australian contract law. Since the High Court of Australia has avoided expressing its views so far,[69] lower courts are left to interpret the contours of the notion.[70] This has also led to a lack of general understanding of the principle, and provided arguments for the opponents of good faith being recognised in Australian contract law. However, in spite of the academic oscillation between recognising and explicitly rejecting good faith, the business community is slowly integrating the doctrine in its contractual dealings through codes of conduct and standards in specific industries.[71] This move is therefore pushing towards the recognition of good faith in contract law, and proving the need for the legislature and the judiciary to promote fair dealing in transactions and ensure parties keep to their word.

In certain instances, the way parties express their consent, and perform their duties can be unfair. Legislatures have intervened by introducing protective measures to ensure the equilibrium between parties is maintained and the contract is performed.[72] This is where good faith has been used.[73] In Australia, good faith has been used in consumer protection[74] and

[62] Robert French, 'Judges and academia - building bridges' [2007] FedJSchol 12, speech presented at *Fragmentation or Consolidation? Fostering a Coherent Professional Identity for Lawyers* the Australian Academy of Law Symposium, Brisbane (17 July 2007).
[63] *Trade Marks Act 1995* (Cth) ss 18; 22; 61; 92.
[64] *Australian Consumer Law, Competition and Consumer Act 2010* (Cth) sch 2 s 22; s 210; s 211.
[65] *Native Title Act 1993* (Cth) ss 24IB; 24 JA; 31.
[66] *Australian Consumer Law, Competition and Consumer Act 2010* (Cth) sch2 ss 210-211.
[67] *Competition and Consumer (Industry Codes—Franchising) 2014 Reg* (Cth) s 6.
[68] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.
[69] *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289.
[70] Robert French, Judges and academia - building bridges' [2007] FedJSchol 12, speech presented at *Fragmentation or Consolidation? Fostering a Coherent Professional Identity for Lawyers* the Australian Academy of Law Symposium, Brisbane (17 July 2007).
[71] See Chapter 5.II.A.2.
[72] *Australian Consumer Law, Competition and Consumer Act 2010* (Cth) sch 2.
[73] *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts* [1993] OJ L 95/29; *Competition and Consumer (Industry Codes—Food and Grocery) 2015 Reg* (Cth); *Competition and Consumer (Industry Codes—Franchising) 2014 Reg* (Cth).
[74] *Australian Consumer Law, Competition and Consumer Act 2010* (Cth) sch 2 s 22.

recently in small business legislation.[75] It has also been enacted as a duty in mandatory and voluntary industry codes.[76] Similarly, at the EU level, a duty to act in good faith is imposed on parties in a commercial agency agreement,[77] while the doctrine of good faith is a core determinant in deciding whether a term is unfair in consumer contracts.[78] These examples demonstrate situations where party autonomy is not fully exercised, when one party is considered 'weaker' and therefore in need of protection.[79] Interestingly, the use and recognition of good faith in areas of contract law is developing more and more, therefore making this research potentially valuable in gaining insight into the development of the doctrine in both jurisdictions.

Scholarly work, from the drafting of Principles of European Contract Law[80] to the Draft Common Frame of Reference for European Contract Law[81] has provided the foundation for new EU initiatives and paved the way towards the recognition of good faith as an enforceable principle of general contract law.[82] In the EU, the recognition of a European contract law is part of a broader debate in relation to the existence of such a body of European contract law. The lack of a clear mandate in the instituting treaties has led to the development of a targeted approach to European contract law, leading to topical applications of good faith in consumer protection[83] and commercial agency.[84] However, the difficulties associated with the regulation of contract law at European level[85] have created challenges. Enforcing a set of rules, including a duty to act in good faith applicable to European contracts, is yet to be enacted. This aspect is

[75] *Small Business Commissioner Act 2011* (SA) s 5(2).
[76] *Competition and Consumer (Industry Codes—Food and Grocery) 2015 Reg(Cth)* s 28; *Competition and Consumer (Industry Codes—Franchising) 2014 Reg* (Cth) s 6; *Small Business Commissioner Act 2011* (SA) s 5(2).
[77] *Council Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents* [1986] OJ L 382/17.
[78] *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts* [1993] OJ L 95/29.
[79] The determination of the weaker party in Australia and the EU will be analysed further in Chapter 5.
[80] Ole Lando, Hugh Beale (eds), *Principles of European Contract Law, Parts I and II* (Combined and Revised) (Kluwer Law International,2000).
[81] Study group on a European Civil Code, Research Group on EC Private law (Acquis Group) *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference* (DCFR) (Sellier 2009).
[82] Study group on a European Civil Code, Research Group on EC Private law (Acquis Group) *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference* (DCFR) (Sellier 2009); *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* COM/2011/0635 final - 2011/0284 (11 October 2011).
[83] *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts* [1993] OJ L 95/29.
[84] *Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents* [1986] OJ L 382/17.
[85] For example, lack of definition of the doctrine of good faith at the EU level, fragmented approach to contract law and topical application of good faith, uncertainty concerning the application and the interpretation of the notion will be discussed in PART Two (Chapters 4 and 5) of the thesis.

explored further in the second part of this thesis.[86]

B Methodology and questions

This research explores how a clear and explicit recognition of the doctrine of good faith in Australia could improve the efficiency of exchanges, reduce legal costs and reconcile the law with the needs of the community to promote fair dealing. It aims to determine why, in spite of the lack of definition, the doctrine of good faith is used more and more in legislation and industry codes. The Australian situation will be compared to the experience of the EU, the birthplace of good faith. This thesis will show that each legal order faces similar challenges and can benefit from the other's experience to draw lessons for the integration of good faith in contract law.

The research focuses on the analysis of the phenomenon in which good faith appears in contract law in spite of criticisms. It considers for reasons for a resurgence of the doctrine in modern contract law in both Australia and the EU; and it examines how good faith is used in contract law as a protectionary tool. The hypothesis is that a principle of good faith in contract law may provide certainty and protection to contractual parties no matter who they are; whether consumer or small business or larger business; or indeed the type of transaction. In order to test and substantiate this hypothesis, it is important to outline the research questions followed by the research methodology that this thesis will use to attempt to provide answers.[87]

1. The questions

The hypothesis laid out by this thesis is that the current topical applications of good faith in contract law have contributed to the fragmentation of contract law and led to the uncertainty as to whether or not parties are under a duty to act in good faith. Therefore, the main question is to determine whether an explicit recognition of the concept of good faith in contract law in Australia and the EU could bring more certainty and predictability in contractual exchanges. Faced with the context surrounding the Australia and the EU as laid out above, this research

[86] Especially in Chapter 5.
[87] Neil J. Salkind, *Encyclopedia of Research Design* (Sage, 2010) 'hypothesis' 586.

addresses three main questions.

The first question, analysed in Part One of the thesis, relates to the definition of comparative law within the context of the object of the research: good faith in contract law in Australia and the EU. This points out the methodology used and explains the relevance of the research design. Under this question, different issues are highlighted by the following sub-questions:

- What makes the two studied jurisdictions, Australia and the EU, comparable?
- What is the best approach to compare the development of good faith within these two jurisdictions?
- Are there any commonalities in the sources of the doctrine of good faith in these jurisdictions?

The second question, analysed in Part Two of the thesis, relates to the contemporary use of good faith in contractual dealings in Australia and the EU. This applies the comparative methodology to identify similarities and differences between the two jurisdictions. Under this question, the following issues are examined as framed by these sub-questions:

- What are the legislative and judicial applications of good faith in contract law in Australian and EU contract laws?
- What is the rationale for such application?
- How is good faith presented in each jurisdiction?
- Whether good faith could be a principle
- Is good faith a duty?
- Is there any other body of rules that promote good faith in contract law in these jurisdictions?
- What are the challenges encountered in each jurisdiction?

The third question, analysed in Part Three of the thesis, relates to the identification of avenues for reform, following the assessment based on the comparison of the jurisdictions. This identifies the potential solution to remedy the fragmentation of contract law and the uncertainty of the parties in determining whether a duty to act in good faith is imposed in a particular transaction. Under this heading, the following issues are raised by the sub-questions below:

- What form should good faith take to be successfully integrated in contract law?
- What purpose should such integration aim to achieve?

- What vehicle is the most appropriate?
- Who should be leading such reform?

2. **The methodology**

There are two main aspects to the methodology of this research. Firstly, this thesis is based on documentary doctrinal research. Secondly, it is a comparative analysis.

i.Documentary doctrinal research

This research compares the application of good faith in EU and Australian contract law through a documentary doctrinal approach.[88] It explores party behaviour and its sanction or promotion in the context of contractual agreements through the situations presented before the courts (case law) and the situation tackled by the legislature (statutes). These form the primary sources used for the analysis. A documentary doctrinal approach has been chosen because an analysis of judicial decisions and legislative enactments will help identify the patterns that lead to the use of good faith in contract regulation. Through the exploration of behaviours, their meaning and context within these documents, there is a qualitative aspect to this research.[89]

Through a documentary based analysis, the research investigates theories relating to both comparative law and the moral influences on contract law. The selection of materials for this research is a factor in the success of the thesis and the analysis. To do so, it is important to carefully select primary and secondary legal materials.[90] Therefore, case law, statutes and scholarly commentaries will be analysed in this thesis. Furthermore, besides these traditional sources, there is consideration of codes of conduct as they are used more and more as the vehicle used to integrate good faith in contract law.[91]

[88] For an analysis of the need to explain methodology in legal research see, Terry Hutchinson, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83.
[89] Lisa M. Given, *The Sage Encyclopaedia of Qualitative Research Methods* (Sage, 2008) 517.
[90] Roberta Morris, Bruce D Sales and Daniel W Shuman, 'Introduction to Legal Research, in *Doing Legal Research* (Sage, 1997) 2.
[91] See Chapter 5.II.A.2.

An analysis of the choice of these documents and their influence in shaping contract law in Australia and the EU will be provided in Chapter 2.[92] These documents act as informants[93] of the law in the two jurisdictions but also as formants in that they shape the law and its evolution.[94] The instrumental role these instruments play in the integration of good faith in contract law will shape the recommendations for reform this thesis will subsequently advance.[95]

Following from the collection of these documents and sources, analysis will be carried out to demonstrate the similarities and differences in the way good faith is used in Australian and EU contract laws.

ii.Comparative analysis

Choosing comparative research involves answering four questions: how to work out the objective of the comparative study, what the objects of the research are, which one to choose and finally, to gather and analyse data.[96] By choosing to analyse the applications of good faith in Australian and EU contract law, this thesis delineates the time and space of the research and provides the frame of the research. This comparative cross jurisdictional approach is used to describe the differences and similarities between the jurisdictions in their approach to good faith in contract law. Comparative research often oscillates between two extremes.[97] On the one hand, the 'universality approach' searches for similarities that can lead to uniform patterns applicable to all situations in any location.[98] On the other hand, the 'culturalist approach' focuses on the differences and the uniqueness of each set of circumstances. In the middle of these positions is an argument 'that particular phenomena in any society can be the outworking

[92] See Chapter 2.I.C.3.
[93] Pertti Alasuutari, Leonard Bickman, Julian Brannen, *The Sage Handbook of Social Research Methods* (Sage, 2008) 480.
[94] Rodolpho Sacco, 'Legal Formants: A Dynamic Approach To Comparative Law (Installment I of II) (1991) 39 *American Journal of Comparative Law* 1; Rodolpho Sacco, 'Legal Formants: A Dynamic Approach To Comparative Law (Installment II of II) (1991) 39 *American Journal of Comparative Law* 343.
[95] The research 'examines the role of documents in a network [to generate] questions about what documents do' Pertti Alasuutari, Leonard Bickman, Julian Brannen, *The Sage Handbook of Social Research Methods* (Sage, 2008) 480.
[96] Wendy Olsen, *Data Collection: Key Debates and Methods in Social Research* (Sage, 2012) 186.
[97] Pertti Alasuutari, Leonard Bickman, Julian Brannen, 'comparative and cross national designs' *The Sage Handbook of Social Research Methods* (Sage, 2008) 251.
[98] For more on this approach, read Charles Ragin, David Zaret, 'Theory and Method in Comparative Research: Two Strategies' (1983) 61(3) *Social Forces* 731.

of more or less universal principles and of the particular cultural and historical circumstances within which the phenomena is placed'.[99] This research adopts the latter position, as the call for a renewed classification of legal systems will be demonstrated in chapter 2.[100]

Even though the comparative method can be used in different fields,[101] it is comparative *law* methodology that is of interest here. While the theory surrounding comparative law will be explained in chapter 2, it is necessary to present it here to highlight the relevance of this approach for the thesis. In order to answer the questions posed by this research, it is necessary to identify the issue at stake; identify the foreign jurisdictions and their legal families; identify the primary sources of law; gather, assemble and organise the materials; map out possible answers; analyse the principles; and draw conclusions.[102]

It is useful to compare Australia and the EU for a number of reasons. The relationship between the EU and Australia has been undervalued.[103] Even though the EU is not Australia's largest trade partner, its trade is significant,[104] coming only after China and Japan.[105] In 2011, it accounted for 14.1 per cent of Australia's two-way trade and it was in 2015 'worth $83 billion and accounting for 13% of Australia's total trade'.[106]

The EU is the most appropriate candidate for comparison for a number of reasons. Firstly, Australia and the European Union are two relatively recent jurisdictions whose history is relatively new. While Australia is an early nation born at the start of the twentieth century[107]

[99] Pertti Alasuutari, Leonard Bickman, Julian Brannen, *The Sage Handbook of Social Research Methods* (Sage, 2008) 251 comparative and cross national designs; examples include Max Weber, *Sociology of Law*; Emile Durkeim, *The Division of Labor in Society* Translated by W.D. Halls (New York: The Free Press, 1984); Roger Cotterrell , Community As A Legal Concept? Some Uses Of A Law-And-Community Approach In Legal Theory (2006) *No Foundations* 15; Javier Trevino, *The Sociology of Law* (Transaction Publishers, 2001).

[100] See Chapter 2.I.C.

[101] Victor Jupp, 'comparative method' *The Sage Dictionary of Social Research Methods* (Sage, 2006) 34.

[102] Peter De Cruz, C*omparative Law in a Changing World* (Cavendish Publishing, 2nd ed, 1999) 235-239; Neil J. Salkind, 'research hypothesis' *Encyclopedia of Research Design* (SAGE, 2010) 1260.

[103] Gonzalo Villalta Puig, *Economic Relations Between Australian and the European Union: Law and Policy* (Wolter Kluwer 2014) 22.

[104] In 2013, this represented 22,072 million AUD in export and 57, 266 million AUD in imports to a total trade of close to 80, 000 million AUD. A quarter of this trade is taken by goods and service trade with the United Kingdom.(In 2013 7,841 million in export and 12,044 in import, close to 20,000 million AUD) – Department of Foreign Affairs and Trade, *Trade at a Glance*, <http://dfat.gov.au/trade/resources/trade-at-a-glance/Pages/g20.aspx>.

[105] Australian Government, Attorney General's Department, *Improving Australia's Law And Justice Framework: A Discussion Paper To Explore The Scope For Reforming Australian Contract Law* (2012) 11.

[106] See <http://dfat.gov.au/trade/resources/trade-talk/Pages/infographic-australia-eu-trade-takes-centre-stage.aspx>.

[107] *Commonwealth of Australia Constitution Act 1900* (UK); *Australian Constitution.*

gaining its legislative independence from the UK in 1986, the EU is a post war product, whose development has been a feature of the twentieth century.[108] Secondly, the two jurisdictions are market economies and follow a similar philosophy based on party autonomy in contract law. Thirdly, the authority to make laws and enforce them is similar and is given to particular institutions, including a mandate from the nation via constitutional law.[109] The legislature and the judiciary play primary roles in the development and interpretation of laws.[110] Fourthly, there is a separation between the state and religion in each studied jurisdiction.[111] The significance of this distinction will be explained and developed further in Chapter 3 when the relationship between law, morals and the place of good faith as a legal duty is approached through an historical analysis. The EU and Australia both share similar values of justice and fairness.[112] Fifthly, both jurisdictions share a similar institutional federal framework: the primacy of Australian Commonwealth institutions over the Australian states and territories, and the European institutions over the member states of the Union. This means that EU law is a superior norm over member states law,[113] and the Australian Commonwealth legislation takes precedence over states and territories' laws.[114] Sixthly, in both jurisdictions, there is a dynamic between the institutions. EU institutions and the member states influence the development of EU contract law and the domestic integration of European contract law principles. This dynamic is also reflected in the tensions between Australian states and territories and the Commonwealth of Australia; the different states and territories' institutions, and the federal institutions.

Finally, the EU is facing similar challenges in relation to the integration of good faith at the European level. Currently, the European principle of good faith is applicable to certain transactions. It is also facing a similar challenge to Australia in that a truly European principle of good faith applicable to all contracts is yet to be made enforceable.

These reasons illustrate the similarities between the two jurisdictions and further justify the relevance of the choice for this comparison. These elements and the currency of the reform

[108] *Australia Act 1986* (Cth); *Australia Act 1986* (UK).
[109] *Australian Constitution* s 51; *Consolidated version of the Treaty on the Functioning of the European Union* 2012 OJ C 326/47 art 223-228.
[110] *Australian Constitution* Chapter I and III; *Consolidated version of the Treaty on the Functioning of the European Union* 2012 OJ C 326/47; Chapter 1.I.B.
[111] Gilles Cuniberti, *Grands Systèmes De Droit Contemporains* (LGDJ, 2011) 25.
[112] See Chapter 2.I.C.III.
[113] *Consolidated version of the Treaty on the Functioning of the European Union* 2012 OJ C 326/47, art 288.
[114] *Australian Constitution* s 109.

provide the background to this research.

Further to the research question outlined above, the thesis will address the following issues: firstly what makes Australia and the EU contract laws comparable; secondly, it will determine where good faith is used in the contract law context in both jurisdictions, and thirdly what steps are required to ensure good faith is successfully integrated and enforced in Australian and EU contract law. It will furthermore identify the different issues surrounding the doctrine of good faith and the challenges it faces in being recognised as a mandatory enforceable principle of contract law.

IV. SIGNIFICANCE OF THE RESEARCH

The significance of the thesis is threefold. Firstly, it is an original contribution to the field of comparative law, contract law and the debate surrounding the doctrine of good faith. It encompasses theoretical developments regarding the classification of legal systems and addresses some of the questions relating to its (in)adequacy in today's globalised world. By proposing a new typology and building on the literature in the comparative law discipline, it is also a foundational step to further research in this area.

Secondly, the comparative law methodology provides an opportunity to bring new elements to the debate surrounding good faith, by analysing current legal applications. This research advances knowledge on the topic of good faith in domestic contract law by providing a new perspective on issues and current developments. This provides the foundations for a better understanding of the notion, development and possible application in Australian contract law, in light of the EU experience. Certain initiatives taken by Australia can also inform the European efforts to promote good faith as an enforceable doctrine across the EU.

Thirdly, following a comprehensive historical and theoretical approach, this research provides a tangible solution to integrate good faith into contract law as a general principle. It presents a framework for legal situations, present and future. This thesis, and potential future research, may provide assistance for institutions (for instance, Business Commissioners in different Australian States) in the development of industry codes, which may enforce fairness in

contractual dealings across certain business situations.[115] The thesis can also provide a useful analysis to the European Commission in its endeavour to support small businesses' dealings across EU member states. This could lead to the integration of good faith in contractual dealings, therefore bridging the gap between law and practice.[116] It also sheds new light on the possible avenues for reform opened to EU institutions to promote fair dealing in the European internal market.

Ultimately, the thesis paves the way towards the development and strengthening of mutually beneficial and collaborative relationships with industry, community and professional organisations. The ultimate goal is to provide a legal framework that encourages exchanges and addresses current legal questions of fairness and justice while respecting party autonomy.

V. OVERVIEW OF THE THESIS

The thesis will, in the chapters that follow, attempt to provide the answers to the questions laid out above, which will be summarised in the conclusions. Since there are three main questions, the thesis is split in three parts, each containing two chapters. This is preceded by an opening chapter that will provide the backdrop to the development of good faith in different countries, which are trading partners of Australia.

Chapter 1 lays down an overview of the use of good faith in contract law across legal systems and international conventions and principles. It outlines the geographical and contextual limitations of the research.

PART I provides answers to the first question relating to the definition of comparative law. It establishes the theoretical framework of the research by presenting comparative law methodology and its application to this research. It looks at Australia and the EU and identifies similarities in their legal tradition and translation of morals in law as well as differences in

[115] Chapter 5.II.A.2.
[116] Catherine Mitchell, *Contract Law and Contract Practice Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart, 2014).

addressing contract law regulation. This part is consists of Chapter 2 and Chapter 3.

Chapter 2 discusses comparative law methodology and legal transplants. Since a significant focus of this thesis is a comparative study, it is necessary to establish the methodological foundations. It develops the methodology of comparative law and provides an overview of possible approaches before explaining the choice to rely on deep level comparative law, providing justification for this choice.

Chapter 3 focuses on historical and theoretical developments in relation to good faith in contract law to show that good faith is part of a broader dynamic between law and the enforcement of morals. It aims to determine whether there is any commonality in the sources of the doctrine of good faith in each jurisdiction.

PART II provides answers to the second question relating to the contemporary use of good faith in contractual dealings in Australia and the EU. It provides a detailed comparative study of the development of good faith in contract law in the EU and Australia. Good faith is shown as a principle that captures the obligation to conduct legal relationships with fairness, honesty, loyalty and reasonableness. This part comprises Chapter 4 and Chapter 5.

Chapter 4 investigates the extent to which good faith is recognised in the general law of contract in Australia and in the EU, be it by parliamentarian, judge or scholar. It presents the legislative and judicial applications of good faith in contract law in each jurisdiction and the rationale for such application.

Chapter 5 focuses on the current topical applications of good faith in the EU and in Australia, in particular in the area of consumer protection and small businesses. It identifies different bodies of rules that promote good faith in contract law in these jurisdictions, and the consequences of such an approach.

PART III provides answers to the third question relating to the identification of avenues for reform. It presents a framework to explicitly recognise a principle of good faith in contract law and analyse this framework in light of the international context presented in chapter 1. This part consists of Chapter 6 and Chapter 7.

Chapter 6 evaluates the integration of the doctrine of good faith as a mandatory enforceable

principle of contract law in both Australia and the EU. It explores the possibility of recognising a general principle of good faith as an umbrella principle applicable to every contractual situation; it presents its purpose and the remedies available to a party who is victim of a breach of the principle to act in good faith.

C**hapter 7** analyses the vehicle needed to successfully integrate the principle in contract law before considering how reform could take place and who should be leading it.

The thesis then concludes with a summary of the outcomes of the research. It also outlines the implications of recognising good faith as a principle across legal systems to ensure good faith is promoted and enforced throughout contract law, whether at the domestic and international contractual levels in Australia and the EU.

Chapter 1
Good faith in contracts: national and international perspectives

> [Good faith] is at least in some legal systems regarded as a vitally important ingredient for a modern law of contract.[1]

The concept of good faith can be found in many different domestic laws. It has evolved in European countries and has travelled across jurisdictions through its implementation in colonial law in North America, as the impact of the French Civil Code in Louisiana demonstrates. The notion of good faith is also present at an international level and contributes to the regulation of both state and private dealings. Indeed, public international legal instruments require countries to act in good faith.[2] This chapter places Australia and the EU in this globalised context, while focusing on the application of a doctrine of good faith in private dealings involving companies and individuals. It examines whether good faith is indeed part of the institution of contract in different legal systems.[3]

The focus of the research rests on the development of the concept of good faith and the steps towards its recognition in contract law in the EU and Australia. However, this chapter will contextualise these two jurisdictions within the broader international landscape to highlight the dynamics of the relationship between domestic and international trade. Since good faith is mentioned in international instruments, good faith might be a positive duty in international contracts. While international contracts may be regulated by these international instruments,

[11] Simon Whittaker and Reinhard Zimmermann, 'Good Faith in European Contract Law: Surveying the Legal Landscape' in Reinhard Zimmermann and Simon Whittaker (ed), *Good Faith in European Contract Law* (Cambridge University Press, 2000) 7, 13.

[2] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 26; United Nations Environment Programme, *Environmental Law Guidelines and Principles on Shared National Resources* (1978) principle 6(2)-7 <http://www.unep.org/training/programmes/Instructor%20Version/Part_2/Activities/Interest_Groups/Decision-Making/Supplemental/Enviro_Law_Guidelines_Principles_rev2.pdf>; *Rio Declaration on Environment and Development*, 31 ILM 874 (1992) principles 19, 27. The *Statute of the International Court of Justice* art 38 refers to the court applying 'general principles of law recognised by civilised nations'. These principles have been said to include good faith: see, eg, Steven Reinhold, 'Good Faith in International Law' (2013) 2 *UCL Journal of Law and Jurisprudence* 40.

[3] The concept of good faith is also present in *Contract Law* (People's Republic of China) art 6; *Trademark Law* (People's Republic of China) art 16; *Civil Code* (United Arab Emirates) arts 106, 246.

domestic law may also be impacted, as a discussion of the *Convention on Contracts for the International Sale of Goods* will demonstrate. Therefore, it is important to analyse jurisdictions where good faith is recognised as a positive duty in domestic contract law.

Australia and the EU, as we will see, are not the only legal systems to be challenged by the concept of good faith in contract law. An overview of its use and developments in other jurisdictions will help illustrate how good faith can be imposed on contractual parties and be enforced by the courts.

Section I examines the doctrine of good faith in some EU member states, namely Germany, France and England, to show the dynamic relationship between their domestic laws and EU law. This will provide the background to further discussion of the EU later in this thesis. In order to determine the status of the doctrine of good faith in Australia, it is necessary to look at two examples where good faith has been recognised in contract law in other common law countries, the USA and Canada. Section II focuses on the international context, and in particular the relevance of the doctrine of good faith in the interpretation and implementation of two important legal instruments: the *Convention on Contracts for the International Sale of Goods* (CISG)[4] and the *Unidroit Principles of International Commercial Contracts* (PICC)[5] in order to determine the use and interpretation of good faith in the context of international trade. This analysis aims to provide the international backdrop to the rest of the thesis and is a reminder that jurisdictions do not exist in a vacuum but instead interact with each other, including in relation to the application of good faith in contract law.

[4] *Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) ('CISG').
[5] *UNIDROIT Principles of International Commercial Contracts* (2016) ('PICC').

I. GOOD FAITH IN CONTRACT LAW: EXAMPLES OF DOMESTIC LAWS

European contract law is evolving within a particular legal context that influences its development. The legal systems of the member states have played an important role in the integration of good faith into European contract law. This section explores the national laws of trading partners who share similarities with Australia and the European Union (EU),[6] be it by through their economic ties or by belonging to a similar legal tradition.[7]

Section A discusses the evolution of the doctrine of good faith in three major legal systems, namely Germany, France and England.[8] These jurisdictions are shaping the development of EU contract law through a dynamic relationship. Section B analyses the development of the law relating to good faith in two countries that share a common law tradition with Australia, namely the USA and Canada.

A Good faith in the 'Major Three'[9]

Germany, France and England may share geographical proximity, and may be part of the same supranational entity that is the EU, but they remain distinct jurisdictions. This is exemplified by the different patterns of fairness and justice adopted by each of these legal systems. While the English model has been called a 'liberal and pragmatic design fit for commercial use', the French model is 'a forward looking political design of a (just) society', and finally the German model has been described as 'an authoritarian paternalistic-ideological though market-orientated design'.[10] Such patterns are illustrated by the approach each of these three countries has adopted in relation to good faith in contract law.

This section will discuss the approaches taken by these jurisdictions and how they are reflected

[6] For a discussion on comparative law and legal traditions, see Chapter 2.I.B.
[7] Legal traditions, particularly common law and civil law, will be discussed in Chapter 2.I.B.1.
[8] Christian Von Bar, 'Comparative Law of Obligations: Methodology and Epistemology' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing, 2004) 123, 133; Moses Hess, *Berlin, Paris, Londres: La Triarchie Européenne* (Du Lérot, 1988).
[9] Hess, above n 8.
[10] Hans-W Micklitz, 'Introduction' in Hans-W. Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar, 2011) 3, 8, 14, 18; Chantal Mak, 'Unweaving the CESL: Legal-Economic Reason and Institutional Imagination in European Contract Law' (2013) 50 *Common Market Law Review* 277, 289.

in the role given to good faith in contract law. It can be noted that, as founding EU members,[11] France and Germany have influenced the shaping of EU legislation. Both domestic systems belong to the civil law tradition.[12] They rely on civil codes: the French Civil Code[13] and the German Civil Code or '*BGB*'.[14] Both codes are deliberately general in order 'to contain, by anticipation, a decision for cases that may arise'.[15] Both codes stipulate an obligation to perform contracts in good faith.[16]

However, it is interesting to highlight here that, while the *BGB* was written for the legal profession, not the layperson,[17] the French Civil Code was intended to be readable by the general population.[18] Consequently, it is necessary to start with a broader discussion of the understanding of contracts in these jurisdictions. This will provide a broader picture of the philosophy of the codes in relation to contract. This section will also highlight the role of the judiciary in order to help understand how good faith is interpreted in these jurisdictions. Since the interpretation of good faith is key to its recognition, this will provide a useful insight into the integration of a principle of good faith in Australia and the EU as developed in Chapter 7.[19]

1. Good faith in Germany: a general clause

In German contract law, a contract is made up of two declarations of intent. This intent has prime place in German contract law.[20] For instance, the true intention of the parties guides the interpretation of the agreement.[21] These declarations of intent are a core component of

[11] France and Germany were the founding members of the European Coal and Steel Community (ECSC), which evolved over 60 years into the EU we know today.
[12] Konrad Zweigert, *Introduction to Comparative Law* (Clarendon Press, 1998) 68.
[13] *Code civil* [Civil Code] (France).
[14] *Bürgerliches Gesetzbuch* [Civil Code] (Germany) ('*BGB*').
[15] Friedrich Karl von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (A Hayward trans, Littlewood, 1831) 28. See also Arthur von Mehren and James Gordley, *The Civil Law System: An Introduction to the Comparative Study of Law* (Little, Brown & Co, 2nd ed, 1977) 78; Jean-Étienne-Marie Portalis, *Discours préliminaire du premier projet de Code civil* (1801).
[16] *BGB* § 242 and *Code civil* [Civil Code] (France) art 1134 prior to 2016.
[17] Von Mehren and Gordley, above n 15, 78.
[18] Portalis, above n 15.
[19] Chapter 7.I.A.2.
[20] *BGB* § 118.
[21] *BGB* § 133: 'When a declaration of intent is interpreted, it is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration': translation available <http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0340>; Denis Alland and Stéphane Rials (eds), *Dictionnaire de la culture juridique* (PUF, 2003) 144.

contracts,[22] forming a binding offer[23] and a communicated acceptance.[24] Each declaration is made up of three components: a general intention to act, a conscious declaration of intent, and business intent.[25] The interpretation of contracts is required when a term is contested or needs to be interpreted in order to resolve a dispute. It is regulated by *BGB* § 157.[26] Courts first look at the words and intent of the contract and the parties, then the surrounding circumstances, and finally principles of good faith and customary practice.[27] This demonstrates the importance of the contract but also of the circumstances surrounding the agreement.

The principle of *treu und glauben*, loyalty and confidence, which is often translated as good faith, can be found in § 242 of the German Civil Code. This section stipulates that contracts have to be performed in *treu und glauben*. The principle of *treu und glauben* encourages certain behaviours and sanctions, taking on aspects of equitable doctrines in common law. For instance, the withdrawal of a statement on the basis that a formal requirement has not been complied with is contrary to *treu und glauben*.[28] This can be associated with the English doctrine of estoppel according to which a party may be estopped from withdrawing a promise if that would be detrimental to the other party to the contract who relied on that promise to his/her detriment.[29] *Treu und glauben* cannot be used to circumvent the formalities associated with certain legal procedures.[30]

The doctrine of *treu und glauben* developed further than what was originally intended and it has become a general clause. A general clause is 'a legal norm, written with a very wide application, with a blurry or indeterminate content, which allows the judge … to "penetrate" the contract in a certain manner'.[31] Even though § 242 only refers to good faith in performance, the doctrine has been extensively applied by the judiciary to the different stages of contract[32]

[22] *BGB* §§ 116–44.
[23] *BGB* § 145.
[24] *BGB* § 147.
[25] Nigel Foster and Satish Sule, *German Legal System and Law*s (Oxford University Press, 3rd ed, 2002) 379–80.
[26] *BGB* § 157: 'Contracts are to be interpreted as required by good faith, taking customary practice into consideration.'
[27] Foster and Sule, above n 25, 388.
[28] *Edelmann decision*, RGZ 117, 121 case no 21 (1927); Foster and Sule, above n 25, 390.
[29] *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; see Chapter 4.I.A.3.
[30] Foster and Sule, above n 25, 388.
[31] Camille Jauffret-Spinosi, 'Théorie et pratique de la clause générale' in Stefan Grundmann and Denis Mazeaud (eds), *General Clauses and Standards in European Contract Law: Comparative Law, EC Law and Contract Law Codification* (Kluwer, 2006) 23, 24: 'la clause générale est une norme légale, écrite ayant un champ d'application très large, au contenu flou, ou indéterminé, qui permet au juge, … de « pénétrer » d'une certaine manière dans le contrat'.
[32] See below pages 41-42.

as well as in German private law.[33] This development has led to it becoming a general principle of German law.[34] As described below, the judiciary has played a key role in this development. The relevance of the true intention of the parties has allowed § 242 to grow and become a general clause.[35]

§ 242 has been used to interpret and to expand contractual terms, to reconstruct and to correct contracts, to limit the conditions of business, to ensure compliance with formal requirements and to introduce equitable justice.[36] Although the wording only imposes a duty to act in good faith during contract performance, the doctrine has also been used in negotiations and termination, to ensure contractual fairness.[37] Interestingly, *treu und glauben* has been used as a foundation of hardship clauses,[38] clauses that require renegotiation when a change in circumstances profoundly alters the balance of the contract. Until the recognition of business codes in the *BGB*, § 242 was also used in a similar way to the *contra proferentem* rule,[39] meaning that 'ambiguous conditions of business [were] construed against the party who seeks to rely on them'.[40]

There has been a correlation between the expansion of the power of judges to adjust a contract, and the development of good faith as a general clause. For example, German judges have used the clause to alter contract law in a way not planned by the drafters of the code.[41] Furthermore, following the First World War and the devaluation of the *Reichmark*, § 242 was used to give primacy to the contract and not the currency laws, meaning that the debtor had to pay the nominal value laid out in the contract.[42] These examples further reflect an implicit admission by the drafters of the code that any legislation can only be incomplete.[43] This is where the

[33] RGZ (1914) 858, 108; Jauffret-Spinosi, above n 31, 28; Ole Lando, 'Is Good Faith an Over-Arching General Clause in the Principles of European Contract Law?' (2007) 15(6) *European Review of Private Law* 841.
[34] *Motive zu dem Entwurfe eines Burgerlichen Gezetzbuches fur das Deutsche Reich* (1888) 17, available in English in James Gordley and Arthur T Von Mehren, *An Introduction to the Comparative Study of Private Law: Reading, Cases, Materials* (Cambridge University Press, 2006) 64.
[35] Nathalie Hofmann, 'Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe' (2010) 22 *Pace International Law Review* 145, 156.
[36] Foster and Sule, above n 25, 389.
[37] It has been applied as a limitation to the possible excess of contractual freedom. See Raphael Powell, 'Good Faith in Contracts' (1956) 9 *Current Legal Problems* 17, 32.
[38] Reiner Schulze, 'Les divergences franco-allemandes dans la théorie du contrat' (2013) 4 *Revue des Contrats* 1720, 1721.
[39] BGH DB 1975, 682.
[40] Foster and Sule, above n 25, 390.
[41] René David and Camille Jauffret-Spinosi, *Les grands systèmes de droit contemporains* (Dalloz, 11th ed, 2002) 28.
[42] Whittaker and Zimmermann, above n 1, 21.
[43] Guillaume Busseuil, *Contribution à l'étude de la notion de contrat en droit privé européen* (LGDJ, 2008) 548.

application and interpretation of a general provision of the code can be expanded by the judiciary.

As good faith developed as a general clause, political concerns emerged about the ramifications of such a broad use of the *BGB* provision. Its use as a tool to implement the anti-Jewish policy under the Nazi regime highlighted the consequences of a pervasive interpretation of § 242. However, in defence of general clauses, Professor Lücke addressed these concerns and highlighted that '[t]hese developments, which admittedly occurred in the name of good faith, are hardly sufficient to discredit the good faith approach in societies with well-entrenched humanitarian and democratic practices and values'.[44] This relationship between fundamental rights and good faith in German law is still relevant today.[45]

The laws of contractual obligations were reformed in 2001. The reform focused on the integration of the *Principles of European Contract Law*[46] but did not alter the grounding of *treu und glauben* as an imperative general clause even though it is not clearly defined as such in the *BGB*.[47] The judiciary has used the flexible nature of the principle of good faith in § 242 to apply it in a wide range of situations.

Good faith has come to play an important role in the development of a fair approach to contracts in Germany, by limiting party autonomy and controlling contractual terms as a part of the interpretation of the intention of the parties. It is placed in will theory[48] as a basis of contract law and the intent of the parties to enter into a legally binding agreement. This means that the intention and therefore will of the parties is the exclusive notion used to determine and interpret the content of an agreement.[49] Judicial activism has expanded the principle of good faith into a core element of German contract law. These aspects have some similarities to the understanding of contracts and conduct in good faith in French law as discussed below.

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[44] Horst Lücke, 'Good Faith in Contractual Performance' in Paul D Finn (ed), *Essays on Contract* (Law Book Co, 1987) 155, 167; see also Scott C Styles, 'Good Faith: A Principled Matter' in A D M Forte, *Good Faith in Contract and Property* (Hart Publishing, 1999) 157, 178.

[45] For more information see Béatrice Schütte, 'The Influence of Constitutional Law in German Contract Law: Good Faith, Limited Party Autonomy in Labour Law and Control of Contractual Terms' in Luca Siliquini-Cinelli and Andrew Hutchison (eds), *The Constitutional Dimension of Contract Law* (Springer, 2017) 217, 233–7.

[46] Matthias Lehmann, 'Le projet Catala et le droit allemand' (2007) 4 *Revue des Contrats* 1427.

[47] Bénédicte Fauvarque-Cosson (ed), *Principes Contractuels Communs*, vol 7, Droit privé comparé et européen (Société de législation comparée, 2008) 138.

[48] Mark Van Hoecke, 'Deep Level Comparative Law' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing, 2004) 165, 181.

[49] Gordley and Von Mehren, above n 34, 63.

2. **Good faith in France: a principle**

French contract law refers to the agreement between the two parties as the foundation of the contractual relations.[50] Until the reform of 2016, French contracts were made up of four essential components: capacity, certainty of object, consent and legal cause.[51] While capacity and certainty of object are common to other jurisdictions,[52] it is interesting to note the French understanding of consent and cause to highlight the philosophy of contract law in this legal system. Until the reform of 2016, consent was stipulated in the opening statement of art 1134 of the *Code Civil*: '[a]greements lawfully entered into take the place of the law for those who have made them'. Consequently, courts cannot change the content of the obligations between two parties in a contract.[53] Until 2016, the concept of cause was a 'French legal exception'.[54] It meant that the contract must have a legal reason to exist.[55] This was particularly relevant in determining the validity and legality of the agreement between two parties.[56] However following the reform of contract law provisions within the Civil Code, the concept has disappeared.[57]

French contract law has developed as a transaction-based law;[58] it has developed specific rules depending on the relationship at stake.[59] While the French Civil Code refers to broad principles applicable to every contract, more specialised legislation can be found in other codes, including competition law, consumer law and commercial law.[60] One of these broad principles is the

[50] *Code civil* [Civil Code] (France) art 1101.
[51] Ibid art 1108 in 2016.
[52] In relation to certainty, see *Coal Cliffs Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1; *United Group Rail Services Ltd v Rail Corporation New South Wales* [2009] NSWCA 177; in relation to capacity, see *Age of Majority Act (Reduction) Act 1971* (SA) s 3. In Germany, see *BGB* §§ 104–15.
[53] Comm, 10 July 2007, Bull civ IV, nº 188.
[54] *Code civil* [Civil Code] (France) arts 1108, 1131 in 2016; Lehmann, above n 46.
[55] Ole Lando, 'CISG and its Followers: A Proposal to Adopt Some International Principles of Contract Law' (2005) 53 *American Journal of Comparative Law* 379, 390: '*The functions which French law and other Romanist legal systems have attributed to cause by invalidating contracts due to absence of legal basis, illegality or immorality, absent or insufficient quid pro quo, etc.'*
[56] *Code civil* [Civil Code] (France) arts 1108, 1131–3 in 2016. Now art 1162 does not refer to 'cause'.
[57] Ibid art 1128; Nicolas Dissaux and Christophe Jamin, *Réforme du droit des contrats, du régime général et de la preuve des obligations (ordonnance n2016-131 du 10 février 2016)* (Dalloz, 2016) 34.
[58] *Code civil* [Civil Code] (France) arts 1108–11 distinguishes between contracts written by two private parties, '*contrats sous seing privé*', and contracts requiring the drafting by public notaries, '*acte authentique*' including most conveyance matters. Art 1102 differentiated between bilateral contracts, '*contrats synallagmatiques*' and art 1103 unilateral promises, such as donations. Now both notions are found in art 1106.
[59] Francois Collart Dutilleul and Philippe Delebecque, *Contrats civils et commerciaux* (Dalloz, 2011) 4.
[60] Éric Savaux, 'La notion de théorie générale, son application en droit des contrats. Théorie générale du contrat et

doctrine of good faith, which applies to every transaction.

Until 2016, art 1134 of the French Civil Code stipulated the requirement for good faith by stating that parties must 'perform the contract in *bonne foi*'. Similar to the German concept of *treu und glauben*, *bonne foi* applies to all types of contracts, but was originally limited to their performance. *Bonne foi* has a moral quality, and implies loyalty, sincerity, honesty and the keeping of promises made.[61] Parties cannot exclude its application; it has become part of the public policy principles underpinning French contract law.[62]

Bonne foi did not emerge as a cornerstone of French contract law until the second half of the twentieth century.[63] The judiciary has used the notion of good faith in every stage of a contract: from the start of negotiations until the end of the contractual relationship. However, once contractual relations have ended, so does the duty of *bonne foi*.[64] As a positive obligation, *bonne foi* imposes three main duties: a duty to be loyal, a duty to disclose and assist, and finally a duty to cooperate.[65] *Bonne foi* has three functions:[66] to interpret the contract,[67] to complete the contract,[68] and to limit the exercise of rights.[69] Some authors add a fourth function to the doctrine, the modification of the contract.[70] However, *bonne foi* did not give a judge the power to substantially alter the terms of the agreement.[71]

Raphael Powell argued that art 1134 was 'merely an ancillary provision to the interpretation of

théorie générale des contrats spéciaux' (2012) 401 *Petites Affiches* 4.

[61] Alland and Rials, above n 21, 143 entry for 'bonne foi'.

[62] Civ 3, 9 December 2009 reported in Bull civ III nº 275.

[63] Muriel Fabre-Magnan, *Droit des Obligations* (PUF, 2nd ed, 2010) 63; Rémy Cabrillac, *Droit européen comparé des contrats* (LGDJ, 2012) 3; Guillaume Busseuil, *Contribution à l'étude de la notion de contrat en droit privé européen* (LGDJ, 2008) 552.

[64] Cass 2 vic, 25 February 2010, nº 09-11352 publié au bulletin.

[65] Philippe Le Tourneau and Matthieu Poumarède, 'Bonne foi' (2009) *Répertoire Civil*.

[66] Philippe Stoffel-Munck, *L'abus dans le contrat* (LGDJ, 2000) [60]; see also Martin Hesselink, 'The Concept of Good Faith' in E H Hondius (ed), *Towards a European Civil Code* (Kluwer Law International, 3rd ed, 2004) 471.

[67] *Code civil* [Civil Code] (France) art 1156 stipulated: 'One must in agreements seek what the common intention of the contracting parties was, rather than pay attention to the literal meaning of the terms'. Translation available at <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>; Alland and Rials, above n 21, 143.

[68] To give the contract business efficacy. This also applied to art 1135: 'Agreements are binding not only as to what is therein expressed, but also as to all the consequences which equity, usage or statute give to the obligation according to its nature.' See Alain Benabent, 'Jouer sur les qualifications est contraire a la bonne foi et a l'equite des articles 1134 et 1135 du code civil' (2006) 3 *Revue des contrats* 713.

[69] See below on the abuse of rights.

[70] Stoffel-Munck, above n 66, [60].

[71] Cass com, 10 July 2007, pourvoi nº 06-14768; Laurent Aynes, 'Bonne Foi' (2007) 4 *Revue des Contrats* 1107.

other provisions'.[72] In reality, the judiciary has made this article an important principle of contract law. Even though *bonne foi* is only relevant when there is a contract between the parties,[73] by interpreting the terms and deciding on the dispute, a judge endeavours to preserve the contract and its performance, as long as it is possible to do so. This interpretation relies on the difference between contractual prerogatives and the substance of the obligations legally agreed, which form the core of the contract.[74] There are numerous illustrations of the enforcement of the duty of good faith in French contract law. It has been found to be incompatible with the obligation to act in *bonne foi* where: a publisher ruins the credibility of an author in public;[75] an agent denigrates his/her principal by doubting his/her honesty and skills;[76] a landlord delivers a termination notice, knowing that his/her tenant is on holiday;[77] or a company does not disclose the precariousness of its legal position to the other party to a contract.[78]

A parallel can be drawn between *bonne foi* and the doctrine of the abuse of rights. An abuse of rights occurs when the right is exercised with the intention of harming another person or where that exercise is contrary to its economic and social purpose.[79] The doctrine of abuse of rights in France first developed in property law before expanding into the regulation of industrial relations following strikes during the nineteenth century.[80] Today it is applicable to contractual situations. The next task is therefore to determine the relationship between abuse of rights and the doctrine of good faith.

Whether the doctrine of abuse of rights should be recognised as a general theory is controversial.[81] Many say that there is a direct relationship between abuse of rights and *bonne foi*.[82] For others, if a right is exercised wrongly, it constitutes an abuse of rights and does not

[72] Raphael Powell, 'Good Faith in Contracts' (1956) 9 *Current Legal Problems* 17, 31.
[73] Cass civ 3, 14 September 2005, pourvoi nº 04-10856; Yves-Marie Laithier, 'Précisions sur le domaine de l'obligation de bonne foi' (2006) 2 *Revue des Contrats* 314.
[74] Yves-Marie Laithier, 'Le declin de la bonne foi?' (2001) 3 *Revue des Contrats* 814; Aynes, above n 72.
[75] TGI Paris, 15 February 1984, inédit.
[76] Cass com, 17 March 1998, nº 95-16.507 Lamyline.
[77] Cass 3eme civ, 15 December 1976, nº 75-15.377.
[78] Cass 1ere civ, 27 May 1997, nº 95-17.920; LAMY, droit civil, 'la loi contractuelle' 365; Other examples include refusal to apply a clause relied upon in bad faith; a termination clause; limitation and exclusion clauses; *abus de droit* relating to the power to purchase associated to a life annuity; and withdrawal of a promise in bad faith.
[79] Whittaker and Zimmermann, above n 1, 34.
[80] Antonio Gambaro, 'Abuse of Rights in Civil Law Tradition' (1995) 3(4) *European Review of Private Law* 561.
[81] Stoffel-Munck, above n 66, [60]; Beatrice Jaluzot, *La bonne foi dans les contrats, etude comparative des droits francais, allemand et japonais* (Dalloz, 2001) 71.
[82] Stoffel-Munck, above n 66.

fall under the sanction of *bonne foi*.[83] Since abuse of rights could be interpreted as the exercise of a purported right to harm another person, it fell under the application of the former art 1134 and consequently *bonne foi* applied. Therefore, the interpretation, on the one hand, of the contract, and on the other hand, of the behaviour of the parties, has highlighted the tort dimension of the concept of *bonne foi*.[84] *Bonne foi* requires each party to take reasonable care in considering the interests of the other party but it does not mean that the party should sacrifice its own interests for the benefit of the other.

Good faith has also a link with the French doctrine of *équité*.[85] *Equité* is not clearly defined in French law and is therefore another notion that causes controversy.[86] It is a notion that guarantees a search for a balanced solution.[87] *Equité* is here understood in the same way as Aristotle defined it, as the *aequum*.[88] It has been defined as

> the art of Social Justice which, under the form of a proportional equality, attributes to each one what the consideration of the proper circumstances of his case – consideration dominated by principles of Natural Law – shows to the common sense of the legislator or of the judge as being due to him.[89]

While *équité* is not a source of French law,[90] the provisions of art 1135 allowed courts to correct the contract, adding to it when necessary.[91] For instance, it was used to void abusive clauses.[92] It could not, however, be an avenue for judges to alter the terms of the contract.[93] The relationship between *équité* and *bonne foi* was also highlighted in the commentary on arts 1134 and 1135 where cases were discussed under both provisions. This could be explained by the

[83] Jaluzot, above n 81, [1844].
[84] Cass civ 3, 14 September 2005, pourvoi nº 04-10856; Laithier, 'Precisions sur le domaine', above n 73; see also Stoffel-Munck, above n 66, [58].
[85] Christophe Albiges, 'Équité' (2009) *Répertoire Civil.*
[86] Ibid [30].
[87] E Littré, *Dictionnaire de la langue française* (Hachette, 1874) vol. 2, 1477.
[88] See Chapter 3.II.B.
[89] André Dessens, *Essai sur la Notion d'équité* (F Boisseau, 1934) 5–6, as translated in G M Razi, 'Reflections on Equity in the Civil Law Systems' (1963) 13 *American University Law Review* 24, 27.
[90] Soc, 4 December 1996, Bull civ V nº 421. This is similar to the Australian approach: *Romanos v Pentagold Investments Pty Ltd* (2003) 217 CLR 367, 375: 'equity does not intervene to reshape contractual relations in a form the court thinks more reasonable or fair'.
[91] Albiges, above n 85, [36].
[92] And led to recognition in the *Code de la Consommation* [Consumer Code] (France) L132-1 following implementation of *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29.
[93] Civ, 6 March 1876, Affaire du canal de Craponne.

fact that only a legal provision can be the foundation of a judicial decision, meaning a judge cannot decide on their own initiative on the grounds of *équité* alone.[94]

Over the last eighteen years, projects to reform the French Civil Code[95] have tried to keep the spirit of the Civil Code intact while bringing it into line with European developments.[96] The call for reform originally followed discussions during celebrations of the bicentenary of the French Civil Code and the need for the code to adapt to the EU environment.[97] These projects aimed to increase the currency of the text, ensuring that the law is applicable to every citizen.[98]

The first revision of the code was proposed by the Catala project.[99] This emphasised the need for loyalty[100] and solidarity between contractual parties.[101] According to the proposal, the rules regarding the formation of contracts revolve around three notions: freedom, loyalty and security.[102] It was proposed that *bonne foi* be extended to negotiations.[103] A distinct obligation to inform potential contractual parties was proposed in a separate article.[104] While these proposals constituted improvements to the current provisions of the French Civil Code, they only required good faith in contract performance and acknowledged the relevance of the concept in relation to the duty to disclose information. This reform also dealt carefully with the role of the judge.[105] Courts could prevent the disloyal use of a contractual right, but would not be able to change the substance of the rights and obligations under the contract.[106] These changes would have recognised the position laid out by the doctrine and judicial developments.[107] However, the project did not get any further until 2013.

[94] Soc, 4 October 1985, nº 83-46.113.
[95] *Avant projet de réforme du droit des obligations (Articles 1101 à 1386 du Code civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil)*, Rapport à Monsieur Pascal Clément Garde des Sceaux, Ministre de la Justice (22 Septembre 2005) (‘*Avant-Projet 2005*’); Sous la direction de François Terré, *Pour une réforme du droit des contrats* (2008); Bureau du droit des obligations, *Avant projet de reforme du droit des obligations* (2013).
[96] *Avant-Projet 2005* 1.
[97] Ibid, présentation générale.
[98] Lehmann, above n 46.
[99] *Avant-Projet 2005*.
[100] Ibid arts 1104, 1110, 1120, 1134, 1176.
[101] Ibid arts 1114–13, 1122–3, 1125s, 1140–1, 1154, 1175, 1165–4, 1289 al. 3, 1299, 1356, 1357, 2266.
[102] Philippe Delebecque and Denis Mazeaud, ‘Formation du contrat (art. 1104 à 1107)’ in *Avant-Projet 2005* 17.
[103] *Avant-Projet 2005* art 110: ‘L’initiative, le déroulement et la rupture des pourparlers sont libres, mais ils doivent satisfaire aux exigences de la bonne foi.’
[104] Ibid art 1176: ‘Les parties ont un devoir de loyauté dans l’accomplissement de la condition.’ This article was deleted during the reform.
[105] Lehmann, above n 46.
[106] This is regularly reaffirmed by the Cour de Cassation [Consumer Court]. See, eg, Gilles Pillet, ‘Substance des droits et obligations ou effet relatif des contrats’ (2013) 8 *L’essentiel du Droit des Contrats* 4.
[107] Le Tourneau and Poumarède, above n 66.

In 2013, a new project from the Ministry of Justice stipulated that contracts should be formed and performed in good faith.[108] Similarly to the Catala project, a duty of disclosure was also proposed as a separate duty.[109] Following this renewed interest, in 2014, a draft new French contract law stated that contracts must be formed and performed in *bonne foi*.[110] Therefore, this wording recognised the judicial development of the doctrine of good faith in negotiation even though art 1134 of the French Civil Code only referred to performance.

The impetus to reform French contract law gained further momentum with the introduction of an Act that would allow the government to legislate via ordinances,[111] thereby facilitating the process of reform of the French Civil Code. However, the Senate rejected the possibility of changing contract law in this way, considering the reform too important to be dealt with by bypassing the ordinary legislative process.[112] However, the Constitutional Court decided against the position of the Senate and validated the Act.[113] A few days later, the *Law on the modernisation and simplification of law and procedures in the domains of justice and internal affairs*[114] was enacted.

Public consultations on the 2014 proposal closed on 30 April 2015. This led to an ordinance in 2016 which reformed contract law in the Civil Code and changed the role of good faith within it.[115] The reform is still the source of debate before the Legislative Assembly and we can expect changes to some of the provisions, as even the concept of cause and its return to the Civil Code have been discussed in the Assembly.[116] However, the reform made the principle of good faith applicable to all stages of a contract. Article 1104 currently states that 'contracts must be

[108] Bureau du droit des obligations, *Avant projet de reforme du droit des obligations* (2013) art 3.
[109] *Avant-Projet 2005* art 37.
[110] Bureau du droit des obligations, *Avant projet de reforme du droit des obligations* (2013) art 1103.
[111] *Projet de loi relatif à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures* art 3: 'on the basis of article 38 of the constitution, the government can make regulations on the affirmation of general principles of contract law, the simplification of contract law; the affirmation of core principles and the introduction of a general law of obligations'.
[112] See repeal of art 3: France, Sénat, *Texte de la commission des lois constitutionnelles, de législation, du suffrage universel, du règlement et d'administration générale* (15 January 2014) <http://www.senat.fr/leg/pjl13-289.html>. The overall timeline of this project can be found at <http://www.senat.fr/dossier-legislatif/pjl13-175.html#block-timeline>.
[113] Conseil constitutionnel [French Constitutional Court], decision nº 2015-710 DC, 12 February 2015.
[114] *Loi nº 2015-177 du 16 février 2015 relative à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures* (1) JO nº 0040, 17 February 2015, 2961.
[115] *Ordonnance no 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*. This ordinance applies to contracts made after 1 October 2016.
[116] Éric Coquerel in 'Séance en hémicycle du 11 décembre 2017 à 16h00' (11 December 2017) *Nos Député* <https://www.nosdeputes.fr/15/seance/637#inter_bfa96115e2ad3e10e51c35ab426d383b>.

negotiated, formed and performed in good faith'. It further states that this provision is part of public policy, meaning it cannot be excluded. Furthermore, this article is to be found in preliminary provisions, thereby erecting the principle of *bonne foi* as a principle of contract law.[117] This reflects the influence of the *Principles of European Contract Law* and other instruments.[118]

The changes have been incorporated into the *Code Civil* 2016. However, since the changes were made by ordinance and not statute, it is necessary to pass an Act ratifying the ordinance. This Act was introduced to Parliament during the summer of 2017. The ratification process has been used to amend some of the reformed articles of the code to increase clarity and modernise French contract law. This opportunity has been taken up by the Senate, which was against reforming the code by ordinance.[119] Almost two years after the ordinance changed the French Civil Code, the Senate adopted the amended ordinance.[120] The proposal is currently before the National Assembly for adoption.[121]

The principle of *bonne foi* has not been altered by the project of ratification currently before the chambers of the French Parliament. In fact, whether the notion of *bonne foi* should be a principle of contract is not hotly debated. By inserting the concept in preliminary provisions, the reform has made the body of contract law as a whole dependent upon the principle. Contractual freedom and good faith are therefore paramount to ensure 'contractual justice and commercial freedom',[122] and to protect individual freedom.[123] This is reflected in the report

[117] *Code civil* [Civil Code] (France) art 1104.

[118] *Rapport au Président de la République relatif à l'ordonnance nº 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, Préambule [13].

[119] *Projet de loi ratifiant l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations* n° 46 modifié par l'Assemblée nationale le 11 décembre 2017 art 15.

[120] 'Session ordinaire de 2017–2018' (1 February 2018) Sénat <https://www.senat.fr/leg/tas17-054.html>.

[121] For more information on the current developments see *Dossiers législatifs – Projet de loi ratifiant l'ordonnance nº 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations* <https://www.legifrance.gouv.fr/affichLoiPreparation.do?idDocument=JORFDOLE000032851308&type=general&typeLoi=proj&legislature=14>; François Pillet, *Rapport fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale (1) sur le projet de loi*, modifié par l'Assemblée Nationale, ratifiant l'ordonnance nº 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, enregistré à la Présidence du Sénat le 24 janvier 2018, 26 <https://www.senat.fr/rap/l17-247/l17-2471.pdf>.

[122] *Without consumer guardianship*: *Avant-Projet 2005* 3.

[123] Philippe Stoffel-Munck, 'Réforme du droit des obligations: la force obligatoire du contrat en danger', *Dalloz-actualité*, 22 October 2018 <http://www.dalloz-actualite.fr/interview/reforme-du-droit-des-obligations-force-obligatoire-du-contrat-en-danger#.U_P1Lh3KZ2B>.

dated 10 February 2016 accompanying the reform of the Civil Code. This report highlights the importance of both contractual freedom and good faith by declaring them general principles of contract law.[124] A general principle of law in France can be applied in an infinite number of ways.[125] A principle is both the foundation and the rule 'above the provision'.[126] Now that *bonne foi* has been made a principle of contract law, it is to be considered when interpreting and enforcing other provisions of the code. This was further illustrated by the discussion of applying the notion of *bonne foi* to non-performance of a contract.[127]

The importance of *bonne foi* as principle of law has been commented upon favourably during the debate before the Senate.[128] The notion of *bonne foi* has also been added to art 1221 regarding non-performance of the contract:

> The Senate considered it useful, in order to avoid any abuse, to specify that manifest disproportionate cost to the debtor in relation to the interest in the creditor, the request for compulsory execution could not be only for the benefit of the debtor in good faith.[129]

In conclusion, contractual freedom and good faith are equally important in French law and German law. In both countries, statutory provisions originally prescribed good faith in the performance of contracts, while the judiciary has applied it to negotiation and termination of agreements as well. Yet, understandings of the meaning of contract and good faith vary between Germany and France. For instance, in contrast to the German doctrine, *bonne foi* cannot be used for hardship clauses.[130] In France, the concept of good faith was historically

[124] *Rapport au Président de la République relatif à l'ordonnance nº 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations* <https://www.legifrance.gouv.fr/eli/rapport/2016/2/11/JUSC1522466P/jo/texte>.

[125] J Boulanger, 'Principes généraux du droit et droit positif' in Georges Ripert (ed), *Le droit privé français au milieu du XXème siècle* (Librairie générale de droit et de jurisprudence, 1950) vol 1, 56; Jean-Etienne-Marie Portalis, *Ecrits et discours juridiques et politiques* (PUAM, 1988) 26.

[126] Ibid.

[127] See Mme Nicole Belloubet: 'Ainsi encadré, le droit à l'exécution forcée en nature limite l'abus de droit. Votre commission y a ajouté la condition de la bonne foi du débiteur, ce n'est guère utile, puisque le principe commande à l'intégralité du contrat, c'est l'article 1104 – elle vaut pour les deux parties', Séance du mardi 17 octobre 2017, 6e séance de la session ordinaire 2017–2018, présidence de Mme Marie-Noëlle Lienemann <http://www.senat.fr/cra/s20171017/s20171017_mono.html#par_374>.

[128] 'Réforme du droit des contrats', *Compte rendu analytique officiel du 17 octobre 2017*, 6e séance de la session ordinaire 2017–2018, présidence de Mme Marie-Noëlle Lienemann <http://www.senat.fr/cra/s20171017/s20171017_mono.html#par_374>.

[129] Pillet, above n 121.

[130] See Civ, 6 March 1876 (Affaire du canal de Craponne); *Avant-Projet 2005* art 1135-1 of the Catala project only stipulates the possibility of renegotiating in the context of hardship clauses.

given primary importance and has since been recognised as a principle of contract law.[131] Both jurisdictions are also bound by a common theme: a fair approach to contract. The underlying foundation is that a contract will only be enforceable if it is fair.[132] Morally tainted provisions have been struck out to correct contracts and provide a balanced approach to contract law and contract disputes. Fairness is enforced through good faith, which is given a primary role in contract law. However, the contours of the doctrine of good faith are yet to be clearly drawn. While there has been reluctance in France to see the doctrine develop as a general principle of law in the same way it developed in Germany, recent reform has brought good faith to the foreground of contract law provisions within the French Civil Code. The French reform of contract law has embraced the recognition of good faith at every stage of the contract, making good faith a pillar of the legal agreement.

3. **Good faith in England: a rejection?**

While the regulation of contracts and the approach that a contract must be fair were established early on in Germany and France, this was not the case in English common law. There is therefore no general recognition of the concept of good faith in English contract law.[133] This void is partly filled by equitable concepts, including estoppel and unconscionable conduct.[134] Following the United Kingdom's accession to the European Community in 1973 and the recognition of good faith in EU directives, the EU has imposed good faith on English law in certain areas, thereby encouraging the development of the concept in contract. The thesis will return to the influence of the EU in Chapters 4 and 5. While this influence is now in doubt following Brexit, it is still important to review the influences of the EU so far and highlight the possible consequences of the withdrawal from the EU on English contract law. For now, this section focuses on the influence of liberalism on the development of contract law in England. This will provide the background to the reasons why there is a lack of recognition of good faith in English contract law.

[131] Busseuil, above n 43, 553.
[132] Alland and Rials, above n 21, 280.
[133] In Scotland, however, civil law has impacted on the development of good faith in contract law. See Hector MacQueen, 'Good Faith in the Scots Law of Contract: An Undisclosed Principle?' in Angelo D M Forte (ed), *Good Faith in Contract and Property* (Hart Publishing, 1999) 5. For a comparison with Australia, Canada and the USA see Oliver Spencer Froböse, 'What Does Fairness Have to Do With It? A Critical Jurisdictional Comparison Regarding the Notion of "Buildability"' (2014) 30 *Building and Construction Law Journal* 238.
[134] Mary Arden, 'Coming to Terms with Good Faith' (2013) 30(3) *Journal of Contract Law* 199; *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433.

i. Contract and liberalism

The reason why good faith is not recognised in England stems from the liberal approach,[135] where the market regulates behaviour and there is no need for the government or courts to intervene. It is important to note that this approach is exemplified by legal developments that flowed from the Industrial Revolution, and the notions of individualism and laissez-faire.[136] Inspired by liberalism, individualism is a core component of classical contract law theory in the common law.[137] According to this theory, courts should intervene as little as possible as the will of the parties determines their agreement and the performance of their obligations.[138]

Party autonomy and the freedom of the parties to contract were core principles during the development of merchant contract law in England.[139] The doctrine of caveat emptor is a clear example.[140] This doctrine is founded on the idea that a buyer must be active in searching for information: not everything must be stated by the seller. In general contract law, caveat emptor is still applied and this means that the seller does not have a general duty to disclose information, reinforcing the liberal idea of autonomy in relations including the responsibility to obtain information and to 'let the buyer beware'.

English courts have been wary of good faith as an uncertain principle that cannot be reconciled with the common law tradition. In *Walford v Miles*,[141] Lord Ackner stated that there was no duty to negotiate in good faith. In spite of this strong position, a duty to inform can be found in particular transactions, including insurance contracts and partnerships where utmost good faith is required.[142] These contracts are said to be contracts of utmost good faith or *uberrimae fidei contracts*. However, the creation of monopolistic abuses, the lack of consumer protection and heavy transaction costs have eroded this approach.[143]

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[135] Van Hoecke, above n 48, 180.
[136] Antonio Gambaro, Rodolfo Sacco and Louis Vogel, *Traité de droit comparé – Le droit de l'Occident et d'ailleurs* (LGDJ, 2011) 98; see Chapter 3.II.A.1.
[137] See Jeannie Patterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (Lawbook Co, 4th ed, 2011) 6.
[138] Ibid; Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1979).
[139] Patterson, Robertson and Duke, above n 139, 6.
[140] *Smith v Hughes* (1971) LR 6 QB 597.
[141] [1992] 2 AC 128.
[142] Peter MacDonald Eggers, Patrick Foss and Simon Picken, *Good Faith and Insurance Contracts* (Lloyd's List, 3rd ed, 2010).
[143] See F Buckley (ed), *The Fall and Rise of Freedom of Contract* (Duke University Press, 1999); Richard E

ii.The development of fair dealing

Despite the individualistic approach shaping the law in this area, the principle of fair dealing underpins many court decisions in English contract law. This section examines the role of judges in affirming this principle.

'English law recognises no general principle that a party must exercise his contractual rights "reasonably" or "in good faith"'.[144] Yet the notion of reasonable exercise of discretionary rights shows that English courts do promote fairness in contractual dealings. This approach is not new. In 1766, Lord Mansfield mandated the concept of good faith in English law by making it clear that all contracts shall be governed by good faith, leading to the recognition of utmost good faith in insurance contracts.[145] The UK Parliament has also legislated controls to define acceptable contractual behaviour. These include reasonable expectations[146] and a list of unfair behaviours.[147] A general test of fairness was applied by the *Unfair Terms in Consumer Contracts Regulations 1999*, using 'implicit understandings in contractual relations to control explicit understandings'.[148] This has now been replaced by Part 2 of the *Consumer Rights Act 2015* but the test remains unchanged.[149]

Epstein, 'Contracts Small and Contract Large: Contract Law Through the Lens of Laissez Faire' in F Buckley (ed), *The Fall and Rise of Freedom of Contract* (Duke University Press, 1999) 25.

[144] E McKendrick, *Contract Law* (Palgrave Macmillan, 10th ed, 2013) 219.

[145] *Carter v Boehm* (1766) 3 Burr 1905.

[146] *Unfair Contracts Terms Act 1977* (UK) s 3: '(1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business. (2) As against that party, the other cannot by reference to any contract term – (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or (b) claim to be entitled – (i) to render a contractual performance substantially different from that which was reasonably expected of him, or (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all, except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness'; see also *Unfair Terms in Consumer Contracts Regulations 1999* (UK) which implements the *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*.

[147] *Unfair Terms in Consumer Contracts Regulations 1999* (UK) sch 2 lists some terms that may be regarded as unfair. Examples include 'excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier; … enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract; … enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided; … obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his'.

[148] Hugh Collins, 'Discretionary Powers in Contracts' in David Campbell, Hugh Collins and John Wightman (eds), *Implicit Dimensions of Contract Discrete, Relational, and Network Contracts* (Hart Publishing, 2003) 220, 225.

[149] *Consumer Rights Act 2015* (UK) ss 61–63.

Despite the absence of a broader regulatory framework in England, the courts have had to determine whether conduct is unfair and consequently reprehensible in contractual disputes. The courts have used construction of terms, expectations, customs and conventions from the trade sector relevant to the dispute to determine whether a party is exercising its discretionary right in a reasonable manner.[150] A power to exercise a unilateral right must be exercised honestly and not arbitrarily.[151] There have been a number of examples in judicial decisions. For instance, the control of discretionary powers is to 'be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality'.[152] Courts have experience in dealing with reasonable expectations and have focused on the written contractual terms.[153] Interpretation of such terms falls under the precedent of *Investor Compensation Scheme v West Bromwich.*[154] Courts require that one party notifies the other if there is a variation to the obligation of the latter,[155] and imply terms of trust and confidence.[156] This means that, even though the power is discretionary, 'the powers must be exercised for sound business reasons rather than egregious or overreaching outcomes'.[157]

Besides the courts' enforcement of fair dealing through contractual interpretation, contractual parties are increasingly using good faith by adding clauses stipulating a duty to cooperate or a duty to act in good faith.[158] For instance, an obligation to attempt, in good faith, to resolve a

[150] Jeannie Marie Paterson, 'Implied Fetters on the Exercise of Discretionary Contractual Powers' (2009) 35 *Monash University Law Review* 45, 49; Collins, above n 148, 238.
[151] *Lymington Marina Ltd v MacNamara* [2007] Bus LR Digest D29, cited in Arden, above n 134.
[152] *Socimer International Bank Limited (in liquidation) v Standard Bank London Ltd* [2008] EWCA Civ 116.
[153] Surrounding circumstances are only to be considered if they have a persuasive character. See Jeannie Paterson, 'The Standard of Good Faith Performance: Reasonable Expectations or Community Standards?' in Michael Bryan (ed), *Private Law in Theory and Practice* (Routledge-Cavendish, 2007) 153, 162.
[154] [1997] UKHL 28. According to Lord Hoffmann: 'Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. The background was … the "matrix of fact" … The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent … The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. … The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents.'
[155] *United Bank Ltd v Akhtar* [1989] IRLR 507 EAT; *Paragon Finance plc v Nash* [2001] EWCA Civ 1466.
[156] Collins, above n 148, 242–3.
[157] Paterson, 'Implied fetters', above n 150, 73.
[158] Arden, above n 134, 199; Mr Justice Leggatt, 'Contractual Duties of Good Faith' (Lecture to the Commercial Bar Association, London, 18 October 2016) [17] <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/mr-justice-leggatt-lecture-contractual-duties-of-faith.pdf>.

dispute through arbitration has been held enforceable,[159] implying a standard of fair, honest and genuine discussions aimed at resolving the dispute.[160] Good faith can require the parties to observe reasonable commercial standards of fair dealing.[161] In *Compass Group v Mid-Essex NHS Trust*,[162] the contract stipulated a duty to cooperate in good faith. This duty related not only to the efficient transmission of information and instructions, but it also enabled the trust or any beneficiary to derive the full benefit of the contract. Lord Justice Jackson interpreted the clause as meaning that the parties 'will work together honestly endeavouring to achieve the two stated purposes'.[163] Furthermore, in *Bristol Groundschool Limited v Intelligent Data Capture Limited*,[164] the Court implied a duty of good faith in a relational contract by stating that, 'as a matter of construction, it is hard to envisage any contract which would not reasonably be understood as requiring honesty in its performance'.[165] Even though a general doctrine of good faith is not recognised, this shows that honesty, standards of commercial dealings, and fidelity to the parties' bargain are core elements of the law on the performance of contracts in England. From these examples, it can be seen that good faith is infiltrating discussions on English contract law. While there is no general principle of good faith in English law, the influence of EU legislation has prompted the integration of good faith in English contract law.

While Chapters 4 and 5 will discuss good faith within EU legal instruments, it is relevant to show here how EU law has led to the use of good faith in certain contracts, namely consumer contracts. Following the UK's accession to the EU on 1 January 1973,[166] English courts have had to apply EU directives[167] following their incorporation into English law, such as for instance the *Unfair Terms in Consumer Contracts Regulations 1999* (UK). In *Director General of Fair Trading v First National Bank plc*,[168] the House of Lords had to decide whether a term in a standard form credit agreement entitling the bank to demand payment on the balance and surrounding interest following default of an instalment was unfair or not. The Court reversed the Court of Appeal decision, which had found the term to be unfair under the regulations

[159] *Cable & Wireless v IBM* [2002] EWHC 2059 (Comm).
[160] *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm).
[161] *Berkeley Community Villages v Pullen* [2007] EWHC 1330 (Ch).
[162] [2013] EWCA Civ 200.
[163] Ibid [112].
[164] [2014] EWHC 2145 (Ch).
[165] *Bristol Groundschool Limited v Intelligent Data Capture Limited* [2014] EWHC 2145 (Ch) [137].
[166] *Treaty of Accession of Denmark, Ireland and the United Kingdom* (1972) OJ L 73 (27 March 1972).
[167] *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29.
[168] [2002] 1 All ER 97.

implementing the *Directive on Unfair Terms in Consumer Contracts*.[169] The Court based its position on the fact that the provision was not unfair.[170] The provision could not be said to cause a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.[171] This shows that, even if the EU is harmonising certain aspects of consumer protection, there is still room for differences in domestic interpretation.[172] The 2009 case of *Office of Fair Trading v Abbey National plc*[173] made several references to the implementation of a directive as well as the substance of the specific directive on unfair terms. The Court held that the position taken by Parliament was taken at the time of the implementation of the directive to give 'the consumer an informed choice; rather than protect the consumer from making an unwise choice'.[174] This led to the UK Supreme Court deciding whether 'relevant charges' charged to bank customers due to overdrawn accounts constituted 'the price or the remuneration, as against the services supplied in exchange' within the meaning of the regulation. This question, albeit narrow, was important as it determined whether the terms could possibly be unfair.[175] The Supreme Court decided, through interpretation according to the natural meaning of the text,[176] that the charges were part of the price or remuneration for the bank services provided and therefore it did not need to assess their fairness under the 1999 regulation by considering their adequacy against the services provided.[177] The Court determined that it was not necessary to refer the question to the European Court of Justice to help with interpretation.[178] In 2017, Sturt Isaacs QC, sitting as deputy judge of the High Court, had to decide whether to follow or reject the 2009 decision.[179] This question presented itself after European Court of Justice cases referred to the possibility of national legal systems deciding to

> adopt national legislation which authorises judicial review as to the unfairness of contractual terms which relate to the definition of the main subject matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other hand, even in the case where those

[169] Ibid [27].
[170] Ibid [24].
[171] *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433.
[172] See further discussion in Chapter 5.I.B.
[173] [2009] UKSC 6.
[174] [2009] UKSC 6, [93] (Lady Hale), [6], [51] (Lord Walker).
[175] *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29 art 4(2); *Unfair Terms in Consumer Contracts Regulations 1999* reg 6(2).
[176] [2009] UKSC 6 (Lord Walker) [45].
[177] Ibid [51].
[178] Ibid [48]–[50].
[179] *Casehub Ltd v Wolf Cola Ltd* [2017] EWHC 1169 (Ch) [53].

terms are drafted in plain, intelligible language.[180]

Furthermore, the ECJ, while recently providing guidance on the interpretation of art 4(2) of the directive, did however leave it to the courts 'to verify that classification of those contractual terms having regard to the nature, general scheme and stipulations of the agreements concerned and the legal and factual context of which they form part'.[181] Isaacs QC decided that the Court had to follow the *Abbey* decision nonetheless.[182]

Other examples of the influence of EU legislation on the recognition of good faith in English contract law can be found in the *Consumer Protection from Unfair Trading Regulations 2008*, which implement the *EU Unfair Commercial Practices Directive*[183] and which came into force on 26 May 2008. It sets up a more comprehensive framework for dealing with sharp practices and rogue traders. This encompasses commercial practice that comprises professional negligence, misleading and aggressive commercial practices and unfair practices. For instance, professional diligence is to be assessed according to honest market practice and good faith in the trader's field.[184]

Another instance can be found in the *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013*,[185] which implements the *Consumer Rights Directive*.[186] The directive imposes information requirements to lessen the disparities that

[180] *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* (C-484/08) [2010] ECR I-4785, [49].

[181] *Matei Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA* (European Court of Justice (Ninth Chamber), C-143/13, 26 February 2015) [78].

[182] *Casehub Ltd v Wolf Cola Ltd* [2017] EWHC 1169 (Ch) [54].

[183] *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Text with EEA Relevance)* [2005] OJ L 149/22 ('*EU Unfair Commercial Practices Directive*'). For more information on the transposition of this directive see Policy Department Economic and Scientific Policy, *Transposition and Enforcement of the Directive on Unfair Commercial Practices (2005/29/EC) and the Directive Concerning Misleading and Comparative Advertising (2006/114/EC)* (2008) <http://www.europarl.europa.eu/webnp/webdav/users/jribot/public/IMCO%20Meeting%202009/Briefing%20Note%20on%20TIE%20of%20UCP%20and%20MCA%20Directives.pdf>.

[184] *EU Unfair Commercial Practices Directive* art 2 defines 'professional diligence' as 'the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either – (a) honest market practice in the trader's field of activity, or (b) the general principle of good faith in the trader's field of activity'.

[185] See Department for Business Innovation and Skills, '2010 to 2015 government policy: consumer protection' (Policy paper, 8 May 2015) app 3 <https://www.gov.uk/government/policies/providing-better-information-and-protection-for-consumers/supporting-pages/implementing-the-consumer-rights-directive-2011-83-eu>.

[186] *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the*

create barriers in the internal market.[187] The regulations mandate disclosure of any relevant information to the consumer, whether the contract is on premises, off premises or a distance contract.[188]

Following these developments and the influence of EU legislation, the judiciary has become more vocal about the doctrine of good faith in contract law. In the case of *Yam Seng*,[189] good faith is associated with honesty and other commercially acceptable and reasonable standards. Acting in good faith imposes fidelity upon the bargain: the parties must be true to their word. As the Court later stated, once they have agreed on the terms, the parties must respect them, performing their obligations without a breach of that same contract.[190] This recent English case has brought good faith in contract to the foreground by analysing English contract law and comparing it with other common law countries, including the USA, Canada and Australia.[191] This decision has however been criticised and some judges have distanced themselves from implying good faith in contracts.[192] More recently, *D&G Cars Limited v Essex Police Authority*[193] referred to *Yam Seng*[194] and proposed to replace good faith with an implied term of integrity[195] which was breached in that case.[196] This lack of consensus shows that a universal

Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA Relevance [2011] OJ L 304/64.

[187] Ibid recital (6).

[188] See ibid sch 1 for a list of information to be provided in on-premises contracts and sch 2 for distance and off-premises contracts.

[189] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB). Although see Norris J in *Hamsard 3147 Limited v Boots UK Ltd* [2013] EWHC 3251 (Pat) stating he does not regard the 'decision in *Yam Seng Pte Ltd v International Trade Corporation* as authority for the proposition that in commercial contracts it may be taken to be the presumed intention of the parties that there is a general obligation of "good faith". I readily accept that there will generally be an implied term not to do anything to frustrate the purpose of the contract. But I do not accept that there is to be routinely implied some positive obligation upon a contracting party to subordinate its own commercial interests to those of the other contracting party.'

[190] *Bluewater Energy Services BV v Mercon Steel Structures BV* [2014] EWHC 2132 (TCC).

[191] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [120]–[127].

[192] *Carewatch Services Ltd v Focus Caring Services Ltd* [2014] EWHC 2313 (Ch); *TSG Building Services plc v South Anglia Housing Ltd* [2013] EWHC 1151; *Myers v Kestrel Acquisitions* [2015] EWHC 916 (Ch). For a review of the doctrine of implied terms in English law, see Hugh Collins, 'Implied Terms: The Foundation in Good Faith and Fair Dealing' (2014) 67(1) *Current Legal Problems* 1.

[193] [2015] EWHC 226 (QB).

[194] Ibid [174].

[195] Ibid [175]: 'By the use of the term "integrity", rather as Leggatt J uses the term "good faith", the intention is to capture the requirements of fair dealing and transparency which are no doubt required (and would, to the parties, go without saying) in a contract which creates a long-standing relationship between the parties lasting some years … There may well be acts which breach the requirement of undertaking the contract with integrity which it would be difficult to characterise definitively as dishonest. Such acts would compromise the mutual trust and confidence between the parties in this long-term relationship without necessarily amounting to the telling of lies, stealing or other definitive examples of dishonest behaviour.'

[196] Ibid [216].

recognition of the doctrine by the courts is a long way away.[197] This is partly due to the idea expressed by Moore-Bick LJ in a 2016 case: 'There is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement.'[198] That statement was a direct response to the one made by Legatt J in *Yam Seng*, regarding what he called a 'manifestation of a more general principle of good faith'.[199]

In addition to judicial activism by some judges in England, there have also been some legislative developments. The *Sale of Goods Act* refers to good faith in some sections, but only in relation to good faith as a subjective right, that is, as a defence. For instance, s 23 states that, '[w]hen the seller of goods has a voidable title to them, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title'.[200] Good faith is interpreted within the meaning of the Act as 'done honestly, whether it is done negligently or not'.[201] The new *Consumer Rights Act* also refers to good faith in relation to unfair contract terms.[202] The Act applies to agreements between a trader and a consumer.[203] It aims to clarify and simplify rights of consumers and protection of their interests in England by increasing consumer confidence and providing an enforcement mechanism. It provides in one single statute the rules applicable to all consumer contracts previously found in different statutes.[204] Since its enactment on 26

[197] This is further illustrated by a recent article on why *Yam Seng* or good faith should not be used and instead why a duty of fairness should be promoted in the context of employment contracts: Astrid Sanders, 'Fairness in the Contract of Employment' (2017) 46(4) *Industrial Law Journal* 508, 531–2.

[198] *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2016] EWCA Civ 789 [45].

[199] *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283 (Comm) [97]–[98].

[200] *Sale of Goods Act 1979* (UK) s 23.

[201] Ibid s 61(2), repealed (3 January 1995) by 1994 c 35, ss 7, 8(2), sch 2 para 5(9)(b), sch 3 (with s 8(3)).

[202] *Consumer Rights Act 2015* (UK) s 62.

[203] *Consumer Rights Act 2015* (UK) s 1(1).

[204] From the explanatory note, these are: *Supply of Goods (Implied Terms) Act 1973*; *Sale of Goods Act 1979*; *Supply of Goods and Services Act 1982*; *Sale and Supply of Goods Act 1994*; *Sale and Supply of Goods to Consumers Regulations 2002*; *Unfair Contract Terms Act 1977*; *Unfair Terms in Consumer Contracts Regulations 1999; Unfair Terms in Consumer Contracts (Amendment) Regulations 2001*; *Competition Act 1998*; *Enterprise Act 2002*. The European Directives implemented in the Bill are *Directive 99/44/EC of the European Parliament and Council on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees*; *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*; some provisions of *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA Relevance* [2011] OJ L 304/64. The Bill also implements some provisions (in respect of enforcement) of: *Regulation (EC) No 2006/2004 of the European Parliament and Council on Cooperation Between National Authorities Responsible for the Enforcement of Consumer Protection Laws*; *Regulation (EC) No 765/2008 of the European Parliament and Council on the Requirements for Accreditation and Market Surveillance Relating to the Marketing of Products*; *Directive 2001/95/EC of the European Parliament and Council on General Product Safety*; *Directive 98/27/EC of the European Parliament and*

March 2015, the *Consumer Rights Act* has replaced the *Sale of Goods Act* in business to consumer contracts.[205] The *Sale of Goods Act* continues to apply to business-to-business contracts.

iii.Brexit

On 23 June 2016, UK citizens voted by referendum to decide on the question: 'Should the UK remain a member of the European Union or leave the European Union?' A majority of voters (51.9%) voted in favour of leaving the European Union. What followed was a mix of bewilderment and chaos. Indeed, the courts were asked to determine who could trigger art 50 of the *Treaty on European Union* and decided that the Prime Minister could not do so without the consent of the UK Parliament,[206] which she obtained on 16 March 2017.[207] On 29 March 2017, art 50 of the *Treaty on European Union* was triggered by Prime Minster Teresa May, meaning the UK and the EU entered into 12 months of negotiations regarding the conditions of the withdrawal of the UK from the EU. Since then the EU and the UK have been embroiled in discussions on what the withdrawal agreement will contain and what will become of the laws implementing EU law and the role of the ECJ post-Brexit.

In conclusion, the principle of good faith is yet to be fully acknowledged in England. Even though topical applications of the doctrine seem to suggest the judiciary is coming to terms with the doctrine in contract law,[208] the backlash and lack of support demonstrate that good faith will only be integrated into English contract law through the implementation of EU laws. This position is now put in doubt due to Brexit, but the consequences of Brexit are yet to be fully grasped. A report on the protection of consumers following the withdrawal is currently awaiting response by the government.[209]

Furthermore, notwithstanding the liberal approach to contracts, English courts have developed

Council on Injunctions for the Protection of Consumers' Interests.

[205] *Consumer Rights Act 2015* (UK) s 1(5).

[206] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5; *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin); [2016] NIQB 85.

[207] *European Union (Notification of Withdrawal) Act 2017* (UK).

[208] Arden, above n 134.

[209] House of Lords, European Union Committee, 'Brexit: Will Consumers be Protected?' (HL Paper 51, 19 December 2017). See recommendation 19 on the need for the government to set out a clear plan for regulators for consumer protection.

a fair approach to the reasonable exercise of discretionary rights. The clear differentiation between commercial dealings and the protection of consumers demonstrates that the English approach to contract law is status-based. However, the current targeting of consumer rights is highly influenced by the development of European law regulating consumer protection. This is where the doctrine of good faith is mostly used, but only because of the implementation of EU directives and no further, as the *Consumer Rights Act* shows. The pressure to recognise good faith in England is slowly building, from the introduction of good faith in consumer protection to recent cases by English courts. However, it seems that England is a long way away from recognising such a duty on its own, in spite of commentary stating otherwise.[210] The English system is still true to its 'liberal and pragmatic design fit for commercial use',[211] but the influence of the EU has changed its character. What will become of this influence post-Brexit is today unknown.

B Good faith in North America

Unlike England, other common law legal systems have recognised a principle of good faith. Two examples are notable: the USA and Canada. Both jurisdictions have used the doctrine in contract law. In this section, their approach to the integration and application of good faith in contract law is described in order to determine whether the duty to act in good faith in the performance of contracts has led to more uncertainty, as claimed by its detractors,[212] and whether good faith can coexist with other equitable doctrines, such as estoppel.[213]

1. Good faith in the USA: a duty

The USA has recognised good faith through two legal instruments: the *Uniform Commercial Code* (UCC)[214] and *Restatement (Second) of Contracts*.[215] Even though it was drafted in 1950, the UCC has become 'one of the major sources of commercial law in the US'.[216] The use of

[210] Van Hoecke, above n 48, 186; also echoed in Leggatt, above n 158.
[211] Micklitz, above n 10, 8; see also Mak, above n 10, 289.
[212] See Chapter 4.I.D.
[213] Even though similar reasoning can be found in German law: see above.
[214] *Uniform Commercial Code 2012* (USA) s 1-201 (20).
[215] American Law Institute, *Restatement (Second) of Contracts* (1981) § 205.
[216] It is used in all US states except for Louisiana.

good faith within the code is therefore noticeable. The *Restatement (Second) of Contracts* has been the most famous non-binding authority in US contract law since its drafting in 1981.

In 1915, *Simon v Etgen* set the stage for the UCC by stating that '[e]very contract implies good faith'.[217] According to § 1-304 of the UCC, 'every contract or duty within the UCC imposes an obligation of good faith in its performance and enforcement'. In this legislation, good faith is understood as 'honesty in fact in the conduct or transaction concerned'.[218] Yet, the jurisprudence warns that '[we] caution anyone who is confident about the meaning of good faith to reconsider'.[219] In spite of the definition in the UCC, it is clear that good faith is not a clearly defined concept. This can be explained by the fact that each state interprets the provisions laid out in the UCC according to its own context, thereby leading to divergent interpretations.

The US understanding of the duty to act in good faith in the performance of the contract is illustrated as follows.

> Where, as here, a contract simply provides a binary choice – to renew the lease or not – the duty of good faith and fair dealing is unnecessary to protect the parties' interests, particularly when the lease terms make clear that the renewal provisions are simply to provide an efficient mechanism for extension of the Lease if desired by both Lessor and Lessee.[220]

In spite of being considered a weak interpretative tool by some,[221] the application and enforcement of good faith has gone beyond the strict definition of the notion.[222] The good faith principle does not, however, prevent a party from using a discretionary right as long as it is exercised reasonably. Good faith has also been applied in franchising cases.[223] For instance, a

[217] *Simon v Etgen*, 213 NY 589, 107 NE 1066, 1067–8 (1915).
[218] *Uniform Commercial Code 2012* (USA) s 1-209(19). This provision was transplanted into the US code through the input of Professor Karl Llewellyn who had been taught in Germany: Allan Farnsworth, 'The Concept of Good Faith in American Law' *CISG Database* (14 December 2009) <http://www.cisg.law.pace.edu/cisg/biblio/farnsworth3.html>. See W Twining, *Karl Llewellyn and the Realist Movement* (University of Oklahoma Press, 1985) 312.
[219] *Uniform Commercial Code*. Vol 1 (4th ed), 1995, 187
[220] *Sunshine Gasoline Distributors, Inc v Biscayne Enterprises, Inc* (Rothenberg J), opinion filed 11 June 2014.
[221] Katharina Pistor, 'Legal Ground Rules in Coordinated and Liberal Market Economies' in Klaus Hopt, Eddy Wymeersch, Hideki Kanda and Harald Baum (eds), *Corporate Governance in Context: Corporations, States and Markets in Europe, Japan, and the US* (Oxford University Press, 2005) 249, 261.
[222] Alan Farnsworth, 'Good Faith in Contract Performance' in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Clarendon Press, 1995) 159.
[223] *National Franchisee Association v Burger King Corp,* 715 F Supp 2d 1232 (SD Fla, 2010); *Carvel Corp v Diversified Mgmt Group Inc,* 930 F 2d 228 (2nd Cir, 1991).

Delaware Court considered that the duty of good faith in fair dealing, as expressed in § 205 of the *Restatement of Contracts*, 'requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain'.[224] However, the Court would only imply a covenant to act in good faith if the contractual provisions had left an ambiguity or potential gap.[225]

§ 205 of the *Restatement of Contracts* stipulates that 'every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement'. It emphasises faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterised as involving bad faith because they violate community standards of decency, fairness or reasonableness.

Consequently, both the *Restatement* and the UCC mandate a duty to act in good faith. However, it only 'arises from the contract itself … and [consequently] cannot apply before the contract is formed'.[226] This is because other doctrines apply at the stage of contract formation. Indeed, 'good faith is to be differentiated to the related idea of unconscionability which is applicable at contract formation'.[227] Both focus upon protecting the weaker against the stronger party.[228] This differs from the German and French civil law approach where *treu und glauben* and *bonne foi* have been extended to the negotiation stage of the agreement. While the *Restatement* is only persuasive, the UCC is enforceable before the courts. It is important to note that the interpretation of the UCC has been left to the states. The lack of an overall federal approach and the fact that the code only applies to commercial situations and not contracts in general are the reasons why the USA has not been chosen as the core focus of this thesis.[229]

[224] *Wilgus v Salt Pond Investment Company*, 498 A 2d 151, 159 (1985).
[225] *Fortis Advisors LLC v Dialog Semi Conductor* PLC CA No 9522-CB (Del Ch, 30 January 2015) (Bochard, memorandum of opinion, 12).
[226] William H Lawrence and Robert D Wilson, 'Good Faith in Calling Demand Notes and in Refusing to Extend Additional Financing' (1988) 63(4) *Indiana Law Journal* 825, 828.
[227] Kevin M Teeven, *A History of the Anglo-American Common Law of Contract* (Greenwood Press, 1990) 307.
[228] Charles K Knapp, 'Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel' (1981) 81 *Columbia Law Review* 52, 79.
[229] For examples of such studies, see Steven J Burton, 'Breach of Contract and the Common Law Duty to Perform in Good Faith' (1980) 94 *Harvard Law Review* 36; Farnsworth, 'Good Faith in Contract Performance', above n 227; Robert S Summers, '"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54(2) *Virginia Law Review* 195.

2. Good faith in Canada: an organising principle

This section examines the Canadian approach where, until recently, there was no explicit legal recognition of a good faith principle in contract law.[230] Similarly to the US, good faith is applied at some stages of the contract only; the Canadian debate has focused on performance of the contract and the implication of a term to act in good faith.[231] The question is whether the duty to act in good faith is owed by the operation of law, or is based on the presumed intentions of the parties.[232] The debate was resurrected in 2014 with a Supreme Court decision discussed below.

Recognition of a principle of good faith in negotiation is slowly developing. For example, in *SCM Insurance Services Inc v Medisys Corporate Health LP*,[233] a duty to act in good faith in negotiation was placed upon the parties. Good faith was interpreted as:

> refraining from acting in a manner which would have the result that the plaintiffs did not have a reasonable opportunity to acquire the Business … to act reasonably in the performance of its obligation to provide the plaintiffs with the right of first negotiation. Specifically, it is a duty to act reasonably in negotiating a possible sale of the Business to the plaintiffs.[234]

In this instance, the Court considered that the duty was not breached.[235]

In the performance of contracts, the importance of context in drawing the contours of good faith has been identified as one of the reasons for the lack of recognition.[236] In 2014, the

[230] For a review of case law see Shannon Kathleen O'Byrne, 'The Implied Term of Good Faith and Fair Dealing: Recent Developments' (2007) 86(2) *Canadian Bar Review* 193, 197.
[231] See, eg, *Transamerica Life Canada Inc v ING Canada Inc* (2003) 68 OR (3d) 457 (CA): 'Canadian Courts have not recognized a stand-alone duty of good faith that is independent from the terms expressed in a contract or from the objectives that emerge from those provisions. The implication of a duty of good faith has not gone so far as to create new, unbargained-for rights and obligations. Nor has it been used to alter the express terms of the contract reached by the parties. Rather, Courts have implied a duty of good faith with a view to securing the performance and enforcement of the contract made by the parties, or as it is sometimes put, to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into.' See, eg, John McCamus, *The Law of Contracts* (Irwin Law, 2005) 783.
[232] O'Byrne, above n 231, 206.
[233] [2014] ONSC 2632 (Ontario).
[234] Ibid [36].
[235] Ibid [47].
[236] O'Byrne, above n 231, 244.

Supreme Court of Canada had to decide on the implication of a good faith principle in contract law. In what was to become a landmark decision, the Court decided to recognise good faith as an 'organising principle of the common law of contract [that] manifests itself though existing doctrines'.[237] *Bhasin v Hrynew*[238] dealt with the question of whether a decision to renew a contract implied a covenant to make the decision in good faith. The Court started its judgement by stating:

> Two incremental steps are in order to make the common law more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second step is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.[239]

As a result, the courts must consider good faith as an organising principle to allow 'the doctrine to adapt to highly context-specific understanding of what honesty and reasonableness in performance require so as to give appropriate consideration to the legitimate interests of both contracting parties'.[240] The Court considered that the respondent breached their duty to act in good faith and damages were awarded to the appellant. As a clear recognition of good faith provisions in Canadian contract law, *Bhasin* is a 'revolutionary decision'.[241] This case is quite exceptional, in that it has already gained landmark status following its publication.[242] Even though this decision allows good faith to coexist with common law doctrines and especially applies to commercial contracts,[243] uncertainties prevail: its incorporation in Canadian law is yet to be clearly delineated; and the concept is open-ended.[244] For these reasons Canada, like the USA, was not chosen as the core focus of this thesis.

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[237] *Bhasin v Hrynew* [2014] SCC 71, [66].
[238] Ibid.
[239] Ibid [33].
[240] Ibid [69].
[241] Chris D L Hunt, 'Good Faith Performance in Canadian Contract Law' (2015) 74 *Cambridge Law Journal* 4, 6.
[242] Geoff R Hall, 'Bhasin v. Hrynew: Towards an Organizing Principle of Good Faith in Contract Law' (2015) 30(2) *Banking & Finance Law Review* 335, 335: 'the decision of the Supreme Court of Canada in *Bhasin v Hrynew* is an exception. From the moment the Supreme Court granted leave to appeal it was apparent the case would be a landmark.'
[243] *Bhasin* [2014] SCC 71, [80].
[244] Hall, above n 243, 342–3.

C Conclusion to Section I

Section I of this chapter has reviewed the use of good faith in three European member states, and the USA and Canada. A number of conclusions can be drawn. In spite of the distinction between transaction-based law and status-based law, the doctrine of good faith has evolved to apply to more and more contracts. Today, good faith is firmly established in French and German contract law, even though there are variations in the development of the notion as well as its application. By making good faith a principle of contract law that cannot be derogated from, reform of French contract law is making a statement about the importance of good faith and recognising the case law over the last 50 years. In German law, the code does not reflect the similar development in German judicial decisions. These variations illustrate the flexibility of the concept and provide an insight into the different uses of good faith in civil law systems and, perhaps more surprisingly, the importance of judicial activism in such legal systems. The protection of consumers through good faith at the EU level has led to some changes in England and contributed to the development of an expanding doctrine of good faith as well as a reinforcement of the doctrine as a foundation of contract law in France and Germany. The current discussions regarding the withdrawal of the UK from the European Union are likely to lead to fruitful discussions on the state of the law as implemented from EU directives, but judicial activism regarding good faith is still very much divided between proponents and sceptics of the recognition of good faith as a legal principle.

Developments in North America further show that good faith can exist in common law jurisdictions. In the USA, good faith is limited to performance of contracts and is prescribed by the Uniform Commercial Code. In Canada judicial activism has led to the recognition of a principle of contract law requiring honesty. These examples provide a valuable insight for Australia and silence some of the critics who claim that good faith is not a suitable doctrine in common law countries,[245] even though the US doctrine only applies to commercial contracts. It is clear that, in spite of some resistance, the recognition of good faith in contract law is evolving and indeed growing through its application to new contractual disputes in different

[245] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11.

jurisdictions[246] and different legal traditions. While the diversity of legal traditions has led to divergent understandings of contract and fairness, good faith and abuse of rights, it is interesting to note the importance of judicial activism in both civil and common law legal traditions, a point that will be discussed later in relation to the Australian judicial approach.[247] After exploring good faith in legislation and case law in the domestic context, the next section of this chapter will turn to international legal instruments on contract and their references to good faith.

II. INTERNATIONAL COMMERCIAL CONTRACTS

The presence of good faith in contractual dealings is further demonstrated by its recognition on the international stage in conventions and principles dominating commercial law. First, Smith and Ricardo proposed concepts that influenced later developments. Second, increasing international trade and globalisation have transformed global economies and international commercial contracts.[248] Indeed, following the specialisation of the production of goods and services, companies across the world have exported their goods and services to respond to demand from external markets. This plethora of exchange has led to the questioning of the applicable laws, and discussion of the possibility of developing a unified law that would apply only to international trade. Bringing uniformity to international contracts is not a new idea. Back in the 1920s, it was suggested that the law of the international sale of goods be unified.[249] This led to the drafting of the *Hague Conventions on the Sale of Goods* in 1964.[250] However, only 9 states ratified them, which led to a rethinking of the instruments used for such harmonisation. Later in the twentieth century, two instruments provided steps towards the standardisation of international commercial contract law. The *Convention on Contracts for the International Sale of Goods* (CISG) and the *Unidroit Principles of International Commercial*

[246] See above on the development of good faith in France.
[247] See Chapter 4.II.B.2.
[248] See, eg, Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2005). See below on the development of international instruments to regulate international contracts.
[249] Ingeborg Schwenzer (ed),'Introduction' *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 3rd ed, 2010) 1.
[250] *Convention on the Law Applicable to Contracts for the International Sale of Goods* (HCCH) (1985) 24 ILM 1575 (signed 22 December 1986); Lando, 'CISG and its Followers', above n 55, 379. As of 28 February 2018, the only states parties to the convention are Argentina, Czech Republic, Netherlands, Republic of Moldava and Slovakia.

Contracts (PICC) follow the European understanding of contract laid out in the Introduction. The agreement between the parties is the core element to the conclusion of a contract.[251] The use of good faith in this context is, however, quite different. Section A examines how the extensive interpretation of the CISG has led to the recognition of good faith in the international sale of goods. Section B discusses the central place of the duty to act in good faith in the PICC and its fate in practice.

A Good faith in the Convention on Contracts for the International Sale of Goods: a principle of interpretation

The CISG came into force in 1988. It applies automatically in contracts regulating the international sale of goods, whether or not it is expressly stated by the parties, or due to rules of private international law nominating the law of a contracting state as the law applicable to the contract.[252] Parties can exclude its application by stating it expressly.[253] The purpose is to provide a modern, uniform and fair regime for contracts for the international sale of goods, and it has introduced certainty in commercial exchanges. Today the CISG governs more than 80 per cent of international trade.[254] Consequently, it is considered 'the most successful and noteworthy result of unification of international contract law'.[255] Most major trading nations have ratified the Convention. In spite of notable absences among contracting parties,[256] 'still on the whole there can be no doubt that the CISG provides a most valuable and fairly innovative normative regime for international sales contracts'.[257]

The CISG contains substantive rules that can apply to international contracts. It is therefore important to review the definition of a legal agreement under the Convention. According to the

[251] CISG arts 14–24; PICC comment 2 of art 1.2.
[252] CISG art 1.
[253] Ibid art 6.
[254] United Nations, 'Status of the United Nations Convention on Contracts For the International Sale of Goods' (22 March 2012) *United Nations Treaty Collection* <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X10&chapter=10&lang=en>; Schwenzer, above n 252, 1.
[255] Hofmann, above n 35, 146.
[256] Such as the UK and India. See UNCITRAL, *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)* (2018) <http://www.uncitral.org/uncitral/uncitral_texts/sale_goods/1980CISG_status.html>.
[257] Michael Joachim Bonell, 'The CISG, European Contract Law and the Development of a World Contract Law' (2008) 56 *American Journal of Comparative Law* 1, 4.

CISG, offer and acceptance are core requirements of a contract for the sale of goods.[258] A contract is concluded when an acceptance is effective.[259] The CISG does not regulate the validity of the contract,[260] or the liability of the seller for personal injury.[261] Certain categories of contract are excluded from its scope, including the sale of goods bought for personal, family or household use; sales by auction or on execution or otherwise by authority of law; and sale of stocks, shares, investment securities, negotiable instruments or money.[262]

Article 7(1) stipulates that the Convention has to be interpreted in such a way that it observes good faith in international trade. Article 7(1) imposes good faith only in regard to the interpretation of the Convention. The text does not impose a duty of good faith upon the parties in an international sale of goods.[263] Article 7 was the result of a compromise with the UK which did not want good faith recognised as a duty applicable to parties whose contract is governed by the Convention. Yet, in spite of this, the UK is yet to ratify the Convention. The explanatory notes detail the need to understand 'good faith in international trade' across legal systems, without reference to the domestic understanding of the notion, in order to promote a uniform approach to interpretation.[264]

There is yet to be a 'universal' interpretation of the doctrine of good faith in international contract law. Due to the lack of guidelines within the Convention as to what good faith in international trade means, a US Court has used private international law mechanisms to ultimately guide the American interpretation.[265] France has also used art 7 to impose a duty of

[258] CISG art 14.
[259] Ibid art 23.
[260] Ibid art 4.
[261] Ibid art 5.
[262] Ibid art 2 also includes sale of ships, vessels, hovercraft or aircraft; and of electricity. See Bonell, above n 266.
[263] John Felemegas, 'Comparative Editorial Remarks on the Concept of Good Faith in the CISG and the PECL' (2001) 13 *Pace International Law Review* 399, 401: 'The wording was agreed upon only after lengthy deliberations and it was meant as a final rejection of more far-reaching proposals to apply the principle of "good faith and fair dealing" to the obligations and the behavior of the parties themselves'. See also Ingeborg Schwenzer above n 252 121–2; Max Wesiack, 'Is the CISG Too Much Influenced by Civil Law Principles of Contract Law Rather than Common Law Principles of Contract Law? Should the CISG Contain a Rule on the Passing of Property?' (2004) *CISG Database* <http://www.cisg.law.pace.edu/cisg/biblio/wesiack.html>; Troy Keily, 'Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)' (1999) 3(1) *Vindobona Journal of International Commercial Law and Arbitration* 15.
[264] Bruno Zeller, 'Four-Corners – The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods' (2003) *CISG Database* ch 3 <http://www.cisg.law.pace.edu/cisg/biblio/4corners.html>.
[265] *Schmitz-Werke GmbH & Co v Rockland Industrie, Inc; Rockland International FSC Inc*, 37 Fed Appx 687 (2002); *Forestal Guarani SA v Daros International, Inc* (United States Court of Appeals for the Third Circuit, No 08-4488, 21 July 2010).

good faith upon the parties to a contract. For instance, the Court of Appeal of Grenoble decided that,

> by not telling the seller the ultimate destination of the goods and by sending them to another location than the one stated in the contract, the buyer breaches article 7 CISG as such conduct is contrary to the principle of good faith in international trade laid down in article 7 CISG.[266]

Article 7 has also been used to decide 'to allow a buyer to declare the contract void at the time of trial [which] would violate the principle of good faith'.[267] More generally, good faith has been mentioned in several cases,[268] but has only been applied in a limited number of them.[269]

As previously mentioned, the UK is not party to the Convention. The reference to good faith in the Convention has been advanced as one of the reasons why the UK did not ratify it.[270] This is significant and once again points to the general reluctance in England to recognise the concept. Different reasons have been suggested for this. Firstly, the *Sale of Goods Act* was considered stricter than the rules in the Convention. Secondly, the presence of good faith in art 7 has also been advanced as a reason for the non-ratification.[271] Finally, the Convention is yet to be ratified because of lack of parliamentary time.[272] In 2009, the House of Lords made it clear that the Convention (as well as the PICC and the *European Principles on Contract Law*) is mainly based on continental traditions,[273] and is therefore at odds with the common law philosophy.[274] Lord Hoffmann also concluded that the Convention should not be applied in England due to the difference and maybe even antagonism between England and France.[275] In spite of this position, English courts may still need to interpret and apply the CISG due to rules

[266] *BRI Production 'Bonaventure' v Pan African Export*, Grenoble Court of Appeal, France, decision nº 93-3275, 22 February 1995.
[267] Keily, above n 273, 17; referring to case no 7U 1720/949, February 1995.
[268] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.
[269] Benedict Sheehy, 'Good Faith in the CISG: The Interpretation Problems of Art. 7' (2007) *Review of the Convention on Contracts for the International Sale of Goods* 153.
[270] Hofmann, above n 35.
[271] CISG art 7(1): 'In the interpretation of this Convention, regards is to be had to … the observance of good faith in international trade'. See Hofmann, above n 35; see also Schwenzer, above n 2667.
[272] James Douglas, 'Arbitration of the International Sale of Goods Disputes under the Vienna Convention' (Paper presented at the Institute of Arbitrator and Mediators Australia National Conference, Cairns, 28–29 May 2006) <http://cisgw3.law.pace.edu/cisg/biblio/douglas.html>; Camille Baasch Andresen, 'United Kingdom' in Franco Ferrari (ed), *The CISG and its Impact on National Legal Systems* (Sellier, 2008) 303.
[273] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38.
[274] See above I.A.3.
[275] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [39].

of private international law, should parties state the CISG as the law applicable to a contract in dispute brought before English courts.[276] It is, however, unlikely that it will follow the US or French judicial approach on expanding the role of art 7(1) of the Convention.

The CISG requires that the text be interpreted to promote the observance of good faith.[277] This is the only reference to good faith in the text. Yet, judicial activism has created an obligation to act in good faith in contracts submitted to the application of the CISG. While it is fair to recognise the doctrines of reasonableness, loyalty and cooperation throughout the Convention,[278] it is quite another thing to consider that the text mandates a duty to act in good faith, when negotiations during the drafting on that matter were so heated.[279] The CISG has had different impacts in Australia and the EU. Australia ratified the Convention on 17 March 1988 and enacted national legislation in line with its dualist model.[280] Zeller argues that, by incorporating the CISG into its domestic law, Australia has integrated the notion of good faith into domestic law.[281] However, this approach adopts the broader interpretation of art 7 and departs from the literal interpretation of the Convention. The lack of an explicit duty of good faith placed upon the parties has not prevented the doctrine being implied by the courts. A broader duty to cooperate and the concept of reasonableness are also said to emanate from the text of the CISG.[282] Furthermore, despite the CISG being implemented in domestic law in

[276] CISG art 1(1) states: 'This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State'. See Herbert Bernstein and Joseph Lookofsky, *Understanding CISG in Europe* (Kluwer Law International, 2nd ed, 2002) 14–16, reproduced in Thomas Kadner Graziano, *Comparative Contract Law: Cases, Materials and Exercises* (Palgrave McMillan, 2009); *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 7th ed, 2009) 33-123.

[277] CISG art 7.

[278] Schwenzer, above n 252.

[279] For a history of the Convention see ibid.

[280] *Sale of Goods (Vienna Convention) Act 1987* (ACT); *Sale of Goods (Vienna Convention) Act 1986* (NSW); *Sale of Goods (Vienna Convention) Act 1987* (NT); *Sale of Goods (Vienna Convention) Act 1986* (Qld); *Sale of Goods (Vienna Convention) Act 1986* (SA); *Sale of Goods (Vienna Convention) Act 1987* (Tas); *Sale of Goods (Vienna Convention) Act 1987* (Vic); *Sale of Goods (Vienna Convention) Act 1986* (WA); *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

[281] Bruno Zeller, 'Good Faith – Is it a Contractual Obligation?' (2003) 15(2) *Bond Law Review* 215, 217.

[282] See, eg, CISG art 16(2)(b); Hugh Beale, Bénédicte Fauvarque-Cosson, Jacobien Rutgers, Denis Tallon and Stefan Vogenauer, *Contract Law Ius Commune: Casebooks for the Common Law of Europe* (Hart Publishing, 2nd ed, 2010) 151; Lorena Carvajal-Arenas and A F M Maniruzzaman, 'Cooperation as Philosophical Foundation of Good faith in International Business-Contracting - A View Through the Prism of Transnational Law' (2012) *Oxford University Comparative Law Forum* 1.

Australia,[283] it has rarely been used, or it has been used incorrectly.[284] As a matter of comparison, Australian courts have only referred to the Convention in eleven cases.[285] Only six cases[286] have actually applied a provision of the Convention, while the other cases refer to the Convention as a matter of interpretation, including the concept of good faith.[287]

At the EU level, the CISG has had a large influence on the drafting of international principles, including the *Principles of European Contract Law* (PECL). Such influence is illustrated by the *Directive of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees*.[288] However, this directive goes further than the CISG by imposing responsibility on the seller for the quality and performance of the goods. It is also the source of the PECL.[289] The CISG has furthermore influenced the Common European Sales Law regime, regulating transactions between businesses.[290]

[283] *Sale of Goods (Vienna Convention) Act 1987* (ACT); *Sale of Goods (Vienna Convention) Act 1986* (NSW); *Sale of Goods (Vienna Convention) Act 1987* (NT); *Sale of Goods (Vienna Convention) Act 1986* (Qld); *Sale of Goods (Vienna Convention) Act 1986* (SA); *Sale of Goods (Vienna Convention) Act 1987* (Tas); *Sale of Goods (Vienna Convention) Act 1987* (Vic); *Sale of Goods (Vienna Convention) Act 1986* (WA); *Trade Practices Act 1974* (Cth).

[284] Lisa Spagnolo, 'The Last Output: Automatic CISG Opt Outs, Misapplication and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers' (2009) 10 *Melbourne Journal of International Law* 141.

[285] Compared to 58 cases in France, as found in Unilex database on the CISG. *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Roder-Zelt und Hallenkonstruktionern GmbH v Rosedown Park Pty Ltd* (1995) 57 FCR 216; *South Sydney District Rugby League Football Club Ltd v News Ltd* [2000] FCA 1541 (3 November 2000); *Downs Investments Pty Ltd v Perjawa Steel BHD* [2001] QCA 433; *Ginza Pty Ltd v Vista Corp Ltd* [2003] WASC 11; *Summit Chemicals Pty Ltd v Vetrotex Espana SA* [2003] WASC 182; *Hannaford v Australian Farmlink Pty Ltd* [2008] FCA 1591 (24 October 2008); *Olivaylle Pty Ltd v Flothweg GmbH & Co KGAA* [2009] VSC 328; *Delphic Wholesalers Australia Pty Ltd v Agrilex Co Ltd* [2010] VSC 328; *Cortem SpA v Controlmatic Pty Ltd* [2010] FCA 852 (13 August 2010); *Castel Electronics Pty v Toshiba Singapore Pte Ltd* [2010] FCA 1028.

[286] *Roder-Zelt und Hallenkonstruktionern GmbH v Rosedown Park Pty Ltd* (1995) 57 FCR 216; *Downs Investments Pty Ltd v Perjawa Steel BHD* [2001] QCA 433; *Ginza Pty Ltd v Vista Corp Ltd* [2003] WASC 11; *Delphic Wholesalers Australia Pty Ltd v Agrilex Co Ltd* [2010] VSC 328; *Cortem SpA v Controlmatic Pty Ltd* [2010] FCA 852 (13 August 2010); *Castel Electronics Pty v Toshiba Singapore Pte Ltd* [2010] FCA 1028.

[287] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Downs Investments Pty Ltd v Perjawa Steel BHD* [2001] QCA 433.

[288] 1999/441EC, 1999 OJ (L 171) 12 (EC). Art 2 is almost identical to CISG art 35 and art 3 to CISG arts 36, 46, 49 and 50.

[289] Ole Lando and Hugh Beale (eds), *Principles of European Contract Law, Parts I and II* (Kluwer Law International, 2000) xxv–xxvi.

[290] G Wagner, 'Termination and Cure Under the Common European Sales Law' (2013) 50 *Common Market Law Review* 147, 162.

B Good faith in the Unidroit Principles of International Commercial Contracts: a duty

The PICC is part of the *lex mercatoria* and is not part of the hard law that includes the CISG. Yet, it is important to highlight certain aspects of the PICC since some argue that the PICC has become a 'background law'.[291] Furthermore, the PICC was influenced by the CISG.[292] Finally it is an interesting example of the actors involved in the development of fairness in contractual dealings, be they national, supranational or international.[293]

The International Institute for the Unification of Private Law, also called UNIDROIT, was created in 1926 as an auxiliary organ of the League of Nations. Since the collapse of the latter, it is now an organism of its own.[294] Australia, the UK and France are some of the 63 member states of the organisation, which 'represent a variety of different legal, economic and political systems as well as different cultural backgrounds'.[295]

The PICC 2016 is the latest version of a document first published in 1994. Parties can submit a contract to the application of the PICC, or the *lex mercatoria* more generally.[296] It can also apply through the application of private international law rules if the parties have not chosen a law to regulate their agreement.[297] To be applicable to the situation, the contract must be international, involving different states or relating to international trade. The contract must also be between commercial parties, as the PICC does not apply to consumer contracts.[298]

The PICC includes a definition of a legal agreement. It recognises its binding nature, one that is validly entered by two consenting parties.[299] Their mere agreement is sufficient.[300] A contract is therefore formed through offer and acceptance.[301] In order to determine the rights and duties

[291] Ralf Michaels, 'The UNIDROIT Principles as Global Background Law' 19(4) *Uniform Law Review* 643.
[292] Lando, 'CISG and its Followers', above n 55, 381.
[293] To be discussed in Chapter 7.II.
[294] UNIDROIT, 'History and Overview' (29 August 2018) <https://www.unidroit.org/about-unidroit/overview>.
[295] Ibid.
[296] PICC preamble.
[297] Ibid and commentary. See, eg, 1998 Rules of Arbitration of the International Chamber of Commerce art 17(1); Rules of the Arbitration Institute of the Stockholm Chamber of Commerce art 24(1).
[298] PICC art 2.
[299] Ibid arts 11, 13.
[300] Ibid art 3.1.2.
[301] Ibid art 2.11.

of the parties, a domestic court may imply a term.[302] When implying terms, the courts may look at different factors including good faith and fair dealing.[303] Any right or condition that contradicts the duty to act in good faith[304] as well as unreasonable exercises of discretionary rights[305] are unenforceable.

The legal foundation of the doctrine of good faith can be found throughout the PICC. Article 1.7 stipulates that 'each party must act in accordance with good faith and fair dealing'. This duty cannot be excluded.[306] Interestingly, the PICC recognises the dynamic relationship between equitable principles and good faith. For instance, art 1.8 describes the concept of estoppel,[307] a doctrine well known in common law countries, as 'a general application of the principle of good faith and fair dealing'.[308] Furthermore, art 2.1.15 deals with negotiations in bad faith. Therefore, the PICC not only recognises common law doctrines and their relationship with good faith but integrates the civil law application of good faith throughout the life of the contract. By doing so the PICC is seen by some as halfway between the common law and civil law.[309] The PICC also considers that implied obligations can stem from good faith and fair dealing, which leads the author to wonder whether the PICC does indeed recognise good faith as a principle and not simply as a duty, albeit implicitly.[310]

Similar to the provision of the CISG, the PICC requires an interpretation of good faith and fair dealing in line with the specific context of international trade and independent from national understandings. The interpretation of good faith and fair dealing cannot be influenced by domestic interpretations of the concepts.[311] The emphasis is upon the specificities and characteristics of cross-border transactions. Good faith is interpreted as cooperation between contractual parties.[312]

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[302] Ibid art 5.1.2.
[303] Ibid art 5.1.2 (as well as the intention of the parties, practices established by the parties and reasonableness).
[304] 'Good faith and fair dealing' is a fundamental idea underlying the principles. See UNILEX, 'Official Comments' 1.7 <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13637&x=1>
[305] See above I.A.2. See also ibid.
[306] *Unidroit Principles for International Commercial Contracts* (2010) art 1.7(2). See UNILEX, 'Official Comments' 1.7 <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13637&x=14>.
[307] This doctrine will be developed further in Chapters 4 and 5.
[308] PICC art 1.8 comment 1.
[309] 'Such domestic standards may be taken into account only to the extent that they are shown to be generally accepted among the various legal systems': Eva Lein and Bart Volders, 'Liberté, loyauté et convergence: la responsabilité précontractuelle en droit comparé' in *Regards comparatistes sur le phénomène contractuel* (PUAM, 2009) 37.
[310] PICC art 5.1.2 comment 1; art 7.1.6 comment 1.
[311] UNILEX, 'Official Comments' 1.7 <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13637&x=1>.
[312] Lorena Carvajal-Arenas and Maniruzzaman, above n 293.

The fourth and latest edition of the PICC in 2016 focuses on recognising the particular context of long-term contracts and the particular legal principles that may apply to such relationships. Interestingly, good faith is also portrayed as being synonymous to a duty to use best efforts.[313]

The PICC differs from the CISG as it is soft law. However, the soft law character of the PICC has not diminished its impact.[314] The PICC is broader than the CISG and applies to all commercial contracts, whereas the CISG only applies to the international sale of goods. The PICC forms a 'more matured product'.[315] It has influenced national and supranational legislation.[316] Furthermore, as will be developed further in later chapters,[317] the *Principles of European Contract Law*[318] (PECL) share similarities with the PICC.[319] Both are principles and as such are attractive: '[t]he obvious attraction of the principles is that they are principles, coherent and intelligible'.[320] While academics have embraced the PICC, this has not been seen in practice, and the principles are yet to be fully embraced by the business community.[321]

C Conclusion to Section II

This section has explored the use of good faith in international contract law. From this it can concluded that 'the CISG and the PICC are tenants in the uniform law building, but they are not co-habitants'.[322] Both instruments provide a harmonised view of the rules applicable in

[313] PICC art 5.1.4 comment 3.
[314] See, eg, United Nations Commission on International Trade Law, Working Group VI (Security Interests), *Draft Model Law on Secured Transactions*, 27th sess, UN Doc A/CN.9/WG.VI/WP.63 (30 January 2015) art 5.1:as a general standard of conduct, 'A person must exercise its rights and perform its obligations under this Law in good faith and in a commercially reasonable manner.'
[315] Joseph Perillo, 'Unidroit Principles of Commercial Contracts: The Black Letter Text and a Review' (1994) 63 *Fordham Law Review* 281, 282.
[316] Scottish Law Commission, *Review of Contract Law, Discussion Paper on Third Party Rights in Contract* (Discussion paper no 157, March 2014) referred to the Draft Common Frame of Reference, the proposal for a Common European Sales Law, and the PICC.
[317] See Chapter 3.I.B.2.iii.
[318] Lando and Beale,above n 300.
[319] Donald Robertson, 'Long-Term Relational Contracts and the UNIDROIT Principles of International Commercial Contracts' (2010) 17 *Australian International Law Journal* 185; Lando, 'CISG and its Followers', above n 55, 379.
[320] Paul Finn, 'The UNIDROIT Principles: An Australian Perspective' (2010) *Australian International Law Journal* 193, 194.
[321] Stefan Vogenauer, 'The UNIDROIT Principles of International Commercial Contracts at Twenty: Experiences to Date, the 2010 Edition, and Future Prospects' (2014) 19 *Uniform Law Review* 481, 487–8.
[322] Michael Bridge, 'The CISG and the UNIDROIT Principles of International Commercial Contracts' (2014) 19 *Uniform Law Review* 623, 642.

international contracts. Both promote the development of international trade. Even though they both only apply to commercial contracts,[323] each has a role to play. However, the CISG is a binding agreement that reflects the law applicable to the international sale of goods unless it is excluded. The PICC on the other hand is soft law and has a broader aim to shape the law for both national and international legislators.[324] Even though some consider that they are 'the best way forward',[325] it is unlikely that they will be used as a model for domestic legislation,[326] since the interpretation of their principles is to be tailored to the context of international trade. The judicial understanding of art 7 of the CISG shows the volatility of the interpretation of the doctrine of good faith and the need for clearer guidelines on such a principle, highlighting the need for jurisdictions to provide clear guidelines on the contours of the doctrine of good faith. This chapter started by saying that good faith is 'at least in some legal systems regarded as a vitally important ingredient for a modern law of contract'.[327] This section has shown that, internationally, good faith in contracts is also recognised as a duty and implicitly as a principle, showing the relevance of the doctrine not only in domestic contracts but also in international commercial agreements.

III. CONCLUSION

This chapter has explored the use of a principle of good faith in national and international contract law. It has demonstrated that the recognition of a requirement of good faith in contract law is not an issue facing only Australia and the EU. Even common law countries whose legal traditions have been said to differ fundamentally from the philosophy of the doctrine of good faith have recognised good faith, with the Canadian judiciary even considering the notion an 'organising principle of contract law'.[328] International contracts are also subject to rules that implicitly[329] or explicitly[330] recognise good faith. The development of an enforceable principle

[323] PICC preamble note 7; Robertson, above n 323.
[324] See PICC preamble.
[325] Michael J Dennis, 'Modernizing and Harmonizing International Contract Law: The CISG and the UNIDROIT Principles Continue to Provide the Best Way Forward' (2014) 19 *Uniform Law Review* 114, 121.
[326] For a different view, see Bruno Zeller, Submission No 2 to Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope For Reforming Australian Contract Law*, 20 July 2012; Zeller, above n 2852.
[327] Whittaker and Zimmermann, above n 1, 13.
[328] *Bhasin* [2014] SCC 71.
[329] In the case of the CISG.
[330] In the case of the PICC.

of good faith in contractual dealings, whether it is in the EU or in Australia, could potentially have implications for the interpretation of good faith in the other jurisdictions considered. Even though good faith on the international stage should not be interpreted in light of domestic developments, international interpretations are likely to impact on the domestic implementation of the principle of good faith in the EU and Australia. Through comparative law, judges, academics and review committees have emphasised the need to look abroad for insights into the challenges facing Australia and the EU in the recognition of good faith as a principle of contract law. The question concerning the doctrine of good faith is less whether it will apply. The notion is evolving, and its recognition as a principle of contract law is gaining momentum, albeit slowly. Faced with this international context the question facing the European Union and Australia is how to explain current applications of good faith in their respective 'systems and the consequences for both parties to a contract specifically, and contract law more generally'.[331]

[331] Farnsworth, 'The Concept of Good Faith', above n 219.

PART ONE: LEGAL THEORY

Part One addresses the first question posed by this thesis: the definition of comparative law within the context of the research good faith in contract law in Australia and the EU. It introduces the comparative methodology used in the study of good faith in contract law and demonstrates that Australia and the EU are comparable. It then focuses on historical and theoretical development surrounding the recognition of a duty to act in good faith in contractual dealings to illustrate the challenges faced by both jurisdictions.

Chapter 2 addresses the comparability of the jurisdictions studied, their systems and contract laws. It starts with an exposé of the comparative law analysis, its interpretation and use within this thesis. It provides a critique of the traditional classification of legal systems and shows that the compartmentalisation of legal orders into legal families is not necessarily well suited to today's world in which legal systems draw upon international instruments and legal transplants from other countries to develop their legal rules. After examining the comparability of the two jurisdictions as a whole, the chapter discuss the development of contract law, using a microscopic approach, and setting at clear guidelines for the rest of the thesis.

Chapter 3 investigates the historical and theoretical developments of the doctrine of good faith in contract law in Australia and the EU to determine whether there are any commonalities in the sources of the doctrine in the two jurisdictions. From the development of fairness in Roman contractual dealings up to the regulation of contract law today, both jurisdictions share a common heritage. An analysis of these commonalities informs the development of the doctrine of good faith in contract law today in the EU and Australia. This chapter provides an overview of Roman law and the development of the Roman judicial system and the role played by bona fides (good faith) within this development. It then discusses the theory that focuses on the dynamic tension between party autonomy and the legitimacy of regulation of contracts by the legislature and the judiciary.

Chapter 2
Comparing good faith in contract law in the European Union and in Australia

To compare is at best [to] listen to several cultures as they have listened to themselves and then listen to them between themselves.[1]

This chapter explores the foundations of the comparative analysis within this thesis: its methodology and its core concepts. It will provide a common understanding of the jurisdictions and theories, and explain why the contract laws of Australia and the EU are comparable. Comparative law has three main roles:[2] first, it provides insights for 'historic or philosophical research on the rule of law';[3] second, it increases understanding of the development of domestic law; and third, it helps us understand foreign nations and ultimately contributes to a better system of international relations. This research will attempt to fulfil all three roles throughout the following chapters.[4]

Section I examines what is meant by comparative law and maps out the relationship and interaction between the Australian and the EU legal systems. It justifies the choice of these two jurisdictions by demonstrating their similarities, including a common legal tradition. Section II develops the methodology of deep-level comparative law and provides an overview of the doctrines covered in the thesis: contract and good faith. These are investigated because, in both Australia and the EU, contracts are at the forefront of any business relationship, whether it involves commercial parties or consumers. A contract is a legal representation of exchanges between two parties who must behave in a way that results in the performance of their obligations under the agreement. The concept of good faith is furthermore used in both Australia and the EU to promote such behaviour in certain dealings.

[1] 'Comparer c'est au mieux entendre plusieurs cultures comme elles se sont entendues elles-mêmes puis les entendre entre elles, reconnaitre les différences construites en les faisant jouer les unes en regard aux autres': Pierre Legrand, *Le droit Comparé* (Presses Universitaires Francaises, 2011) 30, referring to M Detienne, *Comparer l'incomparable* (Le Seuil, 1999).

[2] René David and Camille Jauffret-Spinosi, *Les Grands Systèmes de Droit Contemporains* (Dalloz, 11th ed, 2002) 13.

[3] Ibid.

[4] For historic and philosophical foundations see Chapter 3; For understanding of Australian domestic law see chapter 4.I and chapter 5 II; for understanding of the EU context see Chapter 4.II and Chapter 5.I.

I. COMPARING LEGAL SYSTEMS

First, it is important to define what is meant generally by the discipline of comparative law. Section A aims to achieve this, while Section B explores comparative law in the context of the grouping and classification of legal systems, and highlights its inadequacy in classifying today's legal systems. Finally, Section C proposes a renewed approach to such classification by proposing the image of the 'occidental tree' in order to demonstrate the comparability of the Australian and EU legal systems, in particular in relation to contract law. This section therefore forms an important part of the theoretical foundation of this research.

A Methodology of comparative law

This section explains comparative law as a discipline that can inform the analysis of a legal doctrine. It highlights the methodology of the comparison and its application to this thesis with reference to aspects such as legal systems and legal traditions. It shows that comparative law facilitates the recognition of legal doctrines in different jurisdictions, demonstrating the possibility of harmonising certain aspects of law.

Comparative law can firstly be used to better understand a particular legal system within a legal family by identifying valid legal sources and determining the content of the rules they contain.[5] To compare is 'to note the similarities and differences' between two comparable objects, here good faith in Australian contract law and in EU contract law.[6] The second step is to organise these sources and content and 'integrate them into one coherent whole, through interpretation and theory building'.[7] Comparative law is therefore more than just describing; it serves a specific purpose,[8] assigned by the object of the comparison. This thesis will therefore not only describe good faith in the EU and Australia but also determine the lessons that can be learnt by

[5] Mark Van Hoecke, 'Deep Level Comparative Law' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing, 2004) 165, 165.
[6] *Oxford Dictionary of English Law.*
[7] Van Hoecke, above n 5, 165.
[8] Christian Von Bar, 'Comparative Law of Obligations: Methodology and Epistemology' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing, 2004) 123, 124.

each jurisdiction. It will analyse the development and different applications of the object of this comparative analysis: the notion of 'acting in good faith' in contractual dealings in Australia and the EU.

Comparative law can involve the analysis of either the structure of a particular legal system or the study of the discipline or legal doctrine through legislation, cases and academic commentary. The selection of the object of the comparison has clear implications for the study, its research questions and its conclusions. The comparatist 'shapes and determines the purpose of the comparison and through him the conclusions that can be drawn after the experience of observation'.[9] The author has maintained an objective approach by analysing the different sources of contract law where good faith is used.[10]

Academics are the prime users of comparative law. They provide analysis, comparison and classification of legal systems, which can be used for legal reform. By providing this context, scholars also develop so-called 'deep comparative law' where particular legal concepts are analysed across different legal systems and legal families.[11] This trustworthy, sound and reliable information on the substance of foreign law[12] provides the research needed by legislators to draft statutes and by judges to develop legal doctrines.[13] Preparatory work and explanatory memoranda to legislation also show that legislators sometimes draw from foreign laws and doctrines to determine the adequacy of a particular doctrine or solution. An example of this was the Attorney-General's Department's discussion paper on the possible reform of Australian contract law.[14]

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[9] Pierre Legrand, 'Questions à Rodolfo Sacco' (1995) 47(4) *Revue Internationale De Droit Comparé* 943, 943: 'façonne et détermine l'objet de la comparaison et à travers lui les conclusions qu'il y a lieu de tirer d'une expérience d'observation'.

[10] This is particularly relevant to the Australian context. Chapter 4 looks at case law and statutes while Chapter 5 II presents codes of conducts and industry standard.

[11] Reinhard Zimmerman and Simon Whittaker (ed), *Good Faith in European Contract Law* (Cambridge University Press, 2000); Jack Beatson and David Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon Press, 1995).

[12] Thomas Kadner Graziano, 'Is It Legitimate and Beneficial for Judges to Use Comparative Law?' (2013) 21(3) *European Review of Private Law* 687, 695. See also Thomas Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (Cambridge University Press, 2010) 4.

[13] Ole Lando and Hugh Beale (eds), *Principles of European Contract Law, Parts I and II (Combined and Revised)* (Kluwer Law International, 2000); Yehuda Adar and Pietro Sirena, 'Principles and Rules in the Emerging European Contract Law: From the PECL to the CESL, and Beyond' (2013) 9(1) *European Review of Contract Law* 1; Study Group on a European Civil Code, Research Group on EC Private law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (Sellier, 2009).

[14] Australian Government, Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law* (2012).

Judges also use comparative law to find solutions to particular cases and to aid in the interpretation of doctrines.[15] This particular use of comparative law is probably the most controversial. Indeed, there is debate on whether it is legitimate and, if so, beneficial for judges to use comparative law.[16] While it is controversial in constitutional law,[17] it is however widely used in contract law.[18] There are practical reasons why a judge might use comparative law in deciding a case. Firstly, private international law rules might involve the application of foreign law.[19] Secondly, comparative law is an interpretation method that may be used to 'preserve coherence'[20] and the integrity of domestic law. Thirdly, foreign law is not binding, but may provide insights into how foreign jurisdictions solved a similar legal issue.[21] In the context of good faith in contract law, references to foreign jurisdictions have often been made to provide judges with an understanding of the notion and its possible uses, or to provide grounds for its rejection.[22]

Comparative law has a number of goals. Comparative law provides information on trade partners' laws. Ultimately, this creates a favourable context for the harmonisation of laws by developing international relations, and by favouring the development of political alliances.[23] Besides promoting the convergence or harmonisation of national laws, some argue that the ultimate goal of comparative law is to reach uniformity of rules. For instance, Sacco believes

[15] Konrad Zweigert, *Introduction to Comparative Law* (Clarendon Press, 1998) 19: 'Courts in England … and other commonwealth countries have long made reciprocal reference to each other's decisions and are now invoking continental law to a remarkable degree.'

[16] Graziano, above n 12, 699.

[17] Mark Tushnet, 'The Boundaries of Comparative Law' (2017) 13 *European Constitutional Law Review* 13. For a different opinion on public law see, eg, *Lawrence v Texas*, 539 US 558, 558, 598 (2003), where Scalia J stated that the discussion of foreign views is meaningless dicta that can be dangerous.

[18] For instance, Priestley J referred to the concept of good faith in the CISG and American developments in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 267.

[19] *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)* OJ L 177/6.

[20] Graziano, above n 12, 699.

[21] See, eg, *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB); *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151.

[22] See, eg, reference to civil law systems and the USA in *Renard Constructions (ME) v Minister for Public Works* (1992) 26 NSWLR 234, 234, 263–5 (Priestley JA); see reference to foreign law including Australian law in the Canadian case *Bhasin v Hrynew* [2014] 3 SCR 494, [57]–[58] and the English case *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [124]–[130].

[23] Eg, the relevance of internationalisation of contract law in Australian is further emphasised in the context of the Asian century in May Fong Cheong, Submission No 38 to Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law*, 20 July 2012, 1.

promoting uniformity is one role of comparative law.[24] There are examples of comparative law leading to such unification. The example of the EU jurisdiction is interesting to highlight for two reasons. Firstly, the comparison of the laws of each member state has led to the unification of some rules and the promotion of the internal market within the EU.[25] Secondly, the political system of the EU has allowed comparative law to take a primary role in the determination of the harmonisation of legal rules.[26] Legal instruments reflect this will to unify laws. EU regulations are legal instruments enacted by EU institutions that are directly applicable in the domestic laws of the member states without the need for ratification or implementation.[27] In this instance, no discretion is left to the state. Under this rationale, certain aspects of contract law are unified across the domestic laws of member states.[28]

However, most comparative law does not lead to such unification. In addition to EU regulations, EU directives are commonly used legal instruments. They are used to harmonise the rules of EU member states but also to give a discretionary margin to the member state in relation to their implementation in domestic law. Eliminating the gaps between different domestic Acts with the aim of creating a unified legal system across the world would possibly decrease legal innovation.[29] This thesis also argues that the cultural specificities of each state will lead to the modification of rules. The same law will be interpreted in light of the specificities of the nation in which it is created. Harmonisation is arguably more desirable[30] than unification since on the one hand it gives a baseline, and on the other hand it allows the cultural specificities of legal systems to continue.

While Australia is a federal state and not a sui generis supranational organisation like the EU, there are some commonalities. For instance, while some laws are made at the federal level, states and territories also have the ability to enact their own laws.[31] Lack of statutes in some

[24] Rodolfo Sacco, *Anthropologie Juridique Apport à une Macro-Histoire du Droit* (Dalloz, 2008) 32.
[25] Considered one of Europe's great achievements, the single market is in the process of being upgraded to a deeper and fairer system. Commission, *Upgrading the Single Market: More Opportunities for People and Business* Brussels, COM (2015) 550 Final.
[26] Lando and Beale, above n 13; Study Group on a European Civil Code, above n 13.
[27] *Consolidated Version of the Treaty on the Functioning of the European Union* [2012] OJ C 326/47, art 288.
[28] *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)* OJ L 177/6.
[29] Sacco, above n 24, 35; Camille Jauffret-Spinosi, 'La Pensée de René David' in Association Henri Capitant, *Hommage à René David* (Dalloz, 2012) 13, 19.
[30] Yves Marie Laithier, 'Regards sur l'œuvre du comparatiste René David' in Association Henri Capitant, *Hommage à René David* (Dalloz, 2012) 23, 24.
[31] *Australian Constitution* s 51 exhaustively states the executive legislative powers of the Parliament.

areas have left the door open for the development of different interpretations and decisions in common law. This is the case in relation to good faith where not only are judicial decisions mostly made at the lower level of state and territory supreme courts and courts of appeal, but they also provide slightly different understandings and enforcement of good faith in contract, as later chapters will explore.[32] The consequence is that an approach different to the one proposed for the EU will be prescribed for Australia. The thesis argues that, for good faith to be part of Australian contract law, the different understandings of the notion should be unified to provide coherence and certainty to a notion that is often presented as lacking these fundamental characteristics.[33]

Another phenomenon whereby comparative law can lead to law reform is through the internationalisation of norms. This development has become more prominent with the development of international trade, commercial legal instruments and the establishment of new institutions.[34] It poses two questions: whether international contracts and domestic contracts should be differentiated and regulated through specific legislation; and whether international contract law should influence domestic contract law, and if so, how much impact it should have on domestic law reform.[35]

The internationalisation of contract law in Australia is one of the points mentioned in the 2012 discussion paper on the possible reform of Australian contract law.[36] The question is whether the domestic law of contract should include doctrines and reasoning adopted by trade partners in order to encourage cross-border trade and to bring more legal certainty to international dealings by harmonising domestic contract laws. Chapter 5 will show how harmonisation has allowed the EU to integrate the concept of good faith into certain contractual dealings. Furthermore, determining the proper law of contract applicable to the dealing at stake can be a source of disagreement. Parties can choose the law that will apply to their relationships.[37] They

[32]See Chapter 4 I. A-C
[33] See Chapter 6 I.A and for a contrary view see Chapter 4.I.D. .
[34] As the discussion of the CISG and the PICC in Chapter 1 illustrated.
[35] Mary Keyes, 'The Internationalization of Contract Law' in Mary Keyes and Therese Wilson (eds), *Codifying Contract Law: International and Consumer Law Perspectives* (Routledge, 2014) 15.
[36] Australian Government, above n 14; Bruno Zeller, Submission No 2 to Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope For Reforming Australian Contract Law*, 20 July 2012, 2; Cheong, above n 23; 'contract law, like law, in general, ought to strive towards international harmonisation'in B Svantesson, Submission No 16 to Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law,* 20 July 2012.
[37] *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law*

are less likely to disagree if the laws chosen are in harmony with the law they are familiar with, thereby allowing common principles of contract to govern their relationship. Before examining these principles through the example of good faith, it is necessary to define the legal traditions the EU and Australia belong to.

B Legal classifications

This section identifies the main characteristics of each jurisdiction, namely, the EU and Australia. These characteristics will assist in identifying the legal tradition these jurisdictions belong to, thereby providing guidelines for this comparative analysis of good faith in contract law.

Legal systems are traditionally classified into different legal families. Legal families are determined according to a number of factors, which include: their historical background and development; the predominant and characteristic methods of thought; the existence of especially distinctive institutions; the legal sources they acknowledge and the way they are handled; and their ideologies.[38] A certain level of generality is necessary to be able to group different legal systems. Through this pragmatic approach,[39] Zweigert and Kotz have identified six different legal families: Romanistic, Germanic, Anglo-American, Nordic, law in the Far East and religious legal families.[40]

1 The traditional distinction between common law and civil law

Common law originated in England following the Norman invasion in 1066.[41] Its two most dominant characteristics are the importance of the judge and the case-law approach to legal rules. The doctrine of precedent ensures predictability in the law. The common law tradition has been defined as

Applicable to Contractual Obligations (Rome I) OJ L 177/6; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50; *Akai Pty Ltd v People's Insurance Company Limited* (1996) 188 CLR 418.

[38] Zweigert, above n 15, 68.

[39] Denis Alland and Stéphane Rials (eds), *Dictionnaire de la Culture Juridique* (Presses Universitaires Francaises, 2003) 703.

[40] Zweigert, above n 15.

[41] H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford University Press, 5th ed, 2014); Zweigert, above n 15.

a system in which parts or the whole of English common law have been in the past or are at present treated as law of the land or at the very least are of direct and highly persuasive force; or else it derives from any such system.42

Therefore, case law is one of the primary sources of law.[43] This fact has historic origins. When William conquered England, he first decided to use local customs, instead of imposing a new law.[44] This meant that judges travelled across provinces to apply local customs. Later, these would be used to create a law that was common across the provinces, and contributed to the development of royal justice and procedural writs.[45] Parliaments then appeared, first in 1265 with Simon de Montfort.[46] Following the English Civil War, Parliament took supremacy over the courts.[47] Legal systems including Australia, Canada and the USA are generally associated with this tradition, as seen in Chapter 1.[48]

Civil law originated in continental Europe and is often presented as the grouping of the Romanistic and Germanic legal traditions, since both rely on codified abstract legal norms.[49] Its two dominant characteristics are its relationship with Roman law and the process of codification of statutes.[50] Indeed, Roman law plays a 'central position in the legal history of the West'.[51] Rules are laid down with an underlying promotion of justice and moral values.[52] The codification is based on the centrality of the person[53] and the regulation of the person's interaction with others.[54] The civil law tradition has been defined as

a system in which parts or the whole of Justinian's Corpus Iuris Civilis have been in the past or are at present treated as the law of the land, or, at the very least are of direct and highly persuasive force; or else it derives from any such system.[55]

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[42] Esin Orucu, 'Family Trees For Legal Systems' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing, 2004) 359, 366.
[43] María José Falcón y Tella, *Case Law in Roman, Anglosaxon and Continental Law* (Brill, 2011) 25. For a detailed overview of the courts' functioning in England, see Lord Mackay of Clashern, *The Administration of Justice* (Sweet & Maxwell, 1994).
[44] Ellen Goodman, *The Origins of the Western Legal Tradition* (Federation Press, 1995) 223.
[45] Ibid.
[46] Catriona Cook, Robin Greck, Robbert Geddes and David Humer, *Laying Down the Law* (Lexis Nexis, 2012) 23.
[47] Ibid 24.
[48] Cross reference Chapter 1.I.B.
[49] See, eg, Glenn, above n 41; Antonio Gambaro, Rodolfo Sacco and Louis Vogel, *Traité De Droit Comparé: Le Droit De l'Occident Et D'Ailleurs* (LGDJ, 2011); David and Jauffret-Spinosi, above n 2.
[50] Glenn, above n 41, 133.
[51] Tella, above n 43, 7.
[52] David and Jauffret-Spinosi, above n 2, 16.
[53] Glenn, above n 41, 50.
[54] David and Jauffret-Spinosi, above n 2, 17.
[55] Alan Watson, *The Making of Civil Law* (Harvard University Press, 1981) 4, quoted in Orucu, above n 42, 366.

Interestingly, while common law's biggest feature is the idea that case law is the primary source of law, 'jurists in continental systems continue to debate whether case law may be considered at most a source of definition of subjective rights, or also a source for creation of objective law'.[56]

In addition to differences between the sources of law, there are other 'cultural' differences between common law and civil law. While common law favours free enterprise and individual initiative, civil law is perceived as interventionist through the multiplication of legal texts and codes.[57] While common law is described as an open and incomplete system, civil law is characterised by its plenitude and completeness. Even though these differences are less obvious today, many consider that these two legal traditions are still quite distinct.[58]

2 Inadequacy of the division between civil and common law

The classification of legal traditions into clearly defined families seems inadequate in the legal world in which we live for a number of reasons. Firstly, in relation to the classification of legal systems, the historical period is extremely important,[59] as well as the perspective of the person doing the classifying.[60] In the common law family, even though countries are presented as members of the same family, it is important to note the differences between English law, due to the influence of European law, and US law, where the influence of codification has resulted in the *Uniform Commercial Code* and the restatements on contracts.[61] This difference has resulted in further classification where US and English law are divided into two families: an English legal family and an American legal family.[62] There are differences between them in spite of a common nucleus.[63] This shows that the primary classification does not take into consideration later legal evolution.

[56] Tella, above n 43, 1.
[57] Glenn, above n 41, 145.
[58] Tella, above n 43, 54.
[59] Zweigert, above n 15, 65.
[60] René David and John E C Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (Stevens and Sons, 3rd ed, 1985) 21, cited in Orucu, above n 42, 361.
[61] See Chapter 1.I.B.1.
[62] See Gambaro, Sacco and Vogel, above n 49; David and Jauffret-Spinosi, above n 2.
[63] Tella, above n 43, 1, 20.

Secondly, even though the characteristics of the common law and civil law seem clearly identifiable, the level of generality necessary to define these legal families and to gather a legal system within them is problematic.[64] Thirdly, the legal evolution and shift of some legal systems between families, as well as the development of so-called mixed systems, add to the general difficulty associated with the classification of legal systems into families. Palmer identified three main abstract characteristics of the notion of mixed legal systems: the specificity of the mixture in question, the obviousness of the mixed law to an ordinary observer and the structural allocation of content to particular legal traditions, for example civil law for private law and common law for public law.[65] The EU does not belong to a clear civil or common law legal family, even though continental Europe and its civil law tradition has influenced its norm making. Zimmermann indeed pointed out that

> All our national private laws in Europe today can be described as mixed legal systems. None of them has remained 'pure' in its development since the Middle Ages. They all constitute a mixture of many different elements: Roman Law, indigenous customary law, canon law, mercantile custom and Natural Law theory, to name the most important ones in the history of obligations.[66]

Since the characteristics of these national perspectives feed into the development of European private law, it is clear that the EU can also be characterised as a mixed system, rather than one belonging exclusively to one legal tradition, common law or civil law.

Fourthly, civil law and common law have some commonalities: a diffusion of their legal systems through colonialism; the importance of the state; the process of enacting legal rules; the importance of human rights; and the freedom of the citizen.[67] These common characteristics also add to the understanding of the legal culture of the jurisdiction. Nation-states are traditionally defined by their institutions, legal systems and frontiers.[68] They are also defined by their morals and values. These must be taken into account as they impact on the judges' reasoning and on the development of statutes.

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[64] See later references to concepts of unconscionability in Chapter 4.I.A.1.
[65] Vernon Palmer, 'Mixed Legal Systems: The Origin of the Species' (2013) 28 *Tulane European and Civil Law Forum* 103, 110.
[66] Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law* (Oxford University Press, 2001) 159, quoted in Palmer, above n 65, 114.
[67] See Glenn, above n 41, 272–9.
[68] See, eg, the structure of the *Australian Constitution*.

An important determinant of the classification of legal systems and comparative analysis more generally is the consideration of sources of law. In order to tackle the inadequacy of this classification of legal systems it is necessary to consider non-traditional sources of law when determining the legal tradition of a particular legal system, the so called 'legal formants'.[69] This may be explained as follows. Each legal system has its own context with its own culture. Law is an element of the culture of any legal system.[70] Here, 'culture' refers to the history of the country, its values and morals. The concept of legal culture is widely debated and there is some uncertainty about its meaning.[71] It can be understood narrowly as the technique of exposition and interpretation by jurists. It can also mean 'a way of describing relatively stable patterns of legally oriented social behaviours and attitudes'.[72]

Legal anthropology is the study of societies and their rules.[73] This includes not only legislative enactments and judicial decisions, but also the so-called legal formants:[74] the study of the interpretation of a legal rule, its application or lack thereof, and commentary by scholars. These elements inform the development and permanence of enforceable rules.[75] Within this thesis legal formants include cases and statutes, but also academic commentary and codes of conduct. The inclusion of the latter is due to the importance of scholarship, or 'la doctrine', in civil law countries,[76] as well as in the development of EU law.[77] Cases, statutes, delegated legislation and academic works are presented together as the legal formants of both Australia and the EU.[78] This demonstrates the pluralism of legal sources[79] in these jurisdictions and the

[69] Rodolpho Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' (1991) 39 *American Journal of Comparative Law* 1; Rodolpho Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' (1991) 39 *American Journal of Comparative Law* 343.

[70] Sacco, *Anthropologie Juridique*, above n 24, 3; see also Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books, 1983); Sally Engle Merry, 'Anthropology, Law, and Transnational Processes' (1992) 21 *Annual Review of Anthropology* 357.

[71] David Nelken, 'Thinking about Legal Culture' (2014) 1(2) *Asian Journal of Law and Society* 255; Alan Watson, 'Legal Culture v. Legal Tradition' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing, 2004) 2.

[72] David Nelken, 'Legal Culture' in Jan M Smits (ed), *Elgar Encyclopaedia of Comparative Law* (Edward Edgar Publishing, 2006) 372, 374.

[73] For a summary of legal anthropology see Elizabeth Mertz and Mark Goodale, 'Comparative Anthropology of Law' in David S Clark (ed), *Comparative Law and Society* (Edward Elgar, 2012) 77.

[74] Sacco, *Anthropologie Juridique*, above n 24, 12.

[75] Sacco, 'Legal Formants (II of II)', above n 69, 384.

[76] On the role of scholars in France and Germany see Mathias Siems, *Comparative Law* (Cambridge University Press, 2014) 47–8.

[77] Lando and Beale, above n 13.

[78] Chapter 3.I.B.2 will analyse academic compilations, and Chapters 4 and 5 will analyse EU legal sources: CJEU case law, directives, optional regulation and academic compilations. They will also present Australian sources with an emphasis on case law, statutes and codes of conduct.

[79] For an analysis of legal pluralism see John Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1; Michael Giudice, 'Global Legal Pluralism: What's Law Got to Do with It?'

importance of taking them into consideration for an exhaustive analysis of the development of good faith in contract law in the EU and in Australia. These legal formants provide the basis for the argument that civil law and common law are the core legal systems of a broader family of western law[80] or occidental law,[81] in order to reflect today's legal norm making.

C A new legal tradition: the 'occidental tree'

After establishing the inadequacy of the traditional classification of legal families, this thesis proposes that there is a legal family of occidental law. This embraces the similarities between common law and civil law but also recognises their differences and allows them to coexist within the occidental legal family. It provides a more satisfactory grounding for the comparison of the EU and Australia.

1 A renewed theory

In 1950, René David developed his own classification of legal systems into families based on two main characteristics: ideology and legal technique.[82] He brought together common law and civil law under the heading of the occidental family.[83] Other families included socialist law, Muslim law, Hindu law and Chinese law.[84] His original classification was based on the idea that, in spite of clear differences that should not be ignored, there were enough similarities between common law and civil law to justify bringing them together under the term occidental law. Due to wide criticism,[85] he later withdrew this analysis and referred to the common law and civil law as two separate groups.[86] The criticism was that the differences between the two families were too great to be ignored.[87]

(2014) 34(3) *Oxford Journal of Legal Studies* 589; Leone Niglia, *Pluralism and European Private Law* (Hart, 2013).

[80] See Glenn, above n 41, 50.

[81] Gambaro, Sacco and Vogel, above n 49.

[82] Zweigert, above n 15, 64.

[83] René David, 'Existe-t-il un droit occidental?' in Kurt H Nadelmann, Arthur T von Mehren and John N Hazard, *XXth Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E. Yntema* (A W Sythoff, 1961) 56.

[84] Ibid.

[85] Legrand, 'Questions à Rodolfo Sacco', above n 9; David, above n 83.

[86] David, above n 83.

[87] Ibid.

Today, common law and civil law are still presented as two traditions that are in opposition to each other.[88] However, David may be correct. As he commented, the question of the existence of the occidental legal tradition depends on the sources of law that are taken into consideration. Rodolfo Sacco has also acknowledged similarities between the two legal traditions that cannot be ignored.[89] These similarities include the importance of the 'constitutionalisation'[90] of legislation, the synchronicity of their development and the common understanding of legal sources as one enforceable legal corpus. This brings these legal orders closer to each other than traditionally argued.[91] Sacco has developed the idea of legal formants, thereby demonstrating that sources of law are plural and has brought common law and civil law under the broader title of occidental law.[92]

Esin Örücü has analysed the relationship between common law and civil law using the image of a tree.[93] This classification goes farther than examining legal systems and instead reaches for the values associated with these systems, thereby creating a renewed classification of legal orders.[94] This image 'regards all legal systems as mixed and overlapping … and groups them according to the proportionate mixture of the ingredients'.[95] It not only considers case law and statutes but more broadly includes legal formants and legal cultures.[96] The image of trees, instead of clear-cut legal families, is presented as an antidote for the traditional classification to better 'explain mixed systems', 'trace trans-frontier mobility' and 'establish the internal logic of each order'.[97] It follows a more organic approach to the comparison of legal concepts and doctrines. Indeed, according to Örücü, her '"family trees" scheme starts with the given assumption that all legal systems are mixed, whether covertly or overtly, and group[s] them according to the proportionate mixture of the ingredients'.[98]

[88] Peter De Cruz, 'Comparative Law in a Changing World' (Cavendish Publishing, 2nd ed, 1999); Reinhard Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006).
[89] Gambaro, Sacco and Vogel, above n 49, 54.
[90] Ibid 50.
[91] Ibid 49.
[92] Ibid.
[93] Orucu, above n 42; see also Esin Orucu, 'A Theoretical Framework for Transfrontier Mobilty of Law' in Robert Jagtenberf, Esin Orucu and Anne De Roo (eds), *Transfrontier Mobility of Law* (Kluwer Law International, 1995) 5.
[94] Alland and Rials, above n 39, 701.
[95] Orucu, 'Family Trees', above n 42, 363.
[96] Sacco, 'Legal Formants (II of II)', above n 69, 365.
[97] Orucu, 'Family Trees', above n 42, 634.
[98] Esin Örücü, 'What is a Mixed Legal System: Exclusion or Expansion?' (2008) 12 *Electronic Journal of Comparative Law* 1, 2.

2. **The recognition of diverse legal cultures**

Instead of referring to legal traditions, the 'occidental tree' theory emphasises the specificities of each legal system and its own culture.[99] The term 'culture' refers to a society's entire background, one that might shape the form that the rules will take, whereas 'context' refers to those circumstances that specifically drive the development of a particular rule. While culture might dictate what shape a rule takes and in certain cases might serve to reject a law that is transplanted without being revised to match the culture, context more specifically dictates whether such a rule is necessary in the first place. Hence, in certain situations, context drives the need for a law, whereas the broader culture determines the shape of that law.[100]

The emulation of legal norms is not always successful. A society is a legal microcosm. It evolves in contact with other societies by imitating a neighbouring society or by rejecting its values and (re)affirming its identity. Transnational law is seen as a threat, due to newly created tensions between domestic and transnational law. Legal anthropology is concerned with the study of the meaning of law within specific cultures. Emotional ties of a society with its culture and history can provide the foundations for the rejection of a transplant into national law.[101] The business community may not apply transnational concepts or may explicitly reject the application of certain domestic legal instruments. The fate of the *Convention on the International Sale of Goods* (CISG) and the *UNIDROIT Principles of International Commercial Contracts* (PICC) are examples of the difficulty of fully integrating the transnational into domestic law.[102]

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[99] Mark Van Hoecke and Mark Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model For Comparative Law' (1998) 47 *International and Comparative Law Quarterly* 495, 498.

[100] Richard G Small, 'Towards a Theory of Contextual Transplants' (2005) 19 *Emory International Law Review* 1431, 1438.

[101] Sophie Vigneron, 'Le Rejet De La Bonne Foi En Droit Anglais' in Sophie Robin-Olivier and D Fasquelles (eds), *Les Echanges Entre Les Droits: L'expérience Communautaire* (Bruylant Larcier, 2008) 307.

[102] See also Chapter 1.I.A.3. For a discussion see, eg, Lisa Spagnolo, 'The Last Output: Automatic CISG Opt Outs, Misapplication and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers' (2009) 10 *Melbourne Journal of International Law* 141; Lisa Spagnolo, 'Law Wars: Australian Contract Law Reform vs. CISG vs CESL' (2013) 58(4) *Villanova Law Review* 623; Arjya B Majumdar, 'Uniform Commercial Code v. the Vienna Convention on the International Sale of Goods: A Comparative Analysis' (18 May 2013) <http://ssrn.com/abstract=2266754>; Nathalie Hofmann, 'Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe' (2010) 22 *Pace International Law Review* 145; Paul Finn, 'The UNIDROIT Principles: An Australian Perspective' (2010) *Australian International Law Journal* 193.

However, the development of the doctrine of good faith shows that it is not a transplant, but indeed part of the common understanding of the notion of contract, and the primary element of intention, as this thesis will demonstrate.[103] Therefore, this thesis does not argue that good faith can be transplanted but instead that it is already part of the legal culture of the jurisdictions studied.[104] However, this argument must be justified as good faith has been presented as a legal transplant in scholarly writing, most famously by Teubner, irritating the legal system it is introduced into.[105]

The author of this thesis considers that legal transplants are possible, as long as a careful analysis is made before a notion is imported into a legal system. For this reason, each transplant must be examined separately.[106] Both the formal and informal legal orders have to be taken into consideration.[107] Not doing so will impede the success of the reception of a legal transplant. Legal transplants are deeply linked to the structure of power and the existence of social groups.[108] This contextual approach to the success of legal transplants fills the gap created by other theories on transplants.[109] If the particularities of the receiving country are not taken into consideration, then the transplant is likely to fail or not be enforced. Kanda and Milhaupt discuss the legal transplant of a US provision central to corporate law into Japanese law. By success, they understand that the transplanted rule 'is used in the same way that it is used in the home country'.[110] In 1950, Japan added to its commercial code a provision imported from the USA according to which 'directors owe to the company the duty to perform faithfully, in compliance with laws'.[111] However, this provision was not used until the late 1980s. The authors considered why legal transplants exist before providing thoughts on why some are successful.[112] They explain that the transplant was initially unsuccessful because it did not 'fit

[103] See Chapter 6.I.B.
[104] Or even the wider culture.
[105] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11.
[106] Hideki Kanda and Curtis J Milhaupt, 'Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law' (2003) 51(4) *American Journal of Comparative Law* 887; Jonathan M Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 51 *American Journal of Comparative Law* 839.
[107] Mindy Chen-Wishart, 'Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding?' (2013) 62(1) *International and Comparative Law Quarterly* 1, 12.
[108] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) *Modern Law Review* 1, 13.
[109] See Kanda and Milhaupt, above n 106, 890.
[110] Ibid.
[111] Ibid 888.
[112] Ibid 891.

in' with the Japanese legal infrastructure and institutions, which changed after a prolonged recession.[113]

Even though legal transplants are no fantasy, the existence of legal culture means that, once a notion is transplanted into a national legal system, it adapts to that system, creating new differences, although minor, between close legal traditions. Legal transplants have also been presented as legal irritants. In a system where the law constantly evolves,[114] we can talk of legal irritants, rules that are 'not transplanted into another organism rather it works as a fundamental irritation which triggers a whole series of new and unexpected events'.[115] The adaptation of the legal irritant to a new system can bring new divisions in the 'interpretation of operationally closed social discourses'.[116] A legal irritant has consequences not only for the legal discourse but also for the social discourse.

Pierre Legrand argues that there are benefits of having a plurality of laws and takes a strong position against the aim of the comparative lawyer to create uniformity of laws.[117] Due to the idea that any law, in the sense of a rule, is deeply rooted in the culture in which it was born, he considers legal transplants an intellectual fantasy. In his views, legal transplants are impossible. Displacing a legal notion to another system cannot be successful because the meaning will always be different, unless one transplants the language itself.[118] For instance, based on this conception, the concept of 'bonne foi' cannot be transplanted in Australian law by the simple translation of good faith based on the French notion because it is removed from its context into a foreign environment. Legrand's perspective was very strongly criticised by Alan Watson in 2000 in a paper where he relied on comparative legal history to show that legal transplants were commonplace and inevitable.[119] Watson continues to argue that divergences are to be expected and should be encouraged. This thesis will demonstrate that fairness in contractual dealings and good faith are part of the implicit dimensions surrounding any contract:[120] they are part of the universal context surrounding agreements. However, there are divergences in

[113] Ibid 899.
[114] Chen-Wishart, above n 107, 27.
[115] Teubner, above n 105, 12.
[116] Ibid 32.
[117] Legrand, *Le Droit Comparé*, above n 1.
[118] Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111, 114.
[119] Alan Watson, 'Legal Transplants and European Private Law' (2000) 4(4) *D Ius Commune Lectures on European Private Law* 2 <https://www.ejcl.org/44/art44-2.txt>.
[120] See Chapter 3.II.C.2..

the way that the EU and Australia have used good faith as a protective tool.[121]

3. **The application to the studied jurisdictions**

Common and civil legal systems represent two branches of the occidental tree, the trunk of which is made up of overlaps between Roman law, canon law and equity.[122] The trunk is composed of a shared history and theories. Firstly, this emphasises that common law and civil law share a history.[123] Religion and law have been separated; the administration of law is given to professionals, who then constitute a system. Law is seen as a coherent ensemble and an integrated space.[124] This has been common to both the civil law and common law traditions in Europe since the eleventh century. The common values are not only legal but also moral.[125] Flowing from a common trunk, certain differences between common law and civil law generally, and Australia and the EU more specifically, make for the growth of different branches.

The Australian legal system is often presented as a member of the common law family. The English common law characteristics of the Australian legal system are endemic to the Commonwealth of Australia, traditionally stamped as a common law jurisdiction. Australia retains its reliance on case law in spite of the increase in the number of statutes over the years. The latter phenomenon can be illustrated by the *Criminal Code 1995* (Cth) and the *Australian Consumer Law*,[126] which codified the Australian law in certain areas.

Case law is the primary source of law; and the doctrine of binding precedent applies. This tradition comes from England and has influenced the development of Australian case law.[127] English law has had a great influence and continues to do so despite the growing influence of other sources. This is illustrated by the fact that the executive power is vested in the Queen and

[121] See Part II of this thesis.
[122] Sacco, 'Legal Formants (II of II)', above n 69, 363.
[123] Gambaro, Sacco and Vogel, above n 49, 55.
[124] Ibid 56.
[125] Chapter 3.II.B will develop the relationship between law and morals further. It will show that, in the context of contract law, party autonomy and regulation of the behaviour of contractual parties has played a role in the development of the principle of good faith in both Australia and the EU. For now, we focus our attention on the organic nature of the occidental tree.
[126] *Competition and Consumer Act 2010* (Cth) sch 2.
[127] See, eg, Michael Kirby, 'Precedent Law, Practice and Trends in Australia' (2007) 28 *Australian Bar Review* 243.

is exercisable by the Governor-General as the Queen's representative.[128] However, today English law and Australian law appear as two separate sets of law.[129]

This research focuses on the powers that have influenced the development of the doctrine of good faith by actively taking a position on its recognition or rejection, namely the legislature and the judiciary. Since Australia is traditionally attached to the common law tradition, the judiciary has played a considerable role in the development and stagnation of the recognition of a legal concept requiring parties to act in good faith in contractual dealings.[130]

Legislative power in Australia is vested in the Parliament which is sovereign. The Commonwealth Parliament has the 'power to make laws for the peace, order, and good government of the Commonwealth with respect to trade and commerce with other countries, and among the States'.[131] State parliaments can legislate on any matter as long as the subject matter is directly relevant to the state and the law is not one of the exclusive legislative powers of the Commonwealth.[132] Under s 51 of the Constitution, states conserve their power to make their own laws. State governments are made up of their own legislative, executive and judicial branches.[133]

In that context, it is necessary to highlight the sources this thesis relies upon. In relation to contract law, concepts such as the definition of an offer[134] or the intention to enter into legal relations[135] as presented in Chapter 1 are also applicable in Australia and have been developed through case law. Case law is the main source of Australian contract law. The judiciary has developed equitable doctrines such as estoppel[136] and unconscionability.[137] These have led to new remedies such as specific performance, and providing relief to contractual parties by supplementing the traditional common law remedy of damages.[138]

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[128] *Australian Constitution* s 61.
[129] James Douglas, 'England as a Source of Australian Law: For How Long? (2012) 86 *Australian Law Journal* 333.
[130] This trend will be discussed further in Chapters 4 and 5.
[131] *Australian Constitution* s 51(i).
[132] *Australian Constitution* s 109.
[133] For more information on role of the states, see David Clark, David Bamford and Judith Bannister, *Principles of Australian Public Law* (Lexis Nexis, 5th ed, 2016).
[134] *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424.
[135] *Masters v Cameron* (1954) 91 CLR 353; *Coal Cliffs Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1.
[136] *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424.
[137] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.
[138] For a discussion of remedies see Chapter 6.II.

There is no general law on contract enacted by state or Commonwealth parliaments. However, the legislature has provided further protection to consumers in contractual dealings. For instance, in Australia, the *Trade Practices Act 1974* was repealed in 2010 and replaced by a more general statute, the *Competition and Consumer Act*, which provides clearer and stronger protection for consumers as well as dealing with business relations, by providing a 'clarified understanding of the law for Australian consumers and businesses' in one single national law.[139] This reform was the result of a policy reform movement that began in August 2008, when the Ministerial Council on Consumer Affairs developed a national consumer policy objective based on the Productivity's Commission's proposal 'to improve consumer wellbeing through consumer empowerment and protection fostering effective competition and enabling confident participation of consumers in markets in which both consumers and suppliers trade fairly'.[140] Specialised legislation however refers to specific contracts such as agreements with consumers, through the *Competition and Consumer Act 2010*, or with insurance providers, through the *Insurance Contracts Act 1984*. It is interesting to note that all these legislative initiatives are limited to certain situations. Finally, legal formants of the Australian branch include codes of conduct. Whether they are voluntary or mandatory, these codes play an important role in shaping Australian contract law. Indeed, scholarly writings have also discussed the movement towards codification,[141] a movement that seemed to be recognised in the ill-fated 2012 discussion paper[142] and which has open the door to topical and contract-specific recognition of good faith. Chapters 4 and 5 will demonstrate the role of codes in particular industries including in building contracts,[143] the supply of food and groceries,[144] and in the franchising industry.[145]

[139] Australian Government, *The Australian Consumer Law: A Framework Overview* (2013) 1 <consumerlaw.gov.au/files/2015/06/ACL_framework_overview.docx>.
[140] Ministerial Council on Consumer Affairs Meeting, *Joint Communiqué* (15 August 2008) 2.
[141] J G Starkie, 'A Restatement of the Australian Law of Contract as a First Step Towards an Australian Uniform Contract Code' (1978) 49 *Australian Law Journal* 234; Warren Swain, 'Codification of Contract Law: Some Lessons from History' (2012) *University of Queensland Law Journal* 36; Warren Swain, 'Contract Codification in Australia: Is It Necessary, Desirable and Possible?' (2014) 36 *Sydney Law Review* 131.
[142] Attorney-General's Department (Cth), 'Improving Australia's Law and Justice Framework: A Discussion Paper Exploring the Scope for Reforming Australian Contract Law' (22 March 2012) <http://apo.org.au/system/files/28736/apo-nid28736-57031.pdf>. Cf the position in Attorney-General's Department (Cth), *Australian Government Response: 'Harmonisation of legal systems within Australia and between Australia and New Zealand'* (2008) 16.
[143] Australian Standard 11000 General Conditions of Contract.
[144] *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Cth).
[145] *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth).

The second jurisdiction and other branch of the occidental tree is the EU. The EU is a hybrid legal system due to the diversity of legal systems it embraces (its member states). It is the only sui generis supranational organisation in the world.[146] Born from an agreement between mature legal traditions to join forces to achieve economic and political goals,[147] the powers of the institution have grown with its membership.[148] This is clearly expressed in the EU motto 'united in diversity' and the development of EU-specific legislation, such as regulations and directives. The EU is more than a supranational entity. It has helped the 'cohabitation' between civil and common law principles and thinking methods.[149] The Council, the Commission and the European Parliament are the three main institutions involved in EU legislation.[150] These institutions decide the rules that should apply across the EU through the main legislative procedure.[151] Interestingly, the legislative procedure of the EU is very different from any member state or any other jurisdiction such as Australia. In the EU, it is the Commission who is given the '(almost) exclusive right to *formally* propose legislative bills',[152] and the Parliament and the Council enact them.[153] The Council, representing the member states, also has the role of ensuring the member states are involved and their views heard.[154] The Court of Justice of the EU (CJEU) ensures that EU law is interpreted[155] and applied[156] in member states in accordance with the aims of the EU.[157] This means that European private law is not only the

[146] William Phelan, 'What Is *Sui Generis* About the European Union? Costly International Cooperation in a Self‐Contained Regime' (2012) 14 *International Studies Review* 367.

[147] European Union, 'The Schuman Declaration – 9 May 1950' (24 October 2017) <https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en>; *Treaty Instituting the European Coal and Steel Community*, signed 18 April 1951, 261 UNTS 140 (entered into force 23 July 1952), signed by Belgium, Germany, France, Italy, Luxembourg and the Netherlands.

[148] *Treaty Establishing the European Economic Community*, opened for signature 25 March 1957, 298 UNTS 11 (entered into force 12 January 1958); *Treaty on European Union (Maastricht Text)*, opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993); *Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, opened for signature 2 October 1997, [1997] OJ C 340/1 (entered into force 1 May 1999); *Consolidated Version of the Treaty on European Union*, [2010] OJ C 83/01.

[149] David and Jauffret-Spinosi, above n 2, 54.

[150] 'There are 3 main institutions involved in EU legislation: The European Parliament, which represents the EU's citizens and is directly elected by them; the Council of the European Union, which represents the governments of the individual member countries. The Presidency of the Council is shared by the member states on a rotating basis; The European Commission, which represents the interests of the Union as a whole.' European Union, 'Institutions and Bodies' (22 May 2018) <https://europa.eu/european-union/about-eu/institutions-bodies_en>.

[151] *Consolidated Version of the Treaty on the Functioning of the European Union* [2012] OJ C 326/47 art 289 ('*TFEU*').

[152] Robert Schütze, *European Union Law* (Cambridge University Press, 2015) 193. See also *TFEU* art 17.

[153] *TFEU* arts 14, art 16(1); Schütze, above n 152, 165, 183.

[154] *TFEU* art 16(2); Schütze, above n 152, 174.

[155] *TFEU* art 267.

[156] Ibid art 260.

[157] Ibid art 5.

product of European institutions but also the product of its application by domestic institutions. The process of harmonisation, whereby the member states have some discretion in the implementation of directives, provides an efficient mechanism to ensure the coherence of the implementation of EU law while also respecting the particular characteristics of each member state. Consequently, the EU branch of the occidental tree further branches out in the member states' legal systems.

At the EU level, there is no clear definition of contract law and what it embraces. It can be viewed in different ways. From a narrow perspective, EU contract law includes the *acquis communautaire*. The *acquis* is made up of directives and regulations enacted at the EU level. This thesis will not analyse every EU legislative initiative that regulates contractual dealings in the EU.[158] Instead, it focuses on the use of the doctrine of good faith in such legislative instruments. From a broader perspective, European contract law includes the communications of the Commission, the proposal for optional regulations and comparative contract law materials; these include the *Principles of European Contract Law* (PECL),[159] and the *Draft Common Frame of Reference* (DCFR).[160] Chapter 4 will discuss the content of these instruments further and will highlight the central role of the Commission as the driver of European contract law.[161]

In order to analyse European private law, we need to understand the existence of a European community, with 'its own internal logic',[162] independent from state interests. This is why this thesis relies on the broader perspective of EU contract law and embraces legal formants that are not necessarily enforceable, such as the *Draft Common Frame of Reference*, to inform the discussion on good faith in this discipline.

On 18 June 2018, Australia and the European Union launched a negotiation period for a free trade agreement between the two jurisdictions.[163] It is therefore an opportune time to determine some of the aspects of the concept of the contract, the notion at the core of any transaction. The

[158] For an example of this broader approach, see Kathleen Gutman, *The Constitutional Foundations of European Contract Law* (Oxford University Press, 2014).
[159] Lando and Beale, above n 13.
[160] Study Group on a European Civil Code, above n 13.
[161] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, 3rd ed, 2003) 64.
[162] Von Bar, above n 8, 132.
[163] Department of Foreign Affairs and Trade, 'Australia-European Union Free Trade Agreement' <http://dfat.gov.au/trade/agreements/negotiations/aeufta/Pages/default.aspx>.

first aspect is to determine how comparable the two jurisdictions are. There are clear differences between the two studied jurisdictions. Firstly, while Australia is a federal nation-state, the EU is a supranational organisation, of which countries are member states. Secondly, due to their nature, the two jurisdictions have a different model of governance and different internal relations. Thirdly, what Australia can do as a country is not the same as what the EU can do as a supranational organisation. Different powers are given to the federal government and the EU institutions.[164] Despite these clear differences, the two jurisdictions share some commonalities at a higher level. This thesis argues that both belong to the occidental tree, whose roots are can be traced back, through legal history, to the Roman and Greek era. As Chapter 3 will discuss, there have been parallels between the developments of the two legal cultures which demonstrate their attachment to similar values and notions of justice. The purpose of the comparison and of this thesis is to demonstrate through the example of good faith in contract law that, despite sharing broad values of justice and fairness, how the two jurisdictions apply and legally enforce them differ. Chapters 4 and 5 will demonstrate that the differences in contract law legislation and in how the concept of good faith is integrated into the law are intrinsically linked to the different powers given on the one hand to the Australia federal Parliament and on the other hand to the EU institutions. However, the spirit and rationale of the implementation of good faith is similar, which will lead to the discussion of promoting good faith as a principle of contract law in Chapters 6 and 7.

D Conclusion to Section I

Section I of this chapter has therefore shown that comparative law plays an important role in the analysis of a problem. It shows that comparative law is based on the study of legal systems and their classification. However, the traditional classification of legal families does not seem adequate to reflect the characteristics of certain legal systems, as illustrated by some common law countries and the EU. This section has shown the inadequacy of the traditional classification and presented the idea of an occidental tree, thereby merging two main ideas: 1) certain legal cultures belong to one common tradition; and 2) the particularities of each legal culture must be taken into consideration. This provides the theoretical basis for comparing comparable jurisdictions: the EU and Australia. Finally, it lays down the foundation for a

[164] *FEU* arts 2–6; *Australian Constitution* ss 51–52.

comparison at a deeper level, in order to analyse the development of good faith in the contract law discipline within each of these jurisdictions.

II. COMPARING DOCTRINES

Following from a macro-comparison of the legal systems of the EU and Australia, this section provides a micro-comparison of legal doctrines. Section A explains the merits of deep-level comparative law, Section B presents the central notions of contract law, and Section C introduces the doctrine of good faith in the EU and in Australia. This shows the similarities in the notion of contract while acknowledging some of the differences in the development of good faith, in order to provide an overview of the context of the doctrine in both jurisdictions.

A Deep-level comparative law: discipline specific

This thesis analyses Australian and EU contract law and the development of the doctrine of good faith through a micro-comparison of these legal systems. Such a deep-level comparison is necessary in order to determine whether an explicit recognition of good faith fits within the context of Australian contract law and EU contract law. Section I of this chapter established that both legal systems belong to the same legal tradition: the occidental tree.[165] While this is relevant to illustrate the comparability of the two jurisdictions, a micro-comparison of the discipline of contract law, and within it the development and use of good faith, provides further justification for a new classification of legal systems.

Indeed, deep-level comparative law further shows that divergences and differences at one level may in fact not be as obvious once one goes into a deep-level comparative approach.[166] As explained above, Australia is traditionally presented as a common law country due to its English law heritage. The EU has been influenced by the continental approach to law, including

[165] Orucu, 'Family Trees', above n 42; Orucu, 'A Theoretical Framework' above n 93; Esin Örücü, 'Developing Comparative Law' in Esin Örücü and David Nelken (eds), *Comparative Law: A Handbook* (Hart, 2007) 43.
[166] Van Hoecke, above n 5.

that of France and Germany.[167] While the English approach deals with some common standards of 'law, equity and justice',[168] the concept of fairness is present throughout these jurisdictions, irrespective of their influences. However, before discussing this further, it is important to outline the foundations of the notion of contract in the EU and in Australia and present an overview of the use of good faith in their contract law to set the scene for the discussion to come in the upcoming chapters.

B Comparability of notions of contract in Australian and EU laws

This section uses deep-level comparative law to demonstrate that the legal notion of contract in Australia and the EU shares common characteristics. This discussion builds on the development of the notion of contract presented in Chapter 1 in order to identify the similarities and differences in the understandings of the concept.

There is no European legal definition of contract.[169] One possible reason for this is the sovereignty of the member states and their unwillingness to relinquish their power to make laws. This is clear from the wording of art 3 of the *Treaty on the Functioning of the European Union* whereby the exclusive competence of the Union to make laws is restricted to particular areas, namely:

> the customs union; the establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the euro; the conservation of marine biological resources under the common fisheries policy; and common commercial policy.

There is no general power for the Union to legislate in contract law. Article 4 details where the Union shares the power to make law with member states, including the internal market and consumer protection. Consequently, directives have regulated international exchanges in particular fields, and contract is not the central object of the EU legislation.[170] There are however two perspectives on the EU notion of contract. On the one hand, the narrow view

[167] See Chapter 1.I.A.
[168] Van Hoecke, above n 5, 187.
[169] Bénédicte Fauvarque-Cosson (ed), *Terminologie Contractuelle Commune* (LGDJ, 2008) 244.
[170] Fauvarque-Cosson,above n 169, 245.

holds that the intention of the parties is the basis for the enforcement of the contract.[171] On the other hand, the intention of the parties is the basis for the protection of the legitimate expectations of the parties.[172]

A contract is seen as a legally enforceable agreement between parties, no matter the jurisdiction of the member state. The differences lie in the pillar of this agreement. Member states are free to keep their understanding of contract, for example whether it is an exchange of promises or a bargain and whether it requires consideration to be binding. Member states are also free to modify their understanding of contract, as the French reform of contract law in 2016 demonstrates. This reform led to the disappearance in law of the concept of *cause*, a notion that had been essential to the validity of contract law since the enactment of the French Civil Code in 1804.[173] Even though member states are attached to their own understanding of contract, there have been attempts at harmonising what a contract entails, as well as the essential characteristics, objectives and effects of a contract. This has mostly been dealt with by academic scholarship which shows that member states' differences can be reconciled.[174]

This means that besides the legal definition of contract, or in this instance lack thereof, it is important to analyse the doctrinal point of view. Academic exercises have mapped the European private law landscape. They allow EU institutions to better understand the legal diversity of the member states. By acknowledging differences and similarities, academic critiques make it easier for EU institutions to determine where regulation and harmonisation are needed.

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[171] *Council Directive 90/314/EEC of 13 June 1990 on Package Travel, Package Holidays and Package Tours* [1990] OJ L 158/59, art 2.5: '"contract" means the agreement linking the consumer to the organizer and/or the retailer'. See Chapter 1.I.A. on contractual freedom in member states including the triarchy.

[172] This concept will be discussed further in Chapter 3.II.A.2. *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA Relevance* [2011] OJ L 304/64, art 2: '"sales contract" means any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services; (6) "service contract" means any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof; (7) "distance contract" means any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded'.

[173] See Chapter 1.I.A.2.

[174] Lando and Beale, above n 13; Study Group on a European Civil Code, above n 13; Bénédicte Fauvarque-Cosson (ed), *Principes Contractuels Communs* (LGDJ, 2008).

Since 2001, new enthusiasm concerning European contract law has engulfed the EU,[175] even though this enthusiasm lost momentum when the proposal for a *Common European Sales Law* (CESL) was abandoned in December 2014.[176] In 2000, the Commission on European Contract Law published the *Principles of European Contract Law* (PECL)[177] under the chair of Professor Lando.[178] The PECL resemble the American Restatements of Law presented in Chapter 1: both sets are structured in parts with articles. Each of its articles also includes comments on member states' specific context, providing a better understanding of the issues at stake as well as a commentary on the substance of each article and hypothetical examples.

Under the PECL, a contract is considered concluded when the parties intend to be legally bound; and the agreement reached is sufficient,[179] meaning it is adequately defined by the parties.[180] The work of the PECL has been the basis for the Study Group on a European Civil Code. This illustrates the importance of the intention to enter a legally binding agreement and highlights this component of the definition of contract as a fundamental criterion. A revision of the PECL was published in 2008 by the *Législation de Droit Comparé*.[181] This project adopted the same definition.[182] This was followed in 2009 by the release of the DCFR, which again used the same elements of intention and certainty.[183] These compilations show the importance of the intention and the conduct of the parties when deciding to enter into a legally binding agreement.[184] This sets the foundation for the protection of legitimate expectations, based on the intention to enter into the transaction in the first place.

In Australia, the liberal English approach to contract has meant that the philosophy of the contract is to favour exchanges.[185] A contract, in Australian law, is created by the

[175] See Chapter 4, II.B in relation to communications from the Commission.
[176] See Chapter 4.II.C.
[177] Lando and Beale, above n 13.
[178] The CECL began its work in 1992.
[179] Lando and Beale, above n 13, art 2:101.
[180] Ibid art 2:103.
[181] Fauvarque-Cosson, *Principes Contractuels Communs*, above n 174, 221.
[182] Ibid.
[183] Study Group on a European Civil Code, above n 13, art 4:101.
[184] See for instance the work compiled by the Academy of European Private Lawyers in Pavia in 1999 stating that a contract is the agreement between two parties that will create, regulate, modify or terminate legal obligations between the parties. *European Contract Code* art 1, http://www.trans-lex.org/450100.
[185] See Reinard Zimmermann, 'The Present State of European Private Law' (2009) 57 *American Journal of Comparative Law* 479.

communication of an unconditional acceptance of an offer.[186] Offer, acceptance, consideration[187] and the intention of the parties to create legal relations form the foundation of an agreement under Australian contract law. Article 5 of the 1992 Draft Australian Contract Code puts the emphasis on legal intention by stating that 'a contract is made only when the parties intend legal obligations to arise'.[188] The 2014 draft code of the Australian law of contract, proposed by academics, also states the intention to be legally bound as one of the main criteria to exist for a contract to be formed.[189]

The understandings of contracts in common law and civil law are often presented as opposed to each other.[190] While the common law favours the exchange of promises, civil law considers a contract is formed where there is a meeting of the minds. While the common law interprets the contract from an objective starting point, civil law relies upon the intention of the parties. Yet, this distinction is less flagrant when one compares the Australian understanding with the European insights, a combination of common law and civil law. The reciprocity and the interdependence of the obligations constitute the foundation of contract, not only in the EU[191] but also in Australia. The importance of the intention to enter legal relations is then reflected in what flows from the intention: the protection of the legitimate interests[192] of the parties and their cooperation[193] in performing obligations under the contract. This thesis argues that the comparison between Australia and the EU is possible because, despite some differences, the notion of contractual freedom is sacrosanct. Both jurisdictions have limited how far parties are free to agree on the terms and conduct within a contractual relationship but, as Chapters 4 and 5 will demonstrate, such limits are carefully placed to promote a fair and just approach to contracts. In 2016, academics from the Queensland University of Technology provided a comparative analysis of consumer policy frameworks including the European Union,[194] and

[186] *Carlill v Carbolic Smokeball* [1893] 1 QB 256; *R v Clarke* (1927) 40 CLR 227.
[187] *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424.
[188] Fred Ellinghaus and Ted Wright, 'An Australian Contract Code' (Law Reform Commission of Victoria Discussion Paper 27, 1992) art 5.
[189] Ted Wright, Fred Ellinghaus and David Kelly, 'A Draft Australian Law of Contract' (Working Paper No 13-03-14, Newcastle Law School, 2014) s 13.
[190] Siems, above n 76, 58.
[191] Fauvarque-Cosson, *Terminologie Contractuelle Commune*, above n 169, 28.
[192] See Chapter 3,II.B; *Far Horizons Pty Ltd v McDonalds* [2000] VSC 310.
[193] *Mackay v Dick* (1881) 6 App Cas 251, 263; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596.
[194] Stephen Corones, Sharon Christensen, Justin Malbon, Allan Asher and Jeannie Marie Paterson, *Comparative Analysis of Overseas Consumer Policy Frameworks* (Commonwealth of Australia, 2016) 31 <http://consumerlaw.gov.au/files/2016/05/ACL_Comparative-analysis-overseas-consumer-policy-frameworks-1.pdf>.

demonstrated the relevance of analysing EU law to inform Australian contract law.

C Development of notions of good faith in Australian and EU laws

This section presents a short overview of the use of the concept of good faith to regulate certain aspects of contract law in the EU and in Australia. While this overview will be expanded in Chapters 4 and 5, it highlights the comparative approach taken in this thesis to understand the different applications of good faith in Australia and in the EU.

1A preliminary EU overview: a fragmented and topical approach

At the EU level, references to good faith can be found in directives.[195] The first use of good faith in European directives was in the context of commercial agency.[196] The 1986 *Directive Relating to Self-Employed Commercial Agents* imposes a duty to act in good faith on both the principal and the agent.[197] Another directive that puts the emphasis on good faith in contract law is a directive on unfair terms in contracts.[198] The 1993 *Directive on Unfair Terms in Consumer Contracts* stipulates that

> [a] contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.[199]

This is the prime example of the use of the doctrine of good faith in directives; however, it does not contain a definition of the doctrine. Even though member states should ensure that their implementation and interpretation are compliant with EU law,[200] the absence of clear guidelines in the text has led to the survival of diverse domestic interpretations of the doctrine

[195] *Council Directive 86/653/EEC of 18 December 1986 on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents* [1986] OJ L 382/17, ss 3–4; *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29, preamble and art 3.
[196] *Council Directive 86/653/EEC of 18 December 1986 on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents* [1986] OJ L 382/17.
[197] Ibid arts 3–4.
[198] *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29.
[199] Ibid art 3.1.
[200] See Chapter 5.B.1.

of good faith in contract, including *treu und glauben*, and *bonne foi*,[201] each having their own characteristics.[202]

The recent *Proposal of Regulation on a Common European Sales Law* (CESL) was the latest legislative attempt by the EU to develop a common law of contract across its territory. In this proposal, the expression 'good faith and fair dealing' was defined as a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question.[203] The CESL stipulated that parties must perform according to good faith and fair dealing.[204]

Member states have used the preliminary ruling procedure to gain insight into the interpretation of the directives.[205] The Court of Justice of the European Union (CJEU) provides guidelines that help to harmonise European contract law. These guidelines are very important due to the lack of guidance on interpretation within the directives. However, the role of the CJEU is limited and the judge is not allowed to provide the solution for a particular case, and can only provide guidance on the interpretation of the legislative test in dispute.[206]

The doctrine of good faith is also present throughout the PECL. Article 1-201 states that 'Each party must act in accordance with good faith and fair dealing.' Although similarly worded, it goes further than the US *Uniform Commercial Code* s 1-203, which refers to enforcement.[207] The PECL articles, in contrast, refer to all stages of the life of a contract, and also include formation, validity and interpretation of contracts.

Good faith is also presented as a positive duty applicable to the behaviour of the parties in other

[201] Gianmaria Ajani and Martin Ebers, 'Uniform Terminology for European Contract Law: Introduction' in Gianmaria Ajani and Martin Ebers (eds), *Uniform Terminology for European Contract Law* (Nomos, 2005) 11 <https://www.researchgate.net/publication/265101505_Uniform_Terminology_for_European_Contract_Law_Introduction>. See also Chapter 1.I.A.

[202] Chapter 1.I.A.

[203] *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* COM/2011/0635 final – 2011/0284 (11 October 2011) art 2(b).

[204] Ibid art 2.

[205] Already forecast by authors. See, eg, Walter Van Gerven, 'The Case-Law of the European Court of Justice and National Courts as a Contribution to the Europeanisation of Private Law' (1995) 3(2) *European Review of Private Law* 367, 374.

[206] For more see Chapter 5.I.B.2; Gutman, above n 158, 63.

[207] Van Hoecke, above n 5, 188–9; PECL arts 2:102 and 5:102.

academic scholarship.[208] The principle of good faith applies to all stages of the contract in the Pavia project.[209] The Société de Législation Comparée advocates for good faith to be recognised as a general and mandatory principle.[210] The DCFR presents good faith as 'a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question'.[211]

This highlights the importance of the conduct of the parties and the link between good faith and the need to take into consideration the interests of the other party. It brings the discussion to the core of the understanding of good faith in contractual dealings, which will be developed in Part Two of this thesis.

2. **A preliminary Australian overview: a prudent and reluctant approach**

In a recent English case, Judge Leggatt drew an idealistic picture of the concept of good faith and its recognition in Australia by stating that 'in Australia the existence of a contractual duty of good faith is now well established, although the limits and precise juridical basis of the doctrine remain unsettled'.[212] Even though many already note that Australia is at the eve of recognising good faith,[213] the question remains as to the modalities of such recognition.[214] While there appears to be some indication that good faith has been recognised in Australian contract law,[215] a review of case law and jurisprudence shows that the position is not as clear.

The judicial approach is fragmented by the recognition of good faith in some contractual

[208] See Chapter 3.I.B.2.
[209] *European Contract Code*, Book One, arts 1.2, 6, 32, 75.1.
[210] Fauvarque-Cosson, *Principes Contractuels Communs*, above n 174, 198.
[211] Study Group on a European Civil Code, above n 13, art I 1:103.
[212] See Leggat J in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [127].
[213] Van Hoecke, above n 5, 186.
[214] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB).
[215] Ibid.

dealings but not all.[216] A review of case law[217] shows that Australian courts have discussed good faith as an implied term, but that the method to be used is not accepted by all judges.[218] *Renard Constructions*,[219] decided by the NSW Court of Appeal in 1992, marked the start of the renewed debate on good faith in Australian contract law. Justice Priestley applied the doctrine of the implication of terms to decide that there was a duty of good faith applicable to the situation presented before the Court. However, the Court did not clearly state whether good faith could be implied as a matter of fact or in law.[220] Meagher JA brought the notion back to a duty to take into consideration the legitimate interests of the other party. This case created confusion, an 'unfortunate doctrinal by-product', by not stating clearly the foundations for the recognition of good faith in contractual dealings.[221]

In *Royal Botanic*,[222] the High Court of Australia missed an opportunity to develop the principle of good faith in contract law. Only Justice Kirby discussed (obiter) the difficulty of implying good faith in contract law. The High Court is yet to take a judicial position on a duty to act in good faith and the legal basis for such a concept: mandatory law, implied term as a matter of

[216] See William M Dixon, 'Good Faith in Contractual Performance and Enforcement: Australian Doctrinal Hurdles' (2011) 39(4) *Australian Business Law Review* 227; Bill Dixon, 'What is the Content of the Common Law Obligation of Good Faith in Commercial Franchises?' (2005) 33(3) *Australian Business Law Review* 207; John W Carter and Elisabeth Peden, 'Good Faith in Australian Contract Law' (2003) 19 *Journal of Contract Law* 155; Justin T Gleeson, J A Watson and Elisabeth Peden (eds), *Historical Foundations of Australian Law – Volume II: Commercial Common Law* (Federation Press, 2013); Howard Munro, 'The Good Faith Controversy in Australian Commercial Law: A Survey of the Spectrum of Academic Legal Opinion' (2009) 28 *University of Queensland Law Journal* 167; Elisabeth Peden, 'When Common Law Trumps Equity: the Rise of Good Faith and Reasonableness and the Demise of Unconscionability' (2005) 21 *Journal of Contract Law* 226; Elisabeth Peden, 'Incorporating Terms of Good Faith in Contract Law in Australia' (2001) 23 *Sydney Law Review* 233.

[217] See Kim Lewison and David Hughes, *The Interpretation of Contracts in Australia* (Thomson Reuters, 2012).

[218] See Chapter 4 and 5 for a detailed analysis of the following cases: *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* (1999) 21 ATPR 41-703; *Hurley v McDonald Australia Ltd* (2000) 22 ATPR41-741; *ACCC v Simply No Knead (Franchising) Pty Ltd* (2000) 104 FCR 253; *Automasters Australia Pty Ltd v Bruness Pty Ltd* [2002] WASC 286; *Boral Formwork and Scaffolding Pty Ltd v Action Maker Ltd* [2003] NSWSC 713; *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289; *Burger King Corp v Hungry Jack's Pty Ltd* [2001] NSWCA 187; *Coal Cliffs Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1; *Roder-Zelt und Hallenkonstruktionern GmbH v Rosedown Park Pty Ltd* (1995) 57 FCR 216; *Delphic Wholesalers Australia Pty/Ltd v Agrilex Co Ltd* [2010] VSC 328; *Cortem SpA v Controlmatic Pty Ltd* [2010] FCA 852; *Castel Electronics Pty v Toshiba Singapore Pte Ltd* [2010] FCA 55; *Ginza Pty Ltd v Vista Corp Ltd* [2003] WASC 11; *Australis Media Holdings Pty Ltd v Telstra Corporation Ltd Share* (1998) 43 NSWLR 104; *Aiton Australia Pty Ltd v Transfield Pty Ltd Share* (1999) 153 FLR 236; *United Group Rail Services Ltd v Rail Corporation New South Wales* [2009] NSWCA 177; *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49.

[219] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.

[220] Dixon, 'Good Faith', above n 216.

[221] Ibid 237.

[222] *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289.

fact or of law,[223] or a principle of interpretation.

This confusion associated with the implementation of the CISG,[224] and the recourse to the UNIDROIT principles[225] by the judiciary to interpret the concept of good faith at the domestic level, shows that there is a need for a better understanding of the doctrine of good faith in Australian contract law.

Today, good faith is mentioned in more than 150 Australian statutes,[226] relating to a large array of topics including consumer protection,[227] native title,[228] and corporations law.[229] It is used either as a defence,[230] or as a statutory obligation.[231] Good faith is also stipulated in legislation regulating certain contractual situations.[232] Yet, there is no guidance provided on how to understand and interpret the notion, except in certain contracts such as utmost good faith in insurance contracts, which is based on centuries of case law.[233]

Rules in Australian contract law mainly originate from judicial decisions; there is no general contract law regulation through legislation. Specialised legislation does exist and refers to

[223] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289.

[224] *Sale of Goods (Vienna Convention) Act 1986* (Qld); *Sale of Goods (Vienna Convention) Act 1986* (SA); *Sale of Goods (Vienna Convention) Act 1987* (Tas); *Sale of Goods (Vienna Convention) Act 1987* (Vic); *Sale of Goods (Vienna Convention) Act 1986* (WA); *Sale of Goods (Vienna Convention) Act 1987* (ACT); *Sale of Goods (Vienna Convention) Act 1986* (NSW); *Sale of Goods (Vienna Convention) Act 1987* (NT); *Roder-Zelt und Hallenkonstruktionern GmbH v Rosedown Park Pty Ltd* (1995) 57 FCR 216; *South Sydney District Rugby League Football Club Ltd v News Ltd* [2000] FCA 1541; *Downs Investments Pty Ltd v Perjawa Steel BHD* [2001] QCA 433; *Summit Chemicals Pty Ltd v Vetrotex Espana SA* [2003] WASC 182; *Hannaford v Australian Farmlink Pty Ltd* [2008] FCA 1591; *Olivaylle Pty Ltd v Flothweg GmbH v COKGAA* [2009] VSC 328; *Delphic Wholesalers Australia Pty/Ltd v Agrilex Co Ltd* [2010] VSC 328; *Cortem SpA v Controlmatic Pty Ltd* [2010] FCA 852; *Castel Electronics Pty v Toshiba Singapore Pte Ltd* [2010] FCA 55; *Ginza Pty Ltd v Vista Corp Ltd* [2003] WASC 11; *United Nations Convention on the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988).

[225] *UNIDROIT Principles for International Commercial Contracts*, 2010.

[226] Robert French, 'Judges and Academia – Building Bridges' (Speech delivered at Fragmentation or Consolidation? Fostering a Coherent Professional Identity for Lawyers, Australian Academy of Law Symposium, Brisbane, 17 July 2007) 12.

[227] *Competition and Consumer Act 2010* (Cth) sch 2 s 22(1)(l) (old section: *Trade Practices Act 1974* (Cth) s 51AC(3)(k)), referring to relations between supplier and customers; *Competition and Consumer Act 2010* (Cth) sch 2 s 22(2)(l) (old section: *Trade Practices Act 1974* (Cth) s 51AC(4)(k)), referring to relations between acquirers and suppliers; *Australian Securities and Investments Commission 2001* (Cth) ss 12CC(1)(l), s 12CC(2)(l).

[228] *Native Title Act 1993* (Cth) ss 94P, 94Q.

[229] *Corporations Act 2001* (Cth) s 181.

[230] *Competition and Consumer Act 2010* (Cth) sch 2, s 22.

[231] *Corporations Act 2001* (Cth) s 181.

[232] *Insurance Contracts Act 1984* (Cth) s 13.

[233] *Carter v Boehm* (1766) 3 Burr 1905; *Seaton v Heath* [1899] 1 QB 782; *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd* [2003] 1 AC 469; *Smart v Westpac Banking Corporation* (2011) 282 ALR 400.

specific contracts such as agreements with consumers, notably through the *Competition and Consumer Act 2010* (Cth). Part 2-2 of the *Australian Consumer Law* (ACL) deals with unconscionable conduct. Section 22 stipulates matters the court may have regard to when considering whether a party has engaged in an unconscionable manner. Among other elements, the courts may look at the extent to which the supplier and the customer or the acquirer and supplier 'acted in good faith in their dealings'.[234] The ACL also prescribes a test to determine when a contractual term may be unfair. However, instead of mandating a good faith element, the notion is set aside here. As Paterson argues, this is 'largely due to continuing uncertainty over the function and meaning of the duty of good faith under both this regime and contract law generally'.[235]

The *Australian Securities and Investments Commission Act 2001* (Cth) contains similar provisions to the *Competition and Consumer Act 2010* (Cth) for financial services. The Act was amended at the same time that the *Competition and Consumer Act 2010* was drafted. In the same spirit as the *Australian Consumer Law*, the Act provides that a court may have regard to the extent to which parties 'acted in good faith' when asked to determine whether a party engaged in unconscionable conduct. Again, no definition is provided for the expression 'acted in good faith'.

The concept is used in different Australian legal disciplines. The *Corporations Act 2001* (Cth) deals with corporations and their structures. It is interesting to note that good faith is mentioned not less than 27 times in the Act. The first reference to good faith is in s 181(1), which stipulates that 'a director or other officer of a corporation must exercise their powers and discharge their duties: (a) in good faith in the best interests of the corporation; and (b) for a proper purpose'. However, there is no definition of the expression 'in good faith', and it has been up to the courts to interpret and enforce the provisions.[236] It is also important to note that such a duty of good

[234] *Competition and Consumer Act 2010* (Cth) sch 2 ss 22(1)(l), 22(2)(l). Other references include *Competition and Consumer Act 2010* (Cth) s 210 (old section: *Trade Practices Act 1974* (Cth) s 85).

[235] Jeannie Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts' (2009) 33 *Melbourne University Law Review* 934, 943.

[236] *United States Surgical Corporation v Hospital Products International Pty Ltd* (1984) 156 CLR 41; *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285; see also Ross W Parsons, 'The Director's Duty of Good Faith' (1967) 5 *Melbourne University Law Review* 395; Phillip Lipton, Abe Herzberg and Michelle Welsh, *Understanding Company Law* (Thomson Reuters, 2015) ch 13; Rosemary Teele Langford, 'Solving the Fiduciary Puzzle – The Bona Fide and Proper Purposes Duties of Company Directors' (2013) 41 *Australian Business Law Review* 127; Rosemary Teele Langford, 'The Distinction Between the Duty of Care and the Duties to Act Bona Fide in the Interests of the Company and for Proper Purposes' (2013) 41

faith is a fiduciary duty owed by the director to the company in case law.[237] Such a characteristic imposes a higher level of obligation than a contractual duty, even if such a duty is statutorily imposed.

Certain Acts have recognised the importance of good faith in the conduct of judicial proceedings. For instance, the *Farm Debt Mediation Act 1994* (NSW) relates the doctrine to mediation in good faith between debtor and creditor.[238] The *Native Title Act 1993* (Cth) mentions good faith not less than 20 times. The principle of good faith is deeply linked to the fairness of the process of deciding native title claims. Another dimension, the concept of bad faith, is found in trademark law. Under the *Trade Marks Act 1995* (Cth), '[t]he registration of a trade mark may be opposed on the ground that the application was made in bad faith'.[239] These examples demonstrate the multiplicity of uses of the doctrine of good faith in different aspects of Australian law, and show that the doctrine is not uncommon in this jurisdiction. However, what the doctrine means and how it is applied and enforced differ in each of these legal fields, as alluded to in the introduction to this thesis.

At the state level, the Small Business Commissioner in South Australia must develop industry codes that foster business relationships based on the duty to act in good faith.[240] Comparison with similar entities such as in Victoria and New South Wales will be very useful because it will highlight the different approaches each state has taken in the role and responsibility given to this office. There is no reference to good faith in the *Small Business Commissioner Act 2003* (Vic). The NSW office was opened in October 2011 and legislation is yet to be enacted to make it official.[241] This will be reviewed further in Chapter 5.

The scholarly debate is wide-ranging; from the rejection of the incorporation of good faith in Australian contract law, to divergence on what the legal basis for the doctrine should be.[242] The

Australian Business Law Review 337.

[237] But not under the *Corporations Act*.

[238] *Farm Debt Mediation Act 1994* (NSW) s 11.

[239] *Trade Marks Act 1995* (Cth) s 62A.

[240] *Small Business Commissioner Act 2011* (SA) s 5(2).

[241] Ken Phillips, 'NSW Lends Muscle to Soloists' on *Smart Company* (27 June 2012) <http://www.startupsmart.com.au/ken-phillips-/nsw-lends-muscle-to-soloists.html>; Office of the Small Business Commissioner, *10 Big Ideas to Grow NSW* NSW Business Chamber <http://www.businesschamber.com.au/NSWBC/media/Misc/Lobbying/Submissions/10_Big_Ideas_small_business_commisioner.pdf>. Other initiatives to regulate commercial behaviours include the obligation to act in good faith in the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth).

[242] Beatson and Friedmann, above n 11; Christopher J F Boge, 'Does the Trade Practices Act Impose a Duty to

submissions made in response to the Attorney-General's Department's 2012 discussion paper on reform of Australian contract law further illustrate this situation. For instance, Bathurst considers that good faith could be recognised on a case by case basis and not through codification.[243] Others consider that the introduction of a general duty may generate uncertainty.[244] Finally, Clarke is even 'unpersuaded that a doctrine of good faith should be introduced into Australian law as part of the proposed reforms'.[245]

D Conclusion to Section II

Section II provided a preliminary overview of the notion of contract and good faith in the two jurisdictions studied in this thesis: Australia and the EU. It has established that the notion of contract in each jurisdiction is similar in spite of the use of different legal formants, including directives, academic compilations and cases. The identification of these similarities provides further justification for comparing the two jurisdictions, an argument developed in Section I of this chapter. While the intention of the parties is what drives both the enforcement of

Negotiate in Good Faith? Part 1' (1998) 6 *Trade Practice Law Journal* 4; Christopher J F Boge, 'Does the Trade Practices Act Impose a Duty to Negotiate in Good Faith? Part 2' (1998) 6 *Trade Practice Law Journal* 68; Roger Brownsword, 'Two Concepts of Good Faith' (1994) 7 *Journal of Contract Law* 197; John W Carter, 'Good Faith in Contract: Why Australian Law is Incoherent' (Legal Studies Research Paper No 14/38, Sydney Law School, 2014); John W Carter and Michael P Furmstonm, 'Good Faith and Fairness in the Negotiation of Contracts Part I' (1994) 8 *Journal of Contract Law* 1; John W Carter and Michael P Furmston 'Good Faith and Fairness in the Negotiation of Contracts Part II' (1994) 8 *Journal of Contract Law* 93; Carter and Peden, above n 216; Dixon, 'Good Faith', above n 216; Dixon, 'What is the Content', above n 216; James Douglas, 'Exploring the Recent Uncertainty Surrounding the Implied Duty of Good Faith in Australian Contract Law: The Duty to Act Reasonably – Its Existence, Ambit and Operation' (Paper delivered at the LexisNexis Contract Law Master Class, Brisbane, 26 August 2006) <http://cisgw3.law.pace.edu/cisg/biblio/douglas1.html>; Paul Finn, 'Fiduciary and Good Faith Obligations Under Long Term Contracts' in Kanaga Dharmananda and Leon Firios (eds), *Long Term Contracts* (Federation Press, 2013) 136; Gleeson, Watson and Peden, above n 216; Anthony Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 *Law Quarterly Review* 66; Jeannie Marie Paterson, 'The Contract to Negotiate in Good Faith: Recognition and Enforcement' (1996) 10 *Journal of Contract Law* 120; Peden, 'When Common Law Trumps Equity', above n 216; Peden, 'Incorporating Terms', above n 216; Lisa Spagnolo, 'Opening Pandora's Box: Good Faith and Precontractual Liability in the CISG' (2007) 21 *Temple International & Comparative Law Journal* 261; Spagnolo, 'Law Wars', above n 103; Jane Stapleton, 'Good Faith in Private Law' (1999) 52(1) *Current Legal Problems* 1; Andrew Stewart, 'What's Wrong with the Australian Law of Contract?' (2012) 29 *Journal of Contract Law* 74; Bruno Zeller, 'Good Faith – Is it a Contractual Obligation?' (2003) 15(2) *Bond Law Review* 215.

[243] Tom Bathurst, Submission No 55 to Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law,* 20 July 2012, 14.

[244] University of Sydney, Submission No 31 to Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law,* 20 July 2012, 2.

[245] Philip H Clarke and Julie N Clarke, Submission No 40 to Attorney-General's Department, *Improving Australia's Law And Justice Framework: A Discussion Paper To Explore The Scope For Reforming Australian Contract Law,* 20 July 2012, 2.

obligations and the protection of legitimate expectations in the EU, in Australia contracts are mostly seen as the instrument of exchanges. This means that, while EU instruments have used good faith as a means to regulate the behaviour of contractual parties, Australian laws and cases have been more cautious about the possible recognition of good faith as a principle of contract law. Section II also provides the context for the rest of this thesis. The development of good faith is different in each jurisdiction, proving that Australia and the EU may be part of the same occidental tree but are two distinct branches of that tree. Yet there is an impetus in both jurisdictions to determine the place of good faith in contract law.

III. CONCLUSION

This chapter argued that the EU and Australia belong to the same legal family, the occidental tree. This renewed classification is based on a broader definition of the sources of law under the concept of legal formants. These sources are similar for each jurisdiction and include: statutes, codes of conduct, case law, academic writings and scholarly compilations on contract law. This thesis has emphasised the significance of EU and Australian cultures and contract laws,[246] both in comparing them to see what each jurisdiction can learn from the other,[247] and to move the debate on the recognition of good faith in contract law further. Using a deep comparative law approach, this thesis will argue in the upcoming chapters that the EU and Australia have the foundations for a principle of good faith. Chapters 4 and 5 will present the development of good faith in each jurisdiction in more detail. In order to address the question of the development of good faith in Australian and EU contract law, it is necessary to understand the trunk of the occidental tree, the historical and theoretical contexts of the approach to the regulation of contracts, and the use of the notion of fairness in Australia and the EU. This is the subject of Chapter 3.

[246] The notion of EU culture will be discussed further in Chapter 3.I.B.2.
[247] Legrand, *Le droit Comparé*, above n 1, 30, referring to D Etienne, above n 1.

Chapter 3
Historical and theoretical developments

> [A]n effective contract law requires an ethically endorsed framework for cooperation between involved parties which cannot be reduced to technical predictability.[1]

This chapter traces the historical and theoretical developments of the recognition of fairness in contractual dealings through the example of good faith as a moral and legal doctrine. Following the image of the occidental tree laid out in Chapter 2, it explores the Australian and EU branches by analysing the roots and trunk. Common histories form part of this trunk:[2] the Roman influence is one major common source.[3] The influence of Roman law is clearly visible in continental Europe including in the development of EU contract law. Even though the common law does not always recognise its Roman heritage,[4] this chapter explains how it has infiltrated the development of laws in the common law tradition, thereby influencing the development of Australian law. Academics have helped create the bridge between Roman law and common law.[5] From this grounding, the parallels in the development of good faith and fairness in Roman law and common law will be discussed in relation to the legal foundation of fairness in contractual dealings. The importance of the role of morals in contract law will be highlighted to provide the background to a discussion of the contextual and relational approach to contract law in both jurisdictions.

Section I analyses the commonalities between the development of the action of bona fides in Roman contract law and the emergence of equitable remedies in the common law. Section II considers the theoretical framework that surrounds the dynamic relationship between party autonomy and regulation of contracts by states. This provides the foundation for the study of the contemporary relationship between contract and good faith.

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[1] David Campbell, 'What Is Meant by "the Rule of Law" in Asian Company Law Reform?' in Roman Tomasic (ed), *Company Law in East Asia* (Ashgate, 1999) 11, 11.

[2] See Esin Örücü, 'Family Trees for Legal Systems' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing, 2004) 359; Chapter 2.I.C.1.

[3] Stephen P Buhofer, 'Structuring the Law: The Common Law and the Roman Institutional System' (1997) 5 *Swiss Review of International and European Law* 703, available in English at <http://www.beckerglynn.com/wp-content/uploads/2008/08/Structuring-the-Law1.pdf>1, 31.

[4] Ibid 8.

[5] From Blackstone to Savigny and French jurist Pothier: René-Marie Rampelberg, *Repères Romains Pour Le Droit Européen Des Contrats: Variations Sur Des Thèmes Antiques* (EJA Paris, 2005) 37; Buhofer, above n 3, 20.

I. HISTORICAL DEVELOPMENTS

This section provides a historical study of the development of good faith from a procedural tool to a substantive right. Section A exposes the characteristics of Roman law with an emphasis on its understanding of contract and the development of the concept of bona fides. Section B investigates the relationship between Roman law and branches of the occidental legal tradition through the examples of Australia and the EU.

A Characteristics of Roman law

Roman law had four distinct characteristics.[6] First, a case could be brought before a judge by bringing an action, following a specific procedure. Second, each case received a decision specific to the circumstances at stake. Third, certain religious values led to the recognition of legal rules. Finally, the *jurisconsult*, an expert in law with no judicial or legislative responsibility,[7] and his analysis of legal decisions, played an important role in the development of legal norms, even taking precedence over the Roman legislator.[8]

Another characteristic of Roman law, which can be linked to its oral procedure, was its formalism. In order to obtain a remedy, a claimant had to comply to the oldest known procedure of *legis actiones*, their ability to act/sue according to the law.[9] Originally, a formal conditional question and a formal unconditional answer made the agreement binding. The remedy and therefore the decision in the case was linked to the expression of a correct formula. This constituted the so-called *ius civile*. From the third century BC onwards, these actions were complemented by specific formulae and the increasing role of the judge. This development ultimately led to legal recognition of the concept of bona fides.[10]

[6] María José Falcón y Tella, *Case Law in Roman, Anglosaxon and Continental Law* (Brill, 2011) 8–10.
[7] John Merryman and Rogewlio Perez-Perdomo, *The Civil Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press, 3rd ed, 2007) 57.
[8] This is reflected today in the role given to scholars in the EU. See below, I.B.2.
[9] Martin Josef Schermaier, 'Bona Fides in Roman Contract Law' in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press, 2000) 63, 72.
[10] See below, Section A.2.

1 The notion of contract as an example of strict formalism

Before analysing the development of Roman law and the role of good faith within it, it is necessary to analyse the notion of contract in Roman law, since that is the context of this thesis and the background against which good faith in Roman law developed. Chapter 2 emphasised two pillars of contracts in both Australia and the EU: the intention of the parties and the legally binding character of the contract. This commonality can be traced back to Roman law where, as the law developed, the particular characteristics of agreements were recognised.[11] A brief summary follows.

In ancient law, two parties took an oath before the goddess Fides.[12] This oath was purely religious and did not have any legal consequences. However, Fides was more than a goddess before whom parties set promises. According to Cicero, fides was also seen as a human quality.[13] Therefore, the binding character of the contract came to be recognised in law to reflect the changes of perspective in society. Even though this oath laid out the foundations from which the binding nature of contracts developed, in that parties took an oath to keep to their word, there was no clear link between this oath and the development of the concept of bona fides in Roman contract law. Interestingly though, the temple of this goddess was the repository of international treaties.[14] The relationship between treaties and the now famous maxim according to which international agreements must be respected, *pacta sunt servanda*, can therefore be traced back to this time.

At a time when the religious oath disappeared, a new morally sanctioned form of agreement emerged: the trust or *fiducia*. This agreement was not legally binding before the Roman courts, but referred to the good faith of the fiduciary. Such doctrines can be identified as the origins of fiduciary duties and the concept of trust in the common law.[15]

[11] James Gordley, 'Some Perennial Problems' in James Gordley (ed), *The Enforceability of Promises in European Contract Law* (Cambridge University Press, 2001) 1, 2.
[12] Sandrine Tisseyre, *Le rôle de la bonne foi en droit des contrats – Essai d'analyse à la lumière du droit anglais et du droit européen* (LGDJ, 2012) 23–4, 249.
[13] Ibid 23–4.
[14] Schermaier, above n 9, 78.
[15] Arthur R Emmet, 'Reception of Roman Law in the Common Law' in Justin T Gleeson, J A Watson and Ruth C A Higgins, *Historical Foundations of Australian Law, Volume I: Institutions, Concepts and Personalities* (Federation Press, 2013) 52.

Roman contract law was heavily shaped by the formalism of this time. It appears from the totality of works on Roman law that the Roman legal system did not have a general contract law, but instead developed laws for specific contracts. Specific rules applied to different types of agreement.[16] The classical law period brought the development of new contract categories. Two examples can be mentioned here where contracts were based on reciprocal obligations. In the case of *real contracts*, the first example, it was the delivery of the object of the agreement that gave the contract its binding nature. Real contracts could only be used for certain things. A second example is the *stipulation*, a unilateral promise that formed the basis of consensus contracts, *solus consensus obligat*.[17] During the classical law period a new type of contract also developed, *consensu contracts*. The latter included sales, leases, partnerships and *mandatum*. This type of contract laid the foundation for the development of the action of bona fides.[18]

The strict recourse to formulae and very restrictive procedural rules as well as the fragmentation of contracts into specific agreements led to the development of certain types of actions where the parties and the judge had more freedom respectively to bring the case before the court and to look for the intention of the parties. This was done through the legal recognition of good faith through the action of bona fides.

2 The notion of bona fides*:* the recognition of faithfulness

The action of bona fides developed from the use of consensual contracts and the binding nature of a promise.[19] It is however important to note that real contracts were also sanctioned by such actions. Bona fides was 'rooted in Roman social ethics recognising comprehensive duties of fidelities and faithfulness'.[20] It related to trust, loyalty and honesty.[21] Bona fides was about not violating expressed commitments and not creating legitimate expectations in others if the person knew they would be violated. Actions of bona fides also helped with the substantive determination of the fiduciary relationship.[22] From a purely procedural role, it developed as an

[16] Rampelberg, above n 5, 28.
[17] 'Only a consent obliges': Tisseyre, above n 12, 253.
[18] Ibid 241.
[19] Schermaier, above n 9, 82.
[20] Ibid 77.
[21] Tisseyre, above n 12, 250.
[22] Schermaier, above n 9, 82.

implied term and later expanded into a positive obligation.[23]

One interesting example is given by the famous orator Cicero in *De Officii*.[24] He commented on the sale of a building and the need to disclose relevant information to the potential purchaser. The augurs

> had ordered Titus Claudius Centumalus, who had a residence on the Caelian hill, to demolish those parts of the building whose height obstructed observation of the birds. Claudius advertised the block for sale and Publius Calpurnius Lanarius purchased it. The same notice was served on him by the augurs … Publius then summoned Centumalus before an arbitrator for a decision on what restitution he should make to him on the basis of good faith.[25]

Cicero reported that the arbitrator decided that the vendor should have disclosed the information and had to 'make good the loss to the buyer'.[26] This demonstrates the relationship between bona fides and the duty of disclosure, which can be found today in French law and is one reason for the reluctance to integrate the doctrine into contract law in Australia, where caveat emptor, or buyer beware, is still the rule.[27]

3 The increasing role of the judge

This overview highlights the fact that the development of Roman law is 'the first example of how a legal system is renovated under the influence of equitable ideas'.[28] The development of the action of bona fides was very much a demonstration of the increased role of the judge, known as the *praetor*. More than ever, what this exposé shows is the importance of the consent of the parties and their moral understanding of the transaction they are entering into. This is more than the legal understanding of an agreement and the traditional formalism of the courts.

This push-pull relationship between formalism and morals could not have developed without

[23] Tisseyre, above n 12, 252–3.
[24] Cicero, *De Officii – On Obligations – A New Translation by P.G. Walsh* (Oxford University Press, 2000).
[25] Ibid 3, 66.
[26] Ibid 3, 67.
[27] See Chapter 4.I.A.2.
[28] Schermaier, above n 9, 65.

the intervention of the *praetor*. A *praetor* would balance parties' interests based on his *officum*.[29] The rulings by the *praetors* were given for the good of all and were used 'to support, amend and correct the law'.[30] The judge was given interpretation powers, which freed him from the *legis actiones* he was forced to comply with until then. This allowed him to actively look for the intentions of the parties. By impacting clearly and deeply on the development of contract law, the *praetor* became less a judge, and more a law maker.[31] While the role of the judge in common law will be highlighted below, it is interesting to note the parallel between the *praetor* and the common law judge in law making.[32] Mason has highlighted the role and the responsibility of the judge in making law.[33]

4 The compilations of Roman law

Roman law was originally mostly oral and only references made to cases by authors, such as Cicero,[34] gave an insight into the structure and laws of the Roman legal system. In 150, a jurist called Gaius compiled the legal rules in western Roman law.[35] His commentary shows the need for parties to act in good faith; for instance, in agency agreements.[36] His work was, however, not discovered until 1860, so it had no influence on the development of medieval law and canon law during later centuries.[37] This revival is analysed later and shows the influence Roman law had on contract law in continental Europe.

During the sixth century, Justinian, emperor of the Eastern Roman Empire, also compiled the rules used in Roman law with the help of jurists in order to set up common rules as the applicable law in his *Corpus Iuris Civilis*. His aim was to bring back the glory days of the Roman legal system before its fall, and he 'framed a plan for going down to posterity as a great

[29] Ibid 82.
[30] Papinian, D.1, 1, 7, 1: 'Ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vet corrigenda iuris civilis.'
[31] William W Buckland, *Equity in Roman Law* (University of London Press, 1911) 5.
[32] Anthony Mason, 'The Judge as Law Maker' (1996) 3 *James Cook University Law Review* 1.
[33] Ibid 6.
[34] Cicero, above n 24.
[35] Gaius, *The Institutes of Gaius* (c 170 AD).
[36] Ibid Third commentary, 155: 'Agency is established whether we direct it to take place for our own benefit or for that of another; and hence whether I direct you to transact my business or that of another, the obligation of mandate is contracted, so that both of us will reciprocally be liable, for whatever you must do for me, or I must do for you, in good faith'.
[37] Rampelberg, above n 5, 27.

legislator'.[38] This work provided a very good summary of Roman law and laid the first foundations of the law of contract as understood by the civil law tradition, even though Roman law was modified by the understanding of jurists of his time.[39] Consensual contracts eventually 'took over' and became the norm during the medieval period.[40] They reflected the idea that an agreement is born from the meeting of the minds and the will of the parties to create legal relations.[41] In this context, good faith was an objective reference, associated with the reasonable 'man', the *bonus pater familias*. In spite of the absence of a definition of the concept of good faith, judges interpreted the concept according to homogenised (but evolving) values that were accepted by society.

An issue, however, remained: the definition of good faith.[42] Canon law was used by the Christian community to sanction certain behaviours. The influence of religion did not, contrary to intuition,[43] lead to the refinement of the notion of good faith. The flexibility of the doctrine also led to its weaknesses and opened the door to criticisms. The canonists' interpretation of good faith was usually similar, if not identical, to the Roman law approach. Good faith was always translated first in Roman law and then into canon law, the latter reproducing the understanding of the former. During this time, good faith was associated with good conscience but did not go further and instead relied on the approach taken by Roman law. It is, however, clear that both branches of medieval law confined good faith to contracts.[44]

B Influence on Australia and the EU

Today, Roman law is not a source of Australian law or EU law. Yet, it is important to analyse its development for the following reasons. Firstly, the doctrine of good faith has some foundation in Roman law. Good faith has travelled through the ages thanks to the reception of

[38] William W Buckland, *A Textbook of Roman Law* (Cambridge University Press, 3rd ed, 1966) 39.
[39] 528 commissioners were appointed for the First Code and a committee of 16 for the Digest; Buckland, *A Textbook*, above n 38, 39; Georges Mousourakis, *The Historical and Institutional Context of Roman Law* (Ashgate, 2003) 388.
[40] Baldus de Ubaldis, *Consilia, sive responsa* (1575) no 61 1, 2, 8; Rampelberg, above n 5, 48; James Gordley, 'Good Faith in Contract Law in the Medieval Ius Commune' in Reinhard Zimmermann and Simon Whittaker (eds), *Good faith in European Contract Law* (Cambridge University Press, 2000) 93, 105.
[41] Rampelberg, above n 5, 31.
[42] Gordley, 'Good Faith', above n 40, 94.
[43] Since Fides was the religious origin of the doctrine: see above, I.A.1.
[44] For a review of the two branches of law, see Gordley, 'Good Faith', above n 40.

Roman law, mostly in continental Europe. Secondly, Roman law has influenced the development of the Australian and European legal systems. Roman law has had an impact, however limited, on the development of English law. It also has influenced the development of laws and legal systems in continental Europe. These legal systems have influenced on the one hand Australian law and on the other hand EU law. Therefore, 'an awareness of the Roman tradition in Australian jurisprudence can not only help in a better understanding of principles that are derived from that tradition',[45] but also increase understanding of EU law.

1 In Australia: the influence of the recognition of equity in England

To understand the development of equitable actions in Australia, it is necessary to consider the origins of courts of common law and equity in England.[46] The connection between Roman law and the common law tradition is not necessarily obvious. Yet, Roman law with its institutions and basic principles is the 'companion of common law'.[47] Firstly, a historical analysis of case law in Roman times shows that the Roman legal system originally followed a case-based approach. So 'both systems built up through a discussion and decision of cases'.[48] Secondly, the legal development of both Roman law and common law centred on particular forms of action: *judiciae* in Roman law and writs in England.[49] Furthermore, in both legal systems, legal actions were divided into two parts: firstly, the formalities associated with the identification of the issue, and secondly the emphasis placed on evidence to reach a decision in the particular case.[50] The third commonality relates to the remedy, if any, to be awarded to the claimant. At first, the nature of the remedy was based on a strict characterisation of the law, but other remedies later appeared within the development of both Roman law and the common law, moving from a rigid system of procedural formulas to substantive equity and *ius honorarium*.[51]

The formalism of the English judicial system meant that parties would not necessarily obtain

[45] Emmet, above n 15, 80.
[46] England also influenced the development of law in the US. See, eg, Stephen N Subrin, 'How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective' (1987) 135(4) *University of Pennsylvania Law Review* 909, 914. For an updated commentary on this article see Doug Rendleman, 'The Triumph of Equity Revisited: The Stages of Equitable Discretion' (2015) 15 *Nevada Law Journal* 1397, 1399.
[47] Bufoher, above n 3, 11.
[48] Peter G Stein, 'Roman Law, Common Law and Civil Law' (1991) 66 *Tulane Law Review* 1591, 1591.
[49] Ibid 1592.
[50] Ibid 1593.
[51] Ibid 1594.

'justice', as technical rules did not allow certain pleas to be legally answered. After many requests and no response from the Westminster courts,[52] the Lord Chancellor developed a new system of courts. The new procedure before the Lord Chancellor was more informal and these courts became a 'jurisdiction of conscience'.[53] Therefore, the parallels between Roman law and equity are obvious. While Roman law had *stricti iuris* actions, common law had strict law. While Roman law had the action of bona fides, the legal tradition of common law was accompanied by equity delivered by the Chancery.[54] Finally, where good faith in Roman law reflected the infiltration of religious values into the law, equity reflected the use of Christian morals and their use in law.[55] This can be explained by the fact that judicial offices were originally filled by priests, as the development of law in the Middle Ages shows.[56]

Therefore, a parallel can be drawn between the evolution of the Roman and English judicial systems.[57] The development of both equity and *ius honorarium* were triggered by ideals of fairness and justice. Both the action of bona fides and equitable remedies allowed for better justice. In the same way as the action of bona fides developed to answer the need for justice for the parties, equity developed as an antidote to strict formalism. In England disputes were brought before the courts of common law only if they corresponded to specific writs.[58] The parallels between English writs and actions in classical Rome show similarities in judicial procedures.[59] Yet the restrictions on access to justice led to the creation of new writs.[60] The interpretation of judges and their search for the real intention of the parties contributed to the legal understanding of good faith as a procedural action in Roman law, in the same way that equity developed in England.

The influence of Roman law has been clearly limited to substantive English law. However, the works of Bracton in the thirteenth century show that Roman law is a useful tool for comparing

[52] Antonio Gambaro, Rodolfo Sacco and Louis Vogel, *Traité De Droit Comparé – Le Droit De l'Occident Et D'ailleurs* (LGDJ, 2011) 87.
[53] Ibid 89.
[54] D Ibbetson, 'A House Built on Sand: Equity in Early Modern English Law' in Egbert Koops and Willem J Zwalve (eds), *Law and Equity: Approaches in Roman Law and Common Law* (Brill, 2014) 55, 69.
[55] Gambaro, Sacco and Vogel, above n 52, 89.
[56] H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford University Press, 5th ed, 2014) 238.
[57] Buckland, *Equity*, above n 31, 5–9.
[58] Gambaro, Sacco and Vogel, above n 52, 68.
[59] Ellen Goodman, *The Origins of the Western Legal Tradition: from Thales to the Tudors* (Federation Press, 1995) 232.
[60] From 39 in 1189 to more than 400 under Edward 1 (1272–1307). Ellen Goodman, Above n 59, 232.

different legal doctrines.[61] Interestingly, a lot of Roman terminology is used in relation to obligations, showing the influence of Roman law on English contract law.[62] From the seventeenth century onwards, the influence was more limited with the development of an independent set of laws. However, civil law, and consequently Roman law, still has some influence in the Courts of Chancery and the maritime courts. In addition, in a famous English case, the concept of utmost good faith appeared and became a source of obligations for parties to certain contracts such as partnerships and insurance contracts.[63] In the eighteenth century Blackstone made a clear differentiation between Roman law and English law. Despite this, the famous English scholar used Roman terms and even went as far as finding some Roman origins of the doctrine of consideration,[64] showing the influence, however limited, of Roman law. English lawyers studied Roman law at university, which can explain this influence.[65]

This English development ultimately shaped the development of courts and doctrines in Australia, as English law was a source of Australian law. Following the UK's accession to the EU, Australian and English laws started to diverge due to the implantation and application of EU law in the UK. Indeed, a different history can be recounted in relation to continental Europe where religion and legal institutions clearly preserved the relationship between Roman law and the laws of certain member states of the EU. This ultimately shaped some of the legal doctrines and approaches used by the EU today.

2 In the EU: the use of compilations and the recognition of good faith as a principle

There are three characteristics of Roman law that have clearly influenced the development of EU law: categorisation of contracts, use of good faith and the compilation of principles.

The Roman classification of contracts into nominate contracts, instead of the general law of contracts, deeply influenced the way the civil law was to structure its own contract law. Despite the inclusion of broad contractual principles and the use of the expression 'convention', the

[61] Emmet, above n 15, 60.
[62] Ibid 62.
[63] *Carter v Boehm* (1766) 3 Burr 1905, 1165.
[64] Emmet, above n 15, 74.
[65] Tella, above n 6, 47.

French Civil Code also deals with contracts of sale and leases.[66] Some argue that France is moving away from a general law of contract and towards a specialised law of contracts instead.[67] The same could be argued for the state of European contract law due to the multiplicity of directives. Indeed, this emphasis on classification can also be found in the EU, which regulates particular transactions including consumer contracts and commercial agency.[68] The first generation of directives included the *Doorstep Directive*,[69] the *Distance Contract Directive*[70] and the *Package and Timeshare Directives*.[71] The second generation of directives deals with aspects of the contractual process rather than methods of selling or types of contract. These new directives impact directly on the domestic law on contracts of the different member states. They include the *Unfair Terms in Consumer Contracts Directive*,[72] the *Sales Directive*[73] and the *Directive on Consumer Rights*.[74] The absence of a general European definition of contract or agreement by the European institutions[75] characterises the European law of contracts. Although there are academic initiatives to recognise a common European principle of contract law, the directives, the proposal for an optional regulation on sales law and the proposal for a directive specific to e-commerce[76] certainly continue the tradition of differentiating between different types of contracts, even though they are all based on the

[66] See, eg, the structure of the *Civil Code* (France). See Francois Collart Dutilleul and Philippe Delebecque, *Contrats Civils Et Commerciaux* (Dalloz, 9th ed, 2011) 4.

[67] Ibid.

[68] *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29; *Council Directive 86/653/EEC of 18 December 1986 on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents* [1986] OJ L 382/17; *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* COM/2011/0635 final – 2011/0284 (11 October 2011).

[69] *Council Directive 85/577/EEC of 20 December 1985 to Protect the Consumer in Respect of Contracts Negotiated Away from Business Premises* [1985] OJ L 372/31.

[70] *Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts* [1997] OJ L 144/19.

[71] *Council Directive 90/314/EEC of 13 June 1990 on Package Travel, Package Holidays and Package Tours* [1990] OJ L 158/59; *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees* [1999] OJ L 171/12; *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA Relevance* [2011] OJ L 304/64.

[72] *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29.

[73] *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC; Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council* [2005] OJ L 149/22.

[74] *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees* [1999] OJ L 171/12; *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29.

[75] See Chapter 2.II.B.

[76] *Proposal for a Directive of the European Parliament and of the Council on Certain Aspects Concerning Contracts for the Online and Other Distance Sales of Goods* 9.12.2015 COM (2015) 635 final 2015/0288.

intention of the parties.

The EU has also increasingly emphasised good faith as an enforceable value. EU directives' use of the idea of good faith has established its role in European contract law. Yet the European concept differs from the Roman one in that there it has primarily a substantive meaning rather than a procedural one. The development of this European *ius commune* is born from a progressive harmonisation of the laws of the different member states on contracts and good faith. To this day, there has only been harmonisation of the law relating to certain contracts such as consumer contracts[77] and agency.[78] Even though harmonisation is limited to certain contracts, the emerging pattern is that good faith crosses between these classifications.

From a procedural right to present a case before the courts in classical Roman law, two definitions of good faith have developed. Good faith is today used either as an obligation to act in good faith, or a defence. The former is usually presented as an objective conception of the doctrine, meaning that 'the debtor [must] perform in such a way as good faith demanded'.[79] The second understanding of the doctrine of good faith is presented as a subjective conception, whereby a defendant who did not know about a set of circumstances will be said to be acting in good faith.[80] Here, it is relevant to note that these conceptions can also be found in Australian contract law. Therefore these two aspects are found today in both civil law countries[81] and common law countries. For instance, ACL s 210(1)(c)(ii) stipulates that a defendant can rely on a defence if 'he *relied in good faith* on a representation by the person from whom the defendant acquired the goods that there was no safety standard for such goods'.[82] The dual conception of good faith can be paralleled with the notion of estoppel, which has sometimes been referred to as both a shield and a sword.[83]

[77] *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29.
[78] *Council Directive 86/653/EEC of 18 December 1986 on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents* [1986] OJ L 382/17.
[79] Schermaier, above n 9, 66.
[80] Philippe Le Tourneau and Matthieu Poumarède, 'Bonne Foi' (2009) *Repertoire Civil* nn 3–4; Tisseyre, above n 12, 25.
[81] See, eg, Chapter 1.I.B.
[82] Emphasis added. Similar understandings of good faith as a defence are also found in the *Australian Consumer Law*. See *Competition and Consumer Act 2010* (Cth) sch 2 ss 211, 252, 253.
[83] *Combe v Combe* [1951] 2 KB 215, 218: 'It is just and equitable that if such a promise with those conditions can be used as a shield by the promisee, he can also use it as a sword and sue upon it, and in such case the promisor should not be allowed to plead that his promise is not binding on him: the promisor is estopped from denying his promise.'

Some argue however that the objective character of the duty to act in good faith can be misleading since even in this case it is the intention and behaviour of one party that will determine whether a person acted *mala fide* or not.[84] It is then important to understand whether the good faith interpretation in a particular situation is relied upon by both parties.[85] In order to discover the intention of the parties, the judge may use principles of fairness and justice,[86] also known as *aequitas* or equity.[87]

The development of compilations and codes is significant to civil law,[88] and originated in the Roman tradition. While there is no European contract law code at this stage, it is important to highlight the fact that European private law is made up of another legal source, a legal formant,[89] academic work. Although not a set of enforceable rules, these works represent a snapshot of the state of European contract law. This academic *lex mercatoria* provides a map of the European contract law landscape that allows the European institutions to better understand their own legal system and aims to guide the drafting of new laws. The work of European scholars is moving the EU towards a unified European contract law. With a rationale of promoting a common legal culture with associated values within the internal market, it has promoted the concept of good faith as a European principle. EU scholars have helped broaden the duty of good faith, and have sketched out the next steps towards a unified European contract law, of which good faith is a pillar. Academic works are recognised and encouraged by EU institutions. For instance, in 2003 a communication from the Commission[90] laid out the basis for a Common Frame of Reference. Therefore, academic projects have examined the common contract law provisions in the different national member states. The Trento Project,[91] the

[84] Willem J Zwalve, 'Law and Equity at Odds: Liability of a Principal for Accidental Losses Suffered by His Agent' in Egbert Koops and Willem J Zwalve (eds), *Law and Equity: Approaches in Roman Law and Common Law* (Brill, 2014) 177, 178.
[85] Ibid.
[86] Ibid 179.
[87] See above I.A.2.
[88] See Chapter 2.I.A.1-2.
[89] This legal concept was developed by Rodolpho Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' (1991) 39 *American Journal of Comparative Law* 1; Rodolpho Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' (1991) 39(2) *American Journal of Comparative Law* 343.
[90] Communication from the Commission of 12 February 2003 to the European Parliament and the Council, *A More Coherent European Contract Law – An Action Plan* COM (2003) 68 final OJ C 63.
[91] The Trento Project is part of 'The Common Core of European Private Law' series of publications, which includes Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press, 2000); James Gordley (ed), *The Enforceability of Promises in European Contract Law* (Cambridge University Press, 2001). For a list of publications, see http://www.common-core.org/node/33.

Academy of European Private Lawyers' code[92] and finally the Lando Commission[93] are the most renowned and relied upon academic works on contract law within European academia.

i. Trento

The Trento Project, or Common Core of European Private Law, intended to establish a legal cartography, and '*unearth the common core of the bulk of European private law'.*[94] The ultimate goal was to contribute to building a common European culture, with common values. The project was divided into discrete law topics: contract, property, mistake and misrepresentation, trusts and remedies.[95]

Based on the method developed by Schlesinger, scholars developed a questionnaire that allowed the legal sources to be broader, to be legal formants, and included doctrine. The 2002 book *Good Faith in European Contract Law*[96] was the first completed product from the working group. As a reviewer commented, 'this book contains a rich trawl of data and affords authoritative guidance on the way in which fifteen European systems approach cases that can raise questions of good faith'.[97] This volume provided a legal map to be used by European institutions to help them understand the national systems, and to address hindrances to the establishment of the single European market.[98] It presents an understanding of the concept of good faith before tackling case studies and analysing them through the lens of national laws. The book was divided in two main parts: the first part provided insights on scholarly writing and understandings of good faith throughout the ages. The second part examined how each jurisdiction answered a particular problem scenario and whether they applied the doctrine of good faith. The volume contains 30 case studies. This sheer amount of information collected and the systematic approach to each case demonstrates that '[t]he project was well-conceived, the data is well-presented and the analysis, which seems comfortingly agnostic about the merits of general good faith provisions, is balanced and shrewd'.[99] The book concludes with an

[92] Académie Des Privatistes Européens, *Code Européen Des Contrats, Avant-Projet* (Dott A Giuffrè Editore, 2001).
[93] Ole Lando and Hugh Beale (eds), *Principles of European Contract Law, Parts I and II (Combined and Revised)* (Kluwer Law International, 2000).
[94] Mauro Bussani and Ugo Mattei, *Approach* (2002) The Common Core of European Private Law <http://www.jus.unitn.it/dsg/common-core/approach.html>.
[95] A review of the plenary sessions can be found in ibid.
[96] Zimmermann and Whittaker, above n 91.
[97] Roderick Munday, 'Good Faith in European Contract Law Book Review' (2000) 59(3) *Cambridge Law Journal* 615, 616.
[98] Ole Lando, 'The Common Core of European Private Law and the Principles of European Contract Law' (1998) 21 *Hastings International and Comparative Law Review* 809, 810.
[99] Munday, above n 97, 617.

analysis of the results. In their synthesis, Whittaker and Zimmermann refer to harmony and dissonance.[100] Although national laws achieved a similar result in most cases, the roads to the conclusions often differed. This meant that, to some extent, whether the doctrine of good faith was used did not matter if domestic laws had mechanisms to ensure fairness in contractual dealings.[101] However, this does not mean that good faith had no role to play, although the extent of this role was left out of the discussion.[102] Indeed, the case studies and the analysis show that good faith is often intertwined with other jurisdiction-specific doctrines including *culpa in contrahendo*, the obligation to inform or *laesio enormis*.[103] This conclusion makes the idea of a general principle of good faith in contracts on an international scale difficult to envisage. Yet, European instruments have tried to tackle this challenge.

ii Pavia

The Academy of European Private Lawyers was founded in Pavia in 1992. The main goal of the academy was to promote effective uniformity of contract law in the EU. This would be achieved by providing unified rules, a *loi substantielle* (substantial law), making the contract an efficient instrument to use in the common market.

Following questionnaires sent to eminent scholars from European member states and plenary sessions, Gandolfi drafted a European contract code, published in 2001,[104] including a volume on sales law.[105] Presented as the 'most comprehensive general doctrine on contracts',[106] it is made up of two books containing a total of 219 articles. One book refers to the law of contract in general, while the second book focuses on sale contracts. This code has influenced contract law reforms in Latin America.[107] The concept of good faith[108] applies to all stages of the contract: from the negotiation[109] (including the duty to inform),[110] to the interpretation of the

[100] Simon Whittaker and Reinhard Zimmermann, 'Coming to Terms with Good Faith' in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge, 2000) 653, 653.
[101] Ibid 700–1.
[102] Ibid 701.
[103] Ibid 676.
[104] Académie Des Privatistes Européens, above n 92.
[105] The code is available in English from *Academy of European Private Lawyers* <http://www.accademiagiusprivatistieuropei.it/>.
[106] Gabriel Garcia Cantero, 'L'Avant Projet de Pavie du Code Européen des Contrats' [2005] *Studia Universitatis Babeş-Bolyai Jurisprudentia* 55, 63.
[107] See, eg, Luis F P Leiva Fernandez, 'Autour d'un droit des contrats' (2012) 64 *Revue Internationale de Droit Comparé* 334.
[108] Académie Des Privatistes Européens, above n 92, book 1, art 1.2.
[109] Ibid book 1, art 6(2).
[110] Ibid book 1, art 7.

contract,[111] implied terms[112] and the performance of the contract.[113] Good faith is also used in its subjective sense, as a defence.[114]

iii The PECL

The *Principles of European Contract Law* (PECL) were prepared by the Commission on European Contract Law (CECL) chaired by Lando. The commission began its work in 1992 and published the PECL in 1999. The work of the CECL has been used by the Study Group on a European Civil Code. The CISG[115] was highly influential in the drafting of the PECL.[116] The PECL bears some resemblance to the *UNIDROIT Principles of International Commercial Contracts* and the CISG, and forms part of a *lex mercatoria*.[117] The PECL goes further than these international instruments in that it is applicable to both commercial and consumer contracts. The rules attempt to provide the best solution to contract law situations.[118] The PECL also takes inspiration from the US *Uniform Commercial Code*.[119] It is intended to be seen as a European Restatement of Contract Law, to be used by courts and arbiters in their determination of what European contract law is. The PECL articles regulate every stage of a contract. Each article is also accompanied by commentary distinguishing between member states' legislation.

The PECL applies good faith to every stage of the contract.[120] Article 1-201 states that each party must act in accordance with good faith and fair dealing. Good faith is ranked as a fundamental principle applicable in European contract law;[121] it is a vector used by the judge to bring back the equilibrium of the contract.[122] This provision cannot be excluded by the parties. It requires the parties to show due regard for the interests of the other. Although parties

[111] Ibid book 1, art 39(4).
[112] Ibid book 1, art 32.
[113] Eg ibid book 1, arts 51, 57, 75, 94.
[114] Ibid book 1, arts 46.2, 47, 65.2, 67, 81.
[115] It is extensively referred to in Lando and Beale, above n 93.
[116] Even though the latter takes good faith from the confines of interpretation (CISG art 7; PECL art 1:106) into formation, performance and enforcement (PECL art 1:201).
[117] For a comparison of these instruments, see also Larry A DiMatteo, 'Contract Talk: Reviewing the Historical and Practical Significance of the Principles of European Contract Law' (2002) 43 *Harvard International Law Journal* 569, 576. For a broader review see also John Felemegas, 'Comparative Editorial Remarks on the Concept of Good Faith in the CISG and the PECL' (2001) 13 *Pace International Law Review* 399.
[118] Bussani and Mattei, above n 94.
[119] Mark Van Hoecke, 'Deep Level Comparative Law' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing, 2004) 165, 188–9.
[120] PECL arts 2:102, 5:102.
[121] It is a general duty in the PECL.
[122] Guillaume Busseuil, *Contribution à L'étude De La Notion De Contrat En Droit Privé Européen* (LGDJ, 2008) 561.

are free to contract and start and end negotiations, this freedom is not absolute.[123] The reason for this is to enforce community standards of decency, fairness and reasonableness in commercial transactions.[124] The PECL emphasises the dual nature of the concept of good faith: subjective and objective.

> 'Good faith' means honesty and fairness in mind, which are subjective concepts. A person should, for instance, not be entitled to exercise a remedy if doing so is of no benefit to him and his only purpose is to harm the other party. 'Fair dealing' means observance of fairness in fact, which is an objective test.[125]

These two aspects of the doctrine are derived from Roman law.[126] Good faith and fair dealing is found throughout the PECL[127] and extends after the contract is entered into with the duty to mitigate damages.[128]

Until the PECL, there was no 'catalogue' of general European contract law principles. The principles were an attempt to provide a foundation of European contract law to aid interpretation of the newly drafted directives.[129] The PECL failed to deliver because of its academic nature and its lack of use by the business community.[130] This may be because the PECL also refers to equitable concepts such as estoppel[131] and unconscionability, without associating these provisions directly with the concepts of good faith and fair dealing.[132] The PECL does not adopt the perspective that good faith can be a defence, and consequently diverges from the understanding in France[133] and the Gandolfi project. Some authors have argued that the PECL does not directly tackle consumer protection.[134] In spite of these

[123] Eva Lein and Bart Volders, 'Liberté, Loyauté Et Convergence: La Responsabilité Précontractuelle En Droit Comparé' in Centre de Droit Comparé, Européen et International de l'Université de Lausanne et al, *Regards Comparatistes Sur Le Phenomene Contractuel* (LGDJ, 2009) 18.
[124] Ole Lando, 'Salient Features of the Principles of European Contract Law: A Comparision with the UCC' (2001) 13 *Pace International Law Review* 339, 356; Lando and Beale, above n 93, 113.
[125] Lando and Beale, above n 93, 115.
[126] Zwalve, above n 84, 178.
[127] Eg PECL art 2:301 on breaking negotiations; art 2:302 on not disclosing confidential information given during negotiations; art 6:102 on determining implied terms; art 9:102 on the refusal to order specific performance of a contractual obligation if that would cause the debtor unreasonable effort and expense.
[128] PECL art 9:505 on the mitigation of damages.
[129] Lando and Beale, above n 93, xxiii.
[130] Michael Joachim Bonell, 'The CISG, European Contract Law and the Development of a World Contract Law' (2008) 56 *American Journal of Comparative Law* 1, 11.
[131] PECL art 2:202(3).
[132] PECL art 4:109.
[133] Chapter 1.I.A.2.
[134] See Hans-W Micklitz, 'The Principles of European Contract Law and the Protection of the Weaker Party' (2005)

criticisms, and although originally an academic exercise, the PECL is cited in new instruments from the European institutions,[135] and represents the blueprint for a European contract law code.[136] The leading principles are consistent with the development of national laws and directives: '*autonomy and self-determination restricted by good faith'*.[137]

iv The Draft Common Frame of Reference in contract law

A revision of the PECL was published in 2008 by the Législation de Droit Comparé.[138] The revision confirms that contractual loyalty, contractual freedom and security have emerged as guiding principles of the construction of European contract law.[139] The revision proposes that the concept of good faith should be a general and mandatory duty.[140]

These principles are to be used as guidelines for the interpretation of the PECL and are to be read in conjunction with the works of the Lando Commission. They are seen as the concrete substance of the principle of contractual loyalty.[141] Good faith is defined as a general duty that applies to every stage of the contract, from the negotiation process to the performance and enforcement of the agreement. The PECL and its proposed revision have contributed to the development of the revised Draft Common Frame of Reference (DCFR), published in 2009. After a Council decision on 18 April 2008 confirmed the fundamental role to be played by a Common Frame of Reference in the Europeanisation of private law,[142] the DCFR was published in 2009 under the direction of Von Bar.[143] Since it drew most of its inspiration from the PECL principles, the 2009 DCFR essentially provides a revision of the PECL. Yet it goes further[144] by containing more details on the main concepts, their definition and their interpretation. The purpose of the DCFR is to provide a foundation for the common frame of

27 *Journal of Consumer Policy* 339, 352.

135 Philippe Malinvaud, 'Réponse – hors délai – à la Commission européenne: à propos d'un Code européen des contrats' in Bénédicte Fauvarque-Cosson and Denis Mazeaud (eds), *Pensée Juridique francaise et harmonisation européenne du droit* (LGDJ, 2003) 231, 249.

136 DiMatteo, above n 117, 581.

137 Micklitz, above n 134, 339.

138 Bénédicte Fauvarque-Cosson (ed), *Principes Contractuels Communs* (LGDJ, 2008) 221.

139 Ibid 17.

140 Ibid 198.

141 Bénédicte Fauvarque-Cosson (ed), *Terminologie Contractuelle Commune* (LGDJ, 2008) 207; Fauvarque-Cosson (ed), above n 138, 134.

142 Rémy Cabrillac, *Droit Européen Comparé Des Contrats* (LGDJ, 2102) 16.

143 Christian von Bar and Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Oxford University Press, 2010).

144 Study Group on a European Civil Code, Research Group on EC Private law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (Sellier, 2009) 9; Lando and Beale, above n 93, xvv.

reference[145] but it was also intended to be used in a broader context. In spite of its academic nature, it is hoped that it will be used as a tool to modernise national legislation as well as the content of future European contract law instruments.[146] The underlying principles of the DCFR are freedom, security, justice and efficiency.[147]

The DCFR stipulates that a contract is concluded without any further requirements if the parties intend to enter into a binding legal relationship and reach a sufficient agreement.[148] However, the contract itself is not performed; it is the obligations within it that are performed.[149] The principle of loyalty was not taken up by the DCFR,[150] and good faith appears within the concepts of contractual security and justice. The text also promotes solidarity and social responsibility.[151] This is demonstrated by the recognition of a duty to negotiate in accordance with good faith and fair dealing.[152]

Good faith and fair dealing is understood as 'a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question'.[153] Good faith and fair dealing is an interpretation principle to be used for the contract[154] and the rules themselves.[155] In the context of the performance of obligations,

> a person has a duty to act in accordance with good faith and fair dealing in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an obligation or contractual relationship.[156]

This is also mentioned throughout the provisions including in the context of implied terms[157] and unfair terms.[158]

[145] Study Group on a European Civil Code, above n 144, 6.
[146] Ibid 8.
[147] Ibid 17.
[148] Ibid art 4:101.
[149] Ibid 31.
[150] Ibid 13.
[151] Ibid 15.
[152] DCFR II 3:301.
[153] DCFR I 1:103.
[154] DCFR II 8:102.
[155] DCFR I 1-102(3)(b).
[156] DCFR III 1:103.
[157] DCFR II 9:101.
[158] DCFR II 9:403 to 9:405.

Although a Common Frame of Reference was supposed to be published, this is yet to happen. In October 2011, European institutions proposed an optional regulation for common European sales. The recent *Proposal for a Regulation on a Common European Sales Law*[159] is a further example of how far European private law has come. As early as 2003, discussions on a non-specific optional instrument were launched.[160] If such an instrument were to emerge it would take into account the Draft Common Frame of Reference.[161] Beyond the harmonisation and the integration of European rules in national law, Europeanisation consists in 'de-territorialising contract law',[162] making it transnational. European institutions later took a step towards the enactment of a European set of common contract rules by proposing the CESL.[163] However, this attempt was abandoned in December 2014.[164]

C Conclusion to Section I

Equity and actions based on good faith have emerged following the inadequacy of strict procedural rules to meet the needs of society. This section has shown how the doctrine of good faith evolved from procedural law to substantive law and became a creator of rights, emphasising the importance of the expression of the intentions of the parties.[165] Both procedural actions appear to bring the focus back to the importance of the social relationship. Contracts are first and foremost promises between two parties who plan transactions, who do not necessarily consider the legal consequences of these promises, but rather focus on the consequences for their business and lives.[166] Contract law is about more than two reciprocal promises. Parties enter into an agreement and hope that the other will keep to their word and allow a satisfactory and timely performance of the contract. Contracts are part of the social

[159] *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* COM/2011/0635 final – 2011/0284 (11 October 2011).
[160] Commission, Communication to the European Parliament and the Council, *A More Coherent European Contract Law – An Action Plan* [2003] 68 final OJ C 63, 15.
[161] Ibid [95].
[162] Lucinda Miller, *The Emergence of EU Contract Law: Exploring Europeanization* (Oxford University Press, 2011) 4.
[163] *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* COM/2011/0635 final – 2011/0284 (11 October 2011); see Chapter 4.II.C.
[164] See Chapter 4.II.C.
[165] Gordley, 'Good Faith', above n 40, 116.
[166] , see Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (Thomson Reuters, 5th ed, 2016) 29.

relationships between individuals.

This historical view of the development of contract law, good faith and equity has shown the divide between law and morals; the tension inherent in legally enforcing moral values, such as the need to keep to one's word. It seems that equitable concepts and good faith can become a bridge between morals and law, between society and legal perspectives. In spite of originally being a concept known to Roman law, good faith has developed around new social values that fed into interpretations made by judges. This reflects the reality that there is a moral aspect to any contractual relationship. Yet, from the examples given and the historical account, it seems that the question is not whether moral rules should be legalised, but what role moral rules play in the development, interpretation and adequacy of legal norms. The morality surrounding the contractual relationship is important, and brings that relationship back into the 'social landscape'.

II. THEORETICAL UNDERPINNINGS

In order to understand the integration of the concept of good faith into certain contractual dealings, it is necessary to analyse a broader debate surrounding contract law. Contracts are based on the parties' intention to enter into an agreement and their relations are dictated on their own terms. They express this intention by exchanging promises. They regulate their own dealings. Therefore, party autonomy is predominant and regulation of contracts that is external to the parties' intention should be kept to a minimum.

Section A discusses the importance of party autonomy in contract law while also discussing its limits. It provides theoretical and doctrinal examples of this principle. Section B shows the infiltration of morals into law. The prime example in contract law is the need for fairness and cooperation in the contracting process. Section C develops a modern approach to contract law theory and shows that good faith is a moral rule brought into the law through the implicit dimensions of contract law.

A Party autonomy and its limits

1 The relative importance of party autonomy

Under the doctrine of autonomy, parties to an agreement choose the terms of the contract, what to include, and what not to include. This is a foundation of the common law.[167] As explained in Chapter 2, Australia is generally presented as a member of this legal family where the principle of party autonomy is paramount in contract law.[168] An English classic case demonstrates this principle:

> A basic principle of the common law of contract … is that parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and, where they do, the statement is determinative.[169]

In Australia, Chief Justice Warren took a step further, describing commercial parties as 'leviathans' whose relationship should only be regulated when necessary.[170]

Party autonomy can be presented as an example of the economic theory according to which each party to a contract is a rational actor. A person decides to enter into a legal agreement if the advantages outweigh the costs. Therefore, the goal of the transaction is to see it successfully performed.[171] 'A major purpose of contract law is to encourage contracts that are likely to be mutually beneficial, and discourage contracts that are likely to leave one party with a net loss.'[172] In this theoretical situation, both parties gain from the transaction, because they are

[167] Sarah Worthington, 'Common Law Values: The Role of Party Autonomy in Private Law' in A Robertson and M Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing, 2016) 301, 302.
[168] On classical theory see Paterson, Robertson and Duke, above n 166, 4. The freedom of the parties to choose the terms and conditions of their agreement is also recognised in the EU, where such autonomy and freedom has led to the liberty of a person to move, to work, and to provide services and goods within the internal market. See the freedoms laid out in *Consolidated Version of the Treaty on the Functioning of the European Union* [2012] OJ C 326/47, Title IV Free Movement of Persons, Services and Capital, arts 45–66.
[169] *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848.
[170] *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228, 228.
[171] 'It is true that, when people make contracts, they usually contemplate the performance rather than the breach.' Oliver Wendell Holmes Jr, *The Common Law* (Dover Publications, 1991) 302.
[172] Henry Mather, 'Searching for the Moral Foundations of Contract Law' (2002) 47 *American Journal of Jurispridence* 71, 75.

presented as 'self-interested egoists who maximise utility'.[173] The consequence of this is to 'favour freedom to contract and discourage state intervention'.[174]

The issue is therefore how far autonomy can be pushed. There are indeed instances where a party acts opportunistically and seeks to take advantage of the other party.[175] In this case, limits are placed upon autonomy. Worthington identifies different types of constraints. For instance, general constraints prevent a party from hiring an assassin.[176] Perhaps most significantly, there are constraints in contract law itself as illustrated by the importance of consent and legal interventionism to protect the idea that consent should be freely given.[177] This intervention is also apparent in the doctrines of implied terms, exclusion clauses, express termination clauses and penalty clauses.[178] Furthermore if one party breaches the duty to perform, the person who suffered a loss is entitled to damages. Even though contractual parties usually contemplate the performance of the contract rather than its breach there are instances where such a breach can benefit both parties, even though it seems to go against the idea of entering into contracts in the first place. This is the theory of the efficient breach.

The theory of efficient breach develops the idea that, in certain circumstances, a party may be better off breaching a contract rather than performing its own obligations, even though the party in breach may have to pay damages.[179] Here is an example:

> Suppose Alice can make widgets for $1 each, and she contracts to sell Bob 100 widgets at a price of $2 a piece because Bob needs the widgets to run his sprocket machine. Alice can conclude the sale of widgets to Bob, make $100 in profit, and Bob can use the widgets in his sprocket machine to make $50 in profit. Thus, the total profit to both Alice and Bob is $150.
>
> Suppose Alice, though, after contracting the sale with Bob but before delivery of the widgets, is approached by Carl who offers to buy the very same 100 widgets at a price of

[173] Cento G Veljanovski, 'Economic Approach to Law: A Critical Introduction' (1980) 7 *British Journal of Law and Society* 158, 162.
[174] Paterson, Robertson and Duke, above n 166, 18.
[175] Ejan Mackaay, 'Good Faith in Civil Law Systems – A Legal-Economic Analysis' (2012) 18 *Revista Chilena de Derecho Privado* 149.
[176] Worthington, above n 170, 303.
[177] Ibid 303–4.
[178] Ibid 305–6.
[179] Holmes, above n 174, 301.

> $3 apiece. The efficient breach theory dictates that Alice break her contract with Bob and sell the 100 widgets to Carl. This way Alice will receive $200 in profit from Carl (the $300 selling price minus her $100 cost), rather than $100 profit from Bob ($200 selling price minus her $100 cost). The breach is not merely profitable for Alice but profitable for society, as Alice, who is now $200 richer, can compensate Bob for the $50 in lost profits that he would have made had Alice delivered the widgets to him.[180]

This example demonstrates how a party's breach may lead to: 1) a better outcome for the party who commits the breach; 2) compensation for the party who suffered a breach; and 3) a contract with a third party. No-one is left uncompensated or worse off because of the breach, making the latter 'efficient' and profitable to society.

The theory of the efficient breach has become the holy grail of the law and economics movement,[181] and is advanced as the foundation of expectation damages.[182] It is recognised in the USA,[183] where a promise is seen as an obligation to choose between performance and compensatory damages.[184] However, the theory has been rejected in Australia.[185] This shows that there are limits to how far a contractual party can exercise its autonomy. The foundations for such rejection can be found in the primacy of the promise, and the infiltration of moral values into the regulation of contractual dealings. Party autonomy is limited by complaints of unfair dealing.[186]

2 The primacy of intent and moral objections to party autonomy

Contract law involves more than just protecting party autonomy.[187] Understanding the

[180] Ronal J Scalise Jr, 'Why No "Efficient Breach" in the Civil Law? A Comparative Assessment of the Doctrine of Efficient Breach of Contract' (2007) 55 *American Journal of Comparative Law* 721, 724.
[181] Ibid 722; Tareq Al-Tawil, 'The Efficient Breach Theory: The Moral Objection' (2011) 20(2) *Griffith Law Review* 449, 473.
[182] See, eg, Barak Medina, 'Renegotiation, "Efficient Breach" and Adjustment: The Choice of Remedy for Breach of Contract as a Choice of a Contract Modification Theory' in Ewan McKendrick and Nili Cohen (eds), *Comparative Remedies for Breach of Contract* (Hart, 2005) 51, 52.
[183] Jeffrey L Harrison, 'The Influence of Law and Ecnomics Scholarship on Contract Law: Impressions Twenty-Five Years Later' (2012) 68 *New York University Annual Survey of American Law* 1, 5.
[184] Charles J Goetz and Robert E Scott, 'Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach' (1977) 77 *Columbia Law Review* 554.
[185] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8, [13].
[186] Paul Finn, 'Fiduciary and Good Faith Obligations Under Long Term Contracts' in Kanaga Dharmananda and Leon Firios (eds), *Long Term Contracts* (Federation Press, 2013) 136, 137.
[187] This is demonstrated by the legal literature: see Reinhard Zimmermann, *Roman Law, Contemporary Law,*

importance given to the contractual promise and the moral limits to party autonomy provides valuable insights into the understanding of good faith in contract law.[188]

'A man must stick to his bargain, for otherwise social relations would not be possible'.[189] The latter view is a common law perception, born from the English development of commerce, whereby the written contract speaks for itself. This is the reason why vitiating factors are not readily recognised. Parties who join in a contract must stick to the promises they have made. They must be faithful to the bargain.[190] It is reasonable for one party to the contract to expect that the other party who entered the contract is willing to perform its obligation. Reasonable expectations go further in that they provide certain limits to the exercise of discretionary powers within the contract. 'The promisee's right is to the promisor's performance.'[191] Promise comes from '*promys*' and the concept of a vow,[192] meaning that a party's promise is a pledge that the person will act upon it. Contracts form the law between the parties.[193]

One important question is what the contract and good faith within it entails. Does it impose upon the parties a duty not to act unreasonably or does it impose a duty to act reasonably? The question is not yet settled, and it may well be that it cannot be. Beale has demonstrated the inconsistencies within the PECL in trying to answer that exact question.[194] As we will see through the example of efficient breach below, good faith can be used as a tool to punish and prevent fraudulent behaviour. Stating that it imposes a positive duty upon the parties that goes beyond 'sticking to the bargain' would make good faith redundant as it would become synonymous with fiduciary duties. This thesis argues that good faith and fiduciary duties are not always synonymous.[195] Therefore, what must be decided is how moral obligations can be brought into the legal contractual transaction and whether they can be enforced by the courts.

European Law: The Civilian Tradition Today (Oxford University Press 2001) 174.

[188] Finn, above n 186, 149.

[189] Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965) 44.

[190] Finn, above n 186, 148.

[191] Kant, *The Metaphysics of Morals* 6:273, quoted in Liam B Murphy, 'The Practice of Promise and Contract' in Gregory Klass, George Letsas and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford University Press, 2014) 151, 152.

[192] *Chambers Dictionary of Etymology* (2008).

[193] See the discussion of French law in Chapter 1.I.A.2.

[194] Hugh Beale, 'General Clauses and Specific Rules in the Principles of European Contract Law: The "Good Faith" Clause' in Stefan Grundmann and Denis Mazeaud (eds), *General Clauses and Standards in European Contract Law* (Kluwer Law International, 2006) 205, 216.

[195] See Chapter 6.I.A.1.

Equity developed as a response to cases where a common law judge failed to give effect to moral obligations.[196] Moral obligations can help with decision making.[197] Such is the case with good faith and the need to ensure contracts are performed fairly. Good faith is no longer a cause of action as it was under Roman law. Instead, it is a source of rights and duties. Good faith is a moral rule that prescribes certain behavioural norms to be respected by the parties.[198] As Markovits states, 'good faith does not just prevent exploitation; it is essential for contract to exist at all',[199] and for parties to trust the contractual relationship as well as the system in which they operate. Good faith helps this and, Markovitz argues, is the core value of the contract.[200] The relationship created by the contract will be analysed by the courts through this lens.

In relation to the example above of efficient breach, it is this core value, Markovits argues, that requires a party who breaches their promise to provide a payment to the promisee. And it is the same value that prevents the promisee from seeking specific performance.[201] Yet, good faith as a core value goes further. The doctrine of efficient breach conflicts with the idea of cooperation of the parties, so its rejection in Australia and in the EU can be justified on moral grounds. Allowing parties to breach their promise and end the contract, allows them to act immorally.[202] Breaking a promise goes against the notion of parties sticking to their bargain. It would be contradictory to the roots of the occidental tree to consider some breaches of contract as efficient:[203] 'The aim of contract law … is to make things better.'[204] The doctrine of efficient breach is considered fallacious by some;[205] it is also advanced that the theory of efficient breach does not necessarily take into consideration the broader context in which parties interact. Firstly, and based on a cost–benefit analysis, some law and economics scholars have also shown that this behaviour can lead to an increase in transaction costs due to the need to take precautionary measures.[206] Macneil states that failing to consider the transaction costs involved

[196] Devlin, above n 189, 45.
[197] Robert A Hillman, *The Richness of Contract Law: An Analysis of Critique of Contemporary Theories of Contract Law* (Kluwer, 1998); see also Chapter 5.II.B.2.
[198] Beatrice Jaluzot, *La Bonne Foi dans les Contrats: Etude Comparative des Droits Francais, Allemand et Japonais* (Dalloz, 2001) 66.
[199] Daniel Markovits, 'Good Faith as Contract's Core Value' in Gregory Klass, George Letsas and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford University Press, 2014) 273, 293.
[200] Ibid 273.
[201] Ibid 281.
[202] Scalise, above n 180, 723.
[203] This has been prohibited since the praetors in Roman law. See Scalise, above n 180, 723.
[204] Murphy, above n 191, 153.
[205] Ian Macneil, 'Efficient Breach of Contract: Circles in the Sky' (1982) 68 *Virginia Law Review* 947, 950.
[206] Mackaay, above n 175.

with such a situation makes the whole reasoning frail.[207] Secondly, and related to the transaction cost argument, the rejection of the theory of efficient breach can be associated with the effort of legal systems to fight opportunism. Opportunism is understood here as 'discretion ... used to recapture opportunities foregone upon contracting'.[208] Opportunism has a cost, and parties are encouraged to cooperate in contractual dealings to ensure long-term benefits for both parties and avoid increases in transaction costs due to the uncertainty and unpredictability of the future of a commercial relationship. Thirdly, the efficient breach theory contravenes the idea according to which the promise made in a contractual situation creates a trustful bond between the parties, a bond that is exemplified by the duty to perform.[209] If we accept that the promise is at the core of the theory of contractual obligation then, according to Fried, there is a moral obligation to make a promise binding.[210] Fried argues that good faith requires loyalty to the promise and that contract law imposes legal obligations that are convergent with moral obligations.[211] Good faith is seen as the moral and legal obligation to ensure parties cooperate.[212] This brings in the broader debate surrounding the place of morals in law, and the development of legally enforceable morals.[213]

B The interaction between morals and law: a means to ensure contractual fairness

Laws and morals are traditionally two different notions.[214] 'From a dishonourable cause, an action does not arise.'[215] This means that there is a need for a breach of law for a remedy to be available; a breach of morals is not sufficient. Morals are said to have originated from the Latin *moralis,* coined by Cicero.[216] Morals vary from one person to another and are mostly imposed by individuals upon themselves.[217] There is 'a fundamental difference between the law that

[207] Macneil, above n 205, 949.
[208] Steven J Burton, 'Breach of Contract and the Common Law Duty to Perform in Good Faith' (1980) 94 *Harvard Law Review* 369, 373.
[209] Al-Tawil, above n 181, 460.
[210] Hillman, above n 197, 12; Charles Fried, *Contract as Promise* (Oxford University Press, 2015) 146.
[211] Fried, above n 210, 147.
[212] Baldus, above n 40.
[213] As Aristotle identified. See below page 140.
[214] Jaluzot, above n 198, 62.
[215] *Ex turpi causa non oritur actio*.
[216] *Chambers Dictionary of Etymology* (Chambers, 2008).
[217] Jaluzot, above n 198, 61.

expresses a moral principle and that law that is only a social regulation'.[218] Morals and law have different aims: on the one hand, morals are linked to the individual, whereas law is addressed to society. They have different sources: morals come from the conscience of the individual and law is imposed by external institutions. Finally, morals are broader and vaguer while law enacts precise rules. 'Legalisation is seen as the natural enemy of morality, for morality is at its best when each case is judged entirely on its merits.'[219]

The traditional division between law and morals does not take into account the necessary convergence between the two notions. While they have different characteristics, laws should not go against morals and some laws find their source in morals.[220] The concept of good faith is an example of this convergence. From moral rule to legal norm, 'good faith is one of the means used by the legislature and the courts to allow the moral rule to penetrate in law'.[221] The doctrine of good faith protects the legitimate expectations of the parties and ensures both procedural and substantive fairness in contractual dealing. It regulates behaviours[222] and, while the intention of the parties is interpreted objectively, the notion of legal expectation is what comes closest to the theory of subjective rights as it is known in civil law.[223] The moral view of contract law is that the good person should deal fairly.[224] The pragmatic view is that keeping faith does not matter.[225] Opponents of the doctrine of good faith insist that it is difficult to decide where morals stop and where law begins.[226] The first part of this chapter has shown how an action based on good faith was used to broaden justice and to punish fraudulent behaviour, including misleading or taking advantage of the other party.[227] *Carter v Boehm*, a landmark case in insurance contract law that led to the recognition of the doctrine of good faith in the UK, demonstrates the importance of the concept through the duty of disclosure: 'the reason of the rule which obliges parties to disclosure, is to prevent fraud, and to encourage good faith'.[228] This shows that good faith is also about fidelity to the bargain and that such fidelity is required

[218] Devlin, above n 189, 60.
[219] Ibid 46.
[220] Jaluzot, above n 198, 63.
[221] Ibid 65. See also Georges Ripert, *La Règle Morale Dans Les Obligations Civiles* (LGDJ, 1949) 157: 'la bonne foi est l'un des moyens utilisés par le législateur et les tribunaux pour faire pénétrer la règle morale dans le droit'.
[222] Jaluzot, above n 198, 66.
[223] Busseuil,, above n 122, 587.
[224] Devlin, above n 189, 43.
[225] This is where efficient breach occurs.
[226] R Goode, 'The Concept of "Good Faith" in English Law' (Centro di Studi e Richerche di Diritto Comparato e Straniero, Saggi, Conferenze e Siminari 2, Rome, 1992).
[227] Gordley, 'Good Faith', above n 40, 100.
[228] *Carter v Boehm* (1766) 3 Burr 1905, 1162, 1165.

and encouraged in some transactions including insurance contracts.

To provide context to the debate surrounding the understanding of the notion of good faith in contracts, it is important to reflect on the origins of the distinction between law and morals to demonstrate that they have always been intertwined. Aristotle did not use the notion of good faith but identified three virtues: liberality, fidelity and commutative justice. Firstly, Aristotle understood liberality as giving resources sensibly.[229] This meant for instance that people should not be prodigal, that is waste their substance (their money).[230] Secondly, breaking a promise was being unfaithful to one's word.[231] An example of the second virtue can be found in art 1134 of the French Civil Code, as already alluded to in Chapter 1. A renewed attention given to this French Civil Code provision after the Second World War[232] and the increasing impact of morality on different relationships, including contractual relations, slowly led to the development of new obligations and duties for parties, such as the duties to disclose information,[233] and to cooperate in the negotiation[234] and performance of the agreement.[235] These obligations all mirror the Aristotelian virtue of fidelity and commutative justice, the latter being associated with equitable fairness.[236]

> Promises might also ground a morally significant loyalty obligation, depending on one's theory of loyalty. For example, there may be cases in which an individual promises to be loyal, thus creating a moral duty to be loyal in light of that promise. Accordingly, even if loyalty lacks a moral basis as a general matter, in specific contexts loyalty can take on a moral dimension – loyalty and morality are at least sometimes linked.237

The idea that promises should be kept was also shared by Thomas Aquinas,[238] in the same way Aristotle asked parties in a contractual relationship to keep to their word.[239] Thirdly, the idea

[229] Gordley, 'Some Perennial Problems', above n 11, 4.
[230] Aristotle, *Nicomachean Ethics* (350 BC) book IV.
[231] Gordley, 'Some Perennial Problems', above n 11, 6. Primary source: Cajetan, *Commentaria to Thomas d'Aquinas Summa theologiae* (Pafdua, 1698) pt II-II, Q 88, art 3; Q 110.
[232] Le Tourneau and Poumarède, above n 80, n 18.
[233] Chapter 1.A.2.
[234] Chapter 1,A.2.
[235] Chapter 1.A1-2.
[236] Gordley, 'Good Faith', above n 40, 107; Anton-Hermann Chroust and David L Osborn, 'Aristotle's Conception of Justice' (1942) 17 *Notre Dame Law Review* 129, 136.
[237] Andrew S Gold, 'Accommodating Loyalty' in Paul B Miller and Andrew S Gold (eds), *Contract, Status, and Fiduciary Law* (Oxford University Press, 2016) 1, 5.
[238] Gordley, 'Some Perennial Problems', above n 11, 4. Primary source: Thomas Aquinas, *Summa Theologiae* pt II-II, Q 88, art 3, ad 1; Q 110, art 3, ad 5.
[239] Ibid. Primary source: Cajetan, *Nicomachean Ethics* book IV, ch vii, 1127a–1127b.

of commutative justice or the will to exchange resources of equivalent value, so that neither party was enriched at the expense of the other, was also reinforced by Thomas Aquinas.[240] Therefore, the three Aristotelian virtues were maintained during the medieval period.[241] Reflecting this philosophy, contracts were classified under two broad categories: liberalities or donations and commutative justice,[242] referring to contracts as the Romans understood them, that is, consensus contracts.[243]

The understanding of the doctrine of good faith was revived by the works of Baldus, a leading medieval Roman law scholar of the fourteenth century in Italy. Before then, good faith was understood as consisting of three obligations:[244] to keep to one's word, to not take advantage by misleading or driving too harsh to a bargain,[245] and to abide by obligations an honest person would recognise.[246] The first obligation has always been part of the development of good faith and led to *pacta sunt servanda*.[247] Baldus revived the works of Thomas Aquinas and Aristotle to arrive at a better understanding of the notion of good faith. He understood the concept as an obligation not to become enriched at the expense of the other party.

For instance in Australia, there is a difference between acting in the interests of another and taking their interests into consideration. The concept of good faith only applies in the latter situation and must be differentiated from fiduciary duties.[248] Fiduciary duties[249] are equitable duties that can exist together with contractual duties. Fiduciaries must not profit from their position, and must avoid and disclose conflicts of interest. Remedies may be restitution (disgorging profits), and compensation if a breach results in loss to the beneficiary. The express

[240] Ibid. Primary source: Aquinas, *Summa Theologiae* pt II-II, Q 61, art 3.
[241] Ibid.
[242] Ibid 5.
[243] See above, I.A.1; Cause and consideration may be different but seek to achieve the same goal: the promise is binding and has a reason to exist.
[244] Gordley, 'Good Faith', above n 40, 94.
[245] Ibid 99–101.
[246] See Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press, 1st ed, 1990) 664–71.
[247] See, eg, Ulpian D 2, 14, 77; for a longer discussion see also Alexis Keller, 'Debating Cooperation in Europe from Grotius to Adam Smith' in William Zartman and Saadia Touval (eds), *International Cooperation: Extents and Limitations of Multilateralism* (Cambridge University Press, 2010) 15, 19.
[248] Paul Finn, 'The Fiduciary Principle' in T G Youdan (ed), *Equity, Fiduciary and Trusts* (Carswell, 1989) 1, 4, cited in Andrew Terry and Cary Di Lernia, 'Franchising and the Quest for the Holy Grail: Good Faith or Good Intentions' (2009) 33 *Melbourne University Law Review* 542, 554.
[249] J W Carter and M P Furmston, 'Good Faith and Fairness in the Negotiation of Contracts Part I' (1994) 8 *Journal of Contract Law* 1, 6; Finn, 'The Fiduciary Principle' above n 248, 4, cited in Terry and Di Lernia, above n 248, 554.

fiduciary duty is to act in the interest of another. In *McKenzie v McDonald*,[250] this duty was defined as meaning that one party has powers and discretions that affect the interests of the other, the latter putting trust and confidence in the actions of the former. The category is open ended and can overlap with other doctrines such as unconscionability.[251]

The question then becomes how much acting in good faith, by taking into consideration the interest of the other party, can be 'pushed'. There is no fiduciary relationship between the parties when the relationship between the parties is of a commercial nature, entered into by equal parties at arm's length with the intention that both parties would gain a profit.[252] Establishing that parties deal at arm's length and on an equal footing in a commercial relationship can be difficult.[253] In *Hospital Products v US Surgical Corp*,[254] the parties were involved in an exclusive distributorship arrangement for products manufactured by the defendant. The plaintiff began to manufacture products that were essentially identical to those manufactured, using the defendant's products as models. This meant that the contractual parties were now competitors. The question was whether the plaintiff was a fiduciary. By a bare majority the High Court held that there was no fiduciary relationship between the parties and a right to relief rested in a claim for damages for breach of contract.[255]

C A contextual approach to contract law: the example of Australia

The relationship between morals and legal rules in the context of contract law is even more obvious in the context of long-term contracts. These contracts focus more on the relationship between the parties than on the strict terms. An agreement 'can be inconsistent with the actual expectations of the parties'.[256] This section focuses on the theory surrounding relational contracts and implicit dimensions as a way to demonstrate the part played by morals in the enactment of contract laws, and how good faith has infiltrated the strictness of the classical

[250] [1927] VLR 134 (Dixon J).
[251] See Chapter 4.I.A.1.
[252] For a review of status in fiduciary law see Paul B Miller, 'The Idea of Status in Fiduciary Law' in Paul B Miller and Andrew S Gold (eds), *Contract, Status, and Fiduciary Law* (Oxford University Press, 2016) 25, 37.
[253] *News Ltd v Australian RFL* (1996) 58 FCR 447, a case involving the structure of the Australian Rugby Football League.
[254] *Hospital Products v US Surgical Corp* (1984) 156 CLR 41, 68 (Gibbs CJ).
[255] Ibid 74.
[256] Stewart Macaulay, 'The Real and the Paper Deal' in David Campbell, Hugh Collins and John Wightman (eds), *Implicit Dimensions of Contract: Discrete, Relational, and Network Contracts* (Hart Publishing, 2003) 51, 51.

contract by taking into consideration the context of the contractual relationship.

1 Relational contracts

Relational contracts were defined by Macneil.[257] His theory is based on two pillars: the length of the contract, and the relationship between the parties. According to him, the life of the contract is not entirely predictable; therefore, it will always be incomplete. 'The more relational an exchange, the less likely the parties plan and allocate risks effectively.'[258] Moral obligations can therefore help with decisions relating to the implication of terms.[259] The judge is also active in the contract, and its adaptation. Macneil identifies ten norms that define a contract as relational: (1) role integrity (requiring consistency, involving internal conflict, and being inherently complex); (2) reciprocity (the principle of getting something back for something given); (3) implementation of planning; (4) effectuation of consent; (5) flexibility; (6) contractual solidarity; (7) the restitution, reliance and expectation interests (the 'linking norms'); (8) creation and restraint of power (the 'power norm'); (9) propriety of means; and (10) harmonisation with the social matrix, that is, with supracontract norms.[260]

Two points can be made here. Firstly, the categories are not finite.[261] Secondly, reciprocity and contractual solidarity bring ideas of fairness and justice into contract law. Any 'exchange behaviour includes a combination of the ten common contract norms, containing at a minimum solidarity and reciprocity'.[262] Therefore, the cooperative nature of the exchange is seen as a 'given' in relational contract theory.[263] The norm of solidarity keeps creeping in contractual exchanges,[264] meaning that '[p]arties are committed to improvements that may benefit the relationship as a whole, and not only the individual parties'.[265] This reasoning agrees with the need to take into consideration the other party, and therefore good faith. Good faith is presented

[257] Ian R Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (Yale University Press, 1980) 10.
[258] Hillman, above n 197, 256.
[259]Ibid. Also see Chapter 4.I.B.2.
[260] Ian Macneil, 'Relational Contract Theory, Challenges and Queries' (2000) 94 *Northwestern University Law Review* 877, 879–80.
[261] Ibid.
[262] Chapi F Cimino, 'The Relational Economics of Commercial Contracts' (2015) 3 *Texas A&M Law Review* 91, 100.
[263] Ibid 101.
[264] Ibid 110.
[265] Ibid.

as an economic expectation of the parties,[266] whereby cooperative norms actually lower costs.[267]

Macneil's theory[268] has been widely criticised on different grounds. Firstly, one key question addressed by Tisseyre in her thesis is whether contracts have to be flexible to fit Macneil's definition.[269] According to Tisseyre, it is only a matter of 'spotlight orientation'.[270] In the relational contract, the relationship is put in the spotlight rather than the exchange itself. Secondly, other critics advance arguments about the selection criteria and the inadequacy of the time factor.[271] Thirdly, relational contract theory places a high reliance upon judicial capacity to evaluate and interpret norms.[272] Some argue this can be costly due to the need for expertise in particular circumstances.[273] Furthermore, courts have not generally defined standards and often just announce the conclusion.[274] Finally, courts cannot rely on trade usage because it differs greatly from place to place, and customs tend to be vague.[275]

Following these critiques, some have tried to redefine the relational contract, while others have changed the perspective of the concept. Busseuil does the latter in his thesis, where he develops a definition of the concept based on two pillars: the legal link between the obligation and the relationship and the notion of *favor contractus.*[276] Parties do not mind owing each other favours[277] if this means that the contractual relationship is maintained and even flourishes: the contractual link between the parties will prevail. A case in point is revisions of the contract because of hardship, which imply a renegotiation of the contract due to changing circumstances.[278] This highlights that the relationship, the duties and the sources of those duties all form the contract. From this perspective, he considers that good faith has an important role

[266] Ibid 112.
[267] Ibid 114.
[268] For a review of the use of the theory see Josetta McLaughlin, Jacqueline McLaughlin and Raed Elaydi, 'Ian Macneil and Relational Contract Theory: Evidence of Impact' (2014) 20(1) *Journal of Management History* 44.
[269] Tisseyre, above n 12, 281.
[270] Ibid 280.
[271] Busseuil, above n 122, 152.
[272] Ibid 153.
[273] Macaulay, above n 256, 52.
[274] Ibid 68, referring to Robert Scott on commercial law, common law and code methodologies, cited in Jody Kraus and Steven Walt, 'The Jurisprudential Foundations of Corporate and Commercial Law' (2000) 94 *Northwestern University Law Review* 847.
[275] Macaulay, above n 256, 66; Lisa Bernstein, 'The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study' (1999) 66 *University of Chicago Law Review* 710, 730.
[276] Busseuil, above n 122, 350.
[277] Jan B Heide and George John, 'Do Norms Matter in Marketing Relationships?' (1992) 56(2) *Journal of Marketing* 32, 39.
[278] See, eg, PECL art 6:111.

to play to ensure the contract is adapted to comply with a new set of circumstances or to remedy the absence of some terms in the contract.

The core of relational contract theory as laid out by Mac Neil is still relevant in spite of criticisms and remodelling of his theory:

> First, every transaction is embedded in complex relations.
>
> Second, understanding any transaction requires understanding all essential elements of its enveloping relations.
>
> Third, effective analysis of any transaction requires recognition and consideration of all essential elements of its enveloping relations that might affect the transaction significantly.
>
> Fourth, combined contextual analysis of relations and transactions is more efficient and produces a more complete and sure final analytical product than does commencing with non-contextual analysis of transactions.[279]

Interestingly, there is currently a renewed interest in relational contract theory. Empirical research is being conducted to provide further justification for the need to take into consideration the relationship between the parties.[280] While contract law is still deemed important, the emphasis is placed on business deals which should be honoured[281] since they are the ones that have 'established the boundaries of permissible conduct'.[282] Consequently, it seems that the parties to the agreement and the agreement itself are surrounded by other forces that guide their relationship and the terms of the contract. Taking the context and these forces into account is the recognition of the implicit dimensions of a contract. These implicit dimensions are also relevant in determining the context within which a relational contract may be terminated. Such a contract often comes before the court because of one of the following issues: i) the exercise of discretionary powers; or ii) the use of termination clauses.

[279] Macneil, above n 260, 881.
[280] See Cimino, above n 262.
[281] Hillman, 'Chapter 7'above n 197.
[282] Ibid 253.

i. Discretionary powers

In a contractual situation, parties must perform their respective obligations under the contract, and once this has been completed the contract will be extinguished. The contract may however be terminated earlier, depending on the circumstances surrounding performance. This alters the balance of powers between the parties, since an early termination means that one party does not get the full benefit of the original agreement. The exercise of contractual powers must be practised fairly to ensure a party does not suffer a loss as the consequence of such an exercise. An early termination can occur in four situations: in pre-contractual dealings relating to contingent conditions, in actions that might be unconscionable, during the contract and during its termination through the exercise of a discretionary power.

A contractual term is contingent when the performance is conditional on an event neither party promises to ensure. In the case of a condition precedent, if the event does not occur, either party is entitled to terminate. Parties may however be under an obligation to take reasonable steps to ensure the condition is satisfied.[283] Courts are sometimes required to examine the extent of such an obligation. Based on the duty to cooperate to reach satisfactory performance and completion of the contract, as laid out in *Butt v McDonalds*,[284] in *Meehan v Jones* the High Court of Australia considered a clause in a contract for the sale of land 'subject to the purchaser obtaining satisfactory finance'.[285] The Court highlighted that the judgment of the purchaser as to whether finance is on satisfactory terms had to be reached honestly or honestly and reasonably.[286] Gibbs CJ and Murphy J interpreted this as meaning that the purchaser merely had to make an honest assessment of the finance available.[287] This shows that one party has to take into account reasonable standards of conduct,[288] but this does not extend to acting altruistically. The doctrine of good faith consequently has a role to play as it can refer to acting honestly.[289]

The question of good faith and legitimate expectations and interests is relevant when a court must decide whether a particular behaviour is unconscionable. Unconscionability and good

[283] *Newmont Pty Ltd v Laverton Nickel NL* (1982) 44 ALR 598.
[284] (1896) 7 QLJ 68.
[285] *Meehan v Jones* (1982) 149 CLR 571.
[286] Ibid 590 (Mason J).
[287] Ibid 581 (Gibbs J).
[288] Anthony Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 *Law Quarterly Review* 66, 72.
[289] See Chapter 1.A.1-2.

faith are linked by legislation. Section 51AC of the *Trade Practices Act 1952* (Cth) proscribed unconscionable behaviour. According to s 51AC(3)(k), the extent to which parties acted in good faith is relevant to determine whether conduct is unconscionable. In *Automasters Australia P/L v Bruness P/L*,[290] a defendant operated under a franchise agreement until he terminated it, alleging that the franchisor acted unconscionably. The case highlighted the bad conduct of the franchisor during the performance of the agreement. Clause 15.1 of the agreement stated that 'the franchisor will use its best endeavours to promote the performance and success of the franchise business and will deal at all times with the franchisee in absolute good faith'. This term was considered certain and enforceable,[291] and to imply that parties must have 'due regard to the legitimate interests of both parties of the fruits of the contract'.[292] The Court stated that the plaintiff failed to respect this obligation.[293] The actions of the plaintiff were unreasonable and capricious.[294] Good faith played an important role in assessing whether the conduct of the party was unconscionable and a breach of the obligations in the contract.[295]

Parties exercise their rights independently, although within the frame of the contract. This means that the exercise of contractual powers relates to obligations that are not directly conditional on the performance of an obligation by another party. However, this means that the parties must still take a reasonable approach by considering the interests of the other party in making decisions. They must act reasonably, and not capriciously or for some extraneous purpose.[296] This is further illustrated by the reasoning of Justice Filkenstein in *Garry Rogers Motors (Aust) Pty Ltd v Subaru Pty Ltd*.[297] Even though the duty of good faith could be implied,[298] it had not been breached in the decision by the franchisor to terminate the relationship.[299] The standard to be applied to the exercise of contractual powers here is the implied duty not to exercise powers capriciously or for an extraneous purpose.[300] However, an important point highlighted by the judge was that '[m]any relationships can only operate satisfactorily if there is mutual confidence and trust'.[301] This is the basis for a reasonable

[290] [2002] WASC 286.
[291] Ibid [150].
[292] Ibid [388].
[293] Ibid [392].
[294] Ibid [372].
[295] Ibid [177].
[296] *Far Horizons Pty Ltd v McDonalds* [2000] VSC 310, [119].
[297] [1999] FCA 903.
[298] Ibid [35] (Filkenstein J).
[299] Ibid [38].
[300] Ibid [39].
[301] Ibid [46].

exercise of discretionary powers, although the extent to which it applies is still being reviewed by the courts. In *Commonwealth Bank of Australia v Barker*, the High Court of Australia decided that an employment relationship does not necessarily impose a term of mutual trust and confidence.[302] Interestingly, the judges in this case referred to good faith, although it had not been argued by the parties and therefore could not be considered in this case.[303]

The most obvious discretionary power is the right to terminate a contractual relationship. Under common law, the possible ways to terminate include: agreement of the parties to do so,[304] non-fulfillment of a contingent condition,[305] breach of a condition,[306] sufficiently serious breach of an intermediate term,[307] or a repudiation of the contract by one party.[308] If the term is a condition, the common law gives the other party a right to terminate.[309] The courts will look at any precedent, as well as the language of the contract, the importance of the term, other terms of contract, and the serious consequences of the breach to determine whether a term is a condition.[310] If the term is an intermediate term, the right to terminate depends on the gravity of the breach and its consequences.[311] If the term is a warranty, it will not of itself give rise to a right to terminate the contract,[312] but the claimant may be entitled to damages for the loss suffered.[313]

Repudiating the contract means that one contractual party is unwilling or unable to perform a condition of the contract, or the whole contract, or a fundamental part thereof.[314] If a party repudiates the contract, the other can elect to terminate the contract.[315] As Carter noted,

> the focus of the repudiation doctrine is on the intention and acts of the promisor, whereas

[302] *Commonwealth Bank of Australia v Barker* [2014] HCA 32, [35]–[44].
[303] Ibid [107].
[304] *Pan Foods Company Importers and Distributors Pty Ltd v Australia and New Zealand Banking Group Ltd* [2000] HCA 20; *McDermott v Black* (1940) 63 CLR 161.
[305] *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537.
[306] *Arcos v Ronaasen* [1933] AC 470.
[307] *Koompatho Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61.
[308] *McKenzie v Rees* (1941) 65 CLR 1.
[309] *Bowes v Chaleyer* (1923) 32 CLR 159; *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423.
[310] *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61, [54].
[311] *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 69–70; *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61, [71]; Roger Gamble, 'Australia and the Intermediate Term – "No Country for Old Rules"' (1998) 34(2) *Monash University Law Review* 457, 460.
[312] *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 69–70.
[313] On remedies for breach of contract, see Chapter 6.II.
[314] Paterson, Robertson and Duke, above n 166, 333.
[315] *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61, [60].

> under the [intermediate term] doctrine the focus is on the consequences of the breach … in other words, repudiation is primarily based on the conduct of the promisor whereas the [intermediate] term doctrine relies on the detriment, loss and so on, suffered by the promisee.[316]

ii. Termination clauses

It is necessary to consider whether, when a party has a right to terminate at the discretion of one of the parties, it must be exercised fairly. When the right is an explicit term of the contract, the discretionary power triggering the application of such a clause requires the power to be exercised reasonably.[317]

Termination clauses provide a strong shield against the opportunistic conduct of one party.[318] If one party does not cooperate, the other party can use the express clause to terminate the contract. Yet some parties may use this power opportunistically and unfairly, thereby providing a cause of action for the other party. A duty to act in good faith can be attached to the exercise of a termination clause in order to ensure that parties do not act arbitrarily and 'without reasonable cause'.[319] In *Secured Income Real Estate (Australia) Limited v St Martins Investments Pty Ltd*,[320] the High Court considered that a duty to act reasonably within the sphere of the contract had been breached. This shows that the relationship between discretion, reasonableness and good faith must be explored to understand the role of good faith in the policing of the exercise of the discretionary right of termination as provided under the terms of a contract.

The first question that follows from this relates to discretion and reasonableness. The New South Wales Court of Appeal used the doctrine of good faith to decide whether the power to terminate a contract due to an express clause had be used reasonably. A party must act in an

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[316] John Carter, *Breach of Contract* (Lexis Nexis, 2nd ed, 1991) [643], quoted in Paterson, Robertson and Duke, above n 166, 332.

[317] Hugh Collins, 'Discretionary Powers in Contracts' in David Campbell, Hugh Collins and John Wightman (eds), *Implicit Dimensions of Contract: Discrete, Relational, and Network Contracts* (2003) 219, 245.

[318] Ibid 246.

[319] Matthew Harper, 'The Implied Duty of "Good Faith" in Australian Contract Law' (2004) 11(3) *Murdoch University Electronic Journal of Law* 22, [11]–[12]. On the use of good faith in termination for convenience clauses see Anthony Gray, 'Termination for Convenience Clauses and Good Faith' (2012) 79(3) *Journal of International Commercial Law and Technology* 260.

[320] [1979] 144 CLR 596, 609.

unbiased way and attempt to verify information on which a decision may be based.[321] In *Renard Constructions (ME) Pty Ltd v Minister for Public Works*,[322] a construction contract contained a termination clause stating that in case of default of performance by the contractor, he is required to show cause before the contract is cancelled.[323] This case resulted in significant discourse on the concept of good faith and reasonableness. In assessing the reasonable exercise of discretion in that case, Handley J considered honesty, the objective implication of the 'show cause' requirement, reasonableness and arbitration.[324] Priestley JA considered that reasonableness required the principle 'to consider facts before acting'.[325] The decision of the New South Wales Court of Appeal was that the contractual powers were not exercised reasonably by the principal. A party to a contract has a duty to take steps to promote successful performance of the contract. Priestley JA considered that a term to act in good faith could be implied in law.[326] Consequently, an implied duty of good faith can require a party to give notice to the other party of the decision to terminate so as to allow the other party to rearrange its affairs before the actual termination of the contract.[327]

The second question relates to good faith and reasonableness. Reasonableness is a concept that is used in Australian contract law to address contractual behaviour and ensure parties act fairly. Many disputes in relation to the reasonable exercise of contractual powers arise in the context of termination of contracts. Two examples will be considered here: the exercise of discretionary contractual powers and termination clauses. In *Renard Constructions*,[328] Priestley JA discussed at length the concepts of reasonableness and good faith. He considered that there was a '*close* association of ideas between the terms unreasonableness, lack of good faith and unconscionability'.[329] *Renard Constructions* marks the start of the implication of good faith in contract law.[330] However, although it developed the idea of recognising good faith in contracts using construction techniques, it did not clearly state whether good faith could be implied in law or in fact.[331]

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[321] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 246; *Sigiriya Capital Pty Ltd v Scanlon* [2013] NSWCA 401, [47].
[322] (1992) 26 NSWLR 234.
[323] Ibid 239.
[324] Ibid 279 ff.
[325] Ibid 260.
[326] Ibid 263.
[327] Paterson, Robertson and Duke, above n 166, 375.
[328] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.
[329] Ibid 265.
[330] Ibid 268.
[331] See William M Dixon, 'Good Faith in Contractual Performance and Enforcement: Australian Doctrinal Hurdles'

These examples further demonstrate the need to consider elements that surround the contract and influence the intentions of the parties. This is also shown in the well-known New South Wales Court of Appeal decision, *Burger King v Hungry Jack's.*[332] In that case, the Court was faced with the construction of a termination clause in a franchising contract. The Court considered that such a clause was subject to an implied duty of good faith. The Court recognised the implied duty to act in good faith as a matter of law and not of fact.[333] The agreement had developed with implied terms of cooperation, good faith and reasonableness, complying with 'an honest person's view of what would constitute fair dealing'.[334] The Court considered that the franchisor was acting as part of a 'deliberate plan to prevent [the franchisee] expanding' and instead to enable the franchisor itself 'to develop the Australian market'.[335] This duty was held to have been breached because the franchisor had imposed a third party freeze and financial approval withdrawal. The Court decided that there was wrongful termination.[336] Therefore, in this instance, the franchisor could not exercise its right to terminate the contract, due to the extraneous purpose of this action. In spite of these cases and the use of reasonableness in deciding good faith–related cases, the relationship between these two doctrines is yet to be clearly determined.[337]

This shows that Australia has enforced a duty to cooperate and to exercise discretionary rights in a reasonable manner. The concept of good faith has been introduced in the exercise of termination clauses. This shows that the concept is not totally foreign to Australian contract law; indeed, it has developed alongside judicial intervention to promote fair dealing and cooperation up to the termination of the agreement. Good faith has therefore been used as a tool to ensure cooperation and completion of obligations under the contract.

(2011) 39(4) *Australian Business Law Review* 227, 235.

[332] [2001] NSWCA 187; (2001) 69 NSWLR 558, 570.

[333] Ibid (2001) 69 NSWLR 558, 569.

[334] Ibid [2001] NSWCA 187, [189].

[335] Ibid [639].

[336] Ibid [165].

[337] See, eg, *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268, [6]; *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49, [586].

2 Implicit dimensions

The concept of relational contracts only applies to certain contractual relationships, namely long-term contracts. According to Macaulay, it can be used in different situations: either as a way to encourage settlement between parties, and to interpret indeterminate legal principles; or to reduce the costs associated with a long-term relationship due to the lack of foreseeability associated with it.[338] Eisenberg reinforces this by stating that every contract is indeed relational.[339]

The contextualists base their theory on the fact that there is more than just an agreement between the parties. A contractual situation is made up of a written agreement as well as some implicit understandings. These understandings need to be considered to ensure that the intentions of the parties, and their reasons for entering the relationship, are clearly reflected. Reasons for entering the relationship can be implied by standards from the community and the specific industry, the broader business context, and the general community or even the idealised general community.[340] Social relationship theory emphasises the importance of the societal context, and the reality faced and understood by the community, in the shaping of contract law. This approach 'confines expectations and is imbedded in conventions, norms, mutual assumptions and unarticulated expectations'.[341] According to Hugh Collins, there are three levels of social relations that shape contracts.[342] First, the written contract represents the frame of reference. Second, the economic relations illustrate the rational self-interest of the parties. Third, trust impacts on every social interaction between the parties. For example, parties rely on the good faith of the other. Economic relations and trust form the core of the implicit dimensions of a contract. The cement between these elements is the legitimate expectations of the parties,[343] meaning an expectation that a benefit or right will be obtained as the contract is performed. This guides the courts in filling in an incomplete agreement or making decisions based upon the terms of the contract. Doctrines such as cooperation and good faith are included

[338] See Macaulay above n 256, 83.
[339] Melvin A Eisenberg, 'Why There Is No Law of Relational Contracts' (2000) 94(3) *Northwestern University Law Review* 804, 821.
[340] Jeannie Paterson, 'The Standard of Good Faith Performance: Reasonable Expectations or Community Standards?' in Michael Bryan (ed), *Private Law in Theory and Practice* (Routledge-Cavendish, 2007) 158.
[341] Hugh Collins, 'Introduction' in David Campbell, Hugh Collins and John Wightman (eds), *Implicit Dimensions of Contract: Discrete, Relational, and Network Contracts* (Hart Publishing, 2003) 1, 2.
[342] See Collins, 'Discretionary Powers', above n 317, 250.
[343] Ibid 250.

in these implicit dimensions.[344] In fact, each contract is relational and this is recognised through the duty to cooperate.

This approach is criticised by those who consider predictability is decreased by the use of these standards, with the ultimate consequence of increasing transaction costs.[345] They prefer giving more power to the legislator to prescribe specific rules rather than leaving it to the judicial interpretation of a broad standard.[346] Yet, the historical review in this chapter has shown the importance of and the role to be played by the judge in determining the boundaries of such standards, as well as ensuring their adaptability to different contexts. This analysis is not foreign to Australian law, where case law has been used to ensure fairness in contract law.[347]

Cooperation is enforced in Australian contract law.[348] The duty to cooperate in the performance of a contract is a well-established rule in the case law.[349] Cooperation in performance relates to enforceable contractual obligations and requires reasonable acts of cooperation. In *Butt v McDonald*,[350] the Court stated:

> *[*It] is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract.*[351]*

Consequently, parties should cooperate not only to perform their obligations, but also to ensure each party is able to benefit from the transaction. This was affirmed by the High Court in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd.*[352] Mason J stated that a duty to cooperate is necessary for fundamental obligations to be performed.[353] Article 10 of the Australian Contract Code proposed in 1992 stated that parties should perform their promises exactly, and do everything which conscience requires in order to ensure that each gets

[344] Macaulay, above n 256, 52.
[345] For a review, see James Gordley, 'The Moral Foundations of Private Law' (2002) 47 *American Journal of Jurisprudence* 1.
[346] How to implement a duty to act in good faith will be discussed further in Chapter 6.I.A.
[347] See *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.
[348] *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607.
[349] Paterson, Robertson and Duke, above n 166, 346.
[350] *Butt v McDonald* (1896) 7 QLJ 68.
[351] Ibid 70–1.
[352] (1979) 144 CLR 596.
[353] Ibid 607.

the benefit intended by their promises.[354] Whether parties have breached that duty must be determined from the intentions of the parties as manifested by the contract.[355] This is also present in art 9 of the 2014 proposal for an Australian Law of Contract.[356]

The contours of the duty to cooperate have been drawn and cooperating does not mean acting selflessly. This means that a party is not required to disregard its own interests. This is illustrated in *Far Horizons v McDonalds*.[357] This case involved a franchise of Far Horizons. McDonalds decided to open a new restaurant not far from theirs, which was likely to decrease customers at Far Horizons, and reduce its profit. Opening a new store was a right that McDonalds could exercise by virtue of the non-exclusive contract with Far Horizons. The Court found that the franchisee failed to show that the franchisor acted improperly and was motivated by an extraneous motive. This case shows that, even though it seems that parties had conflicting interests, there was nothing in the contract or the contractual behaviour of the franchisor that prevented it from opening a competing store.

Furthermore, the duty to cooperate '*is not a mechanism for alleviating the consequences of hard, even harsh or unconscionable, contractual provision*'.[358] In *Council of City of Sydney v Goldspar,* Giles J referred to the lack of clarity on the Australian position.[359] He considered that the duty to cooperate meant acting in good faith and reasonably.[360] The Court found that the appellant did not act in good faith in the sense of honesty, nor did it act reasonably.[361] The link between cooperation and good faith as a means to ensure cooperation between the parties was thus established, following the advocacy in academia.[362]

The duties to cooperate and to act in good faith apply to both the performance of obligations and the exercise of rights. In *Alcatel v Scarcella*,[363] the New South Wales Court of Appeal

[354] Fred Ellinghaus and Ted Wright, 'An Australian Contract Code' (Law Reform Commission of Victoria Discussion Paper 27, 1992) art 10.
[355] *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 608.
[356] Ted Wright, Fred Ellinghaus and David Kelly, 'A Draft Australian Law of Contract' (Working Paper No 13-03-14, Newcastle Law School, 2014).
[357] [2000] VSC 310.
[358] *Council of City of Sydney v Goldspar* [2006] FCA 472, [162].
[359] Ibid [166]: 'There is a bewildering variety of opinions in the authorities and commentaries as to the implication of terms as to reasonableness and good faith in commercial contracts'.
[360] Ibid.
[361] Ibid [185].
[362] John W Carter and Elisabeth Peden, 'Good Faith in Australian Contract Law' (2003) 19 *Journal of Contract Law* 155; Mason, 'Contract', above n 288, 69.
[363] [1998] 44 NSWLR 349.

accepted that a duty of good faith, requiring cooperation, could be implied as part of a lease.[364] The case dealt with requirements for fire safety as prescribed by a fire engineer. The landlord required the work to be carried out by the appellant, the tenant. The tenant argued that the landlord was acting unconscionably. The trial judge found an implied term of cooperation and fair dealing. Through a careful analysis of the facts and the legal requirements for the building to be fire safe, the trial judge found that the landlord acted reasonably. The New South Wales Court of Appeal followed his opinion by applying the following test: (1) Has the building owner pressured the authorities relating to safety orders in order to force the tenant to comply with them as it is an obligation of the tenant to observe and perform lawful requirements? (2) If so, is it a breach of the clause in the contract relating to maintaining the building in good substantial repair? The first answer was affirmative but the second was negative. The owner of the building had a legitimate interest in making sure the building was fire safe.[365] More recently, In *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd*,[366] Bathurst CJ used Sir Anthony Mason's understanding of good faith[367] and stated that the content of a duty to act in good faith

> has commonly been held to embrace three related matters: 1. An obligation on the parties to co-operate to achieve the contractual objectives. 2. Compliance with honest standards of conduct. 3. Compliance with standards of conduct that are reasonable having regard to the interests of the parties.*[368]*

The discussion above shows that the duty to cooperate incorporates notions of reasonableness,[369] and more generally deals with the behaviour of parties within a contractual relationship. This duty can imply that parties must use their 'best efforts in performing their obligations'.[370] The importance of going further than the black letter of the contract is highlighted by the need to take into consideration the circumstances of the agreement, the parties and their relationships and their own background to ensure fair dealing. This calls for a contextual approach to contract law where good faith bridges the gap between morals and law.

[364] Ibid 369.
[365] Ibid.
[366] [2012] NSWCA 184.
[367] Mason, 'Contract', above n 288, 69.
[368] *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184, [145] (Bathurst CJ); in line with Mason, 'Contract', above n 288, 69.
[369] *Council of City of Sydney v Goldspar* [2006] FCA 472, [140].
[370] *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 63.

This discussion has also highlighted the theoretical framework that has shaped the development of laws and the interactions between morals and law. 'There are so many varieties of contract that it would be difficult to find principles that are well adapted for them all.'[371] Yet good faith can be presented as a concept that has crossed centuries and that is supported by the theory relating to relational contracts and more generally the implicit dimensions surrounding contracts.

In principle, parties to a contract enter into a contract to see it performed.[372] Not only is anti-cooperative behaviour discouraged,[373] but parties are encouraged to cooperate. This has led to the advancement of a requirement of reasonable conduct of contractual powers. Such reasoning provides a possible foundation for the application of a doctrine of good faith in Australian contract law. In this context, it is understood as requiring parties to act honestly and with good conscience,[374] and to take into consideration the other party's legitimate expectations.[375] Good faith does not require altruism, or subjugation of self-interest.[376]

D Conclusion to Section II

Every contract shares 'voluntariness and boundedness'.[377] Legal scholarship is divided between relational theory, which promotes substantive justice, and the classical perspective, which encourages procedural justice.[378] Section A has highlighted the dynamic relationship between law and morals and the juxtaposition of autonomy and legal intervention in contract law. Section B has discussed the recognition between law and morals based on the primacy of the promise. Section C has shown the need for a broader contextual approach to understand the place of good faith in contract law.

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[371] Devlin, above n 189, 52.
[372] See Murphy, above n 191, 153.
[373] MacNeil, 'Efficient Breach', above n 205, 968.
[374] R S Summers, 'The General Duty of Good Faith – Its Recognition and Conceptualisation' (1982) 67 *Cornell Law Review* 810, 824–5.
[375] Christopher J F Boge, 'Does the Trade Practices Act Impose a Duty to Negotiate in Good Faith? Part 1' (1998) 6 *Trade Practice Law Journal* 4, 7.
[376] Liam Brown, 'The Impact of Section 51AC of the TPA on Commercial Certainty' (2004) 28 *Melbourne University Law Review* 589, 605.
[377] Collins, 'Introduction', above n 341, 1.
[378] Ibid 8–10.

III. CONCLUSION

This chapter has highlighted common strands in the development of contract law theory in Australia and the EU. These commonalties form part of the shared history that has shaped the trunk of the occidental tree. Historically, there are similarities in the development of the law and a parallel has been drawn between on the one hand leaving the parties to regulate their relationship, and on the other the need to ensure fairness in procedural and substantive justice: from the development of new actions of good faith in Roman law, the appearance of equitable remedies in equity, to the development of good faith as a duty and source of rights. The concept of good faith as an overarching principle and common value is also present in Australia but the legal implications of the doctrine of good faith are yet to be sketched out, even though by nature it is a concept that evolves and can never be fully drawn out. Consequently, the most important question is not whether it is possible to integrate good faith into contract law, but instead how to implement the doctrine in Australian and EU contract law and in what form.

CONCLUSION TO PART ONE

Part One confirmed the hypothesis that Australia and the EU and their contract laws are comparable. It established the best approach for comparing the two jurisdictions as well as their theoretical and historical foundations. It introduced the comparative approach used in the study of good faith in contract law and demonstrated that Australia and the EU are comparable. It focused on historical and theoretical developments surrounding the recognition of a duty to act in good faith in contractual dealings to illustrate the challenges faced by both jurisdictions.

Chapter 2 has shown that the best approach to compare Australia and the EU rests upon a 'classification' of legal systems using the metaphor of the tree. From common roots and a common trunk, legal systems develop in divergent directions – branches – without completely moving away from their common origins. Although at first controversial, the idea of an occidental tree seems to suit perfectly the development of the EU, a true melting pot of civil and common law traditions, as well as Australia where the strict definition of common law does not suit its current developments. Using deep comparative law further, Chapter 2 demonstrated that there are commonalities between the understanding of contract in the two jurisdictions. Even though the EU is yet to provide a European definition of this concept, its legal formants (or sources) show that the intention of the parties to enter into a legally binding agreement is essential. This element is also found in Australian case law. In addition to the contractual terms, the relevance of the will of the parties and of their behaviour surrounding the existence of the contract must therefore be taken into consideration in the regulation of contract law.

Chapter 3 highlighted the commonalities in the sources of the doctrine of good faith. It provided an overview of the theoretical and historical developments of good faith in contract law, developments that form the trunk of the occidental tree, of which Australia and the EU are branches. Similarities between the development of the Roman judiciary and the development of English courts and equity have been exposed. Furthermore, in spite of the apparent hegemony of party autonomy in regulating their contractual terms, the need for fairness and justice in contract law has crossed over boundaries: both jurisdictions have had to regulate aspects of contract law to promote fairness in contractual dealings. The liberalist view,

predominant in contract law, led to the classical theory of contract law. It is exemplified by notions such as business efficacy, efficiency, freedom to contract and autonomy of the parties. Yet, morals have crept in to the application of law to soften its contours, as we have seen throughout history. From the use of bona fides as a tool to soften the harshness of procedural law during the Roman era to the development of a substantial duty of good faith to be imposed on contractual parties, good faith has become part of a broader debate on the influence of implicit dimensions in contract law. Its legitimacy stems from the need for norm makers, namely the legislature and the judiciary, to tackle problems linked to the relationship of the parties and the vulnerability of certain parties to agreements.

PART TWO: COMPARISONS INTRODUCTION

Part Two uses the comparative methodology discussed in Chapter 2 and builds on Chapter 3 by identifying the application of good faith in contract law in Australia and the EU through different legal formants: namely legislation, case law and codes. It examines the rationale for the application of good faith in the current contract law of the two jurisdictions and analyses how good faith is used: as a duty, a principle, and a requirement. While Part One established the theoretical foundations of the thesis and described relevant historical developments, Part Two primarily focuses on developments from the twentieth century onwards. The aim of this part is to determine how good faith is currently used in the different jurisdictions and to identify any similarities and differences, and their ramifications. This will allow the research to show the current challenges faced by Australia and the EU in integrating good faith into contract law.

Chapter 4 focuses on the modern foundations of the recognition of good faith as a principle of contract law. It aims to identify the principle's underpinnings and demonstrate whether the practice reflects the theory. It presents the different perspectives of each jurisdiction in order to identify whether good faith is relevant and if so why it is not yet recognised as a principle of general contract law. It will also examine the interaction between good faith and cooperation to determine whether cooperation can provide the basis for good faith to be recognised in Australian contract law and whether good faith could be recognised in the EU in light of the constitutional challenges.

Chapter 5 focuses on the development of good faith in Australia and in the EU as a 'tool to protect'. The two jurisdictions have used the doctrine to promote fair dealing by ensuring the parties are not in an unfairly balanced contractual relationship, meaning each party benefits from the contract. This chapter presents how the doctrine of good faith is applied in consumer protection and commercial law in order to identify similarities and differences between Australia and the EU, and to highlight the consequences of the use of good faith as a duty to protect certain parties in certain dealings.

Chapter 4
Good faith as a principle of contract law: challenges

> The result is that people generally, including judges and other lawyers, from all strands of the community, have grown used to the Courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations.[1]

This comment was made in 1992 by Justice Priestley in obiter. It could be expected that parties enter into a contract with some cultural and moral expectations, including the idea that the other party will be true to their word and loyal when bargaining, even though this may not be explicitly stated in the contract. But is this hypothesis reflected in the law on contract? The question is how much of this is recognised and enforced in contract law. While Chapter 3 established the relevance of the theories, discussed their implicit dimensions and considered relational contracts, Chapter 4 highlights the challenges faced by Australia and the European Union (EU) in integrating good faith within contract law, and the relationship of good faith with other doctrines that are used to ensure fairness. Even though cooperation and fairness can be identified as the foundation of the concept of good faith, the concept of good faith is struggling to be fully recognised in the general law of contract in both Australia and the EU. As the chapter will demonstrate, the intricacies of this hurdle appear differently in each jurisdiction.

Each part of this chapter examines the context of each jurisdiction, and the 'implicit dimensions' particular to each legal system which have inhibited the recognition of good faith in contract law. It will be shown that there is one strong similarity: the lack of a recognised concept of good faith in either jurisdiction. However, the reasons behind the lack of recognition differ greatly between the jurisdictions. Section I demonstrates that the role of good faith is yet to be decided by the High Court of Australia. Missed opportunities or strong opposition to its

[1] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 268 (Priestley JA).

recognition have left a gap between the common understanding of good faith and the legal understanding of the notion.[2] Section II analyses how the imposition of a contractual principle to act in good faith in the EU is part of a broader challenge for EU institutions to find a legitimate basis for the development of a European contract law.

I. THE INTEGRATION OF GOOD FAITH INTO CONTRACT LAW: AUSTRALIAN CHALLENGES

This section presents three possible ways to incorporate a duty to act in good faith into contract law, each having been tested by the courts. In Australia, the incorporation of a term can occur in one of three ways. These are dealt with in turn in this section. Firstly, it will show how good faith has been dealt with when it is an express term. Then, it will examine the implication of good faith as a term of a contract. Finally, it will explore the theory according to which good faith can be incorporated through the construction of the contract.[3]

An express term can provide for a duty to act in good faith if it is intended by both parties and it is sufficiently certain. Some contract law areas require that parties act in good faith. They include fiduciary relationships, insurance contracts, franchise agreements and small business dealings.[4] In the general contract law context however, there is no clear interpretation of the concept. This can be partly explained by the distinction made between interpretation and construction.[5] Interpretation finds the true sense of words.[6] Construction determines the context in which the word was chosen and used.[7] This process is also found in the context of contract law, although it will be shown that this is not universally accepted.[8]

[2] Suzanne Corcoran, 'Good Faith as a Principle of Interpretation: What Is the Positive Content of Good Faith?' (2012) 36 *Australian Bar Review* 1, 2.

[3] See the discussion of the concept of acting selflessly and in good faith in John W Carter and Michael P Furmston, 'Good Faith and Fairness in the Negotiation of Contracts Part I' (1994) 8 *Journal of Contract Law* 1; John W Carter and Michael P Furmston, 'Good Faith and Fairness in the Negotiation of Contracts Part II' (1994) 8 *Journal of Contract Law* 93.

[4] For specific applications in Australia, see Chapter.II.A.

[5] Francis Lieber, *Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics* (Little and Brown, 1839); see also Greg Klass, 'Interpretation and Construction 2: Samuel Williston' on *New Private Law: Project on the Foundations of Private Law* (23 November 2015) <https://blogs.harvard.edu/nplblog/2015/11/23/interpretation-and-construction-2-samuel-williston-greg-klass/>.

[6] Lieber, above n 5, 23.

[7] Greg Klass, 'Interpretation and Construction 1: Francis Lieber' on *New Private Law: Project on the Foundations of Private Law* (19 November 2015) <https://blogs.harvard.edu/nplblog/2015/11/19/interpretation-and-construction-1-francis-lieber-greg-klass/>.

[8] Shawn J Bayern, 'Contract Meta-Interpretation' (2016) 49 *UC Davis Law Review* 1097.

However, before this exposé, it is necessary to highlight the presence of other doctrines providing equitable remedies in Australian contract law that have been used to ensure fair dealing. Courts and legislatures have used equitable causes of action to provide remedies to consumers who have suffered a loss.[9] The development of equitable remedies and doctrines can be advanced as one reason for the lack of explicit recognition of good faith in contract law in Australia. The common ground between these principles and good faith is that they are used to promote contractual fairness and acknowledge the significance of fair dealing in contractual dealings.[10] The discussion below will focus on the efficacy of these equitable causes of actions, with a view to determining the role that good faith could play in the context of contract law.

A Regulating party behaviour: a gap already filled by other doctrines?

In this section attention is focused on the development of doctrines used to re-establish the balance between the parties where the contract involves one consumer and one business or two businesses. This will capture both consumer and commercial contracts. The first instance where unfair behaviour may occur is during the phase preceding and leading to the formation of the contract.

1 Precontractual dealings and unconscionability

Unconscionability is an equitable doctrine born from the judicial recognition that some actors may exploit the special disadvantage of the other party to enter into a contract with the latter.[11] The concept of unconscionable conduct embraces situations where acting in a particular way within particular circumstances can be regarded as harsh, oppressive or capricious.[12]

Before the enactment of the *Australian Consumer Law* (ACL),[13] unfair practices were tackled

[9] See below, I.A.2.
[10] See below, I.A.1.
[11] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.
[12] *Legione v Hateley* (1983) 154 CLR 406, 429; *Hurley v McDonald's* [1999] FCA 1728; Russell Miller, *Miller's Australian Competition and Consumer Law Annotated* (Lawbook, 35th ed, 2013) [1.s2.20.40], 1552.
[13] *Australian Consumer Law, Competition and Consumer Act 2010* (Cth) sch 2 ss 20–21.

by the *Trade Practices Act 1974* (Cth) (TPA). Section 51AC of the TPA, the provision that concerned unconscionability, was introduced in 1998 in order to protect business from unfair and exploitative conduct.[14] The provision was criticised[15] for bringing uncertainty to business transactions, due to the use of broad notions such as good faith.[16] The courts have interpreted this provision with extreme caution and a threshold applies: the provision can only apply if there is a case of serious misconduct or a situation that is clearly unfair and unreasonable.[17]

Originally a doctrine established by case law,[18] the doctrine of unconscionability has been incorporated into legislation[19] and it is now proscribed by the ACL, although the Act does not replace the equitable concept.[20] Sections 20–22 of the ACL have been presented as an avenue to prohibit unfair conduct generally.[21] Section 20 of the ACL stipulates that '[a] person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time'. The introduction of statutory unconscionability in s 21 of the ACL[22] has been considered as a way to deal with unfair tactics used in commercial dealings.[23] Section 22 of the ACL develops matters the courts can take into consideration when determining whether a business has acted unconscionably. The extent to which the parties acted in good faith is one of those factors.[24] Unconscionability has been used as an 'overriding policing device'[25] because of the unequal powers of the parties to whom the doctrine may apply. Even though the doctrine mostly relates to circumstances preceding or leading to the agreement, the statutory provision also embraces conduct during the performance of the contract.[26] There is no case law that discusses the provisions of good faith within this section

[14] Liam Brown, 'The Impact of Section 51AC of the TPA on Commercial Certainty' (2004) 28 *Melbourne University Law Review* 589.
[15] Parliamentary Library, Commonwealth of Australia, *Bills Digest: Trade Practices Amendment (Fair Trading) Bill 1997*, No 55 of 1997–98, 13 October 1997; Brown, above n 15.
[16] Also echoed in Michael Bridge, 'Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?' (1984) 9(4) *Canadian Business Law Journal* 385.
[17] Brown, above n 15, 605; *Hurley v McDonald's Australia Ltd* [2000] FCA 1728.
[18] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.
[19] *Trade Practices Act 1974* (Cth) ss 51AA, 51AB.
[20] *Australian Consumer Law, Competition and Consumer Act 2010* (Cth) sch 2 ss 20–21.
[21] Christopher J F Boge, 'Does the Trade Practices Act Impose a Duty to Negotiate in Good Faith? Part 1', (1998) 6 *Trade Practice Law Journal* 4, 18.
[22] The *Trade Practices Act (Fair Trading) Amendment Act 1998* (Cth) introduced s 51AC to the TPA.
[23] Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 41–2.
[24] *Australian Consumer Law, Competition and Consumer Act 2010* (Cth) sch 2 s 22(2)(l): the court may have regard to 'the extent to which the acquirer and the supplier acted in good faith'.
[25] Robert A Hillman, *The Richness of Contract Law: An Analysis of Critique of Contemporary Theories of Contract Law* (Kluwer, 1998) 132. There are similar provisions in *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CC (1)(l), 12CC(2)(l).
[26] *Australian Consumer Law, Competition and Consumer Act 2010* (Cth) sch 2 s 21(4)(c): 'in considering whether

of the ACL.[27]

The provisions laid out in the ACL ensure that parties have reasonable expectations and do not take advantage of a position of power or vulnerability.[28] The imbalance in the relationship has highlighted the possible implementation of the doctrine of unconscionability,[29] instead of an explicit recognition of good faith, which is considered too nebulous.[30] For instance, the Australian Government rejected the implementation of a principle of good faith, stating that statutory unconscionability already fulfilled the need to protect parties in unfair dealings.[31] Furthermore, the statutory indicators laid out in s 22 of the ACL already include the use of good faith.[32] The same Bill that introduced s 51AC also proposed to prohibit unfair conduct by inserting a new s 51AA in the TPA.[33] Fifteen years later, the concept of 'unfair conduct' is yet to be recognised as such in commercial transactions, in spite of a review of the TPA in 2002.[34]

Finn classifies good faith, unconscionability and fiduciary duties as part of a 'three-tier hierarchy of protective responsibility'.[35] Acknowledging and respecting the interests of the

conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of: (i) the terms of the contract; and (ii) the manner in which and the extent to which the contract is carried out; and is not limited to consideration of the circumstances relating to formation of the contract'.

[27] For recent cases discussing s 21 see *Swiss Re International SE v Eagle Downs Coal Management Pty Ltd* [2015] FCA 1479; *Aboriginal Housing Company Limited v Kaye-Engel (No 6)* [2015] NSWSC 1241; *CPA Australia Ltd v Storai* [2015] VSC 442; *HSBC Bank Australia Ltd v Mavaddat* [2015] WASC 153; *Wilson HTM Investment Group Ltd v Pagliaro* [2012] NSWSC 106.

[28] See Paul Finn, 'Unconscionable Conduct' (1994) 8 *Journal of Contract Law* 37, 46.

[29] Small Business Development Corporation, Submission No 50 to Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law*, 1 July 2012, 4.

[30] Ibid 4–8.

[31] See Department of Industry, Innovation, Science, Research and Tertiary Education, *Australian Government Response to the Review of the Disclosure Provisions of the Franchising Code of Conduct* (1 February 2007) 9, <https://static.treasury.gov.au/uploads/sites/1/2017/06/GovtResponseFranchisingCoC.pdf>.

[32] *Australian Consumer Law, Competition and Consumer Act 2010* (Cth) sch 2 s 22; Bryan Horrigan, Emmanuel Laryea and Lisa Spagnolo, Submission No 35 to Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law*, 1 July 2012, 17.

[33] The Trade Practices Amendment (Fair Trading) Bill was introduced by Senator Andrew Murray in June 1997. The uncertainty associated with the term 'unfair' was noted in Parliamentary Library, Commonwealth of Australia, *Bills Digest: Trade Practices Amendment (Fair Trading) Bill 1997*, No 55 of 1997–98, 13 October 1997.

[34] See Pharmacy Guild of Australia, Submission, *Review of the Trade Practices Act*, July 2002, 12, suggesting the removal of 'unconscionable' and replacing it with 'unfair'. For a similar view see House of Representatives Standing Committee on Industry, Science and Resources, *Finding a Balance: Towards Fair Trading in Australia* (1998) ch 6; Daryl Dawson, Curt Rendall and Jillian Segal, *Review of the Competition Provisions of the Trade Practices Act* (2003) <http://tpareview.treasury.gov.au/content/report.asp>.

[35] Paul Finn, 'Fiduciary and Good Faith Obligations Under Long Term Contracts' in Kanaga Dharmananda and Leon Firios (eds), *Long Term Contracts* (Federation Press, 2013) 136, 142.

other are common characteristics of this hierarchy.[36] Good faith can be seen as a generalised community standard that can be used as an interpretative aid.[37] An obligation to act in good faith prohibits certain conduct, including unconscionable conduct, and would apply to both negotiation and performance.[38] Even though unconscionability has developed into a strong doctrine in Australian contract law, good faith is still considered in the determination of unconscionable conduct and it could provide guidance in ensuring the doctrine of unconscionability does not go too far.[39] Although a mere lack of good faith is different from acting unconscionably, it could play a significant role in determining whether a party has acted unconscionably or not by 'informing the courts as to what may amount to an unfair tactic'.[40] However, courts are yet to use good faith in determining whether a party acted unconscionably within the meaning of the ACL.

Unconscionable conduct is not restricted to the ACL. For instance, unconscionable conduct provisions in state legislation within the Victorian *Retail Leases Act 2003* (Vic) protect commercial tenants against grossly unfair conduct by landlords.[41] This includes an unwillingness to negotiate and the use of unfair tactics. One of the factors to be considered in determining whether a landlord has acted unconscionably is if a landlord has unreasonably used turnover information in rent negotiation. This Act also improves provisions that protect tenants in cases of relocation, demolition and damaged premises.[42] This further shows legal recognition of the need for parties to cooperate and have due regard to the interests of the other party, even at the stage of negotiations.[43] This understanding does bring the notion of good faith as described in Chapter 3 back to the foreground, and highlights the clear influence of the doctrine where one party is in a stronger position or when a party acts grossly unfairly. This echoes the excluder doctrine of good faith, which argues that good faith is no more than not acting in bad faith,[44] even if it is yet to be clearly and explicitly recognised in the USA as such.[45]

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[36] Ibid 136.
[37] Boge, above n 21, 6.
[38] Horrigan, Laryea and Spagnolo, above n 32, 18.
[39] Such a perspective is mostly found in the USA: see Hazel Glenn Beh, 'Curing the Infirmities of the Unconscionability Doctrine' (2015) 66 *Hastings Law Journal* 1011.
[40] Boge, above n 21, 17.
[41] *Retail Leases Act 2003* (Vic) pt 9 ss 76–80.
[42] Victorian Small Business Commissioner, *Annual Report* (2003/04) 40.
[43] See, eg, *Overlook v Foxtel* [2002] NSWSC 17.
[44] Robert S Summers, '"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54(2) *Virginia Law Review* 195
[45] See Chapter 1.I.B.1.

2. **Precontractual dealings and misleading and deceptive conduct**

Section 18 of the ACL stipulates that 'a person, must not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead and deceive'.[46] The doctrine of misleading and deceptive conduct has also been used as a way to avoid the conversation about good faith.[47] Perhaps the most interesting development surrounding misleading and deceptive conduct is the tension between silence and the need for disclosure of information. Even though commercial entities are presumed to be on an equal footing and should actively be seeking information before entering into a transaction, reasonableness has appeared when courts have interpreted behaviour that misled, especially in the context of commercial law.[48] Reasonable expectations have been used to determine whether a party misled or deceived another, further eroding the classic doctrine of caveat emptor.[49]

> Good faith is opposed to notions of freedom of contract, individualism, and caveat emptor. There is no good faith obligation in the arm's length market, but there is a modern sense that the arm's length dissolves and quasi fiduciary duties arise once there is either a contract formed or foreseeable reliance.[50]

There is a clear implication that parties should act honestly and faithfully in carrying out a common purpose.[51] A party should take into account the legitimate interests of the other party. But a party is not expected to act purely selflessly. The neighbourhood concept[52] may have become one of the generalised standards of conduct, but it does not mean that 'a party should love its neighbour to death!'[53]

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[46] *Australian Consumer Law, Competition and Consumer Act 2010* (Cth) sch 2 s 18.
[47] *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151; *Service Station Association Limited v Berg Bennett & Associates Pty Ltd* (1993) 45 FCR 84.
[48] *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45; Frederika De Wilde, 'The Less Said – the Worse: Silence as Misleading and Deceptive Conduct' (2007) 15 *Trade Practices Law Journal* 7, 15: 'This category includes people who are less astute, less intelligent or less well-informed than the average member of the community. The Courts' view has simply been that there is a need to provide all material information, which is intelligible to reasonable members of the class.'
[49] See Frederika De Wilde, above n 48, 9.
[50] Kevin M Teeven, *A History of the Anglo-American Common Law of Contract* (Praeger, 1990) 306.
[51] Ibid 307.
[52] Paul Finn, 'Commerce, the Common Law and Morality' (1989) 17 *Melbourne University Law Review* 87, 90. This is not to be confused with fiduciary duties: see below.
[53] Christopher J F Boge, 'Does the Trade Practices Act Impose a Duty to Negotiate in Good Faith? Part 2', (1998) 6 *Trade Practice Law Journal* 68, 87.

The importance of dealing with silence and the duty to disclose information[54] have led to heavy reliance on legislative provisions targeting misleading and deceptive conduct in Australia. The traditional contractual freedom is expressed by the doctrine of 'let the buyer beware'.[55] However, the recognition that silence can be misleading conduct has shaken this concept.[56] Therefore, while caveat emptor is presented as an obstacle to the recognition of a principle of good faith during negotiation, it is important to note that that the same hurdle has been eroded by judicial activism in the area of misleading and deceptive conduct, when silence is said to be misleading. Furthermore, the recognition of the duty to disclose some information shows the importance of the requirement to take into consideration the interests of the other party, and what this may mean concerning disclosing information.[57] While certain information must be disclosed to the consumer, it is different for commercial parties, which are presumed to be on an equal footing.[58]

In *Demagogue Pty Ltd v Ramensky*,[59] a broad interpretation was given to the term 'conduct', which included silence.

> Although 'mere silence' is a convenient way of describing some fact situations, there is in truth no such thing as 'mere silence' because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed.[60]

The particular circumstances of the commercial situation have to be taken into consideration[61] to determine the level of disclosure. However, there is no duty requiring full disclosure.[62]

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[54] Ibid 72.
[55] *Smith v Hughes* (1871) LR 6 QB 597, 604.
[56] *Kimberley NZI Finance v Torero Pty* Ltd [1989] ATPR (Digest) 46-054, 53, 195.
[57] Boge, 'Does the Trade Practices Act Part 2', above n 53, 70.
[58] This is part of the consumer guarantees. See *Australian Consumer Law* ss 51–63.
[59] (1992) 39 FCR 31.
[60] Ibid 32.
[61] *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164, 178.
[62] *Lam v Ausintel Investments (Australia) Ltd* (1989) 97 FLR 458, 475 (Gleeson J): 'Where parties are dealing at arms' length in a commercial situation in which they have conflicting interests it will often be the case that one party will be aware of information which, if known to the other, would or might cause that other party to take a different negotiating stance. This does not in itself impose any obligation on the party to bring the information to the attention of the other party, and failure to do so would not, without more, ordinarily be regarded as dishonesty or even sharp practice. It would normally only be if there were an obligation of full disclosure that a different result would follow. That could occur, for example, by reason of some feature of the relationship

Although there is no general duty to disclose, Boge argues that, by requiring the party to have regard to the legitimate interests of the other, a duty to disclose information, when that information could reasonably influence the purchaser's mind, may be imposed.[63] The author refers to two situations, namely the negotiation of the sale of land without disclosing defects and the failure to ascertain information which a purchaser might expect a vendor to disclose.[64] Boge seems to agree with Gummow J,[65] according to whom any possible duty to disclose is assessed on a case-by-case basis, but always using the 'reasonable expectation' test.[66] A link between this position and cooperation as explained in Chapter 3 can be highlighted here.

The concept of reasonableness is applicable to misleading and deceptive conduct, through taking into consideration reasonable expectations. Yet, the doctrine of good faith has been used as an indicator of a breach of the provisions relating to misleading and deceptive conduct. In *Hughes Aircraft Systems International v Airservices Australia*,[67] it was found that the Civil Aviation Authority had engaged in conduct that was misleading or deceptive. It had therefore contravened TPA s 52 due to the non-disclosure of information, namely the price variation of the other tenderer. The importance of the context is again relevant here.[68] Boge has argued that misleading or deceptive conduct indeed recognises some good faith standards, especially in cases where silence is proscribed and where good faith creates an obligation to disclose information.[69] Such an approach is consequently further eroding the standing of caveat emptor in favour of the recognition of implicit dimensions, and the need to take into consideration the interests of the other parties. As analysed in Chapter 3, this further adds to the argument that the spirit of good faith is present at the stage of contract negotiations.

between the parties, or because previous communications between them gave rise to a duty to add to or correct earlier information.'

[63] Boge, 'Does the Trade Practices Act Part 2', above n 53, 75.
[64] Ibid.
[65] *Elders Trustee and Executor Co Ltd v EG Reeves Pty Ltd* (1987) 78 ALR 193, 241.
[66] Cf *Sutton v AJ Thompson Pty Ltd (in liq)* (1987) 73 ALR 233 where a failure to check the false representation was held not to deprive the party of a remedy under *Trade Practices Act 1974* (Cth) s 52.
[67] (1996) 76 FCR 151.
[68] Colin Lockart, *The Law of Misleading or Deceptive Conduct* (LexisNexis, 2011) [3.18].
[69] Boge, 'Does the Trade Practices Act Part 2', above n 53, 71.

3. Contract performance and estoppel

The focus of this section is on the development of doctrines to address unfair behaviour that occurs once the contract has been formed and is due to be performed. What happens when a party retracts a promise to the detriment of the other party? Even though the doctrine of estoppel acts as a shield[70] in any contract, the use of the doctrine to protect parties is significant. Analysing the doctrine also provide insights into whether, and if so where, good faith has a place in Australian contract law.

Promissory estoppel is an equitable doctrine according to which a person who makes a statement, which is relied upon by another to his/her detriment, should be prevented or 'estopped' from withdrawing his or her statement.[71] For instance, if A leads B to act on the assumption that a right will not be exercised, then B can ask for the promise to be enforced if the withdrawal of the promise would cause detriment to B. For estoppel to be recognised, three elements must be proven: the relying party must have adopted an assumption; the assumption must have been induced by the conduct of the representor; and the relying party must have acted on the assumption in such a way that he or she will suffer detriment if the representor does not adhere to the assumption.[72] Estoppel has also been used to provide some protection to a party who assumed from the other party's conduct that a contract would be formed.[73] This issue has been brought before the courts in the context of the sale of land.[74] In these cases, the concept of good faith has not been used and judges have relied upon the different elements of estoppel to decide whether the termination of the contract by one party could be held unfair.

A case-by-case approach must be used, in order to take into consideration all relevant elements of the particulars of a dispute. The consideration of context here is particularly relevant. This is apparent in *Legione v Hateley*,[75] a case that related to a contract for the sale of land. The vendor tried to terminate the contract for failure of the purchasers to pay at the required date. Prior to the date, the purchasers had asked for a seven-day extension. The secretary of the

[70] *Combe v Combe* [1951] 2 KB 215.
[71] *Walton Stores (Interstate) v Maher* (1988) 164 CLR 387, 388.
[72] Ibid.
[73] *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582, 610.
[74] *Legione v Hateley* (1983) 152 CLR 406; *Foran v Wight* (1989) 168 CLR 385; *Stern v McArthur* (1988) 165 CLR 489.
[75] (1983) 152 CLR 406.

vendor's solicitor stated: 'I think it will be alright but I'll have to get instructions'.[76] The vendor terminated the contract due to the absence of payment on the required date. The majority of the High Court decided that the vendor should not be estopped from terminating the contract.[77] Mason and Deane JJ held that promissory estoppels can only come from a clear representation as to the future conduct.[78] There was no unequivocal representation to this effect, so no estoppel arose against the vendors. Brennan J stated that the vendor's solicitors had no authority to vary the effect of a notice of intention to rescind.[79] The purchaser's solicitors ought to have known the limits of the secretary's authority. The dissenting judges, Gibbs CJ and Murphy J, found that the conduct of the secretary had been relied upon by the purchaser's solicitors. So the vendors were prevented from treating the contract as rescinded.

There are instances where the courts seem to have been concerned with whether the exercise of a right is fair and reasonable. In *Legione v Hateley*,[80] the Court developed an equitable test to determine whether relief against forfeiture could be granted. The Court took into consideration whether the conduct of the aggrieved party contributed to the other party's breach; whether the other party's breach was trivial and inadvertent; the consequences for the aggrieved party; the magnitude of the purchaser's loss and the vendor's gain if the forfeiture was to stand; whether specific performance with or without compensation was an adequate safeguard for the vendor; and the contribution of the vendor to the breach.[81] In this case, the Court took note of the contribution to the breach of the vendor, as well as the circumstances of the case, to grant relief against forfeiture. Since the purchasers had erected a house on the land, it would not be fair to rescind the contract.[82] The High Court decided that relief against forfeiture was potentially available since the purchaser's breach was inadvertent and not wilful. It is interesting to highlight here again the consideration given to the context of the transaction, demonstrating the influence of good faith as a moral obligation in contract law in Australia, as explained in Chapter 3.

In *Foran v Wight*[83] the issue also concerned a contract for the sale of land. The sale was to be

[76] Ibid 409.
[77] Mason, Brennan, Deane, JJ and Gibbs CJ.
[78] *Legione v Hateley* (1983) 152 CLR 406, 438.
[79] Ibid 453.
[80] Ibid.
[81] Ibid 449.
[82] The issue was ultimately remitted to the Supreme Court for determination.
[83] (1989) 168 CLR 385.

completed on 22 June 1983 and time was of the essence.[84] On 20 June, the vendor's solicitors stated that the vendor could not settle as the registration of a right of way required by the contract had not been completed. The purchasers could have terminated the contract for an anticipatory breach, but they did not exercise that right. No settlement occurred on 22 June. On 24 June, the purchasers elected to terminate the contract and claimed the return of their deposit, relying on an actual breach of the contract. The vendors argued that on the due date the purchasers did not have the funds to complete the transaction either. The trial judge found that the purchasers did not prove their ability to perform. Brennan, Deane and Dawson JJ found that the purchasers were not 'substantially incapable' of getting the required amount.[85] The High Court held that the purchasers had validly terminated the contract.

In *Stern v McArthur*,[86] the Court had to decide whether the decision of the vendor to terminate a contract for the sale of land because the purchaser was behind on instalment payments was fair. The High Court granted relief against forfeiture, comparing the situation to the security of a mortgage. The Court did not want the vendor to get a windfall due to the increase in the price of the land, following the agreement with the purchaser. The consequences of the termination were given more importance than the conduct itself. The dissenting judges criticised the generous approach of the relief against forfeiture.[87] The majority of the bench had different opinions on why reliance against forfeiture should be granted. While the Court was solicitous to ensure the circumstances of the transaction were considered, it is also important to highlight the thought process of the majority who analysed the implicit dimensions of the contract, the conduct of the parties, and the terms of the agreement. Deane and Dawson JJ stated that it was unconscionable for the vendor to 'insist upon strict contractual terms'.[88] Gaudron J stated that it was unconscionable because a decree of specific performance would ensure completion of the purchaser's obligations.[89]

Based on the reasoning of the courts and the examples given, it is clear that equity plays an important role in addressing the possible unfair behaviour of one party. As a consequence, it could be said that good faith is not needed in these instances. This further demonstrates the

[84] Ibid 386.
[85] Ibid 431.
[86] (1988) 165 CLR 489.
[87] See dissent, ibid 503–4 (Mason CJ); 510 (Brennan J).
[88] Ibid 528.
[89] Ibid 541.

parallel between Roman law and good faith on the one hand and English law and equity on the other hand, with the latter being inherited by Australia. This is particularly obvious when the development of two key concepts of Australian contract law are analysed. Misleading conduct and unconscionability are doctrines that target the precontractual relations of the parties. Estoppel is used when there is no contract but a statement is nonetheless made early in the discussion between the parties and this influences how the other party acts. These doctrines are either legislative or equitable. Only the legislative provision regarding unconscionability actually clearly brings good faith into its realm but the courts are yet to decide at least in part of this provision. The precontractual stage is regulated not only by these doctrines but also by the common law. For instance, as the next section will show, there are also cases where the parties' dispute turns on whether the parties acted in good faith within the negotiation process. This seems to suggest that the provisions and cases described in this section do not suffice to target all behaviours by parties at the precontractual stage. The next section will demonstrate how the common law is struggling to integrate good faith and whether it should indeed do so.

B The difficulty in choosing the means to integrate good faith

'[Good faith] is a conception that has been recognised (though not by all courts in Australia) as an implication or feature of Australian contract law attending the performance of the bargain and its construction and implied content'.[90] The question is how to integrate good faith into Australian contract law. This is not universally accepted and is also not reflected beyond performance and construction, as is shown in how courts decide on good faith in negotiations.

1 Good faith in negotiations: the example of express terms

Parties are generally free to withdraw from negotiations before an agreement is reached. The promotion of the traditional liberty to do business has impacted on the recognition of good faith in negotiation.[91] Yet there are circumstances where the withdrawal from negotiation may not be not exercised reasonably. The question is then whether, and if so where, the aggrieved party has a right of action. The duty to cooperate extends to the formation of the agreement.

[90] *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50, [287].
[91] Carter and Furmston, 'Good Faith Part I', above n 3, 2.

Can a contract that requires the parties to negotiate in good faith be enforced before the courts? In *Walford v Miles*,[92] it was held that an agreement to negotiate lacks legal certainty to such an extent that it cannot be an enforceable obligation. Due to the absence of legal content, parties are free to withdraw at any time. Enforcing such an agreement was considered by the courts as being contrary to the adversarial position of the parties. Thus it was not possible to imply an obligation to negotiate in good faith. This English case has been echoed by Australian decisions.[93]

Good faith has also been used as a positive duty in the context of contractual negotiations. In *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd*[94] a mining contract stated: 'The successful operation of this Contract requires that [Thiess] and [Placer] agree to act in good faith in all matters relating both to carrying out the works, derivation of rates and interpretation of this document.'[95] The Western Australian Supreme Court held that this clause meant that the parties agreed to cooperate on rates in advance.[96] The Court considered that this clause was enforceable and in this instance had been breached.[97]

The question of whether a term imposing a duty on the parties to negotiate in good faith was too vague to be enforceable has come before Australian courts. A clause or a contract to negotiate should be analysed through the usual lens of ordinary contract law principles. Paterson believes that the argument relating to the lack of certainty of such agreements can be refuted, because, unlike an agreement to agree, an agreement to negotiate is complete.[98] In *Coal Cliff Collieries v Sijehama*[99] parties entered into a 'heads of agreement' to jointly develop mining rights. The agreement anticipated the future execution of a joint venture but the parties failed to reach final agreement, and a few years later negotiations were terminated. According to the terms in the heads of agreement, parties would 'proceed in good faith to consult'.[100] The

[92] [1992] 2 AC 128.
[93] For example, *Australis Media Holdings v Telstra* (1998) 43 NSWLR 104, 128; *Caves Beachside Cuisine Pty Ltd v Boydah Pty Ltd* [2015] NSWSC 1273; *Baldwin v Icon Energy Ltd* [2015] QSC 12.
[94] [2000] WASCA 102.
[95] Ibid [22].
[96] Ibid [33].
[97] Ibid [118].
[98] Jeannie Marie Paterson, 'The Contract to Negotiate in Good Faith: Recognition and Enforcement' (1996) 10 *Journal of Contract Law* 120, 124.
[99] (1991) 24 NSWLR 1.
[100] Ibid 10.

majority of the New South Wales Court of Appeal accepted that a promise to negotiate in good faith may be enforceable.[101] However, it was considered in this instance to be too vague and uncertain.[102] Kirby J found that, if there was an enforceable agreement to negotiate in good faith, it had not been breached. *Coal Cliff* was also applied in *Australis Media Holdings v Telstra*[103] where a clause in the heads of an agreement contemplated the expansion of the business relationship into further fields of pay television and other joint venture arrangements.[104]

The question whether a party must act in good faith even though the contract is yet to be agreed upon illustrates the dynamic tension between self-interest and cooperation in reaching an agreement in the context of negotiations. *Aiton Australia v Transfield*[105] distinguished *Coal Cliff*. The dispute related to a construction contract which contained a dispute resolution procedure including obligations to negotiate and mediate in good faith. Einstein J held a party contracting to negotiate or mediate in good faith is obliged to adopt certain behaviour.[106] Einstein J also stated that these obligations do not require a party to act for or on behalf of or in the interests of the other party or to act otherwise than by having regard to self-interest.[107] The Court held that promises to negotiate and mediate in good faith in resolving disputes under an agreement were here sufficiently certain to be enforced.

These cases demonstrate the lack of clarity in the common law. The terms must be very clear and specific for a court to enforce an agreement to negotiate in good faith. It is easy to see that fairness can be used in situations 'where one party is unable in a real sense to protect his or her own interests'[108] and 'not when a party failed to take its own precautions'.[109] However, it is

[101] Ibid 27.
[102] Ibid.
[103] (1998) 43 NSWLR 104.
[104] Ibid 129: 'This expansion was to be negotiated in good faith by TNC and Galaxy. The Court considered that relevant criteria here included, the agreement itself, its certainty and the intention of the parties to determine that the provision was too vague to be enforceable'.
[105] (1999) 153 FLR 236.
[106] Ibid 268: '(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 & 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.'
[107] Ibid 265: 'Good faith is presented as accommodating the tension between negotiation done in self-interest and the reasonable conduct of the parties.'
[108] Boge, 'Does the Trade Practices Act Part 2', above n 53, 86.
[109] *Elders Trustee & Executor Co Ltd v EG Reeves Pty Ltd (Elders)* (1987) 78 ALR 193, 241 (Gummow J); See also Boge, above 108,d 85;

that lack of detail and clarity on what good faith means that has so far prevented the courts from enforcing a duty to negotiate in good faith. 'Imposing generalised standards of conduct such as good faith to negotiations may lessen the certainty'[110] businesses want. Therefore, a duty to negotiate in good faith must be precise, clear and detailed to be enforced by the courts. The content of the obligation will vary according to the circumstances of a specific case.[111] The question then becomes what it means to negotiate in good faith.

Peden argues that an express term requiring good faith in negotiation or mediation needs more detail to be certain than express terms for performance, but if it is given, it is likely to be interpreted.[112] If community values incorporate good faith,[113] does the law require people to do more than just not act unreasonably?[114] Based on the examples above a duty to negotiate in good faith could tackle the following behaviours: a refusal to negotiate; inflexibility from one party; obstruction and delay from a party; the existence of unreasonable terms or parallel negotiations; or the unreasonable termination of negotiations; and non-disclosure.[115]

Parties must exercise their rights fairly.[116] Existing doctrines currently fail to provide a remedy where negotiations have failed, by focusing on the misconduct enabling the contract to be set aside. The role of good faith then allows for the imposition of an obligation to continue negotiations and provides a basis for a remedy.[117] Although good faith can regulate some situations involving negotiations,[118] there is no clear recognition of a duty to negotiate in good faith in Australian contract law. A recent case in Queensland also addressed this issue and stated that good faith in negotiation is unenforceable.[119] The tension between the promotion of fairness and the commercial justification for withdrawals has resulted in the courts failing to

[110] Boge, 'Does the Trade Practices Act Part 2', above n 53, 86.
[111] Ibid 84.
[112] See Elisabeth Peden, 'Incorporating Terms of Good Faith in Contract Law in Australia' (2001) 23 *Sydney Law Review* 233.
[113] Boge, 'Does the Trade Practices Act Part 2', above n 53, 70.
[114] Carter and Furmston, 'Good Faith Part I', above n 3, 2; see also Robert S Summers, '"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54(2) *Virginia Law Review* 195.
[115] Paterson, above n 98.
[116] See Chapter 3.II.B.
[117] JohnW Carter and Michael P Furmston, 'Good Faith and Fairness in the Negotiation of Contracts Part I' (1994), above n 3, 8 *Journal of Contract Law* 1, 8. See Chapter 6.II for further discussion on remedies.
[118] *Native Title Act 1993* (Cth),); *Farm Debt Mediation Act 1994* (NSW).
[119] *Baldwin v Icon Energy Ltd* [2015] QSC 12, [53]]: 'In my view, neither the agreement to the reasonable endeavours within cl 1.3 or (if it be different) the agreement to work in good faith within cl 2(b) of the MOU had a sufficiently certain legal content. Therefore, they are unenforceable'.' The Court relied on *Walford v Miles* [1992] 2 AC 128.

recognise a general duty to act in good faith in the negotiation stages.[120] A similar pattern can be drawn when looking at good faith in contractual performance, in spite of the *Paciocco* comment made by Chief Justice Allsop which started this section.

2. **Good faith in contractual performance: the example of implied terms**

Before analysing the case law in this area, it is worth recalling the steps needed to imply a term as a matter of law or as a matter of fact. Firstly, in order to imply a term as a matter of law, a specific category of contracts must be identified,[121] a category to which a duty to act in good faith would apply. Commercial contracts are not considered a sufficiently certain class of contracts: the notion of what a commercial contract is has yet to be determined. However, certain commercial contracts are subject to the implication in law of a duty of good faith, as typified by franchise agreements in Australia. Secondly, in deciding whether to imply a term in a contract as a matter of fact, business efficacy and obviousness are core determinants. If the contract is not totally reduced to writing, the courts apply a test of necessity. The requirement of necessity 'reflect[s] the concern of the courts that, unless such a term be implied, the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined'.[122] Although it would seem obvious that parties that agree to enter into a contract should perform their obligations under the agreement fairly, the issue relating to the recognition of good faith 'reveals the circularity that can attend rejection of an implication of good faith because of the need to show necessity for business efficacy'.[123]

The development of good faith began with the recognition of the duty to cooperate. Cooperation in performance relates to enforceable contractual obligations and requires reasonable acts of cooperation. The meaning of cooperation was lain down in *Mackay v Dick:* 'It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the

[120] See Carter and Furmston, 'Good Faith Part I', above n 3, 9 for further discussion on the tension that exists here.
[121] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* [1977] UKPC 13; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; *Regreen Asset Holdings Pty Ltd v Castricum Brothers Australia Pty Ltd* [2015] VSCA 286.
[122] *Byrne v Australian Airlines Ltd* (1995) 185 CLR 11, 450. Another illustration of the test is *Liverpool v Irwin* [1977] AC 239.
[123] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 261–3 (Priestley J).

contract'.[124] The English case of *Butt v McDonald* cemented such an understanding,[125] and the duty to cooperate in the performance of a contract is a well-established rule in Australian contract law also.[126] Such a recognition in Australia extends beyond the strict performance of the contract, meaning that each party should be able to benefit from the transaction. This was affirmed by the High Court in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*, where Justice Mason stated that a duty to cooperate is necessary for fundamental obligations to be performed.[127] Whether parties have breached that duty must be determined from the intentions of the parties as manifested by the contract.[128]

In 2006, Justice Giles considered the duty to cooperate to mean acting reasonably and in good faith.[129] The court found that the appellant did not act in good faith in the sense of honesty, nor did it act reasonably.[130] The link between cooperation and good faith as a means to ensure cooperation between the parties was established. However, the judge also highlighted that the duty to cooperate 'is not a mechanism for alleviating the consequences of hard, even harsh or unconscionable, contractual provision',[131] such that legislation has now stepped in to regulate unfair contract terms for both consumers and small businesses.[132]

It is commonly agreed that parties can exercise their rights as long as such exercise remains within the frame of the contract. Through the duty to cooperate, parties must, however, take a reasonable approach by considering the interests of the other party in making decisions. For instance, if a right to terminate is stipulated in the contract and can be used at the discretion of a party, it must be exercised fairly. In *Renard Constructions*,[133] the New South Wales Court of Appeal decided that, when a discretionary right is an explicit term of the contract, the discretionary power to trigger the application of the clause must be exercised reasonably, not capriciously or for some extraneous purpose.[134] Justice of Appeal Priestley discussed at length

[124] *Mackay v Dick* (1881) 6 App Cas 251, 263.
[125] *Butt v McDonald* (1896) 7 QLJ 68, 70–1.
[126] Jeannie Paterson, Andrew Robertson and Duke Arlen, *Principles of Contract Law* (Thomson Reuters, 4th ed, 2011) 346.
[127] *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607.
[128] Ibid 608.
[129] *Council of City of Sydney v Goldspar* [2006] FCA 472, [166].
[130] Ibid [185].
[131] Ibid [162].
[132] *Consumer and Competition Act 2010* (Cth) sch 2 ss 23–27.
[133] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.
[134] See the scholarship in Hugh Collins, 'Discretionary Powers in Contracts' in David Campbell, Hugh Collins and John Wightman (eds), *Implicit Dimensions of Contract: Discrete, Relational, and Network Contracts* (Hart Publishing, 2003) 219, 245.

the concepts of reasonableness and good faith. He considered there to be a 'close association of ideas between the terms unreasonableness, lack of good faith and unconscionability'.[135] *Renard* is said to mark the start of the implication of good faith in Australian contract law. In relation to terms implied as a matter of fact, one of the core issues is whether a term of good faith can pass the test of business efficacy.[136] Priestley JA in *Renard Constructions* highlighted this issue.[137] Furthermore, although this case developed the idea of recognising good faith in contracts using construction techniques, it did not clearly state whether good faith could be implied in law or in fact.[138] This case has been followed by other courts, but they have used the requirement for parties to act reasonably and not capriciously or for some extraneous purpose, not the obiter on good faith.[139]

Yet as time went by, the concept of cooperation became associated with good faith.[140] The duties to cooperate and to act in good faith apply to both the performance of obligations and the exercise of rights. In *Alcatel v Scarcella*,[141] the New South Wales Court of Appeal accepted that a duty of good faith, requiring cooperation, could be implied as part of a lease.[142] The case dealt with requirements for fire safety as prescribed by a fire engineer. The landlord required the work to be carried out by the appellant, the tenant. The tenant argued it was not the duty of obligation to do the work and that the landlord was acting unconscionably. The trial judge found an implied term of cooperation and fair dealing. Through a careful analysis of the facts and the legal requirements for the building to be fire safe, the trial judge found that the landlord acted reasonably. The New South Wales Court of Appeal followed his opinion by applying the following test: (1) Has the building owner pressured the authorities relating to safety orders in order to force the tenant to comply with them, as it is an obligation of the tenant to observe and perform lawful requirements? (2) If so, is it a breach of the clause in the contract relating to maintaining the premises in good substantial repair? The first answer was affirmative, but the second was negative. The owner had legitimate interests in making sure the building was fire

[135] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 265.
[136] William M Dixon, 'Good Faith in Contractual Performance and Enforcement: Australian Doctrinal Hurdles' (2011) 39(4) *Australian Business Law Review* 227, 243; Elisabeth Peden, *Good Faith in the Performance of Contracts* (LexisNexis, 2003) 111.
[137] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 257–8.
[138] See Dixon, above n 136.
[139] *Far Horizons Pty Ltd v McDonald's* [2000] VSC 310, [119].
[140] John W Carter and Elisabeth Peden, 'Good Faith in Australian Contract Law' (2003) 19 *Journal of Contract Law* 155; Anthony Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 *Law Quarterly Review* 66, 69.
[141] [1998] 44 NSWLR 349.
[142] Ibid 369.

safe.[143]

It is worth noting the impact of academic scholarship on these decisions. One famous meaning of good faith by Justice Mason was used by Chief Justice Bathurst in *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd*, in which he stated that the content of a duty to act in good faith 'has commonly been held to embrace three related matters: 1. An obligation on the parties to cooperate to achieve the contractual objectives. 2. Compliance with honest standards of conduct. 3. Compliance with standards of conduct that are reasonable having regard to the interests of the parties.'[144]

Can a duty of good faith be implied in law? Implying good faith would mean that good faith imposes a duty to at least take into consideration the legitimate interests of the other party,[145] to ensure parties cooperate. In *Hughes Aircraft Systems International v Airservices Australia*,[146] Finn J considered whether the evaluation between two tenderers was conducted fairly and in a manner equal to both tenderers. The concept of 'fair evaluation' was interpreted through an analysis of the contract. Finn continued by stating that there was a general duty of good faith implied in law in certain contracts, such as public bodies' competitive tender processes. However, 'setting the appropriate standard of fair dealing is, in my view, another matter altogether from the acceptance of the duty itself'.[147] The question then becomes which types of contractual terms can be implied in law.

Since for a term to be implied in law a specific class of contracts must be identified, it is necessary to ask whether commercial contracts represent a definite group to which good faith can be implied in law. In *Far Horizons Pty Ltd v McDonald's*,[148] the Court recognised that an implied duty of good faith exists in franchise agreements.[149] In *Burger King v Hungry Jack's*, the NSW Court of Appeal considered that a duty to act in good faith could be implied in law, but applied the test for implication in fact.[150] This case has been used to support an implication

[143] Ibid.
[144] *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184, [145] (Bathurst CJ). This is in line with Mason, above n 145.
[145] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; see also discussion by Priestley. This was also the opinion of Meagher JA in the same case.
[146] (1996) 76 FCR 151.
[147] Ibid 193.
[148] [2000] VSC 310.
[149] Ibid [68].
[150] *Burger King v Hungry Jack's* [2001] NSWCA 187; Dixon, above n 136, 236.

of a duty to act in good faith in all commercial contracts.[151] Courts have, however, considered that commercial contracts are not a definite class of contracts according to which an implied term of good faith could be implied in law.[152] In *Service Station Association Limited v Berg Bennett & Associates Pty Ltd*,[153] Gummow J criticised the idea of good faith being recognised in Australia via the implied term theory.[154] Warren J in *Esso Australia Resources* agreed:

> Ultimately, the interests of certainty in contractual activity should be interfered with only when the relationship between the parties is unbalanced and one party is at a substantial disadvantage, or is particularly vulnerable in the prevailing context. Where commercial leviathans are contractually engaged, it is difficult to see that a duty of good faith will arise, leaving aside duties that might arise in a fiduciary relationship.[155]

Commercial contracts are not a finite category of contracts to which good faith can be implied in law. Yet, good faith has been used to regulate party behaviour and to ensure cooperation and fair dealing, therefore setting 'them apart'[156] from consumer contracts. The notions of trust and cooperation exemplified by the doctrine of good faith are increased in the context of relational contracts. This is most obvious in case law regarding franchise agreements. Since 1999, one particular category of contracts has attracted a discussion of the concept of good faith in contract law, namely, franchise agreements. The discussion has less to do with what duties are owed and more to do with how rights are exercised. For instance, the importance of regulating discretionary obligations is illustrated by the reasoning of Justice Filkenstein in *Garry Rogers Motors (Aust) Pty Ltd v Subaru Pty Ltd.*[157] There, even though a duty of good faith could be implied,[158] it had not been breached in the decision by the franchisor to terminate the relationship.[159] The standard to be applied to the exercise of contractual powers here is the

[151] Dixon, above n 136, 239; *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228, [4].

[152] See *Insight Oceana Pty Ltd v Philips Electronics Australia Ltd* [2008] NSWSC 710; *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15. In *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228, [25] Buchanan JA stated: 'I am reluctant to conclude that commercial contracts are a class of contracts carrying an implied term of good faith as a legal incident, so that an obligation of good faith applies indiscriminately to all the rights and power conferred by a commercial contract.'

[153] (1993) 45 FCR 84.

[154] Ibid 97: 'To some extent equity has regulated the quality of contractual performance by the various defences available to suits for specific performance and for injunctive relief. In some, but not all, of this, notions of good conscience play a part. But it requires a leap of faith to translate these well-established doctrines and remedies into a new term as to the quality of contractual performance, implied by law.'

[155] *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228 (Warren CJ).

[156] Marilyn Warren, 'Good Faith: Where Are We At?' (2010) 34 *Melbourne University Law Review* 344.

[157] [1999] FCA 903.

[158] Ibid [35] (Filkenstein J).

[159] Ibid [38].

implied duty not to exercise powers capriciously or for an extraneous purpose.[160] However, an important point highlighted by the judge was that '[m]any relationships can only operate satisfactorily if there is mutual confidence and trust'.[161] This is the basis for requiring a reasonable exercise of discretionary obligations.

Good faith in franchises also led to the clarification that cooperating does not mean acting selflessly. A party is not required to disregard its own interests. This is illustrated in *Far Horizons v McDonald's.*[162] This case involved a franchise to Far Horizons. McDonald's decided to open a new restaurant not far from theirs, which was likely to decrease customers at Far Horizons and reduce its profits. Opening a new store was a right that McDonald's could exercise by virtue of its non-exclusive contract with Far Horizons. The court found that the franchisee failed to show that the franchisor acted improperly and was motivated by an extraneous motive. Even though it seems that the parties developed conflicting interests, there was nothing in the contract or the contractual behaviour of the franchisor that prevented it from opening a competing store.

In the 2001 case of *Burger King v Hungry Jack's*,[163] the New South Wales Court of Appeal needed to decide on the construction of a termination clause in a franchising contract. A franchisor's discretion relating to approvals was subject to an implied duty of good faith, consequently precluding the franchisor from exercising the termination for extraneous purposes. The franchisor breached his implied duty by imposing a third party freeze and financial approval withdrawal. The Court decided that there was wrongful termination.[164] The Court recognised the application of an implied duty to act in good faith as a matter of law and not of fact.[165] The agreement had developed with implied terms of cooperation, good faith and reasonableness, conforming to 'an honest person's view of what would constitute fair dealing'.[166] The court considered that 'the franchisor was acting as part of a "deliberate plan to prevent the [franchisee] expanding" and instead to enable the franchisor itself "to develop the Australian market"'.[167]

[160] Ibid [39].
[161] Ibid [46].
[162] [2000] VSC 310.
[163] (2001) 69 NSWLR 558, 570.
[164] *Burger King Corp v Hungry Jack's Pty Ltd* [2001] NSWCA 187, [165].
[165] *Burger King Corp* (2001) 69 NSWLR 558, 569.
[166] *Burger King Corp* [2001] NSWCA 187, [189].
[167] Ibid [639].

Can a contract exclude the application of good faith? The answer is yes.[168] In *Vodafone Pacific Ltd v Mobile Innovations Ltd*,[169] the use of sole discretion was enough to mean that good faith was excluded.

> The power [to set the sales levels for the distributor] was emphatically described as a sole discretion. Since there was only one Vodafone (whichever of the entities it was), the point of 'sole' lay in the exclusion of any constraint upon Vodafone. Its exercise was excluded from the dispute resolution procedure, with the further emphasis that 'Vodafone's decision will be conclusive and binding on the parties' (cl 32.6) and the emphasis again that it could be exercised in any manner Vodafone saw fit (cl 41). These words in the ASP Agreement cannot be passed over, and they weigh against the implied obligation of good faith and reasonableness in the exercise of the power.[170]

This is to be contrasted with an earlier case in which Finn J decided that an entire agreement clause does not preclude the implication of a duty to act in good faith.[171] As a consequence of this fluctuation in case law, courts are still indecisive about which one to apply.[172] It is possible that good faith does not really fit within either of the predetermined categories regarding the implication of a term that would require parties to act in good faith, either as a matter of fact or a matter of law. Good faith, a chameleon concept, could be too context specific to be implied in law and too 'niche' to be implied in fact. Yet, in 2014, the High Court argued that it was only the lack of pleadings that prevented it from discussing good faith in contract law. The case of *Barker*, an employment-related case, created much debate when the notion of good faith reappeared. While good faith was discussed in obiter, it was not ultimately the ground for the decision, perhaps rightfully so.[173] The lack of clarity on the concept was however highlighted: 'whether there is a general obligation to act in good faith in the performance of contracts [and] ... whether contractual powers and discretions may be limited by good faith and rationality requirements' are still open questions.[174] This seems to suggest that courts are open to decide

[168] *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15.
[169] Ibid.
[170] Ibid [195].
[171] *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1, 209.
[172] Dixon, above n 136; *Sigiriya Capital Pty Ltd v Scanlon* [2013] NSWCA 401 where only part of the test was laid out, not contrary to express terms.
[173] Anthony Gray, 'Good Faith in Australian Contract Law after Barker' (2015) 43 *Australian Business Law Review* 358, 378.
[174] *Commonwealth Bank of Australia v Barker* [2014] HCA 32, [42]; see also [107].

upon these questions but judges will rely on the quality and exhaustiveness of the parties' pleadings.

This chronological retrospective shows that courts have dealt with the regulation of parties' behaviour within a contractual relationship through the duty to cooperate. This duty can imply that a party must use its 'best efforts in performing their obligations'.[175] But it is also 'tainted' by notions of reasonableness.[176] Reasonableness is a concept that is used in Australian contract law to tackle contractual behaviour and ensure parties act fairly, a case in point being the reasonable exercise of contractual powers that arise in the context of the termination of contracts. Australia has enforced a duty to cooperate and exercise discretionary rights in a reasonable manner. Good faith seems to be the underlying, or dare I say organising, principle that is constantly in the background of these discussions. One of the issues with a duty to act in good faith is how to imply it: a matter discussed in *Bhasin*[177] and not settled in Australian contract law.[178] It sometimes makes it to the foreground as exemplified in *Renard*. This shows that the concept is not totally foreign to Australian contract law. Yet the relationship between cooperation, reasonableness and good faith has yet to be determined.[179] The courts have shown reluctance in approaching the term of good faith and even more in implying and interpreting it. There is a final way to look into how good faith is discussed by courts and academics who are looking at the place of good faith in Australia contract law: the essence of the contract.

C Good faith as the essence of the contract?

The construction approach to the incorporation of a duty to act in good faith is echoed by the literature.[180] Cooperation in performance has been seen as part of the essence of the contract. Peden advocates for this as a means of promoting a more consistent approach and avoiding artificial implications.[181] Despite the lower courts' obiter on good faith in contract law, the High Court has been silent and has yet to seize the opportunity to clarify their position on the

[175] *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 63.
[176] *Council of City of Sydney v Goldspar* [2006] FCA 472.
[177] *Bhasin v Hrynew* [2014] SCC 71, [48].
[178] Dixon, above n 1336.
[179] See, eg, *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49.
[180] Corcoran, above n 2.
[181] Elisabeth Peden, 'Implicit Good Faith – Or Do We Still Need an Implied Term of Good Faith?' (2009) 25 *Journal of Contract Law* 50.

common law of contract in Australia. Ten years on from *Renard*, in *Royal Botanic*,[182] the High Court of Australia missed an opportunity to develop the principle of good faith in contract law. Only Justice Kirby discussed (obiter) the difficulty of implying good faith in contract law. The High Court has yet to take a judicial position on a duty to act in good faith and the legal basis for such a concept: a mandatory law, an implied term as a matter of fact or of law,[183] or an interpreting principle.[184] In *Royal Botanic Gardens and Domain Trust v South Sydney City Council*,[185] the High Court of Australia had to decide on the construction of the terms of a lease agreement and, more specifically, the construction of the clause with the expression with 'regard to additional costs and expenses'.[186] The clause was held to be ambiguous and it was stated that parties should lay out an exhaustive list of possible reasons for any rent increase in the clause in dispute. Both parties agreed on the implication of a duty of good faith in the performance of the contract, through construction of the contract as a whole. Consequently, the Court did not consider the content of the duty in detail. Yet, the decision has been criticised widely for the lack of clarification from the High Court, given the golden opportunity this case provided.[187]

In *Electricity Generation Corporation T/As Verve Energy v Woodside Energy Ltd*,[188] the Western Australian Court of Appeal interpreted a clause asking a party to use 'reasonable endeavours' to supply supplemental gas within a commercial context and found the respondent in breach. Even though good faith was not expressly discussed in this case, the rationale of the Court could be seen as pointing in the direction of such a doctrine. Accepting Woodside's construction of that clause, the majority of the High Court overruled the decision and held that Woodside was not required to supply gas to Verve Energy. The majority of the Court based its decision on the construction of the clause in the context of the contract.[189] The obligation was 'necessarily conditioned by what is reasonable in the circumstances', including what may affect

[182] *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289.
[183] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289.
[184] See, eg, the argument made in Corcoran, above n 2.
[185] (2002) 186 ALR 289.
[186] Ibid 290.
[187] Dixon, above n 136; Bill Dixon, 'What is the Content of the Common Law Obligation of Good Faith in Commercial Franchises?' (2005) 33(3) *Australian Business Law Review* 207; Howard Munro, 'The Good Faith Controversy in Australian Commercial Law: A Survey of the Spectrum of Academic Legal Opnion' (2009) 28 *University of Queensland Law Journal* 167.
[188] [2013] WASCA 36.
[189] Ibid [35], [46]–[47].

Woodside's business.[190] Contracts may include their own internal standard of reasonableness, which in this instance included an express entitlement for Woodside to take into account 'relevant commercial, economic and operational matters', as stated in their contract. It is interesting to note that the High Court's judgement seems to clearly refer to cooperation. It cited *Hospital Products*[191] in its discussion on what constitutes best efforts,[192] a judgment that emphasised the difficulty of proving successfully that a fiduciary relationship exists when commercial parties are at arms' length.[193] Part of that judgment led the Court in *Woodside* to discuss reasonableness and cooperation, although the latter was never explicitly mentioned.

Considering good faith as part of the essence of the contract would prevent attempts by parties to exclude good faith. Yet this has not been recognised by the courts and a clause excluding all implied terms has been held sufficient to also exclude good faith.[194] Even though the notion of good faith is no less certain than other acceptable standards such as 'reasonable care', or 'best endeavours',[195] its interpretation and implication are proving a struggle for common law judges. The judicial discretion associated with the doctrine leaves a feeling of uneasiness and judges are reluctant to step in, and are more likely to implement the terms of the contract.[196]

D The arguments against good faith

As the chronological review above demonstrated, Australian courts are yet to recognise a duty of good faith in the general law of contracts. Beyond the difficulty in finding a way to recognise such a concept and implement it in the general law of contract, there is also a clear reluctance from judges to delineate what good faith might mean. This is probably the most difficult point regarding good faith for a common law jurisdiction like Australia. For instance, Handley JA, albeit in the minority in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd*, stated that there were no criteria that could help determine what good faith could mean, ultimately stating that 'a

[190] Ibid [41].
[191] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 91–2.
[192] *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7, [41].
[193] See Chapter 3.II.A.1.
[194] *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15, [198].
[195] Paterson, above n 98, 142.
[196] Elisabeth Peden, 'When Common Law Trumps Equity: The Rise of Good Faith and Reasonableness and the Demise of Unconscionability' (2005) 21 *Journal of Contract Law* 226. See, eg, *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289.

promise to negotiate in good faith is illusory'.[197] Gummow J in *Service Station Association Ltd v Berg Bennet & Associates Pty Ltd* stressed that recognising an implied duty of good faith and fair dealing requires a 'leap of faith',[198] as it would restrict contractual freedom much further than equity currently does, as discussed above.

In academic scholarship in Australia and beyond, a similar sentiment is expressed when the topic of good faith in contract law is mentioned. For instance, good faith has been presented as an elusive idea, taking different meanings and emphases in different contexts.[199] Teubner famously describes good faith as a legal irritant, whose implementation in English law through EU directives would start a domino effect in contract law, that would 'irritate British legal culture considerably'[200] and also 'trigger deep, long-term changes from highly formal rule-focused decision-making in contract law towards a more discretionary principle-based judicial reasoning'.[201] Michael Bridge also highlighted the possible links between morality and good faith and the impact this might have in Canadian and US contract law.[202]

This uneasy feeling about good faith was echoed in the submissions made to the discussion paper on a possible reform of contract law in 2012. The submission by the University of Sydney made it clear that good faith could generate uncertainty.[203] In a similar vein, Philip H Clarke and Julie N Clarke were 'unpersuaded that a doctrine of good faith should be introduced into Australian law'.[204] Yet, in spite of these examples, some judges have been able to relate good faith to an 'essential framework' certain enough to allow clauses to negotiate in good faith to be enforced.[205] It has led judges to refer to good faith and the lack of opportunity given to decide on it due to the lack of argument on that notion in pleadings.[206] The Hon T F Bathurst, for example, concededthat good faith could be discussed and possibly decided upon on a case-

[197] *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1, 41–2.
[198] *Service Station Association Ltd v Berg Bennet & Associates Pty Ltd* (1993) 45 FCR 84, 96.
[199] Roger Brownsword, Norma J Hird and Geraint Howells (eds), ' Good Faith in Contract: Concept and Context' in *Good Faith in Contract: Concept and Context* (Ashgate, 1999) 1, 3.
[200] Gunter Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61 *Modern Law Review* 11, 20.
[201] Ibid 21.
[202] Bridge, above n 16, 391.
[203] University of Sydney, Submission No 31 to Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law,* 20 July 2012, 2.
[204] Philip H Clarke and Julie N Clarke, Submission No 40 to Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law,* 20 July 2012, 2.
[205] *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236, 268.
[206] *Commonwealth Bank of Australia v Barker* [2014] HCA 32, [42], [107].

by-case basis,[207] a position more in line with the common law and its incremental change approach to the development of the law.

E Conclusion to Section I

Concluding Section I, the development of equitable doctrines and remedies can be advanced as one reason for the lack of recognition of good faith in contract law in Australia. Courts and legislatures have used equitable causes of action to provide remedies to consumers who have suffered a loss.[208] Even though it would seem obvious that parties that agree to enter into a contract intend to perform their obligations under the agreement fairly,[209] the question of the recognition of good faith 'reveals the circularity that can tend towards the rejection of an implication of good faith because of the need to show necessity for business efficacy'.[210] Good faith is presented as unnecessary to ensure the business efficacy of the terms of the contracts, even though parties will intend to perform their obligation. However good faith, implied terms, and the doctrines of undue influence and unconscionability certainly rest upon the context surrounding the creation of the agreement. The common ground between these equitable doctrines and good faith is that they are used to promote contractual fairness and acknowledge the significance of fair dealing in contractual dealings. The common law equivalent of good faith in consumer law is the development of doctrines to prohibit unfair behaviour such as the tort of deceit, unconscionability, misleading and deceptive conduct and estoppel.[211]

[207] Tom Bathurst, Submission No 55 to Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law,* 20 July 2012, 13.
[208] See above I.A.
[209] James Allsop, 'Good Faith and Australian Contract Law: A Practical Issue and a Question of Theory and Principle' (2011) 85 *Australian Law Journal* 341, 357.
[210] Ibid, referring to *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 261–3.
[211] Carter and Furmston, 'Good Faith Part II', above n 3, 95.

II. THE LEGITIMACY OF EU CONTRACT LAW AS A CHALLENGE TO INTEGRATING GOOD FAITH

In the EU, the recognition of good faith in contract law is part of a broader debate about the ability of EU institutions to regulate contract law. The legitimacy of the contract law program and the development of European values are at the core of the issue of recognising good faith as a principle of contract law in the same way as it is presented in EU academic works.

A The challenge of defining European private law

Before analysing EU contract law, it is important to examine the concept of a European private law, the existence of which is in itself a source of controversy. The main question is: is it reality or fantasy? Arguments for the former include the fact that the presence of a *ius commune* in continental Europe has been the foundation of a new movement towards the creation of a European contract law. The concept of a so-called *novus ius commune europeaum*[212] dates back centuries.[213] Following the establishment of nations, the concept lost its appeal until the late twentieth century. Today, European private law is 'in the process of reacquiring a genuinely European character'[214] and 'we cannot stop or wish away the re-emergence of European … private law'.[215]

The adjective 'private' is commonly used because this set of legal rules affects the individual[216] and focuses on horizontal relations between parties.[217] It differentiates itself from public law which traditionally includes constitutional, administrative and public contract law.[218]

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[212] Nikolas Roos, 'NICE Dreams and Realities of European Private Law' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing, 2004) 197.
[213] See the discussion of common values in Roman law and medieval law in Chapter 3.I.A.5.
[214] Simon Whittaker and Reinhard Zimmermann, 'Good Faith in European Contract Law: Surveying the Legal Landscape' in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge, 2000) 7, 8.
[215] Ibid 11; see also James Gordley and Arthur T Von Mehren, *An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials* (Cambridge University Press, 2006); Thomas Kadner Graziano, *Comparative Contract Law: Cases, Materials and Exercises* (Palgrave McMillan, 2009).
[216] Guillaume Busseuil, *Contribution à L'étude de la Notion de Contrat en Droit Privé Européen* (LGDJ, 2008) 28; H Gaudemet-Tallon, 'Droit privé et droit communautaire: quelques réflexions' (2000) 473 *Revue Du Marché Commun et de L'union Européenne* 228, 229.
[217] Lucinda Miller, *The Emergence of EU Contract Law: Exploring Europeanization* (Oxford University Press, 2011) 16.
[218] Busseuil, above n 216, 26.

The adjective 'European' is justified by the sources of this particular topic. These sources are the national laws of the member states, international private law, transnational law and most importantly the body of legislation from European institutions regulating contract law, the so-called *acquis communautaire* of contract law.[219]

The concept of a private European *ius commune* is a source of controversy as some argue that there is no European culture[220] that would cement such a *ius commune*, making European private law a fantasy. Some consider that a European *ius commune* cannot exist due to the great differences between member states on the definition of a contract. Legrand is among those who reject the existence of a *ius commune*.[221] Beyond particular examples, the main point of contention relates to the existence of a Euro-culture.[222]

B The challenge of the legitimacy of European contract law regulation

EU laws are composed of a particular body of legislation which comprises directives, legislative instruments that give member states flexibility within which they can implement the provisions of the directive and adapt it to their domestic context. The directives cover particular situations rather than contract law as a whole: from commercial agency and unfair contract terms, to distance contracts and package travel arrangements.[223] This is part of the *acquis communautaire* that EU member states must implement in their domestic legislation. The *acquis communautaire* is enforceable before national courts as well as before the Court of Justice of the European Union (CJEU). More than just principles of conduct, it is an enforceable set of rules, making it the law in the regulated area.

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[219] Ibid 30; Christian Von Bar, 'Comparative Law of Obligations: Methodology and Epistemology' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing, 2004) 123, 132.

[220] See Chapter 2.I.C.2.

[221] Pierre Legrand, 'European Legal Systems are not Converging' (1996) 45 *International and Comparative Law Quarterly* 52; for a discussion of his approach see Roos, above n 212.

[222] Philippe Malinvaud, 'Réponse – hors délai – à la Commission européenne: à propos d'un Code européen des contrats' in Bénédicte Fauvarque-Cosson and Denis Mazeaud (eds), *Pensée Juridique francaise et harmonisation européenne du droit* (LGDJ, 2003) 231, 243.

[223] *Council Directive 85/577/EEC of 20 December 1985 to Protect the Consumer in Respect of Contracts Negotiated Away from Business Premises* [1985] OJ L 372/31; *Council Directive 86/653/EEC of 18 December 1986 on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents* [1986] OJ L 382/17; *Council Directive 90/314/EEC of 13 June 1990 on Package Travel, Package Holidays and Package Tours* [1990] OJ L 158/59; *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29.

However, it is important to highlight the diverse legal systems of the 28countries that form the EU and the challenges that this state of affairs entails. The multilinguistic nature drives decisions on terms used in the directives. Most of the terms must have a translation and interpretation in each language.[224] But they also have a slightly different meaning in each jurisdiction.[225] The move towards harmonisation also impacts on the cultural and legal identity of the states.[226] The success of such a trend depends on the emergence of a 'European man [sic]',[227] a European identity, with its own culture and values, such as loyalty and good faith.[228] Directives promote fairness in contractual dealings and promote rules that ensure the equilibrium between the parties is maintained.

The introduction of a supranational organisation has changed the traditional approach according to which states regulate within their own boundaries. EU legislation now alters this dynamic by imposing its European harmonised norms on member states. EU institutions are driving reforms that aim to establish and to promote the development of an internal market, where goods and services can be traded.[229] Contracts are the primary tools for such a trade to occur and EU rules and institutions have intervened to ensure legal norms do not dampen their efforts to promote the development of the internal market. The legitimacy of regulating contract law has developed in two stages: before 1993 and since the establishment of the Maastricht Treaty.[230] This has had two main effects on contract: firstly, the changes in legal requirements following implementations of directives; and secondly, the recognition of a harmonised law in relation to some contracts across the EU.[231] Ultimately, the effect has been to alter the understanding of contracts in the EU, despite a lack of an EU-wide definition of the notion of contract.

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[224] For an example of the different domestic interpretations of the word contract, see Chapter 1.I.
[225] EUROPA, the main European legal site, can be accessed in 24 languages: <http://europa.eu/>.
[226] Hugh Collins, 'European Private Law and the Cultural Identity of States' (1995) 3(2) *European Review of Private Law* 353.
[227] Ibid 357.
[228] Norbert Reich, 'European Consumer Law and its Relationship to Private Law' (1995) 3(2) *European Review of Private Law* 285.
[229] The internal market is defined in Consolidated version of the *Treaty on European Union*, [2012] OJ C 326/13 (*TEU)* art 26(2) as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'. This was formerly found in *Treaty Establishing the European Community*, opened for signature 7 February 1992, [1992] OJ C 224/6 (entered into force 1 November 1993) ('*EC*') art 14.
[230] *Treaty on European Union*, opened for signature 7 February 1992, [2009] OJ C 115/13 (entered into force 1 November 1993).
[231] See also Chapter 5.I.B.1.

1 The European institutions

Article 13 of the *Treaty on European Union* identifies seven principal institutions: the European Parliament, the European Council, the European Commission, the Court of Justice of the European Union (CJEU), the European Central Bank and the Court of Auditors. For the purposes of this thesis, attention will be brought to the main institutions involved with the regulation of contract law: the Council, the Commission, the Parliament and the CJEU. While the language used may be similar to the names of organisations in national systems, European institutions share competences, making it 'impossible to describe one as the sole legislator, or the sole executive'.[232] The institutions 'shall practice mutual sincere cooperation'.[233]

The Commission is the main legislative body. According to art 17 of the *Treaty on European Union*, the three main three missions of the Commission are: promoting the general interests of the Union, ensuring the application of the treaties and being the guardian of the European Union. Article 17 lays out that 'the Commission shall promote the general interest of the Union and take appropriate initiatives to that end'. As a consequence, making legislative proposals is the prerogative of the Commission.[234] The Commission can also provide consultation documents, either white papers, green papers or communications, to propose law reform.[235]

The Council is made up of a representative of each member state.[236] This institution, along with the Parliament, is in charge of exercising legislative and budgetary functions.[237] Due to its members, it represents the national interests of the different member states. This is to be differentiated from the Parliament.

The Parliament is made up of elected members that are independent from their national origin. Members are grouped according to their political origin. Over time, this institution has gained

[232] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, 6th ed, 2015) 30.
[233] *Consolidated Version of the Treaty on European Union* [2012] OJ C 326/13, art 13(2) ('*TEU*').
[234] Ibid art 17(2), but not the exclusive competence of the Commission: see exception at *Consolidated Version of the Treaty on the Functioning of the European Union* [2012] OJ C 326/47, art 76 ('*TFEU*').
[235] *EU* Protocol (No 1) on the Role of National Parliaments in the European Union art 1.
[236] TEU art 16(2).
[237] TEU art 16(1).

increased legislative power. Since the Lisbon Treaty, the Parliament can be involved in the making of EU laws through two avenues.[238] Firstly, according to the *FEU* art 225, the Parliament can make an informal proposal to legislate if the institution considers that 'an Union Act is required for the purpose of implementing the Treaties'. Secondly, the Parliament is involved once the Commission has proposed legislation. This can follow the Ordinary Legislative Procedure.[239] Under this procedure, both the Council and the Parliament act as co-legislators.[240] The Parliament can also exercise its powers through the Consent Procedure. Under this procedure, this institution can reject or propose amendments to some legislative provisions, although such action does not allow the institution to add provisions.[241] Finally, the Parliament can be consulted in certain cases.[242] However, in this last instance, the role of the Parliament is limited to a supervisory role.[243]

The CJEU is made up of the Court of Justice, the General Court and specialised courts.[244] It is in charge of judicial matters.[245] There are three functions and powers given to the Court: ruling on actions brought by member states, institutions or a person; ruling in other cases provided for in the treaties; and giving preliminary rulings.[246] One of the most important jurisdictions of the CJEU in relation to good faith in European contract law is its ability to give preliminary rulings concerning the interpretation of directives and regulations.[247]

2. **Before 1993: regulating contract law as an implicit prerogative**

The foundation of the EU resides in the establishment and flourishing of an internal market, cross-border exchanges and facilitation of the freedom of exchange of goods and the provision of services, and the freedom of establishment.[248] The achievement of the internal market is dependent on the harmonisation of the laws of the member states and the respect for the four fundamental European freedoms. The freedom of movement of persons applies to activities

[238] Robert Schütze, *European Union Law* (Cambridge University Press, 2015) 165.
[239] *TFEU* arts 257, 289(1).
[240] See Schütze, above n 238, 244 for further information on the old co-decision procedure.
[241] *TFEU* art 19.
[242] Ibid art 22(1).
[243] Schütze, above n 238, 164.
[244] *TFEU* art 19(1).
[245] *TEU* art 19(3).
[246] Ibid art 16(3).
[247] Ibid art 267 (formerly *TEC* art 234).
[248] *TFEU* Title II, IV.

between private parties.[249] The freedom of movement of goods is laid out in *TFEU* arts 34–36 (formerly *TEC* arts 28–30). The Court has drawn the contours of this freedom; hidden defects[250] and precontractual duties to inform (also known as *culpa in contrahendo*)[251] do not fall under this European freedom and remain part of the national competence of member states' legislative bodies.

Originally, there was no explicit competence to legislate on contract law. The only indirect influence of the treaties on contract law is found in what is now the *Treaty on the Functioning of the EU* (*TFEU*): 'any agreement that prevents, restricts or distorts competition in the internal market is automatically void'.[252] Yet, the diversity of legal systems and legal rules and the lack of information given to consumers meant that cross-border trade was not flourishing as expected. Even though 'the market already exists and copes outstandingly well with the diversity of laws',[253] EU institutions considered that a harmonised approach across the member states was necessary. To justify their intervention, EU institutions used the Treaty of Rome in an innovative way.

To circumvent the lack of explicit competence to legislate for contract law and in order to intervene in some contractual matters, European institutions argued that consumer protection impacts on cross-border trade, and that enhancing such protection would facilitate the development of the internal market.[254] In order to provide such protection, the institutions started using the provisions relating to the internal market program. Article 115 of the *TFEU* (formerly *TEC* art 94) states that the Council acts unanimously on laws that affect the establishment or functioning of the internal market, through regulation of the member states. This provision was the basis for some directives such as the directive on misleading and comparative advertising,[255] and the directive on contracts away from the business premises.[256] Article 114 states that the European Parliament and the Council shall adopt 'measures for the approximation of the provisions laid down by law in member states which have as their object

[249] *URBSFA v Bosman* (C-415/93) [1995] CCR I-4921.
[250] *Alsthom Atlantique* (C-339/89) [1991] ECR I-00107.
[251] *CMCMotorradcenter* (C-93/92) [1993] ECR I-05009.
[252] *TFEU* art 101(2) (formerly *TEC* art 81(2)).
[253] Malinvaud, above n 222, 231; See also Graziano, above n 215, 463.
[254] From very early on: *Commission v Germany* (C-178/84) [1987] ECR 1227.
[255] *Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 Concerning Misleading and Comparative Advertising* (codified version) [2006] OJ L 376/21.
[256] *Council Directive 85/577/EEC of 20 December 1985 to Protect the Consumer in Respect of Contracts Negotiated Away From Business Premises* [1985] OJ L 372/3.

the establishment or functioning of the internal market'. This provision has become 'the cornerstone'[257] of the contract law program in the EU and the mechanism to promote fairness in contract law within the EU.[258]

3. Since Maastricht: regulating contract law as a shared competence

i. Role and competence of the institutions

The doctrine of subsidiarity was introduced by the Maastricht Treaty.[259] This stipulates the competences conferred by the member states upon European institutions. 'The objective [was] to share sovereignty on certain issues, not to relinquish sovereignty to a new super-state.'[260] According to the subsidiarity principle, the community shall not go beyond what is necessary to achieve the objectives of the treaty. Three main ideas follow from this principle: the community (now Union) only takes action when the member states cannot successfully achieve the objectives; the community can take action due to its larger scale when compared to its member states individually; if the community takes action, it is limited to what is necessary to achieve the objectives.[261] The institutions are promoting the establishment of a uniform set of rules that would regulate cross-border trade within the internal market. By doing this, they are challenging the boundaries of the subsidiarity principle. This also creates more tension between them and the member states by pushing back their sovereignty on private law.

The European institutions only have competence to legislate on matters laid out in *TFEU* arts 3 and 4. The Union shares competence with the member states in areas such as consumer protection and the internal market.[262] Since it is not an exclusive competence, it has had to deal with member states' concerns regarding broadening EU regulation.[263] This reflects the member

[257] Miller, above n 217, 46.
[258] See Chapter 5.I.A.
[259] *TEU* art 5.
[260] Collins, 'European Private Law', above n 226, 353.
[261] Craig and de Búrca, above n 232, 95.
[262] See *TFEU* art 4(1):'The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.'
[263] Many member states believe that contract law is a domestic matter, better regulated by national institutions: Teubner, above n 200; Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111; Pierre Legrand, 'La Comparaison Des Droits Expliquée à Mes Etudiants' in Pierre Legrand (ed), *Comparer les droits résolument* (Presses Universitaires Francaises, 2009) 209–44.

states' concern about losing control over some of their core national principles in favour of a European approach. EU institutions must demonstrate the existence of certain elements to justify legislative intervention.[264] Firstly, the impediments to the internal market due to the European juridical diversity must be listed. Secondly, the economic advantages of having a common set of rules must be identified. Finally, the lack of contradiction with the proportionality and subsidiarity principles must be demonstrated.[265]

The Council represents the interests of the member states and therefore will often provide a voice for the member states to push back in domains where the EU is trying to intervene. The Commission has developed its theory of harmonised contract law in a more prudent manner than the Parliament. The Commission has used consultations, while the Parliament provided an 'ambitious vision'[266] through resolutions from as early as 1989.[267] These parliamentary actions have been vividly criticised.[268] Article 352 of the *TFEU* (formerly *TEC* art 308) allows the Council, acting unanimously and advancing the objectives of the community, to take appropriate measures. However, this cannot be used to create new competences.[269] The theory of implied competences has been advanced as a foundation too fragile and vulnerable to ensure the longevity of a European Contract Law code.[270] By circumventing the unanimity provision, the need for consensus is bypassed.[271]

The CJEU prevents the extensive use of *TFEU* art 114 (formerly T*EC* art 95):[272] 'a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms … [is not] sufficient to justify' action under this article.[273] This reasoning led to the annulment of Directive 98/43/EC relating to the advertising and

[264] Malinvaud, above n 222, 231–41.
[265] This is acknowledged in Commission, *Communication to the Council and the European Parliament on European Contract Law* [2001] 398 OJ C 255, 11.
[266] For a discussion on power shifting between the Commission and the Council, see Craig and de Búrca, above n 232, 157–9.
[267] *Resolution of 26 May 1989 on Action to Bring into Line the Private Law of the Member States* [1989] OJ C 158, 400.
[268] See, eg, Bénédicte Fauvarque-Cosson and Denis Mazeaud (eds), *Pensée Juridique francaise et harmonisation europeenne du droit* (LGDJ, 2003).
[269] See Jurgen Basedow, 'Codification in Private Law in the EU: The Making of a Hybrid' in Graziano, above n 215, 459.
[270] Malinvaud, above n 222, 237.
[271] Stephen Grundmann, 'Costs and Benefits of an Optional European Sales Law (CESL)' (2013) 50 *Common Market Law Review* 225, 242.
[272] Malinvaud, above n 222, 237.
[273] *Germany v Parliament and Council (Tobacco Advertising)* (C-376/98) [2000] ECR I-8419, [84].

sponsorship of tobacco products.[274] As Kathleen Gutman pointed out, four points can be made here:[275] firstly, there is no 'general power to regulate the internal market';[276] secondly, obstacles to the internal market are likely to emerge;[277] thirdly, the provisions are necessary;[278] and fourthly, the distortions are 'appreciable'.[279]

In spite of this judicial control, the provisions of the TFEU have been used to justify the creative harmonisation of the field of contract law. Using art 114 as its basis, the recent proposal for a *Common European Sales Law* (CESL) represented a shift in the contract law program of the European institutions.[280] The European Commission plays a prominent role in this endeavour since it is a central institution in the development of European law.[281] Despite being prudent,[282] when compared with the role played by the Parliament,[283] it has been an important actor in the harmonisation of contract laws across member states. It has reflected on the achievement of the *acquis* and its improvement before calling for a European contract code.[284] In 2003, it proposed an action plan to harmonise EU contract law. This plan suggested the adoption of a mixed approach: 'to improve the quality of the EC acquis in the area of contract law, including the CFR; to promote the elaboration of EU wide standard contract terms and to reflect on an optional instrument'.[285] The Commission's 2004 communication[286] confirmed that plan by setting up a time frame for the adoption of a Common Frame of Reference (CFR). The draft of the CFR was published in 2008. It remains only a draft although a revised draft was published in 2009.[287] In 2011, the proposal for a CESL took precedence over the development of this

[274] The Court's controls on the use of art 114 included *Commission v Council (Titanium Dioxide)* (C-300/89) [1991] ECR I-02867; *Spain v Council* (C-350-92) [1995] ECR I-01985.
[275] Kathleen Gutman, *The Constitutional Foundations of European Contract Law: A Comparative Analysis* (Oxford University Press, 2014).
[276] *Germany v Parliament and Council (Tobacco Advertising*) (C-376/98) [2000] ECR I-8419, [83].
[277] *Spain v Council* (C-350-92) [1995] ECR I-01985, [35].
[278] *Germany v Parliament and Council (Tobacco Advertising)* (C-376/98) [2000] ECR I-8419, [100].
[279] *Commission v Council (Titanium Dioxide)* (C-300/89) [1991] ECR I-02867, [23].
[280] Martin Engel and Johanna Stark, 'The CESL as a European Brand: Paypalizing European Contact Law' in Horst Eidenmüller (ed), *Regulatory Competition in Contract Law and Dispute Resolution* (Hart, 2013) 337.
[281] Craig and de Búrca, above n 232, 64.
[282] Rémy Cabrillac, *Droit européen comparé des contrats* (LGDJ, 2102) 14.
[283] See above, II.B.1.
[284] Commission, *Communication to the Council and the European Parliament on European Contract Law* [2001] 398 OJ C 255.
[285] Commission, *Communication to the European Parliament and the Council – A More Coherent European Contract Law – An Action Plan* [2003] 68 final OJ C 63, [4].
[286] Commission, *Communication to the European Parliament and the Council, European Contract Law and the Revision of the Acquis: The Way Forward* [2004] 651 final (not published in the *Official Journal*).
[287] Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Outline Edition* (Sellier, Dissen, 2009).

instrument.

Compared to the Commission's role explained above, the Parliament originally had fewer constitutional prerogatives. Over time, the Parliament has gradually become more powerful as a European institution[288] and is today more vocal about the need for harmonisation in private law within the EU.[289] Characterised by some as ambitious,[290] the Parliament has put forward the need to harmonise contract law in the EU.[291] It considers that greater harmonisation of private law is essential to the internal market.[292] Who could provide such a contract code? Even though the powers of the European Parliament make it the best institution to provide such a contract code, its powers are limited.[293] The Commission must have the support of the European Council and the Council of Ministers.[294] This is because of the lack of legal basis for the EU to legislate on contract law as a whole.[295] The *TFEU* does not provide any explicit competence to harmonise national contract laws of the member states. This means that there is no legislative basis for an EU contract law code. As previously mentioned, art 352 provides for action by the Union if it thinks a particular action is necessary to attain one of the objectives of the treaties. However, 'Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.' Malinvaud argues that this provision could not be used to harmonise contract law across the EU member states.[296] Ultimately, it seems that the only opportunity to adopt a contract code would be if the role of the Parliament in initiating legislation develops in the future.[297]

ii. Limits and modalities

There have been cases where the tenuous link between the objective of an internal market and the drafting of a directive led to its annulment.[298] However, this leads to the question of the

[288] Craig and de Búrca, above n 232, 75.
[289] *Resolution A2-157/89* [1989] OJ C 158/400.
[290] Cabrillac, above n 282, 14.
[291] *Resolution A2-157/89* [1989] OJ C 158/400; *Resolution A3-0329/94* [1994] OJ C 204/518.
[292] *Resolution B5-228/2000.*
[293] Malinvaud, above n 222, 233.
[294] Ibid 2; *TFEU* art 169 on the need for the Parliament and the Council to adopt relevant measures for consumer protection.
[295] See TFEU arts 3–6.
[296] Malinvaud, above n 222, 237.
[297] See Chapter 7.I.A.2.
[298] *Germany v Parliament and Council* (C-376/98) [2000] ECR I-8419; *Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Relating to the Advertising and Sponsorship of Tobacco Products* [1998] OJ L 213/9; see also discussion in Miller, above n 217, 55.

legitimacy of the contract law program and its limits. Are European institutions going too far by proposing uniform proposals? Is this an excessive use of powers towards centralisation?[299] Could the *acquis* be a 'Trojan horse'?[300]

From the emergence of the consumer protection and contract law program to the latest development by the European institutions, there is a definite trend to move towards a uniform set of rules for cross-border exchanges within the internal market. Since a contract law program has developed within the constitutionalised framework, institutions have developed their own identity and are finding their place in the fulfilment of the objectives of the treaties. Alongside the development of the EU as a supranational entity, the Europeanisation of contract law has gained momentum. The Commission and the Parliament have made clear their intention to harmonise the contract laws of the member states and ultimately to enact a set of rules reflecting the contractual practices among member states.

C The challenge of moving forward: the CESL as a missed opportunity

As the development of contract law gained momentum in the EU, so did the part to be played by good faith. Originally a provision in directives, it became a European principle of contract law, then it was elevated to the rank of a fundamental principle in the latest innovation of EU institutions, the CESL.[301]

The EU has come a long way from its original diverse set of national legislation. Harmonisation via directives has decreased differences and academic projects have shown that the differences between nations are merely variations on a common theme, rather than dichotomies. The 2011 proposal for a CESL was the latest legislative attempt by the European institutions to develop a unified contract law for the internal market. It took inspiration from the *Principles of European Contract Law* (PECL)[302] and was seen as an alternative to the *Convention on the International Sale of Goods* (CISG)[303] for cross-border transactions within the internal market.

[299] Collins, 'European Private Law', above n 226.
[300] Diana Wallis, 'Is It a Code?' [2006] *ZEuP* 513, reproduced in Graziano, above n 215, 483.
[301] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law [2011] 635 final 2011/0284, s 1 'General Principles', art 2.
[302] Cabrillac,above n 282, 17.
[303] Fabrizio Caffagi, 'From a Status to a Transaction Based Approach? Institutional Design in European Contract Law' (2013) 50 *Common Market Law Review* 311, 311.

This optional regulation would be added to the already harmonised models of EU member states. Parties would have had to make the CESL applicable to their relationship before the CESL rules could have been enforced. The CESL would merely have been an alternative contract law regime within each national legal system. Some have compared the CESL to standard form contracts,[304] since the rules would only apply if the choice of law clause referred to them.[305]

This proposal was the first official legislative step towards what could have been identified as a European civil code, although it was never expressly described as such. Such an instrument was identified as the most favoured option for small and medium businesses, when asked about a uniform set of European contract law rules.[306] The goal of the optional regulation was to advance cross-border trade between EU member states.[307] The aim of the CESL was to be faithful to the objectives of the treaties: to encourage consumers to buy across the border. It was also to avoid consumers exiting the market while ultimately forcing suppliers to change their behaviour.[308] The regulation was split into two parts: the core of the regulation dealt with procedural issues while the annex contained the actual CESL. The rules were to be interpreted autonomously. The CESL generated debate,[309] but it undeniably constituted a step forward towards a general set of rules in European contract law; rules which could have been the same no matter where in the EU the parties were located.

Freedom to contract, good faith and fair dealing and cooperation were the general principles of the CESL,[310] following the proposal by the Société de législation comparée. The proposed regulation for a CESL defined a contract as 'an agreement intended to give rise to obligations or other legal effects'.[311] The CESL stipulated that parties must perform according to good

[304] Hugh Collins, 'Regulatory Competition in International Trade: Transnational Regulation through Standard Forms Contracts' in Horst Eidenmüller (ed), *Regulatory Competition in Contract Law and Dispute Resolution* (Hart, 2013) 121, 138; see also Thomas Ackerman, 'Public Supply of Optional Standardised Consumer Contracts: A Rationale for the Common European Sales Law' (2013) 50 *Common Market Law Review* 11.

[305] This analogy has its limits because every standard form contract would have some basic rules on offer and acceptance; nor would there be reference to mandatory rules: Collins, 'Regulatory Competition', above n 304, 138.

[306] Stefan Vogenauer and Stephen Weatherill, 'The European Community's Competence for a Comprehensive Harmonisation of Contract Law: An Empirical Analysis' (2005) 30 *European Law Review* 821.

[307] Memorandum, Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM/2011/0635 final – 2011/0284 (11 October 2011).

[308] Reich, above n 228, 286.

[309] See, eg, the special issue (2013) 50 *Common Market Law Review.*

[310] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM/2011/0635 final – 2011/0284 (11 October 2011) arts 1–3.

[311] Ibid art 2.

faith and fair dealing. The duty was to become mandatory and might have precluded a party from relying on a right, remedy or defence.[312] The expression 'good faith and fair dealing' was defined in accordance with the proposition in the DCFR.[313] Good faith and fair dealing were to be appraised depending on the level of expertise of the parties, leading to possible divergent interpretations depending on whether the dispute concerned only businesses or also consumers.[314] The uncertainty about the interpretation and application of this core principle created some debate about its inclusion in the text of the CESL.[315]

If the regulation had become law, how would this principle have been applied? The European judge is the ultimate interpreter.[316] The CJEU could have decided by analogy.[317] On the one hand, and since the concept of good faith is context dependant, the CJEU may have been reluctant to provide too much guidance in this field, leaving much of the interpretation to the national courts.[318] On the other hand, the European court could have used its interpretative powers to provide guidance regarding the application of the concept of good faith and to embrace more than what is prescribed by the CESL's wording,[319] providing truly harmonised European good faith principles in relation to sales contracts within the EU. But this was not meant to be.

The CESL was amended and ultimately approved by the Parliament on 26 February 2014 with a strong majority.[320] Amendments followed the report from the Legal Affairs Committee, JURI, on the need to restrict the application of the CESL to online commerce. Following the co-decision procedure, the Council of Ministers needed to approve the proposal.[321] On 16

[312] Ibid art 2.
[313] Ibid art 2(b).
[314] Richard A Epstein, 'Harmonization, Preferences, and the Calculus of Consent in Commercial and Other Law' (2013) 50 *Common Market Law Review* 207, 209.
[315] Simon Whittaker, 'Identifying the Legal Costs of Operation of the Common European Sales Law' (2013) 50 *Common Market Law Review* 85, 94.
[316] Chantal Mak, 'Unweaving the CESL: Legal-Economic Reason and Institutional Imagination in European Contract Law' (2013) 50 *Common Market Law Review* 277, 293.
[317] Based on *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Ludger Hofstetter and Ulrike Hofstetter* (C-237/02) [2004] ECR I-3403; Whittaker, above n 315, 105.
[318] *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Ludger Hofstetter and Ulrike Hofstetter* (C-237/02) [2004] ECR I-3403.
[319] An example would be estoppel, covered by good faith in Germany as well as in the DCFR. See the suggestion by Whittaker, above n 315, 106.
[320] 416 votes for, 159 against and 65 abstentions: European Commission, 'Optional European Sales Law Receives Strong Backing by the European Parliament', Memorandum, 26 February 2014 <http://europa.eu/rapid/press-release_MEMO-14-137_en.htm>.
[321] *TFEU* art 294 (formerly *TEC* art 251).

December 2014, the proposal was withdrawn by the Commission. In its communication,[322] the Commission focused its actions on jobs, growth and investment, and e-commerce policy. The CESL would become part of a 'modified proposal in order to fully unleash the potential of ecommerce in the Digital Single Market'.[323]This is yet to happen.

This highlights the difficulty of interpreting a concept, like good faith. The JURI report recommended that the principle of good faith be amended to provide guidance on the way parties should cooperate.[324] It recommended that the definition provided in the original proposal[325] be deleted and instead added to art 2(fe) as: '"good faith and fair dealing" means a standard of conduct characterised by honesty and openness with regard to the other party to the transaction or relationship in question and excludes an intention the only purpose of which is to harm'.

This definition would be restricted to business-to-business relations.[326] It would be used as a shield and not as a sword and would only grant damages in specific cases.[327] These latest developments represent a missed opportunity for EU institutions to move towards a unified contract law. The CESL represented an important step towards such progress by making good faith a central principle.[328] A modified proposal could also focus on the provisions laid out in the statement of the European Law Institute,[329] an institution whose goal is to foster research in the field of European legal developments. This statement does not drastically change the concept of good faith, only changing where the definition of good faith is to be located, and focuses on other aspects of the proposal,[330] the ultimate aim being to 'maximise the CESL's

[322] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Commission Work Programme 2015 A New Start* 16.12.2014 COM(2014) 910 final.
[323] Ibid annex 12.
[324] Explanatory Memorandum, *Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law 18.2.2013*, 110, amendment 31 <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/927/927290/927290en.pdf>.
[325] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM/2011/0635 final – 2011/0284 (11 October 2011) art 1(2)(b).
[326] It would be associated with the concept of abuse of rights. See Chapter 1.I.A.2.
[327] Explanatory Memorandum, *Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law 18.2.2013*, 110, amendment 31 <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/927/927290/927290en.pdf>.
[328] This is also discussed in Yehuda Adar and Pietro Sirena, 'Principles and Rules in the Emerging European Contract Law: From the PECL to the CESL, and Beyond' (2013) 9(1) *European Review of Contract Law* 1.
[329] Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law COM (2011) 635 final 1st Supplement: Response to the EP Legislative Resolution of 26 February 2014.
[330] Including making a binding contract, obligations of the parties and remedies. Ibid 34 ff.

utility and use in practice'.[331]

D Conclusion to Section II

Section II has shown that the question of the foundation of a principle of good faith in contract law leads to different challenges in Australia and the EU. Section I demonstrated that in Australia judicial decisions are struggling with a principle whose modalities of application are yet to be drawn. However, although the highest court is yet to take a clear position on the issue, the lower courts have slowly moved towards the integration of good faith into Australian contract law.[332] Section II shows that the debate surrounding good faith in the EU is different. The challenge to the integration of good faith is the question of the legitimacy of the contract law program led by EU institutions. European institutions have actively contributed to the Europeanisation of contract law where good faith is set to play a vital role. Since 1993 and within the limits imposed by the doctrines of subsidiarity and proportionality, both the Parliament and the Commission have found new means to regulate contract law, harmonise European private law, and promote good faith in contract law. With the proposal of a CESL, the EU has demonstrated its will to lead member states towards a European contract law code.[333] With the withdrawal of the CESL, EU institutions have taken a step backwards in the harmonisation of European contract law and the recognition of common European values.

III. CHAPTER CONCLUSION

In conclusion, Australia and the EU aim to promote trade and create an environment where trade thrives. In order to achieve these objectives, regulation of contract law in Australia and consumer protection in the EU is paramount. The need to ensure fairness in contractual dealings has led to the recognition of principles of cooperation and reasonableness. While in Australia it is the cooperation between the parties that is at the centre of the debate, it is a different cooperation challenge in the EU: the cooperation between EU institutions and member states and the recognition of the legitimate power of the EU to regulate the internal market. Both

[331] Ibid 7.
[332] *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49; *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.
[333] Hugh Collins, 'Why Europe Needs a Civil Code' (2013) 21(4) *European Review of Private Law* 907.

jurisdictions face challenges but also demonstrate that there are foundations for a principle of good faith in general contract law. However, the modalities of the application of such a principle are still to be determined. In Australia, a clear and concrete path for the integration of good faith in contractual dealings is yet to appear, with discussions of the implication of terms and construction of contracts leading ultimately to confusion. In the EU, the only clear use of good faith in general contract law is to be found in academic compilations and works. The withdrawal of the CESL shows the lack of momentum to enforce such a duty at a more general level in contract law. Justice Priestly stated that

> people generally, including judges and other lawyers, from all strands of the community, have grown used to the Courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations.[334]

But this has not been proven in fact, neither in Australia where the comment was made, nor in the EU where the lack of clear competence of EU institutions to regulate on contractual matters has meant the only intervention they can have is on specific matters and not the general law of contract.

[334] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 268.

Chapter 5
Good faith as a tool to protect: specific applications

> Tell me how you contract, I'll tell you who you are.[1]

This chapter explores the uses of good faith as a protectionary tool. The duty to act in good faith is seen as a means of protecting consumers and small businesses. Though there is no general recognition of good faith in the law of contract, that has not prevented the application of the doctrine in certain situations. This chapter will show that the relationship between good faith and the determination of the parties to be protected is approached differently in Australia and the EU but that similar challenges surface in both jurisdictions. The road to the recognition of good faith as a general contract law principle may be a long one, but applications of the doctrine in certain categories of contract have allowed relationships to be recalibrated to ensure unequal bargaining powers are not used in an unfair manner.

Section I will analyse the application of the doctrine of good faith in the context of consumer protection in the EU. Section II draws attention to the use of good faith to ensure small business protection in Australia as well as new initiatives by the EU in this area. Both sections demonstrate the evolving nature of the protection of vulnerable persons by good faith in contract law.

[1] Daniel Mainguy, 'Le contractant, Personne De Bonne Foi?' in Christophe Albigès and Eric Négron (eds), *La réforme du droit des contrats et des obligations* (Publications de la faculté de droit et des sciences politiques de Montpellier, 2015) 83, 88.

I. GOOD FAITH AND THE PROTECTION OF CONSUMERS: THE EXAMPLE OF THE EU

A consumer in the EU, according to the 2011 *Consumer Rights Directive*, is a 'natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession'.[2] In Australia, a consumer is a person who has paid less than $40,000 for the goods or services or who purchases goods of a kind ordinarily acquired for personal, domestic or household use or consumption.[3] It can be said that the concept of the 'consumer' is understood similarly in both Australia and the EU.[4] Despite this similarity, the principles conveyed by the approach to consumer protection are different. The discussion below will focus on the role played by good faith as a tool to protect consumers in the EU.

Section A will determine why consumer protection is considered essential to the successful development of the EU market. Section B will explore the use of good faith in consumer protection in the EU and the emergence of a truly European norm in consumer protection.

A Consumer protection, paramount to the success of the internal market

The protection of the consumer has become the gateway to the harmonisation of EU contract laws. This is because, as we have seen in Chapter 4, EU institutions cannot regulate contract law, which remains the prerogative of member states. Seen in this light, consumer protection is paramount to the development of the European contract law program. Beyond the economic justification of the consumer protection policy, the consumer has become instrumental in facilitating the internal market.[5] Consumer vulnerability and the need to protect free choice in

[2] *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA Relevance* [2011] OJ L 304/64, art 2(1). The same definition appears in *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29, art 2.

[3] *Australian Consumer Law, Competition and Consumer Act 2010* (Cth) sch 2 s 3.

[4] 'A person is taken to have [contracted] as a consumer if … the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption': ibid. '"Consumer" means any natural person who … [contracts] for purposes which are outside his trade, business, craft or profession'**:** *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29, art 2.

[5] See Lucinda Miller, *The Emergence of EU Contract Law: Exploring Europeanization* (Oxford University Press,

deciding to enter into a transaction or perform under a fair agreement has guided the development of European legislation.[6] In the application of the subsidiarity principle,[7] *TFEU* art 4 stipulates that EU institutions share competence with the member states to legislate for consumer protection.[8] Article 12 (formerly *TEC* art 153(2)) states that 'consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities'. The protection of consumers has two dimensions. It follows the principle of consumer choice, which includes the rights to information and access to markets;[9] it also involves legal protection of the consumer's safety, health and access to the law.[10] Providing consumer protection will ultimately increase the quantity of cross-border transactions within the internal market. It is therefore seen as necessary to reduce impediments for any economic actor, including consumers, to facilitate establishment and functioning of internal trade.[11]

A 2001 Green Paper on EU consumer protection discussed the need for action and the future direction of European consumer protection.[12] It posed the question whether the most appropriate approach is the elaboration of further specific directives, or an overall approach within a framework directive. Following the Green Paper and in order to provide some statistics for the discussion, a 2002 survey showed that 56% of European consumers considered their rights better protected in their own member state,[13] and were consequently reluctant to engage in cross-border trade. Consumers expressed their reservations about engaging in cross-border

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2011) 49; see also *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees* [1999] OJ L 171/12, Preamble.

[6] Examples include *Council Directive 90/314/EEC of 13 June 1990 on Package Travel, Package Holidays and Package Tours* [1990] OJ L 158/59; *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Text with EEA Relevance)* [2005] OJ L 149/22.

[7] See Chapter 4.II.B.3.

[8] *Consolidated Version of the Treaty on the Functioning of the European Union* [2012] OJ C 326/47, art 4(2). The article also lists the following areas of shared competence: 'internal market; social policy, for the aspects defined in this Treaty; economic, social and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; environment; … transport; trans-European networks; energy; area of freedom, security and justice; common safety concerns in public health matters, for the aspects defined in this Treaty'.

[9] Norbert Reich, 'European Consumer Law and its Relationship to Private Law' (1995) 3(2) *European Review of Private Law* 285, 290.

[10] Ibid; Chapter 4.II.B.3.

[11] *Communication from the Commission to the Council and the European Parliament on European Contract Law* COM/2001/0398, Executive Summary.

[12] Commission, *Green Paper on European Union Consumer Protection* [2001] 531 final.

[13] See Stefan Vogenauer and Stephen Weatherill, 'The EC's Competence for a Comprehensive Harmonisation of Contract Law' (2005) 30(6) *European Law Review* 821, reproduced in Thomas Kadner Graziano, *Comparative Contract Law: Cases, Materials and Exercises* (Palgrave McMillan, 2009) 478.

trade because of possible sales-related issues, and the apparent difficulty in bringing an action before a court in a 'foreign' state.[14] Surveyed consumers stated that harmonised consumer rights and protection when suing under national laws would provide a suitable means of redress and encourage them to buy goods and services in other member states.[15] The reliability of the study can, however, be questioned as only 15,043 consumers from the then 15 member states of a total European population of around 484 million[16] were surveyed.

Since the Maastricht Treaty in 1993,[17] the European institutions have had an explicit competence to legislate on consumer protection.[18] *TFEU* art 169 (formerly art 129a) stipulates that,

> [i]n order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

Article 169(2) provides that:

> [t]he Union shall contribute to the attainment of the objectives through: (a) measures adopted pursuant to Article 114 in the context of the completion of the internal market*;* (b) measures which support, supplement and monitor the policy pursued by the [member state].

The wording of art 169 relates directly to the 'completion of the internal market'. This restricts the margin of action of the European institutions, which explains why institutions continue to use *TFEU* art 114[19] more widely.[20]

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[14] Ibid.
[15] Ibid.
[16] Based on Monica Marcu, 'The EU-27 Population Continues to Grow' (Eurostat 31/2009, European Commission, 2009) <http://edz.bib.uni-mannheim.de/www-edz/pdf/eurostat/09/KS-QA-09-031-EN.PDF>.
[17] *Treaty on European Union*, opened for signature 7 February 1992, [2009] OJ C 115/13 (entered into force 1 November 1993); see Chapter 4.II.B.3.
[18] Consumer policy is an explicit competence now: see *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1 November 1993) art 169 (formerly art 129a) ('*TFEU*').
[19] See Chapter 4.II.B.
[20] Miller, above n 5, 46.

The justification for a consumer protection policy comes from the idea that consumer welfare needs to be optimised if the markets are integrated. The rationale is that many rules could hinder the establishment and flourishing of the internal market within the EU. This has led to an 'economic beguiling argument'[21] that consumer protection is needed in order to encourage further cross-border trade between the member states. The *Doorstep Directive*[22] is an example of this reasoning. Rather than regulating the substance of contract law, it is more concerned with the transparency of pre-contractual information.[23]

European contract law has developed alongside the relinquishment of national powers to European institutions in relation to consumer protection, and the development of European contract law principles. Rather than focusing on the type of transaction at stake, the equilibrium in contractual terms and the protection of some parties are essential means towards the development of the internal market. The focus of the directives has shifted towards establishing 'certain common minimal standards to protect consumers in contract law'.[24] This status-based approach relies heavily on the concepts of fairness and good faith by regulating market failures.[25] The *Unfair Terms in Consumer Contracts Directive*[26] has played a central role in the development of these values, adding to the construction of a European legal culture.

The Commission has asked whether good faith should become a general clause in European contract law.[27] Such recognition would 'prevent the emergence of the kind of problems encountered with the current consumer protection directives, due to legislation being overtaken by technological and market developments'.[28] This commentary has examined good faith in European contract law and brought it to the rank of a fundamental principle, a truly European contract law principle. However, at the present time, such a doctrine is only enforceable as a result of its presence in directives enacted by EU institutions.

[21] Ibid 47.
[22] *Council Directive 85/577/EEC of 20 December 1985 to Protect the Consumer in Respect of Contracts Negotiated Away from Business Premises* [1985] OJ L 372/31.
[23] See discussion by Miller, above n 5, 51.
[24] Reich, above n 9, 289.
[25] Ibid.
[26] *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29.
[27] Commission, *Green Paper on the Review of the Consumer Acquis* [2006] 744 final OJ C 17. See also Chapter 1.I.A.1 for the German understanding of 'general clause'.
[28] Commission, *Green Paper on the Review of the Consumer Acquis* [2006] 744 final OJ C 17.

B A cautious start: the directives and role of the CJEU

1 Directives in European law

By identifying consumer protection as an area where intervention was needed to regulate market failures and promote cross-border trade, EU institutions have started harmonising contract law. Since regulating these exchanges is considered necessary,[29] harmonisation is the first step towards the creation of a European private law. Through the application of *TFEU* art 114, directives have played a fundamental role in the harmonisation of contract law in the EU.[30] Secondary legislation has been one of the sources of the Principles of European Contract Law.[31] However, directives have been the only legal instrument used by the EU to provide consumer protection, to remove barriers to cross-border trade and to promote the establishment of an internal market.

Until recently, the directives could be implemented with 'minimal harmonisation' in order to avoid resistance from the member states. Member states could adopt higher standards than those prescribed by the directives.[32] There was room for the member states to adapt the legislation to their national context and legal culture.[33] However, this approach dampened the success of any directive and the harmonisation of contract law,[34] since variations risked confusing contractual parties.

European judges play a pivotal role in harmonisation,[35] as seen in Subsection 2 below. European courts promote a common understanding and interpretation of legal concepts throughout European legislation. This helps with the development of common thinking.[36] A

[29] Antonio Gambaro, Rodolfo Sacco and Louis Vogel, *Traité de droit comparé – Le droit de l'Occident et d'ailleurs* (LGDJ, 2011) 304.
[30] Rémy Cabrillac, *Droit européen comparé des contrats* (LGDJ, 2102) 14; Commission, *Communication to the Council and the European Parliament on European Contract Law* [2001] 398 OJ C 255, Executive Summary.
[31] Ewoud Hondius, 'The Reception of the Directive on Unfair Terms in Consumer Contracts by Member States' (1995) 3(2) *European Review of Private Law* 241; Ole Lando and Hugh Beale (eds), *Principles of European Contract Law, Parts I and II (Combined and Revised)* (Kluwer Law International, 2000).
[32] *Consolidated Version of the Treaty on the Functioning of the European Union* [2012] OJ C 326/47, art 153 (formerly art 129(a)).
[33] This is understandable since the enactment of this legislation does not follow a democratic process. Reich, above n 9, 296.
[34] Miller, above n 5, 66.
[35] Gambaro, Sacco and Vogel, above n 29, 303–5.
[36] As shown by the title of Société de Législation Comparé, Bénédicte Fauvarque-Cosson (ed), *Terminologie*

case can be presented before the CJEU because of a request for a preliminary ruling from a national court.[37] These procedures allow the directives to provide 'an effective guarantee for citizens of the enforcement of their subjective rights under community law'.[38] If a member state does not implement a directive promptly, a national court can directly apply provisions of the directive which are yet to be fully implemented in the said member state.[39] This is a demonstration of the doctrine of direct effect, where a court can apply a provision if the member state has failed to implement the directive.[40] If a member state incorrectly implements the directive, individuals also have a course of action before the national courts.[41] This mechanism ensures that, on the one hand, the application of EU law is not dependent upon the will of the member states, and on the other, that individuals can benefit from the provisions laid out in EU secondary legislation.

i. Unfair terms in consumer contracts and the protection of consumers in respect of distance contracts

Two major directives relate to the protection of consumers and include a duty to act in good faith.[42] The first is the 1997 *Directive on the Protection of Consumers in Respect of Distance Contracts*, which stipulates that a consumer must be provided with specific information before entering a distance contract.[43] This information must be provided clearly and with due regard to the principle of good faith in consumer transactions.[44] The directive does not impose a positive duty of fairness on all consumer contracts but does bring good faith into the equation.

The second is the *Unfair Terms in Consumer Contracts Directive*, which makes good faith a

Contractuelle Commune (LGDJ, 2008).

[37] Request for a preliminary ruling from the Audiencia Provincial de Álava (Spain) lodged on 5 October 2015 – *Laboral Kutxa v Esmeralda Martínez Quesada* (C-525/15) (2015/C 414/28).

[38] Reich, above n 9, 297.

[39] *Van Duyn v Home Office* (C-41/74) [1974] ECR 1337.

[40] *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* (C-152/84) [1986] ECR 1986/723.

[41] *Francovich and Bonifaci v Italy* (C-6 and 9/90) [1991] ECR I-5357.

[42] *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29; *Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts* [1997] OJ L 144/19; also present in the definition of professional diligence in *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market* [2005] OJ L 149/22.

[43] A distance contract is defined in art 2 as a 'contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded'.

[44] *Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts* [1997] OJ L 144/19, art 4(2).

basic principle to be followed in consumer contracts. The duty appears in both the preamble and the articles of the directive. Good faith means that

> particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account.[45]

Article 3 corroborates this statement by stipulating that a non-negotiated contractual term will be held unfair if there is a significant imbalance in the parties' rights. The link between the concept of good faith and the abuse of rights has been recognised at the European level with the *Unfair Terms in Consumer Contracts Directive*. The doctrine of abuse of rights is a French concept,[46] whereby

> If a party setting the standard terms deviates considerably from the default rules without giving compensation for doing so, instead of just moderately adapting the default rules to meet the particular needs of the relevant sector or business, such a deviation is presumed to be abusive.[47]

This directive places good faith at the centre of contract law and consumer protection. One party should take into consideration the other party's interests without subordinating its own interests. According to Collins, this requirement of good faith 'poses a challenge to purely self-interested rationality'[48] in that the parties must look at each other's legitimate interests.

The *Unfair Terms in Consumer Contracts Directive* has been criticised extensively for not going far enough.[49] It does not apply to all contracts, but only to non-negotiated contracts. It

[45] *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29, Preamble.
[46] See Chapter 1.I.A.2.
[47] Stefan Grundmann, 'The General Clause or Standard in EC Contract Law Directives – A Survey of Some Important Legal Measures and Aspects of EC Law' in Stefan Grundmann and Denis Mazeaud (eds), *General Clauses and Standards in European Contract Law: Comparative Law, EC Law and Contract Law Codification* (Wolters Kluwer, 2006) 141, 145.
[48] Hugh Collins, 'Good faith in European Contract Law' (1994) 14 *Oxford Journal of Legal Studies* 229, 254.
[49] Grundmann, above n 47, 145; Christian Joerges, 'The Europeanisation of Private Law as a Rationalisation Process and as a Contest of Disciplines: An Analysis of the Directive on Unfair Terms in Consumer Contracts' (1995) 3(2) *European Review of Private Law* 175; Alain Benabent, 'Clauses Abusives: le droit français et ses réactions à la directive européenne' (1995) 3(2) *European Review of Private Law* 211; Anne De Moor,

only applies to consumer contracts.[50] Difficulties of implementation have surfaced with the appearance of good faith in English contract law.[51] Since the directive must be implemented in domestic law, England had to bring the concept of good faith into its domestic law,[52] even though it is otherwise not only unfamiliar with the concept but also reluctant to integrate it into its contract law.[53] Member states which already provide more stringent measures did not have to implement parts of the directive.[54] Although this puts the onus on European institutions to provide a high level of consumer protection, it does not iron out the differences between member states. Furthermore, since good faith is not defined in these instruments, it is up to national courts to interpret them. The member states' reluctance to transplant the directive into their national laws came at a cost, with the Commission 'enforcing the directive'.[55]

France ratified the *Unfair Terms in Consumer Contracts Directive* by the *Law of 1 February 1995*,[56] by adding provisions in the *Code de la Consommation* [Consumer Code],[57] and the *Council Directive on Commercial Agents*, by creating new articles in the *Code de Commerce* [Commercial Code] with the *Law of 25 June 1991*. Interestingly, none of the implemented provisions refer to *bonne foi*. Since art 1134, now 1104, of the French Civil Code stipulates that *bonne foi* applies to every contractual situation, there seems to be no need to repeat the rule in other provisions. For instance, the provisions relating to commercial agents do not refer to *bonne foi* but instead to an obligation of loyalty and a duty to inform.[58] This example highlights the 'umbrella' function of *bonne foi* in France, and the Civil Code. It demonstrates

'Common and Civil Law Conceptions of Contract and a European Law of Contract: The Case of the Directive on Unfair Terms in Consumer Contracts' (1995) 3(2) *European Review of Private Law* 257; Hondius, above n 31.

[50] *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29, Preamble.

[51] Stephen Weatherill, 'Prospects for the Development of European Private Law Through 'Europeanisation' in the European Court – The Case of the Directive on Unfair Terms in Consumer Contracts' (1995) 3(2) *European Review of Private Law* 307, 322.

[52] See Chapter 1.I.A.3.

[53] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11.

[54] See below.

[55] *Commission v Netherlands* (C-144/99) [2001] ECR 2001/35412. See also other cases discussed in Hans-W Micklitz and Norbert Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51(3) *Common Market Law Review* 771, 775.

[56] Loi no 95-96 du 1er Février 1995 Concernant les Clauses Abusives et la Présentation des Contrats et Régissant Diverses Activités d'Ordre Economique et Commercial JORF n°28 du 2 Février 1995, 1755.

[57] Most consumer protection–related directives are implemented in the Consumer Code in France as is demonstrated by the transposition of the EU *Unfair Commercial Practices Directive* into articles L 120-1, L 121-1 to L 121-7 and L 122-11 to L 122-15 of the Consumer Code (as amended by Act No 2008-3 of 3 January 2008 and Act No 2008-776 of 4 August 2008).

[58] *Code de Commerce* [Commercial Code] (France) art L134-4.

the advantages of flexible EU legislation. This manner of implementation allows EU member states to take their own circumstances and legal culture into consideration.[59]

ii. Towards full harmonisation and the impact on good faith

The success of the contract law program resides in the innovation and flexibility mechanisms that allow national law and EU law[60] to coexist with the aim of simplifying the protection of consumers,[61] while also providing a high level of protection.[62] In 1999, the *Consumer Sales Directive*[63] set out new rights and remedies for the consumer. The purpose of the directive was to provide uniform minimum rules governing the sale of consumer goods.[64] This directive is an example of the integration of international elements into EU law. Indeed the directive used the CISG to pursue 'conformity with the contract'.[65] The directive has led to profound changes in member states' laws.[66] In 2011, the *Consumer Rights Directive*[67] merged two previous directives[68] into one framework directive. This covers off-premises contracts, which are 'defined as a contract concluded with the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader';[69] distance contracts, which are defined as contracts 'concluded between the trader and the consumer under an organised distance sales or service provision scheme, with the exclusive use of one or more means of distance communication';[70] and on-premise contracts, defined as contracts made on the business premises.[71] It does not apply to certain contracts such as rental contracts and

[59] For a discussion on culture see Chapter 2.I.C.2.
[60] Miller, above n 5, 71.
[61] For a history of the harmonisation of European consumer law, see Jerome Huet, 'L'harmonisation du droit de la consommation' (Paper presented at the 7th Colloque international de la CEDECE, Paris, 8–9 October 1992).
[62] *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1 November 1993) art 114(2).
[63] *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees* [1999] OJ L 171/12.
[64] *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) art 1.
[65] See Michael Joachim Bonell, 'The CISG, European Contract Law and the Development of a World Contract Law' (2008) 56 *American Journal of Comparative Law* 1, 7.
[66] For a discussion, see Miller, above n 5, 71.
[67] *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA Relevance* [2011] OJ L 304/64, recital 21.
[68] In relation to contracts negotiated away from businesses and to distance contracts.
[69] *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA Relevance* [2011] OJ L 304/64, recital 21.
[70] Ibid recital 20.
[71] Ibid recital 22.

building contracts.[72] Member states started applying the provisions on 13 June 2014.

The *Consumer Sales Directive* together with the *Consumer Rights Directive* and the *Unfair Terms in Consumer Contracts Directive* provide foundations for a possible future EU contract law.[73] One important foundation is the duty to disclose certain information. Indeed, both directives clearly emphasise that the consumer must be well informed and highly protected throughout the negotiation and performance of the contract.[74] Furthermore, by recently shifting its strategy, the Commission[75] is now proposing full harmonisation instead of minimal harmonisation.[76] Full harmonisation was introduced by the *Unfair Commercial Practices Directive*.[77] It aimed to increase legal certainty and to reduce the fragmentation of rules to eliminate barriers to cross border trade.[78]

The *Consumer Rights Directive*[79] moves further towards full harmonisation.[80] It sets out to

[72] Ibid art 3(2).
[73] Bonell, above n 64, 8.
[74] *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council* [2011] OJ L 304/64, recital 43, arts 5, 6, 13; *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees* [1999] OJ L 171/12, recital 21.
[75] Martin Engel and Johanna Stark, 'The CESL as a European Brand – Paypalizing European Contact Law' in Horst Eidenmüller (ed), *Regulatory Competition in Contract Law and Dispute Resolution* (Hart, 2013) 337.
[76] See Olha O Cherednychenko, 'Private Law Discourse and Scholarship in the Wake of the Europeanisation of Private Law' in Mel Kenny and James Devenney (eds), *The Transformation of European Private Law: Harmonisation, Consolidation, Codification or Chaos?* (Cambridge University Press, 2014) 148.
[77] *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council* [2015] OJ L 149/22.
[78] Ibid recital 12; see also *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA Relevance* [2011] OJ L 304/64, recital 7; *Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC* [2008] OJ L 133/66, recital 9.
[79] *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council* [2011] OJ L 304/64. On the implementation process, see UK Department for Business Innovation and Skills, *Enhancing Consumer Confidence By Modernising Consumer Law: Consultation on the Implementation of the Consumer Rights Directive 2011/83/EU* (2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32690/12-999-consultation-implementation-of-consumer-rights-directive.pdf>.
[80] *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council* [2011] OJ L 304/64, art 4.

provide maximum harmonisation by requiring the member states not to depart from the rights set out in the directive.[81] Although it is confined to the specified area of consumer contracts,[82] the level of harmonisation has attracted criticism. The sovereignty of the member states is affected by such a move and they are reluctant to relinquish their powers in favour of the EU.[83] It also restricts member states' ability to further develop consumer rights unless all member states agree.[84] It also requires member states to substantially alter their rules to comply with the directive. Full harmonisation does not necessarily mean a high level of consumer protection.[85] This is where the difference between harmonisation and unification and where the limits of the powers of the EU institutions become clearer.

2. **The role of the CJEU in consumer protection**

The role of the CJEU in ensuring uniform interpretation of EU law is essential. This section highlights the need for the European judiciary to provide guidelines on the interpretation of EU law and to determine the role of EU courts in protecting the consumer in the internal market.

Norms in EU law must be interpreted according to EU law and not according to member states' understanding to ensure homogeneity in interpretation.[86] The main method of interpretation in EU law is teleology, which emphasises the object and purpose of the legislation[87] to ensure the effectiveness of directives.[88] For instance, the notion of the 'consumer' has a specific meaning within European legislation.[89]

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[81] Ibid.

[82] Ibid art 3(1): 'This Directive shall apply, under the conditions and to the extent set out in its provisions, to any contract concluded between a trader and a consumer. It shall also apply to contracts for the supply of water, gas, electricity or district heating, including by public providers, to the extent that these commodities are provided on a contractual basis'.

[83] Miller, above n 5, 81.

[84] Jan Smits, 'Full Harmonisation of Consumer Law? A Critique of the Draft Directive on Consumer Rights' (2010) 18 *European Review of Private Law* 5, 6.

[85] Miller, above n 5, 83.

[86] *Oceano Grupo Editorial SA v Rocio Murcinano Quinteto; Salvat Editores SA and Jose M Sanchez Alcon Prades* (C-240/98 to C-244/98) [2000] ECR I-04941. For comments on this decision see Simon Whittaker, 'Judicial Interventionism and Consumer Contracts' (2001) 117 *Law Quarterly Review* 215; *Freiburger Kommunalbauten GmbH Baugesellshaft & Co KG v Ludger Hofstetter and Ulrike Hofstesstter* (C-237/02) [2004] ECR I-3403, [22]; case note by Röthel, ZEuP 2005, 421ff.

[87] *Oxford Dictionary*, 'teleology'.

[88] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, 3rd ed, 2003) 211.

[89] See above n 2.

> The need for uniform application of community law and the principle of equality require that the terms of a provision of community law which makes no express reference to the law of the Member states for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the community.[90]

In 2000, the then ECJ had to interpret the *Unfair Terms in Consumer Contracts Directive* following a request for a preliminary ruling from a Spanish court relating to proceedings dealing with a consumer contract containing deferred payment terms for the purchase of encyclopaedias, and especially a term giving the Courts of Barcelona exclusive jurisdiction in disputes relating to the contract.[91] This case demonstrated that any non-negotiated term in a consumer contract is subject to the directive and may be found unfair and void.

In 2002, a French court referred a case for a preliminary ruling regarding this directive in relation to a consumer credit agreement.[92] The decision raises the question of how far the legislation and its interpretation can go before it creates a significant imbalance to the detriment of the 'commercial creditor'. This decision could also mean that the interests of the consumer are placed above and beyond limitation periods when unfair terms are relied upon by the creditor.

In 2004, a German court requested a preliminary ruling from the ECJ relating to liability for default interest on the price for the building and purchase of a parking space.[93] The German court asked for guidance on the interpretation of good faith within the context of the directive on unfair terms in consumer contracts. This is particularly surprising because German law does have extensive case law on *treu und glauben*. This case, however, demonstrates the member states' demand for guidelines. Yet, the ECJ stated that 'it is for the national Court to decide whether a contractual term such as that at issue in the main proceedings satisfies the requirements for it to be regarded as unfair under Article 3(1) of the Directive'.[94]

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[90] *The Queen v Secretary of State for the Home Department; Ex Parte Nana Yaa Konadu Yiadom* (C-357/98) [2000] ECR-9265, [26].
[91] *Oceano Grupo Editorial SA v Rocio Murcinano Quinteto; Salvat Editores SA and Jose M Sanchez Alcon Prades* (C-240/98 to C-244/98) [2000] ECR I-04941.
[92] *Cofidis SA v Jean-Louis Fredout* (C-473/00) [2002] ECR I-10875.
[93] *Freiburger Kommunalbauten GmbH Baugesellshaft & Co KG v Ludger Hofstetter and Ulrike Hofstetter* (C-237/02) [2004] ECR I-3403.
[94] Ibid [25].

The question is then how to understand the approach of the European judges. Is it dynamic, in that courts contribute to the enforcement of directives? Or does it contradict the EU approach, since it still leaves a lot of leeway to the national courts and their understandings of the provisions of directives? Beyond the implementation of the directive, the ECJ has been asked to provide guidelines to ensure a uniform approach across the internal market. The early ECJ decisions on the *Unfair Terms in Consumer Contracts Directive* were rarely consumer friendly.[95] The Court was originally unadventurous in determining the substantive component of good faith.[96] Yet, a revival of the use of the directive has established the Court's place as the central institution in the Europeanisation of contract law.[97] Certain terms, such as unilateral adjustment clauses, have been singled out.[98] Recent case law seems to suggest that an autonomous European concept of good faith is emerging through case-by-case assessment.[99] For instance, while assessing whether a term was unfair under the *Unfair Terms in Consumer Contracts Directive*, the Court stated that

> [t]he national Court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations.[100]

This means that, while it is still left to the national courts to determine whether a term is contrary to the requirement of good faith according to the directive, the CJEU is prepared to provide more guidance in the interpretation of the text of the directive. In *Aziz,*[101] this meant that

> The supplier, in a contract situation where there has been no 'individual negotiation' in the sense of Article 3(2) UCTD, must take reasonable account of the consumer's ability to bargain. He cannot simply pursue his own business interests of contractual efficiency against the legitimate expectations of the consumer.[102]

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[95] *Cofidis SA v Jean-Louis Fredout* (C-473/00) [2002] ECR I-10875; *Oceano Grupo Editorial SA v Rocio Murcinano Quinteto; Salvat Editores SA and Jose M Sanchez Alcon Prades* (C-240/98 to C-244/98) [2000] ECR I-04941.

[96] *Freiburger Kommunalbauten GmbH Baugesellshaft & Co KG v Ludger Hofstetter and Ulrike Hofstetter* (C-237/02) [2004] ECR I-3403.

[97] Micklitz and Reich, above n 55.

[98] *RWE Vertrieb v Verbraucherzentrale NRW* (European Court of Justice, C-92/11,21 March 2013).

[99] Micklitz and Reich, above n 55, 786.

[100] *Aziz v Catalunyacaixa* (European Court of Justice, C-415/11, 14 March 2013) [69].

[101] Ibid.

[102] Micklitz and Reich, above n 55, 790.

Since only very few cases on consumer protection make their way to the CJEU, the court can only provide limited guidance and it is difficult to assess whether the rules are being applied uniformly and consistently across the EU. This also demonstrates that the role of the Court is limited.[103] The Court intervenes at a late stage in the creation of private law, through the interpretation and enforcement of directives. The Court's careful dealing with the competence of the national courts means that it is not willing to decide on substantive rights, but only on guidelines towards the interpretation of directives. This revival shows that member states are in need of stronger interpretation guidelines. Stronger guidelines would contribute to the development of set values such as good faith in European contract law.

While some EU directives have explicitly recognised a concept of good faith, due to the EU framework they mostly relate to consumer protection.[104] These directives relate to a specific area of law. Due to this targeted harmonisation through directives, there is no general EU contract law but a fragmented approach to particular types of contracts that are regulated at EU level. While principles such as good faith appear in several directives, the lack of an overall approach to contract law means that not only is EU contract law fragmented but the application of good faith as a principle is also dampened.[105] The main reason for the lack of enforceability of broad principles in EU contract law is the inability of EU institutions to legislate on the general law of contract.[106]

C Conclusion to Section I

To conclude Section I, by providing some protection to European individuals, European institutions anticipate that the consumer will be less reluctant to engage in cross-border trade, thereby actively promoting the development of the internal market. The use of good faith has been instrumental in moving towards this goal. Interestingly, the roles of the institutions and the use of good faith as an instrumental tool to promote certain behaviours are reversed in

[103] Walter Van Gerven, 'The Case-Law of the European Court of Justice and National Courts as a Contribution to the Europeanisation of Private Law' (1995) 3(2) *European Review of Private Law* 367, 375.
[104] the main one being *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29.
[105] And limited to consumer protection, see above I.B.
[106] See Chapter 4.II.B.

relation to commercial law, which is considered below.

II. GOOD FAITH AND THE PROTECTION OF SMALL BUSINESSES

It is necessary to differentiate consumer law from the law relating to commercial contracts. In both jurisdictions these contracts are regulated differently, with good faith applied differently to the behaviour of the parties. Section A will illustrate the application of good faith in certain commercial contracts in Australia. Section B will explore the use of good faith in commercial contracts in the EU.

A Statutory interpretation and codes of conduct

In Section I, the application of good faith as a protectionary tool in consumer transactions in the EU was outlined. The Australian approach also recognises the protectionary qualities of the doctrine of good faith but, unlike the EU, it has been used in commercial transactions. Chapter 3 explained why, specifically because of the will of the parties. Ideally, when two parties enter into negotiations, they will both intend to use their best efforts to reach an agreement.[107] Chapter 4 has shown that some equitable doctrines have been used to protect the consumer. The question then becomes what happens in a commercial setting. In a commercial setting, it is a priori difficult to see why one party should have greater protection than the other under the law of contract.[108] However, if one commercial party to a contract is more shrewd and cunning, and outmanoeuvres the other contracting commercial party, the latter may suffer a disadvantage. This is the case when there is a disequilibrium between the parties, with one exercising power over the other. This category includes small businesses, where the use of fairness and honesty has allowed for the establishment of 'minimum levels of commercial good faith'.[109]

[107] See Chapter 3.II.A.2.
[108] *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228.
[109] Robert A Hillman, *The Richness of Contract Law: An Analysis of Critique of Contemporary Theories of Contract Law* (Kluwer, 1998) 135.

1 Small business commissioners and their initiatives

The debate around the support to be given to small businesses through statutory intervention was renewed in 2012, with the call for reform of Australian contract law.[110] From contract formation to dispute resolution and the question of model contracts, small businesses were identified as a group in need of protection.[111] This follows a recent trend of focusing on business *relationships* instead of the *transaction*. For instance, certain behaviours have been identified as necessary to maintain business relationships.[112] These include aligning one's business with businesses that share the same values; commitment to treat each relationship as a long-term arrangement based on trust;[113] mutual interest of each business in achieving a common goal of a profitable, sustainable and ongoing relationship;[114] and clear and transparent communication.

'The business community is an eco-system: larger businesses need a healthy small business sector for their business to thrive'.[115] Small businesses are instrumental to commercial law because they are the majority of the commercial entities in the Australian market. Commercial parties are supposedly on an equal footing when coming to the negotiating table. This idealistic proposition does not recognise the reality of small businesses, which are not usually in a position to negotiate certain terms of so-called 'boilerplate' contracts, defined as standard term contracts where there is no negotiation. They may also lack bargaining power in determining which terms are incorporated in a given contract, even in cases where standard terms are not

[110] See Attorney-General's Department, *Contract Law and Small Business* (2015) <https://www.ag.gov.au/consultations/documents/reviewofaustraliancontractlaw/contractlawandsmallbusiness.pdf>.

[111] Robyn Caroll, Submission No 5 to Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope For Reforming Australian Contract Law,* 20 July 2012; NSW Small Business Commissioner, Submission No 43 to Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law,* 20 July 2012. While there is no explicit reference to good faith in these submissions, there is reference to unfair terms and small businesses.

[112] Office of Victorian Small Business Commissioner, *Forming and Maintaining Winning Business Relationships* (2014) 2. The reference group included Alan Wein, who was also involved in the reform of the *Franchising Code of Conduct*.

[113] Ibid 12, including communicating their intentions openly and honestly to all parties and confirming that all parties have similar intentions.

[114] Ibid 13, including viewing the relationship as a collaborative effort; identifying mutual interests and confirming common goals; and considering the expectations and needs of all parties and ensuring that they are understood by all involved.

[115] Steve Howard, Executive General Manager of Business Development, RACV, quoted in ibid 13. See also Australian Newsagents Federation, Submission No 24 to Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law,* 2012.

used. The issues that small businesses can face are closer to what can be experienced by consumers than by large corporations. Offices have been established to tackle this issue.

Since 2003, Small Business Commissioners (SBC) offices have been established to provide small businesses with adequate protection around Australia. The Victorian SBC was established by the *Small Business Commissioner Act 2003* (Vic). SBCs are 'the primary vehicle for delivering on the Government's commitments to enhance a competitive and fair operating environment for small business.'[116] The powers and functions of the Victorian SBC arise from provisions in a number of Acts.[117] Their role includes facilitating and encouraging the fair treatment of small businesses in their commercial dealings with other businesses in the marketplace, as well as investigating complaints by small businesses[118] regarding unfair market practices and mediating between the parties involved in the complaint.[119] 'Unfair market practice' is not defined. According to the SBC, it should be given the broadest possible meaning. It includes 'any acts or omissions by any private sector or government entity in the course of business dealings or dealings related to business, regulatory or otherwise, within Victoria.'[120] This addresses the imbalance of powers in contracts involving small businesses,[121] while also highlighting the challenges facing small businesses.

Other offices have been established since.[122] Of particular interest is the South Australian SBC.

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[116] Victorian Small Business Commissioner, *Annual Report* (2003–04) 4.

[117] See Victorian Small Business Commissioner, *Annual Report* (2004–05) 6–7; *Small Business Commissioner Act 2003* (Vic); *Retail Leases Act 2003* (Vic); *Retail Tenancies Reform Act 1998* (as amended) (Vic); *Retail Tenancies Act 1986* (as amended) (Vic); *Liquor Control Reform Act 1998* (as amended) (Vic); *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

[118] See Victorian Small Business Commissioner, *Annual Report* (2012–13) 10: 'The number of general commercial disputes lodged under the Small Business Commissioner Act 2003 (SBC Act) increased by 14.9 per cent. However, the total number of these matters is still below the 2010-11 levels.'

[119] *Small Business Commissioner Act 2003* (Vic) s 5(2).

[120] See Victorian Small Business Commissioner, *Annual Report* (2012–13). Franchising disputes come before the VSBC as alleged 'unfair market practices' under the *Small Business Commissioner Act 2003*: Victorian Small Business Commissioner, *Annual Report* (2009–10) 9.

[121] Victorian Small Business Commissioner, *Annual Report* (2005–06) 2: 'The capacity to investigate unfair market practices does much to redress imbalance in small and big business relationships. In 2005–06, 45 investigations were referred to the VSBC. Many of the investigations are ongoing, and are not easily resolved. However, with perseverance a reasonable outcome can be achieved for the complainant.'

[122] The NSW Office of the Small Business Commissioner was established in mid-2011: Ken Phillips, 'NSW Lends Muscle to Soloists' on *Smart Company* (27 June 2012) <http://www.startupsmart.com.au/ken-phillips-/nsw-lends-muscle-to-soloists.html>; Office of the Small Business Commissioner, *10 Big Ideas to Grow NSW* NSW Business Chamber <http://www.nswbusinesschamber.com.au/NSWBC/media/Misc/Lobbying/Submissions/10_Big_Ideas_small_business_commisioner.pdf>.. In Western Australia, according to the *Small Business Development Corporation Act 1983* (WA) s 14A, the functions of the WA commissioner include investigating complaints about unfair market practices affecting small business, providing assistance to attempt to resolve those complaints and providing alternative dispute resolution services for small businesses. The values of the Small Business

The office was established following the enactment of the *Small Business Commissioner Act 2011* (SA). The role of the commissioner is to receive and investigate complaints by or on behalf of small businesses regarding their commercial dealings and to facilitate their resolution.[123] The SBC also provides information and support to the small business community.

The *Small Business Commissioner Act 2011* in South Australia clearly encourages parties to act in good faith, although it leaves the development and explanation of this duty to codes of conduct as mandated by legislation. Section 5(2) of the *Small Business Commissioner Act* states:

> The Commissioner is to perform the functions with a view to the development and maintenance in South Australia of relationships between small businesses and other businesses, and small businesses and State and local government bodies that are based on dealings conducted fairly and in good faith.

The importance of the insertion of good faith into this section was debated in Parliament but a broad provision was finally laid out, leaving it to the SBC to define the contours of the provision.[124]

It will be interesting to see how the role of the South Australian SBC develops. Comparison with similar entities such as in Victoria and New South Wales will be valuable as their role develops.[125] In New South Wales, the development of an industry code that incorporates the doctrine of good faith is unlikely[126] In spite of some careful comments on the notion and even though 'that is not to say that all codes will have to have those good faith obligations',[127] Good faith does not appear in the now *Small Business Commissioner Act 2013* (NSW). Recognising

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Development Corporation in WA include the creation of a trustworthy environment in which small businesses thrive.

[123] *Small Business Commissioner Act 2011* (SA) s 5. See Senator Peter Whish-Wilson and Senator Nick Xenophon in Economics Legislation Committee, Senate, *Small Business Commissioner Bill 2013* (2013) 46: 'Although the office has been in operation for only 11 months, the South Australian Small Business Commissioner has had an outstanding dispute resolution success rate. Of the 356 cases taken on by the Commission since its inception, 271 (or 87.7 percent) were resolved successfully. This clearly demonstrates the benefits of statutory powers in assisting with dispute resolution.'

[124] South Australia, *Parliamentary Debates*, House of Assembly, 14 September 2011, 49.

[125] Even though there is no reference to good faith in the *Small Business Commissioner Act 2003* (Vic).

[126] The Bill includes the possibility of enacting codes of conduct that provide for good faith obligations in commercial dealings. Small Business Commissioner and Small Business Protection Bill 2012 (NSW) s 11(2).

[127] New South Wales, *Parliamentary Debates*, Legislative Council, 23 August 2012, 14310 (Adam Searle): 'it provides the government of the day with another tool for making the appropriate arrangements for industry'.

small businesses as a separate class of contractual parties is the first step towards addressing the imbalance of power between small businesses and larger companies. A difficult second step is defining small business.[128]

2. Codes of conduct and good faith

In ongoing business relations, a power asymmetry can develop over time. In order to tackle this asymmetry, two Australian industry codes promote the application of a duty to act in good faith: the mandatory *Franchising Code of Conduct*, and the voluntary *Food and Grocery Code of Conduct*.[129]

i. Mandatory codes of conduct

The *Franchising Code of Conduct* is one of five mandatory industry codes prescribed under the *Competition and Consumer Act 2010* (Cth) s 51AE. Other codes include the *Horticulture Code of Conduct*, the *Oilcode*, the *Wheat Port Code of Conduct* and the *Unit Pricing Code*.[130]

Franchise agreements are long-term contracts whose relational characteristics initially led to a movement to imply a duty of good faith as a matter of law.[131] Australian courts have enforced good faith in situations where the imbalance of power in the relationship and the vulnerability of the franchisee were exposed. In *Garry Rogers Motors (Aust) P/L v Subaru (Aust) P/L*[132] the Court found the termination of a franchise agreement unconscionable and in breach of s 51AC of the *Trade Practices Act 1974* (Cth).[133] In *Burger King Corp v Hungry Jack's Pty Ltd*,[134] the NSW Court of Appeal had to decide on the construction of a termination clause in a franchise agreement. The Court held that Hungry Jack's had wrongfully terminated the contract and held that good faith was an implied term in law. The agreement had developed with implied terms

[128] This might lead to a need to renegotiate some contracts. See Australian Corporate Lawyers Association, Submission No 25 to Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope For Reforming Australian Contract Law*, 2012.
[129] *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Cth).
[130] *Trade Practices (Horticulture Code of Conduct) Regulation 2006* (Cth); *Competition and Consumer (Industry Codes – Oilcode) Regulation 2006* (Cth); *Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014* (Cth); *Trade Practices (Industry Codes – Unit Pricing) Regulations 2009* (Cth).
[131] Bill Dixon, 'What is the Content of the Common Law Obligation of Good Faith in Commercial Franchises?' (2005) 33(3) *Australian Business Law Review* 207, 222.
[132] (1999) 21 ATPR 41-703.
[133] See Chapter 4.I.A.1.
[134] [2001] NSWCA 187.

of cooperation, good faith and reasonableness.[135] In *Far Horizons Pty Ltd v McDonald's*, Byrne J in the Victorian Supreme Court held that an implied duty of good faith existed in franchise agreements.[136] Good faith was understood as the reasonable exercise of powers: a reasonable exercise of discretionary powers means that such a power is not to be used capriciously, or for some extraneous purpose.[137] This can potentially create confusion where the only difference in the source of the right is an express provision in the contract or a consequence of a breach by one party. This creates uncertainty for the parties when dealing with a situation where a party acts for an extraneous purpose. To remedy this, Paterson argues that 'implied duties fettering the exercise of discretionary contractual powers should instead be seen as articulating simple and fundamental principles of good decision making.'[138] This thesis argues that such a principle could be good faith to ensure fair dealing between the parties. This is reflected in the recognition of good faith in the *Franchising Code of Conduct*.

The development of a code of conduct for franchising contracts has emphasised the link between the importance of the relationship between the parties and the doctrine of good faith. Over the last decade, out of nine review processes, seven recommended the introduction of a duty to act in good faith in the *Franchising Code of Conduct*.[139] A 2008 Western Australian report analysed the duty to act in good faith by providing an international overview, without recommending that such a doctrine be introduced.[140]

The same year, a federal report recommended the introduction of an explicit obligation to act in good faith as an overarching standard of conduct for franchise agreements.[141] Recognising 'the inherent and necessary imbalance of power in franchise agreements in favour of the franchisor, where abuse of this power can lead to opportunistic practice, a statutory duty to act in good faith'[142] would 'promote business integrity and ethics'.[143] The government rejected the

[135] Chapter 4.I.B.2.
[136] *Far Horizons Pty Ltd v McDonalds Australia Ltd* [2000] VSC 310, [120].
[137] *AMC Commercial Cleaning v Coade* [2011] NSWSC 932, [118], [133]–[134].
[138] Jeannie Paterson, 'Implied Fetters on the Exercise of Discretionary Contractual Powers' (2009) 35 *Monash University Law Review* 45, 73.
[139] Alan Wein, *Review of the Franchising Code of Conduct* (Commonwealth of Australia, 2013) 64.
[140] Small Business Development Corporation, *Inquiry into the Operation of Franchise Businesses in Western Australia: Report to the Western Australian Minister for Small Business* (2008), cited in *Automasters Australia Pty Ltd v Bruness Pty Ltd* (2003) ATPR (Digest) 46–229; [2002] WASC 286, [372].
[141] See Parliamentary Joint Committee on Corporations and Financial Services, *Opportunity Not Opportunism: Improving Conduct in Australian Franchising* (December 2008) 101 recommendation 8 [8.60].
[142] Ibid 101.
[143] Tony Piccolo MP, Economics and Finance Committee, Parliament of South Australia, quoted in ibid 107.

introduction of a duty of good faith, stating that the doctrine was still evolving and that introducing it was likely to provide more uncertainty.[144] In 2010, a clause was inserted in the *Franchising Code of Conduct* stating: '[n]othing in this code limits any obligation imposed by the common law, applicable in a State or Territory, on the parties to a franchise agreement to act in good faith'.[145]

The application of this provision was analysed in a 2013 review led by Alan Wein, which ultimately led to the recommendation of a code amendment to include an express obligation to act in good faith.[146] The government accepted this recommendation and the new *Franchising Code of Conduct* came into force on 1 January 2015. It prescribes a duty to act in good faith:

> 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.[147]

The code does not provide a definition of the obligation but does provide guidance to the courts. When determining whether a party breached the duty, courts can look, among other matters, at whether they acted honestly and not arbitrarily and whether they cooperated to achieve the purposes of the agreement.[148] This shows the direct link between cooperation and good faith, and highlights the validity of the foundation of good faith in contract law.[149]

Furthermore, the duty extends from the negotiations to the performance and the termination of the agreement, recognising that cooperation starts from the time parties negotiate, and highlighting the recognition of the intention of the parties to create legal relations and its consequences from the beginnings of the transaction.[150] The duty is understood as meaning that parties must have due regard to the rights and interests of the other party without sacrificing

[144] See Commonwealth, *Commonwealth Government Response to the report of the Parliamentary Joint Committee on Corporations and Financial Services – Opportunity not opportunism: improving conduct in Australian franchising* (December 2008) 13. For a review of this development, see also Andrew Terry and Cary Di Lernia, 'Franchising and the Quest for the Holy Grail: Good Faith or Good Intentions?' (2009) 33 *Melbourne University Law Review* 542.
[145] *Trade Practices (Industry Codes – Franchising) Regulation 1998* (Cth) s 23A.
[146] Wein, above n 141, 63.
[147] *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth) art 6(1).
[148] Ibid art 6(3).
[149] See Chapter 3.II.C.2.
[150] See Chapter 3.II.A.2.

their own. The ACCC considers that dishonest business dealings and acting for an ulterior purpose will breach the duty to act in good faith.[151] The duty cannot be excluded.[152] The code is applied strictly by the courts,[153] and it is likely that the introduction of good faith in the code will lead to judicial interpretation.

There have been other recent developments in other mandatory codes of conduct. On 3 August 2015, an issues paper regarding the mandatory *Horticulture Code of Conduct* was released.[154] The review invited submission on the introduction of a duty to act in good faith, with reference to the development of the *Franchising Code of Conduct*.[155] Like the *Franchising Code of Conduct*, the *Horticulture Code of Conduct* is mandatory under s 51AE of the *Competition and Consumer Act 2010*. The submissions to the review demonstrated a tendency to favour the recognition of good faith in horticulture contracts. For instance, a submission by Apple and Pear Australia Ltd stated that 'the inclusion of a good faith obligation would strengthen the code'.[156] Furthermore, the Australian Food and Grocery Council recognised the value of introducing an obligation of good faith in the *Horticulture Code of Conduct* to 'bring the code into alignment with other industry codes'.[157] Interestingly, the Small Business Development Corporation from Western Australia noted that careful consideration had to be given to the possible introduction of an obligation of good faith in the code.[158] Ultimately, the influence of Alan Wein, who was also in charge of the review of the *Franchising Code of Conduct* that led to the recognition of such a duty, may have determine the introduction of the concept of good faith in the code.[159]

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[151] See Australian Competition and Consumer Commission, *Acting in Good Faith* <http://www.accc.gov.au/business/franchising/acting-in-good-faith>; see also *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth) s 6(6).

[152] *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth) art 6(4).

[153] *SPAR Licensing Pty Ltd v MIS QLD Pty Ltd* [2014] FCAFC 50.

[154] Department of Agriculture and Water Resources, *Horticulture Code of Conduct* (6 April 2017) <http://www.agriculture.gov.au/ag-farm-food/hort-policy/code-of-conduct>.

[155] Mark Napper and Alan Wein, *Issues Paper: Review of the Horticulture Code of Conduct* (August 2015) 41.

[156] Apple and Pear Australia Ltd, Submission to *2015 Review of the Horticulture Code of Conduct***,** 18 September 2015, 2; echoed by Fresh States Ltd, Submission to *2015 Review of the Horticulture Code of Conduct*, 18 September 2015, 2; WA Citrus, Submission to *2015 Review of the Horticulture Code of Conduct*, 18 September 2015, 1.

[157] Australian Food and Grocery Council, Submission to *2015 Review of the Horticulture Code of Conduct***,** 18 September 2015, 9.

[158] Small Business Development Corporation, Western Australia, Submission to *2015 Review of the Horticulture Code of Conduct*, 18 September 2015, 3. The SBDC considered that good faith as a term should not be defined to allow state and federal courts the leeway to develop common law precedent.

[159] *Competition and Consumer (Industry Codes—Horticulture) Regulations 2017* (Cth) ss 8-9.

ii. Voluntary codes of conduct and good faith

A recent wave of codification of industry standards including the duty to act in good faith can also been seen in voluntary codes of conduct. For instance, the stated purpose of the *Food and Grocery Code of Conduct* is 'to promote and support good faith in commercial dealings between retailers, wholesalers and suppliers.'[160] It imposes a duty to act in good faith at all times on the retailer and the supplier.[161] In order to determine whether this duty has been breached, courts can take into consideration the following:

> (a) whether the retailer or wholesaler's trading relationship with the supplier has been conducted without duress;
> (b) whether the retailer or wholesaler's trading relationship with the supplier has been conducted in recognition of the need for certainty regarding the risks and costs of trading, particularly in relation to production, delivery and payment;
> (c) whether, in dealing with the retailer or wholesaler, the supplier has acted in good faith.[162]

Despite a recent review, it is too soon to determine the impact this introduction of good faith has had on the industry. When stakeholders were interviewed and asked what they understood as good faith, their responses reflected notions of fairness, cooperation and honesty, the same concepts that led to the recognition of good faith by the judiciary in some circumstances.[163]

As Chapter 4 demonstrated, the debate surrounding good faith in Australia really started in 1992 with *Renard*[164] and construction contracts. Voluntary standards have also developed in the construction industry and a recent review of building standards has imposed a new explicit obligation on the principal and contractor 'to act reasonably in a spirit of mutual trust and cooperation, and generally in good faith towards the other'.[165] This review ultimately led to the introduction of the duty to act in good faith as laid out in 1992 in *Renard Constructions*. Clause 2.1 of the building standards states that 'the Contractor and the Principal each agree that they:

[160] *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Cth) s 2.
[161] Ibid s 28.
[162] Ibid s 28(3).
[163] Caron Beatons-Wells and Jo Paul-Taylor, 'A Code of Conduct for Supermarket–Supplier Relations: Has it Worked? (2018) 46 *Australian Business Law Review* 6, 22–23.
[164] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.
[165] Building Standard AS11000:2015 cl 2.1. See also Alexander Di Stefano, 'Good Faith in the AS11000: Has the Eagle Landed?' (2016) 33 *Building and Construction Law Journal* 13.

(a) in the performance of their respective duties; (b) in the exercise of their respective powers; and (c) in their respective dealings with each other, will act in good faith'. The legal concept is now defined in the dictionary of the standards:

> good faith in subclause 2.1 means, obligations by the Principal and the Contractor: (a) to act honestly and with a commitment to the agreement comprising the Contract; (b) Not to act so as to undermine the substance of the benefit to both parties of the agreement; and (c) to act reasonably having regard to the interests of both parties under the terms of the Contract.[166]

It is important to note once more that none of these obligations requires the interests of either party to be subordinated to those of the other party.

Therefore, in spite of a lack of recognition in the Australian general law of contract, the duty that requires parties to act in good faith has been made mandatory in certain commercial contracts through codes of conduct. The development of codes of conduct has forced the development of an interpretation of fairness in contractual dealings by the legislature and by some industries. More importantly, it has pushed a bottom-up approach whereby good faith is slowly being recognised in law through industry-led initiatives rather than a federal government push for recognition. This shows that industry codes and special legislation address the gaps and take into consideration the relational nature of particular transactions such as franchising agreements and building contracts and the implicit dimensions that they encompass. But these codes are still being developed, a case in point being the South Australia code of conduct relating to good faith in small business dealings, which is yet to be introduced.[167] While good faith appears again and again in some areas, there is no coherent and cohesive approach to the use of the concept. The lack of a clear overall organising framework could impair the interpretation of good faith by the courts and also by parties to a contract. Good faith becomes a costly principle if detailed and certain provisions must be drafted by practitioners who, again, do not have any guidance about what good faith could be at a general level of Australian contract law. If good faith repetitively appears in different instruments, it may be time to recognise it is not just a concept to be enforced in limited situations but a clear organising principle with many facets.

[166] Di Stefano, above n 163, 17.
[167] As per *Small Business Commissioner Act 2011* (SA) s 5(2).

B The European Union, the CESL and small businesses

1. The regulation of commercial law in directives

The first use of good faith in European directives was in the context of commercial agency.[168] The *Self-Employed Commercial Agents Directive* prescribes that both the agent[169] and the principal[170] have a duty to act in good faith. This means that the agent must:

> make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of; (b) communicate to his principal all the necessary information available to him; (c) comply with reasonable instructions given by his principal.[171]

This also means that the principal must:

> provide his commercial agent with the necessary documentation relating to the goods concerned; (b) obtain for his commercial agent the information necessary for the performance of the agency contract, and in particular notify the commercial agent within a reasonable period once he anticipates that the volume of commercial transactions will be significantly lower than that which the commercial agent could normally have expected.[172]

Therefore, a core element of this duty includes informing the other party of any relevant fact.[173] Furthermore, it stipulates that the agent when acting on behalf of the principal must make 'proper efforts to negotiate',[174] suggesting a duty to act in good faith in the negotiation of contracts.

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[168] *Council Directive 86/653/EEC on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents* [1986] OJ L 382/17.
[169] Ibid art 3.
[170] Ibid art 4.
[171] Ibid art 3(2).
[172] Ibid art 4(2).
[173] Ibid arts 4(3), 3(2)(b).
[174] Ibid art 3(2)(a).

2. The protection of small businesses

The small business community is as important in the EU as it is in Australia. 99% of all companies in Europe are small and medium-sized enterprises (SMEs).[175] They are the 'backbone of the European economy'.[176] Businesses, and in particular small businesses, were not originally targeted as needing a protection framework to the same extent as the consumer. Later the EU recognised that most small businesses 'cannot afford to trade across EU borders because selling abroad means adapting sales contracts for up to 26 different legal systems'.[177] The cost of engaging in cross-border trade is significantly increased by the presence of different legal systems within the internal market. The Commission proposed an SME action program and provided an evaluation of policy measures for the creation and development of SMEs in 1987.[178] It recognised the lack of a common definition of an SME.[179] It evaluated the effectiveness, efficiency and impact of policy measures. A subsequent report shows that the Community's SME action program purported to present data that would allow SMEs to position themselves in the single market alongside other enterprises.[180] It reinforced the policy objective of the Commission to safeguard the business environment, to develop policy to help new and growing enterprises, and the pursuit of social cohesion. However, this mostly involved administrative matters and not contract law.

In 2005, the law firm Clifford Chance commissioned a business survey to determine how businesses viewed the contract law framework at the time.[181] The option of European legislation was approved by most businesses.[182] 74% of those businesses in favour of a

[175] European Commission, 'What is a SME?' <http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_en>.
[176] Fabrizio Caffaggi, 'From a Status to a Transaction-Based Approach? Institutional Design in European Contract Law' (2013) 50 *Common Market Law Review* 311, 327.
[177] European Commission, 'Common European Sales Law: Expanding Consumer Choice and Boosting Trade' (Media Release, 21 October 2011) <http://europa.eu/rapid/press-release_ETW-11-2110_en.htm#Topic1>. See also Vogenauer and Weatherill, above n 13.
[178] EU Commission, *Evaluation of Policy Measures for the Creation and the Development of SME* (1986).
[179] Ibid 11.
[180] EU Commission, *Evaluation of Policy Measures for the Creation and the Development of SME* (1989).
[181] Results and analysis of the survey can be found in Stefan Vogenauer and Stephen Weatherill, 'The European Community's Competence to Pursue the Harmonisation of Contract Law – An Empirical Contribution to the Debate' in Stefan Vogenauer and Stephen Weatherill (eds), *The Harmonisation of European Contract Law* (Hart Publishing, 2006) 105, 130.
[182] 83% of surveyed businesses and 88% of surveyed SMEs.

harmonised contract law considered it should be optional.[183] 82% of those businesses stated that they were likely or very likely to use it in cross-border transactions.[184] However, the reliability of the survey can be questioned because only 175 firms in eight member states were interviewed.[185]

'Think Small First'[186] was a tentative attempt by the European institutions in 2008 to recognise the specific needs of small businesses in order to facilitate the internal market. Modernisation and simplification of current EU legislation were at the centre of the framework. This initiative proposed 10 principles that would improve the legal and administrative environment throughout the EU. It did not however target directly the issue of unfair commercial practices and the need for better protection, even though this is a concern for small businesses.

The *Common European Sales Law* (CESL) was an attempt to regulate commercial contracts and address small business protection.[187] The CESL could have broadened the status-based approach that originally focused on consumers by embracing small businesses.[188] The CESL represented the first definite step by the European institutions to provide protection for small businesses as well as European consumers. It aimed at 'serving as a cost saving device'.[189] The CESL proposal emphasised that the cost of complying with different national laws is one reason for the lack of cross-border trade by small businesses.[190] The CESL relied on the European Commission surveys completed in 2011 to justify its approach,[191] although these surveys and the interpretation of the data have been heavily criticised.[192] Implementing a 'self-

[183] Vogenauer and Weatherill, above n 181, 130.
[184] Ibid 134.
[185] Ibid 138.
[186] *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions* COM(2008) 394 final <http://europa.eu/rapid/press-release_IP-08-1003_en.htm>; European Small Business Alliance <http://www.esba-europe.org/>.
[187] *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* COM/2011/0635 final - 2011/0284 (11 October 2011).
[188] Caffaggi, above n 176, 312.
[189] Thomas Ackerman, 'Public Supply of Optional Standardised Consumer Contracts: A Rationale for the Common European Sales Law?' (2013) 50 *Common Market Law Review* 11, 15.
[190] *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* COM/2011/0635 final - 2011/0284 (11 October 2011) Preamble.
[191] European Commission, *European Contract Law in Consumer Transactions: Analytical Report* (Flash Eurobarometer Series No 321, 2011) <http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_321_en.pdf>; European Commission, *European Contract Law in Business-to-Business Transactions: Analytical Report* (Flash Eurobarometer Series No 320, 2011) <http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_320_en.pdf>.
[192] Some have argued that the interpretation of the surveys relied upon by the Commission is flawed: Ackerman, above n 189, 16; William Hubbard, 'Another Look at the Eurobarometer Surveys' (2013) 50 *Common Market Law Review* 187, 188.

standing uniform set of contract rules' would reduce these costs and obstacles, leading small businesses to trade in different member states.[193] Yet, the provision relating to small businesses in the CESL was limited. There needed to be at least one SME as a contracting party,[194] and member states were given the option to disable this provision.[195]

In addition to this criticism of the CESL, there is the question of whether an optional agreement could be negative for small businesses. The wording of the CESL proposal could have led to less protection for SMEs and ultimately contradicted the aims of the Commission to favour cross-border transactions among all businesses in the EU.[196] Beale questioned whether the CESL could hurt SMEs rather than help them;[197] the question was placed in the context of one SME dealing with another SME. Ostrow also demonstrated that the CESL could have a negative impact on small businesses.[198] Using the facts from an English case, she applied the CESL provisions for business-to-business transactions. She showed that businesses were victims of the lack of protection due to the wording of the CESL.[199] Due to the very precise definition of 'consumer' as a natural person in the CESL, small businesses may well be confused by the lack of protection, even though such protection has been deemed necessary.[200]

The CESL was the subject of some criticism.[201] It would have only applied to cross-border sales contracts, unless member states decided to extend its application to domestic agreements.[202] It compartmentalised European contract law,[203] leading to a law of contracts rather than a general contract law. This fragmented approach to European contract law was further emphasised by the opt-in character of the CESL and the lack of clarity surrounding its core principles. Another issue was the flexible nature of the CESL: it did not have a direct

[193] See Richard Epstein, 'Harmonization, Heterogeneity and Regulations: CESL, the Lost Opportunity for Constructive Harmonization' (2013) 50 *Common Market Law Review* 207, 221.
[194] *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* COM/2011/0635 final - 2011/0284 (11 October 2011) art 7.
[195] Ibid art 13(b).
[196] Ellen Ostrow, 'For the Purposes of This Regulation: Denying Protection to the Small Business through the Application of the CESL' (2014) 29 *American University International Law Review* 255, 284.
[197] Hugh Beale, 'Characteristics of Contract Laws and the European Optional Instrument' in Horst Eidenmüller (ed), *Regulatory Competition in Contract Law and Dispute Resolution* (Hart, 2013) 314, 333.
[198] Ostrow, above n 195, 282–4.
[199] Ibid 281.
[200] Ibid 277.
[201] Horst Eidenmuller, 'What Can Be Wrong With an Option? An Optional Common European Sales Law as a Regulatory Tool' (2013) 50 *Common market Law Review* 69. .
[202] *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* COM/2011/0635 final - 2011/0284 (11 October 2011) art 13(a).
[203] Denis Voinot and Juliette Sénéchal, *Vers un droit européen des contrats spéciaux/Towards a European Law of Specific Contracts* (Larcier, 2012).

effect on consumers, in the same way directives can.[204] There was a need for a proper procedure to deal with legal action under the CESL, as enforcing the CESL would not have been easy. Finally, the concept of good faith was a principle of the CESL but its operation required guidance. Until such guidelines were enacted, attempting to enforce the principle would have proven costly to the parties involved in a dispute under the CESL.[205] Parties who drafted detailed contracts could have circumvented the uncertainty and lack of clarity surrounding the CESL.[206] Small businesses may have found it too costly to draft such contracts.

Such criticisms provided further justification for the withdrawal of the proposal in December 2014. However this means that the protection of small businesses in the EU is almost non-existent. In order to tackle this issue, Beale proposed the enactment of a small business contracts directive in 2013.[207] Yet, new issues arise: from how to define a small business, to what small business contracts would cover,[208] and the possible integration of a duty for parties to act in good faith. Furthermore, the move towards a directive might frustrate the goal of a uniform contract law in Europe 'that can be applied at low cost and high certainty'.[209]

In spite of these criticisms and commentaries, it is clear that the proposed CESL would have promoted the doctrine of good faith in sales contracts with consumers and small businesses. However, it would have further fragmented EU contract law into a law of specialised contracts, since it would have applied only to sales contracts. The multi-layered nature of EU contract law[210] has become a hurdle in the Europeanisation of contract law and the emergence of a truly EU set of enforceable rules. In fact a comment made in 2013 is still relevant today: the 'current disuniformity in contract law across Europe is stifling trade, especially by SMEs'.[211] However, while the withdrawal of the CESL and the lack of development of an instrument to target small businesses in cross-border trade within the EU have further dampened the recognition of good

[204] Reich, above n 9, 400.
[205] Simon Whittaker, 'Identifying the Legal Costs of Operation of the Common European Sales Law' (2013) 50 *Common Market Law Review* 85, 107; Ariel Porat, 'The Law and Economics of Mistake in the European Sales Law' (2013) 50 *Common Market Law Review* 127, 138–9.
[206] Lisa Bernstein, 'An (Un)common Frame of Reference: An American Perspective on the Jurisprudence of the CESL' (2013) 50 *Common Market Law Review* 169, 182.
[207] Hugh Beale, above n 196, 334.
[208] Ibid 334.
[209] Ostrow, above n 193, 286.
[210] See also Jan Smits, 'Toward a Multi-Layered Contract Law for Europe' in Stefan Grundmann and Jules Stuyck (eds), *An Academic Green Paper on European Contract Law* (Kluwer Law International, 2002) 387.
[211] Hubbard, above n 189, 187.

faith as a principle of contract in EU law, the European institutions now have the opportunity to learn from the discussions and alter the current course to prevent further fragmentation of EU contract law.

C Conclusion to Section II

Australian commercial law is at a crossroads. Momentum towards recognition of good faith in some contractual dealings is growing. This is due to the fact that some industries have identified good faith as a way to ensure fair dealing in commercial transactions, especially when these involve vulnerable parties, such as small businesses. The application of the doctrine to small businesses and vulnerable parties within commercial contracts shows the validity and enforceability of the doctrine in certain areas of contract law. While this means that the doctrine is only used in some circumstances, one must note that good faith seems to play a role in restoring the equilibrium between parties to a contract that are not on an equal footing. In the EU, there has been some discussion about developing the doctrine to protect small businesses, as they are also identified as a group who may require protection in certain contractual situations. The withdrawal of the CESL has however halted such evolution, and good faith is above all attached to EU consumer protection.

III. CHAPTER CONCLUSION

As Chapter 4 explained, the 2012 discussion paper relating to a possible reform of Australian contract law included the question of the recognition of a duty to act in good faith.[212] Since then, the recognition of implicit dimensions in contractual relations has been the rationale behind the protection of specific groups in particular contracts:[213] consumers in the EU and small businesses and franchises in Australia. The goal seems to be to bring back some common-sense thinking and social values in business dealings. While the concept of equity seems to be an impediment to the definition of the role of good faith in Australian contract law, words used

[212] Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope For Reforming Australian Contract Law* (2012) 8.
[213] Esin Örücü, 'Developing Comparative Law' in Esin Örücü and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing, 2007) 43.

in statutes show that the ideas of unfairness and lack of cooperation have a great deal in common with good faith. Certain initiatives show that good faith is trying to bridge the gap between the legal formalism of contract law and community values, emphasising the famous colloquialism to 'keep one's word'.[214] But this is only in particular areas. Some initiatives have stalled, like the development of a code of conduct based on good faith in South Australia. This chapter has highlighted that the lack of action taken by the legislature and the courts has led to the development of industry-led codes and initiatives. However, some are voluntary, others are mandatory and all seem like one-off patches. This thesis argues that leaving the development of certain areas of contract law to industries, while it has some merits, is also fraught with danger. Making law is not the business of industries but of the legislature. There is a difference between what contract law dictates, what contract law should regulate, and what practice shows, in other words a gap between law and practice,[215] demonstrating the need for the legislature and the courts to recognise good faith in contract law beyond the current selective applications.

In the EU, due to the proportionality and subsidiarity principles, a uniform contract law has been impossible. Yet, here again, some areas of contract law have been harmonised. The concept of good faith appeared first within directives dealing with the protection of consumers and the regulation of certain commercial practices.[216] The doctrine of good faith has developed alongside the emergence of European consumer law. Good faith is today used as a means to provide better protection in dealings involving consumers.

Where the EU has used good faith to protect consumers, Australia has developed equity-based and statute-based causes of action in certain instances, as demonstrated in Chapter 4. However, an analysis of the relationship between commercial entities has highlighted the imbalance in

[214] *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth); *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Cth); Napper and Wein, above n 154, 41; Building Standard AS11000:2015, cl 2.1.

[215] Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart, 2014); Stewart Macaulay, 'Relational Contracts Floating on a Sea of Custom: Thoughts about the Ideas of Ian MacNeil and Lisa Bernstein' (1999) 94 *Northwestern University Law Review* 775.

[216] *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29; *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees* [1999] OJ L 171/12; *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA Relevance* [2011] OJ L 304/64.

contracts involving certain commercial entities such as small businesses. In the EU the protection of small businesses is only slowly developing, while in Australia it has gained momentum.

PART TWO: CONCLUSION

Part II of this thesis attempted to answer the question of how good faith has developed in Australia and the EU. The answer is it has not developed consistently across all contracts but the concept is applied in certain situations in both jurisdictions. Chapters 4 and 5 have shown that there has been increased intervention by both the legislature and the judiciary to regulate and promote fairness in contractual dealings. The concept of good faith has been applied but is limited to certain contractual situations. While the promotion of fairness can facilitate business by encouraging trade, good faith is used as a 'patch' rather than an organising principle. Indeed, the doctrine is used in Australia and the EU to promote fairness but only in certain categories of contract,[1] and as tool to protect some parties, such as consumers and small businesses.

Chapter 4 established that cooperation is a solid and recognised foundation for the integration of good faith in Australia, and that EU institutions have the authority to regulate EU contract law. Now, the question of the modality of the integration of good faith brings new challenges. As Chapter 4 illustrated, a term of good faith can be expressed, implied or construed as part of the contract. In the current judicial approach, firstly, in order to imply a term as a matter of law, specific categories of contracts must be identified, categories to which the duty to act in good faith would apply. Commercial contracts are not considered a class of contracts in which good faith is implied in law. In spite of this, it is clear from recent and current developments that Australian courts recognise that certain commercial contracts may be subject to a duty of good faith, as typified by franchise-related disputes and the exercise of discretionary powers in Australia.

Indeed, Chapter 4 identified the challenges faced by Australia and the EU in integrating good faith in their general law of contract. In Australia, the question of the integration of the doctrine of good faith through implied terms or the construction of contracts shows that enforcing a principle of good faith in the general law of contract is an arduous task.

In the EU the question of the foundation of a principle of good faith in contract law is part of

[1] Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart, 2014) 3.

the broader debate on the legitimacy of the intervention of EU institutions in the regulation of contract law on behalf of all member states. The construction of European contract law is aimed at the construction of a Union of shared fundamental values concerning the social and economic relations between citizens.[2] The reshaping of national laws to pursue a European identity has not occurred without resistance.[3] Contract law has been ingrained in national codes and legal traditions for centuries and EU institutions do not have the competence to regulate generally on contract law. In spite of this reluctance, there has been a push by European institutions leading to a profound change of national legislation. In the EU, the only recognition of good faith as a fundamental principle is to be found in academic scholarship, and the CESL was presented as the next step towards the building of a European identity.[4] There, the duty to act in good faith was introduced as one of the core principles of the optional instrument. Unfortunately the fate of the optional regulation and the lack of development in the area of contract law in the EU mean that there is a long way ahead before a unified contract law is enforceable in the EU.

Chapter 5 has explored the applications of good faith in certain situations in Australia and the EU and has identified where good faith has been used to protect some parties. European institutions have focused their attention on the harmonisation of the protection of consumers as a catalyst of the establishment of the internal market. Directives deal with particular aspects of contract law. This trend has been characterised by a status-based approach to contract law. Through directives, the concept of good faith is explicitly enforced. Yet the lack of exhaustive legislation on contract law has been identified as a possible hindrance to the development of the internal market when combined with unforeseen market developments.[5] Good faith is mentioned in some directives and the CJEU has been asked to comment on its interpretation. The European judiciary has made it clear that its role is not to determine what a breach of good

[2] See Chantal Mak, 'Unweaving the CESL: Legal-Economic Reason and Institutional Imagination in European Contract Law' (2013) 50 *Common Market Law Review* 277, 287; Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' (2004) 10(6) *European Law Journal* 653, 656–7.

[3] Pascal Clément, *Avant projet de réforme du droit des obligations (Articles 1101 à 1386 du Code civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil), Rapport à Monsieur Pascal Clément Garde des Sceaux, Ministre de la Justice* (22 September 2005).

[4] See Martijn W Hesselink, 'The Case for a Common European Sales Law in an Age of Rising Nationalism' (2012) 8(3) *European Review of Contract Law* 342; Eric Posner, 'The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in European Contract Law' (2013) 50 *Common Market Law Review* 261, 273.

[5] *Communication from the Commission to the Council and the European Parliament on European Contract Law* COM(2001) 398 final, [2001] OJ C 255, [35].

faith is. This is a matter for domestic courts. While this state of affairs is slowly evolving, there is still a long road ahead for national courts to receive guidance from the CJEU on the interpretation of good faith in European secondary legislation. Meanwhile in Australia, good faith has been recognised in certain dealings. The recognition is part of a transaction approach where industries are pushing the legal recognition of certain principles. The review of codes of conduct, the launch of the review of Australian contract law, the express term of good faith in contractual clauses,[6] the lower courts' slow recognition of a term requiring parties to act in good faith, and the development of such a term in construction contracts demonstrate that good faith is indeed already part of Australian contract law.

In spite of the indecision of the courts, academic discourse and industry codes demonstrate that good faith is slowly emerging in contract law in both jurisdictions at least as a tool to protect. Good faith in Australia is developing through industry-led initiatives, a bottom-up approach in which the legislature is not driving the reform. This is very different to good faith in the EU, where good faith has been imposed on areas of contract law through a top-down approach, in which directives enacted by EU institutions have led to applications of a duty of good faith. The difference in approaches is apparent from the applications of good faith in codes of conduct across Australia and legal instruments across the EU. Australia needs to be careful and not relinquish the development of good faith to industries codes only. While it can encourage the development of a bottom-up approach whereby some contracts contain good faith duties, it also needs to develop a longer-term approach to the same duty being applicable to the general law of contract. Meanwhile, the EU needs to understand the pitfalls and assess how to circumvent the obstacles to of the recognition of good faith within a broader framework of European contract law. Indeed, Australia and the EU may have different approaches due to how the doctrine has evolved in these legal systems. Yet, this approach of applying the doctrine only in certain situations is leading to uncertainty and fragmentation of contract law rules. It also goes against the notion of good faith as not only a protective tool but a promotion of good contractual practices, of cooperation and honesty in contractual dealings. This thesis has analysed the challenges from such developments and thereby demonstrated the need for a more cohesive approach in order to address the hurdles faced by both jurisdictions in the recognition of good faith in contractual dealings.

[6] Mary Arden, 'Coming to Terms with Good Faith' (2013) 30(3) *Journal of Contract Law* 199, 199.

PART THREE: LEGAL REFORM INTRODUCTION

Having compared the applications of good faith in Australia and the EU and identified the challenges and pitfalls, this part considers the identification of avenues for reform, to improve certainty and foreseeability in relation to good faith in the contract laws of the two jurisdictions.

The different applications of good faith in Australia and the EU are criticised in that they create a two tier approach: on the one hand situations where good faith is mandated, and on the other situations where good faith could be implemented even though there is no certainty of this happening. Specific applications of the doctrine of good faith have led to a fragmentation of contract law, where different norms and rules apply depending on the type of transaction and the identity of the parties.

The lack of explicit recognition of good faith to all contractual dealings creates uncertainty for parties. Furthermore, the law does not reflect the community understanding that parties should keep to their word and perform their obligations as laid out in the agreement. In order to tackle this issue, this part proposes an explicit recognition of the doctrine of good faith.

Chapter 6 will draw the contours of good faith as a principle that could apply to every contract in order to demonstrate the benefits of such explicit recognition.

Chapter 7 will determine the instruments to be used to facilitate recognition of the principle, as well as the actors responsible the reform to ensure the newly recognised principle of good faith is enforced in contractual dealings.

Chapter 6
Good faith: an 'umbrella principle' in contractual relations

> Good faith may provide a unifying concept for a number of distinct rules dealt with under different headings and contribute to a greater consistency in the law by exerting pressure upon rules which are incompatible with the idea of good faith.[1]

This chapter will propose a model for the concept of good faith that could be applied in either Australia or the European Union.

Section I proposes that a duty of good faith in contractual dealings should be a principle of general contract law, independent from the nature of the agreement. As an 'umbrella principle', good faith will apply to every stage of the contract and to all parties to the agreement. This would not only promote certainty in domestic dealings, but would also align the Australian and European perspectives with those of their trade partners, as well as with international instruments. Section II will discuss the remedies that could be generated from a breach of the principle of good faith in contractual dealings, and will present a case study in order to illustrate the benefits to be gained from adopting good faith as a general principle of contract law.

I. ENSURING THE EQUILIBRIUM OF THE CONTRACTUAL RELATIONSHIP: A PRINCIPLE OF GOOD FAITH

Section A argues how good faith could be stated as a mandatory principle of general contract law, independent from the nature of the agreement, or the identity of the parties. Section B discusses how the principle would apply to the different stages of the contract, namely negotiation, performance and termination.

[1] Daniel Friedmann, 'Good Faith and Remedies for Breach of Contract' in Jack Beatson and David Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon Press, 1995) 399, 399–400.

In both Australia and the EU, the current strict and limited implementation of the concept of good faith promotes uncertainty, as parties only have a duty to act in good faith if their relationship falls under the mandated contracts that require the exercise of such a duty. Parties are free to submit their relationship to the condition that they act in good faith in other contracts. There is, however, a need for a coherent, all-embracing approach that would bring certainty to all contractual dealings. The current application of good faith to certain contractual relations creates a two-tier reasoning: certain commercial contracts on one tier and general contracts on the other. This creates more confusion and, indeed, uncertainty. This shows that there is a gap between what contract law dictates that the law should regulate and what practice shows, in other words a gap between the law and the real deal.[2] This is where a general umbrella principle of good faith could provide grounds for a remedy. Without such a uniform approach, contract law is more confusing and the concepts more legalistic and disconnected from the business community.

Chapter 3 highlighted that good faith is used in the context of relational contracts. However, as Eisenberg describes, 'every contract is relational'.[3] Macneil referred to a spectrum from discrete contracts to fully relational contracts, but alluded to the terminological difficulties associated with such a spectrum.[4] It is clear that there is a connection between parties in most, if not all, contractual relationships. This connection between the parties and commercial expectations can be identified as the sources of the duty to cooperate. This thesis argues that good faith appears to be the most appropriate tool to reflect these commercial expectations and the relational aspect of any contractual arrangement.

[2] Stewart Macaulay, 'Relational Contracts Floating on a Sea of Custom – Thoughts about the Ideas of Ian MacNeil and Lisa Bernstein' (1999) 94 *Northwestern University Law Review* 775.
[3] Melvin A Eisenberg, 'Why There is No Law of Relational Contracts' (2000) 94(3) *Northwestern University Law Review* 805, 821.
[4] Ian R Macneil, 'Relational Contract Theories: Challenges and Queries' (2000) 94(3) *Northwestern University Law Review* 877, 894.

A. A principle of good faith

There are a number of requirements needed for a contract to be formed.[5] There are also principles that apply to the performance and termination of the contract. This thesis advances the argument that one of these principles should be good faith.

1. Good faith as a principle

Contracts are meant to be performed. Any concept that encourages such performance should be elevated to a general principle of contract law; independent from the duration or content, the parties, or the nature of the relationship between them. As an essential feature of contract law,[6] good faith could apply to the entire life of the contract, from the pre-contractual phase to its termination. The principle of good faith would focus upon the behaviour of the parties, and be independent from the terms of the contract themselves.[7] In Australia, this would mean recognising and enforcing a duty to act in good faith in every contract, on every party, and at every stage of the contract. In the EU, it would mean recognising in law the principle of good faith, a principle that has been presented as fundamental in academic works.[8]

Before analysing the proposed principle further, it is necessary to justify the use of the word 'principle'. A principle is defined 'in a generalised sense as a *fundamental* source from which something proceeds, a *primary* element'.[9] It is 'underlying, or transcending, a body of rules … inherently possessing a stability'.[10] Ronald Dworkin stated that

> [i]dentifying principles involves grappling with a whole set of shifting, developing and interacting standards (themselves principles rather than rules) about institutional responsibility, statutory interpretation and the persuasive force of various sorts of precedents, the relation of all these to contemporary moral practices and hosts of such

[5] Offer, acceptance, consideration/cause and an intention to create legal relations.
[6] *Chambers Dictionary of Etymology* (Chambers, 2008) 840.
[7] John Carter and Michael Philip Furmston, 'Good Faith and Fairness in the Negotiation of Contracts Part I' (1994) 8 *Journal of Contract Law* 1; John Carter and Michael Philip Furmston, 'Good Faith and Fairness in the Negotiation of Contracts Part II' (1994) 8 *Journal of Contract Law* 93; Elisabeth Peden, *Good Faith in the Performance of Contracts* (LexisNexis, 2003).
[8] Chapter 3.I.B.2.
[9] *Oxford Dictionary* 499 (emphasis added).
[10] J M Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 1992) 409.

other standards.[11]

The equitable and the good, in the Aristotelian sense,[12] have such standing.[13] This thesis argues that good faith does as well. The weight and importance of good faith make it a principle.[14] This is line with the aims of proposed reforms of commercial law in Australia, namely to base contract law on principles and to fight fragmentation.[15]

It is worth comparing the proposed principle with its applications in other jurisdictions to address the compatibility between them, to ensure common legal requirements and ultimately further certainty in contracts involving parties in different legal systems. For instance, the doctrine of good faith in commercial dealings is well established in the USA. A common legal requirement does not necessarily mean a unified interpretation of the doctrine, though. For instance, even though Australia and the USA 'grew out of the same common law background'[16] and share similar economic and social conditions, it is unlikely that the recognition of the obligation to act in good faith in Australia will be similar to that in the USA.[17] Even though the duty of good faith in contractual performance as it is understood in the USA, especially in the states of New York and Connecticut, does not materially differ from the cooperation principle in Australia,[18] the model proposed in this thesis relies on a broader principle of good faith that is applicable to every bargain, and not restricted to commercial dealings. This thesis argues that it is the legal doctrine that matters, and jurisdictions can still provide particular interpretations based on their own circumstances.

Another comparison is found in Canada. Good faith has only very recently been recognised as an overarching principle of contract law in Canada.[19] Yet commonalities between the Canadian approach and the principle of good faith proposed in this thesis are apparent. In both instances, good faith is presented as a broad principle organising contractual performance. It also imposes

[11] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 36.
[12] See Chapter 3.II.B.
[13] Michael D A Freeman, *Lloyd's Introduction to Jurisprudence* (Thomson Reuters, 2008) 43.
[14] For further analysis see Dworkin, above n 11.
[15] Donald Robertson, 'The International Harmonisation of Australian Contract Law' (2012) 29 *Journal of Contract Law* 1, 22.
[16] James Lacey, 'Partnering and Alliancing: Back to the Future?' (2007) 26 *Australian Resources and Energy Law Journal* 69, 75.
[17] For a different view see ibid.
[18] *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, 800, referring to *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 53 ALJR 745, 749.
[19] Chapter 1.I.B.2.

a duty on the parties to act honestly. However there are differences. The Canadian doctrine is only applicable to performance,[20] while the model presented in this thesis extends to negotiation. Therefore, the principle proposed in this thesis goes further than the common law understanding in Canada.

The application and enforcement of the duty to act in good faith depends either on the type of relationship, whether it is a commercial dealing,[21] or the identity of the party, consumer or business.[22] While recent Australian trends show that parties to long-term contracts are more likely to be under a duty to act in good faith, there are still one-off instances that are not necessarily covered by the concept. The current strict and limited implementation of the concept unfortunately promotes uncertainty, as parties only fall under a duty to act in good faith if their relationship falls under the typical contracts that have been equipped with such a duty. Parties can still provide in the contract that they submit their relationship to the condition that they act in good faith. Courts can impose a duty to act in good faith through the implication of a term or construction of the contract, but these decisions are made on a case-by-case basis. The enactment of mandatory codes of conduct and the establishment of voluntary ones promoting good faith are to be welcomed, as not only does it bring some certainty to certain commercial dealings as to whether the duty of good faith applies to the transaction,[23] but it also satisfies the business community's need for further regulation on the doctrine of good faith, and ensures fair dealing.[24]

There is, however, a need for a coherent, all-embracing approach that would bring certainty to all contractual dealings. This was echoed by Justice Einstein, who stated that it might indeed be 'a virtue of the implied duty [of good faith] that it expresses in a generalisation of universal application, the standard of conduct to which all contracting parties are to be expected to adhere throughout the lives of their contracts'.[25] The thesis argues that good faith cannot be restricted to a set of rigid rules but is instead a framework, a 'general principle' which might be recognised in contract law. Good faith is a chameleon concept that 'can only gain substance

[20] *Bhasin v Hrynew* [2014] SCC 71.
[21] Including franchises and construction contracts: see Chapter 5.II.A.2.
[22] Chapter 5.
[23] For instance in franchising: *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth).
[24] Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart, 2014) 15.
[25] *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236, 258.

from the particular events that take place and to which it is applied'.[26] This thesis agrees with Judge of Appeal Priestley, who stated that 'anything less is contrary to prevailing community expectations'.[27]

In the EU, the recognition of good faith as an organising principle of contract law, which promotes cooperation and honesty in contractual dealings, would provide insights, if it were recognised into how the doctrine could be used. As case law develops following the recognition of good faith in Canadian contract law, conclusions may be drawn on how to integrate the doctrine into EU law. This is because of the mix of common law and civil law traditions in Canada and the existence of these same traditions in the EU.[28]

2. Good faith as imposing positive obligations

Most contract law principles are negative in that they proscribe certain behaviours. Examples include unconscionability and misleading and deceptive conduct. The 'excluder approach' of good faith has been developed by US academic Summers.[29] He explained that good faith can be defined through examples of 'bad faith' behaviour.[30] Yet good faith is broader than this approach and can do more than proscribe bad faith. It also prescribes, and in fact promotes, positive behaviours including taking into account the other party's interests, cooperation and loyalty.[31] Cooperation therefore becomes one facet of good faith, but good faith is broader than the duty to cooperate. This is in line with Mason's understanding of good faith. According to him, acting in good faith

> has commonly been held to embrace three related matters: 1. An obligation on the parties to co-operate to achieve the contractual objectives. 2. Compliance with honest standards of conduct. 3. Compliance with standards of conduct that are reasonable having regard

[26] Gabriela Shalev, 'Negotiating in Good Faith' in Stephen Goldstein (ed), *Equity and Contemporary Legal Developments* (Hebrew University of Jerusalem, 1992) 818, 820.
[27] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 268.

[28] See Chapter 1.I.B.2.
[29] Robert S Summers, '"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54(2) *Virginia Law Review* 195.
[30] Ibid.
[31] James Allsop, 'Good Faith and Australian Contract Law: A Practical Issue and a Question of Theory and Principle' (2011) 85 *Australian Law Journal* 341, 349.

to the interests of the parties.[32]

These definitions are part of the language of the courts,[33] and most importantly focus on the ordinary meaning of good faith;[34] which is the most important factor in drawing the parameters of the concept.

3. **Good faith proposed as non-excludable**

If good faith were a mandatory duty, it could not be excluded from contractual relations through express terms. This would ensure that, in every agreement where a duty to act in good faith is mandated, there will be a fair bargain. This approach is not unfamiliar in either the EU or in Australia. In the EU, the duty to act in good faith is not implied, but statutorily mandated by directives.[35] It is an explicit duty applying to certain contracts.[36] *Bonne foi* and the model of good faith presented in this thesis also share this mandatory nature.[37]

4. **Implications for the jurisdictions**

i. Australia

There is a need to provide more uniformity. Australian courts have shown a reluctance to introduce good faith, and even more reluctance to imply and to interpret the concept. From building contracts[38] to franchising[39] and distribution,[40] Australian businesses have opened the

[32] Anthony Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 *Law Quarterly Review* 66; see also *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184, [145] (Bathurst CJ).
[33] Chapter 3.II.C.2.
[34] Jan Steyn, 'The.Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?' (1991) 6 *Denning Law Journal* 131, 141.
[35] *Council Directive 86/653/EEC on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents* [1986] OJ L 382/17; *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29; *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA Relevance* [2011] OJ L 304/64.
[36] Agency contracts and consumer contracts: see Chapter 5.I.A.1.
[37] See Chapter 1.I.A.2.
[38] Building Contract Standard DRAS11000:2015.
[39] *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Cth); *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth).
[40] *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Cth).

door to the recognition of good faith as a duty applicable in commercial contracts, by including good faith clauses in their contracts. This has forced the courts to confront the issue. To demonstrate this, this thesis has highlighted how fairness in contractual dealings has nonetheless surfaced in jurisprudence.[41] Therefore, the role of the judiciary is primarily to ensure that the law is applied and enforced.[42]

A principle of good faith in contract law would address the current Australian piecemeal approach of both the legislature and judiciary in regulating contracts and promoting fair dealing. Such a principle would provide an umbrella that allows existing doctrines to persist while establishing an overarching framework that would bridge the gap between the community understanding of good faith and the law.[43]

In Australia, according to the *Franchising Code of Conduct*, good faith is mandatory.[44] A broader approach recognising good faith as non-excludable could be implemented through the use of public policy. The main point of contention with this proposition is that public policy is not clearly defined in Australia. Nygh and Carter analyse different interpretations of public policy, but the common point relates to the interests of the court within one legal system, the so-called forum.[45] Nygh considers that public policy must be used to protect the forum's domestic interests, external interests and moral interests.[46] This shows that public policy is deeply rooted in Australian interests.[47] Carter expands this analysis further by considering that public policy must also be used if there is an overriding principle of morality.[48] To ensure the permanence and durability of the application of good faith, such an approach is essential, if the recognition of good faith is to be effected through the use of public policy.

An issue that remains is the fragmentation between consumer and business relations. This thesis aims to make it clear that good faith will apply as a duty to protect every party to every transaction. To avoid a fragmentation of contract law, it would be appropriate to legislate and

[41] Chapter 4.I.A.
[42] See Chapter 7.I.A.1.
[43] Mitchell, above n 24.
[44] *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth) s 6(4).
[45] Peter B Carter, 'The Role of Public Policy in English Private International Law' (1993) 42 *International and Comparative Law Quarterly* 1; Peter Nygh, *Autonomy in International Contracts* (Oxford University Press, 1999).
[46] Martin Davies, Andrew Bell and Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia* (Lexis Nexis, 8th ed, 2010) 376.
[47] Ibid 377–8.
[48] Carter, above n 45.

mandate an overall duty to act in good faith. This umbrella would likely embrace the provisions laid out in codes of conduct[49] and also situations where no codes are in place yet.[50] The duty would be expressly stated and enforceable in all contracts, thereby promoting uniformity in dealings. Both jurisdictions suffer from the fragmentation of the implementation of the doctrine of good faith. The concept needs to be implemented as a general principle in EU legislation to avoid the current uncertainty, and in Australia, it is needed to prevent further fragmentation of contract law.

While the model would act as a principle to ensure fair dealing, it would also integrate the doctrines currently used in Australia. This means that the Australian application of the principle would embrace unconscionability, estoppel, and misleading and deceptive conduct, where such doctrines are applied to provide protection to consumers. Furthermore, it would act as a primary principle in commercial dealings, where such doctrines are not applicable. Therefore, the model would introduce good faith as an umbrella principle applicable to every dealing, while also embracing other doctrines in order to protect vulnerable parties.

ii. The EU

The EU is also facing fragmentation of its laws. Ultimately, the two-tier approach currently adopted further reinforces uncertainty for parties in contractual dealings. The use of the doctrine of good faith in the EU has focused on the protection of the consumer.[51] The aim is to ensure that the equilibrium in the contract is maintained and to promote the establishment of the internal market. Although laudable, this position does not take into consideration the fact that other parties may need protection. To ensure the equilibrium of the relationship, the agreement must be fair and not swing towards the party with the most bargaining power. An umbrella principle of good faith would achieve five outcomes: firstly, ensuring the protection of weaker parties; secondly, ensuring fair dealing in any contract; thirdly, ensuring fair dealing in the conclusion and enforcement of a contract; fourthly, embracing and encompassing equitable doctrines that may already apply in particular circumstances; and fifthly, recognising the implicit dimensions of contracts and their role in contractual transactions.[52]

[49] *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth); *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Cth).
[50] *Small Business Commissioner Act 2011* (SA); proposed Building Contract Standard DRAS11000:2015.
[51] See Chapter 5.I.A.
[52] On umbrella theory in relation to relational contract theory, see Macneil, above n 4, 877.

Furthermore, what is emphasised here is the character of the principle of good faith within the contract.[53] To promote both certainty and uniformity, the duty to act in good faith should apply to both commercial and consumer dealings. The idea of promoting fair dealing through the doctrine of good faith is gaining momentum. Even though the CESL was withdrawn, including its proposal to establish good faith as a founding principle, EU institutions need to take a step forward in the recognition of good faith in contract law.

The model presented in this thesis is intended to apply both domestically in Australia, and at a transnational level through its EU application. The goal in both instances is identical: to ensure contractual dealings are fair. Through an explicit recognition of the doctrine of good faith, these jurisdictions would also conform to international instruments that have adopted the doctrine. Even though the interpretation of good faith in these instruments must take into consideration the particularities of international trade, it would improve certainty in this case by integrating a doctrine of good faith that is similar, if not identical to, the application of good faith in the domestic context.

B. Contours of the duty

1. Good faith to ensure cooperation

i. Meaning in the Australian context

The law protects the parties to a contract by ensuring that dealings are fair. This includes the core of the bargain as well as the parties' motivations. While good faith embodies substantive objectives and values,[54] it is also part of the implicit dimensions, a part of the contractual context.[55] Even though the context is unique to each transaction, there is a constant need to establish and maintain equilibrium in the relationship. Numerous examples can be given to demonstrate that this understanding of good faith is already integrated in some parts of

[53] Guillaume Busseuil, *Contribution à l'étude de la notion de contrat en droit privé européen* (LGDJ, 2008) 658.
[54] Eyal Zamir and Doron Teichman, *The Oxford Handbook of Behavioral Economics and the Law* (Oxford University Press, 2014) 686.
[55] See Chapter 3.II.C.2.

Australian contract law. For instance, one of the Australian *Food and Grocery Code of Conduct*'s purposes is to promote and support good faith in commercial dealings, by ensuring there is no duress.[56] The Australian *Franchising Code of Conduct* defines good faith as 'acting honestly and not arbitrarily',[57] in line with the association of good faith with honesty. The *Franchising Code of Conduct* also describes good faith as mandating the parties to act cooperatively to achieve the agreement's purposes.[58] This understanding is shared between Australia and the EU. Indeed, art 3 of the CESL also associates good faith with honesty and openness. According to art 2 of the CESL, good faith means taking into consideration the other party's interests. These examples demonstrate the need for parties to cooperate, meaning taking into consideration the legitimate expectations of the other party.[59]

ii. Meaning in the EU context

It is clear that the main impediment to the recognition of good faith in EU contract law has less to do with the push back against the doctrine and more to do with the lack of competence of the EU institutions to regulate a general EU contract law.[60] However, even though many EU member states have recognised good faith in their contract law, academic compilations, such as the PECL for instance, demonstrate the kaleidoscope of meanings of good faith at the state level. In the European context, the principle would reflect the understanding developed and promoted by academics, and provide the framework for the integration of good faith in contracts within the internal market. The model presented in this thesis is not incompatible with the understanding of *treu und glauben* in Germany, but the latter is restricted to certain aspects of contract law, instead of being a general clause.[61]

The model also shares some commonalities with the understanding of good faith in France. Good faith and *bonne foi* are used to interpret the contract, complete the agreement and limit certain rights. The aim is to ensure equilibrium between the parties to the transaction.[62] The French understanding broadly corresponds to the interpretation and use of good faith at the EU level. This state of affairs provides further justification for the successful integration of good

[56] *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Cth) s 28(3).
[57] *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth) s 6(3).
[58] Ibid.
[59] Chapter 3.II.C.2.
[60] See Chapter 4.
[61] Chapter 1.I.A.1.
[62] Sandrine Tisseyre, *Le rôle de la bonne foi en droit des contrats: Essai d'analyse à la lumière du droit anglais et du droit européen* (LGDJ, 2012) 242.

faith as a principle of contract law.

Member states' specificities have impacted upon the implementation of doctrines in the EU. EU directives that contain a provision on good faith have not been implemented by domestic legislation in all member states.[63] For instance, while the *Unfair Terms in Consumer Contracts Directive* has had a very large impact on English legislation by integrating good faith into some aspects of English contract law, the same provisions have not been implemented in France, since the French *Civil Code* already imposes an obligation to act in good faith.[64] Consequently, the principle would provide certainty and foreseeability to dealings within the EU.

2. Application of good faith to ensure fair negotiation

This section shows that good faith as a principle of contract law is applicable also to negotiations, which will, on one hand, bring cohesiveness in Australian contract law, and on the other provide protection to parties who trade in the internal market of the EU.

i. Australia

It is necessary to establish a foundation of good faith in negotiation, since at this stage there is no contract in place. There are two types of behaviours that can be tackled by good faith in negotiations: when parties withdraw from negotiations; and when parties act unconscionably, or deceive the other party. Practical applications of this doctrine already exist.[65] This thesis does not argue for a complete overhaul of the current approach to contract law, but instead proposes to bring coherence and cohesiveness into the general law of contract. Therefore, current doctrines would still apply and the principle of good faith would provide an umbrella to protect parties where common law doctrines do not provide any remedy. The common law relies on the concept of 'let the buyer beware' and promotes a 'hands-off' approach, according to which parties must actively seek the information needed to make a conscious decision. However, the need for parties to take into consideration the other party's interests and to cooperate,[66] and for the law to protect vulnerable parties, have eroded the so-called principle

[63] Chapter 5.II.B.1.
[64] *Civil Code* (France) art 1134 prior to 2016.
[65] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49.
[66] Chapter 3.II.C.2.

of caveat emptor. The proposed model addresses the tension between a duty of disclosure and the principle of caveat emptor on two levels, which are explained below.

Firstly, the proposed model addresses the current double standard according to which some transactions are subordinated to disclosure, while others are not. Good faith as a principle of contract law would coexist with the doctrine of caveat emptor. It would provide more certainty and ensure disclosure of information to vulnerable parties, leaving the principle of buyer beware for arm's length relations. This would suit the current state of legislation where the doctrine of good faith is applied as a protectionary tool. In such an instance, the duty to disclose information takes precedence over caveat emptor.[67]

Secondly, a principle of good faith should not impose a duty to disclose every piece of information during the negotiation phase. Instead, emphasis must be put upon the relationship between the parties, the need to cooperate in order to reach a contract, and the need to address the legitimate expectations of the other party in the negotiation. This thesis has described situations where silence is considered misleading or deceptive.[68] The duty to act in good faith would go no further than the current approach in respect of disclosure of information, but it would instead provide further justification for the cases where silence is misleading.

Furthermore, emphasis should be placed on the duty to cooperate in contractual dealings and to be loyal to the bargain. Good faith is an illustration of the need to be loyal to the bargain and the promises made. Consequently, parties are free to withdraw from negotiations, as long as such action is exercised reasonably.[69] This is in line with the broader understanding that parties must exercise discretionary rights reasonably. This thesis has shown that the duty to exercise rights reasonably exists in Australia in termination clauses.[70] Consequently, this links reasonableness with good faith and the possible application of good faith in this instance. This is especially relevant in instances where costs have already been incurred based on the progress of negotiations. In Australia, such a situation is dealt with under the equitable doctrine of estoppel. Estoppel has provided a shield for the party who relied on a promise, which is later withdrawn by the other party.[71] The concept of good faith in the context of withdrawal from

[67] See, eg, consumer contracts: Chapter 5; *Insurance Contracts Act 1984* (Cth) s 13.
[68] Chapter 4.I.A.2.
[69] Chapter 3.II.C.1.i.
[70] Ibid.
[71] Chapter 4.I.A.3; *Coombe v Coombe* [1951] 2 KB 215.

negotiations would act as part of an umbrella doctrine and provide protection to the other negotiating party. Estoppel would be one of the doctrines that would fall under the umbrella of good faith.

Even though the proposed principles have similarities with the German understanding of *treu und glauben* in that they apply to all stages of the contract, the extent to which the model is used in Australia in the case of negotiation would depend on the particular situation.[72] In instances where other doctrines, such as unconscionability, misleading and deceptive conduct and estoppel, have developed, it does not seem necessary for good faith to play an active role,[73] because these doctrines already provide some relief to aggrieved parties. However, good faith would become a principle under which these doctrines operate. This thesis does not argue that good faith needs to replace common law and equitable concepts that are enshrined into Australia contract law. This thesis considers that these doctrines already provide a particular framework in which parties must act fairly in the negotiation phase of the contract.[74] Parties should not act unconscionably, and should not mislead or deceive the other party. In Australia, such behaviour constitutes a breach of the ACL.[75] Therefore, recognising a principle to act in good faith would bring cohesiveness to the law in this area. Whereas unconscionability and misleading and deceptive conduct only target one of the parties, the duty of good faith should be imposed on both, regardless of their status, and whether they are consumers or businesses. However, it should not be used to extend the grounds for unconscionability in an unreasonable manner. For instance, lack of business acumen is currently not a ground to avoid a contract under the doctrine of unconscionability, nor should it be such a ground should good faith apply.

ii.The EU

In EU contract law, other doctrines such as unconscionability and estoppel are not as well developed. Therefore, in the EU, the doctrine of good faith as a principle would provide the ground for remedies for parties who suffer as a result of the deceptive or unconscionable conduct of another party. The duty to negotiate in good faith is expressly proposed in EU academic compilations. For instance, even though a party is free to negotiate, the PECL stipulates that:

[72] Chapter 4.I.A.3.
[73] In Germany, however, good faith is used where these doctrines would otherwise apply.
[74] Chapter 4.I.A.3.
[75] *Australian Consumer Law, Competition and Consumer Act 2010* (Cth) sch 2.

> [a] party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party.
>
> It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party.[76]

This is also reflected in the DCFR, which states:

> A person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing and not to break off negotiations contrary to good faith and fair dealing. This duty may not be excluded or limited by contract.[77]

Therefore, a principle of good faith in contract law would recognise the importance of acting in good faith in the negotiation of an agreement, thereby integrating the provisions laid out by EU scholars. Good faith applies now expressly in the negotiation phase in French contract law,[78] and in some other EU member states.[79]

3. Application of good faith to ensure fair performance

This section shows that good faith as a principle of contract law applicable to the performance of every contract will provide protection to parties in both Australia and the EU, to ensure parties who do not cooperate can be held responsible before the courts.

Parties to a contract are asked to cooperate in the performance of their obligations. An enforceable principle of good faith would be a tool to ensure such cooperation in contractual performance. This thesis has shown that the contract is set within a particular context, and its implicit dimensions shape the agreement. This creates a 'virtuous circle' in which a contract is born from the promises of the parties and their intent, as well as these dimensions. The agreed

[76] PECL s 2:301.
[77] DFCR II-3.301.
[78] See Chapter 1.I.A.2.
[79] It is also part of the Dutch *Civil Code* under the notion of reasonableness and fairness: Dutch *Civil Code* s 6:2.

contract becomes part of the implicit dimensions that will shape future relations between the parties. Good faith is part of this context and dimensions.[80] It is not a term of the contract; it is part of the contractual context in which parties operate.

This means that, in the Australian context, there is no need to use the mechanisms of implication of terms in fact or construction for good faith to be enforced.[81] It also goes further than the concept of construction of the contract in that it not only deals with the terms of the agreement, but also the context of the parties in the negotiation phase.[82] The principle implies that a contract cannot exist without the parties negotiating, performing and terminating the contract in good faith. In situations where no current doctrine would provide relief, an aggrieved party would be able to rely on the principle. Therefore, the link between the relational nature of a contract and good faith is recognised as paramount, as is already shown through the application of good faith in certain contractual dealings regulated by industry codes of conduct.

In the EU context, a principle of good faith in contractual performance is yet to be recognised at the supranational level. The recognition of good faith as a principle was proposed in the CESL, albeit yet again as a subject-specific application. However, the withdrawal of the proposal means that good faith is only used in certain instances of EU contract law, mostly in relation to consumer protection and unfair contractual terms.

4. Application of good faith to ensure fair termination

There are currently no situations in which termination of a contract is regulated by good faith in EU contract law. The introduction in the EU of the principle of good faith applicable to all stages of the contract, including termination, could therefore provide a right of action. Although real efforts have been made in this direction, it may be a long time before such recognition occurs at the European level.[83]

In Australia, the situation is different. There are two situations where a principle of good faith can be used in the phase of termination of a contract: it can regulate instances of unfair

[80] Chapter 3.II.C.
[81] For a contrary view see Chapter 4.II.B.
[82] Chapter 3.II.B.
[83] Chapter 4.II.D.

termination, and the use of termination clauses. Since parties must cooperate in the formation and performance of contracts, it is logical that the termination of the agreement is also subject to standards of good faith and fair dealing. In the same way that parties cannot withdraw from negotiations unfairly,[84] they should not be allowed to terminate the agreement if it is unreasonable and demonstrates ulterior motives.[85] Such reasoning is also applicable to the need for parties to use their discretion reasonably, whether it relates to the behaviour of one party leading the other to terminate the agreement, or to the use of a termination clause. A does not have a ground to terminate the contract unless B has breached a condition.[86] Similarly, A cannot use a termination clause in the contract to 'escape' the agreement.[87]

C. Conclusion to Section I

To conclude, this section of the chapter has presented how good faith could be set as a principle of contract law in Australia and the EU. It proposes a model that will not only provide more certainty, but also address the current fragmentation of laws and contracts. Good faith should be integrated as a mandatory principle of contract law. It has a role to play in both Australia and the EU at every stage of the contract, from its negotiation, to its performance and termination. It is the tool that advances the concept of cooperation in the contract. By being used in so many different contexts, good faith can be analysed in a broader context; as an umbrella principle. The concept is multi-contextual; it can adapt to different situations while not losing its core values. In the words of Friedman at the beginning of this chapter, it 'provide[s] a unifying concept for a number of distinct rules dealt with under different headings and contribute[s] to a greater consistency in the law by exerting pressure upon rules which are incompatible with the idea of good faith'.[88]

[84] Ted Wright, Fred Ellinghaus and David Kelly, 'A Draft Australian Law of Contract' (Working Paper No 13-03-14, Newcastle Law School, 2014) art 9: The parties must act in good faith and conscience in negotiating, making, altering, performing, enforcing or terminating a contract.

[85] *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* (1999) 21 ATPR 41-703; *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Burger King Corp v Hungry Jack's Pty Ltd* [2001] NSWCA 187.

[86] See below for remedies.

[87] Chapter 3.II.C.1.ii.

[88] Friedmann, above n 1, 399–400.

II. REMEDIES

Justice French explains that, while good faith may be legislated, it should be left to the courts to interpret.[89] For the principle to be enforceable, and enforced, the conditions for its breach and the remedies applicable must be clearly identified. While this argument is valid in the context of both Australia and the EU, this section will mainly focus on Australia. The reason for this is twofold: firstly, the EU law of remedies is essentially decentralised.[90] In other words, while EU provisions impose some remedies, it is the prerogative of the member states to impose more stringent provisions. This has been the case until the recent move towards full harmonisation. The reason for such harmonisation is to strengthen the internal market.[91] Secondly, and as a consequence of the first point, the idea of an EU law of remedies is to be questioned. While there is some harmonisation and efforts to build such a body of law, there is currently no such repository of law in the EU. Member states have retained the prerogative to deal with this area of law. It is outside the scope of this thesis to determine the law of remedies of the different states since this thesis has focused on the EU as a legal system rather than the sum of its member states. What the thesis will do in relation to the EU, however, is briefly analyse generally the decentralisation of the law of remedies and the implications of this. This is important because it will provide some context to the EU integration of good faith and is in contrast with the Australian approach.

In order to apply remedies, courts must identify a breach of a provision or of a contractual term. If a party alleges a breach of contract, the courts must determine whether a breach has actually occurred, and what the consequences of the breach are.[92] Understanding what good faith means in a particular context, and whether it has been breached by one party, constitutes the biggest challenge for the courts and for the implementation of good faith as a general contract law principle. This section discusses the remedies that could flow from a breach of the principle of good faith in contractual dealings. Section A discusses some aspects relating to remedies in the

[89] Robert French, 'Judges and Academia – Building Bridges' (Speech presented at the *Australian Academy of Law Symposium Fragmentation or Consolidation? Fostering a Coherent Professional Identity for Lawyers, Brisbane*, 17 July 2007).

[90] Dorota Leczykiewicz, '"Where Angels Fear to Tread": the EU Law of Remedies and Codification of European Private Law' (2012) 8 *European Review of Contract Law* 47, 49.

[91] *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council* [2011] OJ L 304/64, recital 2.

[92] John Carter, *Carter's Breach of Contract* (Lexis Nexis, 2011) 3.

EU. Section B identifies the adequacy of remedies for a breach of good faith in contract law. Section C presents an Australian case study that highlights the benefits to be gained from the implementation of the model.

A. The question of an EU law of remedies

As has been mentioned, remedies in EU contract law are mostly the prerogative of the member states' domestic legislation. Despite this, in the context of EU contract law especially, there have been some efforts towards harmonisation. Indeed, some directives have imposed an obligation on member states to ensure that effective remedies are in place in their national laws.[93] For instance, the *Commercial Agents Directive* clearly imposes an obligation that member states must take 'the measures necessary to ensure that the commercial agent is, after termination of the agency contract, indemnified … or compensated for damage'.[94] The integration of both remedies within the directive was born from a compromise between the German approach (indemnity) and the French approach (compensation).

> Under the indemnity system, the agent is entitled after cessation of the contract to payment of an indemnity if and to the extent that he has brought customers to the principal or significantly increased the volume of business with existing customers and the principal continues to derive substantial benefit from such customers.[95]

The compensation results from the damages the agent suffers because of the termination of their relations with their principal.[96] The directive lays out elements for the indemnification or compensation in art 17. While there is a limit on the amount the agent can be indemnified, there is no maximum amount of compensation: by judicial custom it has been fixed as 'the global sum of the last two years commission or the sum of two years commission calculated over the

[93] *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council* [2011] OJ L 304/64, art 3; *Council Directive 85/374/EEC of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products* [1985] OJ L 210/29, arts 1, 3; *Council Directive 90/314/EEC of 13 June 1990 on Package Travel, Package Holidays and Package Tours* [1990] OJ L 158/59, art 5.

[94] *Council Directive 86/653/EEC of 18 December 1986 on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents* [1986] OJ L 382/17, art 17.

[95] Séverine Saintier and Jeremy Scholes, *Commercial Agents and the Law* (Routledge, 2014) 673.

[96] Ibid 679

average of last three years of the agency contract'.[97]

The *Unfair Terms in Consumer Contracts Directive* states that

> [m]ember [s]tates shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.[98]

The principles of subsidiarity and proportionality in EU regulation are emphasised throughout the preamble of the *Consumer Rights Directive*, which clearly states:

> [i]n addition to the consumer's right to terminate the contract where the trader has failed to fulfil his obligations to deliver the goods in accordance with this directive, the consumer may, in accordance with the *applicable national law*, have recourse to other remedies, such as granting the trader an additional period of time for delivery, enforcing the performance of the contract, withholding payment, and seeking damages.[99]

However, the same directive states clearly that

> Full harmonisation of some key regulatory aspects should considerably increase legal certainty for both consumers and traders. … The effect of such harmonisation should be to eliminate the barriers stemming from the fragmentation of the rules and to complete the internal market in this area.[100]

There are two main illustrations of the full harmonisation in the directive. Firstly art 4 stipulates that member states cannot maintain or introduce 'provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive'. Secondly member states

[97] Ibid.
[98] *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29, art 6.
[99] *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council* [2011] OJ L 304/64, recital 53 (emphasis added).
[100] Ibid recital 7.

must lay down rules on penalties for infringements of the directive.

It is also important to note that the attempt to create a law of remedies has been developed in the PECL[101] and the DFCR.[102] Therefore, where relevant, this thesis will refer back to the state of the law in the EU, but only in cases where there are provisions in EU law.

B. Adequate remedies for a breach of good faith

This section is divided into two subsections that emphasise, firstly, the consequences of a breach of good faith for the Australian parties and, secondly, the consequences of such a breach on the contract itself.

1. Consequences for the parties

This section highlights the remedies available to the party who has suffered damage or a loss due to the behaviour of the other party and is seeking reparation.

i. The lack of recourse to damages

Damages are traditionally presented as the most common remedy in common law.[103] 'They are granted as a matter of right'.[104] The aim of damages is to restore the lost equilibrium of the relationship.[105]

> The rule of the common law is that where a party sustains loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.[106]

In order to determine whether damages can be awarded, courts must establish the presence of

[101] PECL chs 8, 9.
[102] DCFR art III 3-101/102.
[103] Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (Thomson Reuters, 6th ed, 2016) 493.
[104] Friedman, above n 1, 402.
[105] Paterson, Robertson and Duke, above n 105, 493.
[106] *Robinson v Harman* (1848) 154 ER 383, 385.

three elements: a breach, a loss and causation.[107] Firstly, the issue is to determine whether there has been a breach. Even though a duty to act in good faith may be recognised as enforceable, finding a breach of that duty is a different matter. Secondly, once a breach of the duty of good faith can be established, the claimant must then prove a loss. The aim of determining the loss is to put the parties back where they would have been if the contract had been performed.[108] Even though any breach entitles the injured party to seek damages, they are not awarded unless a loss can be proven and assessed monetarily. If the plaintiff cannot assess its loss, it may only be awarded nominal damages.[109] Finally, the claimant must show that the link between the breach and the loss is not too remote,[110] albeit only in consequential damages as expectation damages are a result of the direct loss resulting from the breach.

References to damages are to be found in the ACL and various codes of conduct.[111] Section 236 of the ACL states that an action for damages may be commenced if the claimant has suffered loss or damage because of the conduct of another person resulting from a proscribed action, including unconscionability, and misleading and deceptive conduct.[112] However, these provisions do not lay out a test for the award. Consequently, the courts use the common law test to determine whether the claimant is entitled to damages and if so how much they should receive.[113]

According to Fuller and Perdue, there are three types of damages: reliance damages, expectation damages and restitution damages.[114] Firstly, expectation damages are the most commonly awarded type of damages. They compensate the claimant with a monetary award that represents the loss of gain that would have occurred if the contract had been performed. It usually corresponds either to the loss of bargain or the cost of replacing the original promise.[115] Secondly, parties who incur costs based on the promise of performance by the other party may

[107] Paterson, Robertson and Duke, above n 103, 496.
[108] Michael G Bridge, 'Expectation Damages and Uncertain Future Losses' in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Clarendon Press, 1995) 429.
[109] *Luna Park (NSW) Ltd v Tramways Advertising Ltd* (1938) 61 CLR 286.
[110] *Hadley v Baxendale* (1854) 9 Ex 341.
[111] *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth); *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Cth); *Australian Consumer Law, Competition and Consumer Act 2010* (Cth) sch 2 s 224.
[112] *Australian Consumer Law, Competition and Consumer Act 2010* (Cth) sch 2 s 236.
[113] *Robinson v Harman* (1848) 154 ER 383, 385.
[114] Lon Fuller and William R Perdue Jr, 'The Reliance Interest in Contract Damages' (1936) 146 *Yale Law Journal* 52, 52.
[115] *MacRae v Commonwealth Disposals Commission* (1951) 84 CLR 377.

be entitled to reliance damages.[116] These aim to cover the cost incurred when the performance does not occur.[117] Thirdly, restitution damages require the party who has breached the contract to confer back to the plaintiff any value given and unjustly gained by one party.[118] The latter has been criticised for having 'no positive role in the law of remedies of contract law' and it has been suggested 'that they should be eliminated'.[119]

An analysis of the case law shows that damages are not often used as a remedy for actions in breach of good faith. This can be explained by the fact that, even if courts identify that parties had to act in good faith, they rarely find a breach.[120] One reason is because the boundaries of the notion of good faith are yet to be clearly drawn. For a breach of the duty to act in good faith to occur, such a duty must be a substantial component of the contract and its context. It is only when the action of the party in breach shows obvious bad faith that Australian courts have intervened. Unfair dealing must be proven as a fact:[121] an allegation is not enough. For instance, in *Renard Constructions*[122] the Court held that the principal had not acted reasonably, amounting to a repudiation of the contract. The contractor was entitled to sue under a quantum merit action.[123] Furthermore, *Burger King* implied a term of good faith and considered that the duty had been breached based on the circumstances of the case.[124] The plaintiff was awarded damages.[125] Finally, in *Yokohama*, based on the circumstances of the case, the courts recognised a breach of good faith.[126] Since good faith is factually determined, passing the test for damages can be difficult. In *Hughes Aircraft* dealing unfairly was not enough.[127]

Based on these examples, this thesis argues that no damages would be awarded for a breach of an independent obligation of good faith.[128] Consequently, courts may consider that a party

[116] Paterson, Robertson and Duke, above n 103, 504.
[117] Fuller and Perdue, above n 114, 54.
[118] Paterson, Robertson and Duke, above n 103, 512.
[119] David Campbell, 'Better than Fuller: A Two Interests Model of Remedies for Breach of Contract' (2015) 78 *Modern Law Review* 296, 323.
[120] *Far Horizons Pty Ltd v McDonald's* [2000] VSC 310; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349; *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* (1999) 21 ATPR 41-703; *JR Consulting and Drafting Pty Ltd v Cummings* [2014] NSWSC 1252.
[121] *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 164.
[122] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.
[123] Ibid 247 and 277–8 (Meagher JA, based on the arbitrator's decision).
[124] *Burger King Corp v Hungry Jack's Pty Ltd* [2001] NSWCA 187, [224], [315].
[125] Ibid [762].
[126] *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49, [1424].
[127] *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 264.
[128] See Peden, above n 7, [8.2] for a perspective on the role to be played by fairness as an additional restriction on termination. Also see John Carter, above n 92, [10.52] 493.

failed to perform its duty in good faith. In that situation, good faith would act as an interpretative principle to determine the motive that led to the party in breach acting in a certain way.[129] This is because the doctrine of good faith should be seen as a mandatory principle of contract law, rather than a term of the contract. Attempts to determine the breach should focus on the behaviour of the parties.[130] Doing so may provide further justification for the breach of a term in the contract, but it does not necessarily justify the award of damages for breach of a term to act in good faith. In Australia, such an understanding fits within the current layout of the ACL, where the extent to which parties acted in good faith is one factor to consider in the assessment of unconscionable conduct.[131]

A similar understanding applies in the EU. As Lando pointed out in the PECL, good faith is not confined to specific rules:[132] it is broader than other specific provisions laid out in the PECL. The fact that the DCFR and the CESL both refer to good faith as a pillar of EU contract law further emphasises such a perspective.[133] Consequently, if A enters into a contract with B and does not perform an obligation in good faith, damages will only be awarded if B can prove a loss caused by A's breach of the obligation. Therefore, the breach leading to the award of damages would be not performing an obligation, rather than a breach of the duty to act in good faith.

There is one instance in Australia where good faith can, however, play a role, although indirectly, namely in the award of damages. If a party breaches a term of the contract, the other party is entitled to damages, provided it can prove the breach has led to a monetary loss. Such a loss must be mitigated, that is, the claimant must take reasonable steps to minimise the loss suffered from the breach. As Peden points out, there is a 'strong argument that the basis and reasoning behind the duty to mitigate is a requirement of good faith'.[134] This also illustrates the need for parties to cooperate even when the contract is in dispute.[135] Consequently, if A enters into a contract with B and does not perform its obligation in good faith, and damages can be awarded, the lack of action by B to mitigate the loss may lessen the amount to be awarded. A

[129] Suzanne Corcoran, 'Good Faith as a Principle of Interpretation: What is the Positive Content of Good Faith?'' (2012) 36 *Australian Bar Review* 1.
[130] Since reference to the behaviour rather than the term; see above I.A.1.
[131] See Chapter 4.I.A.1 and *Australian Consumer Law, Competition and Consumer Act 2010* (Cth) sch2 s 20.
[132] Ole Lando, and H Beale (eds), *Principles of European Contract Law, Parts I and II (Combined and Revised)* (Kluwer Law International, 2000) 113.
[133] Chapter 3.I.B.2; Chapter 4.II.C.
[134] Peden, above n 7, [8.7] 203.
[135] Friedmann, above n 1, 412.

principle of good faith would not alter this situation, but would provide further grounding for the concept of mitigation.

The above analysis has focused on contractual measures of damages. The tortious measure must also be considered, especially in cases where the behaviour is fraudulent. However, while the application of tort remedies for breach of good faith can be considered, there are strong arguments against applying tort-related doctrines to contractual situations. Firstly, good faith expresses values inherent to the contractual relationship.[136] Secondly, opening the doors to a tort of good faith could lead to an action for damages following injuries and punitive damages which are not currently applied in Australia.[137] Thirdly, it could provide uncertainty not only for the parties in respect of the remedies available, but also for the courts in respect of the granting of such remedies.[138] This thesis does not argue that good faith has or should have a role to play in remedies associated with tort law. This position fits in with the approach that, if there is a contractual remedy, that remedy will be applied; and that contract and tort should not be assimilated, their sphere of application being distinct.

ii. Civil penalties: a public recognition of a moral breach

Besides the damages that may be claimed for a breach of a substantive term by one party not acting in good faith, the party in breach may have to pay civil penalties. A penalty is a 'sanction imposed on unlawful conduct'.[139] It is a punishment for a breach of the law.[140] There are criminal, civil and administrative penalties. The debate on imposing civil penalties revolves around the public interest in the observance of the law and whether the legislature should be able to impose pecuniary penalty orders in civil circumstances, without the framework that is associated with criminal penalty provisions.[141] This thesis agrees with the proposition that

> civil penalties strike an appropriate balance between the interests of the community and the individuals who may be subject to them. … the Legislature is able to promote

[136] Chapter 3.II.D.
[137] Sandra Chutorian, 'Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing into the Commercial Realm' (1986) 86 *Columbia Law Review* 377, 386.
[138] Ibid 400.
[139] *Concise Australian Legal Dictionary* (Lexis Nexis, 4th ed, 2011) 433.
[140] *Oxford English Dictionary* 461.
[141] Michael Gillooly and Nii Lante Wallace-Bruce, 'Civil Penalties in Australian Legislation' (1994) 13(2) *University of Tasmania Law Review* 269, 270.

> compliance … without the need to criminalise the conduct in question.[142]

This thesis argues that only civil penalties should be applicable to a breach of the principle of good faith. The reason is similar to the ones given in relation to tortious damages. The principle of good faith is deeply linked to the contract. Any application of a criminal penalty would go against such logic and recognise actions contravening the principle as a crime.[143]

In Australia, civil penalties are associated with a breach of the duty of the parties to act in good faith in the *Franchising Code of Conduct*.[144] Consequently, if A enters into a franchising agreement with B and subsequently does not perform in good faith, A may be liable to pay civil penalties on the basis of the application of the Code of Conduct.[145] The ACL also prescribes civil penalties for unconscionable conduct and misleading and deceptive conduct.[146] In determining the appropriate pecuniary penalty the court is guided by the provisions of the ACL. Section 224(2) lays out matters relevant to the court, including

> (a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; and
> (b) the circumstances in which the act or omission took place; and
> (c) whether the person has previously been found by a court in proceedings under Chapter 4 or this Part to have engaged in any similar conduct.

Although not prevalent in contract law,[147] the idea of imposing a civil penalty for a breach of good faith fits in with the idea that good faith is part of the implicit dimensions of the contract;[148] part of community expectations.[149] Therefore, should the ACL enact a provision on the need for parties to act in good faith,[150] civil penalties could be imposed. This would also bring the application of good faith in line with the penalties associated with unconscionable

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[142] Ibid 293.

[143] *Articles Trade Assoc v A-G (Canada)* [1931] AC 310, 324; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 3rd ed, 2010) 6.
[144] *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth) s 6.
[145] Ibid.
[146] *Australian Consumer Law, Competition and Consumer Act 2010* (Cth) sch 2 s 151.
[147] Penalty units are used mostly in criminal law: see, eg, *Sentencing Act 1991* (Vic) s 110.
[148] See Chapter 3.II.C.2.
[149] Jeannie Paterson, 'The Standard of Good Faith Performance: Reasonable Expectations or Community Standards?' in Michael Bryan (ed), *Private Law in Theory and Practice* (Routledge-Cavendish, 2007) 153.
[150] For a discussion on instruments recognising good faith see Chapter 7.I.A.2.

conduct and misleading and deceptive conduct,[151] as well as other applications in Australian law.[152] Such a provision could be part of the prescribed principle as recognised in legislation.[153] It is important that such a provision be enacted at the federal level. Australia can learn from the EU context here. For instance, in the EU, art 24 of the *Consumer Rights Directive* states that member states must lay down rules on penalties and these must be 'effective, proportionate and dissuasive'. A 2017 report on the application of the directive has uncovered that the maximum penalties in several member states do not appear to reach that standard.[154]

Furthermore, a review of some member states' penalty provisions under the directive also highlighted the significant discrepancy between the financial penalties, as well as the lack of evidence that the differences in the financial penalties had an impact on the level of compliance by traders.[155] The report also highlighted the role of the enforcement authorities,[156] actors that will be discussed in Chapter 7. However, the issue of the possible inadequacy of the amount of the penalty has also been the subject of debate and has recently led to changes in the Australian Consumer Law. In determining the appropriate amount, judges have commented that the low maximum amount is insufficient to deter big corporations engaging in unconscionable conduct,[157] or misleading and deceptive conduct[158] in breach of the ACL. The Treasury Laws Amendment (2018 Measures No 3) Bill 2018 amended the *Competition and Consumer Act*, and within it the ACL, and aligned

> the existing ACL penalties with the existing maximum penalties under the competition provisions in the CCA, in order to strengthen the penalties regime, deter non-compliant conduct and reduce the financial benefits and incentives for businesses to engage in conduct in breach of the ACL.[159]

[151] See above.
[152] See for instance *Corporations Act 2001* (Cth) ss 181(1)(a), 1317E.
[153] For more on the vehicle of the principle see Chapter 7.I.
[154] *Report from the Commission to the European Parliament and the Council on the Application of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council* COM(2017) 259 final 6.
[155] European Commission, *Study on the Application of the Consumer Rights Directive 2011/83/EU44* (Publications Office of the European Union, 2017) 44.
[156] Ibid 32.
[157] *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405, [106].
[158] *ACCC v Apple Pty Ltd (No 4)* [2018] FCA 953, [57].
[159] Explanatory Memorandum, Treasury Laws Amendment (2018 Measures No 3) Bill 2018 (Cth) [1.37].

Effective 1 September 2018, the amount under s 224(3A) is determined as follows:

> (a) $10,000,000;
> (b) if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission – 3 times the value of that benefit;
> (c) if the court cannot determine the value of that benefit – 10% of the annual turnover of the body corporate during the 12-month period ending at the end of the month in which the act or omission occurred or started to occur.

While there is room for further improvements to the civil penalty provisions within the ACL,[160] this recent amendment further demonstrates how important the legislature considers the civil penalty regime to be in promoting compliance. It also demonstrates how the judiciary and the legislature can form a beneficial partnership whereby the law is altered to better reflect how it is applied and enforced in practice.

iii. Depriving a party of a reliance on contractual rights

Besides monetary remedies, the last remedy impacting on one party who is not acting in good faith is the inability to exercise its contractual right. If a party breaches a duty to perform an obligation in good faith, it may be prevented from using certain rights under the contract. By removing the possibility of the party in breach exercising rights under the contract, the court will aim to prevent behaviour contradictory to good faith to use a right under the contract. In Australia, s 38(5) of the *Food and Grocery Code of Conduct* illustrates this as it deprives the party in breach of mediation: if the supplier has not acted in good faith, mediation does not have to occur.

Peden refers to two examples that further illustrate the application of this remedy.[161] In *MacKay v Dick*,[162] a party was not able to claim the price of work that was not completed because the party prevented the other doing necessary testing. In *Burger King*[163] a termination notice was held invalid because the party had failed to perform in good faith. This highlights the

[160] Rachel Waye, 'Penalties Increased Under Australian Consumer Law' (2018) 40(9) *Bulletin (Law Society of South Australia)* 12, 13.
[161] Peden, above n 7, [8.17].
[162] *Mackay v Dick* (1881) 6 App Cas 251.
[163] *Burger King Corp v Hungry Jack's Pty Ltd* [2001] NSWCA 187.

relationship between good faith and reasonableness in the exercise of rights. It is an extension of the doctrine that stipulates that parties must cooperate and exercise rights reasonably.[164] Finally, by preventing the party from exercising a right under the contract due to the party's lack of good faith, it provides the equivalent to estoppel which prevents the party from withdrawing from a promise if doing so would cause detriment to the other party.[165] It ensures parties cooperate throughout the relationship, and therefore applies from the negotiation of terms to the performance and termination of the relationship. Preventing a party from exercising its contractual right is a powerful remedy and re-establishes the balance between the parties in the relationship.[166] This was explained in this thesis through the example of the reasonable exercise of discretionary rights.[167] Consequently if A enters into a contract with B and then does not act in good faith in performing contractual obligations, A will be deprived of its right to terminate the contract or obtain payment as per the terms of the contract.

2. **Consequences for the contract**

i. Electing to terminate the contract

Rescission is a powerful remedy that allows a party to 'put an end to the contract in a way that treats the contract as if it never existed'.[168] It means 'cutting off, annulling'.[169] Allowing this remedy in the case of a breach of the principle of good faith, no matter the time of the occurrence of the breach, would exceed expected compensation by 'overprotecting the innocent party' and 'unduly penalising the breaching party'.[170] However, there are instances where rescission may be justified following a breach of good faith. In Australia, these instances are dealt with under undue influence[171] and unconscionable conduct.[172] In the EU, this is dealt with in the DCFR and PECL.[173] This remedy should be limited to the application and breach of the principle of good faith in negotiations. This is because, once the contract has been formed and is partially performed, different remedies should apply as the transaction is then regulated by a contract.

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[164] See Chapter 3.II.C.1.i.
[165] For estoppel see Chapter 4.I.A.3.
[166] Chapter 3.II.B.
[167] Chapter 3.II.C.1.i.
[168] *Concise Australian Legal Dictionary* (Lexis Nexis, 4th ed, 2011) 507.
[169] *Oxford Legal Dictionary* 689.
[170] Friedmann, above n 1, 416.
[171] Tisseyre, above n 62, 207.
[172] Ibid 242.
[173] PECL art 4:109(1); DCFR art II 7-207.

If a party breaches a substantive term of the contract, the claimant can elect to terminate the contract.[174] Again, such a principle promotes the application of good faith.[175] Consequently, if A enters into a contract with B and subsequently fails to perform in good faith, B can choose to either continue with the relationship or terminate the contract. Should a party elect to terminate the contract, it may be entitled to relief against forfeiture. For instance, this means that relief may be given to the claimant if the breach or repudiation by the other party has resulted in unjust enrichment of the promisee.

ii.Voiding a term

There are two types of terms that can be declared void if they are contrary to good faith: unfair contract terms and terms excluding the application of good faith.

The first situation is where a term of a contract is not negotiated in good faith. In such a case, courts may declare it void and inapplicable. In the EU, the *Unfair Terms in Consumer Contracts Directive*[176] illustrates this, as good faith has been used to protect consumers.[177] When an unfair term has been identified, the clause is void. A clause is unfair if it disrupts the equilibrium of the contract.[178]

> A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.[179]

However, the contract still stands and the obligations of the parties must be performed. This is to favour the contractual relationship, the '*favor contractus*'.[180] This further highlights the concept of cooperation and loyalty to the bargain. Once parties have agreed to enter into a contractual relationship, they should keep to their word. Even though these provisions are

[174] *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115.
[175] John Carter, above n 92, [10-52]; *Tankexpress A/S v Compagnie financière belge des pétroles SA (the Petrofina)* [1949] AC 76, 98.
[176] *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29.
[177] For a discussion of the directive see Chapter 5.I.B.1.
[178] Busseuil, above n 53, 618.
[179] *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29 art 3(1).
[180] Busseuil, above n 53, 618.

directed to the non-negotiated terms, there have been attempts to apply good faith to substantive contractual obligations[181] in order 'to discourage professions from using unfair terms in their contracts'.[182]

In Australia, if a term in a consumer contract is held unfair, it will be void.[183] The ACL lays out a non-exhaustive list of unfair terms[184] and more generally assesses the meaning of unfair in a similar way to the EU directive. The only, but important, difference between the two jurisdictions is the lack of reference to good faith in this instance. Until recently, these Australian provisions applied only to consumers. Based on recent declarations by the federal Minister for Small Business and the need to protect small businesses from unfair contract terms, there seems to be no objection to broadening the consumer provisions and applying them to small businesses as well,[185] recognising the need to protect small businesses and ensuring fair dealing. Consequently, if the agreement entered into by A with B includes a term that is contrary to good faith and fair dealing, and upsets the contractual balance between the parties, such a term will be held void and will not apply to the transaction.

The second situation is where a term of a contract expressly or implicitly excludes good faith. There is a strong argument to be made that a term that expressly excludes the application of good faith should be void because it is against the doctrine of cooperation. Such a term in consumer contracts in the EU is likely to be void under the *Unfair Terms in Consumer Contracts Directive*. However, this EU legislation does not apply to small businesses.[186]

In Australia, if a contractual term excludes the application of good faith, it is voidable. As discussed in Chapter 5, *Vodafone* held that good faith could be excluded from the agreement by using an entire agreement clause,[187] a clause 'to the effect that the document contains the whole of the contract between the parties'.[188] If good faith is adopted as a principle of contract

[181] Société de législation comparée and Geneviève Viney, *Livre vert sur le droit européen de la consommation : réponses françaises N°5* (LGDJ, 2007) 54.
[182] Maria Tenreiro, 'The Community Directive on Unfair Terms and National Legal Systems: The Principle of Good Faith and Remedies for Unfair Terms' (1995) 3(2) *European Review of Private Law* 273, 281.
[183] *Australian Consumer Law, Competition and Consumer Act 2010* (Cth) sch 2 s 23.
[184] Ibid sch 2 s 25.
[185] *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth); Alisa Taylor, 'Fair Play on the Building Site: How Extending Unfair Contract Term Protections to Small Businesses Will Impact Construction Projects' (2015) 31 *Building and Construction Law Journal* 365.
[186] See Chapter 5.I.B.1.
[187] *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15
[188] *Concise Australian Legal Dictionary* (Lexis Nexis, 4th ed, 2011) 207.

law, good faith could become part of public policy.[189] Consequently, any provision that excludes its application could be considered unfair and void. Furthermore, interpretation of entire agreement clauses would also be limited by public policy and consequently good faith would not be excluded. So, if A enters into a contract with B and the contract stipulates that the agreement excludes the application of good faith, this term will be void. Furthermore, if A contracts with B and the agreement contains an entire agreement clause, this provision should be interpreted as not excluding good faith. Based on this review of remedies, it is possible to conclude that the ultimate goal of remedies for a breach of good faith is to ensure the parties are at an equilibrium.

C. An Australian case study: construction contracts and termination for convenience

This particular case study has been selected for a number of reasons. Firstly, many parties include good faith clauses in their construction contracts.[190] Secondly, it is a topical issue addressing some of the concerns expressed following the release of a possible redraft of building contract standards.[191] Thirdly, the application of a duty to act in good faith in construction contracts has been brought before the courts[192] and has been commented upon.[193] Finally, it illustrates the link between relational contracts and good faith.[194] Terms in any long-term contract are in essence incomplete, since they cannot foresee every aspect and possible future situation of the parties at the time the contract is negotiated.[195] This case study will determine the role that good faith has to play in completing such agreements and ensuring the cooperation of the parties in such a long-term relationship.

[189] See above I.A.3.
[190] See, eg, Shona Frame, 'Good Faith Obligations in Construction Contracts: A Sword or a Shield?' (2013) 8 *Construction Law International* 25, 25.
[191] AS 11000: General conditions of contract (January 2015).
[192] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337.
[193] Oliver Spencer Froböse, 'What Does Fairness Have to Do With It? A Critical Jurisdictional Comparison Regarding the Notion of "Buildability"' (2014) 30 *Building and Construction Law Journal* 238; Tómas Kennedy-Grant, 'Good Faith, Unconscionability, Reasonableness – What on Earth Do They Have to Do With Construction Law?' (2013) 29 *Building and Construction Law Journal* 4; Albert Monichino, 'Termination for Convenience: Good Faith and Other Possible Restrictions' (2015) 31 *Building and Construction Journal* 68.
[194] See Chapter 3.II.C.1.
[195] Macneil, above n 4.

The scenario is as follows. A enters into a building contract with B. The contract states that 'the successful operation of this Contract requires that A and B agree to act in good faith in all matters relating both to carrying out the works, derivation of rates and interpretation of this document'.[196] The contract also contains a clause which entitles B 'at its option, and at any time and for any reason it might deem advisable, to cancel and terminate the contract'.[197] The contract stipulates that, in that event, A would be entitled to receive compensation.

The facts of this case study are based on a real case, *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd.*[198] In that case, Thiess contracted with Placer in 1989. Following issues with the mine the building contract was related to, a new contract was set up and included the two clauses stated in the case study. In 1995, Placer used its right to terminate the contract under the termination clause. Thiess instigated proceedings, stating that the clause was unlawful. Placer counterclaimed that Thiess breached its obligation to act in good faith under the express provisions of the contract by falsely representing costs incurred. The trial judge dismissed Thiess's claim and decided in favour of Placer, granting the latter substantial damages.[199] Templeman J relied on two main points: firstly, that the termination clause was clear, unambiguous and valid; and secondly, that Thiess did breach the clause relating to good faith in the contract. Thiess appealed the decision. Thiess's appeal was dismissed, and the breaches of good faith were confirmed.[200] However, the decision overruled the granting of substantial damages and Placer was only granted nominal damages. The case was heard by the High Court in relation to the award of damages.[201] The breaches of good faith were not discussed.

The question posed by the case study is whether the termination clause is valid since: a) another clause requires the parties to act in good faith and might therefore contradict the termination clause, and b) the termination for convenience clause disrupts the equilibrium of the contract in favour of B, since the option to terminate is only available to the latter.

Firstly, it is necessary to discuss the relationship between the good faith clause and the

[196] This clause was discussed in *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* [2000] WASCA 102.
[197] Also in ibid.
[198] [1999] WASC 1046.
[199] Ibid.
[200] *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* [2000] WASCA 102.
[201] *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* [2003] HCA 10.

termination clause. To do so, the wording of each clause must be analysed. In relation to good faith, in *Thiess Contractors* there was a clear breach of contractual provisions that led to the use of the termination clause. Looking more specifically at the good faith clause, the use of the expression 'successful operation' means that the good faith clause relates to performance. But does it relate to termination as well? Not according to the trial judge, who considered that successful operation related only to the performance of the contract.[202] The termination clause seems to give carte blanche to B who is allowed to terminate the contract 'at its option, at any time and for any reason'. It is important to highlight the next part of the clause worded 'it may deem advisable'. In *Thiess*, the trial judge considered that the clause was clear and unambiguous. He did not consider that the termination clause renders the contract illusory. Based on the contract negotiations, the judge considered that Thiess entered the contract knowing of the existence of the clause. Looking at the circumstances surrounding the agreement, the risk of termination was considered small, although possible.

If there were a principle of good faith in Australian contract law, what would the consequences for this case study be? There would be consequences in relation to both clauses. Firstly, it would mean that, even though the express term of good faith would only apply to the performance of the contract, the umbrella principle of good faith would cover the termination clause. Secondly, it would also mean that the discretionary right attached to the clause would need to be exercised reasonably. In this respect, the expression 'it may deem advisable' would need to be considered carefully and would not give a free right to terminate but a prerogative to use such a right in reasonable circumstances.

Secondly, it is necessary to address the question of the disequilibrium created by the termination clause. While it provides a unilateral right to terminate for any purpose, the principle of good faith would require that B exercises its contractual powers reasonably. The parties did enter the contract knowing the clauses and their wording. A contract as agreed by the parties is the primary source of rights and obligations between them. Therefore, under the proposed principle of good faith, while the principle could not be excluded, good faith could not add terms to the contract that have not been agreed to during negotiations, such as granting the right to terminate at will to A. While there is a disequilibrium in the contract, it is important to respect the fact that the parties have negotiated and agreed to these terms. The duty to

[202] *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* [1999] WASC 1046.

exercise the right to terminate reasonably as imposed by the proposed principle of good faith would, however, ensure that the use of the clause is fair and reasonable.

Would there have been a different outcome in *Thiess* if there had been a principle of good faith in contract law at the time when these events occurred? Considering the facts of the cases, the actions of Thiess, who did not act in good faith in performing its obligation under the contract, and in exercising the clause, it would be unlikely to produce any change in the decision. This is because Thiess deliberately made false representations regarding the costs incurred. Placer did exercise its right to terminate under the clause in the contract, and would also have done so should there have been a principle of good faith applicable to the contract at the time. However, it is important to highlight the possible penalty against Thiess for not acting in good faith, not under the terms of the contract but under the proposed principle of good faith. Indeed, if the principle is statutorily prescribed, such as a provision in the ACL, a civil penalty for not acting in good faith could be imposed on the party who behaved in such a manner.

The case analysis has shown that, while the proposed principle of good faith does not alter the law substantially, it provides more certainty as to the obligations of the parties. A clearly stated principle to act in good faith is imposed upon the parties, as an obligation born from the transaction, but independent from the terms of the contract. The proposed principle would also deter parties from not acting in good faith, based on the application of the statutory obligation and the penalty associated with its contravention. While today, the expression of good faith in any given situation brings uncertainty, tomorrow, if a principle of good faith in contract law was explicitly recognised, such uncertainty could be resolved, cooperation and reasonable exercise of discretionary rights ensured, and actions contrary to good faith deterred.

D. Conclusion to Section II

To conclude Section II, it has been shown that remedies in contract help bring the parties to a balanced position. Remedies enable the realisation of the contract, even artificially, by bringing the parties to the situation they would be in post-performance. Damages are the most common type of contractual remedies and are prescribed by both the common law and statute. However, damages are not well suited to the principle of good faith in contract law. While good faith

could act as an umbrella and incorporate mitigation of damages, this thesis argues that damages may not be the best remedy for an action against such a principle and that civil penalties may be more appropriate. The use of civil penalties is an example of how far statutes can go in promoting fairness in contractual transactions within society. Such a remedy holds the breaching party accountable for its actions. Ultimately, the most suitable remedy for a breach of good faith seems to be depriving the breaching party of their contractual rights. This approach is well-documented in the EU, but is not followed in Australia. Finally, good faith can be used to void an unfair term and ensure cooperation, maintaining the balance between the parties throughout the relationship.

III. CHAPTER CONCLUSION

This chapter considered good faith as a principle and as an 'umbrella' that broadly guides the behaviour of contractual parties. The doctrine can be associated with an umbrella for the following reasons. Firstly, good faith applies to all parties, irrespective of their status. Using the image of an umbrella demonstrates the protectionary nature of the doctrine, which has been used to protect more vulnerable parties. Secondly, good faith is applicable to all stages of the contract. By opening the doctrine up towards negotiation, performance and termination, the umbrella provides an overall framework to ensure fair dealing in contracts. In addition, good faith is a principle that can apply to every contract, long and short term, thereby strengthening the image of a framework overarching contractual situations. While it is appearing more and more in special contracts such as building, franchising and consumer contracts, good faith could also be extended to the general law of contract as a principle. This would mean that it becomes mandatory and non-excludable. However, if there is a more specific doctrine to apply, then the latter should apply.

Although its meaning can vary over time, the notion of good faith revolves around three main ideas: loyalty, honesty and cooperation. This means that parties will take into consideration the legitimate interests of each other without sacrificing their own interests. The aim of the contractual relationship is to terminate the contract through satisfactory performance. Even though damages are the most common remedy for breaches of contract law, two other remedies are also associated with good faith: depriving the party in breach of using its rights under the

contract, and civil penalties. Civil penalties aim at punishing the breaching party for its behaviour'. Finally, the use of good faith as a means to void unfair terms allows the principle to fully open its umbrella to regulate not only party behaviour, but contract terms as well. As a principle, the concept of good faith needs to be promoted at the highest institutional level to ensure uniformity. This means that both the EU and federal Australian institutions must be in charge of its implementation.

Chapter 7
Beyond legislation: the need for a multi-actor approach

> Recognizing a 'principle' is equivalent to a commitment of the lawmaker (be it a judge or a legislator) to the social norms which that principle restates or reformulates.[1]

Having established the existence of the principle of good faith and its adequacy in Australian and EU contract law, this chapter addresses the question of the instrument that should be used and the institutions that should be responsible for the integration of good faith into contract law in these two jurisdictions. Choosing the right vehicle and advocate to ensure the application and enforcement of the principle of good faith proposed by this thesis is as important as its shape.

Chapter 1 showed that international instruments privilege an international understanding of good faith.[2] This is especially the case for the *UNIDROIT Principles of International Commercial Contracts* (PICC) and the *Convention on Contracts for the International Sale of Goods* (CISG). In spite of the particularities associated with international trade, looking back at these instruments provides insights into the implementation of the principle of good faith in the EU and Australia.[3] While the PICC appears to be an advance in the law, its application in practice is different. For instance, while the 2012 discussion paper on the reform of Australian contract law explicitly refers to it, practice shows that it is mostly rejected.[4] This provides valuable insights into the need to choose the instrument for implementing the principle of good faith very carefully in order to ensure that the gap between law and practice is appropriately filled. Furthermore, the divergence between law and practice in the case of the PICC should be considered an omen of what may happen in Australia and the EU if the recognition of good

[1] Yehuda Adar and Pietro Sirena, 'Principles and Rules in the Emerging European Contract Law: From the PECL to the CESL, and Beyond' (2013) 9(1) *European Review of Contract Law* 1, 21.
[2] Chapter 1.II.
[3] Lisa Spagnolo, 'Law Wars: Australian Contract Law Reform vs. CISG vs. CESL' (2013) 58(4) *Villanova Law Review* 623, 636–7; Commission, *Communication to the Council and the European Parliament on European Contract Law* [2001] 398 OJ C 255 [18].
[4] Ralf Michaels, 'The UNIDROIT Principles as Global Background Law' (2014) 19(4) *Uniform Law Review* 643, 651.

faith as a principle of contract law is not accurately reflected by the different actors involved. Not only does the meaning of the concept have to be appropriately specified, but the dangers of extended judicial interpretation must be acknowledged, drawing on the example of the interpretation of the CISG provisions. This highlights the need to give careful attention to the legal instrument and language used and to carefully monitor its implementation.

Section I will outline and analyse the types of legal instruments that might be used and discuss how a multi-vehicle approach will help integrate the principle of good faith into contract law. Section II will identify the drivers for the introduction of a principle of good faith, building on current developments and highlighting the need for a multi-actor approach. The multiplicities of instruments and actors are related, and emphasise the need for a coordinated approach to implementation and monitoring, in order to successfully integrate the principle into the general law of contract.

I. A MULTIPLICITY OF LEGAL INSTRUMENTS: COMPLEMENTARY COMPONENTS

Both Australia and the EU refer to good faith in a multitude of legal instruments: judicial decisions; mandatory and voluntary codes of conduct; standards in Australia; EU directives; academic principles; the *Draft Common Frame of Reference*;[5] and even hybrid instruments such as the proposed optional regulation in the EU. This section explores the advantages and disadvantages of the different types of legal instruments in the two jurisdictions. This will help determine the best vehicle for the model presented in Chapter 6.

Section A will discuss the different types of legal instruments that could be used to enforce the principle of good faith in Australian law and EU law. Section B will explore how codes of conduct represent the first step in the Australian approach while Section C shows that legislation is also necessary in both jurisdictions to ensure the duty to act in good faith is enforced and its interpretation monitored.

[5] Study Group on a European Civil Code, Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (Sellier, 2009).

A Choosing among different types of vehicle

Although Australia and the EU have not traditionally been considered members of the same legal family,[6] this thesis has demonstrated it can be seen otherwise using the metaphor of the occidental tree. Chapter 2 developed Sacco's concept of legal formants, sources of law that include more broadly instruments that help shape and 'form' the law.[7] After establishing the existence of the occidental tree, this section demonstrates that traditional sources of law used to divide legal systems into the traditional legal classifications (common law/civil law) can be used in a similar fashion in both Australia and the EU. The place of case law in the recognition of good faith in Australian and in EU contract law is likely to become more limited, in favour of other legal formants developed by other institutions.

1. Judicial decisions

Judicial decisions are a traditional means of recognising doctrines in the common law in countries like Australia. Estoppel and unconscionability are prime examples of case law's norm-making ability.[8] In the context of EU contract law, the role of the Court of Justice of the European Union (CJEU) has been to interpret directives and provide guidance to member states.[9]

In the context of the introduction of a principle to act in good faith, this thesis argues that the role of the courts should be restricted to the interpretation and enforcement of the principle. Three main reasons can be advanced for this. Firstly, in the context of contract disputes, courts most often deal with the issue once a dispute has arisen, and a remedy must be provided.[10]

[6] See Chapter 2.I.C.3.

[7] Rodolpho Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' (1991) 39 *American Journal of Comparative Law* 1; see Chapter 2.

[8] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

[9] Request for a preliminary ruling from the Audiencia Provincial de Álava (Spain) lodged on 5 October 2015 – *Laboral Kutxa v Esmeralda Martínez Quesada* (Case C-525/15) (2015/C 414/28).

[10] Declarations of the law are also made in some instances including in contract law to clarify the legal obligations of each of the parties to the contract: see *Mellstrom v Garner* [1970] 1 WLR 603, 604 (Harman LJ); *Nsi Group Pty Ltd v Mokas* [2006] NSWSC 976.

Once a precedent has been set, the judicial decision can act as a deterrent against certain behaviour. This means that the courts must first recognise the doctrine through judicial decisions, then continuously apply it, for such decisions to become precedent and be followed by lower courts in the same hierarchy. As Part Two of the thesis demonstrated, Australian courts and the CJEU have yet to clearly establish continuity in deciding to integrate good faith. While it is best left to the courts to determine the circumstances of a particular case, the contract remains the most important document between the parties. A general principle of good faith should not be seen or used by the judge as an opportunity to rewrite the contract and step beyond his or her capacity. This is, however, a dilemma that courts have encountered when interpreting some contractual provisions or determining whether a particular person has acted as a reasonable person would.[11]

Secondly, and more especially in the case of good faith, the courts are yet to reach a consensus on the application of good faith. This is the case in both Australia, where the cases show a lack of judicial recognition of good faith on a general basis, and the EU, where the lack of guidance from the CJEU has led to the coexistence of different national interpretations.

Thirdly, disputes before the courts can be lengthy. For a doctrine of good faith to be fully accepted, the High Court and the CJEU must be clear about the enforcement of the doctrine. Yet reaching such a decision will take time. Therefore this leaves parties in present cases in a state of uncertainty.

There have been instances and more especially in the case of good faith, the courts where the recognition of good faith is led by the judiciary. One example is to be found in France. Even though France is a civil law country, the judiciary has played a very active role in interpreting the Civil Code's provisions.[12] Another examples is Germany, where the role of the judge in interpreting the doctrine of *treu und glauben* has been shown to have a catalytic effect on the development of the doctrine.[13] Finally, a recent example can be found in Canada,[14] where the principle of good faith has been recognised by the judiciary. While these instances are worth

[11] This is echoed in Robert McDougall, 'The Interpretation of Commercial Contracts – Hunting for the Intention of the Parties' (Paper delivered at the College of Law, 2018 Specialist Legal Conference, Sydney, 18 May 2018) <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/McDougall_20180518.pdf>.
[12] See Chapter 1.I.A.2.
[13] See Chapter 1.I.A.1.
[14] See Chapter 1.I.B.2.

noting, they do not provide a convincing argument that courts should lead the reform in this area because the context in each of these instances is specific to the jurisdictions in which they have occurred.

One characteristic of the Canadian legal system that has forms the background to such recent recognition[15] is the influence of civil law. The Canadian perspective is influenced by its own context, where both common law and civil law interact and where since 2014 good faith has been used as an organising principle of contracts.[16] French provinces already used good faith in contracts and this created a tension within Canada. In *Bhasin v Hrynew*, the judge considered the need to address 'Canadian common law in relation to good faith performance of contracts [which is] … piecemeal, unsettled and unclear'.[17] While this statement is also applicable to Australian contract law, the conclusion that the judiciary should remedy this state of affairs is not applicable to the latter. Indeed, the main difference between the Canadian experience and the model to be integrated into Australian contract law, as well as in the EU, is the role of the judiciary.[18] Even though the Australian judiciary has had opportunities to take a clear stand on good faith in contract law, judicial decisions are still vague on this question.

As Part Two of the thesis demonstrated, Australian courts have consistently declined to discuss good faith and to recognise it in contract law; in the EU, the CJEU is struggling to find its place as a norm maker.[19] Therefore, while judicial decisions will help determine the interpretation and application of the principle of good faith, they cannot be considered the most favourable vehicle for its integration. This is because Australian courts are uneasy about taking such a step, and because EU law is primarily based on regulations and directives, and the CJEU's role is to interpret the provisions within these instruments. Yet the Australian and EU judiciary must provide clearer guidelines, and take an active role in the interpretation and enforcement of the principle of good faith for it to become a successful norm to promote fairness in contract.[20]

[15] Ibid.
[16] See Chapter 1.I.B.2.
[17] [2014] SCC 71, 72.
[18] See Chapter 4.I.B; Chapter 5.I.B.2.
[19] Chapter 5.I.B.2.
[20] Michael Kirby, 'Ten Requirements for Successful Law Reform' (2009) 11 *Flinders Journal of Law Reform* 77.

2. Legislation

Even though case law is what characterises the common law legal tradition, '[l]egislation continues to invade the realms of the judiciary model.'[21] A codified integration of a doctrine has a preventative effect in that it warns the parties beforehand. Consequently, this would address the state of uncertainty parties are left in should the courts be in charge of the recognition of good faith in contract law. Some argue that codification and conventions 'age from the moment the draftsman lays down his pen and often become buried under layers of case law and scholarly exegeses.'[22] However, it is possible to see situations where the statutes and judicial interpretations have formed a beneficial partnership. Again, the doctrine of unconscionability demonstrates this; originally developed by the common law, it is now part of the *Australian Consumer Law* (ACL).[23] Interestingly, while unconscionability was first established by common law, and then subsequently recognised by legislation, there are also examples where the statutory provision preceded judicial decisions. This is the case for the use of good faith in determining whether a term in a consumer contract is unfair. Imposed by an EU directive,[24] the doctrine became part of English law through the implementation process.[25] The courts later used the doctrine to decide whether to void a term.[26]

3. Industry codes: specificities of the Australian context

Industry-specific regulation such as codes of conduct and standards can help answer industry-specific questions and legal issues. They take into account the context and special characteristics of the relationship between the parties and its implicit dimensions.[27]

There are two types of industry-specific codes of conduct. The first is mandatory codes of

[21] Anthony Mason, 'Changing the Law in a Changing Society' (1993) 67(8) *Australian Law Journal* 568, 568.
[22] Ingeborg Schwenzer (ed), 'Introduction' in *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (Oxford University Press, 3rd ed, 2010) 9.
[23] See Chapter 4.I.A.1.
[24] *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29.
[25] *Unfair Terms in Consumer Contracts Regulations 1999* (UK).
[26] See Chapter 1.I.A.3.
[27] On implicit dimensions and relational contract theory see Chapter 3.II.C.

conduct, which are prescribed by legislation. This is the case for five codes of conduct in Australia that are based on the application of s 51AE of the *Competition and Consumer Act*.[28] Voluntary codes of conduct, on the other hand, are applicable on an opt-in basis.[29] Codes can address specific issues faced by the parties in a particular type of transaction and ensure the implicit dimensions of the contract are made explicit and are agreed among the parties. While making a code mandatory ensures that all parties must comply with its requirements, making one voluntary on the other hand possibly dilutes the importance of the principle itself, as it is only applicable if parties submit their relationship to the application of the code.

In Australia, codes of conduct mostly respond to business and industry legal needs by recognising an issue to be dealt with. Two Australian codes already promote the application of a duty to act in good faith: the mandatory *Franchising Code of Conduct*, and the voluntary *Food and Grocery Code of Conduct*.[30] Discussions on the recognition of a duty to act in good faith in current reforms of the mandatory *Horticulture Code of Conduct* and the Building Standards further demonstrate what could be characterised as a bottom-up approach to the integration of a good faith principle in Australia, and the promotion of good faith as an enforceable obligation.

In contracts, mandatory codes of conduct can prove 'ambitious, costly and time consuming',[31] but the industry in which they are implemented can ultimately reap the rewards. The *Franchising Code of Conduct* proves that, even though costs may be greater in setting up such an instrument, the benefits can include less to litigation and more recourse to alternative dispute resolution (ADR) mechanisms.[32] Reducing litigation and increasing recourse to ADR is to be encouraged. Indeed, by going through such a process, claims are less likely to escalate and contractual relationships are more likely to be salvaged, ensuring contractual security. The initiative to create Small Business Commissioner offices also allows disputes to be settled at a lower cost.[33] The obligation on the SA Small Business Commissioner to enact codes that

[28] *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth); *Competition and Consumer (Industry Codes—Horticulture) Regulations 2017* (Cth); *Competition and Consumer (Industry Codes – Oil) Regulation 20017* (Cth); *Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014* (Cth); *Trade Practices (Industry Codes – Unit Pricing) Regulations 2009* (Cth).
[29] Eg *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Cth) s 4(b).
[30] See Chapter 5.II.A.2.ii.
[31] Jolene Lim and Lorelle Frazer, 'Introducing Franchising Regulation' (2002) 10(2) *Journal of Marketing Channels* 39, 54.
[32] Ibid 55.
[33] Chapter 5.II.A.1.

promote parties acting in good faith will contribute to the doctrine being subject to ADR.[34]

A code, and therefore its provisions, can only succeed if has two basic characteristics: it must be the only authoritative statement, and its propositions must be both sufficiently specific to create certainty and sufficiently general to be enduring.[35] A code can be a stocktaking exercise, fill gaps or be a complete reform.[36] Stocktaking and gap filling are more likely to succeed.[37] Indeed, it is important to determine what exists in the common law of Australia and where the gaps are. Addressing these gaps will help successfully integrate a doctrine in law and does not require a complete overhaul of the law of contract. Ultimately, 'there can be no single complete code'[38] regulating all aspects of life. Codes must be based on a utilitarian approach and achieve a particular purpose.[39] The *Franchising Code of Conduct*'s purpose is to 'regulate the conduct of participants in franchising towards other participants in franchising'.[40] The *Food and Grocery Code of Conduct*'s aim is to 'help to regulate standards of business conduct in the grocery supply chain and to build and sustain trust and cooperation throughout that chain', but also 'to ensure transparency … provide an effective, fair and equitable dispute resolution process' and ultimately promote good faith.[41] This shows that there are different aspects to having such a principle of good faith and that it takes many shapes. In order to be authoritative and sufficiently specific, codes should have provisions to guide the courts in matters that can be considered when determining whether a party has acted in good faith or not. This is similar to provisions currently found in the ACL[42] but also in the *Franchising Code of Conduct* itself.[43] The latter provides guidance about matters to which the court may have regard. In this instance, determining whether a party has acted in good faith will include whether the party is 'acting honestly and not arbitrarily',[44] in line with the association of good faith with honesty. The

[34] See *Small Business Commissioner Act 2011* (SA) s 5; Chapter 5.II.A.1..
[35] Fred Ellinghaus and Ted Wright, 'An Australian Contract Code' (Law Reform Commission of Victoria Discussion Paper No 27, 1992) 4; Ejan Mackaay, 'Good Faith in Civil Law Systems – A Legal-Economic Analysis' (CIRANO Scientific Series 2011s-74, 2011) <http://ssrn.com/abstract=1998924>.
[36] Andrew Stewart, 'What's Wrong with the Australian Law of Contract?' (2012) 29 *Journal of Contract Law* 74, 88–9.
[37] Dan Svantesson, 'Codifying Australia's Contract Law – Time for a Stocktake in the Common Law Factory' (2008) 20 *Bond Law Review* 92, 113.
[38] Donald Robertson, 'The International Harmonisation of Australian Contract Law' (2012) 29 *Journal of Contract Law* 1, 24.
[39] Geoff Lindsay, Submission No 4 to Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law*, 20 July 2012, [85]–[95].
[40] *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth) s 2.
[41] *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Cth) s 2.
[42] Australian Consumer Law, *Competition and Consumer Act 2010* (Cth) s 22.
[43] *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth) s 6(3).
[44] Ibid.

Australian *Franchising Code of Conduct* also describes good faith as mandating that the parties act cooperatively to achieve the agreement's purposes.[45]

There are clear advantages to codes of conduct and standards. Codes of conduct allow a doctrine to be broadly applied to certain industry contracts. This is also the case with building standards. Over time building contracts have become more likely to include a duty to act in good faith, or even utmost good faith.[46] By revising building contract standards and raising the question of integrating a duty on the parties to act in good faith, the extent of the application of the principle of good faith is increased. Extending the application of the duty to the whole industry in question adds certainty and foreseeability to the obligations of the parties to a contract.

Both codes of conduct and standards aim to harmonise the behaviour of the parties and contractual clauses within their agreement within a specific industry. This self-regulation (in the cases of voluntary codes) means that the industry is able to 'correct systemic problems within that industry without government intervention.'[47] A regulation is 'a rule prescribed for the management of some matter or for the regulating of conduct.'[48] It also promotes a required and agreed level of behaviour throughout the industry. Regulation by industry institutions aims to harmonise the way contracts are written and performed in certain industries. It is used to promote certain standards. Current developments in Australia[49] are illustrations of a bottom up trend. Codes of conduct are drafted by specialised bodies within certain industries in Australia. As noted above, some are mandatory, such as the *Franchising Code of Conduct*, while others are voluntary, such as the *Food and Grocery Code of Conduct*. Self-regulation fills a 'regulatory vacuum'.[50] This is not, however, a way for governments to avoid their regulatory duties.[51] As a consequence, codes of conduct should act as drivers for governments to take charge and address legal gaps, ensuring fair provisions are promoted across every contract.[52]

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[45] Ibid.

[46] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337.

[47] 'Self-regulation', *Concise Australian Legal Dictionary* (Lexis Nexis, 4th ed, 2011) 529.

[48] *Oxford English Dictionary* 525.

[49] *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth), *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Cth); *Competition and Consumer (Industry Codes—Horticulture) Regulations 2017* (Cth), Building Standard AS11000.

[50] Wesley Cragg, 'Ethics Codes: The Regulatory Norms of a Globalised Society?' in A Soeteman (ed), *Pluralism and Law* (Springer, 2001) 191, 195.

[51] Ibid 199.

[52] See below, I.C.

4. **Compilations**

The process of compiling general principles has been associated with the civil legal tradition.[53] Yet academic initiatives have also led to the development of proposed Australian contract law codes.[54] The aim of the Australian-based compilations has been to shift 'the current debate about codification from an abstract level or one about a specific draft code … [to ultimately] increase the accessibility of contract law to ordinary Australians and reduce the cost of legal services, especially to business'.[55] Albeit they only contain subject-specific examples, in contrast to the compilations made in the EU and the proposed European Civil Codes that would include contract law provisions, the purpose of these Australian initiatives echoes the aims of the EU compilations. The purposes of the PECL were to be a foundation for European legislation, to provide a set of neutral rules to be used by contractual parties, to present a modern formulation of a lex mercatoria and to be a vehicle for the development of contract law.[56]

Such compilations are echoed across the world, as *Principles of Asian Contract Law*[57] and *Latin American Principles of Contract Law*[58] are being drafted. However, in order to ensure the application and enforcement of a principle of good faith in contract law in the EU and in Australia, it is necessary to give it the means to obtain legal standing. Compilations are only preparatory work in that project.

Furthermore, the EU experience differs from Australian current developments in that it still responds to the Commission's action plans and maintains a top-down approach. The only European sets of principles applicable to businesses and consumer contractual dealings are academically drafted: PECL and DCFR. Their experience within the European community and

[53] See Chapter 2.I.B.1.
[54] Ted Wright, Fred Ellinghaus and David Kelly, 'A Draft Australian Law of Contract' (Working Paper No 13-03-14, Newcastle Law School, 2014); Ellinghaus and Wright, above n 35.
[55] Ibid, 1.
[56] Ole Lando and H Beale (eds.), *Principles of European Contract Law, Parts I and II (Combined and Revised)* (Kluwer Law International, 2000) xxiv.
[57] Shiyuan Han, 'Principles of Asian Contract Law: An Endeavor of Regional Harmonization of Contract Law in East Asia' (2013) 58 *Villanova Law Review* 589; Jungjoon Ka, 'Introduction to PACL' (2014) 17 *Contributions to the Study of International Trade Law and Alternative Dispute Resolution in the South Pacific* 55.
[58] See, eg, Rodrigo Momberg, 'Harmonization of Contract Law in Latin America: Past and Present Initiatives' (2014) 19(3) *Uniform Law Review* 411.

their lack of use in legal practice demonstrate the weaknesses of such attempts, but also inform the debate on how a principle of good faith in general contract law should be articulated and promoted. As an example, the existence of the *acquis communautaire* or *ius commune* in European contract law has been extensively debated.[59] Today it is evident that such a body of law exists. However there are still regulatory gaps, which are inevitable within a relatively recent internal market with different legal traditions. The PECL and the DCFR have tried to address these gaps. However, they are voluntarily included by parties in their contractual dealings, although they are general and are not restricted to particular dealings. They attempt to build a bridge between national laws, promote cross-border trade by smoothing out national differences, and focus upon the commonalities between member states.

B The rise of self-regulation and its limitations: a warning for Australia

Firstly, if a principle of good faith in Australia contract law is to be enacted, it is important to ensure parties cannot exclude it from their agreement and to avoid uncertainty.[60] It should be part of the essence of the contractual relationship.[61] A review of EU law also shows the weaknesses of voluntary or optional regulation. The optional law approach has been criticised.[62] The lack of popularity of instruments in the EU such as the PECL, and in Australia of the PICC and the CISG, shows that voluntary measures are unlikely to lead to reform or change practice, particularly because whether they can be used as the law applicable to the contract is not well established. Furthermore, the CESL lost further credibility in consumer contracts by requiring national legal systems to integrate it.[63] Therefore, parties are less likely to integrate voluntary provisions in their contracts and instead maintain the national divide by making one or several member state laws applicable to the contract.[64] By permitting the parties

[59] For a review of the evolution of this concept, see, eg, Carole Aubert de Vincelles, 'La recherche d'une cohérence en droit européen de l'acquis communautaire: l'ébauche d'un droit européen des contrats' in Guillaume Wicker, Carole Aubert de Vincelles, Hélène Boucard and Didier Ferrier (eds), *Droit européen du contrat et droits du contrat en Europe – Quelles perspectives pour quel équilibre?* (Litec, 2007) 7.

[60] See Chapter 6.I.A.3.

[61] See John W Carter and Elisabeth Peden, 'Good Faith in Australian Contract Law' (2003) 19 *Journal of Contract Law* 155.

[62] Stewart, above n 36, 89.

[63] Giacomo Pongelli, 'The Proposal for a Regulation on a Common European Sales Law (CESL) and its Gradual Evolution' (2013) 4 *Comparative Law Review* 1, 26.

[64] There can be *dépeçage*, where parties apply different laws to different parts of the written agreement: David McClean and Kisch Beevers, *Dicey, Morris & Collins on the Conflict of Laws* (Sweet and Maxwell, 7th ed, 2009).

to determine the law applicable to their transaction, institutions comply with the autonomy of the parties to choose the terms of their agreement, but at the same time condemn these instruments to fall short of their common aim: promoting cross-border trade.[65] In contrast with the European approach, the use of mandatory codes in Australia has brought certainty to some but not all dealings. For instance, the Australian *Franchising Code of Conduct* has proved successful in providing guidelines in favour of the franchisor–franchisee relationship.[66]

Since industry codes have recognised the importance of good faith by imposing an obligation to act in good faith, it is possible to look at their impact and character. One example is the report that led to the introduction of the provision on good faith in the *Franchising Code of Conduct*.[67] While Australia has enacted this provision, the duty on parties to act in good faith in franchises is however under siege in the USA.[68] The duty is not present in every American state, and the movement to recognise such a duty in other states is facing resistance.[69] This demonstrates that common law jurisdictions can evolve differently.[70] The current situation in the USA need not be followed in Australia. The proposed model can be integrated in Australia, a common law country which is already open to the doctrine in certain aspects of contracts. The duty as it exists in franchising can be developed further. For instance, one of the main purposes of the Australian *Food and Grocery Code of Conduct* is to promote good faith in commercial dealings between retailers, wholesalers and suppliers.[71] Such a mention of the doctrine in the purpose of the code shows the importance of the principle. More than a section of the code, it inspired the whole code and promotes fairness in contractual relationships by clarifying the duties of the parties. This initiative should be developed further to ensure the general application of the principle of good faith in contract law, as proposed in this thesis. However, in order to prevent further fragmentation of contract law and to ensure certainty in all contractual dealings, it should not to be implemented on an industry-by-industry basis, but instead at a general level.

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[65] *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* [2011] 635 final 2011/0284, Preamble (2); *UNIDROIT Principles of International Commercial Contracts* (2016), Preamble; *Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988), Preamble.

[66] Lim and Frazer, above n 31, 54.

[67] See Chapter 5.II.A.2.i.

[68] Don Sniegowski, *Australia Updates Franchise Code to Include Good Faith* (15 May 2014) Blue Maumau <https://www.bluemaumau.org/story/2014/05/15/australia-updates-franchise-code-include-good-faith>.

[69] Ibid.

[70] And further demonstrates the organic aspect of legal systems: see Chapter 2.I.C.1-2.

[71] *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Cth) s 2.

Secondly, the aim of a principle of good faith in Australia contract law should be to avoid a regulatory 'patchwork'[72] and instead promote a broader approach. 'A more satisfactory alternative is to address specific sector problems by specific legislative solutions'.[73] The issue with the multiplication of these legal instruments is that we move away from contract law and towards a plethora of special laws on contracts. Over time, codes of conduct and standards can lead to very different interpretations of the doctrine of good faith. They can even be reviewed to exclude the application of the doctrine, thereby negating the benefit of recognising it in the first place, or leaving certain industries without protection against behaviour that would contradict and breach a duty to act in good faith.

Industry codes are the first step towards the integration of good faith into contract law in Australia. The introduction of a good faith duty through self-regulation demonstrates that businesses are open to such integration. It testifies to the success of the bottom-up approach whereby some Australian industries are pushing for the recognition of a doctrine that is yet to be explicitly endorsed in Australian contract law. Mostly, these codes of conduct deal with relational and long-term contracts.[74] Yet, this encourages the recognition of the doctrine at the more general level of contract law. The enactment of codes of conduct promoting good faith is to be welcomed, as it not only brings some certainty into some commercial dealings as to whether the duty of good faith applies to the transaction but also shows that the business community needs further regulation on the doctrine of good faith and on fair dealing more generally.

However, there is a danger inherent to self-regulation, since industry codes of conduct are not subject to public scrutiny in the same way as statutes. 'Self-regulation based on voluntary standards of conduct, it might be argued, is not simply bound to be ineffective, it is also profoundly deceptive.'[75] To address this pitfall, some codes of conduct have integrated monitoring mechanisms. For instance, the *Food and Grocery Code of Conduct* was reviewed in 2018, three years after its enactment in order to address whether the code should be

[72] Stewart, above n 36, 77.
[73] Andrew Terry and Cary Di Lernia, 'Franchising and the Quest for the Holy Grail: Good Faith or Good Intentions?' (2009) 33 *Melbourne University Law Review* 542, 575.
[74] See Chapter 3.II.C.1.
[75] Cragg, above n 51, 195.

mandatory.[76] But no recommendations have yet resulted in making it mandatory. This reflects the limits of codes of conduct. Codes of conduct are not competing with legislation in the regulatory field. Instead they inform the community, and provide a model of what the law should integrate.[77] Consequently, even though current Australian developments of codes of conduct and standards integrating a duty on both parties to act in good faith are to be praised, they need to be supported by a broader approach at the federal level that strengthens the foundation of the duty in the general law of contract.

C The need for a federal legislative framework

The emergence of codes of conduct with clear stipulations of the duty to act in good faith demonstrates the need for some codified alternative to judicial recognition. The proposed model rests on the argument that, to promote an overarching principle of good faith, it is necessary to have federal or supranational guidance. Whether it is through federal institutions in Australia or EU institutions, it is essential that these bodies play a primary role in making sure the principle is implemented in a similar way in their states and territories, and member states respectively. This will avoid the fragmentation of the interpretation, application and enforcement of the doctrine of good faith in commercial contracts. In order to consider the specificities of each legal system, this part will first analyse Australia and then the EU.

1. Australia

In Australia, there are divergences in interpretations, as demonstrated by the different approaches taken by the judiciary[78] in respect of the doctrine of good faith in contract law.[79] In spite of efforts to harmonise the legal approach to certain aspects of contract law, there are still considerable differences between states' and territories' laws.[80] The model presented by this thesis argues the need for a different approach, a federal duty applicable across the state and

[76] *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Cth) s 5.
[77] For a view on this, see Hélène Boucard, 'Les instruments internationaux: concurrence ou model pour les droits nationaux' in Guillaume Wicker, Carole Aubert de Vincelles, Hélène Boucard and Didier Ferrier (eds), *Droit européen du contrat et droits du contrat en Europe – Quelles perspectives pour quel équilibre?* (Litec, 2007) 21.
[78] Chapter.4.I.B.2.
[79] Chapter 4, I.B
[80] Stewart, above n 36, 78.

territory borders. This is presented as an essential element of the integration of the doctrine in Australian contract law and, as seen below, also in EU contract law.

The first question in relation to the integration of the proposed model in Australian contract law is to determine the relationship between the policy agenda and good faith in contract law. The Council of Australian Governments (COAG), the high-level forum made up of senior government members across states and territories, has planned 'regulatory reforms to create a seamless national economy by ending unnecessary differences between laws covering the same areas of activity in different states',[81] as demonstrated by the ACL. This commitment is continuing as shown by the development of a National Construction Code.[82] Specifically, COAG is made up of the Prime Minister, the state and territory Premiers and Chief Ministers, and the President of the Australian Local Government Association.[83] Yet a more coherent and uniform approach is needed to ensure trade within the states and territories of Australia is not hindered. A possibility would be to supplement current developments with the draft of a 'general contract law that could express all the basic rules of contract presently governed by the common law'.[84] For instance, consolidation of legislation as seen in European-style codes has appeared in common law countries. In Australia the most relevant example is the *Criminal Code Act 1995* (Cth).[85] In the model presented here good faith is a general principle of contract law, so its inclusion in such a framework seems appropriate. The extent of such a legislated code of contract law and its relationship with current statutes and codes of conduct would need to be determined. The involvement of COAG in the development of such a code must be analysed in the current situation. Should deregulation lead to COAG reviewing its involvement in contract regulation, it may be opportune to highlight in its mission statement that regulation is the means to a seamless economy. This thesis argues that fairness in contractual dealings and contract regulation is an essential component of such an endeavour.

The second question relates to whether the principle of good faith can be taken from already enacted provisions. In Australia, Zeller proposes amendments to Sales of Goods Acts across

[81] Coalition of Australian Governments, *About COAG* <https://www.coag.gov.au/about_coag>.
[82] Australian Building Codes Board for updates see <https://www.abcb.gov.au/Connect/Categories/National-Construction-Code>
[83] The role of COAG is to promote policy reforms that are of national significance, or which need co-ordinated action by all Australian governments: Coalition of Australian Governments, *About COAG* <https://www.coag.gov.au/about_coag>.
[84] Stewart, above n 36, 88.
[85] *Criminal Code Act 1995* (Cth); see also Chapter 2.I.C.3 for a discussion on a Criminal Code in Australia.

states and territories and incorporation of parts of the CISG into domestic law.[86] With respect, this approach is to be dismissed for the following reasons. Firstly, this would not target the issue of fragmentation at state and territory level as highlighted by the comparison in Part Two of the thesis. Secondly, regulation of general contract law at a federal level through the harmonisation of certain types of contracts[87] is already happening through codes of conduct. Not only is there no reason for state and territory parliaments to double up on these provisions, but these codes of conduct already promote harmonised trade rules across Australian states and territories, albeit in limited situations.

The third issue relates to the character of the good faith component. The 2012 discussion paper on the reform of Australian contract law proposed three options: a binding or non-binding restatement, a simplification of current law, and a substantial reform of current law.[88] Some argue for a non-binding restatement[89] while others consider that current laws should be amended.[90] Another important aspect of legislating on the general law of contract is to consider the interaction this legislated code of contract law would have with current legislation and industry codes of conduct. To compare with the EU, the CESL attempted to deal with the question of such interactions by creating an optional body of rules that would be added to the 28 member states' laws. However, the optional character of the CESL has been criticised; it undermines the substance of the regulation, and fails to decrease transaction costs and remove contract law barriers to trade.[91] Furthermore, should the principle of good faith be enacted in a similar way to the umbrella principle proposed in this thesis, the optional character would deprive the principle of one of its fundamental aspects: being mandatory.

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[86] See especially *Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) arts 8–9; Bruno Zeller, 'The CISG and the Common Law: The Australian Experience', Submission No 2 to Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law*, 20 July 2012.

[87] Stewart, above n 36, 88.

[88] Commonwealth of Australia, *The Small and Family Entreprise Ombudsman Discussion Paper* (April 2014) 17.

[89] See, eg, Lindsay, above n 39; LESANZ, Submission No 7 to Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law*, 20 July 2012; Warren Swain, Submission No 13 to Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law*, 20 July 2012, 6.

[90] Zeller, above n 87.

[91] *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* [2011] 635 final 2011/0284, Preamble (3)–(4); Eric Posner, 'The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition' (2013) 50 *Common Market Law Review* 261.

The fourth question is to determine how good faith could be integrated in Australian contract legislation. There are two possibilities. Firstly, good faith could appear in current legislation. In Australia, the most complete statute on contract law is the ACL. Yet the title of this body of rules is confusing since some provisions also cover businesses.[92] Finn argues that good faith is already part of the ACL in s 22 and applies to all parties to a contract.[93] 'Statutory unconscionability's present trajectory is in the direction of proscribing unfair dealing and unfair trading, reinforced by statutory indicators of a like kind that concentrate upon discriminatory treatment, industry code compliance and good faith.'[94] The problem with this proposition is that it makes good faith dependent upon unconscionability. However, the good faith principle is much broader than this and it should consequently embrace unconscionability rather than the other way around. This means that good faith is an umbrella principle under which current piecemeal solutions that tackle unfair behaviour can evolve. Instead of presenting unconscionable risk factors, the mention of good faith gives further discretion to the courts and their interpretation of the provisions in the legislation,[95] and emphasises fair dealing.

Consequently, this thesis argues that, in order to be enforceable as a fundamental principle, good faith should be statutorily prescribed. In Australia the ACL could be used to promote good faith as a principle of contract law and therefore extend such provision not only to consumers but also to any contractual dealings. As a first step, it should be made applicable to both consumers and small businesses in the same way that provisions for unfair terms in contracts are now applicable to these two groups. This will also facilitate its enforcement. 'A legislative obligation of good faith in the Code would undoubtedly have the capacity for a more liberal interpretation and more influential development than its common law progenitor.'[96] It is furthermore important for the federal Parliament to recognise good faith as 'a principle that provides integrity to the contractual bargain, recognising at the same time that contracts are a social institution that are subject to overriding obligations to the public good in certain circumstances.'[97]

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[92] Stewart, above n 36, 78.
[93] Paul Finn as related in Bryan T. Horrigan, New Directions in How Legislators, Courts, and Legal Practitioners Approach Unconscionable Conduct and Good Faith' [2013] *Supreme Court History Program Yearbook 2012* 171, 205.
[94] Bryan T Horrigan, 'New Directions in How Legislators, Courts, and Legal Practitioners Approach Unconscionable Conduct and Good Faith' [2013] *Supreme Court History Program Yearbook 2012* 171, 245; see also Section II of this chapter for a more detailed review of the role of the judiciary.
[95] Ibid.
[96] Terry and Di Lernia, above n 74, 574.
[97] Robertson, above n 38, 21.

A second possible way to incorporate such a principle would be to create a 'single non-comprehensive statute [that] regulate[s] a number of the more important and common types of commercial transaction,'[98] which would include 'universal provisions'.[99] Stewart argues that this statute could cover contracts already under regulation; and it could be progressively updated to include different types of contract.[100] The universal provision aspect sounds similar to the Common Frame of Reference. The overarching aspect of the principle would be highlighted by the structure of the statute, which would also act as an umbrella over more specialised provisions.[101]

2. **The EU**

In order to succeed with the implementation of a good faith principle in EU contract law, the EU must deal with the pluralism of private law within its market by adopting a multi-layered approach. This is because

> [a]ttempting to introduce and sustain new practices through top-down procedures, such as new legislation, or by means of changing attitudes alone was of limited impact, since these governance techniques underestimated the capacity and complexity of social and institutional environments.[102]

A broader approach is needed to ensure that consumers and businesses are confident that legal risks will not be extended if they trade across the borders of the member states. Such a broad statutory framework is yet to be implemented in the EU. The body of contract law in the EU that uses good faith in the contractual context is made up of directives. There is no equivalent to the ACL in the EU. This is in part due to the development of the regulation of consumer protection and contract law in the EU. The main hurdle, and possibly the insurmountable obstacle to good faith becoming a principle of EU contract law, is the fact that the member

[98] Stewart, above n 36, 87.
[99] Ibid.
[100] Ibid.
[101] Robertson, above n 38, 23: alongside allowing organic growth, being polycentric, not forgetting procedural dimensions, doing a cost–benefit analysis and changing mindsets.
[102] Davina Cooper, 'Against the Current: Social Pathways and the Pursuit of Enduring Change' (2001) 9 *Feminist Legal Studies* 119, 142.

states have not given competence to the EU institutions to regulate this area of law. While there have been developments in certain areas including e-commerce and consumer protection, it may be that, at least for the foreseeable future, only academic compilations can provide a set of principles of EU contract law, and these already emphasise good faith and fair dealing as a core principle.

The action plans laid out by the Commission, the academic works on general principles of contract law, and the debate surrounding the enactment of a European Civil Code further support the need for a framework to be presented by EU institutions.[103] Such an approach is to be promoted. The withdrawal of the CESL in late 2014 represents a missed opportunity to promote good faith through EU regulation. However, it also provides an opportunity to correct the trajectory of EU contract law, which further divides contracts according to specialised legislation. Indeed, the CESL only dealt with sales contracts. The PECL and the DFCR represent the closest attempts to promote a European contract law, but EU institutions are yet to implement an instrument that would fulfil this aim.

Due to the nature of the supranational entity that is the EU, it is unlikely that a regulation will impose good faith in contract law across EU members in the foreseeable future. But member state laws often recognise good faith in their national regulation of contract law. A set of common principles that draws upon the academic works and promotes good faith as a principle could be developed. Indeed, the PECL and the DCFR were attempts to apply good faith to the negotiation and performance of contracts.[104] The European institutions should be encouraged to enact a regulation that would promote good faith as a general principle of domestic and international contract law, applicable to both consumer and commercial parties.

[103] For details on these initiatives, see Chapter 3.I.B.2.
[104] Study Group on a European Civil Code, above n 5, II 3:301, III 1:103.

D Conclusion to Section I

To conclude Section I, it can be said that the context of each of the studied legal systems, Australia and the EU, determines the instrument or set of instruments that should to be used to integrate good faith as an umbrella principle in contract law. The Australian development of self-regulation shows the community's desire for clarification concerning good faith in contracts. Even though these initiatives are to be applauded, it is important to consider a federal statutory approach to avoid the fragmentation of contract law into special provisions. Any other approach could result in inefficiency, with similar rules and interpretations being developed simultaneously in different industries. It is not in the interest of the community to increase the number of regulations that repeat the same concept. International examples have indicated that, ultimately, a codified principle will provide certainty and ensure trade is fair. Australian contract law appears more codified than EU contract law. The development of industry codes, and the ACL, are examples of the codification of principles. The European context is dominated by situation-specific legislation and academic compilations. In spite of these differences, both Australia and the EU are at a crossroads. This thesis has argued that both must develop a broader approach where each 'classical' legal source and instrument is used to promote the enactment, interpretation, enforcement and monitoring of the umbrella principle of good faith proposed here. Besides identifying the vehicle of the principle of good faith, the drivers of the reform need to be clearly identified and their role clearly laid out, to ensure the success of the application of the provisions.

II. THE MULTI-ACTOR APPROACH: ESSENTIAL FOR SUCCESSFUL INTEGRATION

Section I has shown that self-regulation and legislation are the most important vehicles for the successful implementation of a principle of good faith. Yet it is important to determine who should drive the reform, the implementation and the enforcement of such a principle. As previously shown, the level at which such reform occurs is also an important question. It has been shown that in Australia there are different instruments which could lead to the recognition of good faith in contract law. This is also the case in the EU. Therefore, the legislature and the judiciary must be in charge of some of the reforms. However, the role of other governmental

institutions is also relevant. Part A will analyse the Australian context and identify three actors: national commissions (Australian Securities and Investments Commission (ASIC) and Australian Competition and Consumer Commission (ACCC)), the federal Parliament, and the judiciary. Part B will analyse the European context and the dynamic between the EU legislature and member state legislators, and the national and European courts.

A Australia

The use of voluntary and mandatory industry codes of conduct and their integration of good faith demonstrates that industry stakeholders want more fairness. Self-regulation by industries needs to be supervised, and there is a need for 'collaborative capacity building'.[105] Braithwaite incorporates this as part of the theory of 'responsive regulation'.[106] Through pyramidal networks, certain behaviours are promoted: '[R]egulators should not rush to law enforcement solutions to problems before considering a range of approaches that support capacity building'.[107] This thesis argues that, for a principle of good faith to be successfully integrated into every aspect of contract law and in every contract, a collaborative effort that involves industry stakeholders and law makers is imperative.

Based on the understanding that law must be useful and be supported by authority, some criteria must be complied with before a principle of good faith can be integrated into Australian contract law. There must be political and legislative will to recognise the notion. The 2012 discussion paper[108] released by the government shows a definite decision from the executive to deal with this question, and this could serve as a foundation for national legislators to take a stand on the question of good faith in contract law. A partnership between legislative, judicial and administrative authorities will favour the recognition of good faith in Australian contract law.

In the Australian context there are three main actors that ultimately 'shar[e] the responsibility

[105] John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 *University of British Columbia Law Review* 476, 476.
[106] Ibid 478.
[107] Ibid 480.
[108] Australian Government, Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law* (2012).

for Australian contract law'.[109] Self-regulation is monitored by ministers, the ACCC and ASIC. Some argue that the legislature should provide a statutory framework, following a 'reform based review of contract law principles (eg by the ALRC) [which] might provide a basis for more consistent judicial developments in this regard'.[110] Finally the courts have an essential role to play in the enforcement and interpretation of the principle. This partnership is to be encouraged. It is necessary to acknowledge the development of the law through codes of conducts and their enforcement but it is also important not to rely exclusively on these. Therefore, this thesis argues that commissions, ministers, members of parliament and judges all have a role to play to ensure the principle of good faith is not only legislated, but also enforced and its development monitored to ensure it is consistent throughout the different facets of contract law.

1. Commissioners, commissions and ministers: to inform and monitor

Small business commissioners, ASIC, the ACCC and government ministers are the first level of the pyramid of responsive regulation. Each is considered below.

i. Small business commissioners: to regulate and to enforce

Although traditionally not the first actor one would think of, some government bodies have developed and filled the gaps left by the legislatures and judiciary. Small Business Commissioners (SBC) have become an essential element of the explicit recognition of the good faith doctrine. The most compelling example is the establishment of SBC offices.

> A Commissioner position has a potentially significant strategic importance for small and medium-sized enterprises, principally through the provision of independent commentary, pushing for red tape and regulatory reduction, overseeing culture change in the public sector, and by providing mediation services and investigative functions.[111]

This is exactly what they aim to do. SBCs promote mediation, cooperation, fair dealing and

[109] Lindsay, above n 390, 27.
[110] Robyn Carrol, Submission No 5 to Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law*, 20 July 2012, 1.
[111] Michael T Shaper, 'Creating Independent Advocates for Entrepreneurs within Government: Some Reflections on the Small Business Commissioner Model' (2008) 16(3) *Journal of Enterprising Culture* 299, 309.

good faith throughout the industries they regulate. By administering mediation, they provide ADR mechanisms that allow for quick resolution of disputes within a regulatory framework with certain values. Disputes presented before the SBC in South Australia include general business (49%) and franchising (15%),[112] with matters relating to retail and commercial leases representing another key area.[113] As another example, most of the disputes brought before the Western Australian corporation, equivalent to the SBC in other states, include retail tenancy disputes,[114] franchise disputes, unfair market practices, and professional and product liability.[115] This shows the large array of questions relating to contractual disputes.

A parallel can be drawn between the lack of contract law influence on business transactions and Macaulay's theory regarding the 'real deal and the paper deal'.[116] It may well be more opportune for one party to come to a compromise with its counterparty rather than terminating the contract, paying any associated costs and finding a new party to form a contract with. While the legal agreement does not reflect this state of affairs, the practice shows that ADR, and in particular mediation, can provide better outcomes for the parties both at a financial and commercial level,[117] as these are interlinked.

This is further reinforced by the recent appointment of the Australian Small Business and Family Enterprise Ombudsman, a federal office whose functions include advocacy and assistance to small businesses and family enterprises.[118]

ii. ASIC and ACCC: to communicate and to investigate

Both ASIC and ACCC provide a relevant point of contact between businesses and regulators. Overall, a regulatory agency 'needs to be both procedurally and substantively just at the same time that it is accommodating and flexible, yet also capable, and publicly known to be capable,

[112] Small Business Commissioner (SA), *Annual Report* (2012–13) 13.
[113] Ibid 18.
[114] These are also the main focus of the *Retail Leases Act 1994* (NSW). Most disputes involving retail shop leases must be certified by the Small Business Commissioner before being escalated to the State Administrative Tribunal.
[115] Small Business Development Corporation, *Types of Disputes We Can Help You With* (2018) <https://www.smallbusiness.wa.gov.au/i-am-in-dispute/types-disputes-we-can-help>.
[116] See Chapter 3.II.C.
[117] These arguments are advanced to promote arbitration as an alternative dispute resolution mechanism: see, eg, Rashda Rana and Michelle Sanson, *International Commercial Arbitration* (Thomson Reuters, 2011) 9.
[118] *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth) s 13. For further information on the role see also Explanatory Memorandum, Australian Small Business and Family Enterprise Ombudsman Bill 2015 (Cth), Australian Small Business and Family Enterprise Ombudsman (Consequential and Transitional Provisions) Bill 2015 (Cth).

of tough and effective enforcement action when a breach occurs'.[119] The role of the ACCC is to 'make markets work for consumers … [and] support fair trading'.[120] ASIC's role includes a mandate 'to maintain, facilitate and improve the performance of the financial system and entities in it; promote confident and informed participation by investors and consumers in the financial system'.[121] Its functions are mainly laid out by the *Corporations Act 2001* (Cth).[122]

While SBCs are the first point of contact for industry stakeholders, whether complying with codes, contracting or investigating a dispute, the role of these two commissions is slightly different for the following reasons. Firstly, the level of oversight is federal while the commissioners are state and territory based. Therefore, they enforce federal codes of conduct, not just state and territory ones. Secondly, ASIC and the ACCC ensure the implementation of legislation enacted by the Commonwealth Parliament. Finally, they have a broader audience and can further educate commercial parties and consumers on their rights and obligations. In relation to good faith, the broad coverage by media and commentators on the different investigations by the commissions can provide useful guidelines, and ensure that the principle of good faith proposed in this thesis will be respected and enforced. Therefore, ASIC and ACCC form the next level of the pyramid of responsive regulation.

An example of the role played by ACCC can be found in a recent case. In *Australian Competition and Consumer Commission v CLA Trading Pty Ltd*,[123] the ACCC brought proceedings against Europcar, stating that some contractual terms were unfair and should therefore be void. The Federal Court considered that the terms were unfair. This decision will have implications not only for consumers but also for small businesses, if the unfair contracts regime applies to them.[124]

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[119] Vibeke Lehmann Nielsen and Christine Parker, 'What Do Australian Businesses Really Think of the ACCC, and Does it Matter?' (2007) 35(2) *Federal Law Review* 187, 197.

[120] See Australian Competition and Consumer Commission, *About the ACCC* <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/about-the-accc>.

[121] See Australian Securities and Investments Commission, *Our Role* (2018) <http://asic.gov.au/about-asic/what-we-do/our-role/>.

[122] See *Australian Securities and Investments Commission 2001* (Cth) s 11(1); *Insurance Contracts Act 1984* (Cth); *Superannuation (Resolution of Complaints) Act 1993* (Cth); *Life Insurance Act 1995* (Cth); *Retirement Savings Accounts Act 1997* (Cth); *Superannuation Industry (Supervision) Act 1993* (Cth); *National Consumer Credit Protection Act 2009* (Cth); *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Cth); *Business Names Registration Act 2011* (Cth); *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Cth).

[123] [2016] FCA 377.

[124] For contracts made on or 12 November 2016.

iii. Ministers: to monitor self-regulation provisions.

The final tier of the pyramid is the ministers. Indeed, they play an important part in the monitoring of self-regulation. Codes of conduct that are prescribed by the *Competition and Consumer Act* must be reviewed by the relevant Minister in consultation with industry.[125] This is also the case for voluntary codes, such as for instance, the *Food and Grocery Code of Conduct*, was reviewed by the Minister three years after its establishment.[126] Ministers also play a role in recommending and approving ASIC actions, for instance in relation to the *Insurance Contract Act*.[127] Therefore, the role of the Minister is to provide a general oversight of their portfolio. This links stakeholders with the executive branch of government.

2. **Federal Parliament: to harmonise laws**

According to s 51 of the *Australian Constitution*, the Parliament has the power to legislate for trade and commerce with other countries and among the states. Through the multiplication of statutes and the integration of broad doctrines in the language of newly enacted Acts, however, lines between the characteristics, and sometimes dichotomy, of common law and civil law have been blurred.[128] This phenomenon further highlights the relevance of the occidental tree as described in Chapter 2, which shows legislation and case based law can indeed interact and inform each other..

The Parliament has considered that good faith can be used in certain instances. As mentioned previously,[129] more than 150 statutes in Australia stipulate a requirement of good faith. Despite this, this thesis has shown that these applications are specific and that there is no general definition in Australia. This illustrates the reluctance to recognise good faith as a general principle of contract law. Integrating the principle of good faith into contract law at the federal level would contribute to the gap filling, which is only being partly done by industry codes as demonstrated in Chapter 5,[130] leading to the continued fragmentation of contract law. It is

[125] This is the final stage of the process following prescription of a code: see Treasury, *Policy Guidelines on Prescribing Industry Codes under Part IVB of the Competition and Consumer Act 2010* (May 2011) 8.
[126] *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* (Cth) s 5.
[127] *Australian Securities and Investments Commission Act 2001* (Cth) s 12.
[128] Ermanno Calzolaio, 'Le Rôle de la Jurisprudence dans la Comparison Civil Law-Common Law' (2014) 42 *Petites Affiches* 7.
[129] Introduction, III.A.
[130] Chapter 5.II.A.2.

precisely this problem that this thesis argues is in need of remediation. Therefore, it is necessary for the federal Parliament to propose a principle of good faith to be applied across states and territories, which must also be interpreted and enforced homogeneously by the courts. If it does this, only then will the Parliament effectively address the current gaps which have produced the lack of certainty surrounding good faith.

3. **Courts: to interpret and enforce laws**

While commissioners (including ASIC, ACCC and SBC) and the Parliament must determine the statutory and regulatory approach, the courts' role will be to enforce the provisions. Yet they often play a broader role than simply enforcement. Indeed, the role of the legislature in common law countries must be analysed against the courts' casuistic approach[131] and their apparent supremacy:[132] apparent, because the Parliament is in fact supreme.[133] This is highlighted by the place given to the legislature in the *Australian Constitution*: the first of the three powers to be presented.[134] However, courts have still had to develop doctrines on which to found remedies.[135] Courts are seen as the ultimate arbiter.[136] This thesis argues that, while the role of the courts should be to interpret statutory and regulatory provisions, and subsequently to enforce them, judicial decisions should not be the way in which a principle of good faith in contract law is recognised. The current uncertainty due to the lack of clear judicial standing on whether to enforce a duty to act in good faith is not helped by the lack of guidance available on the meaning, contours and dimensions of good faith in Australian contract law. Instead of putting pressure on the judiciary to recognise good faith as a principle of contract law, this thesis argues that the courts should focus on interpretation and take an active part in delineating the doctrine of good faith in Australian contract law, but only as guided by legislation. To do so, courts will have to balance the autonomy and self-interest of the parties with the moral concept of trust presented in Chapter 3.[137] Such a balance of interests will

[131] Further highlighted by the fact that books present the common law as a primary source of law: see Alisdair Gillespie, *The English Legal System* (Oxford University Press, 2007) 22; Peter Smith and Stephen Bailey, *The Modern English Legal System* (Sweet and Maxwell, 3rd ed, 1996) 35; Catriona Cook, Robin Greyck, Robert Geddes and David Humer, *Laying Down the Law* (Lexis Nexis, 2012) 99.
[132] See the definition of common law legal systems in Chapter 2.I.B.
[133] In England, the Parliament has had supremacy over the courts since the 17th century: Cook et al, above n 131, 24.
[134] *Australian Constitution* s 1; but courts are the ultimate arbiter: *Landers v Commonwealth* (1996) 70 ALJR 176.
[135] See Chapter 6.II.
[136] Cook et al, above n 131, 24; following *Dr Bonham's Case* (1610) 8 Co Rep 107a.
[137] See Chapter 3.II.B.

determine the interpretation and application of a principle of good faith in contractual situations and further establish good faith as an implicit dimension that is part of any social relationship.[138]

In addition, aspects inherent in the courts' process have been advanced as reasons why courts may not be the best institutions to decide commercial cases.[139] They are 'backward looking'[140] in that they only intervene once a legal issue has arisen. This is not to say, however, that they must be excluded since they will provide valuable interpretation and will shape the notion of good faith to the Australian contractual landscape.[141] It is undeniable that good faith is a flexible doctrine, whose meaning is determined by the particular circumstances of a case. Therefore, the power of interpretation is broad and the courts rely on the legislature's intentions as well as the needs and values of the community.

Statutory gap filling and interpretation are the core functions of the judiciary and ultimately aim to determine the legal rights of the parties to a dispute. Firstly, the main question relating to the application of good faith brought before the courts so far concerns the exercise of a discretionary power. According to Collins, there is an economic rationale to a power to exercise rights discretionally.[142] If good faith is imposed as a principle of contract law, parties who act unreasonably will be sanctioned. Ultimately, parties will refrain from opportunistic behaviour that goes against the duty to act in good faith for two main reasons: the non-breaching party can decide to terminate the contract, and the transaction costs of finding another contractual party may be high.[143] Secondly, gap filling is a well-known concept used to complete contracts.[144] It is linked to the presumed preferences of the parties.[145] Imposing good faith as a principle of contract law and filling gaps in contracts will deter opportunism further.[146] In other words, whether the parties provide that they will be acting in good faith throughout their

[138] Hugh Collins, 'Discretionary Powers in Contracts' in David Campbell, Hugh Collins and John Wightman (eds), *Implicit Dimensions of Contract: Discrete, Relational, and Network Contracts* (Hart, 2003) 219, 250.
[139] John Gava, 'How Should Judges Decide Commercial Contract Cases?' (2013) 30 *Journal of Contract Law* 133.
[140] Mindy Chen-Wishart, 'Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding?' (2013) 62(1) *International and Comparative Law Quarterly* 1, 25.
[141] Ibid: 'Second, the greater the generality of the rule (the wider the range of situations that the rule applies to), the greater will be the need to tune its application to the particular circumstances of the case. Third, the clearer the meaning of the transplanted rule, the less room there is for creative interpretation.'
[142] Collins, above n 138, 226.
[143] Ibid.
[144] This line of argument has been used in the application of other doctrines in Australia, including the practical benefit in *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723.
[145] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52.
[146] Ian Ayres and Robert Gertner, 'Filling Gaps in Incomplete Contracts' (1989) 99 *Yale Law Journal* 87.

transactions with each other or not, a statutorily prescribed principle of good faith will apply and be enforced.

Furthermore, judicial decisions also satisfy a gap-filling function by interpreting statutes. On this point, Beale stated that 'the common law judge has an inherent power, derived ultimately from royal authority, to develop the law'.[147] The recognition of implicit dimensions of the contract allows the use of community standards, and ensures that courts play a role in the enforcement of a principle of good faith in contract law, under the supervision of regulatory actors.[148] Indeed, it is worth remembering that '[j]udicial supervision of market transacting through contract law applies only to a portion of the transacting domain in a modern economy.'[149] Consequently, although the judiciary is an important actor in monitoring the integration of the principle of good faith, it is not the primary actor, since it is only involved when contractual parties bring disputes before it.

While establishing cooperation between the different institutions may prove challenging, it is an essential element of the law reform process in this area. By listening to stakeholders, enacting relevant legislation, interpreting its content, enforcing its provisions and allowing for revisions over time, the Australian multi-actor approach proposed here will be the foundation of a virtuous circle and ensure the successful integration of good faith into contract law.

B The EU

In the European context, two points must be made. The legitimacy of European institutions in regulating contract law has been a controversial and debated topic.[150] To ensure successful implementation of a good faith principle enforceable in EU contract law across the member states, there is a need for a partnership between the member states' institutions and the EU institutions. While the role of judges in Germany includes broad interpretation powers and they

[147] Hugh Beale, 'Characteristics of Contract Laws and the European Optional Instrument' in Horst Eidenmüller (ed), *Regulatory Competition in Contract Law and Dispute Resolution* (Hart, 2013) 313, 314, citing John Baker, *Introduction to English Legal History* (Oxford University Press, 4th ed, 2007) 15.
[148] Jeannie Paterson, 'The Standard of Good Faith Performance: Reasonable Expectations or Community Standards?' in Michael Bryan (ed), *Private Law in Theory and Practice* (Routledge-Cavendish, 2007) 162.
[149] Gava, above n 139, 137.
[150] See Chapter 4.II.

have developed good faith as a general clause,[151] it is unlikely that such a development will occur at the EU level, due to the reluctance of national institutions to relinquish powers to the EU. This is where the principle of subsidiarity acts as a limit on the norm-making powers of EU institutions.[152]

Although there are similarities between the 28 member states, there are strong cultural objections against relinquishing all powers to the supranational level. The creation of European contract law poses the question of what is the most efficient level for such a body of rules.[153] A top-down intervention is only necessary in areas where the member states fail to regulate.[154] Rules should be created by the entity with the most expertise,[155] an expression of the principle of subsidiarity.[156] Any reform of EU contract law should have strong links with the community and practice.[157] However, until now, there has been a top-down approach that starts with the competencies of the EU. The EU shares competence with member states in relation to consumer protection and the internal market.[158] This dynamic both hinders and facilitates regulation, as will be presented below.

1. Role of the European Commission: a leader and a monitor

With the release of the CESL, the aim of the Commission was to encourage an environment where both the CESL and national law would compete in a market where legal rules compete on an equal footing and can be chosen as the law applicable by contractual parties.[159] The content of the CESL promoted a common core of law, different from national laws. It was to 'form part of European law as a set of principles'.[160] Its withdrawal has stopped this. European

[151] See Chapter 1.I.A.1.
[152] See Chapter 4.II.B.3.
[153] Jaap Hage, 'On Which Level Should Private Law in Europe Be Created?' (Working Paper No 2014/8, Maastricht European Private Law Institute, 25 February 2014) 3.
[154] William Bull, Jiangqiu Ge, Catalina Goanta, Mark Kawakami and Jan Smits, 'Who Does What in Consumer Law? A Search for Criteria for Centralised Lawmaking' in Bram Akkermans et al (eds), *Who Does What? On the Allocation of Regulatory Competences in European Private Law* (Intersentia, 2015) 97.
[155] Hage, above n 153, 9.
[156] See Chapter 4, 200.
[157] Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart, 2014), 237.
[158] *Consolidated Version of the Treaty on the Functioning of the European Union* [2012] OJ C 326/47, art 4(2).
[159] Alexander J Wulf, 'Institutional Competition of Optional Codes in European Contract Law' (2014) 38(1) *European Journal of Law and Economics* 139, 156.
[160] Adar and Sirena, above n 1, 33.

contract law has confirmed its fragmented approach through focusing on the digital market.[161] We should not harmonise for the sake of harmonising,[162] but ensure harmonisation is done is brought on by the need to eliminate barriers to trade and ensure cross border trade is facilitated.

The cost of differentiation in national laws is an opportunity cost, 'measured by the loss of trade because welfare-enhancing bargains do not conclude due to the uncertainty and risk or conclude at a higher risk premium'.[163] The policy change towards full harmonisation will mean contracting parties benefit from a more uniform implementation of the law. 'Full harmonization has the potential to produce significant gains in terms of reduction of legal obstacles to cross-border trade, since the elimination of legal diversity is radical and complete.'[164] By proposing directives and regulations, the Commission has the prerogative of leading the integration of good faith into the law as part of a broader contract law instrument and of monitoring its application.

2. **The European Parliament and the Council: a powerhouse and its opponent?**[165]

Over time, the legislative powers of the European Parliament have increased.[166] However, while the Parliament's role is constantly growing, it is important to note that the Commission maintains the prerogative of proposing legislative instruments.

However, its role as a co-legislator will be decisive in asserting the place of good faith in EU contract law. By promoting the interests of the European Union, and building on its growing voice, the Parliament has a clear role to play in the ordinary legislative procedure and 'against' the Council, which represents the interests of the member states. The Parliament's approval of the CESL and the proposed amendments further show how the institution has used its powers to promote an 'ambitious vision' of EU contract law.[167]

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[161] Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe*, [2015] 192 Final.
[162] Robertson, above n 38, 4.
[163] Ibid.
[164] Fernando Gomez and Juan Jose Ganuza, 'How to build European Private Law: An Economic Analysis of the Lawmaking and Harmonization Dimensions in European Private Law' (2012) 33 *European Journal of Law and Economics* 481, 498.
[165] Manfred Kohler, 'European Governance and the European Parliament: From Talking Shop to Legislative Powerhouse' (2014) 52 *Journal of Common Market Studies* 600.
[166] See ibid 615.
[167] See European Parliament, *Legislative Resolution of 26 February 2014 on the Proposal for a Regulation of the*

3. **The CJEU: an interpreter and a guide**

The CJEU is struggling to determine its role and powers and tries to ensure it does not invade the boundaries of domestic jurisdictions. For instance, a German court asked for guidance on the interpretation of good faith at the European level, using the preliminary ruling process.[168] The then ECJ decided that 'it is for the national Court to decide whether a contractual term such as that at issue in the main proceedings satisfies the requirements for it to be regarded as unfair under Article 3(1) of the Directive'.[169] The lack of response by the ECJ further reinforces the fragmentation of the doctrine of good faith. Yet, the role of the ECJ has been presented as a determinant in ensuring EU principles are enforced.[170]

> Principles are the norms of the Union's law which encapsulate the common core of the laws of the Member States and also (with particular regard to subsidiarity and proportionality) create the conditions to apply it at the European level, especially by the Court of Justice.[171]

Therefore, it is important that the CJEU provide the guidance needed for a harmonised European interpretation of good faith in EU contract law. This is necessary to ensure a harmonised understanding and widening of the EU understanding of good faith in European contracts across the member states. The role of the CJEU is particularly relevant here since it can be asked to provide a preliminary ruling on a particular point of EU law. The need for this procedure relates back to the diversity of the member states. In order for good faith to be understood in a similar fashion throughout the 28 member states, it is necessary to have a leading advocate in the shape of the CJEU to ensure uniform interpretation and enforcement of the EU umbrella principle of good faith.

European Parliament and of the Council on a Common European Sales Law (COM(2011)0635 – C7-0329/2011 – 2011/0284(COD)) (Ordinary legislative procedure: first reading) Amendment 17; Rémy Cabrillac, *Droit européen comparé des contrats* (LGDJ, 2102) 14.

[168] See Chapter 5.I.B.2.

[169] *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Ludger Hofstetter and Ulrike Hofstetter* (Case C-237/02) [2004] ECR I-03403, [25].

[170] Federico Della Negra, 'Does "European Regulatory Contract Law" Enhance Citizens' Rights? An Analysis of Consumer and Services Law from Theory to Practice' (2015) 1 *Opinio Juris in Comparatione* article no 2, 30–1.

[171] Adar and Sirena, above n 1, 27.

However, as has been noted, the Court has been reluctant to decide on the good faith sections of the directives and has left this for the member states' courts to decide.[172] Leaving the domestic courts to deal with EU statutes may allow for flexibility; decisions can be in tune with the legal culture and the characteristics of the member state in question. However, such an approach allows domestic courts to undermine the original purpose of the EU statute on national grounds. 'Only if rules and principles are applied in a uniform way can similar cases be treated alike'.[173] Furthermore, the issue with interpretation becomes more problematic when good faith is not recognised and used in national law; because then the member state does not have any comparable approach to rely upon. Domestic courts are left to their own devices in relation to interpretation. The CJEU must take its role as a leader in monitoring EU contract law implementation in member states. This role is crucial for the development of a coherent contract law across the internal market. The Court has

> effective powers of judicial review, with tools to ensure that member states are kept up to the mark even if there is no power to enforce its decisions and with an essentially efficient procedure for achieving consistency in the application of community law … and [competency] to lay down general principles of law.[174]

C Conclusion to Section II

To conclude Section II, reform of contract law has to be an all-encompassing endeavour, connecting community practice to regulatory agencies, the courts and the legislatures. This reasoning stems from the variety of legal instruments that are currently used, a trend that should be encouraged to ensure a cohesive approach.[175] However, there is a need to remain utilitarian[176] and efficient to ensure the reform of contract law in general. A principle of good faith must be decided at different levels. In the Australian context: 'If the ultimate vehicle must

[172] Chapter 5.I.B.2.
[173] Jan Smits, 'Introduction' in Pia Letto-Vanamo and Jan Smits (eds), *Coherence and Fragmentation in EU Contract Law* (Sellier, 2012) 10.
[174] Gordon Slynn, *Introducing a European Legal Order* (Sweet and Maxwell, 1992) 39.
[175] For a critique on the possible role of public actors and the idea of anti-paternalism, see Christine Jolls, Cass R Sunstein and Richard Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50(2) *Stanford Law Review* 1471, 1541: 'a skepticism about antipaternalism, but not an affirmative defense of paternalism.'
[176] In the sense of being of utility: see Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon Press, 1789) [3]–[7]: 'An action then may be said to be conformable to the principle of utility, or, for shortness sake, to utility, (meaning with respect to the community at large) when the tendency it has to augment the happiness of the community is greater than any it has to diminish it.'

necessarily be national legislation because of the quirks of our federation, the process itself should not be left simply in the hands of governments. Australian contract law as a system is too important for that.'[177] The same could also be argued for the EU. The implementation and enforcement of a good faith principle should not become a battle between regulatory actors but instead a coordinated and sophisticated multi-layered approach: academic, legislative and judicial and, most importantly, by the community. An important lesson can be taken from this analysis: the institutions need to cooperate. This is a mandatory requirement for the EU institutions in the *TFEU*. It is the de facto requirement in Australia.

III. CHAPTER CONCLUSION

To conclude, 'the core of law is authority. … If law is totally ignored in practice, it scarcely deserves the name of law.'[178] The likelihood of a successful integration of the principle of good faith into contract law is greatly increased if the rule fits with the pre-existing legal infrastructure and institutions, if there are not many substitutes available and if law reformers are motivated to make use of it.[179] Only time will tell whether such a multi-actor and multi-instrument approach is the best combination for a successful integration of good faith as an enforceable principle of general contract law in both Australia and the EU. It is important to highlight the need for consistency in any vehicle. This is easier at the national level in Australia, where all the actors involved are located in the same country and share more or less uniform rules.[180] This chapter has shown how a partnership between the legislature, the judiciary and private stakeholders could help the integration of a requirement of good faith into contractual dealings, demonstrating the true umbrella nature of the principle of good faith in contract law. The quotation introducing this chapter highlighted the importance of the commitment of the law maker. However, this chapter has shown that not only the commitment of the law maker but also the identification of the different law-making entities and a coordinated approach between them will be essential to achieve a successful integration of the umbrella principle of good faith into contract law.

[177] Paul Finn, 'Internationalisation or Isolation: The Australian Cul de Sac? The Case of Contract Law' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 41, 65.
[178] Alan Watson, 'Legal Culture v Legal Tradition' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing, 2004) 1, 2.
[179] Hideki Kanda and Curtis J Milhaupt, 'Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law' (2003) 51(4) *American Journal of Comparative Law* 887, 891.
[180] Smits, above n 173, 10.

PART THREE: LEGAL REFORM CONCLUSION

Part III has advanced avenues for reform of the contract laws in Australia and the EU, to integrate a principle of good faith applicable to all contracts, and to all stages of the transaction, from negotiation, to performance and termination. It has demonstrated how such a principle of good faith will be beneficial for the parties to the transaction as well as the jurisdictions in which it can be implemented.

Chapter 6 has shown that the recognition of good faith in contract law can be done as a mandatory principle of contract law applicable to every contract, no matter the type of transaction or the identity of the parties. Should a party not respect this principle and the conduct be contrary to good faith, there are avenues to ensure courts enforce the principle and grant remedies to the party who suffers a loss resulting from the breach of a duty to act in good faith.

Chapter 7 has shown that for a principle of good faith in contract law to be explicitly recognised, it will require careful attention to the actors in charge of the reform. The recognition of good faith would need the support of key stakeholders. This chapter has highlighted the primary role to be played by institutions in the implementation and enforcement of the reform: in Australia through a multi-layered approach involving, the industry, regulators such as the ACCC and ASIC, the legislature and the courts; in the EU through a unlikely redefinition of the powers of EU institutions to promote the coherence of the interpretation of good faith in the general law of contract.

General Conclusion

> Why good faith as the unifying theme? Because it is principled and accords with the very nature of the institution of contract, in all cultures.[1]

This thesis aimed to address whether the doctrine of good faith in Australia and the EU could bring more certainty in contractual dealings. It examined how good faith already interacts with certain contractual dealings and discussed who has been driving these interactions. The development of a model for a mandatory and enforceable principle of good faith applicable to every contract is the outcome. This must be flexible enough to adapt to different applications but strong enough to ensure fairness. The thesis has also demonstrated that good faith must be a catalyst for a broader discussion on law and norm-making in contract law. It has brought original insights into the following broader topics: redefinition of legal families, morals and law, cooperation in contractual dealings, and legitimacy of the regulation of contract law by supranational entities and private stakeholders.

I. CONCLUSION OF THE THESIS

A Confirmation of the hypothesis

Before focusing on the doctrine in Australia and the EU, Chapter 1 outlined the international context and the use of good faith in that context. This Chapter showed that good faith has appeared in contract law in many legal systems and is also present internationally. This is relevant since Australia and the EU's trading partners have recognised the doctrine to some extent, and have moved towards the internationalisation of contract laws. Harmonisation of laws between these trade partners is gaining relevance. This Chapter also demonstrated that, in addition to good faith being present in many jurisdictions, and despite interpretations differing,

[1] Donald Robertson, 'The International Harmonisation of Australian Contract Law' (2012) 29 *Journal of Contract Law* 1, 20.

the doctrine plays a role in domestic and international contract laws.

The hypothesis was that the current applications of good faith in Australian and European contract law have contributed to the fragmentation of contract law, and have led to uncertainty as to whether parties are under a duty to act in good faith. To test this, three questions were asked: what makes Australia and the EU comparable?; How has the doctrine of good faith developed and is currently applied in the contract laws of each jurisdiction? And what are the possible avenues for reform?.

The first question was addressed in Part One of this thesis and identified the similarities and differences between Australia and the EU in order to understand what makes the two legal systems comparable. Part One demonstrated that Australia and the EU are two comparable jurisdictions, part of the common legal tradition of the Western world, with common historical and theoretical developments that relate to contract law theory and fairness in the conduct of transactions.

Chapter 2 developed the methodology of comparative law and applied it to the context of this research. By doing so, it argued two points: firstly, that Australia and the EU are comparable jurisdictions; and secondly that their contract law regulations are comparable. Using the classification of legal trees, Australia and the EU were presented as two branches of the 'occidental tree' legal tradition. Not only does this acknowledge the common heritage and development of laws, but it also takes note of the divergence between these two legal systems. This had the advantage of providing a comparative framework closer to the legal reality of those systems than were previously presented by other classifications. Having established the compatibility of the systems, the Chapter moved on to show that contract laws in Australia and the EU are also comparable. A deep level comparative law approach was used to highlight the common features of the two jurisdictions in relation to the notion of legal agreement and fairness in contracts.

Chapter 3 focused on the common roots of the occidental tree in order to determine whether good faith can be traced back to them. By doing so, this Chapter enabled analysis of the role of morals and the relationship with the rule of law. Through a historical and theoretical approach, it showed that legal rules, equity and morals have nourished a complex relationship since the development of Roman law to the present day. This had an impact on the

philosophical and historical development of fairness and good faith in the context of contractual dealings in Australia and the EU.

It was established that the concepts of cooperation and honesty in contractual dealings are part of Australian law through the use of some doctrines including unconscionability, and the duty to exercise discretionary rights reasonably. Courts do not encourage a term that is not reasonable and that encourages behaviour that is dishonest and disloyal. This line of argument is also found in the academic works that compiled the European Contract Law. There, good faith appears as a true principle. Yet, even though good faith seems to be the epitome of fairness,[2] by requiring the cooperation of the parties towards successful performance of contractual obligations, it is only partly recognised. This is so even though Australia and the EU support not only the letter of the agreement, but also the implicit understandings surrounding it, even if the support for the latter is implied. Therefore, the foundations for a principle of good faith and the recognition of the relational aspect to every transaction are present. This leads to the question as to where good faith is currently used in Australian and European contract law and why this is so.

Consequently, Part I provided a definition of comparative law and established the theoretical framework as applied to this research. Chapter 2 focused on the former, Chapter 3 analysed the common points between the two studied legal systems as well as their differences. The approach may be different, Part I shows that there are foundations for a principle of good faith in Australia and in the EU.

The second question related to the contemporary use of good faith in contractual dealings in Australia and the EU. Part Two compared these developments in order to understand how the concept is currently evolving in each jurisdiction.

Chapter 4 has investigated the extent to which good faith is used as a principle of contract law in Australia and the EU. It identified the challenges of integrating good faith in the general law of contract in Australia and in the EU. The recognition of a duty for both parties to act in good faith has appeared in some commercial dealings in both Australia and the EU. Australia started through case law, while the EU developed good faith in commercial dealings through

[2] Anthony Mason, 'Changing the law in a changing society' (1993) 67(8) *Australian Law Journal* 568, 573.

directives. More recently, a new movement has led to further recognition of the doctrine of good faith in contract law in both Australia and the EU through codes of conduct and the release of a draft common frame of reference respectively.

Chapter 5 has investigated the topical applications of good faith in the EU and Australian contract law. It investigated the development of good faith as a doctrine that protects the weaker party and showed that in Australia, the business community is slowly integrating the duty to act in good faith in its contracts and business codes of conduct and is leading a new movement to recognise good faith in commercial dealings. Meanwhile, in the EU, the protection of the consumer is paramount and a duty to act in good faith is instrumental in this endeavour. This demonstrated that the EU also needs to reform its contract law in order to provide better protection, not only to consumers, but also to small businesses.

Part II determined that the contemporary use of good faith in Australia and in the EU is similar in that each of these legal systems has made topical application of good faith in contract law. There is a clear consequence to such an approach. Indeed, these attempts at recognising good faith have the perverse effect of fragmenting contract law into a law of special contracts. The fragmentation of contract law is also known to the EU through the enactment of directives dealing with some aspects of consumer protection and contract law. Ensuring a broader framework for European contract law is confined to academic works. The difficulties facing the introduction of a CESL, and ultimately leading to the withdrawal of the proposal, further demonstrated that in the long term, attempts to bring a good faith duty into certain relationships can have a negative effect, as it hinders the development of the duty as a true principle of the general law of contract. This thesis argues that an Australian principle of good faith applicable to all contracts will align the law with current commercial practice, recognise the understanding in the community that parties should be true to their word, and ultimately bring certainty into contractual dealings.

Comparative law is seen firstly as identifying differences between systems, and secondly as trying to harmonise these systems.[3] Both Chapters 4 and 5 showed the different approaches to the integration of good faith in contract law: a top-down approach in the EU and a bottom-up

[3] For a method of comparative law, see Chapter 2.I.A .; see generally Roger Brownsword, Hans-W Micklitz, Leone Niglia and Stephen Weatherill (eds), *The Foundations of European Private Law* (Hart, 2011).

approach in Australia. Yet both jurisdictions face the same challenges. Through this analysis, this thesis has identified the pitfalls of the current approach to the implementation of good faith in both jurisdictions. The fragmentation of contract law is found in both Australia and the EU. This is a source of uncertainty and unpredictability as to the legal rules applicable to transactions. Yet, it was found that the judiciary is reluctant to take charge of the development of the doctrine in the general contract law in each legal system, even though the idea that contracts should be conducted fairly is well established.

The third question was addressed in Part Three of this thesis which considered possible solutions to remedy the current fragmentation of the application of good faith in contract law in Australia and the EU. The thesis proposed a framework to address the issues faced as a result of such fragmentation.

Chapter 6 developed the contents of a principle of good faith and the remedies such a principle could contain, as a way to remedy the current fragmentation of the law of contract, to harmonise the law of contract across the different types of transactions, and to provide more certainty to the parties. This Chapter observed different avenues for reform leading to the integration of good faith as a principle of contract law in Australia and the EU, and integrated comments based on the understanding of the doctrine in legislation, both in the national and international sphere. By doing so, it demonstrated that the proposed framework fits with the interpretations and use of good faith at the domestic level, in other jurisdictions, as well as in international instruments. It highlighted that there is room for harmonised interpretations of the doctrine of good faith.

The significance of this thesis is above all that good faith has been presented as an umbrella principle that can address some of the inadequacies faced by many jurisdictions in promoting fair dealing. For instance, the use of good faith in regulating aspects of law other than contracts, across jurisdictions, further demonstrates its fundamental gap-filling characteristic.

Chapter 7 has identified the need for a multi-instrumental and multi-actor approach. In the long term, this could lead to the recognition of good faith as an umbrella principle, applicable to every contract, no matter the type of transaction or the identity of the parties.

By paying attention to the international context developed in Chapter 1, the model outlined

represents an original contribution to the development of a better system in domestic and international contractual relations. Indeed, the recognition of good faith as a principle in Australia and the EU could provide a better understanding of the international instruments, their interpretation and application. Even though the doctrine is to be interpreted in the context of international trade, the interaction between state or territory trade in Australia, and trade within the internal market in the EU, could provide insights into and a justification for the development of an international duty for parties to act in good faith.

Therefore, while Part II identified the issues faced by the two legal systems due to their topical applications, Part III analysed the avenues for reform. By identifying the dimensions of the principle of good faith in contract law in both Australia in the EU, the set of legal instruments to be used, and the actors to be involved, this thesis concludes that it is the role of each institution to contribute to the effective integration of an umbrella principle such as good faith. This has the consequence that institutions need to cooperate to ensure good faith is promoted and enforced throughout contract law, whether at the domestic or international contractual levels in Australia and the EU.

B Potential impact of the thesis

This thesis is an original contribution to the field of comparative law, contract law and the debate surrounding the doctrine of good faith. The impact of the thesis in these fields is threefold. Firstly, the comparative law methodology provides an opportunity to bring new elements to the debate surrounding good faith, by analysing current legal applications. Instead of focusing on the transplantation of good faith, the argument is that good faith is already present in Australian and EU contract law. Therefore, the analysis focused on the current state of applications, their rationale and success.

Secondly, following a comprehensive historical and theoretical approach, this thesis suggests a tangible solution to integrate good faith into contract law as a general principle. It identifies the actors and instruments to be used for each jurisdiction. The recognition of good faith as a principle in Australia has been shown to promote certainty in contractual dealings while also being compatible with equitable doctrines that have been used to promote cooperation and

target unfair behaviour. While a European contract code is yet to come to fruition, academic works have shown the place of good faith as a true general principle of European contract law. This must be followed in European legislation. This thesis therefore provides a model that could be applied in both legal systems. It is important for both however to recognise the need of parties for certainty in respect of their obligations in contracts, no matter what the contract may entail. Therefore, this thesis provides recommendations to remedy the problem of the fragmentation of contract law, and the consequential uncertainty that results.

Thirdly, this thesis paves the way towards the development and strengthening of mutually beneficial and collaborative relationships between industry, community and professional organisations. The thesis represents the first step towards the recognition and developments of such relationships. In Australia, a principle of good faith could be successfully integrated, but this endeavour requires the elaboration of a partnership between private stakeholders, the legislature and the judiciary. Meanwhile, in the EU, a principle of good faith needs to be integrated into European regulations, and the CJEU must actively contribute to interpretation and enforcement. While good faith is not at the forefront of the agenda of institutions in Australia and the EU, it is clear that they are closely monitoring the protection of the weaker party; these include the application of unfair contract terms legislation, the regulation of Australian small businesses, and the development of EU contract law.

Consequently, this reasoning confirms that the image of an umbrella principle is perfectly suited to the doctrine of good faith for the following reasons: it protects parties from unfair behaviour in transactions; it encompasses different doctrines which also promote fair dealing; it takes into account multi-actors and emphasises a multi-instrumental approach which is needed for a successful explicit recognition of good faith as a principle of contract law in Australia and the EU.

II. BROADER CONCLUSIONS ON GLOBAL PLURALISM AND LEGAL PRINCIPLES

A The universality of the principle

This conclusion began with the quotation that good faith is a unifying theme.[4] Indeed this presents good faith as universal; present across all legal cultures. This thesis has demonstrated that the idea that parties must act reasonably and cooperatively has crossed boundaries. As a matter of fact, from China,[5] to Scotland[6] and to the UAE,[7] it is obvious that the variety of legal cultures is not an impediment to the recognition of doctrine of good faith in domestic situations. Indeed, the coming closer of the laws of two trading partners, like Australia and the EU, through their harmonisation, can reduce contractual parties' costs associated with understanding the laws of a different legal system.[8]

B Recognition of the context particular to each legal system

The introduction to this thesis started with a quotation which presented good faith as an expected norm of behaviour.[9] This emphasised the implicit dimensions of contracts and the role played by morals in the regulations of contractual dealings. The thesis has shown that such a dynamic is deeply rooted in the legal culture of jurisdictions: cultures that have specificities but also share a common set of roots in ensuring dealings are fair and parties act in good faith.

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[4] Donald Robertson, 'The International Harmonisation of Australian Contract Law' (2012) 29 *Journal of Contract Law* 1, 20.

[5] *New Chinese Contract Law* Article 6; *Trademark Law* (People's Republic of China) s7: application to be made in good faith.

[6] Hector MacQueen, 'Good faith in the Scots law of contract: an undisclosed principle?' in ADM Forte (ed), *Good Faith in Contract and Property Law* (Hart Publishing, Oxford, 1999), 5-37; In Scotland, however; the importance of civil law has impacted on the development of good faith in Scottish contract law.

[7] *UAE Civil Code* Article 246 "a contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith".

[8] Gema Tomas, 'Harmonisation of European Contract Law: Slowly but Surely?' (2013) 20(1) *Lex ET Scientia International Journal* 7; see also Mel Kenny, James Devenney (eds), *The Transformation of European Private Law: Harmonisation, Consolidation, Codification or Chaos?* (Cambridge: Cambridge University Press, 2014) 100.

[9] Anthony Gray, 'Good faith in Australia Contract Law after Barker' (2015) 43 *Australian Business Law Review* 358, 378.

It highlighted the plurality of interpretations but also the universalism of fairness in contractual dealings. Indeed, the thesis also highlighted that diverse interpretations of the doctrine of good faith reflect the chameleon nature of the doctrine. Good faith may be understood slightly differently nationally or internationally, but the core element of the doctrine remains: parties must cooperate and act honestly and reasonably. Such globalisation of fairness is to be promoted.

By considering harmonisation as a consequence of the recognition of broader principles, this thesis does not argue that every country will use good faith as a principle of contract law in the same way. On the contrary, the development of the doctrine is deeply attached to the legal culture of the domestic context in which it is recognised. However, what this research demonstrates is that the legal culture is indeed important and could guide the recognition of good faith including the content of the principle, the identification of actors, the instrument as the vehicle of good faith in contract law. This brings us to the recognition of a true pluralism: actors, instruments, interpretations and cultures. A recent theory develops the concept of 'cosmopolitan pluralism',[10] 'which recognises the existence of multiple, overlapping and conflicting legal orders'.[11] It includes the arrangements and practices that go beyond 'law', as defined as cases and legislation, traditionally used to develop this classification. Some doctrines have international standing following their recognition in international instruments.

The thesis provides broad theoretical conclusions on the perspective of the doctrine of good faith. It has highlighted the relationship between laws, principles and legal culture and demonstrated the apparent universality of fair dealing and the primary role to be played by good faith in such a context. 'Most countries simply cannot engage in international commerce or expect international investment without moving their legal regimes toward common standards.'[12] The thesis has highlighted pluralism, not only of norms creating a new 'law market', but also of interpretations of different doctrines. These interpretations are not antagonistic to each other, but instead represent divergences based on the culture and history which are specific to each national context. Law provides a variety of means to implement

[10] Paul Schiff Berman 'Global Legal Pluralism' (2007) 80 *Southern California Review* 1155; Paul Shiff Berman, *Global Legal Pluralism: a jurisprudence of law beyond borders* (Cambridge University Press, 2012).

[11] Michael Giudice, 'Global Legal Pluralism: What's Law Got To Do With It?' (2014) 34(3) *Oxford Journal of Legal Studies* 589, 598.

[12] Jonathan M Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process (2003) 51 *American Journal of Comparative Law* 839, 840.

policy objectives. In other words, there is a large market of law where different bids are made through different legal instruments, and offered by different tenders; private actors and institutions.[13] Yet, throughout these bids, good faith is one underlying moral dimension to promote contractual security in contractual dealings.[14] Good faith is ultimately a true umbrella that gathers beneath it personal relations, norm makers, norms and legal cultures and promotes fairness in contractual dealings.

[13] Denis Mazeaud, 'Rapport de synthèse' in Guillaume Wicker, Carole Aubert de Vincelles, Hélène Boucard, Didier Ferrier, *Droit européen du contrat et droits du contrat en Europe - Quelles perspectives pour quel équilibre ?* (Litec, 2007), 77.

[14] Ibid, 85.

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