Good Faith and Letters of Comfort

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There has been considerable discussion in recent years in the context of Anglo-Australian law as to whether a duty of good faith is or should be accepted as part of the common law relating to the negotiation, performance and enforcement of contractual obligations. This essay considers whether such a duty, if accepted, would add anything to the current Anglo-Australian jurisprudence on letters of comfort, which have traditionally been seen as imposing moral, rather than strictly legal, obligations.

The notion of a duty (or, perhaps more accurately, duties) of good faith as part of the common law has been of considerable interest to commentators in relation to Anglo-Australian law in recent years. These commentators have looked to the United States and to various European civil code jurisdictions which embody codified duties of good faith by way of comparison with the Anglo-Australian position in order to determine whether such duties would be desirable within our own common law system.[1]

The questions which have most often been asked in relation to good faith are these:

1. What is meant by a duty (or duties) of good faith?
2. Is such a duty, however defined, necessary in a modern legal system? (This

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1. See eg EA Farnsworth 'Good Faith in Contract Performance' in J Beatson & D Friedmann (eds) *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 1995) ch 6; WF Ebke & BM Steinhauer 'The Doctrine of Good Faith in German Contract Law' in Beatson & Friedmann ibid, ch 7.

question is often of most relevance to commercial contracts where the parties may be inclined to act in a particularly self-interested manner.)

3. Does a duty of good faith already underpin certain areas of Anglo-Australian law under the guise of various common law and equitable principles?
4. Is there a need to adopt an express duty of good faith in particular areas to add transparency to the law and/or to remedy perceived defects in the law?

As noted above, questions of good faith typically arise in relation to commercial contracts, especially in situations where one party is in a position to take an unfair or 'immoral' advantage over the other. A common context used for discussion of the duty of good faith is the commercial contractual negotiation process. The question arises whether any damages may be claimed by a party who has been disadvantaged by the sudden breaking-off of negotiations in circumstances where, for example, the way in which the negotiations were brought to an end was tinged with unfairness. An example might be where one party had been 'stringing the other along' while negotiating with a third party, a fact which was not disclosed to the other party.[2]

If the concern is really with unfair, unreasonable or immoral conduct, one area in which good faith may be particularly relevant is that of commercial, unsecured lending transactions such as those involving bare guarantees, letters of comfort or negative pledges. This is because in such cases the lenders have fewer (or at least less valuable) rights to fall back on in the event that the loan is not repaid in a timely manner than in a transaction secured by an interest in property of the borrower or an associated party. In the absence of such proprietary security, a lender may arguably be more reliant on the good faith of the party giving the unsecured assurance that the loan will be repaid (usually a holding or associated company of the borrower or a director or other officer of the borrower company).

Some of the above questions about good faith will be addressed in the following discussion in the context of a case study concerning letters of comfort as a form of unsecured lending. Although the discussion will focus on past case law relating to the interpretation and enforcement of letters of comfort, its wider implications for other areas of unsecured lending and commerce generally will be noted where appropriate.

Transactions involving letters of comfort are an obvious example within the sphere of commercial law of arrangements where some measure of good faith or 'commercial morality' is generally involved. The following discussion is largely concerned with identifying the good faith characteristics inherent in the relevant

2. See eg the discussion in N Cohen 'Pre-Contractual Duties: Two Freedoms and the Contract to Negotiate' in Beatson & Friedmann ibid, ch 2; JW Carter & MP Furmston 'Good Faith and Fairness in the Negotiation of Contracts' (1994) 8 JCL 1.

cases on comfort letters, even though a particular case may have been decided expressly on the basis of contract or estoppel. The question for consideration in each case is the extent to which factors external to the letter itself may either expressly or impliedly have influenced the court's reasoning. The factors in question appear to relate significantly to issues of commercial morality or good faith in a commercial context.

GOOD FAITH

The standard of good faith

The main consensus appearing in the literature on the definition of good faith is that it is an exceptionally difficult term to define and that its shades of meaning change over time. Lücke has summarised the various meanings attributed to the term in the past in Anglo-Australian, United States and European law:

> 'Good faith' has not just one but many meanings, as well as an unusual capacity to acquire expanded and altogether new meanings; no wonder it has been labelled a 'protean' phrase. In the same vein, Bridge has called good faith 'a concept which means different things to different people in different moods at different times and in different places'. Legal writers will unavoidably seek to promote the meaning or meanings which they find most fruitful, and will understandably hope for converts.... American writers have shown overwhelming support for a good faith approach to contract, but there is a remarkable lack of unanimity concerning the meaning which should be assigned to the ancient phrase. Reiter has presented an anthology of meanings for which support can be found in the literature. Amongst these are: fairness, fair conduct, reasonable standards of fair dealing, decency, reasonableness, decent behaviour, a common ethical sense, a spirit of solidarity, community standards of fairness, decency and reasonableness. To Reiter's list one must add 'honesty in fact' which is the statutory definition of good faith preferred by the Uniform Commercial Code. Special mention should also be made of Summers' suggestion that good faith lacks a positive meaning of its own and functions merely as an 'excluder' term, that is, a convenient expression which serves only to condemn and exclude many disparate forms of bad faith conduct.[3]

Notwithstanding the broad and wide-ranging meanings attributed to good faith, Lücke notes that the definition must stop short of a simple duty to act altruistically:

> To postulate good faith as an obligation to act altruistically demands an unrealistically radical departure from our contract tradition with its strong emphasis upon the

3. HK Lücke 'Good Faith and Contractual Performance' in PD Finn (ed) *Essays on Contract* (Sydney: Law Book Co, 1987) ch 5, 160 (footnotes omitted). See also A Mugasha 'A Conceptual-Functional Approach to Multi-Bank Financing' (1995) 6 JBFLP 5, 23-24.

> legitimacy of self-interest as the governing motive. Regretfully, one must leave the universal adoption of such a noble motive to some far-distant and much more enlightened age.[4]

Whether or not one agrees with Lücke's sentiments, his view that good faith stops short of pure altruism has been reflected by a number of other commentators. Farnsworth, for example, takes the view that honesty is more relevant than altruism in defining an obligation of good faith:

> It is undisputed that good faith has a subjective component that requires a party at least to make an honest judgment. An honest judgment in one's own self-interest is sufficient to meet this subjective component.[5]

In the context of commercial group lending transactions, Mugasha has stated that —

> the duty of good faith should arise only in those contracts where the relationship between the parties is such that the parties justifiably expect such a duty to exist. This qualification is important because the typical contractual process is more guided by self-interest than altruism. Each party should, therefore, be presumed to guard its own interests and not rely on the good faith of the other party to the contract. The duty should arise in only very few circumstances where the relationship between the parties is such that the duty should arise. This is close to the fiduciary standard but is less stringent in terms of who may take advantage of the duty of good faith. Whereas it would take an exceptional case to put the banks in a fiduciary relationship, it would require only a mutual expectation between the banks to put good faith into operation.[6]

While agreeing with Lücke on the altruism issue, Mugasha gives some futher guidance as to how to ascertain the circumstances in which such a duty may arise in a given commercial context. However, the translation of moral values into legal precepts in the commercial arena may not be as simple as this in more general commercial contexts. This is largely a result of the fact that large-scale commercial transactions in particular may involve a number of parties with sometimes conflicting, and at other times concordant, commercial interests. A past Chief Justice of the High Court, Sir Gerard Brennan, has tried to identify some of the difficulties in translating moral values into legal rules in the context of commercial law:

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4. Lücke ibid, 162.
5. Farnsworth supra n 1, 163.
6. Mugasha supra n 3, 26 (footnote omitted). See also P Finn 'Commerce, the Common Law and Morality' (1989) 17 MULR 87, 97.

> In the general law which is informed by moral imperatives those imperatives can be identified: general recognition and acceptance, applicability of the standard to one's own conduct in personal living and immediacy or foreseeability of the consequences of non-observance. These three characteristics facilitate the translation of the moral imperative into a legal precept. Absent any of these characteristics and the difficulties of translation are increased. Commercial law, particularly the law relating to corporations, is not able to draw to the same extent as some other branches of law upon the support of moral imperatives which exhibit these characteristics. This is not a defect of commercial law; rather it is a lacuna in the development of moral imperatives. Why is this? Many problems of commercial law relate to the exercise of intangible legal rights. There is not, and perhaps there cannot be, a broad consensus on the morality of acquiring or exercising intangible legal rights. Their variety and the differing circumstances in which they arise and in which they operate preclude reliance on any generally accepted standard to govern their creation or their exercise. Similarly, there is no relevant moral imperative relating to the use of financial power. Since the mediaeval abhorrence of usury has been replaced by a search for maximal return on investment, there is no general moral objection to a person laying out his own money in whatever way he chooses. Yet much of the law of commerce has to do with the acquisition and exercise of abstract legal rights and financial strength.[7]

Although several terms used in this passage could do with clarification (eg, the meaning of 'intangible legal rights' in this context) there is a clear recognition of some of the problems involved in translating moral ideas into legal principles. It is often relatively easy to ascertain the moral imperatives behind transactions between two or more individuals but once artificial legal personalities, such as corporations, are brought into play, the questions become infinitely more complex. Does one consider the intentions and values of the company officers actually involved in negotiating the relevant transactions? Such people may be under direction from a number of senior officers and/or a board of directors. It is not always easy to ascertain the discrete moral imperatives behind ideas which have come from a group of people forming the directing mind and will of a company. Sometimes a group of people may agree on a particular result or course of conduct but for different personal reasons.

Thus, defining a particular standard of good faith in any given scenario can be fraught with difficulty. Over and above the fact that the term itself does not have a particularly clear meaning, save that it seems to stop short of a duty of pure altruism, there is the added difficulty of trying to ascertain what is meant by the term in a commercial context in which the relationships between the parties may be much more complex than in a transaction between individuals.

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7. G Brennan 'Commercial Law and Morality' (1989) 17 MULR 100, 103.

Good faith in the negotiation, performance and enforcement of contracts

Although this discussion focuses on the potential applications of good faith to various stages of commercial contracting, the term is also likely to have relevance to other areas of the law including tort, equity and restitution.[8] In the context of letters of comfort, as well as other areas of commerce, the way in which contracts are negotiated, drafted and ultimately performed is of paramount concern to the lawyer interested in a duty of good faith. This is because commercial relationships are largely based on contract rather than other legal relationships.[9]

What the relevant parties had in mind when negotiating and drafting their agreement will be of paramount importance in ascertaining the moral imperatives underlying the transaction, if indeed any can be ascertained in various commercial contexts. Equally, the way the parties proceed in performing and/or enforcing the obligations bargained for may give some idea of the types of relationship they believed existed between them.

In the context of letters of comfort, the initial negotiation and drafting process will be of most interest in ascertaining both the legal and moral objectives intended to underlie the transactions in question. This is because the main question in litigation concerning the interpretation of a letter of comfort is often whether there was an intention to create legal relations between the parties or merely an intention for one party to give some vague, moral assurance to the other without undertaking a clear legal liability for repayment of another's debt. The answer to this question will depend on the exact wording of the letter ultimately given. However, much emphasis in the case law has also rested on the stages of drafting and negotiation and extrinsic elements concerning the parties' relationship with each other. These issues are dealt with below.

It suffices to note at this point that there are several stages in the contracting process in which a duty of good faith can arise. One is the negotiation and drafting stage, as mentioned above. Good faith at this stage of the contracting process has, in fact, been codified in some jurisdictions, attracting a compensatory penalty for any damage caused to another party in consequence of a failure to act in good faith. [10]

Additionally, good faith may be imposed as a legal duty in relation to the performance and/or enforcement of contractual obligations. This has also occurred

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8. See eg Carter & Furmston supra n 2, 94-110.
9. Although it must be accepted that equitable principles and even torts law are having an ever increasing impact on Australian commercial law.
10. See eg Contracts (General Part) Law 1973 (Israel) s 12, discussed in Cohen supra n 2, 32.

as a guarantee, it may be so interpreted and enforced by a court.[15]

In order to identify the main substantive differences between a letter of comfort and a guarantee, one must look to what the comfort giver has actually offered to the lender under the terms of the letter. Obviously a guarantee involves the guarantor undertaking a secondary (and, in the case of a first demand guarantee, a primary) liability to the lender in the event that the borrower does not make good its obligations under a particular loan arrangement. By contrast, a letter of comfort may incorporate one or more of the following types of representation:

1. An undertaking that the comfort giver will maintain its shareholding in the borrower company.
2. An agreement that the comfort giver will use its influence to see that the borrower company meets its obligations under the loan arrangements with the lender.
3. A confirmation that the comfort giver is aware of the loan arrangements with the borrower, but with no express indication that it will assume any responsibility for the borrower's obligations to the lender.[16]

There may well be other types of representation made within letters of comfort, but the above constitute the main classes which have been considered in the relevant case law to date. Clearly, some of these classes of representation may be stronger than others in the sense that they are more likely to be deemed to give rise to binding legal obligations. Depending on the drafting of the specific comfort letter, a mere confirmation of awareness of the financial arrangements between the borrower and the lender is far less likely to be interpreted as contractually binding than an express undertaking by the comfort giver either to do or not to do something specific, for example, to maintain a particular level of shareholding in the borrower company for a specified period of time.

There are a number of reasons why a third party to a loan arrangement may prefer to give a letter of comfort to the lender rather than a simple guarantee.[17] The following are the main reasons:

1. A third party, particularly if it is an associated company such as a holding company of the borrower, may not wish to incur legal liability under a guarantee.
2. Such a party may not have legal power to enter into a guarantee due to limitations in its memorandum or articles or to restrictions in other financial

15. See eg IE Davidson, J Wohl & D Daniel 'Comfort Letters under French, English and American Law' (1992) 3 JBFLP 3, 6.
16. See eg AL Tyree 'Southern Comfort' (1990) 2 JCL 279; Davidson et al ibid, 12-13.
17. See eg J O'Donovan & J Phillips *The Modern Contract of Guarantee* 3rd edn (Sydney: Law Book Co, 1996) 23.

contracts to which it is a party.

3. Such a party may wish to avoid having a contingent liability show up on its balance sheets.
4. There may be tax or stamp duty implications in some jurisdictions in relation to guarantees.
5. The nature of the third party's relationship with the borrower may not lend itself to guarantee liability (eg, where the third party is not an associated entity of the borrower).[18]

Another reason for the use of a letter of comfort rather than a guarantee which has been identified in a number of cases is that the parties may purposely wish to employ a more ambiguous form of security in the hope that 'all will go well' and no question will ever arise as to the actual intentions behind the document.[19] The deliberate creation of such ambiguities, if apparent in a particular case, may well invite the intervention of the doctrine of good faith. This may be particularly so where the desire to create such ambiguities has emanated from one party to a transaction to the potential detriment of the other, and where that other party may suffer damage and have no recourse to compensation through traditional legal principles.[20]

A final point to note about letters of comfort is that they will often raise similar issues to those which arise in relation to guarantees concerning lack of consideration moving from the third party comfort giver to the lender. To date there has not been a significant amount of commentary on this issue. However, it is arguable that unless some specific consideration of this kind can be ascertained in a particular case, the apparent lack of consideration may strengthen the argument that there are no binding contractual obligations in existence between the comfort giver and the lender. Although a guarantee is often executed in the form of a deed under seal to overcome the consideration problem, it would be unusual for a letter of comfort to be executed in that form. This would run counter to current practice in relation to letters of comfort, particularly where the intention in drafting the letter was to avoid guarantee-like liabilities for one of the reasons outlined above.

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18. This situation arose in *Cth Bank of Aust v TLI Management* infra n 27, discussed in detail infra pp 154-156. In this case, the third party comfort giver was a company which intended to take over the borrower company subject to a number of contingencies, but was not otherwise associated with it.
19. See eg *Kleinwort Benson Ltd v Malaysia Mining Corp Bhd* [1989] 1 All ER 785, Gibson LJ 788-789.
20. These principles may include estoppel, torts relating to negligent or fraudulent misrepresentation, Trade Practices Act 1974 (Cth) s 52, and/or similar legislation in other jurisdictions, including Australian Securities Industry Commission Act 1989 (Cth) s 12DA, which is discussed infra pp 148-149.

> importance to the plaintiffs of security against failure by Metals to pay and the plaintiffs' reliance on the comfort letter, why the plaintiffs drafted and agreed to proceed on a comfort letter which, on its plain meaning, provided to the plaintiffs no legally enforceable security for the repayment of the liabilities of Metals.[34]

The relevant factual circumstances to which the court here refers are: (i) that KB was aware that MMC was unprepared to offer any type of security such as a guarantee or like obligation; and (ii) that this had been taken into account in the final commercial transaction by increasing KB's commission under the loan facility.

This being the case, it is possible to argue that these factors constitute relevant moral imperatives underlying the judgment, notwithstanding that the judgment is expressly based on clear and settled principles of contract law. In terms of good faith, reasonableness or general morality (or any of the similar connotations mentioned above in relation to the scope of good faith), the decision may be justified on the ground that it was a reasonable result based on the conduct of, and the commercial relationship between, the parties.

Clearly, it would not have been fair to allow KB to take the benefit of an increased commission on the understanding that it would receive no particular security for its loan, if it could later enforce the terms of a non-contractual undertaking to receive some kind of 'quasi-security' benefit from MMC. In other words, the court appears to have thought that it would be reasonable for MMC to refuse to make good KB's losses because it had been made perfectly clear by MMC to KB that it would in no circumstances do so.

The one wrinkle in this argument appears in the court's characterisation of the effect of the letters of comfort as creating a 'moral', but not legally enforceable, obligation in favour of KB. In the final analysis, Ralph Gibson LJ stated:

> The plaintiffs have suffered grave financial loss as a result of the collapse of the tin market and the following decision by the defendant company not to honour a moral responsibility which it assumed in order to gain for its subsidiary the finance necessary for the trading operations which the defendants wished that subsidiary to pursue. The defendants have demonstrated ... that they made no relevant contractual promise to the plaintiffs which could support the judgment in favour of the plaintiffs. The consequences of the decision of the defendants to repudiate their moral responsibility are not matters for this court.[35]

Thus, on one level, the court appears to be saying that MMC did owe a moral obligation to KB, but on the other it is accepting that the 'balance of reasonableness' falls on the side of MMC. In other words, in all the circumstances of the case, it was not reasonable for KB to expect compensation from MMC. This apparent

34. Ibid, 797.
35. Ibid, 797-798.

dichotomy of moral obligations or reasonableness may be explained in two ways.

The first and more obvious explanation is that good faith and moral responsibility always involve a balance of factors. In the course of often complex commercial transactions the parties concerned may be reasonable in relation to some matters and unreasonable in relation to others. Thus, what a court must consider in reaching a decision in conformity with the perceived moral imperatives of the case is the 'balance of reasonableness'; that is, it must take into account the relevant conduct of the parties and attempt to define an objective standard of reasonable or moral conduct in determining which party should be held to which obligations. Additionally, a court should bear in mind that considerations of good faith and morality may provide an explanation for particular legal principles and may provide a guide to their application but they are probably not, or at least not yet in Anglo-Australian law, paramount forces which override the application of accepted legal principles.

The second explanation for the acceptance by the court in *Kleinwort Benson* that MMC had a 'moral responsibility' which it had not discharged, notwithstanding its finding in favour of MMC, is that MMC itself argued the case on the basis that it merely owed a moral, rather than a strictly legal, obligation to KB.[36] Perhaps what Ralph Gibson LJ was referring to in the final paragraph of his judgment was an 'altruistic' as opposed to a purely 'moral' obligation.

It is possible that the court was really alluding to the fact that it would take good faith and morality into account by weighing the balance of reasonableness in the conduct of the parties. If MMC had decided to make good KB's loss it would have exceeded the standard required of a reasonable commercial party and gone beyond simple good faith and into the realms of more obviously selfless conduct.

This interpretation would appear to be in line with Lücke's and Mugasha's conceptions of good faith in a commercial context,[37] that is, with their views that the law should not force purely altruistic obligations on commercial parties who must be seen, in most situations, to be acting in their own self-interest. This might, however, be subject to the proviso that they are not acting blatantly immorally. The duty of good faith should perhaps arise only in such a context if there are factors in the relationship between the parties that would lead to its imposition. Even where it is imposed in such contexts, it may not be described as good faith per se but may be imposed under a variety of common law, equitable or statutory headings. It may therefore describe a process of the legal system, or be an underlying explanation for some other legal principles, rather than constituting a discrete principle of its own.

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36. Ibid, 790.
37. Supra n 3.

This explanation of the application of principles of good faith may be equally applicable in an analysis of the decision of Tadgell J in the Supreme Court of Victoria in *TLI Management*. This case followed closely on the heels of the Court of Appeal decision in *Kleinwort Benson* and Tadgell J's analysis closely mirrored the approach, and attitudes, taken by the English court in the earlier decision.

Commonwealth Bank of Australia v TLI Management Pty Ltd

1. Factual Background

The *TLI Management* case involved a letter of comfort given, not by a parent company in respect of a subsidiary, but by a company ('TLI') which was planning to takeover Hovertravel Ltd ('H'). H was the parent company of Hovertravel Australia Ltd ('HA') which was a customer of the plaintiff bank ('CBA'). HA was planning to establish a hovercraft passenger service on Port Phillip Bay, but was running into financial difficulty in doing so. It requested a number of increased overdraft limits from CBA in respect of cheques that had in the past been drawn and would in future need to be drawn in relation to its business.

In relation to one of the agreed increases in the overdraft limit, CBA requested a letter of comfort from TLI as 'security'. A letter was drafted, although the evidence of the parties was in conflict as to the timing of the letter, particularly on the question of whether it had been executed and sighted by the relevant officers of CBA *before* CBA had honoured cheques drawn by HA over and above its current overdraft limit. This issue was of some importance because if the letter was drafted *after* the cheques had been honoured, CBA could hardly assert that it had in any way relied on the 'security' of the letter in so doing. It would also be difficult to establish, for the purposes of contract law, that there was any consideration for the 'undertakings' contained in the letter as past consideration is no consideration in Anglo-Australian law.

On this point, Tadgell J clearly preferred the evidence of TLI, which was ultimately successful in establishing that the letter was not contractually enforceable. TLI's evidence supported the notion that the letter had not been presented to CBA prior to its honouring of the relevant cheques.[38] The letter of comfort was worded as follows:

> We [TLI] hereby acknowledge that [CBA] has agreed to make temporary credit facilities totalling ... $A250 000 available to [HA], which represents payment for ongoing operating costs and salaries.

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38. See *Cth Bank of Aust v TLI Management* supra n 27, 512-514.

> We confirm that the company will complete takeover arrangements [subject to shareholders' approval] of [H] as soon as legally possible. These arrangements include the injection of sufficient capital to repay the temporary facility as mentioned above by takeover date or within 30 days of this date.[39]

It is important to note that the words 'subject to shareholders' approval' were an addition made by TLI to CBA's suggested wording of the letter.

Tadgell J held that the letter was not contractually enforceable. Again, much of the analysis was directed towards the interpretation of the actual wording of the letter. After engaging in a significant amount of textual analysis,[40] Tadgell J came to the conclusion that the wording of the letter was too vague and ambiguous to constitute one or more enforceable contractual promises, particularly in respect of phrases such as 'complete', 'takeover arrangements' and 'as soon as legally possible'.[41] In the final analysis he held that the letter, 'although courteously calculated to achieve a continuance of the status quo, is quite non-committal. In my opinion it was non-promissory'.[42]

2. Analysis

As in the *Kleinwort Benson* case, Tadgell J considered the relationship between the parties and the context in which the representations were made in coming to his conclusion. In addition to stating that he believed TLI's evidence was more reliable than CBA's, he also took the view that in the circumstances surrounding the arrangements, a party in TLI's position would have been unlikely to take on any contractual liabilities in favour of CBA with respect to HA's financial circumstances:

> Quite apart from the uncertainties to which I have referred [in relation to the construction of the letter], there is an obvious question whether [TLI], as a prospective maker of a takeover offer, would have been likely to have intended to bind itself to [CBA] to take over a public company under pain of a liability for damages if it did not do so. So far as the evidence goes [TLI] had not bound itself to anyone else than [CBA] to make a takeover offer for [H]. Is it readily to be supposed that [TLI] bound itself to [CBA] to do so, and thereby (as I would gather) to outlay whatever sum was required in order to repay [CBA]?[43]

Again, on the 'balance of reasonableness', the court came to the conclusion that the plaintiff should not have the benefit of forcing the defendant to make

39. Ibid, 512.
40. Ibid, 515-516.
41. Ibid, 516.
42. Ibid, 518.
43. Ibid, 516.

the present time. Although it does seem to connote different things to different people at different times, in the commercial context it seems clearly to import notions of fairness, reasonableness and acting with the other party's best interests in mind in circumstances where each party might justifiably expect this to occur.

In this context it has been argued that, at least in Australian jurisprudence, accepting a broad notion of good faith as an underlying or organising principle of the common law should not be avoided because of fears relating to vagueness or ambiguity of the term:

> There is no reason to fear that Australian judges, if armed with a good faith standard, would use it in an undisciplined way, or would indulge in a chaotic form of palm-tree justice. Therefore, fear of uncertainty should not prevent good faith becoming as fruitful a source of inspiration and organisational principle in this country as it has been in other jurisdictions.[54]

In considering whether a concept of good faith is necessary in modern Anglo-Australian law, it might be argued that such a concept does already exist. As Rogers CJ pointed out in *Banque Brussels Lambert*, it is a definite possibility that advances in the law relating to unconscionable dealings have already imported notions of 'commercial morality' into the law, albeit under various guises. As Lücke has stated in relation to Australian law:

> It could be argued that a duty to perform in good faith is somehow still implicit in our jurisprudence, particularly in those innumerable rules of our contract law which are palpably designed to bring about just and fair results. Obvious examples are the doctrine of promissory estoppel, the rule which provides relief against forfeiture, the rule which invalidates penalty clauses, and some of the established rules of construction such as the contra proferentem rule and the presumption that exemption clauses in contracts are not intended to confer immunity from the consequences of fundamental breach. Good faith is often equated with fairness and fairness with justice. Does it not follow that rules such as those listed are somehow manifestations of a broad principle of good faith?[55]

In fact, in the context of the jurisprudence of comfort letters, it could be argued that not only *Banque Brussels Lambert*, but all three cases discussed above, evidence considerable concern by the courts for underlying notions of fairness, reasonableness and justice. In the cases in which the comfort letters were held unenforceable, there seemed to be strong underlying reasons, based in part on the conduct and relationship between the parties, why the respective plaintiffs were unsuccessful. It seems clear that such a finding could not be limited to cases concerning comfort letters. In any given area of law, it is often easy to identify

54. Lücke supra n 3, 166-167.
55. Ibid, 157-158 (footnotes omitted).

underlying factors relating to the justice and fairness of the case which may well have swayed the court in coming to its decision.

The remaining question, then, is whether it is necessary for Australian courts to adopt a more 'transparent' approach to issues of good faith and fairness. In other words, should an express general principle of good faith be accepted as an underlying, organisational principle for many areas of law, and specifically contract law, and be expressly referred to in the course of judgments when appropriate?

This approach has already been taken in some jurisdictions as well as in some international treaties.[56] It may further be argued that the overt acceptance of such an express concept into a legal system might well increase that system's transparency and rationality.[57] However, it is by no means necessary to incorporate express reference to such a duty for the principle to operate in a meaningful way within a particular legal system. Cohen has said that:

> In the absence of a general principle of good faith in negotiations, the development of piecemeal solutions to cure problems of unfairness in the bargaining process is a reasonable substitute. Although inevitably imposing some burdens on the judiciary, which must be responsive to the special needs of a case and adjust the application of rules accordingly, it purports to strike a balance between freedom ... and fairness.[58]

The above case study in relation to letters of comfort also illustrates that a broad concept of good faith, reasonableness or commercial morality does appear to underly the application of the relevant common law and equitable principles.

Most legal systems import notions of good faith, reasonableness, commercial morality and fairness into commercial transactions at some level. What is important is that lawyers and their clients have a broad general understanding of what the law is likely to expect of commercial parties in particular circumstances in respect of the negotiation, drafting, performance and enforcement of various commercial agreements. It must also be remembered that such notions will never be applied in a vacuum. The main task for the courts remains to apply the law to the facts in a given case. Although notions of good faith and reasonableness may influence the way in which particular legal or equitable rules are applied in a particular situation, they will not displace rules relating to the construction, interpretation and enforcement of commercial arrangements.

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56. Supra p 144.
57. See eg R Bronsword 'Two Concepts of Good Faith' (1994) 7 JCL 197, 203 et seq.
58. Cohen supra n 2, 31-32 (footnote omitted).

aimed (after the collapse of the Soviet Union) at protecting the United States and its allies against the perceived ballistic missile threat from such States and are designed to defend against tactical ballistic missile attack.

Clarification of the Treaty so as to facilitate the acquisition of TMD systems consistent with the spirit and purpose of the Treaty is necessary because TMD systems are not restricted by the Treaty — indeed, are not covered by the Treaty. Article VI(a) provides that the parties to the Treaty must not give non-ABM components the 'capabilities to counter strategic ballistic missiles or their elements in flight trajectory' and they must not be tested 'in an ABM mode'. Article VI was placed in the Treaty at US insistence because of concerns over Soviet surface-to-air missile systems[26] and was intended 'to make sure that the limits on ABMs in the Treaty were not circumvented by missiles that were given different functions, but actually had ABM capabilities'.[27] As Graybeal and McFate point out, implementing Article VI in a very different strategic environment from that of 1972 requires a clarification of the difference between strategic and theatre ballistic missiles.[28]

On 26 September 1997, then, the United States, Russia, Ukraine, Belarus and Kazakhstan signed, in addition to the MOU as outlined above, a set of agreements that provide for demarcation between theatre missile defence systems and strategic

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Influence' (1998) 28(4) Arms Control Today 14. Debate continues as to the reality and seriousness of the ballistic missile threat. The 1995 National Intelligence Estimate concluded that 'no country, other than the major declared nuclear powers, will develop or otherwise acquire a ballistic missile in the next 15 years that could threaten the contiguous [US] states and Canada': J Pike 'The Ballistic Missile Defense Debate' (1997) Current History 157, 159. See also Cirincione's view that the threat of ballistic missile attack against the US is slight: J Cirincione 'Missile' (1997) Paper No 97-D 74.

26. Keeny et al supra n 17.

27. R Bell, White House Press Briefing (24 Mar 1997) 2. Bell notes that 'when this [ABM] treaty came before the Senate for ratification in 1972 there was an exchange on this issue between Senator Proxmire and the then head of research and development in the Pentagon, Johnny Foster, about where this line was drawn in the treaty between ABMs that were covered and things that fell below that line that were not covered.... And that line at the time was if you shot a missile defense system at any target that went faster than two kilometers per second, or if you attempted to engage a missile at an altitude above 40 kilometers you would, in effect, capture or qualify that system as an ABM.'

28. SN Graybeal & PA McFate 'Strategic Defensive Arms Control' in JA Larsen & GJ Rattray (eds) *Arms Control Toward the 21st Century* (Boulder: Lynne Rienner Publishers, 1996) 131: 'The emerging theater ballistic missile threat includes missiles with ranges in the order of 3 000-3 500 kilometers and maximum velocities of about 5 kilometers per second. Most current modern strategic ballistic missiles have ranges over 9 000 kilometers and maximum velocities over 7 kilometers per second. Permitting ATBM testing against ballistic missiles with velocities up to 5 kilometers per second, as proposed by the Clinton administration in the SCC, would facilitate achieving effective TMD systems without violating the ABM Treaty.'

missile defence systems.[29] The First Agreed Statement deals with lower-velocity systems and permits the testing and deployment of systems with interceptor speeds of 3 kilometres per second or less, provided that the systems are not tested against ballistic targets with speeds above 5 kilometres per second or with ranges greater than 3 500 kilometres. These constraints would permit development, for the United States, of lower-velocity systems such as Patriot and THAAD.[30]

The Second Agreed Statement deals with higher-velocity systems, those with interceptor velocities greater than 3 kilometres per second. Under this agreement the parties cannot test such higher-velocity systems against ballistic missile targets with velocities greater than 5 kilometres per second or with flight ranges of more than 3 500 kilometres. The parties to this agreement are not to develop, test or deploy space-based TMD interceptor missiles or space-based components based on other physical principles that are capable of substituting for such interceptor missiles. The parties will make deployment decisions based on their national compliance determinations. Constraints on TMDs are, then, significantly relaxed; no constraints are placed on TMD testing programs or deployment.

For Spurgeon Keeny Jr, president of the Arms Control Association, the agreements were 'not a step forward from the point of view of the integrity of the ABM Treaty'.[31] George Lewis and Theodore Postol have said that if the agreements —

> are ultimately adopted and exploited, the ABM Treaty will survive in name only and will cease to exist as an agreement enforcing any limitations of substance.... The proposed changes would make it 'legal' to build, test and deploy large-scale highly mobile strategic defenses disguised as theater defenses. There would be no limit on their capabilities — only a technically ineffective and easily circumvented limit on the speed of the targets they could be tested against.[32]

CONCLUSION: SHELTER FROM THE STORM?

It may be that one can have 'highly effective TMDs and adapt the ABM Treaty to permit them while still maintaining the basic benefits of the Treaty',[33] such benefits including the continued progress in strategic arms reductions. For the

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29. 'First Agreed Statement Relating to the Treaty Between the US and USSR on the Limitation of Anti-Ballistic Missile Systems, 26 May 1972'; the 'Second Agreed Statement Relating to the Treaty Between the US and USSR on the Limitation of Anti-Ballistic Missile Systems, 26 May 1972'; and agreements providing for 'common understandings' between the parties with regard to the First and Second Agreed Statements: see Arms Control Assoc 'New START II and ABM Treaty Documents' (1997) 27(6) Arms Control Today 21-22.
30. Stockholm International Peace Research Institute supra n 23, 386; Pike supra n 24.
31. Keeny, Mendelsohn, Rhinelander and Steinbruner supra n 17, 10.
32. G Lewis & T Postol 'Portrait of a Bad Idea' (Jul-Aug 1997) Bulletin of Atomic Scientists.
33. Supra n 27, 3.

United States the two demarcation agreements permit the maintenance of in-place TMD systems designed to provide shelter from a perceived threat of ballistic missile attack emanating from certain 'rogue' States.

Nonetheless, the two demarcation agreements and the MOU will, in the United States, require the advice and consent of the Senate (and will require equivalent approval by Russia, Ukraine, Belarus and Kazakhstan[34]). It may be that such advice and consent will not be granted[35] given Republican opposition to limits on TMD systems and Republican insistence that space-based interceptor systems be allowed in any demarcation agreement.[36] Of course, START II approval by the Russian parliament is also problematic[37] and, again, the Clinton administration will only present the agreements to the Senate if START II is ratified.

Failure of the agreements in the Senate may have dire consequences for the testing and deployment of TMD systems: absent such advice and consent, any testing and deployment would not be legal. Thus, while *legal* uncertainty with regard to the provisions of the ABM Treaty has been brought to an end by the demarcation agreements, failure by the Senate to give its advice and consent to those agreements, and to the MOU, may well create other types of uncertainty.[38] It appears that the ABM Treaty will be as controversial in the twenty-first century as it has been in this one.

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34. Article IX(1) of the Memorandum of Understanding relating to the Treaty between the US and USSR on the Limitation of Anti-Ballistic Missile Systems, 26 May 1972 provides that 'This memorandum shall be subject to ratification or approval by the signatory States, in accordance with the constitutional procedures of those States' and identical provisions in the demarcation agreements provide that those agreements will enter into force simultaneously with entry into force of the MOU: Arms Control Assoc supra n 29; and see Cerniello supra n 13, 32.
35. Keeny et al supra n 17; Center for Security Policy 'Will Senate Pass "No-Brainer", Insist on Right to Advise and Consent on Major ABM Treaty Changes?' (1997) Paper No 97-D 64.
36. S Keeny Jr 'Helsinki: A Pyrrhic Victory?' (1997) 27(1) Arms Control Today 2.
37. Supra n 21.
38. These issues are further complicated by the introduction of a Bill by US Senate Majority Leader Trent Lott which requires the deployment of a national missile defence system operating by 2003, such deployment requiring significant amendments to the ABM Treaty. In that event it is likely that the Russian parliament would either make START II ratification conditional upon the ABM Treaty continuing in its present form or would withdraw from START I and not ratify START II: Arms Control Association 'Advancing the Arms Control Agenda: Pitfalls and Possibilities' (1998) 28(1) Arms Control Today 11. Also, the US Senate Armed Services Committee approved on 21 April 1998 the American Missile Protection Act 1998 which states that it is US policy 'to deploy as soon as is technologically possible an effective [NMD] system capable of defending the ... US against limited ballistic missile attack": C Cerniello 'Senate Panel Approves NMD Bill Seeking to Move Up Deployment' (1998) 28(3) Arms Control Today 23. The Senate, however, rejected in May 1998 a motion to bring the American Missile Protection Act 1998 to a floor vote: C Cerniello 'Senate Narrowly Averts Floor Vote On Cochran NMD Legislation' (1998) 28(4) Arms Control Today 29.

BOOK REVIEWS

Who Killed Rosemary Anderson?

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BROKEN LIVES

By Estelle Blackburn
(Stellar Publishing Pty Ltd 1998 pp 410 $24.95)

DESPITE its status as the capital city of Western Australia, Perth in the year 1960 was much more akin to a large country town than a bustling metropolis. Even today long-term residents reminisce about the 'good old days' when people could leave their houses unlocked, sleep on front verandahs on hot summer nights and walk the streets without fear. But in the early 1960s all this was to change.

This book begins by chronicling the life and crimes of Eric Edgar Cooke. During the period 1958 to 1963, Cooke was, on his own admission, responsible for causing the deaths of five Perth residents, causing serious injury to nearly a dozen others and committing innumerable burglaries and car thefts. Ultimately Cooke found a place in Western Australian history as the last person to die on the gallows of Fremantle gaol.

But this book is not just a chronicle of Cooke's activities. Before he was apprehended, two men were charged and convicted of offences to which Cooke later confessed. The first and perhaps better known of these was a hearing and speech impaired youth named Darryl Raymond Beamish who was sentenced to death (later commuted to life imprisonment) for the wilful murder of Jillian Brewer in 1959. Subsequent to his apprehension in 1963, Cooke confessed to this murder, and declared that Beamish was innocent. As a result the then Minister of Justice referred Beamish's conviction to the Court of Criminal Appeal; however, after hearing evidence from Cooke, the court concluded that there were no grounds to set aside the conviction and dismissed the appeal. The Beamish case was the subject of much controversy and gave rise to intense legal debate.[1]

1. See D Payne 'The Beamish Case' (1966) 7 UWAL Rev 576; P Brett 'The Beamish Case: A Rejoinder' (1967) 8 UWAL Rev 115.

Public Opinion, Politicians and Crime Control

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RETHINKING LAW AND ORDER

By Russell Hogg & David Brown
(Pluto Press 1998 pp 256 $24.95)

SCARCELY a day goes by in which the media do not seek to exaggerate and exploit the public's perception that crime — and particularly violent crime — is spiralling out of control. Newspaper and other media proprietors are keen to fuel that perception and to point to the failure of governments to deal with it effectively. In a recent newspaper article entitled 'Crime Hits Confidence', a local reporter, Burns, stated that 'Westpoll' (a survey conducted for *The West Australian*) had found that —

> The Court government's performance on law and order was rated as unacceptable by 51 per cent of voters surveyed, with just one per cent claiming the government had done very well in the fight against crime.[1]

The Opposition leader, Dr Gallup, responded with the pitch that the public 'had been let down by a weak government'.

It is this mind-set that concerns Russell Hogg and David Brown. Western Australia, like other Australian States, is in the grip of a political law-and-order frenzy in which the current Coalition government is seeking to increase the length of prison sentences and at the same time reduce community-based alternatives to imprisonment.[2] Given that law-and-order is such a controversial issue, it is timely that this book has been published.

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1. A Burns 'Crime Hits Confidence' *The West Australian* 25 July 1998, 4.
2. See eg the Sentence Administration Bill 1998 and Sentencing Legislation Amendment and Repeal Bill 1998 that propose the abolition of work release and home detention, a lengthening of the sentences served where offenders are eligible for parole and a tightening of the eligibility criteria.

Politicians, of course, are keen to give the appearance of responding swiftly and decisively to the perception that violent crime is getting out of control. Tougher law-and-order policies have thus become a predictable criminal justice trend and there does not seem to be any serious opposition to this development, at least at the moment. Hogg and Brown, however, are keen to debunk the rhetoric behind the law-and-order stance of many Australian politicians. Their views are challenging and provocative, and their book provides a well argued critique of conventional government thinking on criminal justice policy. It examines how and why 'the dominant form of law-and-order "commonsense" has failed us, and how we might develop a more responsible and constructive law-and-order politics which takes crime, fear of crime, and criminal justice *more* rather than less seriously' (p ix).

Hogg and Brown do not deny that crime prevention is a serious issue confronting criminal justice policy-makers in modern western societies. But whilst acknowledging that there is a need to reduce crime, they are highly critical of the process of electoral politics and the deleterious effects which it can have on the development of a rational criminal justice system. 'The major parties', they say, 'parade tough law-and-order policies as a leading element in their platforms.... Many appear to welcome any opportunity to show their virility by adopting harsh law-and-order measures' (p 1).

In Chapter 2, the authors identify seven enduring myths of the law-and-order lobby:

- 'Crime rates are soaring!';
- 'It's worse than ever!' – law-and-order nostalgia;
- 'New York and LA – the shape of things to come!';
- 'Going soft on crime – the criminal justice system does not protect ordinary citizens!';
- 'We need more police with greater powers!';
- 'We need tougher penalties!'; and
- 'Victims should be able to get revenge through the courts!'

Discussion of these dogmas provides a useful thread for the book as a whole and the authors 'explore [in] some detail the elements of the law-and-order "commonsense" that forms the bedrock of [a] crisis of perspective' (p 21). They also provide an excellent outline of the social history of crime and the criminal justice system, focusing on New South Wales.

An important aim of the book is to sound a clear warning against the consequences of governments relentlessly pursuing an indiscriminate and unthinking law-and-order approach to criminal justice reform:

> The ascendancy of the political 'right' in Australia presents the very real danger that governments will be increasingly driven by the notion that social order is, in essence, synonymous with market order. If so, we can almost certainly expect to see deepening social divisions, and probably rising crime rates, as the economy is

> further internationalised ...[and] government provision eroded.... A repressive law-and-order politics will assume even greater prominence as a discourse and tool for managing the social fall-out [of government reforms], just as it has done in other parts of the world (p 179).

Thus, for the authors, the policy path of law-and-order will, paradoxically, create further divisions in society and increase crime rates. It is a sobering thought, but who will heed it? Regrettably, the authors do not tease out the precise mechanisms or impetus for 'progressive change', as they define it. Nevertheless, their conclusions are rational and humane, and will appeal to imaginative policy-makers, though many business entrepreneurs and mainstream politicians will not share them. Such people play to the tune of profits and opportunism, rather than reason and justice.

As the authors note, the financial and structural constraints on building more and larger prisons are now being swept away by the emergence of large multinational corporations which have a strong commercial interest in designing, financing and operating private prisons. This means that progressive government ministers have lost an important and convenient excuse not to incarcerate more offenders for longer periods: after all, now that governments can afford to expand the capacity of the prison system without cost to the public purse, what excuse could there be for not doing so?

Despite their pessimism, the authors are mildly optimistic about the possibility for the current 'law-and-order commonsense' to be weakened and for a more co-operative approach to emerge. Since the current policies have failed so badly there must be some pressure for reform. Unfortunately, the precise way in which such reform may be brought about is not fully explored; this is an area which could have received more detailed attention. However, community service orders, family group conferencing of juvenile offenders, and moves towards community-based problem-solving rather than prosecution-oriented approaches, are mentioned as illustrations of a trend towards a more enlightened approach. Disappointingly, one important movement that is not discussed is the 'Restorative Justice Movement', which is now gaining increasing recognition in influential circles, particularly in New Zealand.

One problem with the book (although this is not a criticism of its authors) is that the key political players, both of the right and left, who would most benefit from its insights are the ones least likely to read it. This is a paradox of modern political decision-making and one that is highly disconcerting to policy-makers who can see the futility of continuing to pursue the stock law-and-order approach to criminal justice reform. Where there is a strong feeling in the electorate that violent crime is increasing, as there is today, any statement by a political leader that prison is ineffective and that community-based alternatives are preferable is tantamount to electoral suicide. It is a harsh fact of life that most politicians will

pander to whatever feelings the public has regarding the most appropriate means of controlling violent crime, even when they know that those feelings are palpably wrong.

On a brighter note, a recent example from within the Western Australian criminal justice system suggests that there may be a growing awareness of the limitations of the 'commonsense, law-and-order' approach to dealing with crime. A Report of the Parliamentary Standing Committee on Estimates and Financial Operations suggests discontent with the current penal policies of the Western Australian government. The Chair of that Committee, the Hon Mark Nevill MLC, reported to the Legislative Council that —

> the escalating costs of imprisonment to the State and its apparent ineffectiveness in deterring offenders, particularly juvenile offenders, from re-offending *must lead to a re-evaluation of the effectiveness of imprisonment as a sentencing option other than for the most dangerous and persistent criminals from whom the public must always be protected.* This leads to a consideration of alternatives to custody.[3]

Policy-makers who share the enlightened approach of the Standing Committee will welcome Hogg and Brown's book. The reviewer, having worked in criminal justice policy-making at government level, is convinced of the need to provide alternative political strategies to the authoritarian, 'commonsense' approach of many Australian State governments. A credible and saleable political alternative is needed now. Perhaps this is a task for the next edition of this book. If the present edition is any indication, these authors have the skills and expertise to undertake it.

There are, of course, many recent books dealing with law-and-order issues. What sets this book apart is that it evaluates a diverse range of popular material on crime control which has not been seriously critiqued elsewhere. The book uses a viewpoint that recognises the 'pluralistic and polycratic nature of modern societies' (p 112). It is a viewpoint which is engaging and original.

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3. WA Legislative Council *Report of the Standing Committee on Estimates and Financial Operations* Report 25 (Nov 1998) 9 (emphasis added).

ARTICLES

The UK Access to Justice Report: A Sheep in Woolf's Clothing

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NICOLAS BROWNE-WILKINSON†

In England as well as Australia judicial case management is proving controversial. Will it bring down the costs of administering the civil justice system? Is it compatible with the adversarial procedure as developed in England, Australia and other common law countries? Lord Woolf, the author of the recent Access to Justice *report in the United Kingdom, has given an affirmative answer to both questions. In this article, Lord Browne-Wilkinson, the senior British Law Lord, offers a different view.*

I HAVE decided to speak on a subject which I have long been interested in but which is now, in the United Kingdom at least, a dead letter. However, I believe the topic to be alive in Australia — the relationship between an adversarial system and judicial case management. Will judicial case management cut costs if the underlying system remains adversarial? If judicial case management is to be successful will not that involve eroding the forensic nature of the battle to such an extent as to emasculate its best features? In the interests of saving costs ought we not to look at a non-adversarial system where the court conducts the case with only limited intervention by lawyers?

† Lord of Appeal in Ordinary. This is an abridged version of a paper presented at the Australian Institute of Judicial Administration's Sixteenth Annual Conference (Melbourne, 4-6 Sept 1998) and subsequently at the Supreme Court of NSW Judges' Conference (Sydney, 11 Sept 1998).