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**Assertion Versus Evidence – Taking a Closer Look at
Implied Good Faith Performance Obligations in Australia**

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Assertion Versus Evidence – Taking a Closer Look at Implied Good Faith Performance

Obligations in Australia

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Abstract:

The question of the status of implied good faith performance obligations as an element of the Australian law of contract continues to lurk as a vital yet unresolved jurisprudential puzzle. Given the vital importance of contract as a foundation for commercial exchange and the potential for a good faith performance doctrine to materially impact the operation of contracts, this is an undesirable state of affairs. The evidence presented in this paper suggests that the approach taken to good faith performance has fragmented along jurisdictional lines. Further, far from representing a well developed and established doctrine, it has been the project of a very limited number of judges primarily drawn from just one state. These observations raise significant questions as to the legitimacy of the alleged doctrine.

Key Words:

Contract, Good Faith, Implied Terms

1. Introduction

In at least some quarters, it has been argued that the status of the good faith performance doctrine in the Australian law of contract represents an open empirical question amenable to detailed investigation¹. In some quarters, there is high confidence that a term requiring contracts to be exercised in good faith will be implied in law into all commercial contracts² as a matter of law. However, if recent Australian academic literature on the subject is any guide, such confidence is misplaced. Although some authors have argued that there is now less doubt than ever before as to the existence and enforceability of contractual good faith obligations³, they nonetheless concede that any hold that such a doctrine may have gained on the Australian law is best seen as “tentative”⁴ with the result that this aspect of the law is unresolved and still in a state of flux⁵.

While contributions such as these are of enormous value and significance, they nonetheless leave many open questions. To what extent is the law relating to good faith in flux? Are attitudes towards implied good faith performance obligations changing over time? Are attitudes towards implied good faith performance obligations consistent between different jurisdictions? How broadly based is support for a general requirement that commercial contracts embody a term implied at law requiring good faith in contractual performance – or has this notion been pushed by a loud minority? What are the key features of the body of Australian case law in which the issue of implied good faith performance obligations has been a material issue?

Despite the growing body of academic literature which deals with questions relating to implied good faith performance obligations, published research to date has not

¹ T Carlin, “The Rise (and Fall?) of Implied Duties of Good Faith in Contractual Performance in Australia” (2002) 25 (1) *University of New South Wales Law Journal* 99

² See for example Barratt J in *Overlook v Foxtel* (2002) Australian Contracts Reports 90-143 at para [62], where his honour states that “...an additional term implied by law into commercial contracts is a term requiring the exercise of good faith in the performance of the contract. This is now [in NSW] a legal incident of every such contract.”

³ E Peden, “Contractual Good Faith: Can Australia Benefit from the American Experience?” (2003) 15 *Bond Law Review* 186 at 186.

⁴ B Zeller, “Good Faith – Is It a Contractual Obligation”, (2003) 15 *Bond Law Review* 215 (at 215).

⁵ J Carter & E Peden, “Good Faith in Australian Contract Law” (2003) March – May *Commercial Law Quarterly* 15; E Peden, “Good Faith in the Performance of Contract Law” (2004) *October Law Society Journal* 64.

yielded answers to questions such as these. Therefore, this paper encapsulates the results of a large sample study of Australian cases decided between 1992 and 2004 (inclusive) in which questions relating to implied good faith performance obligations were material. Two key objectives guided the design and execution of the study. First, the desire to construct as comprehensive as possible a descriptive snapshot of the law relating to implied good faith performance obligations in Australia across time and second, to draw key analytical insights from the descriptive data gleaned in the context of the execution of the study.

The remainder of this chapter proceeds as follows. Section 2 describes the data drawn upon for the purposes of executing the study, the sources of that data and data gathering techniques employed. This section of the chapter also describes the data analysis procedures which were employed in an effort to construct the final database used for the purpose of generating the descriptive and analytical content set out in subsequent sections of the chapter. Section 3 provides a descriptive overview of the key characteristics of the sample of identified cases included in the final case database. Section 4 of this provides a range of analytical insights into the development and state of the implied good faith performance doctrine in Australia, while Section 5 provides conclusions.

2. Methods and Data

The central methodological concern underpinning the design and execution of the analysis reported in this paper was to include as many data points as possible in a bid to improve confidence that the data sample used for the purposes of conducting analysis was as representative as possible of the population of available data points, and that the external validity of the analysis was thus maximised.

For the purposes of this paper, each identified Australian case in which questions relating to implied terms requiring good faith contractual performance represented a data point amenable to detailed empirical scrutiny. Several techniques were used in a bid to uncover as many useable data points as possible.

First, the Casebase citator was used to generate lists of cases in which the progenitor Australian good faith case, *Renard*, was cited. The theory behind this approach was that since that case is generally regarded as representing the starting point for wide scale judicial consideration of questions relating to implied good faith performance obligations, later cases in which implied good faith performance obligations were also at issue would display a tendency to cite *Renard*. The Casebase citator was also queried using its keyword search functionality as an additional means of uncovering cases where the implied good faith performance issue had been discussed. This combination of techniques resulted in the generation of an initial list of cases to be subjected to more detailed review.

In addition to the use of the Casebase database, the Austlii Australian caselaw database was also queried, using both approaches used to search the Casebase database (e.g a search for cases in which *Renard* was cited and the use of keyword searches to reveal cases where irrespective of a citation of *Renard*, the issue of implied terms requiring good faith performance arose). While many of the cases identified as a result of this process were in common with those identified as a result of the initial Casebase review, some incremental cases were identified via Austlii which had not been identified via Casebase.

As a final triangulation check, the combined list of potential subject cases gleaned from the Casebase and Austlii databases was compared against cases cited in a range of recent Australian academic literature on the subject of implied good faith performance obligations. No further cases were revealed as a result of this test check, resulting in some degree of increased confidence in the comprehensiveness of the electronic database search routines employed to generate the initial case candidate list.

The procedures described above led to the generation of an initial list of cases which were candidates for closer scrutiny with a view to inclusion in the final case database. A copy of the case report (in electronic form where possible) for each case listed in the initial case list was obtained and subjected to detailed review, with a view to excluding cases in which the issue of implied terms requiring good faith in the performance of contractual obligations was not a material issue. The review process revealed many instances where a case included a citation of *Renard* but good faith

was not an issue, and all such cases were then excluded from the final case database. Similarly, many references to good faith in cases incorporated into the initial case list did not relate to implied terms requiring good faith contractual performance. These cases were also deleted from the sample.

In consequence, the final case database covered a sample of 94 Australian cases reported between 1992 and 2004 (inclusive). While it is not possible to conclude that this list represents the total population of decided cases from that period in which implied terms requiring good faith contractual performance were at issue, every effort was made to uncover the maximum possible number of cases to ensure the highest sampling coverage possible.

Upon generation of the final case database, a process of detailed data gathering and coding was then applied to each case record. The following data points were collected in relation to each case included in the final case database:

1. Year decided (no coding required)
2. Jurisdiction (the territory in which the matter was heard, or, if heard in a Commonwealth court, whether heard in the Federal Court or the High Court.)
3. Level of Judicial Review (coded for data analysis purposes – 1 = first instance hearing before a single judge of a state Supreme Court or the Federal Court, 2 = appeal before a State Court of Appeal or the Full Federal Court, 3 = appeal before the High Court.)
4. Identity of judge/s (no coding required).
5. Whether good faith term implied in fact (coded for data analysis using binary dummy variable, 0 = no, 1 = yes).
6. Whether good faith term implied in law⁶ (coded for data analysis using binary dummy variable, 0 = no, 1 = yes).

⁶ As the data set out in this chapter reveals, in the vast majority of instances in which terms requiring good faith performance were implied, the route was via implication in law. Because the basis of the research methodology employed within this chapter was to allow the case data to speak for itself rather than to preconceive it as falling into defined categories, it was necessary to code this data item on the basis of explicit statements made about the situation in a particular case. Thus, if in a particular judgement a range of general observations were made about the apparent rise of a good faith obligation but the matter was not actually expressly decided within a particular case, the resulting coding was that no term had been implied in that particular instance. Only where a court expressly held that a term was

7. Whether good faith defined (coded for data analysis using binary dummy variable, 0 = no, 1 = yes).
8. Whether breach of term was found (coded for data analysis using binary dummy variable, 0 = no, 1 = yes).
9. Support level for implied good faith performance obligations (coded for data analysis as follows: 1 = unqualified support for the existence and enforceability of implied good faith contractual performance obligations; 2 = qualified support for the existence and enforceability of implied good faith contractual performance obligations; 3 = qualified rejection of the existence and enforceability of implied good faith contractual performance obligations; 4 = unqualified rejection of the existence and enforceability of implied good faith contractual performance obligations.)

Because of the judgement required in the coding of some data items (in particular items 5 through 9 above), an external coding validity check was used as a means of improving confidence as to the reliability of coding by the primary researcher. This involved the selection of a sub sample 20 cases from the final case database for independent coding by a third party. Comparison of the data coding undertaken by the primary researcher and the second coder revealed a high degree of consistency. The high degree of intercoder reliability revealed as a product of the implementation of this test check mechanism resulted in improved confidence as to data validity⁷.

3. Descriptive Data on Australian Good Faith Cases

One of the objectives which motivated the execution of the large sample empirical review reported in this paper was a desire to construct as complete a picture as possible as to the state and development of an implied good faith performance obligation in Australian contract law. One means of beginning to describe the good

in fact implied in a particular case did the coding suggest that a term had been implied. One difficulty with approaching the data in this way is that in many cases, courts proceed on the assumption that a good faith obligation exists, but do not actually decide so themselves. For the sake of conservatism, where a court stated that it had proceeded on the assumption (without expressly deciding the issue) that a good faith obligation would be implied, this was coded as “term implied”.

⁷ See, R Singleton & B Straits, *Approaches to Social Research*, (2005), Oxford University Press at pp. 95 – 99.

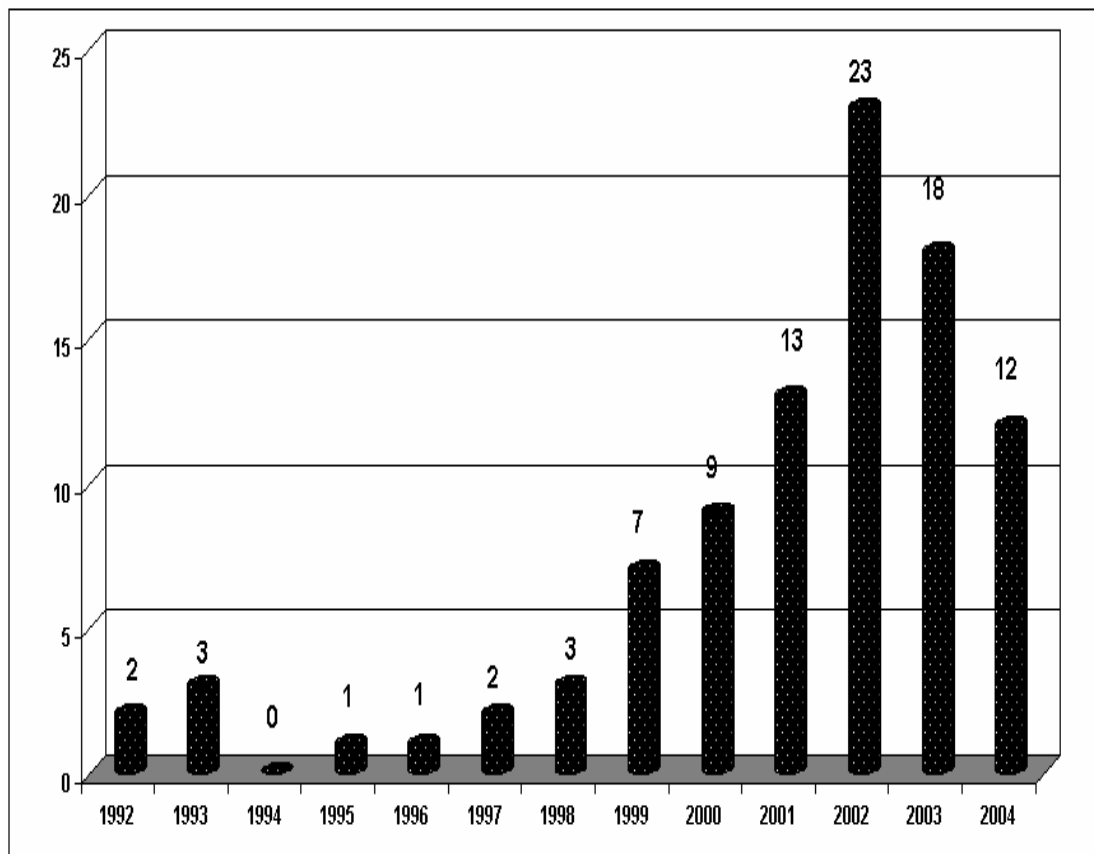
faith phenomenon is to have regard to the number of instances in which the issue of implied good faith performance obligations was raised as a material matter in Australian cases. This data is set out in Chart 1 overleaf.

The data shows the initial flurry of interest in the matter in the period immediately following *Renard*, followed by a period of relative neglect stretching from 1994 through 1998, and then an enormous upsurge of interest between 1999 and 2002, a pattern also evident in the volume of Australian academic and practitioner journal publications relating to good faith in the Australian law of contract, the rate of which more than doubled between 1998 and 2000, and then more than doubled again between 2000 and 2002⁸. Interestingly, though the pace of academic and practitioner publishing on the implied good faith obligation question continued to grow in 2003 and 2004⁹, the number of identified cases in which this was a material issue fell by almost 50% between 2002 and 2004.

⁸ These growth rates are based on a count of the journal titles and abstracts returned after searching the AGIS abstracts database using the terms “good faith” and “contract”.

⁹ Determined using the same search criteria and processes as those applied in relation to earlier periods.

Chart 1 – Identified Cases Per Year

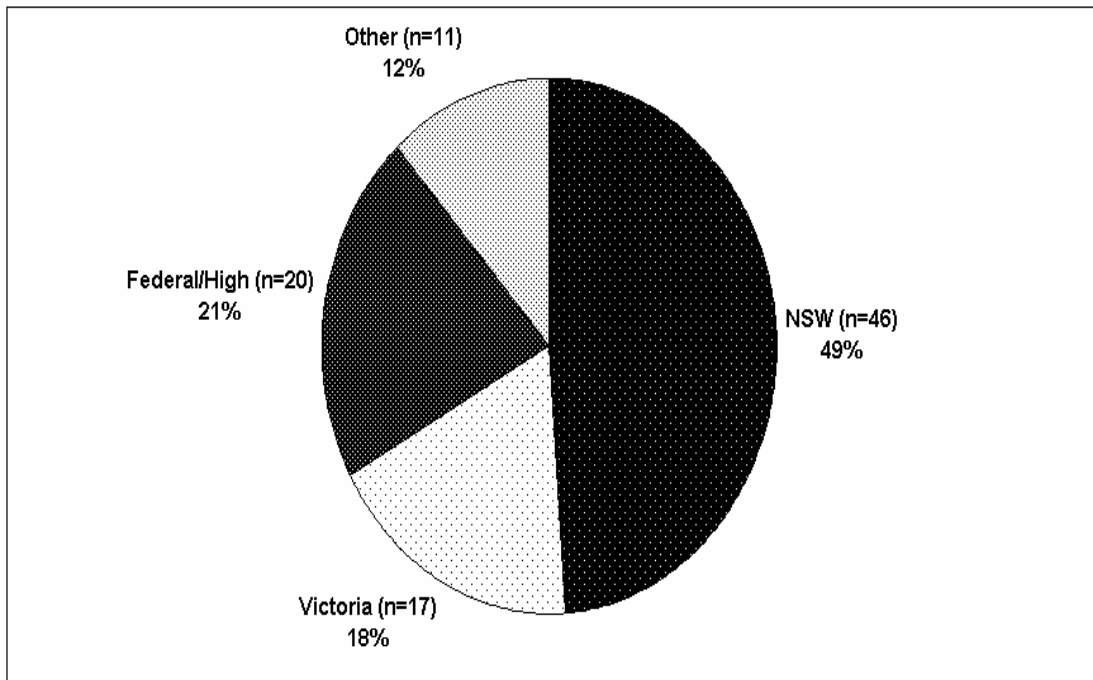


In addition to an uneven distribution across time, the distribution of implied good faith obligation cases is also uneven across Australia's various legal jurisdictions (see Charts 2 and 3, overleaf). Almost half (49%) of identified cases included in the final case database were decisions of NSW courts, with a further 18% coming from Victoria. This means that the number of identified cases from these two jurisdictions alone represents almost exactly two thirds of the entire sample of cases gathered for the purpose of the conduct of the study.

Thus only one third of total observed cases were heard in the courts of jurisdictions other than NSW and Victoria. Of these, twenty cases (21% of the total sample) were heard in either the Federal Court of Australia (19 cases) or the High Court of Australia (1 case), leaving only eleven cases out of ninety four identified as having been decided by state or territory courts outside of NSW and Victoria. Five of these were from Western Australia, three from Tasmania, two from Queensland and one from the Australian Capital Territory. No cases relating to implied good faith obligations were detected in South Australia or the Northern Territory over the period under review.

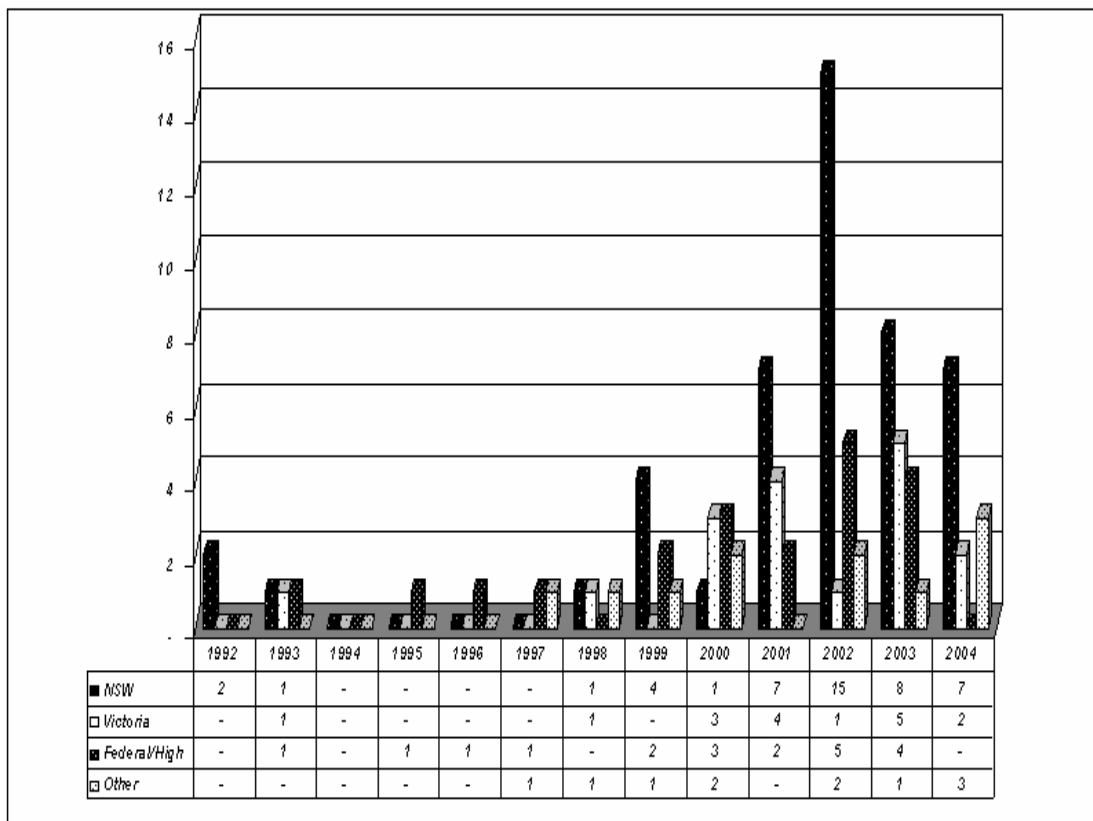
The discrepancies in the volume of good faith cases between the jurisdictions are striking, even allowing for the likelihood that NSW and Victoria play host to a far greater volume of commercial litigation conducive to potential arguments about implied good faith obligations than elsewhere. One inference which might be drawn from the data is that since (holding aside Commonwealth jurisdiction courts) good faith has barely registered on the radar screen outside of the two most populous states, it is far better seen as a south eastern seaboard phenomenon than a national one.

Chart 2 – Cases by Jurisdiction



Note: Other comprises the jurisdictions of ACT, WA, Queensland and Tasmania.

Chart 3 – Identified Cases by Jurisdiction per Year



Note: Other comprises the jurisdictions of ACT, WA, Queensland and Tasmania.

Although some recent academic contributions to the Australian literature on good faith obligations have expressed the view that good faith represents a concept or requirement underlying contract law and is therefore best viewed as incorporated into contracts via construction rather than through the implication of a term¹⁰, the tendency on the part of Australian courts faced with the issue has been (where relevant) to incorporate good faith via the latter, not the former¹¹.

This tendency on the part of Australian courts to see the appropriate pathway to incorporation of good faith requirements as embodied in the expedient of implying a term raised fundamental questions as to whether this process should take the form of the implication of terms in fact or in law. In early Australian case law on the subject, for example *News Ltd v Australian Rugby Football League Ltd*¹² and *Hughes Aircraft Systems International v Airservices Australia*¹³ the route adopted was implication in fact, though in the *Hughes Aircraft Systems* case, Justice Finn took the opportunity, having determined that a good faith requirement ought to be implied on the facts, to expound on the question of whether or not such a term should also be implied as a legal incident of the contract, expressing a sanguine view as to the viability and desirability of this alternative¹⁴. As the data in Chart 4 (below) clearly demonstrates, since the *Hughes Aircraft Systems* case, almost without exception, where courts have chosen to imply terms requiring good faith contractual performance, they have done so at law, not as a question of fact.

¹⁰ E Peden, “Good Faith in the Performance of Contract Law” (2004) October *Law Society Journal* 64.

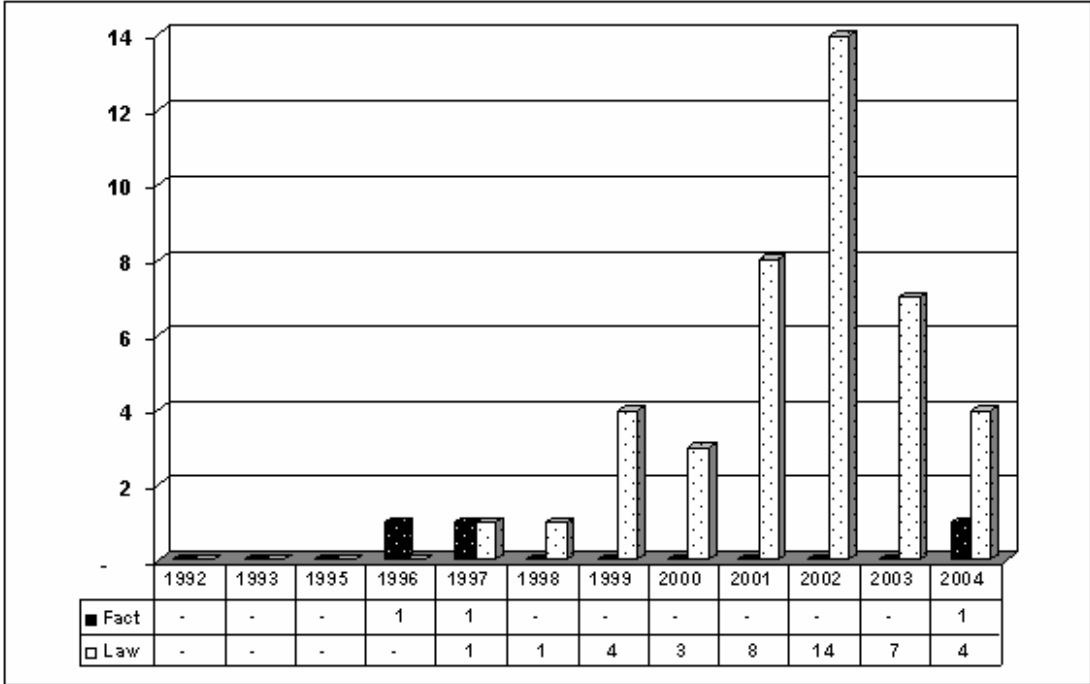
¹¹ See also on this point; E Peden, “Incorporating Terms of Good Faith in Contract Law in Australia” (2001) 23 *Sydney Law Review* 222.

¹² (1996) 135 ALR 33

¹³ (1997) 146 ALR 1.

¹⁴ *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1 at 36 (Finn J).

Chart 4 – Term Implied in Fact vs. Term Implied in Law



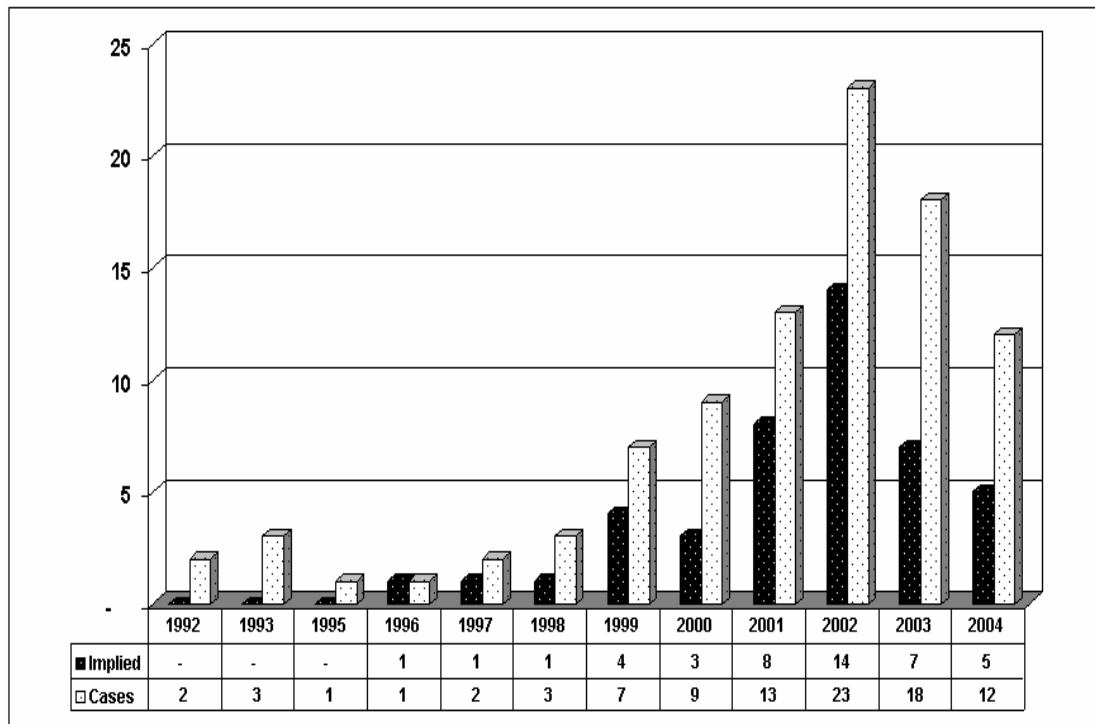
(n = 44 implied cases)

Though a strong consensus appears to have formed in relation to the appropriate mechanism through which to imply terms requiring good faith in contractual performance, the propensity of courts to determine that they will imply such terms when invited to do so has varied considerably over time. One means of demonstrating this is by examining the data pertaining to the number of instances in which a term requiring good faith performance was implied compared against the total number of cases in which the existence of a good faith obligation was at issue, generating the “implication rate”.

Chart 5 below sets out data relating to the total number of identified good faith cases for each year between 1992 and 2004, together with the number of cases in which a court decided to imply a term requiring good faith performance. In Chart 6, this data is combined to form an annual “implication rate”. Analysis of the underlying data suggests a weighted average implication rate of 47% across the period studied¹⁵. It is of interest to note that in that period of time when the highest number of cases relating to good faith was before the courts, 2002, the implication rate stood at 61%, substantially above the whole of sample weighted average mean of 47%. Further, it seems worth noting that in 2003 and 2004, the observed implication rate fell to approximately 40%, measurably below the whole of sample weighted average mean. This observation appears inconsistent with the suggestion that good faith has finally, in recent years, found a comfortable home in the Australian law of contract.

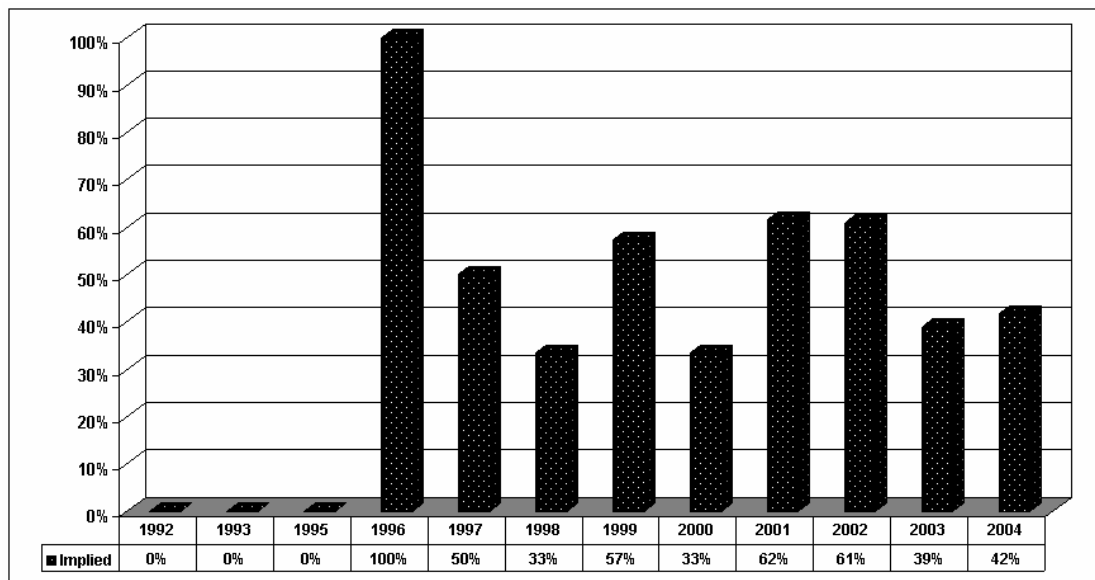
¹⁵ The calculation of a weighted average implication rate is a straightforward mathematical process. First, the number of cases decided in a year is divided by the total sample size, giving a weighting to that year’s data. This results in years in which a greater proportion of total sample cases were decided weighing more heavily than those in which only a small number of cases were decided, and thus reduces the impact of outliers on the calculation. Next, the annual weight is multiplied by its year’s implication rate, yielding a weighted implication rate for each year. Finally, the individual weighted implication rates are summed to produce the whole of sample weighted average implication rate.

Chart 5 – Cases Where Term Implied by Year



(n = 94 cases, n = 44 implied)

Chart 6 – Whole of Sample Annual Implication Rate



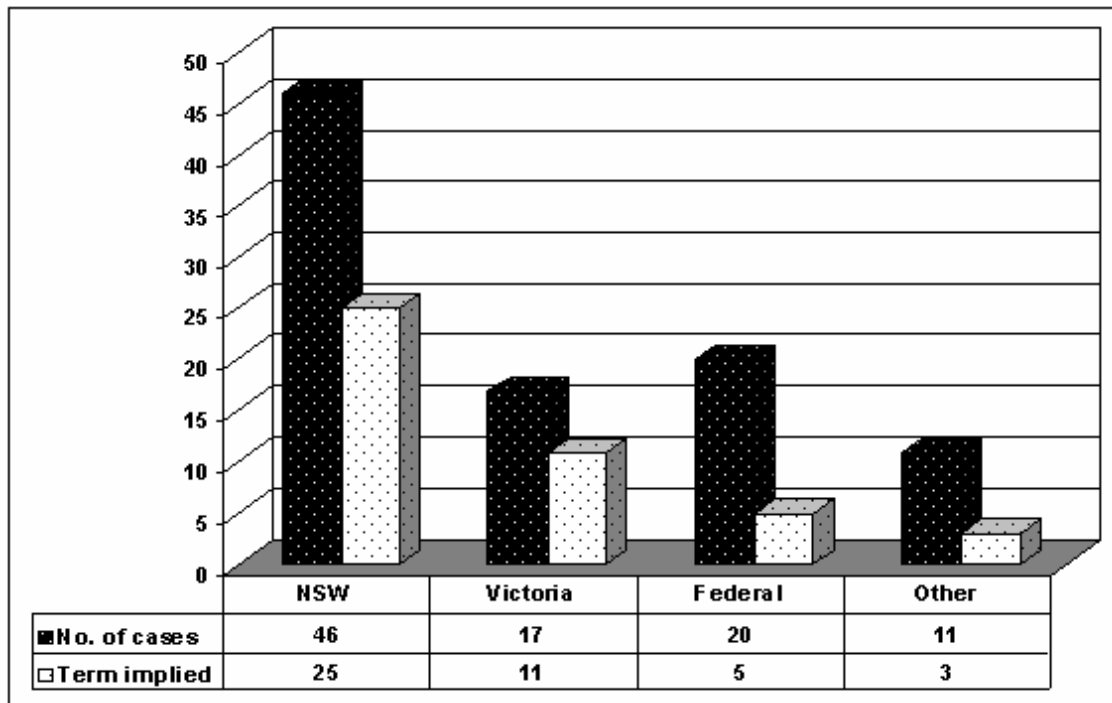
(n = 94 cases, n = 44 implied)

Further, just as the data suggest a highly uneven incidence of good faith litigation between the jurisdictions (refer to Charts 2 and 3 above), the apparent level of acceptance of the idea of implied good faith obligations also differs considerably from jurisdiction to jurisdiction.

There is a strong coincidence between the volume of good faith cases identified for inclusion in the final case database and the level of the resulting observed good faith implication rate. By far the most good faith cases identified were NSW decisions, totalling 46 in all. In 25 of these cases, it was accepted that a term requiring good faith performance of contractual obligations would normally be implied into a contract, generally, as seen above, as a matter of law. This equates to a jurisdiction specific good faith implication rate of 54.3% for NSW over the period between 1992 and 2004. In Victoria, over the same period of time, the implication rate averaged 64.7% over a total of 17 identified cases from that jurisdiction.

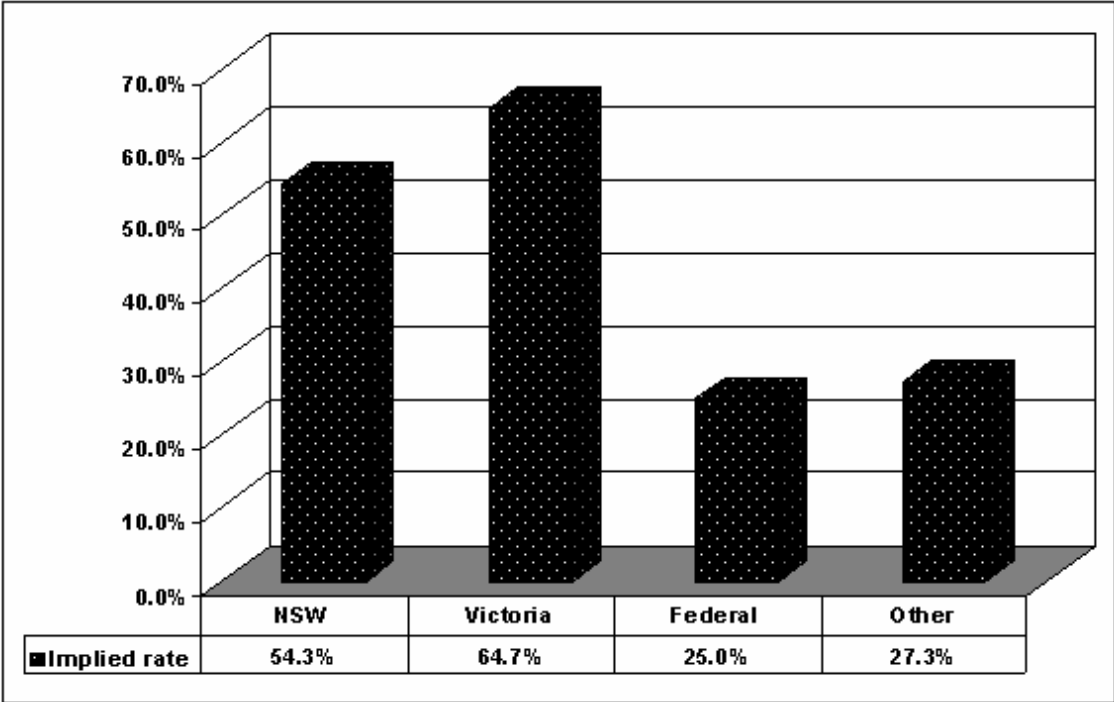
These rates contrast enormously with observed implication rates for cases heard before Commonwealth Courts (i.e the Federal Court of Australia or the High Court of Australia) which averaged only 25% over the period reviewed, and for identified cases heard before the courts of States and Territories other than those of NSW and Victoria, where the whole of period average good faith implication rate stood at only 27.3%, a strikingly similar level to that observed for cases heard before Commonwealth Courts. This data, set out in charts 7 and 8 below suggests a schism between the courts of NSW and Victoria and all other Australian courts on the good faith issue.

Chart 7 – Cases Where Term Implied by Jurisdiction



Note: Other comprises the jurisdictions of ACT, WA, Queensland and Tasmania.

Chart 8 – Implication Rate by Jurisdiction



Note: Other comprises the jurisdictions of ACT, WA, Queensland and Tasmania.

Just as the set of cases in which a court expressed the view that it would be appropriate to imply a term requiring good faith performance represented a sub sample of the total number of cases identified for review, that set of cases in which a breach of an implied term requiring good faith contractual performance represents a sub set of cases where it was found appropriate to imply a term. Whereas 44 instances of implication were identified from a total sample of 94 cases, only 20 instances were identified in which a good faith performance term, having been found to have been implied, was also found to have been breached. This translates to an overall breach rate of 21%. This aggregate level data is presented in Chart 9.

This data suggests a gap between the capacity to convince a court of the existence of an implied term and the capacity to demonstrate that such a term had in fact been breached. Further, the propensity of courts to discover breach consequent upon the implication of a term requiring good faith performance varied considerably across time. Data pertaining to levels of breach versus numbers of cases is set out in Chart 10 below, while Charts 11 and 12 show the breach rate as a proportion of the total case sample and the sub sample of cases in which good faith obligation terms were implied respectively.

The data on breach rate exhibits a high degree of volatility, both when the breach rate is defined on the basis of breaches as a proportion of total identified cases and when the breach rate is defined as a proportion of those cases in which a good faith obligation term was implied. One interpretation of this volatility is that it points towards a conclusion that the nature of the underlying legal construct (good faith) is not well settled in Australian law.

Chart 9 – Breach of Term Across Entire Case Sample

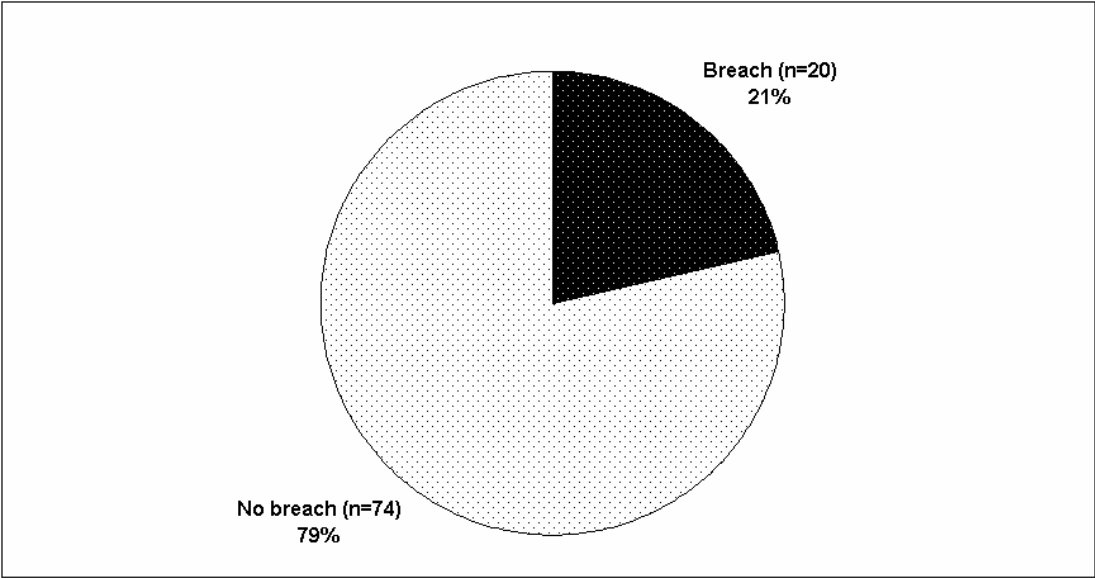
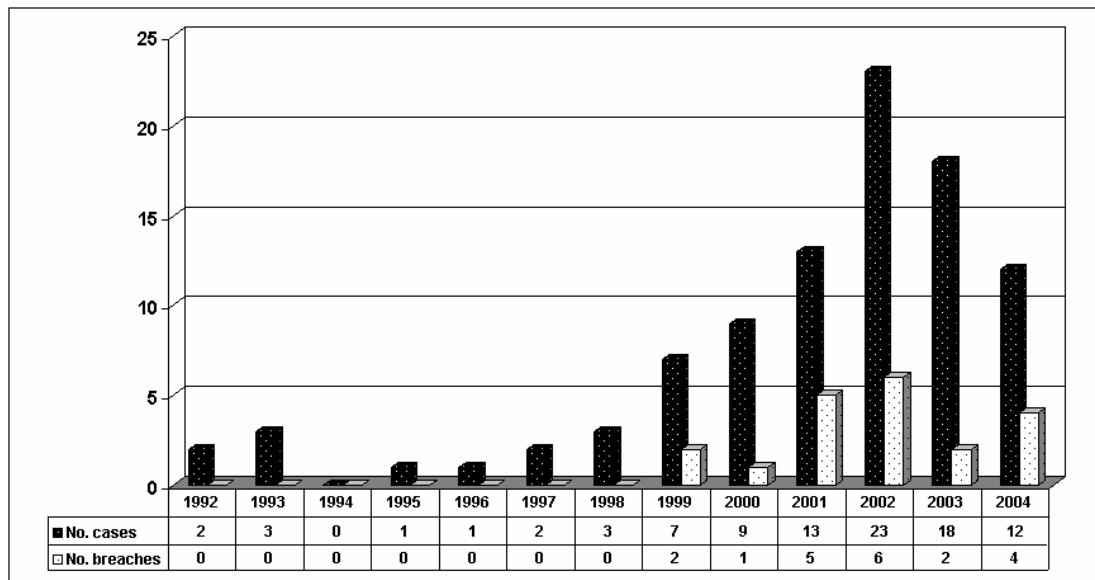
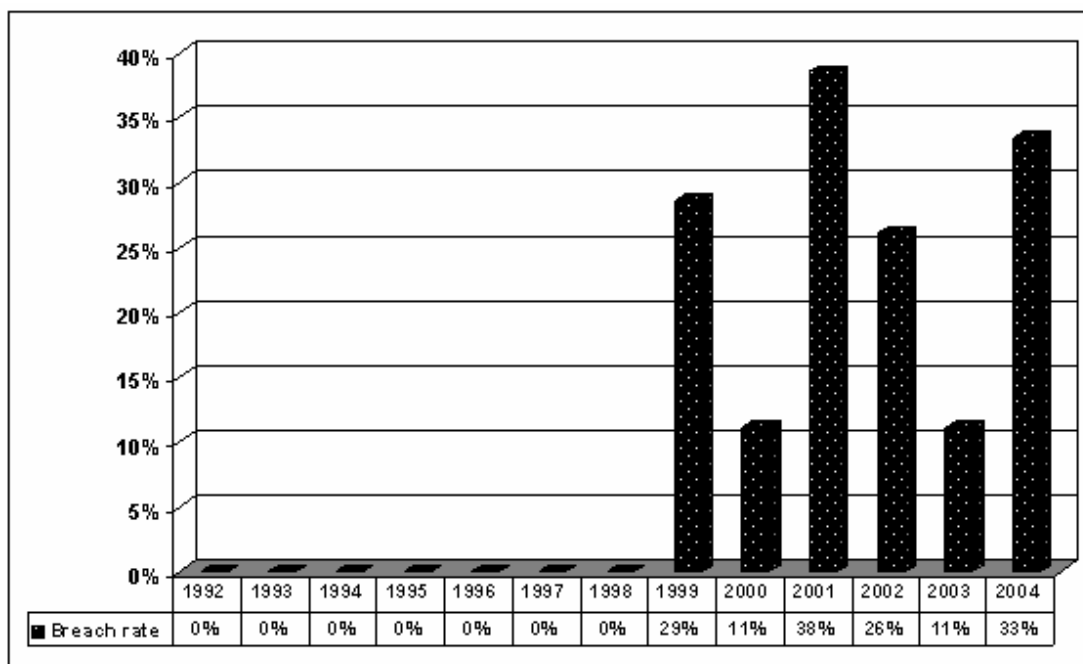


Chart 10 – Breaches vs Cases Per Year



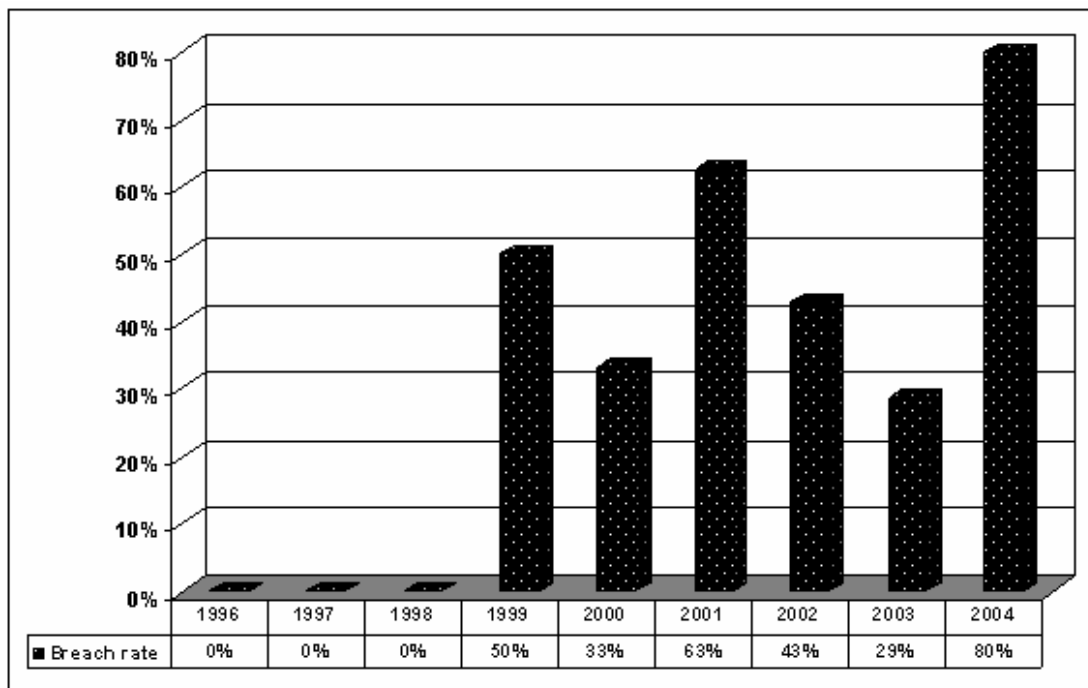
(n = 94 cases, n = 20 breaches)

Chart 11 – Breach Rate (% of All Cases) Per Year



(n = 94 cases, n = 20 breaches)

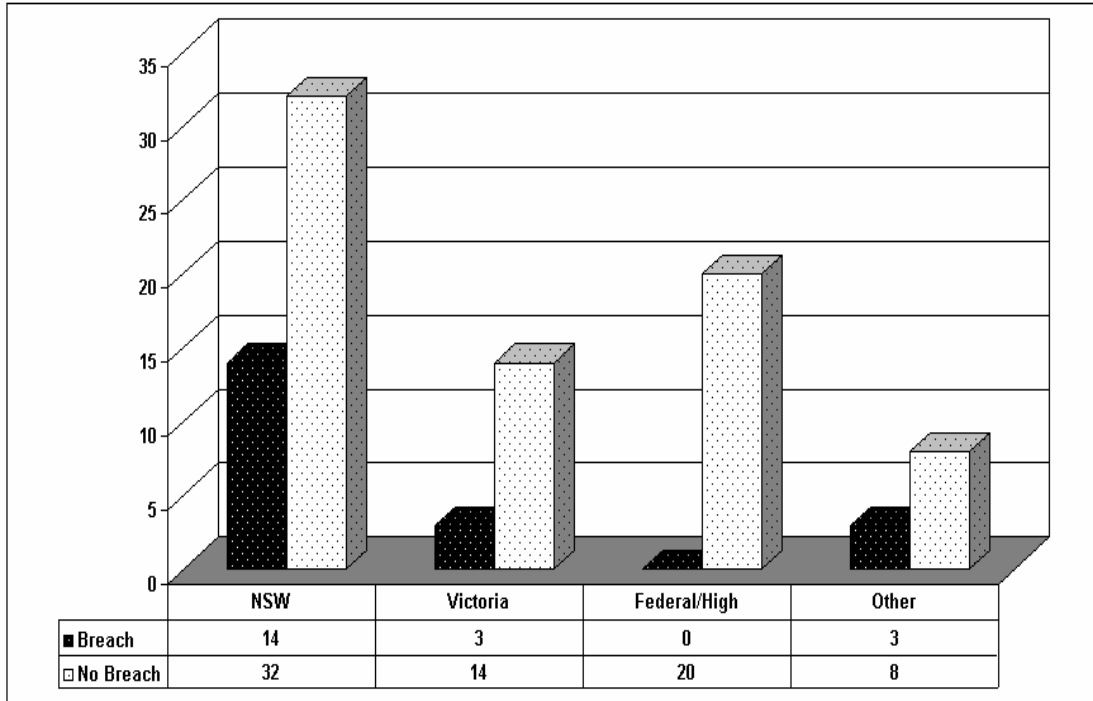
Chart 12 – Breach Rate Where Term Implied Per Year



Just as it has been noted that considerable variation arose between the various jurisdictions in terms of the incidence of cases dealing with the implied good faith requirement issue and the propensity of courts within those jurisdictions to imply such terms, there are systematic variations by jurisdiction in the observed breach rate. The jurisdiction in which the greatest number of breaches of implied terms requiring good faith in contractual performance was observed was NSW, with a total of 14 instances. This compares against a total of only six breaches observed for all other jurisdictions combined.

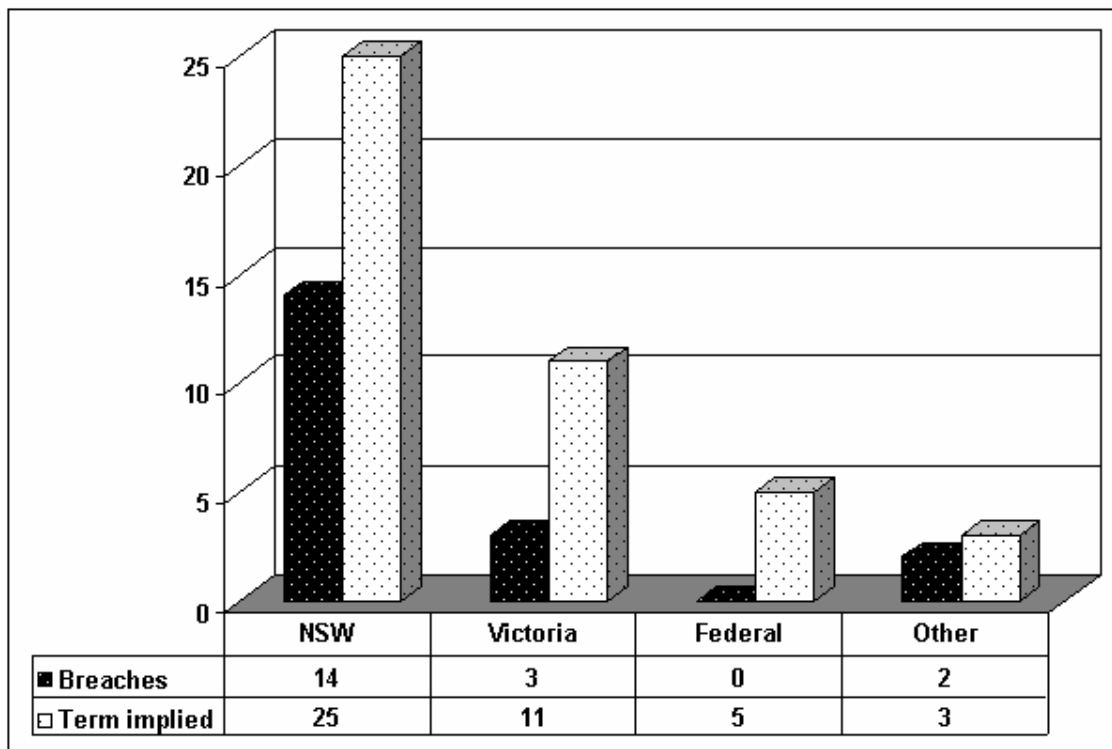
One means of placing this into perspective is to view the breach data in the following light. NSW was the source of 46 of 94 cases included in the final case database upon which the study was based, or 49% of the total identified case sample. Of 44 identified instances where a good faith obligation was implied, 25 occurred in NSW, 57% of the total cases where a good faith term was implied. Of twenty observed instances of breach of an implied good faith term across the sample, fourteen, or 70% came from NSW. By way of contrast, Victoria contributed 18% of the total case sample, 25% of the instances in which a term was implied and 15% of the observed instances of breach. Thus the data suggests that NSW stands alone in its embrace of the good faith concept, and the propensity of litigants to be able to convince a court that a breach of an implied good faith term has transpired. By way of contrast, there was no observed instance of a proved breach in any matter which was heard before a Commonwealth court. The very small sample size for the courts of the other jurisdictions makes the breach rate data for those jurisdictions noisy and difficult to interpret. See Charts 13, 14 and 15 below for depictions of breach data by jurisdiction.

Chart 13 – Breaches vs Number of Cases By Jurisdiction



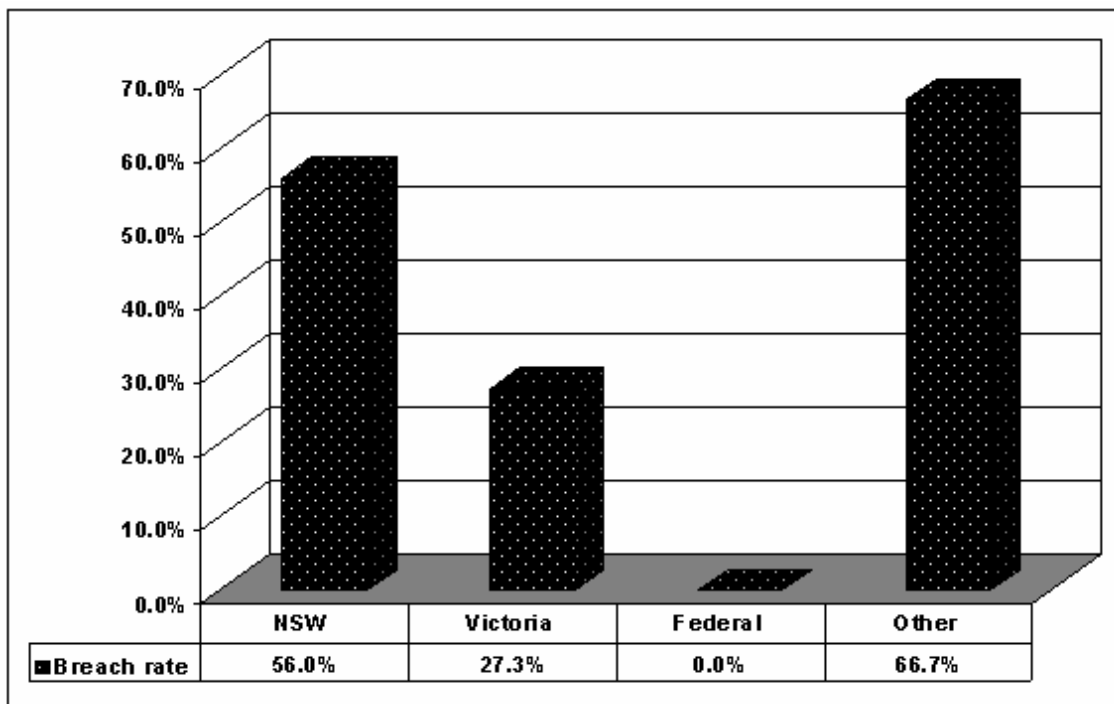
Note: Other comprises the jurisdictions of ACT, WA, Queensland and Tasmania.

Chart 14 – Instances of Breach vs Cases by Jurisdiction



Note: Other comprises the jurisdictions of ACT, WA, Queensland and Tasmania.

**Chart 15 – Breach Rate Where Term Implied by
Jurisdiction**



Note: Other comprises the jurisdictions of ACT, WA, Queensland and Tasmania.

The data described above reveals material variation in the incidence of good faith litigation, the propensity to imply terms requiring good faith performance and the rate at which breaches of such terms have been found both on a time series basis and on a cross sectional basis. Two key propositions may be derived from this. First, that the data supports the view that the law relating to good faith obligations is fractured along jurisdictional lines, with NSW and Victoria, but in particular the former standing out markedly from all other jurisdictions on the three dimensions discussed above. Second, the volatility in the incidence of good faith litigation, implication rates and breach rates suggests considerable tension and is not consistent with the existence of a deeply established and well settled body of law.

However, observed case incidence, term implication rate and breach rate represent only a partial view of the data. Though it is possible to draw inferences from these datapoints, for example as to the apparent variation in approach to good faith between the various Australian legal jurisdictions and as to the apparently unsettled nature of good faith law in Australia by dint of the significant volatility observed in the data reported above, other perspectives are possible. One more direct measure of the status and trajectory of the law relating to implied good faith obligations is to attempt to directly assess judicial attitudes to the good faith question. This is discussed in section 4.4 below.

4.4 – Further Analysis and Interpretation

One of the most important features of the manner in which the law relating to implied good faith obligations has developed in Australia has been the relative lack of

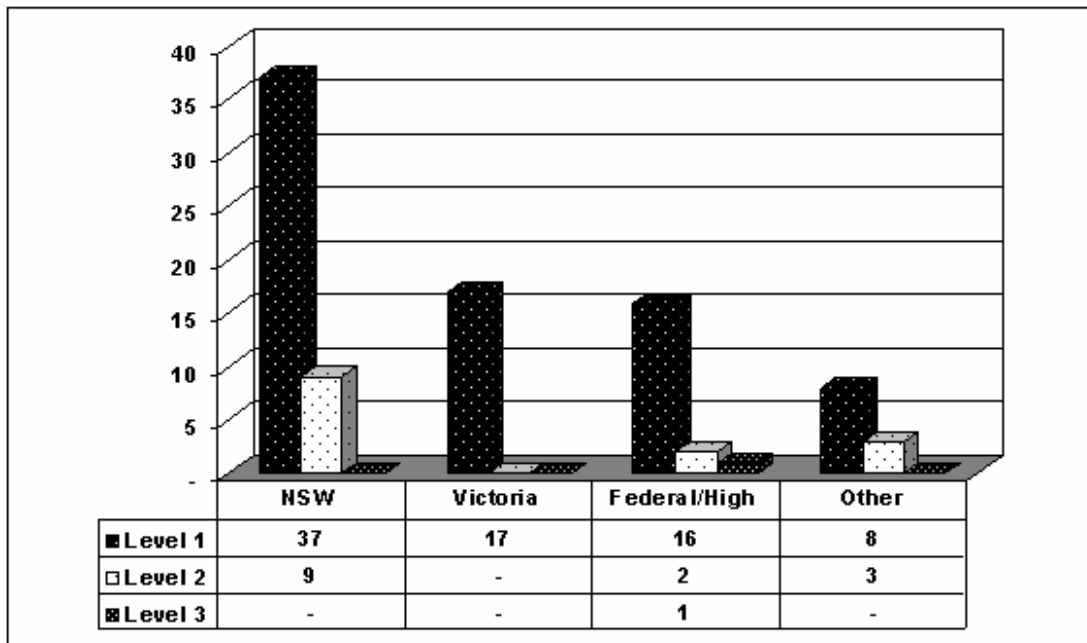
appellate level intervention into the development of the Australian jurisprudence on the subject. To date, the High Court of Australia has refused to be drawn on the issue¹⁶. Of seventeen identified good faith cases from Victoria, all were single judge first instance cases. Of eighteen good faith cases identified as having been heard before the Federal Court of Australia, only two (11%) were heard before a Full Court.

Again, New South Wales stands out, nine of forty six identified cases (approximately 20%) from that jurisdiction having been heard by the Court of Appeal of the Supreme Court of NSW. This yields a situation in which more appellate level cases relating to good faith have been decided in NSW than in all of Australia's other legal jurisdictions combined.

Data encapsulating the level of judicial review of identified Australian good faith cases is presented in Chart 16 below. For the purposes of analysis, level of review is defined as falling into three categories. Level 1 means that the case was a first instance decision by a single judge. Level two denotes a case heard by a state court of appeal or the full court of the Federal Court of Australia, while level three denotes a case heard before the High Court of Australia.

¹⁶ Though, as is well known, brief remarks on the matter were made by some members of the High Court of Australia in *Royal Botanic Gardens and Domain Trust v South Sydney Council* (2002) 186 ALR 289.

Chart 16 – Level of Review by Jurisdiction



Note: Other comprises the jurisdictions of ACT, WA, Queensland and Tasmania.

While on all measures reviewed thus far in this chapter it has been evident that the good faith question has loomed larger in New South Wales than in any other Australian legal jurisdiction, it does not follow from this that good faith jurisprudence in Australia travels in orbit around the developments flowing from New South Wales. One means of demonstrating this is to have regard to the level of support for the concept of implied good faith performance obligations evinced by the courts of the various Australian legal jurisdictions over time.

Recall, as discussed in section 2 (above) that in a bid to measure judicial support for the good faith construct, a four point measurement scale was constructed and coded for each of the 94 cases within the sample. A score of “1” was used to denote a situation where the court unambiguously and without reservation declared the existence of implied terms requiring good faith in the performance of contracts. This form of unambiguous statement was detected in 19 of the 94 cases which made up the final case database.

A score of “2” was used where the court expressed a generally sanguine view as to the existence of good faith obligations but also expressed some degree of reservation as to the state of the law. This was the most common detected approach to the good faith performance question, with 50 of 94 cases falling into this category. One common example of this detected in a significant number of cases was the tendency of the court to discuss the good faith question on the assumption that good faith performance obligations would generally be implied as legal incidents of commercial contracts but without actually deciding so. Here the court does not express aversion to the issue, but neither, apparently, is the court sufficiently confident in the state of the settled law to simply declare, in its own right, that the law is that terms requiring good faith in contractual performance will be implied into commercial contracts.

A score of “3” was used to denote situations where the court expressed doubt or reservation as to the existence or desirability of a good faith performance obligation in the Australian law of contract. There were 22 detected instances of cases conforming to this view of affairs. Finally, a score of “4” was used as a means of coding situations where the court expressly rejected the existence of a good faith performance

obligation. Only three instances of this were detected across the entire final sample of 94 cases.

The data pertaining to the coded support levels of the entire sample of cases used in this study is set out in Chart 17, below. Since this data speaks only to the entire sample and not to cross sectional variation within the sample, it is useful to contemplate average good faith support levels on a jurisdiction by jurisdiction basis in order to provide sharper insights into the underlying dataset. Charts 18 and 19 (below) show two measures of jurisdiction by jurisdiction support for the notion of an implied obligation of good faith performance. The data in Chart 18 is based on a single support score assigned to each case, whereas the data in Chart 19 tracks support down to a judgment by judgment level, taking account of the potential for variation in opinion in multiple judge decisions. The data used to calculate Chart 18 weighs each case evenly, whereas the data used to generate Chart 19 weighs those cases with multiple judgments more heavily, meaning that appeal cases exert higher influence on the support scores depicted in Chart 19 than those depicted in Chart 18.

Chart 17 – Support level across total sample

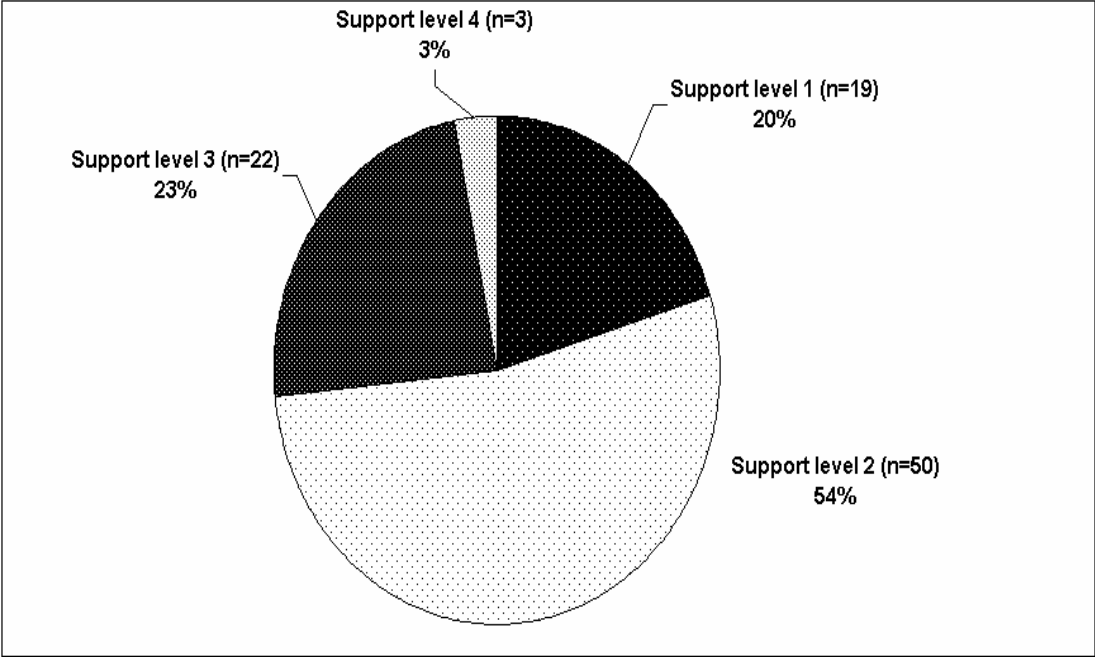
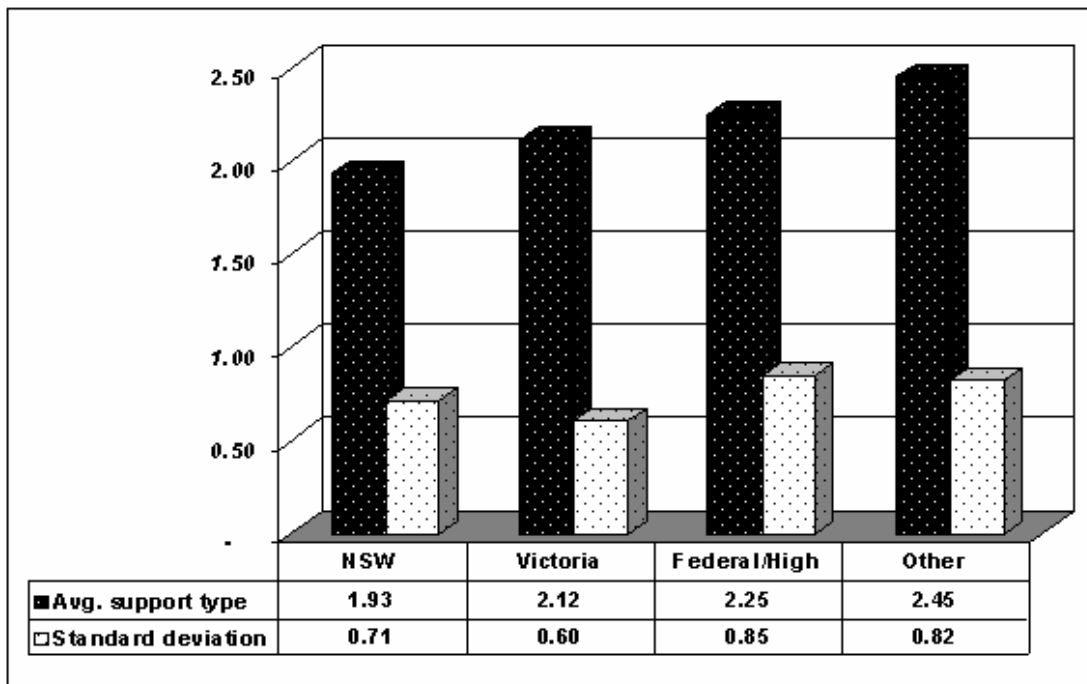
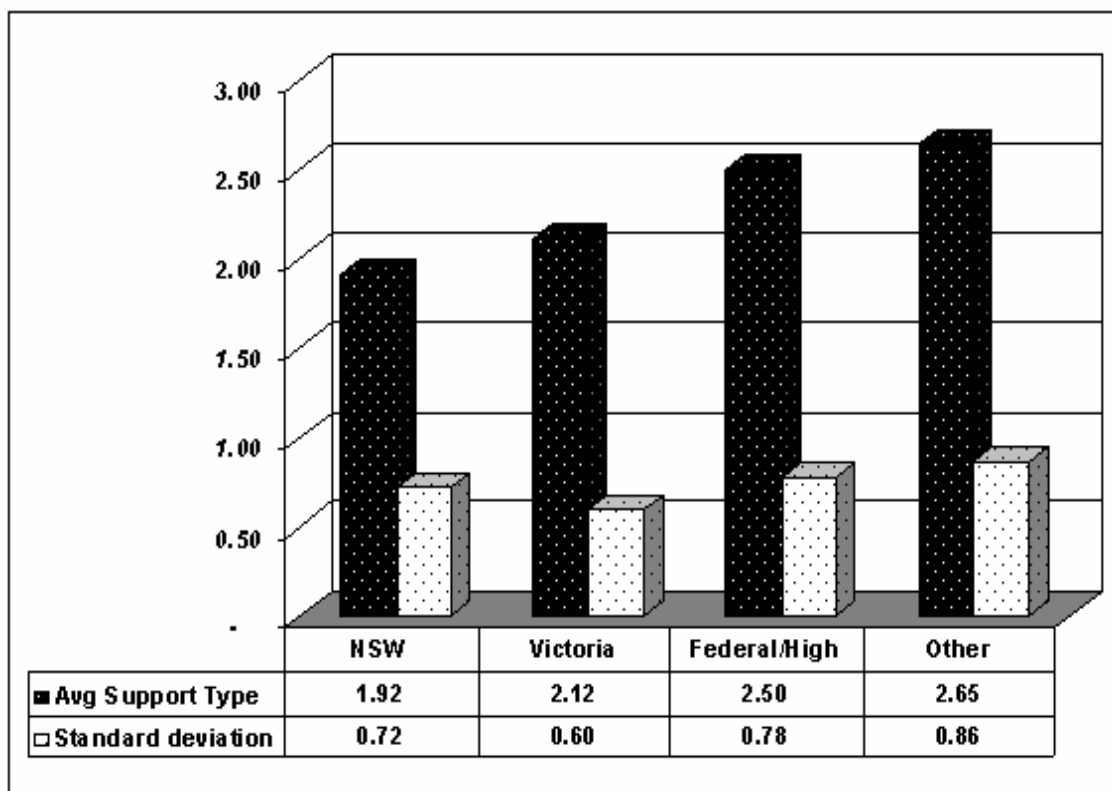


Chart 18 – Average Support Level by Jurisdiction



Note: Other comprises the jurisdictions of ACT, WA, Queensland and Tasmania.

Chart 19 – Average Support Level by Judgment by Jurisdiction



Note: Other comprises the jurisdictions of ACT, WA, Queensland and Tasmania.

The data presented in Charts 18 and 19 above demonstrates a cross sectional variation strongly consistent with the data patterns discussed in Section 3 above. In particular, irrespective of whether support is measured on the basis of a single whole of case support score or on a judgment by judgment basis, NSW stands alone as the jurisdiction in which the highest degree of support (as evidenced by the mean support score closest to “1”) is consistently exhibited. Victoria’s mean good faith support score is also close to that calculated for NSW.

Several other features of the data are also significant. First, the support scores for cases decided before Commonwealth Courts and those decided before the courts of states and territories other than NSW and Victoria are measurably different, with the scores for legal jurisdictions outside NSW and Victoria suggesting less acceptance of implied obligations to perform contracts in good faith in those jurisdictions than in either NSW or Victoria.

Second, the standard deviation of the good faith support scores for those legal jurisdictions outside NSW and Victoria was noticeably higher than the standard deviation of the NSW and Victoria good faith support scores. Since standard deviation is a technique for measuring variation in the underlying data, higher standard deviation suggests greater conflict and uncertainty and that the law relating to implied good faith obligations outside NSW and Victoria is less well settled than the law within those jurisdictions.

Third, note that while the differences between the average good faith support scores reported in Charts 18 and 19 for NSW and Victoria are negligible¹⁷, material differences exist between the two support score measures for both “commonwealth” cases and cases heard in the courts of states and territories other than NSW and Victoria. This is particularly interesting. Recall that the data used to generate the average good faith support scores reported in Chart 18 incorporates a single support

¹⁷ In fact, the mean good faith support score for Victoria is 2.12 in both cases. This is because in Victoria, the number of judgments is exactly equal to the number of cases, because there were no observed instances of multiple judge good faith cases in Victoria. In New South Wales on the other hand, 20% of the observed cases were multiple judge (appeal) cases.

measure per case. This means in effect that every case included in the final case database weighs evenly in the calculation of the mean support scores reported in Chart 18.

However, the data used to calculate the average support scores reported in Chart 19 assigns a support score to each judge¹⁸, and therefore implicitly weighs multiple judgment cases more heavily. This means that the differences which arise between the data presented in Chart 18 and that presented in Chart 19 can essentially be attributed to differences between the approach taken to the good faith question in single judge (first instance) decisions, versus the approach taken to the question in appeal (multiple judge) decisions. The average good faith support score for Victoria remains constant at 2.12 across both measures because in Victoria, there were no multiple judge good faith decisions.

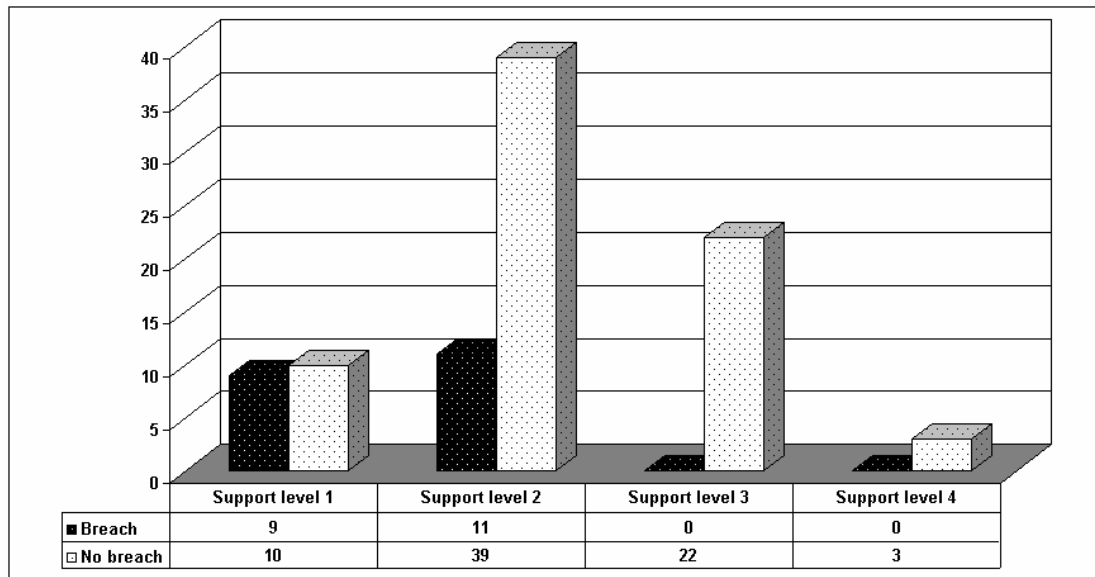
In NSW, the average support score on a case weighted basis (Chart 18) was 1.93. The NSW average support score on a judgment weighted basis (Chart 19) was almost precisely the same, at 1.92. This indicates a significant degree of consistency of approach between first instance decisions and appeal decisions in NSW.

This pattern is not displayed in the support level score data for cases heard before Commonwealth courts and cases heard before the courts of states and territories other than NSW and Victoria. The case weighted (Chart 18) average commonwealth good faith support score was 2.25, but increases to 2.5 when calculated on a judgment weighted (Chart 19) basis. Similarly, the case weighted (Chart 18) average “other jurisdictions” good faith support score was 2.45 but increases to 2.65 when calculated on a judgment weighted (Chart 19) basis. The explanation for this statistical artefact is that appeal judgments in these two instances exhibit lower levels of support for implied good faith obligations than first instance (single judge) decisions.

¹⁸ The final data sample consisted of 94 cases and 127 judgments.

One other significant association revealed in the data is that which exists between the good faith support level and the number of instances in which a breach of an implied term requiring good faith in contractual performance is found. As the data set out in Chart 20 (below) demonstrates, there were no observed instances in which a breach of such a term was found to have taken place where the support level was assessed at greater than 2. Further, the observed “breach found” rate grew as the good faith support level increased. Thus while the “breach found” rate was 0% for support level 4 and 3, it stood at 22% (11 out of 50 cases) for support level 2 but grew to 47% for support level 1, a rate very significantly above the whole of sample breach found rate set out in Chart 12 (above).

Chart 20 – Instances of Breach by Support Level



In addition to taking note of the cross sectional variation in average good faith support scores, it is fruitful to examine the time series properties of the data pertaining to this measure. Chart 21 depicts the average good faith support score and score standard

deviation for each year between 1992 and 2004 across the entire sample of 94 cases in the final case database, calculated on a case weighted basis.

Visual inspection of the data suggests three distinct phases in the Australian good faith journey thus far. The first phase, from 1992 through to 1995 may be conveniently labelled the “initial resistance” phase. Here, mean good faith support scores were high (tending towards 3 out of a possible 4), indicating qualified rejection of the good faith construct during that period.

The second phase, from 1996 through to 2000, may be conveniently labelled the “implementation confusion” phase. During this period, a substantially higher number of cases dealing with good faith were decided than during the “initial resistance” phase¹⁹ and the average annual good faith support score varied significantly between a minimum of 1.71 in 1999 and a maximum of 2.56 in 2000. Further, the observed score standard deviations were higher during this second phase of the time series data than at any other time, indicating the existence of considerable confusion in relation to the existence, enforceability and meaning of implied good faith performance obligations during that period.

The third phase, which for convenience may be labelled the “consolidation phase” of the data stretches from 2001 through to 2004. Whereas some academic literature has characterised this period as providing comfort for the proposition that implied good faith obligations have now solidified into an accepted aspect of the Australian law of contract, a careful reading of the data tells a different story. First, while it is true that the average annual good faith support score for 2001, at 1.77, indicated a relatively strong degree of support for the existence of such obligations, it is noteworthy that in each successive year, the average annual good faith support score increased, reaching a value of 2.33 by 2004. This suggests that courts across Australia have recently

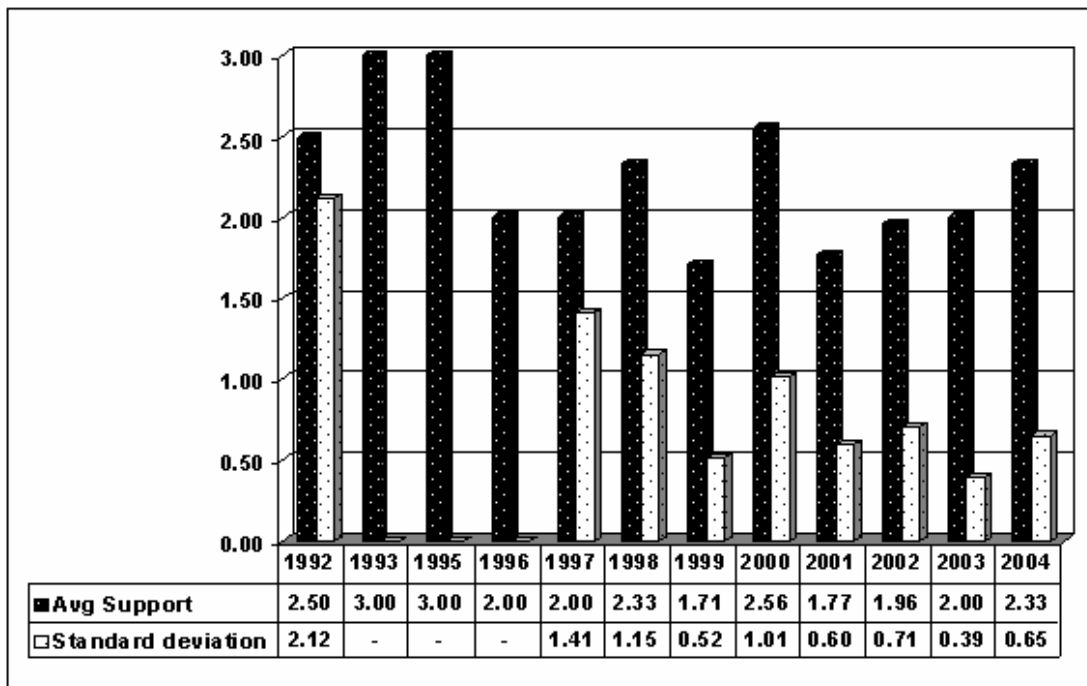
¹⁹ A total of six cases relating to implied good faith performance obligations were identified between 1992 and 1995 – an average of .66 cases per year. Between 1996 and 2000, a total of 22 such cases were identified, an average of 4.4 cases per year. (See Chart 1).

become steadily less sanguine about the existence of such implied obligations than has previously been the case.

Furthermore, it is interesting to note that the annual standard deviation rates during the “consolidation phase” were lower than during the “implementation confusion phase”. Thus, it appears not only that courts became more wary of the good faith obligation issue in each successive year from 2001 onwards, but that there was less variability in their approach to dealing with the issue than had been the case previously. Thus, far from indicating that opinion has solidified around the existence of such terms, the data suggests that the reverse might be transpiring.

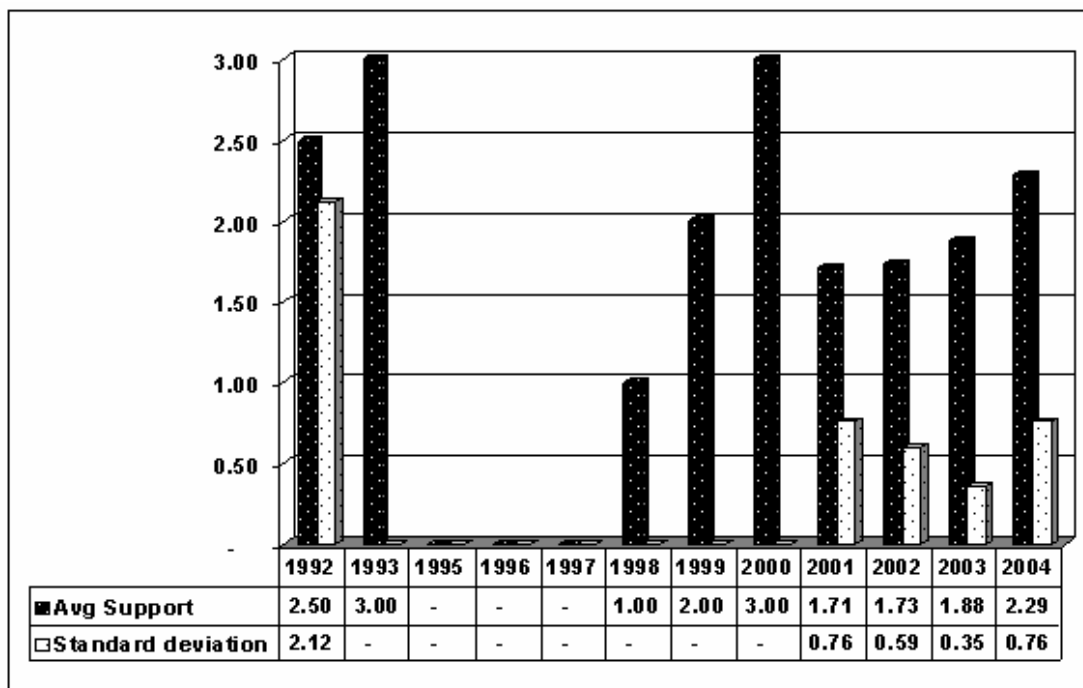
Decomposition of the data into jurisdiction based time series data (as to which see Charts 22 (NSW), 23 (Victoria), 24 (Commonwealth) and 25 (other) below) also yields incrementally useful insights. (See discussion below).

Chart 21 – Average Support All Cases by Year



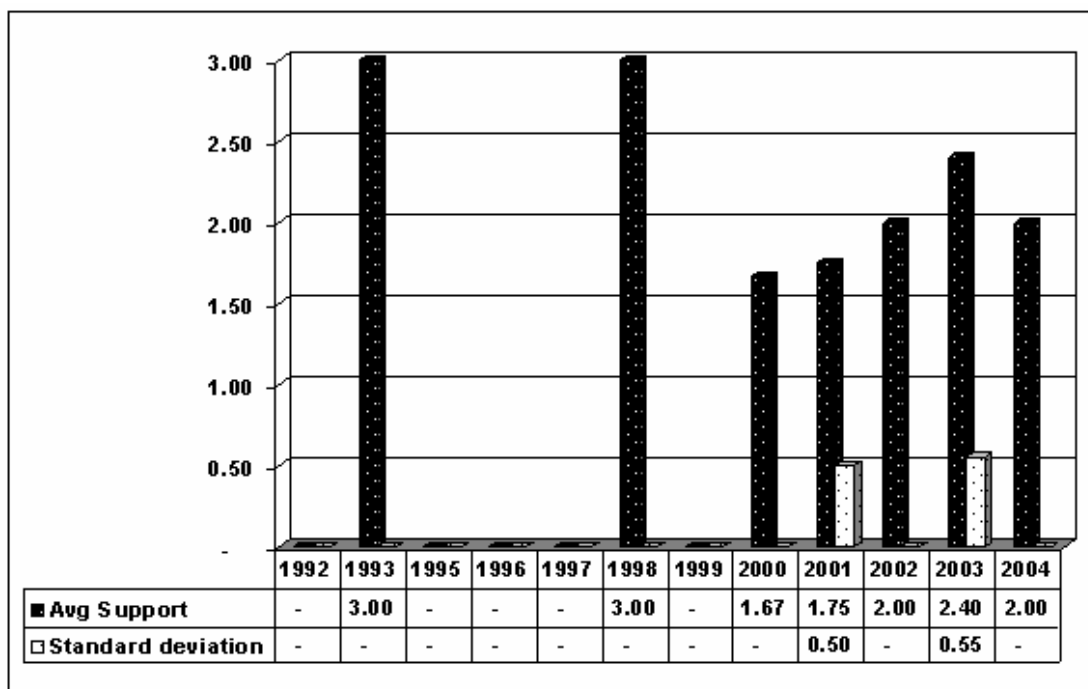
(n = 94 cases)

Chart 22 – Average Support NSW Cases by Year



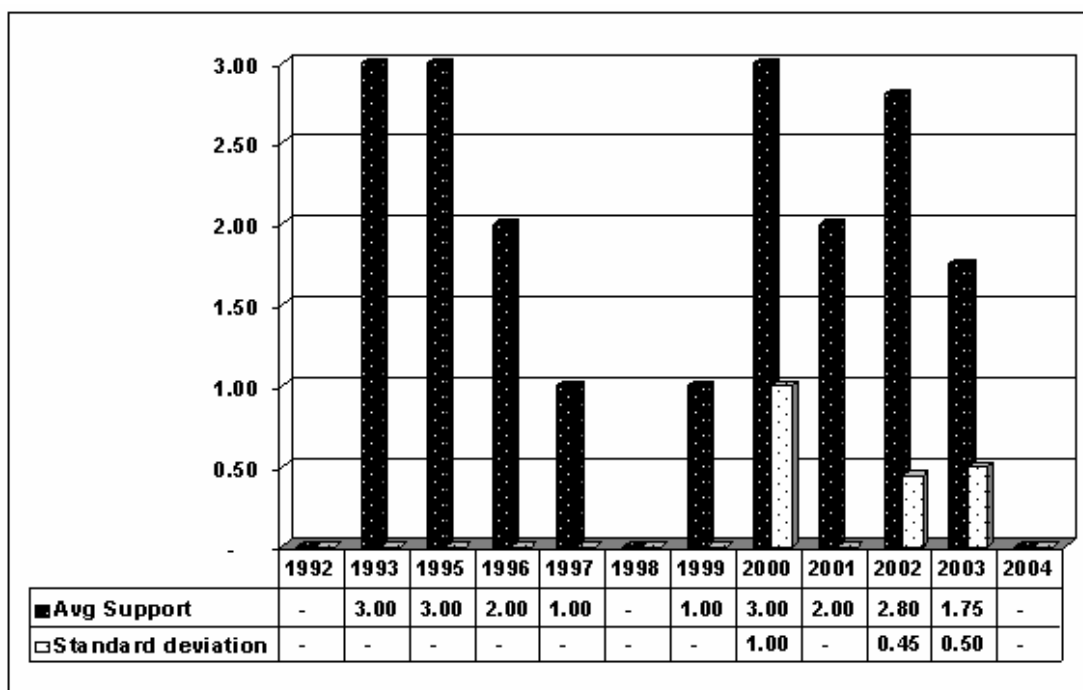
(n = 46 cases)

Chart 23 – Average Support Victorian Cases by Year



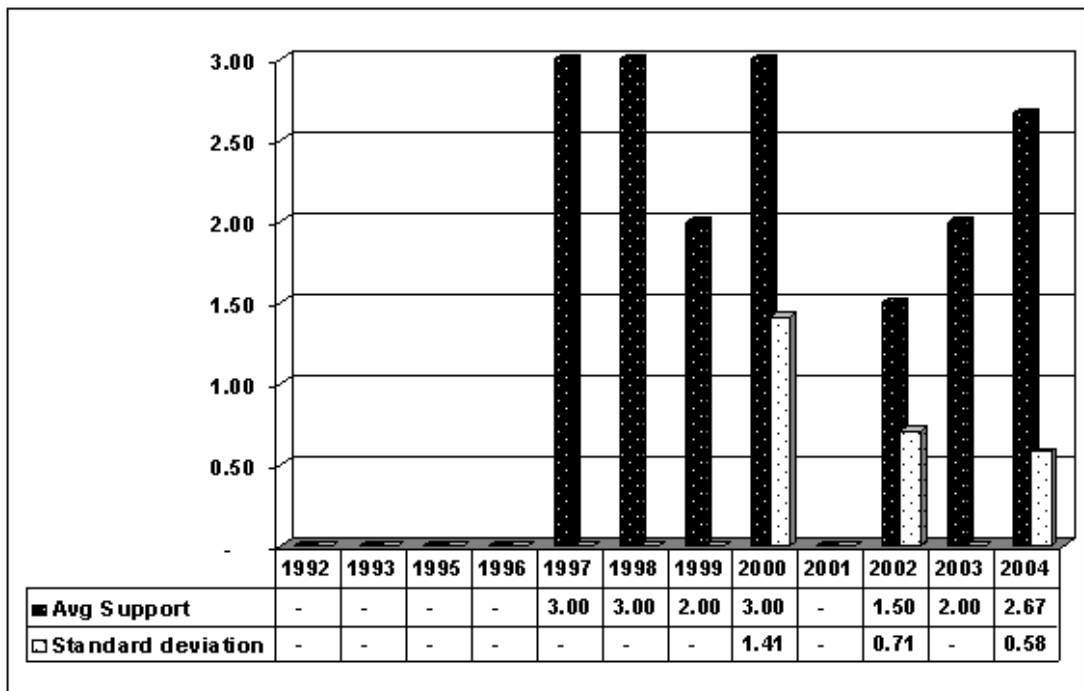
(n = 17 cases)

**Chart 24 – Average Support Commonwealth Cases
by Year**



(n = 20 cases)

Chart 25 – Average Support Other Cases by Year



(n = 11 cases)

Several features of the jurisdiction by jurisdiction time series good faith support score data are significant. First, although New South Wales has the longest tradition of judicial discussion of implied good faith performance obligations and been characterised as the strongest bastion of the implied good faith performance doctrine in Australia, the average good faith support score for that jurisdiction has steadily increased since 2001²⁰, indicating growing caution in relation to the existence, scope and application of the doctrine.

Second, this pattern of increasing caution is also apparent in the data drawn from the Victorian good faith cases²¹ and those drawn from the courts of the other states and territories²². Indeed, having regard to good faith cases from these “other” jurisdictions, of the seven individual years²³ in which cases dealing with implied good faith obligations were detected and analysed the average observed good faith support score fell below two on only one occasion²⁴. By way of contrast, the observed average score was three (indicating qualified rejection of good faith obligations) in three of the seven years. Further, from 2002 onwards, the observed good faith support score increased steadily (consistent with the pattern observed in NSW and Victoria), indicating increasing caution towards the idea of implied obligations requiring good faith in contractual performance.

²⁰ The data in Chart 22 shows that while the average support score for NSW lay at 1.71 in 2001, it had increased substantially to 2.29 by 2004. Recall that a score of 1 indicates absolute and unqualified support for the existence and application of a good faith performance obligation, while a score of 2 indicates qualified support. Thus while in 2001 the average support score level for NSW indicated strong but somewhat qualified support for good faith performance obligations, by 2004, the level of support had fallen and the implied degree of qualification relating to the existence and impact of the doctrine had also increased.

²¹ See Chart 23.

²² See Chart 25.

²³ Although the search conducted for the purpose of constructing the final case database spanned 1992 through 2004 (inclusive), cases from “other” jurisdictions touching on implied good faith obligations were only detected in seven years, being 1997, 1998, 1999, 2000, 2002, 2003 and 2004.

²⁴ In 2002.

The category of cases which provides the greatest analytical challenge is the set of cases drawn from “commonwealth” jurisdiction courts, being the Federal Court of Australia, the Full Court of the Federal Court of Australia and the High Court of Australia. The data pertaining to the average good faith support scores indicated within these cases is set out in Chart 24. Even a cursory glance at this data reveals a high degree of inconsistency in the approach taken to the good faith performance obligation question by this group of courts.

Although NSW has been seen as the jurisdiction in which support for notions of implied good faith performance obligations has been most firmly established, the data reveals that the average annual good faith support score has reached one, indicating unqualified acceptance for the notion of implied good faith performance obligations, on twice as many occasions in “commonwealth” courts than in NSW courts²⁵. In contrast, “commonwealth” jurisdiction cases in many cases also display significant scepticism towards implied good faith performance obligations²⁶.

This variation in good faith support scores from the “commonwealth” cases suggests a significant degree of conflict as to the existence, scope and application of the implied good faith performance obligation doctrine within that jurisdiction. This is symptomatic of a relative lack of appellate attention to questions relating to implied good faith performance obligations²⁷ and can in no way be reconciled with the existence of a well settled body of law.

An alternative means of examining the empirical evidence relating to implied good faith performance obligations is to examine the role played by individual members of the judiciary in the development of this doctrine within the Australian law of contract. Justice Priestley’s involvement is well known because of his widely cited contribution in *Renard*. Yet this was the only case discovered in the course of producing the final case database in which his honour presided over a matter in which the question of implied good faith performance obligations arose.

²⁵ The average good faith support score in NSW in 1998 reached 1. In “commonwealth” cases, a score of 1 was reached in both 1997 and 1999.

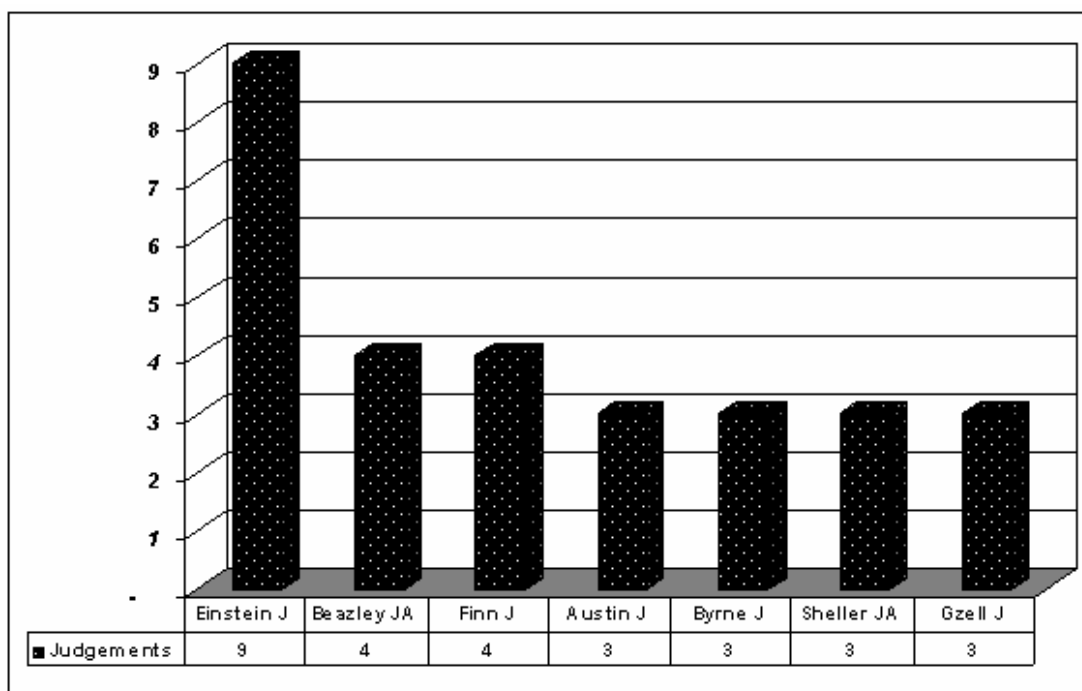
²⁶ See for example 1993, 1995 and 2000 where the recorded average good faith support score was 3, indicating qualified rejection of implied good faith performance obligations.

²⁷ See the data in Chart 16.

In this regard, Justice Priestley was in good company. In all, eighty individual judges produced decisions relating to implied good faith obligations which were identified and incorporated into the final case database. Fifty four of these individuals produced only one decision relating to implied good faith performance obligations. Yet a small number of judges produced a disproportionate number of the total volume of good faith decisions which were incorporated into the final case database. Justice Einstein of the Supreme Court of NSW produced nine identified decisions in which the issue of implied good faith obligations was at hand. Justice Beazley of the Court of Appeal of the NSW Supreme Court produced four, as did Justice Finn of the Federal Court of Australia. Justices Austin, Byrne, Sheller and Gzell all produced three good faith decisions each over the period under review.

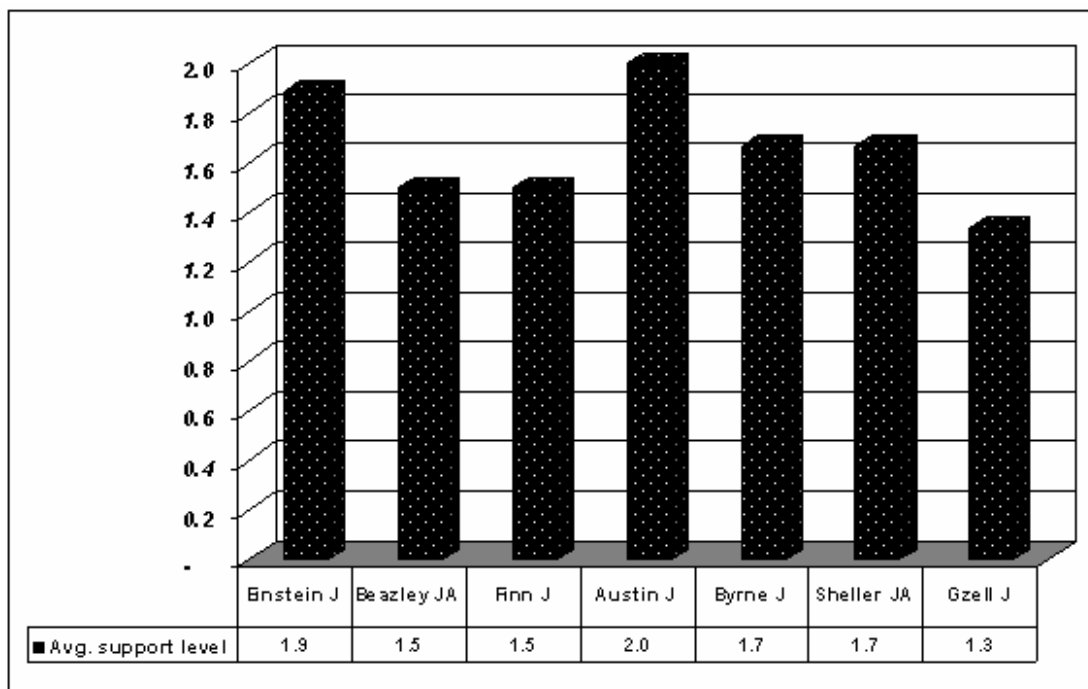
Interestingly, this small band of high volume good faith decision producers also appeared to be consistently supportive of implied good faith performance obligations as a feature of Australian contract law. See Charts 26 and 27 below for data on these individuals.

Chart 26 – Top 7 Judges by judgements



Note: total 128 judgements in sample

Chart 27 – Average Support Level of Top 7 Good Faith Judges

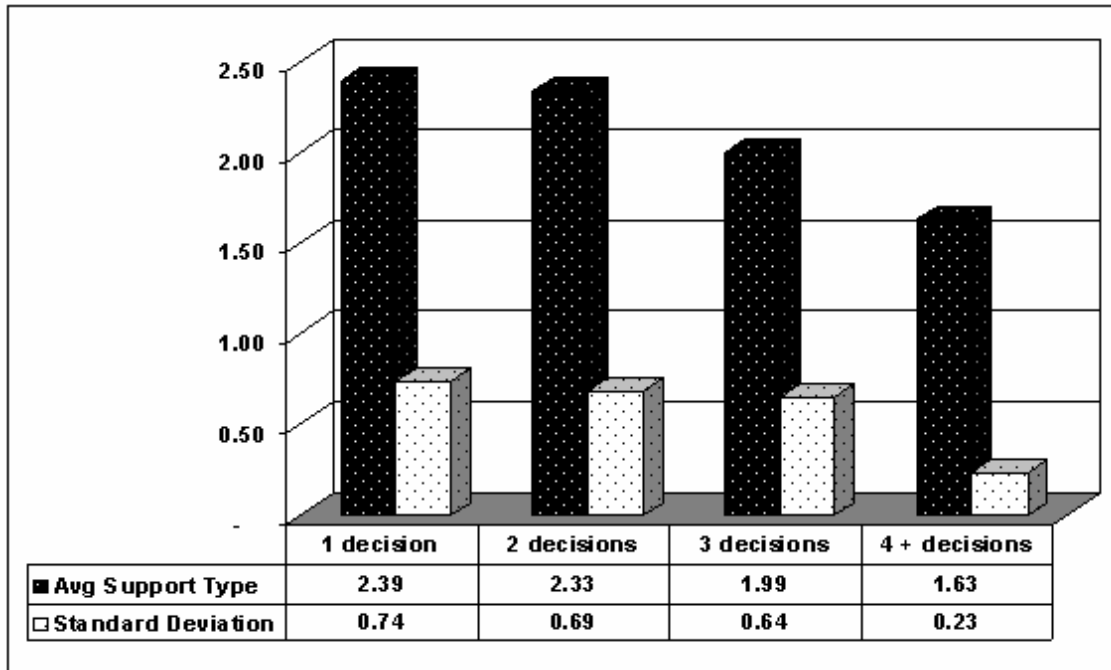


Although the data in charts 26 and 27 above does provide the impression that there is an association between the volume of good faith decisions made and the degree of support for implied good faith performance obligations, it is not until the average support tendencies of the high volume good faith judicial decision makers is contrasted against the average support tendencies of lower volume good faith decision makers that the differences between the high volume good faith judicial decision maker sub population and the remainder of the good faith judicial decision maker population become completely clear.

Chart 28 below sets out data which shows the relationship between the volume of good faith decisions made by judicial decision makers and the associated good faith support level. For those judicial decision makers who produced only one good faith decision, the average observed good faith support score was 2.39, with a standard deviation of .74. For those judicial decision makers who produced two good faith decisions, the average observed good faith support score was 2.33 with a standard deviation of .69. For those judicial decision makers who produced three good faith decisions, the average observed good faith decision support score was 1.99 with a standard deviation of .64, while for that small band of judicial decision makers who produced four or more good faith decisions, the average observed good faith support score was 1.63, with a standard deviation of .23.

Chart 28 – Average Support Level by Decision

Volume



The data clearly suggests that there are significant differences between the good faith attitudes of the very small minority of judges who have produced multiple good faith decisions. Specifically, this group supported implied good faith obligations far more strongly than the general population of judicial good faith decision makers, as evidenced by the inverse relationship between observed number of good faith decisions and observed mean good faith support scores. Further, note that the variation in good faith support levels also fell²⁸ as the volume of good faith decision making increased.

An understanding of the data presented on this dimension helps further illuminate the trends discerned in the jurisdiction by jurisdiction based analysis set out earlier. The prominence of judges from NSW amongst the identified ranks of high volume good faith judicial decision makers²⁹ assists in critical analysis of the mean observed good faith decision level for that state.

On one view, the voices of NSW judges critical of or cautious about implied good faith performance obligations³⁰ have simply been drowned in a high volume cascade of supportive decisions by a small band of judges. In particular, it seems pertinent to ask whether the position taken by Justice Einstein, remarkable amongst good faith decision makers for having produced nine decisions³¹ pertaining to implied good faith performance obligations during the period under review, should be seen as representative of the generally accepted Australian jurisprudence of good faith.

²⁸ As evidenced by falling the standard deviations of the decision volume stratified sub-sample good faith support scores.

²⁹ Of the seven judges identified in Charts 27 and 28, five were from NSW (the exceptions being Finn J of the Federal Court of Australia and Byrne J of the Supreme Court of Victoria).

³⁰ Including but not restricted to; Meagher JA in *Renard Constructions(ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; Rogers CJ in *GSA Gourp Pty Ltd v Seibe Plc* (1993) 30 NSWLR 573; Giles J in *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 and Simos J in *Saxby Bridge Mortgages Pty Ltd v Saxby Bridge Pty Ltd* [2000] NSWSC 433.

³¹ The final case database consisted of 128 decisions produced by 80 judges. Of these, 9 were produced by Justice Einstein. That is, Justice Einstein represented 1.25% of the total judge population identified for the purposes of this study, but produced slightly over 7% of the total decisions, an overrepresentation factor of 5.6 times. Further, and more startlingly, there were a total of 46 good faith cases identified in NSW between 1992 and 2004, of which, as noted, Justice Einstein produced 9. This means that in case volume terms, Justice Einstein alone is responsible for approximately 20% of all NSW implied good faith decisions.

Similarly, the good faith cases decided by the Federal Court of Australia are riven with irreconcilable and contradicting approaches to the good faith question. For example, in *Service Station Association Limited v Berg Bennett & Associates Pty Limited*³² Justice Gummow was invited to conclude that as a matter of law, a term should be implied into every contract that would require each party to act in good faith and with fair dealing in relation to the contract's performance and enforcement. His Honour declined to do so.

Instead, he noted that to imply such a term as a matter of law would be a major step³³, and that there was no authority which bound him to take such a step³⁴. Yet not too many years later in *Hughes Aircraft Systems International v Airservices Australia*³⁵ Justice Finn chose to brush off Justice Gummow's caution and declare that a term requiring good faith in contractual performance would as a matter of law be implied into the contract the subject of the dispute.

Despite Justice Finn's apparent dedication to the good faith cause, other members of the Federal Court of Australia³⁶ have expressed doubts as to the existence, scope and meaning of purported implied good faith performance obligations as a feature of the Australian law of contract. Again however, Justice Finn has had the benefit of volume, having had the opportunity to expound on the good faith question on four occasions (with an average observed good faith support score of 1.5), a greater number of good faith decisions than any member of the Australian judiciary barring Justices Einstein and Beazley from NSW.

Much of the observed volatility in the good faith support scores recorded for "commonwealth" jurisdiction cases may be explicable by reference to Justice Finn's unusually strong support for the notion of implied good faith performance obligations and the relatively high volume of good faith decisions which he produced over the period under review.

³² (1993) 45 FCR 84

³³ Id at 97.

³⁴ Id at 98.

³⁵ (1997) 146 ALR 1.

³⁶ For example Heerey J in *Wenzel v Australian Stock Exchange Ltd* [2002] FCAFC 400; and Heerey J in *Arrowcrest Group Pty Ltd v Ford Motor Company of Australia Ltd* [2002] FCA 1450.

5. Conclusions

The data set out in this paper paints a picture at odds with the notion of implied good faith contractual performance obligations as a settled and accepted part of the Australian law of contract. The empirical evidence suggests fractures along cross sectional (jurisdictional) lines, as well as across time. The evidence also suggests that far from being widespread throughout the judiciary, support for systemic implication of good faith performance obligations has come from a relatively narrow base. Further, there is some evidence that despite a continuation of strong advocacy from its small constituency of judicial good faith advocates, attitudes towards the notion of implied good faith performance implications have been growing more cautious in recent years.

All of these factors serve to raise doubts as to whether implied good faith performance obligations have yet become cemented into the Australian law of contract, but, as important as they may be, fail to address another question of vital practical significance, the confusion which reigns in Australian good faith cases as to the meaning of the obligation in a contractual context. An example of this phenomenon is the manner in which the decisions which purport to deal with good faith demonstrate a growing tendency to merge the terms “reasonable”, “good faith” and “fair dealing” as if they are homogenous in meaning and content.

In *Hughes Aircraft Systems* Finn J commenced his discussion of implied terms using the label “good faith”, but fell largely into references to “fair dealing” thereafter. Arguably the former is more subjective in its content, and the latter more objective. Certainly there seems no reason to equate the two. Yet many of Finn J’s reasons for suggesting the existence of an implied term requiring good faith performance were founded on the assertion that fair dealing is an expected facet of business interaction in the present climate. That may be so, but whether it logically follows that one may be conjured by invoking the other is a separate question.

Cases such as *Alcatel Australia Limited v Scarcella & Ors*³⁷ and *Garry Rogers Motors v Subaru (Aust) Pty Ltd*³⁸ appear to fall into the trap of equating reasonableness with good faith. Both of these cases cite *Renard* as authority for the existence of an implied term requiring good faith, when, viewed more precisely *Renard* is authority for the notion that a principal should exercise powers conferred by a contract reasonably³⁹. Further, there seems to be confusion as to whether good faith will be demonstrated by the absence of bad faith⁴⁰, or by the commission of reasonable acts⁴¹.

Most recently, courts in some jurisdictions appear to have accepted that at least for the moment, no clarification of this matter is likely, and have therefore attempted to resolve questions put before them with reference to multiple constructions of the concepts of good faith and reasonableness⁴², something of a scattergun approach to the problem. The consequence of this lack of clarity is that decision makers have been somewhat hamstrung by an inability to define precisely whether the standard of behaviour required of contracting parties is one of “reasonableness” or “good faith” or perhaps both⁴³. Added to the melee set out above are decisions in which the meaning of good faith is equated only with a requirement of honesty in behaviour⁴⁴, or where good faith is held to represent just another means of expressing⁴⁵ the old but still authoritative rule set out by Griffith CJ in *Butt v McDonald*⁴⁶ that:

*“...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.”*⁴⁷

³⁷ (1998) 44 NSWLR 349.

³⁸ (1999) ATPR 41-703.

³⁹ T Carlin, “The Rise (and Fall?) of Implied Duties of Good Faith in Contractual Performance in Australia” (2002) 25 (1) *University of New South Wales Law Journal* 99

⁴⁰ This approach is favoured by Finkelstein J in *Garry Rogers Motors*, who suggested that to act in good faith meant to not act capriciously.

⁴¹ Einstein J, *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236.

⁴² *Central Exchange Ltd v Anaconda Nickel Ltd* [2002] WASCA 94.

⁴³ See *Hungry Jack's Pty Ltd v Burger King Corporation* [2001] NSWSC 197.

⁴⁴ See *Linfox v Ellul & Ors* [2004] NSWSC 276 at [55].

⁴⁵ *Gilsan v Optus* [2004] NSWSC 1077 at [169].

⁴⁶ (1896) 7 QLJ 68.

⁴⁷ *Id* at 70 – 71. For an earlier construction of the same rule, see *Mackay v Dick* (1881) 6 App Cas 251 at 261 where Lord Blackburn notes that “as a general rule...where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both

Despite the opportunity to clarify the meaning of good faith as it pertains to contractual performance in the recent *Vodafone*⁴⁸ case, the NSW Court of Appeal failed to rise to the challenge, Giles JA metaphorically throwing his hands into the air and expressing disquiet about the “regrettable lack of uniformity”⁴⁹ evident in the existing Australian case law on the subject.

The data set out and discussed in this chapter reveals that in advancing their cause, Australia’s good faith evangelists must be recognised to have achieved several feats of significance. First and perhaps foremost, they succeeded in raising consciousness of a concept which prior to 1992 was essentially a non issue. Second, they took advantage of a rising tide of disputes in which consciousness enhanced litigants pleaded the existence of implied terms requiring good faith contractual performance to pronounce the existence of such terms, often in flagrant disregard for accepted pathways to the implication of terms into contracts⁵⁰. Third, as revealed above, they sustained the assertion that implied good faith performance obligations form a part of the Australian law of contract despite growing confusion as to the meaning and reach of such obligations, or the capacity of commercial actors to structure their arrangements to disclaim the existence of such obligations⁵¹.

Equally however, the data analysed and discussed in this chapter reveals that much of the success enjoyed by Australia’s good faith evangelists to date may prove

concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.” This approach is still authoritative in Australia; see, *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 especially at 607 – 608 (Mason J).

⁴⁸ *Vodafone v Mobile Innovations* [2004] NSWCA 15

⁴⁹ *Vodafone v Mobile Innovations* [2004] NSWCA 15 at [193]

⁵⁰ T Carlin, “The Rise (and Fall?) of Implied Duties of Good Faith in Contractual Performance in Australia” (2002) 25 (1) *University of New South Wales Law Journal* 99; E Peden, ‘Incorporating Terms of Good Faith in Contract Law in Australia’ (2001) 23 *Sydney Law Review* 222.; E Peden, “Good Faith in the Performance of Contract Law”, (2004), October *Law Society Journal* 64.

⁵¹ On this point see Justice Einstein in *Mobile Innovations Ltd v Vodafone Pacific Ltd* [2003] NSWSC 166. His honour was of the view that implied good faith obligations in effect supervene the express language of the agreement reached between the parties and cannot be bargained away. This directly contrasts with the more pragmatic view taken by Cox CJ in *State of Tasmania v Leighton Contractors Pty Ltd* [2004] TASSC 132, where a clause which expressly disavowed implied good faith obligations as between the parties to a contract was treated as acceptable.

ephemeral. The movement towards a good faith laced form of contract has not been supported by a strong theoretical or conceptual framework, but rather, built on a foundation consisting almost entirely of barely disguised normative assertion. Rather than rigorously exploring the desired meaning of good faith obligations, the relationship such obligations would have with other pre-existing legal and commercial constructs and the practical limits of the reach of such obligations prior to their infusion into the law, the journey of good faith into Australian law to date has been characterised by morally laced assertion as to the existence of such obligations, followed by haphazard (and arguably as yet unsuccessful) ex post attempts to attain order and meaning.

It is not difficult to conceive of how this combination of normative assertion as to the existence of good faith obligations and haphazardness in relation to their meaning and reach might have damaging effects on the core users of contract, those engaged in commerce. While some of the rhetorical discourse produced in the context of proselytising implied good faith obligations has paid lip service to “community expectations” as a justification for their introduction⁵², the better view is that those who have supported this agenda most ardently have provided little or no hard evidence that they have in fact taken even the slightest account of the views and needs of the users of contract. This represents an undesirable evolutionary trajectory for a body of law, especially one as vital to commerce as the law of contract. It is therefore to be hoped that some degree of closure in relation to this matter is brought about by the High Court of Australia in the near future.

⁵² For a critical analysis of this see: T Carlin, “Managers, Contracts and Good Faith – Challenging the Community Expectations Myth”, (2005), MGSM Working Paper 2005-12.