IT project failures and the law. Have the customers of failed IT projects lost faith in the law?

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I INTRODUCTION

An examination of the operation of the law on contracts for information technology ("IT") projects is warranted given the significantly high proportion of projects that fail or fall considerably short of what was promised. IT projects may be defined as projects that encompass computerized and automated information handling and related interactions between people and machines.[1]

An often-quoted survey is that conducted by The Standish Group in 1995. The results were astounding:

- 31.1% of projects were reported as having been cancelled before completion;
- 52.7% cost 189% more than originally estimated; and
- only 16.2% were completed on time and within budget.[2]

Although those findings have been queried[3] a 2007 European report recorded failure rates consistent with the Standish Group[4]:

- 30% of contracts were terminated prior to completion; and
- 57% of projects experienced cost overruns.

The Australian Bureau of Statistics found that for the year ending June 2007 the Australian IT market was worth over $98 billion.[5] Further, the costs of a failed IT project are not limited to the costs of the project. Defective IT can of course result in consequential damage including economic loss to contracting and other parties, increasing its impact.[6]

Numerous studies have examined the reasons for IT project failure.[7] No single major cause has been identified.[8] Poor communication, changing client needs, a lack of customer involvement, ineffective project management, the IT vendor's lack of expertise, an undisciplined project baseline, and insufficiently managed requirements[9] each contribute. Those factors operate against the background of a complex and evolving technology.

There have been some calls for the IT industry to be held accountable for a wide range of losses and damages[10] as well as for strict liability for defective software.[11] In some overseas jurisdictions there has been consideration to enacting specific legislation. In Pennsylvania, Illinois and Tennessee a "Computer Lemon Act" was proposed. Such an act would have increased the liability of manufacturers and suppliers for flawed IT.[12] Against that, however, are strong arguments that an undue burden would be imposed on manufacturers, that there are difficulties in determining the extent of liability[13] and that the development of IT would be hindered.[14]

Few reported and unreported cases exist in Australia, which, in the light of the findings mentioned above, might be regarded as surprising. By examining some of the available decisions, this paper attempts to understand why that is so and whether customers of failed IT projects may have lost faith in the law to resolve their disputes. This paper considers whether an implied term of good faith might give customers of failed IT projects a renewed faith in the law to deal effectively with disputes.

II AUSTRALIAN IT PROJECT FAILURES

A *Changing client needs*

In *Ateco Automotive Pty Ltd v Business Bytes Pty Ltd*[15] Ateco Automotive Pty Ltd ("Ateco") contracted Business Bytes Pty Ltd ("Business Bytes") to advise and install a new computerised inventory control system. The project included the supply of computer hardware, software and services. Ateco's business activities during the relevant period included the sale and distribution of cars, car parts and related products and the operation of a warehouse facility. Ateco required a computerised inventory control system that allowed it to identify its inventory and thereby to minimise stock levels.

Ateco did not have its own IT department. It relied on Business Bytes for almost all of its computer advice. Prior to and after the contract was entered into, Business Bytes asked Ateco to provide a detailed analysis of their requirements.[16] That analysis was never undertaken but Business Bytes and Ateco proceeded nevertheless. Ateco experienced rapid growth as well as significant changes to its business between the date of the contract and the commencement of the new system. It added two car marques to its

distribution business and a new warehouse. It was also required to manage year 2000 compliance issues and the introduction of the Goods and Services Tax.

After the system was installed and commissioned Ateco alleged that it was not fully operational and that the cost was greatly in excess of the sum it had agreed to pay. The plaintiff claimed damages for breach of contract, negligence and pursuant to section 82 of the *Trade Practices Act* 1974 (Cth) ("Trade Practices Act").

The trial judge agreed that the ultimate cost was well in excess of the original price, but found that that figure had been exceeded because of Ateco's failures to provide adequate instruction to Business Bytes, undergo necessary training and provide required resources to the implementation. [17] Ateco's claims were dismissed.

B *IT vendor's lack of expertise*

Durham v Aduke Pty Ltd[18] concerned software for use in the real estate and property management industry. Durham, real estate agents, entered into a contract with Aduke Pty Ltd ("Aduke") to provide third party software to be modified by Aduke to meet Durham's specific requirements.

Durham claimed that Aduke had wrongly represented that the system was user-friendly and that service would be prompt.[19]

The trial judge upheld a claim based on section 52 of the *Trade Practices Act.*[20] Aduke had recommended that 20 hours of training would be sufficient to enable use of the system. That was found to be a misrepresentation as to a future matter as substantially more training was required, about which there was an existing body of knowledge.[21] Aduke also claimed that the equipment was not fit for the purpose for which it was acquired because it did not function as required. The trial judge agreed, as the requirements had been made known in pre-contractual negotiations.[22]

C *Undisciplined project baseline*

Westsub Discounts Pty Ltd v IDAPS Australia Ltd[23] concerned a system to record the hiring of video cassettes and perform accounting functions. In pre-contractual negotiations Westsub Discounts Pty Ltd ("Westsub") highlighted its requirements that the system cater for up to 15 computer terminals and that there be a response time of no more than five seconds. IDAPS Australia Ltd ("IDAPS") submitted an agreement which did not refer to Westsub's requirements and purported to exclude reliance on representations and warranties not in the agreement. Although Westsub queried the omission of its requirements and IDAPS refused to modify the agreement, Westsub entered into the agreement nevertheless.

Westsub's business grew substantially during the implementation period. IDAPS failed to implement the system required by Westsub, including by failing to provide the required response time with capacity for up to 15 users. Westsub also lost information. IDAPS agreed to perform further work on the system if Westsub did not pursue a claim.

Westsub relied on IDAPS pre-contractual representations at to response time and capacity. IDAPS asserted that the inadequate response time was a result of the growth of Westsub. That was rejected because Westsub informed ADAP that it expected to experience growth and IDAPS failed to inquire as to what the growth might be. The inadequate response time was caused by a basic flaw in the software and which had not been known to IDAPS. Following *James v Australia and New Zealand Banking Group Ltd*[24] the court held that IDAPS' statements amounted to misrepresentations in breach of section 52 of the *Trade Practices Act*, and that the exclusion clause did not exclude the operation of that provision.[25] Firstly, the disclaimer was contained within a paragraph that primarily dealt with contractual warranties, and secondly, because the clause was presented to Westsub after several weeks of negotiations during which IDAPS failed to warn Westsub that the implemented computer system may not perform as represented, when it "was much too late to cast any doubt upon the firmness of the representations made before the contract was entered into."[26]

Significantly, the claim for breach of contract failed because of the operation of the exclusion clause.

D Insufficiently managed requirements

Unisys Australia Ltd v RACV Insurance Pty Ltd[27] concerned an IT project that was to provide a workflow management system. RACV Insurance Pty Ltd ("RACV") wished to improve handling of insurance claims and to create a paperless office. Unisys Australia Ltd ("Unisys") proposed to adapt its own product, InfoImage, to the needs of RACV.

RACV detailed its requirements for Unisys which included a mandatory response time of 2-4 seconds for document image retrieval for open claims and for claims closed within the previous three months, and a response time of 20 seconds otherwise.

Unisys delivered the system in March 1995 and it was accepted under testing. However, the system failed in operation. Unisys attempted to rectify the problems but failed to do so.

RACV successfully claimed damages for misleading or deceptive conduct, breach of contract and negligent misstatement. The trial judge found that RACV had been

induced to enter the contract by Unisys' misrepresentations as to the system's performance. The failure was due to Unisys configuring the system with insufficient memory. The trial judge stated that:

> *... a fundamental premise of the engagement, understood by Unisys, was that the system implemented would provide retrieval in a timely manner... as required to meet the business purposes of RACV... I reject the submission that under the contract Unisys was to deliver, and RACV was to accept, a system with whatever retrieval times it might come to deliver.*[28]

Under section 51A of the *Trade Practices Act* representations as to future matters will be misleading unless there are reasonable grounds for making the representation. The maker of the representation is responsible for satisfying the court that he or she had reasonable grounds for making the representation: *Wright v TNT Management Pty Ltd.*[29] The relative knowledge of both the maker of the representation and the receiver of the representation is a significant consideration: *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisation Inc.*[30] Section 51A is to be given a very wide interpretation and a representation about an existing state of mind may also be a representation as to a future matter: *Ting v Blanche.*[31] An honest belief in a statement does not constitute reasonable grounds; the overall circumstances need to be considered: *Cummings v Lewis.*[32]

The trial judge found that, contrary to its representations, Unisys did not intend to configure the system adequately by having all current claims on line.[33] There had, accordingly, been a representation as to a future matter for which there was no reasonable ground. An appeal from the decision was rejected.[34]

III WHY ARE THERE SO FEW CASES?

There are relatively few decided court cases in Australia involving IT projects gone wrong. However, this is more a reflection of the complexity and cost of running this kind of litigation than an indication that there are few disputes.[35]

Cost and ethical considerations are two factors that may prove to be the reason why there is an absence of litigation in failed IT projects. It is generally accepted that litigation is costly. The cost of litigation determines not only the price of access to justice, but impacts both the conduct and outcome of litigation.[36] High costs inhibit access to the courts and increase the attractiveness of reaching a settlement since the costs and time of litigation present a significant disincentive.[37] At the beginning of the trial of *Unisys Australia Ltd v RACV Insurance Pty Ltd* the court book consisted of 49 lever arch files containing 18,935 pages of documents.[38] The judge noted the deep pockets of the litigants. The potential to incur such costs in litigation must surely prevent smaller clients of IT vendors pursuing action if the system implemented is defective.

Lawyers arguably have an ethical duty to encourage settlement of disputes in their clients' interests and in the interests of an efficient administration of justice.[39] The duty to the client is expressed in various forms in the different Australian legal bodies' Professional Conduct Rules.[40]

It may be observed that exclusion and limitation clauses often appear in contracts for IT project:

> *Exclusion and limitation clauses, particularly those which exclude liability for indirect and consequential losses, are an accepted feature of contracts... in the Computer Industry.*[41]

The need for such clauses is that a relatively low-cost and immaterial piece of software could be responsible for very large losses.[42] As *Westsub Discounts Pty Ltd v IDAPS Australia Ltd* illustrates, exclusion clauses may not always be effective.[43] Additionally, insofar as consequential losses are concerned, unless those losses fall within one or other of the two limbs of *Hadley v Baxendale*[44] they will not be recoverable.[45] To counter the uncertainty as to how the courts will construe exclusion clauses, IT vendors might be advised to include a list of the types of losses for which the vendor will not be liable in the event of the project failing.[46]

Section 68A of the *Trade Practices Act* limits the operation of exclusion and limitation clauses. Suppliers might limit but not exclude liability for a breach of a condition or warranty for goods not ordinarily acquired for personal, domestic or household use. Liability may be limited to the replacement of goods or payment of the cost of replacing the goods.[47] For services, liability may be limited to resupplying the services or paying for the cost of the services to be resupplied.[48] Section 68A(3) requires consideration of the fairness of such a clause according to all of the circumstances of the case, including the relative bargaining power of the parties: *Qantas Airways Ltd v Aravco Ltd.*[49]

Alternative dispute resolution may be the subject of a contract.[50] In *Aiton Australia Pty Limited v Transfield Pty Limited*[51] the Court identified three criteria for an effective ADR clause:

- the process of dispute resolution must be certain and must not require further agreement by the parties on any course of action;

- the process of selecting the mediator must be prescribed; and
- the rules of the mediation process must be included or a reference made to the rules to be followed.

There exists a significant imbalance in the financial strength of some IT companies as compared to leading companies of other industries. For example, the two largest IT companies operating in Australia, IBM and Hewlett Packard, had revenues in 2005 of $91 billion and $87 billion respectively.[52] Their revenue figures dwarf those of the two largest construction companies in Australia, Leighton and Abigroup, who in 2007 earned revenues of $11 billion and $4.6 billion respectively.[53]

An IT vendor typically draws the contract or uses its own standard form. Subject to the usual rules which apply to the construction of such contracts, that may create a advantage for the supplier.[54]

Suppliers may be advised to split the contract into components of the project that together combine to form the solution.[55] It is then possible for the supplier to deliver components that work separately but do not together deliver the solution desired of the overall IT project. That scenario is analogous to a swimming pool company contracting separately to dig a hole, supply concrete and supply labour, rather than contracting to build a swimming pool to meet the client's needs. The result of such a contract could be a swimming pool which satisfies the requirements of the contract but ultimately delivers a swimming pool that is not what the client expected nor wanted.

Cases such as *Westsub Discounts Pty Ltd v IDAPS Australia Ltd*[56] and *Unisys Australia Ltd v RACV Insurance Pty Ltd*[57] demonstrate the courts' willingness to look at representations made by parties outside of the written contracts. Such an approach suggests that even where an IT project is delivered through separate contracts, unless they work together in the way that had been bargained for overall, a purchaser may gain redress.

IV IT LAW v CONSTRUCTION LAW

There are many similarities between the IT and the construction industry. Both involve a client-vendor relationship where the vendor is either the IT or construction company. The client typically enters into a contract with the vendor to engage in a project to produce an output to meet their needs, and engages the vendor for reasons including expertise, capability, and cost-effectiveness. There is usually a divergence of knowledge and expertise between the client and vendor. For the IT project, the divergence of knowledge and expertise between the client and vendor is often great.[58] And when either an IT or construction project fails, the client may pursue actions for breach of express terms under contract law or breach of the provisions of the *Trade Practices Act*.

There also exist significant differences between IT and construction. The annual value of the IT industry at $98 billion[59] nearly doubles that of the $55 billion construction industry.[60] The IT industry is a relatively recent phenomenon. The output of the construction industry is largely tangible; the output of an IT project can be intangible at least as to part. And while good faith may be seen to play a role in construction contracts,[61] it is not prominent in contracts for IT projects.

V GOOD FAITH

Contract law is to provide consistency, certainty and to assist the commercial decision making process.[62] Good faith, which encompasses co-operation, honesty, and reasonableness,[63] may assist in achieving those objectives.

Even without an express obligation of good faith, the High Court in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*[64] affirmed the principle in *Butt v McDonald*[65] that required parties to a contract to perform their obligations in a spirit of co-operation:

> *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.*

An obligation of reasonableness was discussed in *Renard Constructions Pty Ltd v Minister for Public Works,*[66] a construction case, where Priestly JA stated:

> *The kind of reasonableness I have been discussing seems to me to have much in common with the notions of good faith which are regarded in many of the civil law systems... as necessarily implied in many kinds of contract.*[67]

The Minister for Public Works had appealed against an arbitrator's finding that the principal acted unreasonably in exercising a contractual powers to terminate a contract. Priestly JA held that the principal had breached an implied duty of reasonableness by terminating the contract and had therefore repudiated the contract.[68]

A *Implying the duty of good faith*

Terms will be implied to give effect to the intention of the parties.[69] The High Court's well-known statement in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* required the following:[70]

For a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable;

(2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

The extent to which an obligation of good faith might impose duties more onerous than an obligation to behave reasonably is an interesting issue.

B *Remedies for a breach of good faith*

In cases where an obligation of good faith is found to exist, remedies for breach may include damages, injunctions and specific performance.[71]

Parker J, in *Central Exchange Ltd v Anaconda Nickel Ltd*,[72] stated that it was open to the court to award damages and make other orders for a breach of a term imposing an obligation of good faith.

C *Is an implied obligation of good faith recognised in the Australian common law?*

The value of the implied duty of good faith to IT law is further undermined when the position of good faith in Australian law is considered; as two commentators have observed:

> *To say that the role of good faith in Australian contract law is currently unsettled and that the law is in a state of flux would be an understatement. It may be closer to the mark to say that it is in a state of utter confusion.*[73]

In addition to the lack of clarity and certainty of the duty of good faith, good faith will not operate when a party to a contract is acting in their own best interests: [74]

> *... [good faith] will not operate so as to restrict decisions and actions, reasonably taken, which are designed to promote the legitimate interests of a party and which are not otherwise in breach of an express contract term.*

VI CONCLUSION

Two key matters emerge from the cases considered above. First, the length of time over which an IT project is commissioned and implemented occasions real potential for the "goal posts" to be shifted, whether because the initial project was not defined with specificity or the client's needs change as time goes on due to such things as expansion. Secondly, a client's stated needs might be misunderstood or the capacity to fulfil a client's requirements might not be appreciated (for any number of reasons). Thus, whilst suppliers of IT services seek to limit their exposure by carefully-worded contracts there is a limit to which those suppliers can adopt an attitude of 'all care, no responsibility'. Whether or not Australian courts come to recognise an implied obligation of good faith, care in both the formulation in the description of what can be delivered and in its implementation is required.

It is not possible to determine that IT clients have lost faith in the law or the law's ability to resolve disputes. However, given the intricacies involved in contracts for IT projects there is a need for suppliers and purchasers to tread carefully, failing which it would perhaps be understandable to lose faith in the law's ability to resolve disputes. Many large and costly IT projects are undertaken in Australia, a significant number of which, research suggests, give rise to disputes. This paper has identified some of the factors which might explain why relatively few cases are determined by the courts.

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[1] See, for example, State of California, *State Administration Manual* (2008) <http://sam.dgs.ca.gov/TOC/4800/4819.2.htm> at 10 October 2008.

[2] The Standish Group, (1995) 'Chaos Report' at 2.

[3] See, eg, Robert Glass, 'IT Failure Rates – 70% or 10-15%?' (2005) 22(3) *IEEE Software* 112, 112.

[4] Whitfield, Dexter, *Cost overruns, delays and terminations: 105 outsourced public sector ICT projects* (2007) European Services Strategy Unit <http://www.european-services-strategy.org.uk/publications/essu-research-reports/essu-research-report-no-3-cost-overruns-delays/> at 15 September 2008 at 3.

[5] Australian Bureau of Statistics, *8126.0 - Information and Communication Technology, Australia, 2006-07* (2008) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyReleaseDate/197D7C1F38FC3F81CA2569A4007C29A0> at 6 October 2008.

[6] See Longdin, Louise, "Liability for Defects in Bespoke Software: Are Lawyers and Information Scientists Speaking the Same Language?" (2000) 8(1) *International Journal for Law and IT* 1 and Richard Wu, 'Litigation Relating to Defective Software under Hong Kong Law – Old Bottles for New Wine?' (2000) 30 *Hong Kong Law Journal* 32.

[7] See, eg, The Standish Group, *Chaos Report* (1995).

[8] Sallie Satterthwaite, Fred Thorne, Elizabeth Weber, *Street Smarts: Why Projects Fail* (2007) CSC World < http://www.csc.com/cscworld/012007/dep/ss001.shtml> at 10 October 2008.

[9] Ibid.

[10] Zollers, Francis E., McMullin, Andrew, Hurd, Sandra N., Shears, Peter, "No more soft landings for software: liability for defects in an industry that has come of age" (2005) 21 *Santa Clara Computer & High Technology Law Journal* 745 at 781.

[11] At 782.

[12] See discussion by Rebecca Crandell, 'Recent Development: Do Computer Purchasers Need Lemon Aid?' (2002) 4(2) *North Carolina Journal of Law & Technology* 307, 309.

[13] See, eg, Patrick Miyaki, 'Computer Software Defects: Should Computer Software Manufacturers be held Strictly Liable for Computer Software Defects' (1992) 8 *Computer & High Technology Law Journal* 121, 142.

[14] Dreier, Thomas, "Law and IT—An Uneasy Marriage, or Getting Along with Each Other?" (2005) 14(3) *Information & Communications Technology Law* 207 at 207.

[15] [2003] NSWSC 197.

[16] *Ateco Automotive Pty Ltd v Business Bytes Pty Ltd* [2003] NSWSC 197 at [36] (McClellan J).

[17] At [93].

[18] [1987] WAG 154 (Unreported, French J, 6 November 1989).

[19] Ibid 31.

[20] *Trade Practices Act* 1974 (Cth).

[21] Ibid.

[22] Ibid 42.

[23] (1990) 17 IPR 185.

[24] (1986) 64 ALR 347, 372.

[25] *Westsub Discounts Pty Ltd v IDAPS Australia Ltd* (1990) 17 IPR 185, 232.

[26] Ibid.

[27] [2004] VSCA 81.

[28] At [498].

[29] (1989) 15 NSWLR 679, 689.

[30] (1992) 111 ALR 61, 106.

[31] (1993) 118 ALR 543, 553, per Hill J.

[32] (1993) 113 ALR 285, 292, per Sheppard and Neaves JJ.

[33] At [458]-[460].

[34] *Unisys Australia Ltd v RACV Insurance Pty Ltd* [2004] VSCA 81.

[35] Nicole Heller, Alison Telfer, 'Managing legal risks in IT projects' (2002) 47 *NSW Society for Computers and the Law Journal* 1.

[36] Peter Cashman, 'The cost of access to the courts' (Speech delivered at the Confidence in the Courts Conference, Canberra, 9 February 2007).

[37] Tory Strong, 'From the president: At what cost?' (2005) 79(4) *Law Institute Journal* 4, 4.

[38] *RACV Insurance Pty Ltd v. Unisys Australia Ltd* [2001] VSC 300 at [8].

[39] Gina Dal Pont, 'Ethics: A duty to encourage settlement' (2005) 79(1-2) *Law Institute Journal* 80.

[40] The duty is implicitly prescribed in Law Institute of Victoria Ltd, *Professional Conduct and Practice Rules 2005* (No. 1/2005) r 12.3 and explicitly prescribed in The Law Society of Western Australia, *Professional Conduct Rules* (July 2008) r 5.4.

[41] *The Salvage Association v CAP Financial Services Ltd* [1995] FSR 654, 657, per Forbes J.

[42] See, eg, Dennis Deutsch, 'An Introduction to Current Issues in Computer Law' (1988) 5 *Journal of Paralegal Education and Practice* 41, 44.

[43] See, eg, Grant Follett, 'Just what is "indirect or consequential loss"?' (2004) 55 *NSW Society for Computers and the Law Journal* 1.

[44] (1854) 9 Ex 341 at 354.

[45] See also Harvey McGregor, *McGregor on Damages* (1997), 16th ed, at 20 and Grant Follett, 'Just what is "indirect or consequential loss"?' (2004) 55 *NSW Society for Computers and the Law Journal* 1.

[46] Follett, above n 43.

[47] section 81A(1)(a).

[48] section 81A(1)(b).

[49] (1996) 136 ALR 510 at 512.

[50] Simone Brandon, 'Dispute resolution in IT contracting' (2002) 48 *NSW Society for Computers and the Law Journal* 1.

[51] (1999) 1 FLR 236.

[52] NetValley, Computer Industry Trends: Top 100 Companies (2006) <http://www.netvalley.com/top100am_vendors.html> at 14 October 2008.

[53] Housing Industry Association Economics Group, *Construction 100 2006-2007* (2007) <http://economics.hia.com.au/media/HIA%20Reed%20Construction%20Data%20Construction%20100%202006-07.pdf> at 14 October 2008.

[54] Nicole Heller, Alison Telfer, 'Managing legal risks in IT projects' (2002) 47 *NSW Society for Computers and the Law Journal* 1.

[55] Ibid.

[56] (1990) 17 IPR 185.

[57] [2004] VSCA 81.

[58] Blythe, Stephen E., "Contractual Liabilities for Suppliers of Defective Software: A Comparison of the Law of the United Kingdom and United States" (2005) 26 *Northwestern Journal of International Law & Business* 77 at 78.

[59] Australian Bureau of Statistics, *8126.0 - Information and Communication Technology, Australia, 2006-07* (2008) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyReleaseDate/197D7C1F38FC3F81CA2569A4007C29A0> at 6 October 2008.

[60] DataMoniter, *Construction & Engineering in Australia* (2008), p 9.

[61] Davenport, Philip, *Construction Claims* (2nd ed, 2006) 26.

[62] John Carter, David Harland, *Contract Law in Australia* (2nd ed, 1996) 13.

[63] Anthony Mason, 'Contract and its Relationship with Equitable Standards and the Doctine of Good Faith', The Cambridge Lectures, 8 July 1993, as cited by Elisabeth Peden, 'The meaning of contractual 'good faith'' (2002) 22 *Australian Bar Review* 236, 236.

[64] (1979) 144 CLR 596, 607.

[65] (1896) 7 QLJ 68, 70-71 per Griffith CJ.

[66] (1992) 26 NSWLR 234.

[67] *Renard Constructions Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 263.

[68] At 258.

[69] *Breen v Williams* (1996) 186

CLR 71, 103.

[70] (1977) 180 CLR 266 at 283.

[71] Elisabeth Peden, *Good Faith in the Performance of Contracts* (2003) at 200.

[72] [2001] WASC 128 at [25].

[73] John Carter and Elisabeth Peden, 'Good Faith in Australian Contract Law' (2003) 19 *Journal of Contract Law* 155.

[74] *South Sydney District Ruby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 at 696 (Finn J).