

# Fiduciary and Good Faith Obligations under Long Term Contracts

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## Key points

- 1 The broader question underpinning the doctrines of good faith and fiduciary relationships is: how far should the law go in setting standards of conduct in contractual relationships and dealings? At present, the answer to that question, whether under the guise of fiduciary obligations, good faith, estoppel, or otherwise, appears to depend upon the touchstone of the parties' reasonable expectations. Reasonable expectations arise by reference to the character and terms of the contractual relationship, the context, and how the parties have conducted themselves in their relationship.
2. When considering the existence of fiduciary relationships, a distinction must be drawn between the negotiation phase and the performance phase of the relationship.
3. Good faith is used in three common ways (to impose obligations to act cooperatively or reasonably, to provide grounds for judicial review, and to prevent the recapture of foregone opportunities) but the meaning of good faith necessarily depends on the contract's terms, the parties' manifest purpose, and the parties' reasonable expectations.

Long term contracts are a phenomenon about which I speak with some passion. I realised some time back that of my 17 years as a Judge of the Federal Court, between six and seven years had been devoted to eight long cases, four of which were contracts. What became glaringly apparent to me as I did these cases – and became exaggeratedly so during my work on the preparation of the UNIDROIT *Principles of International Commercial Contracts* – was that our contract law is in a primitive and often unfriendly state for contractors when one is dealing with lengthy relational contracts. It must be said, regrettably, that the High Court for the moment seems determined to keep our law as it is.<sup>1</sup>

<sup>1</sup> The latest instalment we have been given is distinctly unpromising. I refer of course to the observations on contextual interpretation made in rejecting a special leave application in *Western Export Services Inc v Jireh International Pty Ltd* (2011) 282 ALR 604. I will not enter upon what is the status of those observations in Australian law.

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