The Enforceability of Agreements to Negotiate in Good Faith

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Abstract

This article considers the implications of the recent decision of the New South Wales Court of Appeal in *United Group Rail Services v Rail Corporation of New South Wales.* That decision appears to have opened the way for widespread use of effective agreements to 'negotiate in good faith' despite the previous orthodoxy that such contractual terms are void for uncertainty. The article considers the correctness of the decision and whether the autonomy of parties in formulating their bargain to achieve commercial certainty should be privileged above a strict reliance on the rules of contract law. In approaching these questions the article draws on international learning and statutory examples of 'good faith negotiation' clauses.

I INTRODUCTION

In *United Group Rail Services Ltd v Rail Corporation of New South Wales*,[1] the New South Wales Court of Appeal purported to answer a question which had long vexed contract law: will a court enforce an agreement to negotiate? It held that a dispute resolution clause requiring the parties to a complex commercial contract to 'meet and undertake genuine and good faith negotiations'[2] was an enforceable obligation. The judgment was in accordance with widespread academic opinion.[3]

Yet there are indications that the controversy concerning agreements to negotiate in good faith might not have been finally quelled. That is because the case concerned an agreement to negotiate in the context of a dispute resolution clause in a concluded contract. Therefore, cases where the agreement to negotiate is made prior to a fully

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1 (2009) 74 NSWLR 618 ('*United Group*').

2 Ibid [5] (Allsop P).

3 See, eg, Jeannie Marie Paterson, 'The Contract to Negotiate' (1996) 10 *Journal of Contract Law* 120; Adrian Bellemore, 'Genuine and Good Faith Negotiations' (2009) 25 *Building and Construction Law Journal* 368; Jeff Cumerbatch, 'In Freedom's Cause: The Contract to Negotiate' (1992) 12 *Oxford Journal of Legal Studies* 587; John W Carter, Elisabeth Peden and Greg Tolhurst, *Contract Law in Australia* (LexisNexis Butterworths, 5th ed, 2007) [4–14].

concluded contract[4] are distinguishable in fact. Further, the effect of the decision on parties outside New South Wales is uncertain.[5] Because the Court of Appeal's decision can be interpreted as going against the combined wisdom of courts in the United Kingdom,[6] Hong Kong,[7] Canada[8] and several experienced commercial judges in Australia,[9] there remains the possibility that it will not be followed by judges in other Australian jurisdictions. As if to illustrate this concern, only five months after *United Group* was handed down, a judge of the West Australian Supreme Court observed that the law on the enforceability of agreements to negotiate was 'not abundantly clear'.[10] Regrettably, parties to commercial contracts remain without guidance from the High Court of Australia on this important question as no special leave application was brought against the Court of Appeal's judgment.

This article considers the correctness and effect of the Court of Appeal's judgment, and questions arguments frequently put forward to deny the enforceability of agreements to negotiate in good faith. Non-enforceability would, it is submitted, have serious consequences for the principle of freedom to contract and represent a departure from previously accepted maxims of interpretation of commercial contracts. Ultimately, I argue that such provisions ought to be enforceable, and, with a view to providing an element of certainty for parties to commercial agreements, suggest how drafters of these clauses might be able to ensure enforceability.

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[4] See, eg, *Walford v Miles* [1992] 2 AC 128.

[5] The question of whether *United Group* will be adopted by courts in other states will be governed by the High Court's recent holding that 'intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction ... unless they are convinced that [they are] plainly wrong.': *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–2 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

[6] *Walford v Miles* [1992] AC 128.

[7] *Hyundai Engineering & Construction Co Ltd v Vigour Ltd* [2005] 3 HKLRD 723.

[8] See, eg, *Edperbrascan Corp v 117373 Canada Ltd* (2000) 50 OR(3d) 425 (Ontario Superior Court of Justice), affd (2002) 22 BLR (3d) 42 (Ontario Court of Appeal).

[9] Allsop P in *United Group* (2009) 74 NSWLR 618, 635, himself acknowledged that his holding that the clause was enforceable went against judgments by eminent Australian commercial judges, notably Handley JA's judgment in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1; Giles J's judgment in *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194; and Hammerschlag J's judgment in *Laing O'Rourke (BMC) Pty Ltd v Transport Infrastructure Development Corp* [2007] NSWSC 723 (17 July 2007) ('*Laing*').

[10] *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd (No 3)* [2009] WASC 352 (1 December 2009) [96] (Murray J). See also *Guthrie v News Ltd* [2010] VSC 196 (14 May 2010) [62] where Kaye J considered it unnecessary to deal with the question of whether a provision requiring re-negotiation of a contract of employment was enforceable, leaving open the question of whether *United Group* was rightly decided.

II *UNITED GROUP* AND ITS PRECURORS

A *Facts*

The United Group Rail Corporation ('United') had made a contract with the Rail Corporation of New South Wales under which United would design and build new rolling stock for use by the Rail Corporation.[11] A dispute arose between the parties. United sought to rely on the dispute resolution clause of the contract which, in part, provided for a 'senior representative' of each party to 'meet and undertake genuine and good faith negotiations with a view to resolving the dispute'.[12] United contended that that provision was unenforceable by the Rail Corporation. Rein J at first instance held the negotiation clause to be 'valid and enforceable.'[13]

B *The Confused History of Good Faith Negotiation Clauses*

In the Court of Appeal, Allsop P referred at length to the multitude of earlier cases on the question of good faith negotiation clauses. It is useful to trace briefly the history of such clauses to understand how the question of enforceability came to be shrouded in controversy, and also to understand the reasons regularly put forward by courts in favour of denying enforceability. This history begins with *Hillas & Co Ltd v Arcos Ltd*[14] where Lord Wright said:

> There is then no bargain except to negotiate, and negotiations may be fruitless and end without any contract ensuing; yet even then, in strict theory, there is a contract (if there is good consideration) to negotiate ...[15]

However, over forty years later in *Courtney & Fairbairn Ltd v Tolani Brothers (Hotels Ltd)*,[16] Lord Denning, sitting as Master of the Rolls in the Court of Appeal, expressed the view that 'that tentative opinion by Lord Wright does not seem ... to be well founded.'[17] Denning MR considered that it was open to him to take the opposite view. He held

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11 *United Group* (2009) 74 NSWLR 618, 621 (Allsop P).

12 *United Group Rail Services Ltd v Rail Corporation NSW* [2008] NSWSC 1364 (28 November 2008) [2] (Rein J).

13 Ibid [16].

14 (1932) 147 LT 503 ('*Hillas*').

15 *Hillas* (1932) 147 L.T. 503, 515.

16 [1975] 1 WLR 297.

17 *Courtney & Fairbairn Ltd v Tolani Brothers (Hotels Ltd)* [1975] 1 WLR 297, 301 ('*Courtney & Fairbairn*'). The correctness of Denning MR's use of the word 'tentative' is open to some doubt. Although it is true that that Lord Wright's views were obiter, there is nothing in his words to signify any degree of unease or uncertainty. The use of the words 'in strict theory' appear to suggest, by contrast, that Lord Wright had firmly reached the view that such a contract was enforceable under classical rules of contract.

that the law 'cannot recognise a contract to negotiate' because it would be 'too uncertain to have any binding force.'[18]

In 1992, the House of Lords in *Walford v Miles*[19] held that Denning MR's decision as to the enforceability of agreements to negotiate should be preferred. The occasion was an appeal by the Walfords who were prospective purchasers of a photograph processing business. The vendors eventually decided to sell the business to a third party. The Walfords' statement of claim alleged that the vendors had agreed to be 'locked-out' from 'dealing with any third party' and also, impliedly, 'locked-in to dealing with the plaintiffs.'[20] Lord Ackner then explained that 'the reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty.'[21] However, Lord Ackner went further than Denning MR and attempted to explain the nature of the uncertainty, asking rhetorically: 'how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an "agreement"?'[22] For Lord Ackner, therefore, the uncertainty seemingly inherent in such clauses derived from what he perceived as their practical unworkability.

The decision of the House of Lords in *Walford v Miles* was unanimous[23] and the issue has not been reconsidered at length by the House of Lords in the eighteen years since it was decided. Indeed the Privy Council recently observed that 'the principle that an alleged contract is ineffective or unenforceable in law because it is ... an agreement to agree, is well established, and remains an important principle.'[24] Allsop P, however, rightly emphasised that these English 'precedents are useful [only] to the degree of persuasiveness of their reasoning'.[25]

C *The Australian Authorities:* Coal Cliff

Coal Cliff, decided in 1991, constituted a landmark decision on the question of the enforceability of good faith negotiation clauses and appeared to herald a new era of potential enforcement of negotiation

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18 Ibid.

19 [1992] 2 AC 128.

20 Ibid 135 (Lord Ackner).

21 Ibid 138.

22 Ibid.

23 Lord Ackner for Lords Keith, Goff, Jauncey and Browne-Wilkinson.

24 *National Transport Co-operative Society v A-G (Jamaica)* [2009] UKPC 48 (26 November 2009) [61] (Lord Neuberger for Lords Phillips, Rodger, Walker, Neuberger and Collins). Their Lordships' comments can be interpreted as a rebuke of the English Court of Appeal's decision in *Petromec Inc v Petroleo Brasileiro SA Petrobas* [2006] 1 Lloyd's Rep 121 ('*Petromec*') where the Court questioned the universal applicability of the *Walford* principle. The facts and relevance of *Petromec* in the ongoing debate over enforceability will be discussed later in this article.

25 *United Group* (2009) 74 NSWLR 618, 626.

clauses. Because it was cited with approval by Allsop P in *United Group*,[26] it is worth briefly examining the basis for the decision. *Coal Cliff* dealt with a preliminary agreement setting out the basis of a proposed joint venture. The agreement included a statement that 'the parties will forthwith proceed in good faith to consult together upon the formulation of a more comprehensive and detailed Joint Venture Agreement'.[27] Although the Court held that the agreement to negotiate was not enforceable on the facts, there was much in the judgment to encourage proponents of such agreements.[28] Indeed, Kirby P, with whom Waddell AJA 'generally' agreed,[29] expressed the view that 'provided there was consideration for the promise, in some circumstance[s] a promise to negotiate in good faith will be enforceable, depending upon its precise terms.'[30] His Honour held the clause to be 'too illusory or too vague and uncertain to be enforceable'[31] principally because of the high number of points of disagreement between the parties and the fact that there had already been three years of negotiations between the parties which had not greatly advanced resolution of the matter.[32] Handley JA, however, cited Denning MR's judgment in *Courtney & Fairbairn*[33] to hold that a promise to negotiate in good faith cannot be binding.[34] He further stated that 'there are no identifiable criteria by which the content of the obligation to negotiate in good faith can be determined.'[35]

D *The Court of Appeal's Reasoning*

In *United Group*, the New South Wales Court of Appeal directly confronted the question of whether *Coal Cliff*, which allowed for the enforceability of agreements to negotiate in some circumstances, or *Walford*, which did not, should guide the development of Australian law. Allsop P, who gave the judgment of the Court of Appeal, appears to have approached the issue with a view to settling it conclusively,

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26 *United Group* (2009) 74 NSWLR 618 , 636 (Allsop P).

27 *Coal Cliff* (1991) 24 NSWLR 1, 13 (Kirby P).

28 See, eg, Paterson, above n 3.

29 *Coal Cliff* (1991) 24 NSWLR 1, 44. In *United Group* (2009) 74 NSWLR 618, 635, noted that Waddell AJA's use of the word 'generally' was unfortunate given that it created 'some doubt as to the extent of concurrence' with the reasons of Kirby P.

30 *Coal Cliff* (1991) 24 NSWLR 1, 26 (Kirby P).

31 Ibid 27 (Kirby P), quoting *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130, 156 (McHugh JA).

32 *Coal Cliff* (1991) 24 NSWLR 1, 27 (Kirby P). It can be argued that these reasons mingle questions of whether an enforceable agreement existed and what remedy should be imposed. They appear to be more suited to deciding that specific performance of the negotiation agreement would not be enforced given the futility of doing so according to the equitable maxim that 'equity, like nature, does nothing in vain': *Seeley v Jago* (1717) 1 P Wms 389.

33 [1975] 1 WLR 297.

34 *Coal Cliff* (1991) 24 NSWLR 1, 38-40 (Handley JA).

35 Ibid 43.

stating that he did not 'find the views of Lord Ackner in *Walford v Miles* persuasive.'[36] Ultimately, the Court held that:

> a promise to negotiate … genuinely and in good faith with a view to resolving claims to entitlement by reference to a known body of rights an obligations, in a manner that respects the respective contractual rights of the parties, giving due allowance for honest and genuinely held views about those pre-existing rights is not vague, illusory or uncertain.[37]

This is clearly in conflict with the English decisions of *Courtney & Fairbairn* and *Walford*, at least insofar as those decisions have been interpreted as applying a blanket ban to enforceability of agreements to negotiate by declaring them to 'lack the necessary certainty.'[38] Yet, as noted above, it may be too soon to declare that *Walford* no longer affects the law of Australia as there is scope for an argument that *United Group* is 'plainly wrong'[39] given that the rule in *Courtney & Fairbairn* and *Walford* was well established, had attracted sporadic judicial support in this country,[40] and has not been overturned by the High Court of Australia.

There remains, therefore, a possibility that *United Group* has not fully settled Australian law on the point of the enforceability of agreements to negotiate in good faith. At the very least, it is evidence of a judicial willingness to look beyond the constraining approach evinced by *Courtney & Fairbairn* and *Walford*. It is useful then to consider why there has been a noticeable shift in judicial thinking towards enforcing these agreements by looking at the importance of negotiation in commercial dealings, and, in turn, the importance of commercial reality in developing commercial law.

III THE PROPER PLACE OF AGREEMENTS TO NEGOTIATE IN COMMERCIAL LAW

A *The Correct Approach to Interpreting Commercial Contracts*

In *Coal Cliff*, Kirby P pointed out that 'the law of contracts serves the marketplace. It does not exist to satisfy lawyers' desires for neat rules.'[41] It is also well established that 'the law should strive to uphold a contract wherever possible to avoid the reproach of being the

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36 [2009] NSWCA 177 (3 July 2009) [65].

37 (2009) 74 NSWLR 618, 639 (Allsop P).

38 *Walford v Miles* [1992] 2 AC 128, 138 (Lord Ackner).

39 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151-2 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

40 See, eg, Handley JA's judgment in *Coal Cliff*; *Laing O'Rourke v Transport Infrastructure* [2007] NSWSC 723 (17 July 2007) [41] (Hammerschlag J); *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709, 716 (Giles J) ('*Elizabeth Bay Developments*').

41 *Coal Cliff* (1991) 24 NSWLR 1, 22.

destroyer of bargains.'[42] The usual caveat to this permissive approach — that the court will not rewrite the bargain of the parties[43] — applies with reduced force here where the parties have themselves clearly identified the required conduct: to negotiate in good faith. Decisions that agreements to negotiate in good faith are unenforceable are put forward as regrettable counterpoints to these maxims of permissive interpretation of commercial contracts. Lord Steyn perhaps represents the vanguard of *Walford*-criticism on this ground. He labelled the decision 'curious' and expressed the hope that 'if the issue were to arise again, with the benefit of fuller argument ... the concept of good faith would not be rejected out of hand.'[44] Further, he saw the concept of good faith negotiation as 'entirely practical and workable.'[45] These objections to *Walford* recall Lord Devlin's aphorism that 'the commercial law should foster and support commercial practice, not fight it.'[46] The rejection of good faith negotiation clauses is a clear example of contract law fighting sensible commercial practice, and replacing it with 'technical distinctions'.[47] It is useful in this regard to briefly demonstrate why agreements to negotiate are commercially desirable. That is because the reasons commercial parties include such clauses are relevant in defining the commercial practice that the law is to serve. That much was acknowledged by Lord Wilberforce in *Reardon Smith Line v Hansen-Tangen* where His Lordship said that 'in a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.'[48]

B *Distinguishing Two 'Classes' of Agreement to Negotiate*

This section of the article aims to set out the commercial context relevant to interpretation of agreements to negotiate in good faith, as well as to identify and define the two classes of agreements to negotiate that arise in the cases. Such classification is important because the answer to the question of enforceability may well depend on the class into which the agreement to negotiate falls.

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42 *Hillas and Co Ltd v Arcos Ltd* (1932) 147 LT 503, 514.

43 See, eg, *Placer Development Ltd v Commonwealth* (1969) 121 CLR 353.

44 Johan Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 *Law Quarterly Review* 433, 439.

45 Ibid.

46 Patrick Devlin, 'The Relation Between Commercial Law and Commercial Practice' (1951) 14 *Modern Law Review* 249.

47 Johan Steyn, 'Does Legal Formalism Hold Sway in England?' (1996) 49 *Current Legal Problems* 43, 52.

48 [1976] 1 WLR 989, 995 ('*Reardon Smith Line*'). This observation has been endorsed by the High Court of Australia: *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 350 (Mason J); *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 462 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

1 *Preliminary Agreements*

The first class comprises agreements to negotiate which provide for 'further negotiations before the proposed agreement will be complete.'[49] The facts of *Coal Cliff* provide an illustration. In that case, the purported negotiation agreement provided for negotiation as to the terms of the complete joint venture agreement between the parties. The agreement to negotiate was made at a time when the parties 'had a long way to go before they [could] reach complete agreement'[50] on the joint venture terms. Indeed, it was the very fact that the parties had so long to go before agreement was reached that led Kirby P to hold the negotiation clause unenforceable.[51] Agreements to negotiate in this class, as will be seen later in this article, run the risk of falling within the general prohibition on agreements to 'agree at some time in the future.'[52]

The use of agreements to negotiate further terms in good faith reflects the commercial reality that contracts are often the result of several 'rounds' of negotiation, agreement on certain points and re-negotiation resulting in more comprehensive agreement.[53] If agreements to negotiate in good faith prove unenforceable, costs incurred by one party in undertaking preliminary negotiations would prove in vain should the other party capriciously and unilaterally abandon the negotiation before further rounds of negotiation. Agreements to negotiate can therefore provide a measure of certainty and assurance that money spent on preliminary dealings will not be wasted. Another reason why parties might wish to include an agreement to negotiate in good faith is to ensure that negotiations do not get bogged down and become needlessly protracted by one party's delaying tactics or refusal to participate. Negotiations are often affected by momentum and 'the flow of a negotiation can be slowed down and speeded up' by the actions of the parties.[54] In this sense, a clause requiring negotiation in good faith, if enforced, can constitute an 'action-forcing event'[55] ensuring that negotiations do not stagnate.

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49 Paterson, above n 3, 121.

50 Michael Furmston, 'Letters of Intent and Other Preliminary Agreements' (2009) 25 *Journal of Contract Law* 95.

51 *Coal Cliff* (1991) 24 NSWLR 1, 27.

52 *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600, 604 (Gibbs CJ, Murphy and Wilson JJ).

53 E Allan Farnsworth, 'Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations' (1987) 87 *Columbia Law Review* 217. See also J W Carter, 'The Renegotiation of Contracts' (1998) 13 *Journal of Contract Law* 185.

54 Michael Watkins, 'Building Momentum in Negotiations: Time-Related Costs and Action-Forcing Events' (1998) 14 *Negotiation Journal* 241, 248

55 Ibid 242.

2 *Dispute Resolution Agreements*

The second class of agreements to negotiate are those contained within appropriate dispute resolution ('ADR')[56] clauses in a concluded contract. The provisions are designed to have effect not during negotiations of the contractual terms, but during the operation period of the concluded contract. Such a clause will provide, for example, that in the event of a dispute arising between the parties they will, instead of resorting to litigation, agree to negotiate in good faith with a view to resolving the dispute. Such clauses were recently the subject of decisions by the New South Wales Court of Appeal in *United Group* and by the Queensland Supreme Court in *ACMI (IO) Pty Ltd v Aquila Steel Pty Ltd*.[57] The clause considered in *ACMI* is typical. In that case the parties had included in their joint venture agreement a detailed dispute resolution clause requiring, in part, the parties '[t]o use all reasonable efforts in good faith to resolve any dispute which arises between them in connection with this Agreement ...'[58] It was argued that the clause was illusory and conferred no legal rights.[59] There existed some support for that proposition. In *Elizabeth Bay Developments*, Giles J had held that an agreement to negotiate in good faith to resolve a dispute would require 'conduct of unacceptable uncertainty.'[60] Douglas J, however, refused to follow Giles J's judgment and held that the clause was not an uncertain agreement to agree.[61] In doing so, he drew attention to the difference between agreements to negotiate in dispute resolution agreements and those contained in preliminary agreements, such as in *Walford* where the agreement is, 'in effect ... an agreement to negotiate a further agreement.'[62] Allsop P, considering a substantially similar clause, came to the same conclusion in *United Group*.[63] These decisions are evidence of a move away from the restrictive approach evinced by Giles J in *Elizabeth Bay Developments* and a recent trend towards enforcement of agreements to negotiate in the dispute resolution context.

It is worth considering why ADR negotiation clauses have become standard terms of commercial contracts with a view to understanding why they warrant the protection of a permissive approach to contractual interpretation. One potential advantage is that negotiations, unlike litigation, are private. Another is that ADR

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56 'ADR', traditionally meaning 'alternative dispute resolution' has, in recent times, been reinterpreted to mean 'appropriate dispute resolution': Carrie Menkel-Meadow, 'The Public Functions and Accountability of ADR' (Speech delivered at the Civil Justice Research Group, University of Melbourne, 10 May 2010).

57 [2009] QSC 139 (4 June 2009) ('*ACMI*').

58 Ibid [2] (Douglas J).

59 Ibid [11] (Douglas J).

60 (1995) 36 NSWLR 709, 716.

61 Ibid [30].

62 Ibid.

63 [2009] NSWCA 177 (3 July 2009) [74].

clauses can be especially valuable in *relational* contracts:[64] contracts that foster a continuing relationship between the parties extending 'beyond the single discrete transaction'[65] carried out by the instant agreement. Negotiators are capable of giving more weight to the importance of keeping up a workable business relationship than a court single-mindedly applying classical contract law. Thus, ADR clauses are often found in agreements requiring a contract with a lengthy operational period requiring co-operation between the parties during which disputes might arise. Project agreements for public-private partnerships provide a useful example. As part of an elaborate dispute resolution clause, the project agreement for the Victorian Desalination Project requires the 'Senior Project Group to 'consult and negotiate in good faith'.[66] Similarly, project agreements in Canada generally require parties to 'resolve by amicable negotiations any and all [d]isputes arising between them'.[67] Such agreements have become part of the typical contractual structure of such deals and exemplify a commercial recognition of their utility. Yet calls for these clauses to be enforceable on the grounds of their utility in relational contracts[68] have been met by claims that there is no such thing as 'relational contract law', and that these contracts warrant no special relaxation of traditional contractual rules.[69] However, it is suggested that there does not need to be a recognised, distinct body of principle for relational contracts for these agreements to be enforceable. That is because classical principles of contractual interpretation, including the deference given to the commercial sense of an obligation,[70] should suffice to render the negotiation clause enforceable.

Negotiation clauses are therefore of great potential value in commercial transactions. Preliminary agreements are valuable in ensuring that costs incurred in preliminary negotiations are not wasted by preventing the other party from capriciously abandoning further rounds of negotiation. Further, effective use of negotiation clauses in ADR agreements can erase or minimise litigation. The utility of contract law in fostering commerce will be greatly increased if such clauses are enforceable, and it is 'difficult to see who benefits' from a decision that an 'agreement to negotiate is not in law an

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64 For a judicial definition of relational contracts, see *Bobux Marketing Ltd v Raynor Marketing Ltd* [2002] 1 NZLR 506, 516-7 (Thomas J).

65 See, eg, Richard E Speidel, 'The Characteristics and Challenges of Relational Contracts' (2000) 94 *Northwestern University Law Review* 823, 824.

66 Project Agreement for the Victorian Desalination Project, available from <www.partnerships.vic.gov.au>.

67 Project Agreement for the Niagara Health Centre, available from <http://www.infrastructureontario.ca>.

68 For this argument in the related context of franchise agreements, see Andrew Terry and Cary Di Lernia, 'Franchising and the Quest for the Holy Grail: Good Faith or Good Intentions' (2009) 33 *Melbourne University Law Review* 542.

69 Melvin Eisenberg, 'Why There is no Law of Relational Contracts' (2000) 94 *Northwestern University Law Review* 805, 821.

70 [1976] 1 WLR 989, 995 (Lord Wilberforce).

effective contract'.[71] The remainder of this article critically examines objections to the enforceability of negotiation agreements and offers suggestions on how those objections might be overcome.

IV OBJECTIONS TO ENFORCEABILITY

This part of the article focuses on objections courts have employed to deny enforcement of agreements to negotiate. It seeks to explore whether they are justified, and explain their different operation in the case of preliminary agreements and ADR agreements.

A *The Certainty Objection*

1 *Preliminary Agreements*

In 1969, Professor Knapp wrote that the suggestion that contracts to bargain should be enforceable required 'some indulgence' and a 'certain amount of irreverence'.[72] To a large degree, judges have not granted that indulgence, and clauses providing for negotiation before final agreement is reached have regularly been held unenforceable. In *Courtney & Fairbairn*, Denning MR explained that negotiation clauses are 'too uncertain to have any binding force.'[73] This negative approach was continued in *Walford*. In Australia, Handley JA in *Coal Cliff* linked the justification for unenforceability with the general prohibition on 'agreements to agree'[74] set out in *Booker Industries Pty Ltd v Wilson Parking (Qld) Ltd*.[75]

It is, however, possible to trace an argument that agreements to negotiate should not be held to be unenforceable agreements to agree. It is submitted that it is overly simplistic to assimilate agreements to negotiate into the broader category of agreements to agree, provided that the subject matter of the negotiation is clearly set out.[76] It is important to remember — and it often seems to be overlooked — that an agreement to 'negotiate' is not the same as an agreement to 'agree'. An obligation to negotiate does not say anything about the end product of those negotiations. It does not require the parties to agree by some unspecified means.[77] It is merely an agreement whereby the parties are under an obligation to carry out a certain activity: to negotiate in good faith. Thus Rein J at first instance in *United Group Rail Services Ltd v Rail Corporation New South Wales* described the

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71 J W Carter and M P Furmston, 'Good Faith and Fairness in the Negotiation of Contracts: Part II' (1995) 8 *Journal of Contract Law* 93, 113.

72 Charles Knapp, 'Enforcing the Contract to Bargain' (1969) 44 *New York University Law Review* 673, 673.

73 [1975] 1 WLR 297, 301.

74 *Coal Cliff* (1991) 24 NSWLR 1, 41.

75 (1982) 149 CLR 600, 604 (Gibbs CJ, Murphy and Wilson JJ).

76 See, eg, Paterson, above n 3, 124.

77 On this distinction, see, eg, Amy Schmitz, 'Confronting ADR Agreements' Contract/No-Contract Conundrum with Good Faith' (2006) 56 *De Paul Law Review* 55, 83.

obligation as having 'content', and refused to consign it to the category of agreements to agree.[78] The rationale for the rule against agreements to agree simply does not apply. In *Ridgway v Wharton*, Lord Wensleydale said that the reason not to enforce agreements to agree is that 'it is absurd to say that a man enters into an agreement till the terms of that agreement are settled. Until those terms are settled he is perfectly at liberty to retire from the bargain.'[79] However, in a simple negotiation clause there is a settled obligation to negotiate. No more terms need to be settled and it is not clear why a party should be permitted to resile from its bargain without carrying out the conduct it agreed to perform by making it to the negotiation table. Methods of drafting designed to give the obligation 'content' such that it will be more clearly enforceable will be discussed later in this article.[80]

Take, for example, the typical case in which a lease 'provide[s] for a renewal at a "rental to be agreed"'.[81] Assume also that the parties agree to negotiate in good faith as to the rental price. As it stands, the renewal provision is plainly an agreement to agree[82] as a vital matter (price) has been left for further agreement and there is no external machinery to determine a price.[83] There is, however, no reason why the obligation to negotiate cannot be severed from the obligation to renew the lease. Similarly any provision requiring rent in the ordinary pre-renewal situation is unaffected by the uncertainty of the renewal provision. Importantly, enforcing the agreement to negotiate will not leave the court in the invidious position of having to set the renewal price itself because the extent of the obligation is only to negotiate. In *Re Galaxy Media Pty Ltd (in liq)*, Santow J observed that a contract '*in so far as* it contains a stipulation which amounts to no more than an agreement to agree must, *as regards at least that stipulation*, be unenforceable.'[84] The obligation to negotiate will, in many cases, plainly be intended to 'take effect notwithstanding the failure [of the renewal provision]'[85] as the negotiation is intended to precede operation of the uncertain clause. Thus if the renewal provision suffers from uncertainty, the negotiation clause is unaffected and remains enforceable. An analogy can be drawn with contracts providing for arbitration where the arbitration clause itself is considered independent and severable from the main agreement.[86]

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78 [2008] NSWSC 1364 (17 December 2008) [9].

79 (1857) 6 HL Cas 238; 10 ER 1287, 1313.

80 See below pt VI.

81 Ibid.

82 Ibid.

83 See, eg, *Godecke v Kirwan* (1973) 129 CLR 629, 645.

84 (2001) 39 ACSR 483 (emphasis added).

85 *Whitlock v Brew* [1967] VR 803; aff'd (1968) 118 CLR 445, 461 (Taylor, Menzies and Owen JJ).

86 See, eg, *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, 102 (Allsop J).

Here, too, there is no clear reason why the obligation to negotiate, being independent from the main agreement, should be infected by uncertainty.

Once it is acknowledged that an agreement to negotiate is not synonymous with an agreement to agree, and that, in any event, the obligation is only to carry out the promise to negotiate and not to perform an uncertain obligation, then all difficulties should disappear. This article suggests that the more permissive approach to these clauses in the United States should be preferred to the current state of Australian law. The *Restatement (Second) of Contracts* 'does not deal with good faith in the formation of a contract'[87] and expressly excludes negotiation from the ambit of § 205 which imposes a general duty of 'good faith and fair dealing' in the performance of contracts.[88] Since the publication of the *Restatement*, however, the law has developed such that the 'prevailing view' in the United States is that express agreements to negotiate in good faith are enforceable.[89] This is consistent with the view expressed in the *Restatement* that 'bad faith in negotiation', although not subject to § 205, 'may be subject to sanctions.'[90] The Court of Appeals for the 2nd Circuit, for example, recognises the enforceability of clauses where 'the parties recognize the existence of open terms, even major ones, but, having agreed on certain important terms, agree to bind themselves to negotiate in good faith to work out the terms remaining open.'[91] The extent of the obligation imposed by such clauses is '*only to negotiate in good faith* toward conclusion within the agreed framework.'[92] In so deciding, the 2nd Circuit acknowledged that, ordinarily, 'manifestations of assent that require further negotiation … do not create binding obligations.'[93] It noted that intended legal effect of *preliminary* agreements to negotiate in good faith is simply to 'limit the parties' discretion in the conduct of negotiations',[94] and not, for example, to surreptitiously allow the enforcement of a clause which still has essential details to be worked out. This article suggests that the approach of the 2nd Circuit correctly recognises that there is no reason why the obligation to negotiate should be affected by the uncertainty

87 American Law Institute, *Restatement (Second) of Contracts* (1981) § 205 cmt (c).

88 Ibid § 205.

89 Nili Cohen, 'Pre-Contractual Duties: Two Freedoms and the Contract to Negotiate' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon Paperbacks, 1995) 25, 40.

90 *Restatement (Second) of Contracts*, above n 87, § 205 cmt (c).

91 *Shann v Dunk*, 84 F 3d 73 (2nd Cir, 1996) 11-2 (Leval J). As of 2007, this 'framework' for analysing preliminary agreements 'is followed in at least thirteen states, sixteen federal district courts and seven federal circuits': Alan Schwartz and Robert E Scott, 'Precontractual Liability and Preliminary Agreements' (1997) 20 *Harvard Law Review* 661, 663.

92 *Shann v Dunk*, 84 F 3d 73 (2nd Cir, 1996) 12 (Leval J) (emphasis added).

93 Ibid 11 (Leval J).

94 Paterson, above n 3, 121.

of the obligation to which it is attached, such as, in my example, the renewal provision in the lease.

2 *ADR Agreements*

The certainty objection has also caused problems in the context of agreements to negotiate within dispute resolution provisions. In *Laing*, for example, Hammerschlag J held that an ADR negotiation clause was uncertain because there was no 'objective yardstick by which to measure the good faith or otherwise of a negotiating party's stance.'[95] However, there now appears to be an established trend in favour of certainty which correctly privileges the commercial importance of these clauses.[96] In both *United Group*[97] and *ACMI(IO)*,[98] courts have held that agreements to negotiate to resolve disputes are enforceable. In *ACMI(IO)*, Douglas J noted the distinction that ADR negotiation clauses are agreements 'about the process to adopt when the participants agree'[99] and not agreements to finalise an agreement on open terms. This approach is entirely in accordance with a liberal interpretation of the clause which promotes the public policy behind ADR agreements.[100] The elements of that public policy have been thoroughly explored in the literature and include substantial savings in litigation costs and, from a public perspective, the freeing up of judicial resources.[101] The tension between holding an agreement to negotiate uncertain and the benefits of ADR was noted in England by Colman J, who said, in terms also applicable to the Australian context: 'For the courts now to decline to enforce contractual references to ADR on the grounds of intrinsic uncertainty would be to fly in the face of ... public policy...'[102]Although not referred to in *United Group* or *ACMI(IO)*, it appears that the High Court's decision in *Thorby v Goldberg*[103] offers additional support for enforcing agreements to negotiate to

95 [2007] NSWSC 723 (17 July 2007).

96 See above pt III(B)(2).

97 *United Group* (2009) 74 NSWLR 618, 640 (Allsop P).

98 [2009] QSC 139 (4 June 2009) (Douglas J).

99 Ibid [25].

100 See, eg, *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, 87–93 (Allsop P).

101 See, eg, Charles Thensted, 'Litigation and Less: The Negotiation Alternative' (1984) 59 *Tulane Law Review* 76; Carrie Menkel-Meadow, 'Introduction: What Will We do when Adjudication Ends? A Brief Intellectual History of ADR' (1997) 44 *UCLA Law Review* 1613, 1619–20; Vicki Donnenberg, 'Judicial Review of Arbitral Awards under the Commercial Arbitration Acts' (2008) 30 *Australian Bar Review* 177, 178–9.

102 *Cable & Wireless Plc v IBM (UK) Ltd* [2003] BLR 89. See also Giles J's comments in *Elizabeth Bay* (1995) 36 NSWLR 709, 716 that 'mediation is a valuable means of resolution of disputes, and agreements to mediate should be recognised and given effect in appropriate cases'. Given that negotiation as a dispute resolution mechanism is useful in commercial contracts, this observation is applicable by analogy.

103 (1964) 112 CLR 597.

resolve a dispute. In that case, the court dismissed an argument that a contract was uncertain for leaving essential matters to be agreed. Kitto J held that no future agreement was required. He held that the parties' rights had already been defined by the terms of the contract, and implied a term into the contract that the parties would 'negotiate reasonably'[104] so as to ensure that 'the respective rights of the [parties] *as defined* are given effect'.[105] I suggest that, no matter what other arguments are suggested, Kitto J's observations suffice to ensure enforceability of ADR negotiation agreements. ADR negotiation agreements are indistinguishable from the term Kitto J implied: they do not seek to add or detract from existing contractual duties, but to ensure that those duties are carried out in accordance with the contract.[106]

B *Difficulty in Determining Breach*

Hammerschlag J's view that agreements to negotiate are unenforceable because there is no 'objective yardstick' for determining good faith represents another reason regularly put forward to deny enforceability. If the court is incapable of determining whether the obligation has been breached, it cannot be enforceable. For example in *Walford*, Lord Ackner asked — apparently rhetorically — how the court is 'to police such an "agreement"'[107] and questioned how a party will ever know when they are permitted to withdraw from negotiations. In 1996, Sir Anthony Mason, writing on the decision in *Walford*, mused 'perhaps here, as in other areas of the law, the courts shrink from adopting just and fair solutions because adherence to a rigid formal rule offers an easier, though harsher, answer.'[108] Lord Steyn too cited *Walford* as an instance of formalism prevailing over reasoned judgment.[109] It is perhaps easy to understand the resort to a formalist approach when considering the difficulty of giving certainty to the phrase 'in good faith'. Indeed it has — bleakly — been suggested that 'uncertainty ... reigns'[110] as to its meaning.

This article suggests that more assistance can be derived from statutory instances of the obligation to negotiate in good faith than has, until now, been sought by judges. There are myriad instances of

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104 Ibid 603. McTiernan and Windeyer JJ agreed with Kitto J's reasons: at 602, 616.

105 Ibid (emphasis added).

106 But note that this argument would not likely be successful in the context of a preliminary agreement where more agreement is required between the parties as to their respective rights: *Coal Cliff* (1991) 24 NSWLR 1, 39 (Handley JA).

107 *Walford v Miles* [1992] 2 AC 128, 138.

108 Sir Anthony Mason, 'Review: Good Faith and Fault in Contract Law, Jack Beatson and David Friedmann (eds)' (1996) 11 *Journal of Contract Law* 89, 90.

109 Steyn, 'Does Legal Formalism Hold Sway?', above n 47, 50. See generally Alan Barron, 'The Rise of Legal Pragmatism in English Contract Law' (2006) 22 *Journal of Contract Law* 179.

110 Terry and Di Lernia, above n 68, 556.

the obligation in Australian statute law.[111] A certain cross-over of influence from statute to the common law should be no cause for alarm. That is because 'common law and statute coalesce in one legal system'[112] and 'much of what is ordinarily regarded as "common law" finds its source in legislative enactment.'[113] Analogical use of statute in interpreting the common law has been approved in the United Kingdom[114] and has support in Australia where there is a 'consistent pattern of legislative policy'.[115] Thus courts struggling to define 'good faith' in contractual negotiation clauses can find some assistance — despite the differing context — in s 31(2) of the *Native Title Act 1993* (Cth) ('NTA') which states that failure to discuss an unrelated matter is not a breach of good faith. The NTA is a particularly valuable statute given that it imposes the duty to negotiate in a sense analogous to a preliminary agreement by providing that 'the parties must negotiate *with a view to reaching agreement*' about a future act.[116] Further assistance might be gained from the legislative intention behind the obligation on carriers to 'negotiate in good faith' with affected landowners in the *Telecommunications Act*,[117] which appears to be to ensure that the carriers *take into account,* and not simply ignore, the landowners' interests.[118] Thus it is very arguable that the

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111 See, eg, *Native Title Act 1993* (Cth) ('NTA') ss 24MD(2)(d)(ii) which requires a person providing just terms compensation for compulsory acquisition of land to 'negotiate in good faith' a request that that compensation be paid in a form other than money, 31(b) sets out the obligation to 'negotiate in good faith' with respect to a wide range of matters such as conferrals of mining rights: at s 25; *Water Act 2007* (Cth) s 73 which requires the Minister to 'negotiate in good faith with the affected "Basin State"' before exercising a 'step-in' power: at s 68; *Telecommunications Act 1997* (Cth) sch 3 s 27(2)(a) which requires a carrier to make 'reasonable efforts to negotiate in good faith with proprietors and administrative authorities whose approval would be required for carrying out installation before being granted a facility installation permit.

112 *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 589 (Lord Steyn). Justice Gummow, writing extra-curially, agreed with Lord Steyn's view: William Gummow, *Change and Continuity: Statute, Equity and Federalism* (Oxford University Press, 2009) 1.

113 Gummow, above n 112, quoting J M Landis, 'Statutes and the Sources of Law' in Pound (ed), *Harvard Legal Essays* (University Press, 1934) 213, 214.

114 *Erven Warnink Besloten Vennootschap v J Townend & Sons (Hull) Ltd* [1979] 1 AC 731. Lord Diplock said that 'where over a period of years there can be discerned a steady trend in legislation which reflects the view of successive Parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course.': at 743.

115 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49, 62 (Gleeson CJ, Gaudron and Gummow JJ).

116 NTA s 25(2). See also Merrilee Garnett and David Ritter, 'The Application and Operation of the Right to Negotiate' (1998) 17 *Australian Mining and Petroleum Law Journal* 284.

117 *Telecommunications Act 1997* (Cth) sch 3 s 27(2)(a).

118 See Commonwealth, *Parliamentary Debates*, Senate, 30 October 1997, 8454 (Lyn Allison). The senator said 'we want to ensure that the carriers would have to

obligation to negotiate in good faith does not mean parties have to discuss unrelated topics, but it does mean that they are not entitled to ignore the other party's interests. That would not mean that a party must abandon their own interests,[119] but simply to have regard to the aims of the contract;[120] a point Allsop P made when he referred to good faith as encompassing 'fidelity to the bargain'.[121] Thus, for example, in an ADR negotiation clause each party must have regard to the other's legitimate rights under the contract.

Given the help to be derived from statutory negotiation provisions and the ever-growing volume of judicial authority on the meaning of 'good faith', it is now difficult to see how the formalist position of non-enforceability can be sustained. Whether good faith has been exercised is a question of fact for the court to answer in each new case under the guidance of previous decisions. At the very least, it is certain that parties must make some attempt to negotiate.[122] The nuances of the obligation must be determined on a case by case basis. For instance, the obligation to negotiate will not be onerous where the other party institutes the dispute resolution procedure with a complaint that is frivolous or destined to fail.[123] Bad faith in breach of preliminary negotiation agreements may be harder to identify with precision in cases falling short of a complete refusal to negotiate, but may cover situations where one party has failed to disclose that its willingness to enter into the agreement is contingent upon another matter.[124] There is, however, a necessary limit to the effectiveness of any enumeration of examples as the determination must rest on an assessment of the circumstances of the instant case.[125] Ultimately, however, mere difficulty in determining whether good faith has been exercised should not negate the obligation. As Hayne JA said in *Con Kallergis Pty Ltd v Calshonie Pty Ltd*, 'although there may be difficult questions of fact and degree about whether evidence of

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negotiate in good faith with both the landowner and the administrative authority. The government's original proposal would have permitted carriers to *ignore one of these parties* ...': at 8454 (emphasis added).

119 See, eg, *Automasters Australia Pty Ltd v Bruness Pty Ltd* [2002] WASC 286 (4 December 2002) [353] (Hasluck J).

120 See, eg, Terry and Di Lernia, above n 68, 561.

121 *United Group* (2009) 74 NSWLR 618, 640 (Allsop P).

122 See, eg, Paterson, above n 3, 126.

123 See, eg, *Dale v Western Australia* (2009) 261 ALR 21, 36 (Mckerracher J).

124 *Flight Systems Inc v Electronic Data Systems Corp*, 112 F 3d 124, 130 (Nygaard J) (3rd Cir 1997).

125 For example *Jobern Pty Ltd v BreakFree Resorts (Victoria) Pty Ltd* [2008] *Aust Contract Reports* 90-269 [185] where Gordon J, in assessing whether conduct would have constituted a breach of a duty to negotiate in good faith, observed that it was relevant that the parties were 'negotiating in the context of vendor and purchaser'.

particular conduct reveals a lack of good faith ... the obligation to act in good faith ... is an obligation that is certain'.[126]

C *Repugnancy*

This strand of objection to negotiation clauses was popularised by the judgment of Lord Ackner in *Walford*. His Lordship said that the 'concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations.'[127] Taking it at its highest, this objection appears strongest in the context of preliminary agreements where the parties may not already have a strong contractual connection to each other and their behaviour is not otherwise restrained by the terms of a pre-existing contract. The basis for denying enforceability on this ground appears to be 'the rule permitting a court to refuse its assistance to enforce a contract where to do so would be contrary to public policy.'[128] It is difficult to see how this objection can stand, however, given that it is the parties themselves who have agreed to limit their discretion in the conduct of the negotiations 'in a commercial context and for good consideration'.[129] To deny them that power would go against notions of party autonomy and freedom of contract which require that parties of 'competent understanding shall have the utmost liberty of contracting'.[130] As the High Court noted in *Ringrow Pty Ltd v BP (Australia)*, in the context of a liquidated damages clause, 'exceptions from freedom of contract require good reason to attract judicial intervention to set aside the bargains upon which parties of full capacity have agreed.'[131] This threshold cannot be met in relation to express contracts to negotiate. To argue against enforceability based on assumptions of 'proper' adversarial negotiating conduct in which both parties retain complete discretion is to impermissibly supplant the parties' wishes as to how the negotiations are to be carried out with irrelevant judicial opinions as to proper negotiation conduct.

D *Difficulties in Assessing Damages*

An additional perceived difficulty in enforcement appears in Denning LJ's judgment in *Courtney & Fairbairn* where his Lordship said '[n]o court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through'.[132] However, listing this as a reason for unenforceability contravenes the principle

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126 (1998) 14 BCL 201.

127 *Walford v Miles* [1992] AC 128, 138.

128 See, eg, *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215, 247 (Kirby J).

129 Jeff Cumerbatch, 'In Freedom's Cause: The Contract to Negotiate' (1992) 12 *Oxford Journal of Legal Studies* 586, 589.

130 *Printing and Numerical Registering Co & Sampson* (1875) LR 19 Eq 462, 465 (Jessel MR).

131 (2005) 224 CLR 656, 659 (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

132 [1975] 1 WLR 297, 301.

in *Chaplin v Hicks* where difficulty in assessing damages is kept clearly distinct from the existence of an enforceable obligation.[133] Even if Denning LJ is to be taken as departing from that principle, it was strongly endorsed by the High Court of Australia in *McRae v Commonwealth Disposals Commission*.[134] Therefore, there should be no objection to enforceability on this ground.

Although strictly unnecessary to do so to ensure enforcement, Allsop P in *United Group* responded to Denning LJ's observation by pointing out that it 'ignore[d] the availability of damages for the loss of a bargained for valuable commercial opportunity.'[135] Nevertheless, damages calculations for breaches of agreements to negotiate face the difficulty that it will often be 'impossible for the Court to state where negotiations in good faith might finally have led.'[136] That consideration led Kirby P in *Coal Cliff* to the view that only nominal damages would have been awarded.[137] However, it appears the most accurate view is that suggested by Allsop P, and that damages will be assessed by reference to what was the *chance* of securing lost opportunities: 'the chances of the plaintiffs in obtaining the contract'[138] in preliminary agreements, or, in ADR clauses, the chances of resolving the dispute. The objection, in the case of preliminary agreements, that the difficulties of calculating damages are insuperable because the lost 'commercial opportunity' is merely to negotiate a contract which will not *necessarily* be entered into is without substance. Rather, as the High Court held in *Commonwealth v Amann Aviation Pty Ltd* ('*Amann*'), ordinary rules of remoteness apply. The relevant question will be whether the conclusion of a contract following negotiation 'may reasonably be supposed to have been in the contemplation of the parties as the probable result of the breach.'[139] The loss of the prospect of entering into a final contract is a 'probable result'[140] of a breach of an agreement to negotiate — indeed it is the very nature of a preliminary negotiation agreement that the prospect of a concluded contract is 'inevitably contemplated'.[141] Whether this approach in fact results in anything more than nominal damages may itself be a difficult question,[142] but

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133 [1911] 2 KB 786, 792 (Vaughn Williams LJ).

134 (1951) 84 CLR 377, 411 (Dixon and Fullagar JJ).

135 *United Group* (2009) 74 NSWLR 618, 635-6 (Allsop P) citing *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 349 (Mason CJ, Dawson, Toohey and Gaudron JJ).

136 *Coal Cliff* (1991) 24 NSWLR 1, 32 (Kirby P).

137 Ibid.

138 See, eg, Cohen, above n 89, 43.

139 (1991) 174 CLR 64, 92 (Mason CJ and Dawson J) citing *Hadley v Baxendale* (1854) 9 Exch 341.

140 *Amann* (1991) 174 CLR 64, 92 (Mason CJ and Dawson J).

141 Ibid. See also pt III B 1 above concerning the purpose of preliminary negotiation agreements.

142 See, eg, Carter, Peden and Tolhurst, above n 3, [4–14].

nominal damages should not be seen as the maximum remedy but as the base: an 'at least' figure.[143]

V THE FUTURE OF AGREEMENTS TO NEGOTIATE

It appears that no matter whether or when the courts ultimately decide authoritatively that good faith negotiation agreements are enforceable, commercial parties will continue to include them in their contracts. It may be that decisions against enforcement will come to be threatened by the need to be an active participant in the international business community where 'more and more contracts are incorporating good faith negotiation clauses'.[144] The potential for Australia becoming isolated on the issue is shown not only by the favourable United States jurisprudence, but in what might be perceived as a tendency towards enforcement in England despite *Walford*. In *Petromec*,[145] Longmore LJ, though not necessary to do so on the facts, criticised the view that *Walford* imposed a blanket ban on enforceability in all cases. He distinguished it on the basis that there was no *express* agreement to negotiate in *Walford*, and cited Lord Steyn's hope that it would be reconsidered by the House of Lords.[146] Longmore LJ also emphasised the commercial relevance of the transaction, finding it relevant that the agreement was drawn up by City of London solicitors and noting that 'it would be a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered.'[147] Therefore there is at least judicial unease at the non-enforcement approach, although it appears that for the immediate future at least there is no hope of *Walford* being overruled given the confirmation by Lords Neuberger, Phillips, Rodger, Walker and Collins that the rule denying agreements to negotiate is 'well established ... and remains an important principle.'[148] Though these comments were made in the Privy Council, it seems *Walford* is unlikely to be overturned without a radically differently-constituted United Kingdom Supreme Court.

The current situation in Australia, however, despite *United Group*, is uncertain. Although there is much in *United Group* to support good faith negotiation clauses there are two main issues standing in the way of enforcement. First, the case dealt only with negotiation agreements in the ADR setting, not preliminary agreements. Secondly, there has

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143 *Tabet v Gett* (2010) 240 CLR 537, 559 (Gummow ACJ).

144 James R Silkenat, *The ABA Guide to International Business Negotiations: A Comparison of Cross-Cultural Issues and Successful Approaches* (American Bar Association, 2009) 208. See also Mason, above n 108, 90 where Sir Anthony Mason suggested Australia might be left 'beyond the good faith pale'.

145 [2006] 1 Lloyd's Rep 121.

146 Ibid 153 (Longmore LJ).

147 Ibid.

148 *National Transport Co-operative Society v A-G (Jamaica)* [2009] UKPC 48 (26 November 2009) [61] (Lord Neuberger for Lords Phillips, Rodger, Walker, Neuberger and Collins).

been uncertainty over whether *United Group* should be followed in other Australian states.[149] This is a vexed issue as negotiation agreements are highly controversial and have been 'the subject of considerable discussion in the United Kingdom, Australia and New Zealand.'[150] For that reason, it is arguable — on the restrictive view recently taken by the High Court of the role of intermediate appellate courts — that any decision shifting the orthodoxy with potential to cause confusion as to the correct approach in courts of other states should be left to the High Court.[151] That is all the more so when the High Court has, in the recent past, frequently allowed appeals from what it has perceived as judicial overreaches by the New South Wales Court of Appeal.[152]

VI ENSURING ENFORCEABILITY OF NEGOTIATION CLAUSES

Until the High Court makes a pronouncement on the issue, the enforceability of good faith negotiation clauses in both preliminary agreements and ADR clauses will remain uncertain. However, the cases reveal some strategies that will maximise the chances of a negotiation clause being enforced. The strategies aim to give content to the obligation to negotiate and convey a 'clear statement of the circumstances in which [negotiation] is to occur.'[153]

A *Identify the Negotiators*

The clause considered in *United Group* provided that the 'dispute ... is to be referred to a *senior representative* [of each party]' for 'genuine and good faith negotiation'.[154] Allsop P made clear that there was no suggestion that the reference to a 'senior representative' was uncertain.[155] Where it is not otherwise obvious, parties should clearly set out who is to conduct the negotiation to avoid the clause being uncertain. Clearly identifying negotiators may also lead to the clause being recognised as commercially useful and therefore entitled to a permissive approach to enforceability. The Hong Kong case of *Hyundai Engineering & Construction Co Ltd v Vigour Ltd*[156] shows the dangers of a lax approach to identifying the negotiators. Rogers VP in the Court of Appeal, who ultimately applied the reasoning in

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149 *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd (No 3)* [2009] WASC 352 (1 December 2009) [96] (Murray J).

150 *Uranium Equities Ltd v Fewster* (2008) 36 WAR 97, 120 (Steytler P, McLure and Buss JJA)

151 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151-2 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

152 See, eg, *Friend v Brooker* (2009) 239 CLR 129; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269.

153 Carter, 'The Renegotiation of Contracts', above n 53, 190.

154 *United Group* (2009) 74 NSWLR 618, 623 (Allsop P).

155 Ibid [28].

156 [2005] 3 HKLRD 723.

Walford to find the clause in that case unenforceable, said that it was 'somewhat surprising that an attempt to identify the negotiating person ... should be made in such a haphazard way without any attempt to name him or his precise title.'[157]

B *Set Time Limits on the Obligations to Negotiate*

An aspect of Lord Ackner's objection to the good faith negotiation cause considered in *Walford* was the 'absence of any term as to the duration [of the obligation]'.[158] It was therefore unclear when Mr Miles might be entitled to call an end to negotiations. The importance of time limits can be seen by the close analogy to negative negotiation agreements, known as 'lock-out' agreements whereby a party agrees *not* to negotiate with a third party. Despite their apparent similarity to agreements to negotiate, 'lock-out' agreements are treated 'more leniently'[159] and were approved in principle in *Walford*. It is unclear precisely what reasons exist for this added leniency, and why 'A for good consideration ... [may] achieve an enforceable agreement whereby B agrees for a specified period of time not to negotiate with anyone except A'[160] but cannot, for good consideration, achieve the result that B must negotiate with A. Lord Ackner cited the 'good commercial reasons'[161] that exist for lock-out agreements. As we have seen, however, there are also good commercial reasons for 'lock-in' agreements. Given the frailty of the distinction between lock-out and 'lock-in' agreements, and that a time limit is an 'essential characteristic'[162] of a lock-out agreement, it may therefore be wise to include time limits on the obligation to negotiate to ensure enforceability. Support for this view also appears in Hayne JA's judgment in *Con Kallergis Pty Ltd v Calshonie Pty Ltd*[163] where his Honour distinguished *Walford* in contracts where there is a provision for 'an end to the negotiation other than the parties to it retreating to their offices to nurse their pride and their rejected bargaining position.'[164]

C *Define Characteristics of 'Good Faith'*

Although in strict theory it should not be necessary to define 'good faith' to ensure enforceability,[165] setting out some of its characteristics may assist courts in getting over the uncertainty hurdle. Even in the United States where negotiation agreements are, in many

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157 Ibid 731.

158 [1992] 1 AC 128, 136.

159 Cohen, above n 86, 43.

160 *Walford* [1992] 1 AC 128, 139 (Lord Ackner).

161 Ibid 139.

162 Ibid 140 (Lord Ackner).

163 *Con Kallergis Pty Ltd v Calshonie Pty Ltd* (1998) 14 BCL 201.

164 Ibid 212.

165 See, eg, *Con Kallergis Pty Ltd v Calshonie Pty Ltd* (1998) 14 BCL 201.

jurisdictions, looked upon more favourably,[166] courts are 'reluctant to enforce ... agreements that call for good faith negotiations without setting clear parameters for what good faith means.'[167] In Australia the difficulty courts currently face in applying a 'good faith' standard is evident in Hammerschlag J's claim that there is no 'objective yardstick' in determining breach in an 'agreement simpliciter to negotiate in good faith.'[168] The safest option, until 'good faith' is authoritatively stated to be a sufficiently clear yardstick, is to assist courts in giving the phrase content. For instance, parties may define 'good faith' conduct to exclude obviously dilatory conduct, withdrawing simply because of a change of heart on whether to continue to perform the contract,[169] simultaneously conducting parallel negotiations with another party, or, in an ADR negotiation clause, not permitting the other party to have the benefit of the original bargain.[170]

VII CONCLUSIONS

In 1975, Lord Wilberforce said that 'English law … in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.'[171] This 'law before facts' approach, applied in *Walford* to good faith negotiation clauses, has led to usurpation of the principle that 'the law of contracts serves the marketplace' and not 'to satisfy lawyers' desires for neat rules.'[172] Decisions that good faith negotiation clauses are, in all cases, unenforceable, in doctrinal effect drag the law back to before 1792 when Lord Kenyon said 'it is of the highest importance that courts of law should compel the observance of honesty and good faith.'[173] This is a clear opportunity for 'commercially sensible results [to] shape contract doctrine.'[174] That is especially so given that agreements to negotiate are clear bargains struck between consenting parties under which each agrees to limit their discretion in negotiation. Failing to give effect to them undermines the principle of *pacta sunt servanda* for, as we have seen, no good reason.

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166 See, eg, *Shann v Dunk*, 84 F 3d 73 (2nd Cir, 1996).

167 Schmitz, above n 77, 68.

168 *Laing* [2007] NSWSC 723 (17 July 2007) [49].

169 Knapp, above n 72, 722, suggests this as an example of bad faith conduct in relation to the bargain to negotiate.

170 This would constitute an express reflection of the common law duty of co-operation: *Butt v M'Donald* (1896) 7 QLJ 68, 70-1 (Griffith CJ).

171 *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd* [1975] AC 154, 167.

172 *Coal Cliff* (1991) 24 NSWLR 1, 22 (Kirby P).

173 *Mellish v Motteux* (1792) Peake 156; 170 ER 113, 113-14.

174 J W Carter, 'Commercial Construction and Contract Doctrine' (2009) 25 *Journal of Contract Law* 83, 90.