



Law Council
OF AUSTRALIA

Office of the President

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Administrative Law Section
Attorney-General's Department
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By email: goodfaith@ag.gov.au

Dear Attorney-General's Department

Use of the term 'good faith' in civil penalty and criminal offence provisions in Commonwealth legislation

The Law Council of Australia (**Law Council**) welcomes the opportunity to respond to the Attorney-General's Department (**AGD**) inquiry into the use of the term 'good faith' in civil penalty and criminal offence provisions in Commonwealth legislation. The Law Council acknowledges the contribution of the Law Society of South Australia in the development of this submission.

Context of the inquiry

The Law Council notes the contextual background to the inquiry, in particular earlier comments of the Senate Scrutiny of Delegated Legislation Committee (**Scrutiny Committee**) regarding the good faith conduct standard contained in the *Competition and Consumer (Industry Codes—Dairy) Regulations 2019* (Cth) (**Dairy Code**).¹

In its analysis of the Dairy Code, the Scrutiny Committee raised concerns that the drafting of a good faith obligation in the legislative scheme lacked clarity and made it difficult for those seeking to rely on the provision to understand their obligations and the consequences of non-compliance. The Scrutiny Committee had also highlighted its 'broader, systemic concerns about the pursuit of regulatory flexibility via the imposition of broadly drafted good faith provisions at the expense of legal clarity and certainty'.²

In response to the Committee's concerns, the AGD released a Consultation Paper in June 2021 which poses a number of questions for individuals, industry, regulators and government bodies, and lists the various civil penalty and offence provisions on the Commonwealth statute book which use the term 'good faith'.

Noting the high-level at which the Consultation Paper has been prepared, the Law Council has not focussed on any one specific legislative scheme or jurisdiction where a 'good faith'

¹ Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, Delegated Legislation Monitor (Monitor No 10 of 2020, 2 September 2020).

² Ibid, 10.

threshold is utilised. Instead, principle-based feedback has been provided as to the appropriateness of the term across a broad range of civil and criminal frameworks.

General comments

The Law Council's Policy Statement titled *Rule of Law Principles* notes that the intended scope and operation of provisions which create criminal or civil penalties should be unambiguous and key terms should be defined.³ This view is consistent with the view of the Scrutiny Committee's longstanding view that 'offences and civil penalty provisions should be drafted with sufficient clarity to enable persons and entities to understand their obligations and the consequences of non-compliance'.⁴

However, it is acknowledged that legislation may reflect broad legal concepts and common law phrases where appropriate, especially when attempting to provide an objective definition leads to complicated definitions in legislation which can have unintended or unfair results. Attempting to define that which is not easily defined can and often does lead to complex legislation and/or regulation, unintended or unfair results, and less (rather than more) clarity.

Generally, the Law Council considers legislative references to common law concepts such as 'good faith' and 'reasonable' to be appropriate and proper, especially where such concepts are to be applied relative to all the circumstances of the case. The judiciary thus far have shown no reticence in determining the application of these terms in various contexts, and a solid body of precedent applicable to different areas of law and practice has developed.

The Law Council is concerned that a proliferation of differing definitions has the potential to create confusion within and across areas and will result in determinations that are not based on common law understanding. This could result in the need for increased litigation to manage the interpretations of different guidelines against common law rights.

However, in relation to criminal liability, the Law Council encourages the AGD to carefully examine where the concept of good faith may either form the basis for criminal liability as a fault element for an offence, or also potentially as a defence, and any potential intersections with the concept of dishonesty. Consistent with the abovementioned Policy Statement of the Law Council, the intended scope and operation of offence provisions should be unambiguous, key terms should be defined and offence provisions should not be so broadly drafted that they inadvertently capture a wide range of benign conduct.

Response to discussion questions

The Law Council has responded to the first four of the Consultation Paper's questions below, noting that the remaining questions are targeted towards individual/industry compliance and utility for regulators.

1. *Does a lack of legislative definition of the term good faith contribute to any lack of clarity or certainty in civil penalty and offence provisions?*

The Law Council considers that the use of legal concepts such as 'good faith' in legislation is generally proper and appropriate and provides the Courts the appropriate flexibility in relation to civil penalty and offence provisions.

³ Law Council of Australia, *Rule of Law Principles* (Policy Statement, March 2011), 2.

⁴ Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, Delegated Legislation Monitor (Monitor No 9 of 2020, 27 August 2020) 2-6.

Replacing a legal phrase with what could only end up being a complex attempt at an objective definition will not provide clarity or certainty but will likely do the opposite. Courts consider questions of good faith in diverse areas of law including corporate, contract, administrative, procedural, and in the Law Council's view, do not require further a definition of what will be a case-by-case decision, based on the particular circumstances and evidence available.

However, as noted above, certainty and clarity are of particularly importance where the concept of good faith forms the basis for criminal liability as a fault element for an offence, or also potentially as a defence, and any potential intersections with the concept of dishonesty. In these instances, the intended scope and operation of offence provisions should aspire to be unambiguous, including defining key terms where appropriate, and avoiding overly broad terminology that may inadvertently capture a wide range of benign conduct.

2. *Do some areas of law and regulation benefit from the use of the term good faith over others?*

It is noted that the concept of good faith is increasingly important in procedural law where parties are directed to act in good faith in pre-action and dispute resolution processes. However, there is no need in the Law Council's view, to add to the existing legal term in this context. The Courts have provided guidance via case law on a contextual case-by-case basis and the Law Council suggests there is no need to supplement this role.

3. *Does the interaction of a legislative definition of good faith and common law interpretations cause any legal or practical issues?*

The Consultation Paper notes that while the use of good faith in Commonwealth legislation largely reflects common law interpretations, there are some examples where codification has extended beyond the common law to include additional obligations based on the specific context of the duty.⁵

Context-specific legislative extensions aside, the interaction of a legislative definition of good faith and common law interpretations would likely give rise to difficulties, noting that at the very least it opens an argument that there is a difference between the two (so that establishing good faith under statute might not meet the common law requirement or vice versa). The term 'good faith' is used in diverse contexts, and information that seeks to explain the concept differs across jurisdictions. There is an unacceptable risk that a legally determined definition of the concept would be supplanted by administrative directives.

4. *Would defining the term in legislation when used in civil penalty and offence provisions or otherwise affect regulatory coherence, and if so, could non-legislative mechanisms such as regulatory guides complement express definitions to help mitigate this effect?*

As noted above, the Law Council is concerned that further attempts to define the term across different provisions would frustrate regulatory coherence. The use of non-legislative mechanisms such as regulatory guides to complement and define express definitions which may or may not be consistent with common law interpretation of good faith may reduce regulatory coherence further still.

⁵ Attorney-General's Department, *Inquiry into the use of the term good faith in civil penalty and offence provisions in Commonwealth legislation* (Consultation Paper, June 2021), 2, referencing the *Fair Work Act 2009* (Cth) and *Competition and Consumer (Industry Codes – Dairy) Regulations 2019*.

Courts have consistently held that they can make a determination about what constitutes good faith in diverse contexts. The determination of good faith is highly contextual, and further attempts at definition will restrict just decisions. Court decisions alluding to good faith are, in the Law Council's view, sufficient guidance and should not be supplanted by regulation or policy.

While the Law Council is not opposed to guidance material that can assist to improve understanding of concepts of good faith, there is a further risk that regulatory definitions and guidance material would detract from the function of the courts by limiting their capacity to make decisions about good faith on a case-by-case basis, and that guidance material would not remain up-to-date with the common law.

Finally, decisions about good faith when made by the Executive or by regulators can have severe negative implications for those subjected to the legislative framework, and this may be exacerbated when regulators are using their own preferred definitions to achieve policy or agency aims.

Further comments

Decisions about what constitutes good faith are highly variable depending on context and in that regard, it is undesirable to aspire to a single comprehensive definition. For example, the factors that make up good faith in mediation are very different to those that make up good faith in contract or corporate contexts. This is not an area where a 'one size fits all' definition would be helpful, rather it would be a hindrance and a barrier to just and relevant decisions.

The legal profession remains a critical part of education and awareness of good faith requirements and is well-placed to monitor, interpret and advise on developments in the common law over time. Subject to the above concerns, should the AGD conclude that terms such as good faith are not well understood in certain circumstances, the Law Council would welcome the opportunity to assist in further efforts to clarify the common law, and if/as appropriate, its potential application.

Contact

The Law Council would be pleased to provide any further assistance to the AGD throughout the course of its inquiry. In the first instance, please contact Dr Natasha Molt, Director of Policy, at natasha.molt@lawcouncil.asn.au, or on (02) 6246 3754.

Yours sincerely



Dr Jacoba Brasch QC
President