



# Good Faith

ACTU Submission into AGD Good Faith Inquiry

ACTU Submission, 13 August 2021  
ACTU D. No 44/2021

## Contents

Contents .....	0
Introduction .....	1
About the ACTU .....	1
Good Faith .....	1
Response to Questions.....	2
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? .....	2
Do some areas of law and regulation benefit from the use of the term good faith over others? .....	2
Does the interaction of a legislative definition of good faith and common law interpretations cause any legal or practical issues? .....	3
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? .....	3
Do you understand what is expected of you to uphold your obligation to act in good faith in the legislation you operate under?.....	4
Do you believe that a comprehensive definition of good faith, particular to your regulated area, contained in legislation, would make it easier for you to uphold your obligation to act in good faith? .....	4

# Introduction

## About the ACTU

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. There is no other national confederation representing unions. For 90 years, the ACTU has played the leading role in advocating in the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions of employees. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation over that period.

The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates. They have approximately 1.8 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

## Good Faith

The Attorney-General's Department is conducting an inquiry into use of the term good faith in Commonwealth legislation. The ACTU's submission to this inquiry is as follows:

- "Good faith" is a term used in a range of different legislative areas, with no singular meaning or usage of the term. The AGD's paper of June 2021 correctly points out:<sup>1</sup>

*The concept of good faith is used throughout Commonwealth legislation and delegated legislation, including as a positive standard of conduct, an element of a criminal defence, a basis for excluding liability, or a condition of validity for a transaction. It also has relevance beyond statutory law in various areas of general law, such as contract law, and in commercial practice.*

- In industrial relations, the term 'good faith' is used in legislation in at least three ways:
  - In the *Fair Work Act 2009 (Cth)* (**FW Act**), in relation to enterprise bargaining, where there is further guidance as to the meaning of the term. The good faith bargaining regime could (and needs to) be strengthened; however, this is best achieved by means other than further codification of the existing usage of the term good faith.
  - In the *Fair Work (Registered Organisations Act 2009 (Cth))* (**FWRO Act**), in a range of different contexts, and where there is no further elaboration (within the

---

<sup>1</sup> AGD, June 2021, *Inquiry into the use of the term good faith in civil penalty and offence provisions in Commonwealth legislation*, p2

legislation itself) of the meaning of the term. Within this, the term is used in at least two ways:

- To provide for positive duties (with both civil and criminal consequences) for office holders; and,
  - to validate certain acts.
- In employment contracts, where an obligation to act in good faith (whether mutual or otherwise) exists either expressly or impliedly.
- It is already the case that the conduct of unions and their officers is heavily regulated.
  - The common law provides guidance as to the meaning of the term good faith.
  - An across-the-board statutory definition of good faith may prove elusive and may, if imposed, produce unintended consequences due to the different ways in which the term is used across different pieces of legislation;
  - Caution should be had with respect to enacting a statutory definition of good faith in any area of law – for instance, one which captures the conduct of negotiations between dairy farmers and processors – with due regard being paid to whether and how such a definition (and the common law which might build up around it) could impact on the use of the terms in other legislative areas (such as industrial relations and trade union governance).

## Response to Questions

### 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?

Clarity and certainty are important goals, but they are not ends in themselves. What is ultimately desirable is legislation that achieves sound policy objectives.

For example, there is greater clarity and certainty as to the meaning of the term good faith as it appears in the FW Act than there is in the FWRO Act and some other legislation. However, the requirement in the FW Act that parties bargain in good faith is insufficient in a number of areas. In large part, this is due to the procedural nature of the requirement, and the failure to accompany the requirement to bargain in good faith with any overarching obligation to reach agreement or even intend to do so.

In relation to the FWRO Act, and that Act only, we say the following:

- Trade unions take their governance obligations very seriously, and the ACTU regularly assists its affiliates in understanding and meeting the very many regulatory obligations placed upon them.
- Whilst not defined in the FWRO Act, an understanding of the term good faith emerges from the common law.

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

The term good faith is used in a number of different regulatory contexts. In addition to this, the term itself is used in different ways, and to mean and achieve different things. Because the term good faith is used in so many different ways and contexts, it is difficult to make an across-the-board comparative assessment of those terms' benefits.

However, we do note that the term good faith is used to cover a relatively similar subject matter in the FW Act and the dairy code – that of negotiations between parties. It is our view that a major deficiency in the FW Act's good faith bargaining obligations is that they are capable of being complied with procedurally without requiring any intention to conclude an actual agreement. Further, we observe that the dairy code obliges parties to act in good faith throughout their ongoing relationship through its consideration of whether a party has co-operated with another party to achieve the purposes of any relevant agreement. By contrast, there is no specific legislative requirement for an employer to co-operate with its employees (either as individuals or as a whole) in order to achieve the purposes of the FW Act or any relevant industrial instrument. There is also significant uncertainty about whether a *mutual* duty of good faith exists in employment contracts. Resolving this uncertainty would, in the submission of the ACTU, be an appropriate focus of attention.

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

There is presently no statutory definition of the term good faith in the FWRO Act. The meaning of the term is to be found currently in the common law. Accordingly, there is no present issue in relation to the interaction between statute and the common law. Were a statutory definition of the term good faith to be enacted in relation to the FWRO Act, it is possible that this may give rise to issues and difficulties in relation to the interaction between that statutory definition and the common law.

Further, it is possible that any definition of the term good faith in any area of law may give rise to consideration of that definition by the courts, and that the body of common law which builds up in that way may potentially give rise to uncertainty surrounding whether and how it is applicable to the FWRO Act context. Such an outcome could itself bring about uncertainty.

### **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?**

Whether or not this is an effective or desirable solution would depend on the definition enacted and the content of the non-legislative mechanism. To the extent that regulatory guides are developed, this should occur in consultation with industry stakeholders and participants.

**Do you understand what is expected of you to uphold your obligation to act in good faith in the legislation you operate under?**

The operations and governance of trade unions is already a heavily regulated area. Unions take their governance and compliance obligations very seriously and invest heavily in understanding and meeting those obligations. Union officers are obliged to undertake mandatory training with respect to their governance obligations. One such course is provided by the Australian Trade Union Institute and covers the obligation to act in good faith under the FWRO Act. In addition to this, unions are well aware of the FW Act obligation to bargain in good faith, and carefully monitor developments in that area.

**Do you believe that a comprehensive definition of good faith, particular to your regulated area, contained in legislation, would make it easier for you to uphold your obligation to act in good faith?**

Whether a comprehensive definition would make matters easier or more difficult will of course turn on the content of the definition itself.

**address**

ACTU  
Level 4 / 365 Queen Street  
Melbourne VIC 3000

**phone**

1300 486 466

**web**

[actu.org.au](http://actu.org.au)  
[australianunions.org.au](http://australianunions.org.au)