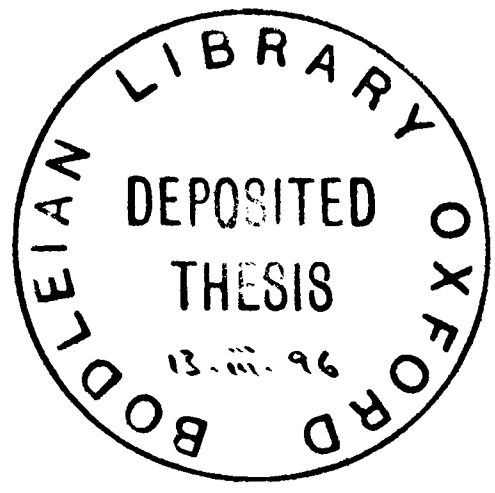
AUSTRALIAN ESTOPPEL

AND THE PROTECTION OF RELIANCE



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ABSTRACT

This thesis focuses upon recent Australian developments in the law of estoppel. It provides a justification and basis in principle for the doctrine of estoppel described in cases such as Waltons Stores (Interstate) Ltd v Maher (1987-1988) 164 C.L.R. 387 and Commonwealth of Australia v Verwayen (1990) 170 C.L.R. 394. This basis is found in the principle that we ought all to take reasonable steps to ensure the reliability of the assumptions that we induce in others. Ensuring the "reliability" of an induced assumption means ensuring that a party who relies upon the assumption does not thereby suffer harm: harm in the sense that he is worse off because the assumption has proved unjustified than he would have been had it never been induced. The thesis suggests a pattern for the development of the Australian law of estoppel reflecting that basis in principle. It further demonstrates the potential usefulness of the doctrine with specific reference to (i) pre-contractual negotiations and letters of intent, (ii) firm offers to contract, (iii) variations of contract unsupported by consideration, and (iv) the "battle of forms".

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PROLOGUE

We all have an interest in building a society in which people take at least some responsibility for the reliability[1] of the assumptions they induce in others. If no such responsibility were acknowledged then each individual would be required to verify every assumption upon which he might rely, trust and co-operation would prove impossible, the processes of communication would be deleteriously affected and much preventable harm would be caused.[2]

This interest in ensuring that people take at least some responsibility for the reliability of the assumptions they induce in others can be seen as supported by three overlapping moral duties, each of which has found expression in Anglo-Australian law. First, there is the duty to keep promises. Although its purpose has been the subject of debate over the past twenty years,[3] lawyers traditionally see contract law as determining when a promissory agreement will be legally binding. Second, there is the duty not to lie. The law of deceit essentially dictates when tort law will provide a remedy for the civil wrong of lying. Third, there is arguably a more general duty to take all such steps as are reasonable to ensure that the assumptions we induce - assumptions regarding either the past, the present or the future - are reliable. Were no such general duty recognised, then the former two would be insufficient to build the level of co-operation and good communication necessary in modern societies, and to limit the occurence of preventable harm. This third duty, like the other two, seems to have provided a foundation for parts of Anglo-Australian legal doctrine and it is with this third duty that this thesis is concerned.

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1 For a definition of the sense in which the terms "reliable" and "reliability" are used in this thesis see p.10 below.

2 See below at p.15ff

3 See, for example, Gilmore, G., The Death of Contract (Columbus: Ohio University Press, 1974); Atiyah, P.S., The Rise and Fall of Freedom of Contract (Oxford: Clarendon Press, 1979); Atiyah, P.S., Promises, Morals and Law (Oxford: Clarendon Press, 1981); Fried, C., Contract as Promise: A Theory of Contractual Obligation (Cambridge: Harvard University Press, 1981); Raz, J., "Promises in Morality and Law", (1982) 95 Harvard Law Review 916; Burrows, A. S., "Contract, Tort and Restitution: A Satisfactory Division or Not?", (1983) 99 Law Quarterly Review 217; Birmingham, R., "Notes on the Reliance Interest", (1985) 60 Washington Law Review 217; Holmes, W.H., "The Freedom Not to Contract", (1986) 60 Tulane Law Review 751.

Part One of this thesis outlines the duty to take reasonable steps to ensure the reliability of induced assumptions, distinguishes that duty from the duty to keep promises and the duty not to lie, justifies that duty and explains why it is worthy of legal expression. This part also describes and assess the treatment of the duty by what I shall call "antecedent Anglo-Australian law", a term defined below.[4] The argument of this part is that the legal treatment of the duty was poorly organised and inadequate.[5] Antecedent Anglo-Australian law too often refrained from enforcing the duty. Too often the courts were either (i) unable to furnish a remedy in situations in which a breach of the duty had caused harm, relief may have been expected and, indeed, may have been available in some other jurisdictions, or (ii) required to patch together a remedy in such situations by applying doctrines designed to express other principles and therefore yielding remedies which were perhaps not appropriate. For example, antecedent Anglo-Australian law inadequately handled the duty in the following contexts: (i) pre-contractual negotiation and letters of intent, (ii) firm offers to contract, (iii) variations of contract unsupported by consideration, and (iv) the battle of forms.

Part Two of this thesis will introduce an important recent Australian development in this complex area of the law. Briefly stated, this development is that under the rubric "estoppel", and relying on authorities traditionally cited for a number of different principles, the High Court of Australia is developing a new and flexible cause of action designed to offer relief where a party has failed in his duty reasonably to ensure that an assumption he has induced was reliable and reliance upon the assumption has caused detriment to another. Part Two will not only set out this new doctrine but will highlight and justify its operation as a "discretionary" doctrine and will describe its relationship to the law of contract, tort and restitution. This new Australian cause of action will be the central focus of the thesis, which will explore its emergent shape and propose ways in which it might be further refined. The thesis will contend that these recent developments

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4 See below at p.4

5 Borrowing an analogy from a American writer in the same field, the situation was reminiscent of that faced by the five blind men of India, who, when presented with an elephant, were all correct and all erred in their different approaches to describing it. See Wangerin, P.T., "Damages for Reliance Across the Spectrum of Law: Of Blind Men and Legal Elephants", (1986) 72 Iowa Law Review 47

have given Australian law an important new approach to the problem of induced assumptions exposed in Part One.

The problem of induced assumptions and the new Australian doctrine having thus been set out, Part Three of the thesis will show that the new doctrine is an appropriate legal vehicle for the duty to take reasonable steps to ensure the reliability of induced assumptions by demonstrating its potential application to the problem areas exposed in Part One.

Before turning to the substance of this thesis, however, four important points need to be stressed.

First, this thesis is concerned only with private law. Questions such as the extent to which public law concepts of "legitimate expectation" and "estoppel" have, can or ought to give expression to the duty to take reasonable steps to ensure the reliability of induced assumptions are specifically excluded. Such questions raise complex issues regarding the philosophy and pragmatics of government which it would be impossible to treat satisfactorily within the parameters of this thesis.

Second, the parameters of the "antecedent Anglo-Australian law" that I shall discuss in Part One must be justified. Both the terms "Anglo-Australian" and "antecedent" need to be considered in this context.

Regarding the concept of "Anglo-Australian" law, throughout this thesis a certain traditional unanimity in English and Australian law is assumed and the term "Anglo-Australian" is frequently used. Australian judge-made law has been derived from English judicial precedent.[6] "The common law of England has exerted a pervasive, almost an exclusive influence over Australian law."[7] Thus, in Public Transport

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6 See Sir Anthony Mason, "Future Directions in Australian Law: The Wilfred Fullagar Memorial Lecture" (1987) 13 Monash University Law Review 149 at pp.150-151

7 Toohey, J.L., "Towards an Australian Common Law", (1990) 6 Australian Bar Review 1 at p.3

Commission (N.S.W.) v J. Murray-More Pty Ltd,[8] Barwick C.J. said that if there was no High Court authority on a particular point of law a state Supreme Court should follow a decision of the English Court of Appeal.[9] Gibbs J. went as far as to suggest that the English decision would be binding upon the local court.[10] This reliance of Australian upon English law, despite differences of opinion in certain moot areas, has made it historically apposite to speak of the "Anglo-Australian" response to particular legal problems. Of course this point ought not to be overemphasised. Australian judges increasingly feel themselves less obliged to adopt English legal solutions wholesale.[11] As will be discussed later in the thesis, this even means that the Australian courts are now re-interpreting many English decisions and using those authorities in a way which might not be acceptable in an English court. Nevertheless, for the purposes of this thesis it is assumed that there has existed a degree of consensus between English and Australian law sufficient to justify the use of the descriptive term "Anglo-Australian".

Regarding the parameters of the "antecedent" Anglo-Australian law, a date must be fixed from which to describe the *lacuna* in the law arguably filled by the recent Australian developments in estoppel. A satisfactory date is the turn of the 1980's. After this time, the courts in England and Australia have been reconsidering various doctrines that might be said to give expression to the duty to take reasonable steps to ensure the reliability of induced assumptions. There has been considerable activity in relation to the tort of negligence and, in particular, negligent misstatement.[12] There has in England, as well as in Australia, been movement in relation to the development of estoppel.[13] Indeed,

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8 (1975) 132 C.L.R. 336

9 Ibid at p.341

10 Ibid at p.349

11 Sir Anthony Mason, "Future Directions" at p.151ff

12 See BT Australia v Raine & Horne [1983] 3 N.S.W.L.R. 221; San Sebastian Pty Ltd v Minister Adminstering the Environmental Planning and Assessment Act 1979 [1986] 162 C.L.R. 340; Smith v Bush, Harris v Wyre Forest DC [1990] 1 A.C. 831; Caparo Industries Plc v Dickman [1990] 2 A.C. 605; Henderson v Merrett Syndicates Ltd [1995] 2 A.C. 145; Spring v Guardian Assurance [1995] 2 A.C. 296

13 See Société Italo-Belge pour le Commerce et l'Industrie v Palm and Vegetable Oils (Malaysia) Sdn. Bhd. [1982] 1 All E.R. 19; Amalgamated Investment and Property Co. v Texas Commerce International Bank [1982] 2 Q.B. 84; Taylors Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd. [1982] Q.B. 133; Pacol Ltd v Trade Lines Ltd [1982] 1 Lloyd's Rep. 456; The Stolt Loyalty [1993] 2 Lloyd's Rep. 281.

the English developments in estoppel arguably pre-date those in Australia. The purpose of the critique undertaken in Part One is to provide a picture of the background against which such developments, including those in estoppel in Australia, have taken place. The "antecedent" Anglo-Australian law regarding induced assumptions is therefore taken to be the law in this area at the turn of the 1980's.

Note that in using the term "antecedent" in this way, I am not implying that all the law in this context of the period before the turn of the 1980's is now redundant. I am simply implying that this law is the context from which the Australian developments in estoppel have emerged.

Third, because the focus of the thesis is on recent developments in the Australian law of estoppel, alternative solutions to the problems outlined in Part One which have been emerging in Australia and other Commonwealth jurisdictions will not be considered. My thesis is neither that the recent Australian developments in estoppel provide the only solution to the problems outlined in Part One, nor that the solution they provide is necessarily preferable to those which the courts may be developing under the rubric of other doctrines or in other countries. My thesis is simply that the Australian developments in estoppel provide a satisfactory way forward.

Fourth, and finally, the use of the term "Australian estoppel" to describe docrtine emerging from these developments must be justified. It would surprise many of the Australian judges to hear the doctrine they are describing as "estoppel" labelled "new."[14] Many would see it as simply a development of the antecedent English and Australian estoppel theory which will be set out in the general survey in Part One. However, over the course of this thesis it will become clear that the "estoppel" doctrine described in cases such as Waltons Stores (Interstate) Ltd v Maher[15] and

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14 Although it would not surprise all the judges. Sir Anthony Mason has claimed that the Australian developments in estoppel "have no precise counterpart in other jurisdictions" (Sir Anthony Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 Law Quarterly Review 238 at p.256).

15 (1987-1988) 164 C.L.R. 387 (hereafter "Waltons")

Commonwealth of Australia v Verwayen[16] differs radically from any of the versions of estoppel recognised up until the time of those judgments. For this reason, and to avoid confusion, the thesis will adopt the expression "Australian estoppel"[17] to refer to the new cause of action and "estoppel" *simpliciter* to refer to the various types of estoppel recognised by antecedent Anglo-Australian law.

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16 (1990) 170 C.L.R. 394 (hereafter "Verwayen")

17 The judges themselves often adopt the term "equitable estoppel" for the new doctrine. However, this term has its own rather polemical history (see below at p.77) and on this basis "Australian" estoppel is preferred.

PART ONE:

THE PROBLEM OF RELIANCE UPON INDUCED ASSUMPTIONS:

THE ANTECEDENT ANGLO-AUSTRALIAN APPROACH

Chapter One:

The Duty and its Justification

(1) The Duty

To outline the duty to take reasonable steps to ensure the reliability of induced assumptions, it will be useful to break the duty down into its constituent parts. This exercise is expository rather than justificatory, and introductory rather than detailed. Having been introduced here, each of the constituent parts of the duty will be discussed at various points throughout the thesis. Justification for the duty is offered in broad terms in the following section, and throughout the thesis when at various points each of its constituent parts is explored in greater detail.[18]

I begin with the first constituent part of the duty by addressing the question, "What types of induced assumption will attract the duty?" The answer to this question is that all types of induced assumption will attract the duty.[19] This includes assumptions regarding the past, the present and the future. The duty is broad in this way because - in the general terms in which it is justified in the following section - a failure reasonably to ensure the reliability of any one of these assumptions may be a cause of preventable harm or may deleteriously affect the promotion of trust and good communication in society.

Second, "How may an assumption be induced?" The answer to this question is that an assumption may be induced by any of the means whereby meaning may be communicated from one person to another. In certain circumstances, this is taken to include silence.[20] Note also that the assumption may be induced by words open to interpretation as a "promise" as much as by a "representation"; which distinction, as we

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18 In particular in Chapter Four.

19 See below at p.89ff

20 See below at p.109ff

shall see in this part, determines neither whether the relevant duty applies, nor whether it has been broken.

Third, "What does it mean to ensure the "reliability" of induced assumptions?" Ensuring the reliability of an induced assumption means ensuring that a party who relies upon it does not thereby suffer harm: harm in the sense that he is worse off because the assumption has proved unjustified than he would have been had it never been induced. That is, it means ensuring that the party in whom the assumption is induced can safely rely upon it as a basis for action.[21]

Fourth, "What does it mean to "ensure" the reliability of induced assumptions?" This means that the party who induces the assumption has a duty to see to it that the other party does not suffer the harm described in the last paragraph.

Fifth, "What does it mean to say that the party upon whom the duty is imposed must take "reasonable steps" to this end?" This means that the duty is not an absolute one. The party upon whom the duty is imposed is not required to offer an absolute guarantee that the induced assumption is reliable.

Sixth, "If the duty is not absolute, how far does it extend: what will constitute "reasonable steps"?" The extent of this duty must depend upon five overlapping considerations. First, it must depend upon the how the assumption was induced: the more strongly I induce an assumption in you, the more steps you can expect me to have taken to ensure its reliability. Second, it must depend upon the content of the induced assumption: some types of assumption are self-evidently less reliable than others and so the duty to take reasonable steps must in those circumstances be a weaker one. Third, the extent of the duty to take reasonable steps must depend upon our relative knowledge. Knowledge brings responsibility: the more I know that you are likely to rely upon an assumption I induce and the more I know that you are likely to suffer harm thereby, the

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21 For the remedial consequences of this aspect of the duty see below at p.130ff

more I should do to prevent that harm. Fourth, the extent of my duty must depend upon the nature of my relationship with you: you must be right to expect a party with whom you have regularly dealt for a long period of time to take more steps to ensure the reliability of any assumptions he induces in you than you would a stranger. Finally, the extent of the duty must depend upon our relative interest in the relevant activities in reliance: if you are providing me with a service, I clearly have a stronger duty to ensure that you suffer no harm thereby than if you are undertaking activities in which I have no real interest.

Ultimately, these five considerations are related to the three justifications offered below for the duty under discussion. They relate to the justification of that duty in terms of (i) the duty not to cause preventable harm, (ii) the duty to promote trust and co-operation in society, and (iii) the duty to facilitate the processes of communication.[22]

Accordingly, at least the first four of the considerations outlined in the paragraph before last are relevant to the issue of whether the harm caused by the induced assumption was "preventable" in a practical, rather than a theoretical, sense. Harm can only be prevented if it is at least able to be anticipated. The extent to which it can be anticipated must in turn depend upon issues such as how the assumption was induced, the content of the assumption, the extent to which the inducing party had knowledge of the likelihood of reliance and the relationship between the inducing and relying parties. Similarly, the closer the relationship between the inducing and relying parties and the greater the interest of the inducing party in the relevant activities in reliance, the stronger the potential threat to trust and co-operation if the harm which the duty seeks to prevent goes unremedied. Finally, the more clear the manner of inducement, the greater the potential threat to the processes of communication if the relevant harm is allowed.

So the answer to the sixth of our questions concerning the duty under discussion is that "reasonable steps" are such steps as a person in the position of the inducing party might

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22 See below at p.15ff.

be expected to take to prevent the relying party from suffering the relevant harm in the light of (i) how the relevant assumption was induced, (ii) the content of the relevant assumption, (iii) the relative knowledge of the parties, (iv) any relationship which existed between the inducing and relying parties and (v) the relative interest of the inducing party in the relevant activities in reliance.

(2) Distinguishing the Duty from the Duty to Keep Promises and the Duty Not to Lie

It is important from the outset to distinguish the duty to take reasonable steps to ensure the reliability of induced assumptions from these two other duties which may apply when one party has induced another to hold a particular assumption.

Consider first the distinction between the duty to take reasonable steps to ensure the reliability of induced assumptions and the duty to keep promises. A promise is a commitment to guarantee the accuracy of a particular induced assumption regarding either the present or the future as, for example, in "I promise you that this house is Victorian" or "I promise you that I will arrive in Chester on Thursday". The promisor has accepted a duty, as much as he is able, and while ever he has not been released from the promise by the promisee, to ensure that the promisee is in the position in which he would be if the relevant house were Victorian or the promisor were to arrive in Chester on Thursday. In particular, where the relevant induced assumption is one regarding the promisor's intentions, he may not simply change his mind. Promising is a social practice of strong effect and the law is rightly circumspect in recognising that a binding promise has been made. The duty to take reasonable steps to ensure the reliability of induced assumptions is, however, of a broader scope. As suggested above[23] and as will be demonstrated below,[24] an assumption may be induced in many different ways for the purposes of that duty, including by words which may also be capable of being interpreted

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23 See above at p.9

24 See below at p.109

as a promise. However, this more general duty does not have the effect of requiring the person inducing the assumption to guarantee the accuracy of a particular assumption regarding either the present or the future. Rather, it has the effect simply of requiring the party who has induced the assumption to put the other party in the position in which he would have been had the assumption never been induced, the position in which he would have been had the inducing party fulfilled his duty to take reasonable steps.

There are two reasons why these duties might sometimes be confused. First, as will be demonstrated below,[25] the duty to take reasonable steps might attach to induced assumptions regarding a party's intentions *qua* intentions and not simply *qua* assumptions regarding implied facts. The duty may in this way have the effect of preventing the party who has induced the assumption from simply changing his mind without putting the other party in the position in which he would have been had the assumption not been induced. This is clearly different to the effect of the duty to keep promises, however, which will operate to prevent the party who has induced the assumption from changing his mind at all, or at least from doing so without putting the party in whom the assumption has been induced in the same position as that in which he would have been had the assumption been justified. Second, the duty to take reasonable steps to ensure the reliability of induced assumptions and the duty to keep promises may, in practical terms, require the same response of the party who has induced the assumption. Of course, the two duties may not always do so. For example, I may induce in you an assumption that I will give you my house upon which you rely by painting it. Imagine that painting adds nothing to the value of the house, so that no question of my being unjustly enriched at your expense arises, but that the painting costs a considerable sum. The duty to keep promises may require that I give you my house; the duty to take reasonable steps to ensure the reliability of induced assumptions may at most require that I reimburse you the cost of the painting. However, the duty to keep promises and the duty to take reasonable steps to ensure the reliability of induced assumptions may well require the same response from those upon whom they lie. This will be in the situation

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25 See below at pp.28-29

in which the *best*, *only*, or *only satisfactory* available means of putting the relying party in the position in which he would have been had the assumption never been induced, is the same as the only available means of putting him in the position in which he would have been had the assumption proved justified. An example may be drawn from MacCormick's illustration given below when the duty under discussion is justified.[26]

To distinguish the duty under discussion from the duty not to lie is less complex than to distinguish it from the duty to keep promises. A lie is an untrue representation made by a person who has knowledge that, or is reckless as to whether, the representation is untrue. It is clear that the duty under discussion is much broader. First, a representation may be perfectly true and yet induce an assumption which is unreliable as a basis for action. Take the following example from Grice, whose work is important for the justification of the duty to take reasonable steps to ensure the reliability of induced assumptions offered below:

> A is standing by an obviously immobilized car and is approached by B, and the following exchange takes place:
> A: "I am out of petrol"
> B: "There is a garage around the corner"[27]

A's statement that there is a garage nearby may be perfectly true and yet, unless the garage is open and has petrol to sell, it may well be unreliable as a basis for action on B's part. Similarly, a representation of as to the future, and particularly a representation of intention, may be perfectly true in the only sense in which it is meaningful to speak of such a representation as being true - that is, it amounts to no false representation of fact concerning the state of the representor's mind or otherwise - and yet it may induce an assumption to which the duty to take reasonable steps attaches. This is because, as will be demonstrated below,[28] the duty can attach to assumptions as to the future *qua* the future or a party's intentions *qua* intentions and not simply to assumptions regarding implied facts. Second, a party inducing a representation may well fail to take reasonable

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26 See below at p.16 and p.31

27 Grice, H.P., "Logic and Conversation" in D. Davidson and G. Harman (eds), The Logic of Grammar (Encino: Dickenson, 1975) p.64 at p.70

28 See below at pp.28-29

steps to ensure the reliability of an induced assumption even though he neither has knowledge that, nor is reckless about whether, the representation inducing the assumption is untrue. It is perfectly possible to break the duty under discussion without being in any sense deceitful.

It is clear that the duty under discussion is both distinguishable from, and much broader than, both the duty to keep promises and the duty not to lie. A well constructed legal system might include doctrines giving expression to all three moral duties. Further, at least two of those doctrines might apply in any one given fact situation.

I turn now to offer a justification of the general duty to take reasonable steps to ensure the reliability of induced assumptions - not in its detail but rather in broad terms - and to explain why it is worthy of legal expression.

(3) Justifying the Duty

Three justifications for this general moral duty are proposed. The first relates to the general obligation not to cause preventable harm to others. From this general obligation MacCormick has deduced a further, more specific, principle which can be used to justify the duty under discussion.[29]

MacCormick's principle is that:

> ...if one person acts in a potentially detrimental way in reliance upon beliefs about another's ... conduct, and if the latter person has by some act of his intentionally or knowingly induced the former to rely upon him [in the sense that he "intended", "knew", "thought it likely" or "ought to have realized" that the other party would rely],[30] then the latter has an obligation not to act in a manner which will disappoint the other's reliance.[31]

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29 MacCormick, N., "Voluntary Obligations and Normative Powers", (1972) Supp. Vol.46 The Proceedings of the Aristotelian Society 59

30 Ibid at p.67

31 Ibid at p.68

MacCormick illustrates this principle by painting the following scene:

> Suppose that Jones has been swimming from a beach at the foot of a cliff on a stormy day. He has failed to notice the speed with which the tide is rising, and is now in such a position that a desperate dash along the beach will perhaps enable him to reach the path up to safety before he is cut off by the tide. MacDonald happens just then to be strolling along the cliff top carrying a few hundred feet of stout climbing rope. He spots Jones's predicament and lowers the rope down the cliff-face to him. Jones sees what he is doing and waits for the rope to reach himself, thus losing time so that he can no longer conceivably reach the path before the tide comes in.[32]

MacCormick argues that from the moment at which it ceases to be possible for Jones to save himself, MacDonald is under an obligation not to abandon the enterprise and that it would be wrong for him to do so even if he could thereby save another person.[33] Otherwise, by throwing down the rope and then abandoning Jones, MacDonald would be guilty of inducing reliance and thereby causing preventable harm.

It is possible to reformulate MacCormick's principle so as to justify the moral duty to take reasonable steps to ensure that the assumptions we induce in others are reliable. After all, the manner in which MacDonald induces reliance is by creating or encouraging a particular assumption - a "belief" or "supposition" as MacCormick puts it[34] - upon which Jones chooses either to rely or not to rely. MacDonald causes preventible harm by inducing an assumption upon which Jones chooses to rely but which proves to be unreliable. Jones's harm is preventable at least to the extent to which MacDonald can be expected to take reasonable steps to ensure that the assumptions he induces are reliable. On the basis of these two propositions it can be argued that MacCormick's principle is essentially the duty to take all such steps as are reasonable to ensure the assumptions we induce in others are reliable.

Note that MacCormick's illustration is one of those circumstances in which giving effect to the duty under discussion may well have the same effect as giving effect to the duty to keep promises. Imagine that a promise to assist Jones had been made. The duty to keep

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32 Ibid at p.67

33 Ibid at p.68

34 Ibid at pp.67 and 68

promises would require that such assistance be given. Yet so, too, might the duty to take reasonable steps to ensure the reliability of induced assumptions. It is difficult to see how else MacDonald could take steps to put Jones in the same position as that in which he would have been had the assumption not been induced. In these circumstances the two duties have the same effect because the response required to fulfill the promise is the *only* way of taking steps to put Jones in the position in which he would have been had the assumption not been induced. In other circumstances it may be the *best* or *only satisfactory* way of doing so.[35]

A second justification for the moral duty proposed is that it is important for the promotion of trust and co-operation in society. Enjoying the benefits of a society in which co-operation is valued must impose some obligation to facilitate co-operation by taking responsibility for the reliability of the assumptions we induce in other people. Moreover, this obligation must extend further than the duty not to tell lies and the duty not to break promises. While a traffic signal is not normally thought of as a promise (nor, indeed, is a careless signal thought of as a lie), a motor vehicle driver must owe some duty not to induce unreliable assumptions about his intended direction of travel.[36] The driver is a part of a system that values co-operation and must accept some responsibility for the reliance of others upon assumptions he induces. When he, in his turn, relies upon others, he is also entitled to protection and the recognition of these reciprocal duties makes the whole co-operative system possible.

A third justification for the moral duty proposed is that it facilitates the whole process of communication. If I engage in and benefit from a workable system of communication I must also acknowledge at least some duty to maintain that system.

Grice has identified the importance to the communication process of what he calls the "Co-operative Principle". This principle is that you should:

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35 See below at p.31

36 For the source of this example and a discussion of reliance more generally as a source of obligation, see Atiyah, P.S., Promises, at p.36

> Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged.[37]

Grice gives his principle normative force in the following way:

> So I would like to be able to show that the observance of the CP and maxims is reasonable (rational) along the following lines: that any one who cares about the goals that are central to conversation/ communication (such as giving and receiving information, influencing and being influenced by others) must be expected to have an interest, given suitable circumstances, in participation in talk exchanges which will be profitable only on the assumption that they are conducted in general accordance with the CP and the maxims.[38]

One set of the maxims to which Grice argues the co-operative principle gives rise is a set of what he calls "Quality" maxims, including "Try to make your contribution one that is true", "Do not say what you believe to be false" and "Do not say that for which you lack adequate evidence". If the central justification for the co-operative principle is that communication is about "giving and receiving information, influencing and being influenced by others" then an underlying rationale for the "quality" maxims must be that they facilitate this process. I would argue that "reliability" is the key here. Most people are centrally interested in receiving information upon which they can rely as the basis of action or inaction: they will only want to be influenced by communications upon which they believe they can rely with some security. Thus the quality maxims may be re-formulated as, "Try to make your contributions as reliable as possible".

On this basis, therefore, a third justification can be formulated for the duty to take reasonable steps to ensure that the assumptions we induce in other people - or at least those things which we communicate to them - are as reliable as possible. By recognising such a duty we facilitate the process of communication from which we each in turn also benefit.[39]

Thus a general duty to take reasonable steps to ensure the reliability of the assumptions we induce in other people may be seen as supported by the duty not to cause preventable

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37 Grice, H.P., "Logic and Conversation" at p.65

38 Ibid at p.69

39 Compare the justification for the regulation of deceptive advertising offered by Craswell in Craswell, R., "Interpreting Deceptive Advertising", (1985) 65 Boston University Law Review 657; Craswell, R., "Regulating Deceptive Advertising: The Role of Cost-Benefit Analysis", (1991) 64 Southern California Law Review 549.

harm, by the duty to promote trust and co-operation in society and by the duty to uphold the processes of communication. I ought now briefly to question whether this general duty, once recognised, is ever worthy of legal expression.

(4) Is the Duty Worthy of Legal Expression?

Regrettably, the question of when reliance ought to be legally protected (outside those circumstances involving promises or deceit) has too often been treated as simply a matter of choice between "paternalistic" and "non-paternalistic" or "liberal" political agendas.[40]

Consider, for example, the following passage from Atiyah's book, Promises, Morals and Law. Atiyah has just drawn the scene in which one neighbour, A, sets his watch by the time of the regular morning departure of his neighbour, B, and B knows of A's practice but has not invited him to rely upon it. Atiyah asks whether if B intends to vary his regular practice he is under an obligation to inform A. He proceeds:

> Now whether it is felt that the neighbour ought to be under some obligation in such a case depends largely on one's ideological starting-point. On the one hand, it may be argued that I ought to be encouraged to rely upon myself, and not upon my neighbour; I ought to get a more accurate clock myself; or find other ways of keeping time. What right have I to impose obligations on my neighbour which he has neither invited, nor been paid for? On the other hand, it may be said that human co-operation ought to be encouraged, and that a man is not sole judge of what duties he owes to his fellow men. If others come to rely upon him, whether or not he has sought that reliance, or been paid for it, he must accept some responsibility for the consequences; just as, when he relies in his turn upon others, he is entitled to some protection.[41]

Obviously, the bases upon which the state is justified in imposing obligations upon the individual are a matter for important political debate; a debate no less relevant to the imposition of obligations to protect reliance than it is to any other. This does not mean, however, that the question whether reliance ought to be protected outside the contexts of promises and deceit is necessarily determined by "one's ideological starting point". In

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40 See, for example, Feinman, J.M., "The Meaning of Reliance: A Historical Perspective", [1984] Wisconsin Law Review 1373 at p.1385ff

41 Atiyah, P. S., Promises at pp.36-37

particular, I would argue that the imposition of an obligation reflecting the moral duty defended in the preceding section can be supported just as much from a "non-paternalistic" or "liberal" political position as from any other.

For writers in the liberal tradition there is always the concern that legal obligations reflecting moral duties will unduly limit the individual's freedom to determine his own values and pursue his own goals.[42] Such writers have tended to conceive of this autonomy of the individual either positively or negatively: either as "a virtue" and "a substantive value in itself" or simply as something to be protected by ensuring that "as many individuals as possible can realize as many of their ends as possible, except insofar as they frustrate the purposes of others."[43]

However, for either class of liberal theorists, the imposition of an obligation reflecting a moral duty and impinging upon an individual's autonomy may certainly be justified if that obligation is necessary to prevent harm to others. In these terms the question, "Is the duty to take reasonable steps to ensure the reliability of induced assumptions worthy of legal expression?" becomes, "Is the legal expression of this duty necessary to prevent harm to others?" Given that a strong part of the justification of this duty is the obligation not to cause preventable harm to others, it would not seem difficult to answer such a question in the affirmative. The legal expression of the duty becomes even more justifiable in these terms if we accept that the duty is important to the maintenance of trust and the effective workings of the processes of communication. So important are trust and communication to the operation of modern society that to detract from them in a real sense causes harm to us all, individually as well as corporately. Even from a classically "non-paternalistic" or liberal position, it would thus seem possible to justify giving legal expression to the general duty to take reasonable steps to ensure that the assumptions we induce in other people are reliable.

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42 Classically Mill, J.S., On Liberty (Harmondsworth: Penguin, 1985). See also Hart, H.L.A., Law, Liberty and Morality (Oxford: Clarendon Press, 1968).

43 For an excellent discussion of these two positions see Hurley, S., Natural Reasons (New York: Oxford University Press, 1989) at p.351

Having thus, (i) outlined this general moral duty, (ii) distinguished it from the duty to keep promises and the duty not to lie, (iii) offered a justification for the duty in broad terms, and (iii) suggested that it is worthy of at least some legal expression, I turn to survey the expression it found in antecedent Anglo-Australian law and to demonstrate the inadequacy of that expression.

Chapter Two:

The Duty in Antecedent Anglo-Australian Law

(1) The Aim, Scope and Organisation of this Survey

In relation to the aim of this survey, an important caveat must be made. In this survey I am not attempting to show that particular areas of the antecedent law were developed for the purpose of expressing the duty to take reasonable steps to ensure the reliability of induced assumptions. Rather, I am asking whether, given that I have identified an important moral duty, I can find any areas of the antecedent law which *ex post facto* can be interpreted as having given it expression. In subsequently describing the inadequacies of the antecedent law I am not, therefore, seeking to identify a failure in the law to achieve its stated purpose but rather seeking to describe why, in the period preceding the development of Australian estoppel, existing doctrines were inadequate as legal vehicles for the duty described.

In relation to the scope of this survey three points should be made. First, for the reasons outlined in the Prologue, the Anglo-Australian law under survey is that in force at the turn of the 1980's: the legal context in which the doctrine of Australian estoppel emerged. Second, the law of contract and deceit are excluded from this survey as being centrally concerned with the expression of other moral duties: the duty not to break promises and the duty not to lie. Third, because this section is intended to serve the function of a survey, only the principal elements of an antecedent Anglo-Australian response to the question of reliance upon induced assumptions will be treated. More detailed questions such as the rôle of the remedial trust or of section 52 of the Trade Practices Act 1974 (Cth) are therefore excluded.

The areas of antecedent Anglo-Australian law most likely to have given expression to the duty to take reasonable steps to ensure the reliability of induced assumptions were

negligent misstatement, misrepresentation, other equitable relief, and estoppel. Each of these areas will be considered in turn, with estoppel considered last because it is the law out of which the doctrine described in Part Two of this thesis has emerged.

(2) Negligent Misstatement

Negligent misstatement was the cause of action most giving expression to the duty under discussion in antecedent Anglo-Australian law.

Consideration of negligent misstatement must begin with the case of Hedley Byrne & Co. Ltd v Heller & Partners Ltd[44] decided in 1963. In this case one company had been induced to give credit to another company, and thereby lost money, on the basis of financial references negligently prepared by the second company's bank. Although the bank was held not to be liable because its references were headed "without responsibility", the House of Lords agreed that the bank owed a duty of care to the first company which it had broken.

It is difficult to establish any clear basis on which the duty of care was recognised in Hedley Byrne & Co v Heller & Partners Ltd. Two concepts emerge repeatedly in the judgments, those of a "voluntary assumption of responsibility" and a "special relationship". It was thought at the time of the case that the courts would establish the parameters of the duty of care against negligent misstatement on the basis of those two concepts.[45] Yet, by the turn of the 1980's, liability for negligent misstatement was on as conceptually unsure a foundation as it had been just after Hedley Byrne & Co v Heller & Partners Ltd was decided.

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44 [1964] A.C. 465

45 See, for example, Stevens, R.,"Hedley Byrne v Heller: Judicial Creativity and Doctrinal Possibility" (1964) 27 Modern Law Review 121 at p.142

Six aspects of the doctrine described in Hedley Byrne & Co v Heller & Partners Ltd, as it stood at the turn of the 1980's, make it difficult to claim that negligent misstatement provided a satisfactory treatment of the general duty to ensure the reliability of induced assumptions. Five of these aspects of the doctrine relate to the situations in which liability would arise under negligent misstatement and the sixth relates to the issue of the remedies to which that doctrine could give rise.

First, at the turn of the 1980's, the need to prove a "voluntary assumption of responsibility" may have been a limitation on the application of the doctrine. Strictly speaking, it was at this time established neither whether a "voluntary assumption of responsibility" was necessary to a claim in negligent misstatement, nor what a "voluntary assumption of responsibility" might have been.[46] Where it was invoked, the concept was presumably intended to ensure that the duty was only imposed where there was some degree of undertaking by one party to the other, but it was never explained satisfactorily. A breach of the duty to take reasonable steps to ensure the reliability of induced assumptions may well be more likely where the inducing party has stressed the accuracy of the induced assumption to such an extent as to have made some type of undertaking in relation to it. However, it is clearly possible to break the duty without in any way voluntarily assuming responsibility for the assumption induced. In that it operated to limit the application of the doctrine, the concept of the "voluntary assumption of responsibility" limited the extent to which that doctrine could give expression to the duty under discussion because the concept was simply not determinative of whether that duty had been broken.

Second, in order to establish liability in negligent misstatement, a "special relationship" needed to be shown. This concept also proved difficult. It was unclear how it related to the concept of the "voluntary assumption of responsibility". Further, it was unclear exactly what would constitute a "special relationship". Despite a holding by the Privy

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46 For a survey and critique of the possible senses in which this phrase was used in the cases see Barker, K., "Unreliable Assumptions in the Modern Law of Negligence" (1993) 109 Law Quarterly Review 461.

Council that this "special relationship" needed to be a relationship with some type of professional adviser who held himself out as qualified to give, or was in the business of giving, information or advice of the relevant type,[47] it was clear by 1980 that this was not the case in England,[48] and, soon after, that it was unlikely to be the case in Australia.[49] It was not yet clear, however, whether the relationship had to be "equivalent to contract" (as Lord Devlin had suggested in Hedley Byrne & Co v Heller & Partners Ltd[50]), or to consist in knowledge of the likelihood of reliance by the other party (as Lord Reid had seemed to suggest[51]), or simply to be the relationship of proximity known to the law of negligence generally (as Lord Morris and Lord Hodson had seemed to claim[52]).

However, to the extent that some type of special relationship or knowledge was required for the application of the doctrine of negligent misstatement, its capacity to give expression to the duty under discussion was reduced. One the one hand, it is clear that the parties' relationship and their relative knowledge must be taken into account in determining whether that duty might apply and what it might require of the party inducing the assumption. The stranger who asks directions in the street cannot expect the same level of diligence on my part as the neighbour who regularly relies on my directions and whom I know to be both unable to read a map and expected at an important meeting within the hour. Yet, on the other hand, it is equally clear that no particular type of special relationship or knowledge could be said to be a pre-requisite for the duty to arise. It is clear that even between total strangers - with no knowledge of one another's affairs - there may be a failure to take reasonable steps to ensure the reliability of induced assumptions. I may very well cause preventable harm[53] and I may

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47 Mutual Life & Assurance Co. v Evatt [1971] A.C. 793

48 Howard Marine v Ogden [1978] Q.B. 574

49 Shaddock v Parramatta City Council (1981) 150 C.L.R. 225

50 Hedley Byrne & Co. Ltd v Heller & Partners Ltd (1964) at p.530

51 Ibid at p.486

52 Ibid at pp.496 and 509 respectively

53 As for example, MacDonald might cause harm to Jones in MacCormick's example, see above at p.16

seriously impede good communication[54] and trust by dealings with a stranger in which I break the duty.

Third, liability for negligent misstatement was principally restricted to situations in which an assumption had been induced by a statement (or sometimes by conduct) and not by silence. It is true that the doctrine of negligent misstatement could sometimes give rise to a remedy in contexts in which there had been a failure to speak that induced an assumption,[55] but there was a reluctance to impose liability in such contexts.[56]

In that it rarely applied in situations in which the relevant assumption was induced by silence, the doctrine of negligent misstatement again did not offer an adequate treatment of the duty under discussion. It is clear that the distinction between assumptions induced by express representation or conduct and assumptions induced by silence is relevant to the question of whether that duty has been broken. Crucial to the application of the duty is the issue of whether one party has caused another to adopt a particular assumption. It is always open to the party who has allegedly induced the assumption to say that his silence had no significance or even a different significance to that understood by the party in whom the assumption was induced. However it is also clear that this distinction between assumptions induced by silence and by some type of representation does not dispose of the question whether the duty under discussion has been broken. In the complexities of communication, silence sometimes speaks with a voice louder than words, as in this example from Grice:

> A is writing a testimonial about a pupil who is a candidate for a philosophy job, and his letter reads as follows: "Dear Sir, Mr. X's command of English is excellent, and his attendance at tutorials has been regular, Yours etc." ... A cannot be opting out, since if he wished to be uncooperative, why write at all? He cannot be unable, through ignorance to say more, since the man is his pupil; moreover, he knows that more information is wanted. He must therefore, be wishing to impart information which he is reluctant to write down. This supposition is only tenable on the assumption that he thinks that Mr. X is no good at philosophy. This, then, is what he is implicating.[57]

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54 As, for example, might the passer-by in Grice's example concerning the car driver, see above at p.14

55 Shaddock v Parramatta City Council (1981)

56 Dillingham v Downs [1972] 2 N.S.W.L.R. 49; Argy Trading v Lapid Development Co. [1977] 1 W.L.R. 444

57 Grice, H.P., "Logic and Conversation" at p.71

By silence understood in its context, A has induced an assumption that Mr X is not skilled in philosophy. In this example the context happens to have involved other express representations but it need not always. If, by his silence, one party is thus capable of inducing an assumption in another party, ought the mere mode of communication to prevent the duty to take reasonable steps to ensure the reliability of induced assumptions from applying? Arguably the mode of communication creating the assumption is an incidental matter, and provided the difficulties of causality can be overcome, the duty ought to apply with equal stringency. The reluctance of the courts to apply the doctrine of negligent misstatement when silence was said to constitute a representation, hampered the potential of the doctrine to give expression to the duty to take reasonable steps to ensure the reliability of induced assumptions.

Fourth, liability for negligent misstatement was principally restricted to situations in which the relevant statement was untrue. It is probable that a statement which was literally true but misleading could give rise to liability in negligent misstatement, though there seems to have been no English or Australian authority directly on the point.[58] In as much as liability in negligent misstatement was restricted to untrue statements, however, it again did not give adequate expression to the duty to take reasonable steps to ensure the reliability of induced assumptions. As was suggested above when the duty was distinguished from the duty not to tell lies, a breach of the duty to take reasonable steps to ensure the reliability of induced assumptions can occur in contexts in which those assumptions are induced by true, just as much as by untrue, representations.[59]

Fifth, a representation about the future could constitute a negligent misstatement only in two particular circumstances. First, it could do so where it falsely represented the real intentions of the person making the representation. In the words of the famous tag, "[T]he state of man's mind is as much a fact as the state of his digestion."[60] Second, a

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58 Though there was authority for this point in the analogous law of misrepresentation as, for example, in Notts Patent Brick and Tile Co. v Butler (1886) 16 Q.B.D. 778

59 See above at p.14

60 This quotation has been important to the law of negligent misstatement, but is actually drawn from a case dealing with the law of deceit: Edgington v Fitzmaurice (1885) 29 Ch.D 459 at p.482 per Bowen L.J.

representation about the future could constitute a negligent misstatement where it wrongly implied that the person making the representation had good grounds for a particular prediction of future events or conditions. In Esso Petroleum Co. Ltd v Mardon,[61] the defendant's representation related to the predicted throughput of a service station, but the reason that it seems to have constituted a negligent misstatement was that it implied that the defendant had good grounds for estimating that throughput.[62] A representation as to the future could not lead to liability in negligent misstatement if it was a statement of intention, honestly held at the time it was made, and the person making the representation had simply changed his mind.

In this approach to statements about the future, the doctrine of negligent misstatement once again did not offer adequate treatment of the duty to take reasonable steps to ensure the reliability of induced assumptions. A representation regarding the future is self-evidently less reliable than a representation regarding existing fact. The future is unknowable and, where the relevant representation is of a party's future intentions, it is usually to be assumed that that party has reserved the right to change his mind. A party who has induced an assumption regarding the future will less often have broken the duty under discussion than will a party who has induced an assumption regarding existing fact. There may well be circumstances, however, in which a party who has induced an assumption regarding the future *qua* the future, and even his intentions *qua* intentions, has broken the duty under discussion. This is because in failing to take reasonable steps to ensure the reliability of an induced assumption as to intention a party may cause just as much preventable harm as he may in failing to take reasonable steps to ensure the reliability of an induced assumption as to fact. MacCormick's work, used to justify the duty on the basis that we ought not to cause preventable harm, was specifically illustrated by a representation relating to intention.[63] Once Jones had relied upon the assumption that MacDonald would help him, and because of the predicament in which Jones would

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61 [1976] 1 Q.B. 801

62 For a similar example, see Mutual Life & Citizens' Assurance Co. Ltd v Evatt (1968) where in the High Court of Australia it was made clear that the relevant negligent misstatement was that a company was, and *would continue to be*, financially stable.

63 See above at p.16

otherwise have found himself, MacDonald was duty bound to take reasonable steps to put MacDonald in the position in which he would have been had the assumption not been induced. This was the only way in which MacDonald could have avoided preventable harm to Jones. Similarly, it may be just as detrimental to trust and co-operation in society that a party who has induced an assumption regarding the future or his intentions, even one which was a perfectly accurate reflection of the state of his mind at the time it was induced and implied no false representations of fact, fails to take steps to ensure that the party in whom is was induced does not suffer harm by relying upon it. The doctrine of negligent misstatement, it is submitted, gave too much weight to the distinction between assumptions induced by representations as to existing fact and those induced by representations as to the future or intention to give adequate expression to the duty under discussion.

Moreover, it is clear that the distinction between assumptions induced by statements of fact and assumptions induced by statements as to the future, while theoretically possible, was never very satisfactory in practice. This was because the parties had rarely addressed their minds to the issue regarded by the law as relevant.[64] Further, the relevant acts of reliance - whatever they may have been - would have been the same whether the representation had been taken as one concerning the state of the representor's mind or his intentions. Thus, in practice, the notion of statements of intention operating as statements of fact concerning the speaker's mind, or as implied statements that the speaker had ground for his representation, often simply provided a way for the judges to circumvent the fact/future distinction in cases in which they intuited that the duty to take reasonable steps to ensure the reliability of induced assumptions had been broken. Consider, for example, the estoppel case of Salisbury (Marquess) v Gilmore[65] in which the distinction between assumptions induced by representations as to fact and assumptions induced by representations as to the future was

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64 Thus in Waltons, the question of whether Maher believed that exchange had taken place and/or that a contract existed (taken to be a belief regarding fact) or whether he merely believed that exchange would take place (taken to be a belief regarding the future) was a question that divided the court. See, in particular, at p.413 per Brennan J.

65 [1942] 2 K.B. 38

also relevant. In this case the statement, "It is the intention of [the plaintiffs] to demolish the building" was said to amount to the factual statement:

> "This house is so old and out of date that any sensible landlord would rebuild it at the end of the term" or, more succinctly, "This house is ripe for re-erection, it is doomed to demolition".[66]

It is clear that this distinction is not one of which the parties themselves would have been aware in their dealings. The antecedent law ought not to have been forced into such artificiality.

Sixth, and finally, the law of negligent misstatement did not offer an adequate treatment of the duty to take reasonable steps to ensure the reliability of induced assumptions because of the remedies to which it could give rise. Two measures of remedy might be awarded to a party who has relied upon an induced assumption. The first measure compensates the party holding the assumption for any loss he might have suffered by his reliance: it puts him in the position in which he would have been had the assumption never been induced. The second measure requires the party who has induced the assumption to make it good: it puts the party awarded the remedy in the position in which he would have been had the assumption proved accurate.

The first of these approaches to remedy is the most obvious way of compensating reliance upon an assumption at the expense of the party who has induced it. It puts the party holding the assumption in the position in which he would have been had the inducing party been more careful to fulfil his duty to ensure the reliability of the relevant assumption. Thus Fuller and Perdue have labelled it the "reliance" measure of remedy.[67] Awarding the second of these measures - the "expectation" measure - could obviously overcompensate reliance upon an induced assumption. The party holding the assumption could end up better off than he would have been had the assumption never been induced at all. The expectation measure of remedy is the measure usually

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66 Ibid at pp.51-52 per MacKinnon L.J.

67 Fuller, L.L. and Perdue W.R., "The Reliance Interest in Contract Damages", (1936-1937) 46 Yale Law Journal 52 and 373

associated with contract and the duty to keep promises.[68] It is not a measure obviously appropriate to enforcing the duty to take reasonable steps to ensure the reliability of induced assumptions.

Nevertheless, as was suggested above,[69] and as Fuller and Perdue have shown, there may be situations in which awarding the expectation measure of remedy may be the best or only satisfactory way of protecting justified reliance. This is because the expectation measure:

> ...offers the measure of recovery most likely to reimburse the plaintiff for the (often very numerous and very difficult to prove) individual acts and forbearances which make up his total reliance...[70]

For this reason a legal system that sought to give adequate treatment to the duty to take reasonable steps to ensure the reliability of induced assumptions would need at least sometimes to offer the expectation measure, as well as the reliance measure, to compensate breaches of that duty.

Yet the action for negligent misstatement would generally only compensate a plaintiff's "out of pocket" loss,[71] and would certainly only give rise to an award in the reliance measure. Two features of the law of remedies that might obscure this point should be cleared away. First, English and Australian tort law have more recently flirted with awards apparently akin to those in the expectation measure, but it should be emphasised that these experiments, whatever their current status, came after the period under discussion.[72] Second, awards in the reliance and expectation measures are sometimes, in practice, difficult to distinguish. For example, it has been claimed that "lost profits" were awarded in Esso Petroleum Co. Ltd v Mardon.[73] However, what was awarded in

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68 Robinson v Harman (1848) 1 Ex. 850

69 See above at pp.13-14 and 16-17

70 Fuller, L.L. and Perdue, W.R., "The Reliance Interest" at p.60

71 Shaddock v Parramatta City Council (1981)

72 For example, in Junior Books Ltd v Veitchi Co. Ltd (1983) and Hawkins v Clayton (1988) 164 C.L.R. 539. One case in which expectation loss does seem to have been remedied in tort in the period under discussion was Ross v Caunters [1980] 1 Ch. 296, but Sir Robert McGarry V.-C. clearly did not intend to lay down any general principle for tort recovery in that case.

73 Esso Petroleum Co Ltd v Mardon (1976). This claim is made, for example, in Fleming, J.G., The Law of Torts 8th edn (Sydney: Law Book Company, 1992) at n.187 p.650

that case was not profits that the plaintiff would have made had the statement made to him been accurate, but rather profits that the plaintiff would have made had the misstatement not been made, had he not invested in the enterprise concerning which the misstatement was made and had he used his money to make profits elsewhere. Such an award may be criticised as speculative, but it was clearly not an award in the expectation measure. Therefore, in that awards in the expectation measure are sometimes necessary for giving effect to the duty to take reasonable steps to ensure the reliability of induced assumptions, because they sometimes compensate a plaintiff's actual reliance loss better than an award in the reliance measure, the antecedent Anglo-Australian law of negligent misstatement may be said to have handled that duty inadequately.

Indeed, in each of the six ways outlined in the preceding pages, the doctrine of negligent misstatement can be seen to have handled that duty inadequately. The doctrine at best amounted to an incomplete system for the protection of justified reliance and for giving expression to the duty under discussion.

(3) Misrepresentation

Negligent misstatement was the principal cause of action in antecedent Anglo-Australian law offering protection for reliance upon induced assumptions. However, in the context in which reliance upon an induced assumption had taken the form of entry into a binding contract, liability for misrepresentation under common law, equity and statute might also have applied.

Relief for misrepresentation in the form of rescission of the contract has long been available both at common law and in equity. At law rescission was only available if the misrepresentation was fraudulent,[74] while in equity "innocent" misrepresentation would suffice.[75] Assuming that the party who had relied upon the misrepresentation would not

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74 For a discussion of the position at common law before the Judicature Acts see Kennedy v Panama, etc., Royal Mail Co. Ltd (1867) L.R. 2 Q.B. 580 at p.587 per Blackburn J.

75 See Redgrave v Hurd (1881) 20 Ch.D.1

have entered the contract had he known of the true state of affairs, rescission would ordinarily have had the effect of putting him in the same position as that in which he would have been had the relevant assumption not been induced. By the turn of the 1980's, various statutory regimes also provided for money damages in situations where innocent misrepresentation had induced entry into a contract.[76] In general the better view was that these damages were valued at the reliance, rather than the expectation, measure.[77]

Yet once again it is important to emphasise the particularity, in at least three senses, of this compensation for reliance upon induced assumptions. First, they only applied where the relevant acts of reliance had been entry into a binding contract. Second, at least to the same extent as the doctrine of negligent misstatement, these doctrines would only apply in the context in which the representation inducing the assumption was untrue and related to a matter of fact. As with negligent misstatement, there was also a reluctance to find that silence had amounted to a misrepresentation. In as much as they were also limited in these ways the common law, equitable and statutory actions for misrepresentation gave no more adequate treatment to the duty under discussion than did the action for negligent misstatement. Third, and again like the action for negligent misstatement, the actions for misrepresentation were unable to give rise to remedies in the expectation measure. In this way, too, they were limited in their ability adequately to express the duty to take reasonable steps to ensure the reliability of induced assumptions. These actions offered some protection of justified reliance, but it was protection of a very particular kind.

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76 Misrepresentation Act 1967 (U.K.) s.2(1); Misrepresentation Act 1971-1972 (S.A.) s.7(1) and s.(2); Law Reform (Misrepresentation) Act 1977 (A.C.T.) s.4(1) and s.(2).

77 In relation to the U.K. legislation see F. & H. Entertainments Ltd v Leisure Enterprises Ltd (1976) 240 E.G. 455; André & Cie. S.A. v Ets. Michel Blanc & Fils [1977] 2 Lloyd's Rep. 166.

(4) Other Equitable Relief

In this survey of antecent Anglo-Australian law potentially giving expression to the duty under discussion, two further actions once available in the equity jurisdiction should be mentioned. These should be mentioned for the sake of historical completeness, although it was fairly clear that by the beginning of the 1980's they were defunct.

First, the courts of equity once enjoyed a power to offer the reliance measure of relief in contexts of induced assumptions.[78] In cases such as Burrowes v Lock[79] and Slim v Croucher,[80] the equity courts claimed a jurisdiction to compensate reliance upon misrepresentations in certain situations such as that in which the party making the misrepresentation had once known the true situation but it was not present to his mind at the time the misrepresentation was made. However, following the decision in Derry v Peek,[81] in which the tort of deceit was restricted to situations in which the defendant knew of the falsity of the relevant representation or had no genuine belief in its truth, this jurisdiction in equity was progressively denied. In Low v Bouverie,[82] Slim v Croucher was finally rejected as inconsistent with Derry v Peek, and Burrowes v Lock was treated by Bowen L.J. as a case concerning estoppel.[83] Notwithstanding the doubts of some writers,[84] this equitable jurisdiction may probably be regarded as having been defunct by the turn of the 1980's.

Second, the courts of equity were at one time able to protect reliance upon induced assumptions by making those assumptions good. The equity courts assumed jurisdiction

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78 For a more complete discussion see Davidson, I.E., "The Equitable Remedy of Compensation" (1982) 3 Melbourne University Law Review 349; Finn, P.D., "Equitable Estoppel" in P.D. Finn (ed), Essays in Equity (Sydney: Law Book Co., 1985) at p.59

79 (1805) 10 Ves. 470

80 (1860) 1 De G.F.&J. 518

81 (1889) 14 App. Cas. 337

82 [1891] 3 Ch.82

83 Ibid at p.106

84 See Sheridan, L.A., "Equitable Estoppel Today", (1952) 15 Modern Law Review 325; Jackson, D., "Estoppel as a Sword", (1965) 81 Law Quarterly Review 84; Duncason, I.W., "Equity and Obligations", (1976) 39 Modern Law Review 268; Dawson, F., "Making Representations Good", (1982) 1 Canterbury Law Review 329; Davidson, I.E., "The Equitable Remedy of Compensation"; Meagher, R.P., Gummow, W.M.C and Lehane J.R.F., Equity: Doctrines and Remedies 3rd edn (Sydney: Butterworths, 1992) at p.422

to enforce representations upon which the representee had relied.[85] In Hammersley v De Biel the House of Lords approved Lord Cottenham's view that:

> A representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will, in general, be sufficient to entitle him to the assistance of this Court for the purpose of realizing such representation.[86]

This jurisdiction to enforce representations was recognised for much of the nineteenth century[87] and at least at the time of Hammersley v De Biel was not thought of as contractual.[88] However, an equitable power to enforce representations outside contract was later repudiated by the House of Lords and Hammersley v De Biel itself explained on a contractual basis.[89] The demise of this equitable jurisdiction was widely accepted by the early 1980's, although it has been argued that it continues to exist unused.[90]

Because of their uncertain status, it can hardly be claimed that these actions adequately equipped antecedent Anglo-Australian law to handle the duty to take reasonable steps to ensure the reliability of induced assumptions.

(5) Estoppel

A survey of most of the antecedent Anglo-Australian law potentially expressing the duty to take reasonable steps to ensure the reliability of induced assumptions has now been drawn. Under that antecedent law no single doctrine or group of doctrines can be said to have given adequate expression to the duty to take reasonable steps to ensure the reliability of induced assumptions. In particular, no doctrine potentially giving

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85 See Holmes, O.W., "Early English Equity", (1885) 1 Law Quarterly Review 162 at p.171ff; Barbour, W.T., "The History of Contract in Early English Equity" in P. Vinogradoff (ed.), Oxford Studies in Social and Legal History vol iv (Oxford: Clarendon Press, 1914); Davidson, I.E. "The Equitable Remedy of Compensation"; Dawson, F., "Making Representations Good"; Finn, P.D., "Equitable Estoppel".

86 (1845) 42 Cl. & Fin. 45 at p.62 approved at p.88

87 See, for example, Prole v Soady (1859) 2 Giff. 1; Loffus v Maw (1862) 3 Giff. 592; Stephens v Venables (No.2) (1862) 31 Beav. 124; Thomson v Simpson (1870) L.R. 9 Eq. 497.

88 See Jackson, D., "Estoppel as a Sword"

89 Maddison v Alderson (1883) 8 App. Cas. 467. The House of Lords had actually already attempted to explain Hammersley v De Biel (1845) on a contractual basis in Mansell v Hedges (1854) 4 H.L.C. 1039.

90 For example, Jackson, D., "Estoppel as a Sword". See also Dawson, F., "Making Representations Good".

expression to that duty was able to give rise to the expectation measure of relief. I must now complete the survey with an account of the antecedent law of estoppel.

(a) Definitions

Defining and categorising the various types of estoppel has never been an easy task. "Estoppel" broadly stated may be taken to signify a rule:

> ...which precludes a person from denying the truth of some statement formerly made by him, or the existence of facts which he has by words or conduct led others to believe in.[91]

Yet the term has rarely been used alone or with so unqualified a meaning. Usually it has appeared as a part of a longer tag attached to a particular category of cases such as "promissory estoppel", "proprietary estoppel", "estoppel by representation" or "estoppel *in pais*". Leopold has identified at least twelve overlapping categories of estoppel and his list is not exhaustive.[92] Moreover, the labels tagged to those categories have not been used with precision by the courts.

Take, for example, the four judgments delivered in the High Court of Australia in Waltons and their use of the terms "promissory" and "proprietary" estoppel. In that case Mason C.J. and Wilson J. claim that the decision of the English Court of Appeal in Crabb v Arun District Council.[93] was an example of "promissory" estoppel.[94] This is surprising as in Crabb v Arun District Council itself Lord Denning M.R. claimed to be applying the principle of "proprietary" estoppel.[95] However, he did at one point[96] rely on Central London Property Trust Ltd v High Trees House Ltd[97] - the *locus classicus*

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91 Burke, J., Osborne's Concise Law Dictionary 6th edn (London: Sweet & Maxwell 1976) at p.136

92 Leopold, A., "Estoppel: A Practical Appraisal of Recent Developments", (1991) 7 Australian Bar Review 47 at pp.71-73. The list does not include, for example, estoppel by negligence, estoppel by silence or the so-called estoppel "by homologation".

93 [1976] Ch. 179

94 Waltons at p.403

95 Crabb v Arun District Council (1976) at p.187

96 Ibid at p. 188

97 [1947] K.B. 130

of "promissory" estoppel in English law - and it may have been that which confused Mason C.J. and Wilson J. Add to all this the fact that Mason C.J. and Wilson J. also emphasise[98] that Crabb v Arun District Council - which they have just cited as an instance of "promissory" estoppel - is consistent with Ramsden v Dyson[99] - a decision they admit to be based in "proprietary" estoppel[100] - and the conundrums of terminology and categorisation become very difficult to unravel. Although Waltons is itself a recent case, this type of terminological confusion has beset the discussion of estoppel for some time.

However, these difficulties notwithstanding, theorists in the period before the turn of the 1980's often displayed great confidence in their ability to classify and categorise at least the most important estoppel cases[101] and, in particular, the text Spencer Bower and Turner: The Law Relating to Estoppel by Representation[102] provided them with a framework in which to place the confusing mass of estoppel decisions and terminology with which to describe it. This book, the third and most recent edition of which was published in 1977 and is still in print, is the only comprehensive published survey of the antecedent Anglo-Australian law of estoppel. It has been treated both in the courts and in academic texts as the major work of reference in the area.[103] By November 1995 the work had been referred to in at least one hundred and ninety three English and Australian cases and the frequency with which it was referred to was growing.[104] It

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98 Waltons at p.404

99 (1866) L.R. 1 H.L. 129

100 Waltons at p.404

101 Not always without difficulty! Spencer Bower and Turner can only unravel Crabb v Arun District Council (1976) by pointing out that the judgment was delivered extempore and thus likely to be confused (Turner, A.K. (ed.), Spencer, Bower and Turner: The Law Relating to Estoppel by Representation 3rd edn (London: Butterworths, 1977) at p.307). Treitel explains Griffiths v Williams [1978] E.G.D. 919 on the basis that "promissory" estoppel was a misprint of "proprietary" estoppel (Treitel, G.H., The Law of Contract 8th edn (London: Sweet & Maxwell, 1991) at p.135).

102 Ibid

103 For example, in relation to estoppel by convention, one author claims that "The frequency with which passages in this chapter [of the book] have been approved by various judges indicates the strong influence this chapter has exerted over the understanding of this doctrine." Harvey, M.N., "Estoppel by Convention: An Old Doctrine with New Potential" (1995) 23 Australian Business Law Review 45 at p.45 n.7

104 This claim is the result of a LEXIS search undertaken in Novermber 1995.

was also referred to in most of the important English and Australian estoppel decisions in the twenty years before Verwayen.[105]

It is therefore the Spencer Bower and Turner position that shall be outlined here as the antecedent Anglo-Australian approach to the theory and categorisation of estoppel. In using the Spencer Bower and Turner book in this way, it must be acknowledged that the book takes a very conservative view of antecedent estoppel doctrine, and especially of cases such as Spiro v Lintern[106] and Evenden v Guildford City Association Football Club Ltd.[107] It certainly does not recognise the range of applications of the antecedent doctrine that was to be recognised after the turn of the 1980's in decisions such as Société Italo-Belge pour le Commerce et l'Industrie v Palm and Vegetable Oils (Malaysia) Sdn. Bhd.,[108] Amalgamated Investment and Property Co. v Texas Commerce International Bank,[109] Taylors Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd.,[110] and Pacol Ltd v Trade Lines Ltd,[111] The Stolt Loyalty.[112] However, the extent to which the work was acknowledged to be an authority in antecedent Anglo-Australian law justifies its choice as an outline of the estoppel law in the period preceding the turn of the 1980's.

Spencer Bower and Turner opened their book with a division of estoppel into two categories, estoppel by representation and estoppel *per rem judicatam*. The second of these they put to one side as involving considerations essentially different to those upon

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105 These include Kammins Ballrooms Co. Ltd v Zenith Investments (Torquay) Ltd [1971] A.C. 850; Hexagon Pty Ltd v Australian Broadcasting Commission (1975) 7 A.L.R. 233; Evenden v Guildford City Association Football Club Ltd [1975] 1 Q.B. 917; Crabb v Arun District Council (1976); Moorgate Mercantile Co Ltd v Twitchings [1976] Q.B. 225; Brikom Investments Ltd v Carr [1979] Q.B. 467; Amalgamated Investment and Property Co. v Texas Commerce International Bank (1982); Taylors Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd. (1982); Legione v Hateley (1983) 152 C.L.R. 406; Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd (1986) 160 C.L.R. 226; Waltons; Verwayen.

106 [1973] 1 W.L.R. 1002

107 Evenden v Guildford City Association Football Club Ltd (1975)

108 Société Italo-Belge pour le Commerce et l'Industrie v Palm and Vegetable Oils (Malaysia) Sdn. Bhd. (1982)

109 Amalgamated Investment and Property Co. v Texas Commerce International Bank (1982)

110 Taylors Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd. (1982)

111 Pacol Ltd v Trade Lines Ltd (1982)

112 The Stolt Loyalty (1993)

which the ordinary private law doctrine of estoppel was built. The first they saw as consisting in three sub-categories, estoppel by representation proper, estoppel by convention or deed, and the doctrine of encouragement or acquiescence, often called "proprietary" estoppel.[113] To these categories of estoppel were also added "two quasi-estoppels, in which while some significant departure is made from one or more of the general propositions ... governing true estoppels, yet the principles generally relating to estoppels are seen for the most part to be applicable."[114] These "quasi-estoppels" were election and "promissory" estoppel.

Estoppel by representation Spencer Bower and Turner defined in the following terms:

> ... where one person ("the representor") has made a representation to another person ("the representee") in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.[115]

Accordingly, a party seeking to raise on an estoppel was required to show:[116]

> (a) That the alleged representation of the party sought to be estopped was such as in law deemed a representation; [This includes any representation of fact capable of giving rise to an action for misrepresentation[117] and made either expressly, by conduct, by silence or inaction.[118]]
> (b) that the precise representation was in fact made;
> (c) that the representation, or case, which the party is later sought to be estopped from making, setting up or attempting to prove, contradicts in substance his original representation, according to proper canons of construction;
> (d) that such original representation was of a nature to induce and was made with the intention (actual or presumed) and the result of inducing, the party raising the estoppel to alter his position on the faith thereof to his detriment;[119]
> (e) that such original representation was made by the party sought to be estopped, or by some person for whose representations he is deemed in law responsible, and

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113 The terms "estoppel by acquiescence or encouragement" and "proprietary estoppel" are used interchangeably in this thesis.

114 Turner, A.K. (ed.), Estoppel by Representation at p.313

115 Ibid at p.4

116 Ibid at pp.27-28

117 Ibid at p.29

118 Ibid at p.45ff.

119 For Spencer Bower and Turner's treatment of this requirement see the outline of their approach to promissory estoppel offered below at p.41ff

> was made to the party setting up the estoppel, or to some person in right of whom he claims.

Within this general framework, estoppel by convention was distinguished from estoppel by representation proper, in that it was founded:

> ... not on a representation of fact made by a representor and believed by a representee, but on an agreed state of facts the truth of which has been assumed, by convention of the parties, as the basis of a transaction into which they are about to enter.[120]

Moreover, for estoppel by convention, the party seeking to rely on the assumed state of facts did not need to have believed in them. It would be sufficient if he had assumed that they were to be treated as true as between the parties themselves.[121]

Estoppel by acquiescence or encouragement operated when:

> ... A has a right or title which B is in fact infringing under a mistaken belief that his acts are not acts of infringement at all, and A is aware of his own title or right and also of B's invasion of that title or right, and of his erroneous belief that he is not encroaching thereon, but is lawfully exercising rights of his own, and yet, with that knowledge, A so conducts himself, or so abstains from objection, protest, warning or action as to foster and maintain the delusion under which he knows that B is labouring, and induce B to act to his prejudice on the faith of the acknowledgment to be implied from such conduct or inaction, [then] A is not permitted afterwards to assert his own rights against B, or contest B's rights against himself.[122]

This type of estoppel was distinguished from all others in that, whereas the latter were said to be merely rules of evidence incapable of founding a cause of action, under this type an action could be brought. Moreover, a party seeking to rely on this type of estoppel was ordinarily required to establish a greater degree of knowledge in the party against whom the estoppel was sought than he was to establish any other type of estoppel by representation. He was required to show that the representor had actual knowledge, not only of his own rights, but also of the fact that the other party was acting under a mistaken assumption.[123] Spencer Bower and Turner did not distinguish proprietary

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120 Turner, A.K. (ed.), Estoppel by Representation at p.157

121 Ibid at pp.159-160

122 Ibid at pp.283-284

123 Ibid at p.288

estoppel on the basis that it applied only to establishing title to land as some writers have suggested.[124]

I turn, then, from the three types of estoppel by representation that Spencer Bower and Turner outlined (estoppel by representation proper, estoppel by convention or deed, and estoppel by acquiescence or encouragement), to one of their "quasi-estoppels" ("promissory" estoppel).[125] Promissory estoppel was of rather uncertain status in Australia at the turn of the 1980's. The doctrine was not recognised by the High Court until 1983,[126] although it had been recognised in some form by the state courts earlier[127] and had a provenance in England much earlier still. However, although not firmly established in Australia until 1983, promissory estoppel formed an important part of the doctrinal background to the decisions in Waltons and Verwayen and for this reason it should be included in this survey of antecedent Anglo-Australian law.

According to Spencer Bower and Turner, promissory estoppel could only ever be established between the parties to a contract or "that kind of relationship."[128] Where a promise was made between such parties which was "intended to create legal relations, [was] to the knowledge of the promisor to be acted upon by the promisee, and [was] in fact so acted upon by the promisee,"[129] it would be given legal effect by the courts. The principal difference identified between promissory estoppel and estoppel by representation was therefore that the former could be built upon a promise and not merely a representation of fact. Like estoppel by representation proper and estoppel by

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124 For example, Burrows, A.S., "Contract, Tort and Restitution" at p.240

125 Nevertheless, for the sake of brevity, "promissory" estoppel is intended to be included whenever in this thesis I refer to the "various orthodox categories of estoppel".

126 In Legione v Hateley (1983). As to why the Australian courts took so long to accept the doctrine see Morgan, S.M., "A Comparative Analysis of the Doctrine of Promissory Estoppel in Australia, Great Britain and the United States" (1985) 15 Melbourne University Law Review 134 at p.145

127 See Gardner v Commissioner of Probate Duties [1967] W.A.R. 106; Wilson v Kingsgate Mining [1973] 2 N.S.W.L.R. 713; Re Australian Continental Resources Ltd (1976) 10 A.C.T.R. 19; Gollin & Co. Ltd v Consolidated Fertilizer Sales Pty Ltd [1982] Qd. R. 435; Je Maintiendrai Pty Ltd v Quaglia (1981) 26 S.A.S.R. 101.

128 Turner, A.K. (ed.), Estoppel by Representation at p.380

129 Ibid at p.369

convention, promissory estoppel gave rise to no new cause of action, but could provide a defence against the enforcement of otherwise enforceable rights.

There had been debate as to whether "detriment" of the type necessary to found an estoppel by representation was also necessary to found a promissory estoppel. Spencer Bower and Turner claimed that this debate flowed from a misunderstanding of the term detriment in estoppel cases generally. They claimed that, for both promissory estoppel and estoppel by representation, detriment was requisite and consisted in any "injustice to the promisee which would result if the promisor were allowed to recede from his promise."[130] Detriment was therefore to be judged at the moment at which the promisor/representor proposed to resile from his promise/representation.[131] Gauging detriment involved comparing the position of the promisee/representee before and after the proposed withdrawal by the promisor/representor and not before and after his reliance upon the promise/representation. In support of such a position Spencer Bower and Turner cited the judgment of Dixon J. in Grundt v Great Boulder Pty Gold Mines Ltd:[132]

> ... the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it. So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment.

This understanding of the detriment requirement should be contrasted with another major antecedent position. According to this second view, detriment in the fuller sense of loss suffered even before the assumption had proved unjustified was a requirement for estoppel by representation, while detriment in the sense outlined by Spencer Bower and Turner was sufficient for promissory estoppel.[133] For present purposes it is sufficient to note the existence of these two commonly accepted, although divergent positions. The

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130 Ibid at p.390

131 Ibid at p.110

132 (1938) 59 C.L.R. 641 at p.675

133 See, for example Treitel, G.H., Contract at p.110

estoppel requirement of detriment will be fully considered in discussing the development of Australian estoppel.

Finally, it was also emphasised in Spencer Bower and Turner's book that promissory estoppel did not modify rights *per se*. The promisor could revoke his promise with notice as long as he could restore the other party to a position equivalent to that which he originally occupied. This was a position about which there was some, albeit limited, debate.[134]

Thus the four principal categories of estoppel (or quasi-estoppel) recognised by antecedent theory - estoppel by representation proper, estoppel by convention, "proprietary" and "promissory" estoppel - have now been outlined.

(b) Estoppel and the protection of reliance upon induced assumptions

It is unclear to what extent the various version of estoppel recognised by antecedent Anglo-Australian law gave expression to the general duty to take reasonable steps to ensure the reliability of induced assumptions. The Spencer Bower and Turner definitions show that reliance upon an induced assumption was required to be proved before any of the various categories of estoppel could be brought into play. On this basis it might be assumed (i) that, at least to some extent, the various categories of estoppel were intended to protect reliance upon induced assumptions, and (ii) that, at least to some extent, they gave expression to the general duty to take reasonable steps to ensure the reliability of induced assumptions. However, neither of these propositions can be at all easily demonstrated for two reasons.

First, requirements of special relationship, special knowledge, that the representation founding the estoppel be one as to fact and not the future, and the like, constrained the

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134 See, for example, Burrows, A.S., "Contract, Tort and Restitution" at p.240

application of the various versions of estoppel almost as much as they did the doctrine of negligent misstatement. Spencer Bower and Turner claimed that "[f]or the purposes of giving rise to an estoppel, a representation [was thought to be] precisely what it [was] for the purpose of giving rise to an action of misrepresentation."[135] In that these limitations upon the various versions of estoppel applied, and for reasons already outlined, they may be said to have prevented them from giving comprehensive treatment to the duty to take reasonable steps to ensure the reliability of induced assumptions.

Secondly, and far more importantly, there was a fundamental confusion in antecedent Anglo-Australian estoppel law as to whether the doctrine was, in fact, intended to protect reliance, to enforce promises or to reverse unjust enrichment. The fundamental purposes of estoppel were as much a matter for debate as the fundamental purposes of contract, except that in the estoppel context the contending positions in the debate were far less clearly articulated.

This confusion was reflected in, fuelled, and was probably at least in part caused by, a corresponding confusion regarding the type of relief to which the various types of estoppel would lead. Did each type lead to the expectation, reliance or restitution measure of relief? Burrows has offered the following example:

> ... say the plaintiff promises the defendant that he will not enforce a debt owed of £2,000. In reliance on this, the defendant incurs a commitment, which he cannot escape from, to the tune of £800. Can the plaintiff now claim the remaining £1,200? If, in using promissory estoppel as a defence, the defendant's status quo [reliance] interest only may be protected, then the plaintiff would indeed be able to claim the remaining £1,200. If, on the other hand, in using promissory estoppel as a defence, the defendant's expectation interest can be protected, the plaintiff would not be able to claim the remaining £1,200.[136]

He thereby pointed out that the question whether the relief available under estoppel was in the expectation, reliance or restitution measure arose whether the doctrine was being used defensively (as in the promissory estoppel, estoppel by representation and estoppel by convention, cases) or as a cause of action (as in the proprietary estoppel cases).

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135 Turner, A.K. (ed), Estoppel by Representation at p.29

136 Burrows, A., "Contract, Tort and Restitution" at pp.241-242

Each of the antecedent categories of estoppel, therefore, should be examined to consider its underlying purpose and the relief to which it would give rise. Only by such a process of examination can the question be answered of the extent to, and manner in, which antecedent Anglo-Australian estoppel protected reliance upon induced assumptions.

I turn first, then, to estoppel by representation proper and estoppel by convention. The application of these principles traditionally led to the automatic award of the expectation measure, by treating as binding the relevant representation or convention. Spencer Bower and Turner affirmed this position[137] and then pointed out that:

> This has an interesting effect upon the ultimate result of the invocation of an estoppel; the damages recoverable by a party who succeeds, supported by an estoppel, may be more than the actual damage suffered by him as a consequence of the representation giving rise to it.[138]

They illustrated this point by reference to Greenwood v Martins Bank Ltd[139] and Ogilvie v West Australian Mortgage and Agency Corporation,[140] two cases in which a bank customer was estopped from denying that forged cheques bore a genuine signature. In each case the bank was entitled to recover the full value of the cheques notwithstanding that its detriment in not having been told that the signatures were forged consisted in missing the opportunity to sue the forger, an action which would have brought a significantly smaller sum by way of damages.

While this position was relatively well established, it was surely juristically anomalous. Estoppel by representation proper and estoppel by convention were both built upon reliance. It was reliance, intended and effected, which lead to a non-contractual representation becoming binding upon the representee, or an assumed state of affairs binding as between the parties to a particular transaction. On the basis of the fundamental

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137 Turner, A.K. (ed.), Estoppel by Representation at pp.112-113. Australian writers have also taken this line in relation at least to the consequences of estoppel by representation proper, although the more common terminology in that country has been to speak of this type of estoppel as "common law" estoppel. See, for example, Parkinson, P., "Equitable Estoppel: Developments after Waltons Stores (Interstate) Ltd v Maher", (1990) 3 Journal of Contract Law 50.

138 Turner, A.K. (ed.), Estoppel by Representation at pp.112-113

139 [1932] 1 K.B. 371 As Spencer Bower and Turner note (ibid at p.113), this point was not discussed in the judgments delivered in the case in the House of Lords, [1933] A.C. 51

140 [1896] A.C. 257

juristic principle that remedies should follow the purpose of rules, it is therefore difficult to see why these two types of estoppel should have automatically had the effect of making good the relevant representation or convention. That is not to say that expectations ought not sometimes to have been enforced as a way of protecting reliance, a possibility outlined above. It is merely to question why these types of estoppel should have automatically protected the expectation interest.

Even more difficult to assess in terms of their underlying purposes and thus the remedies to which they give rise were the doctrines of "promissory" and "proprietary" estoppel.

Regarding promissory estoppel, Burrows has demonstrated that it was unclear whether the doctrine was designed to give effect to promises or to protect reasonable reliance and thus also unclear whether it would principally offer relief in the reliance or expectation measure. This was evinced, he claims, both by the debate as to whether promissory estoppel was extinctive or merely suspensory in effect, and by the debate as to which type of detriment (if any) was a requirement for the application of the doctrine.[141] Burrows has also suggested that promissory estoppel had sometimes been used to prevent unjust enrichment and thus to give relief in the restitution measure.[142]

This uncertainty of purpose in the antecedent Anglo-Australian promissory estoppel authorities has had, incidentally, an interesting parallel in United States law. The majority of the United States recognise a doctrine of promissory estoppel described in the following terms in the RESTATEMENT (SECOND) OF CONTRACTS §90 (1979):

> A promise which the promisor should reasonably expect to induce action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

The United States materials in this area offer a far more developed body of case law than do those of England and Australia and a detailed examination of §90 is outside the scope of this thesis. Yet it is worth nothing that, even in the United States, the aim of the

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141 Burrows, A.S., "Contract, Tort and Restitution" at p. 242

142 Ibid at p.241

doctrine of promissory estoppel (in particular in relation to protecting reliance) and the nature of the remedies to be awarded under it, are still a matter of some debate.[143]

In a similar vein to Burrows' discussion of promissory estoppel, Birks has claimed that proprietary estoppel, which he calls "the doctrine in Ramsden v Dyson,"[144] was not actually one doctrine, but two. He has described it as an unfortunate amalgam of principles designed to enforce promises and to prevent unjust enrichment, unclear in its underlying purposes. Thus he has deplored its "remedial uncertainty".[145]

Birks' claim that proprietary estoppel was marked by confusion of purpose and "remedial uncertainty" was indeed easy to substantiate from the cases. For example, it was relatively clear that detriment was a requirement for the application of the doctrine[146] and remedies for this type of estoppel were said to be measured by "the minimum equity to do justice to the plaintiff."[147] This had been interpreted to be a:

> ... remedy designed to reverse the plaintiff's detriment rather than make good his expectation, unless his expectation is of less value than his detriment, or special circumstances render an expectation remedy more desirable than a detriment remedy.[148]

Both these features would suggest that it was principally the aim of proprietary estoppel to protect reliance, and that the expectation measure would only be awarded as a way of

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143 See, for example, Farber D.A. and Matheson J.H., "Beyond Promissory Estoppel: Contract Law and the 'Invisible Handshake'", (1985) 52 University of Chicago Law Review 903 at pp.904-905. These writers claim that

> ...promissory estoppel is one of the few points of agreement between the critical legal scholars on the left and the law and economics writers on the right. Both agree that reliance has been the foundation of promissory estoppel and both accuse the courts of incoherence in applying the doctrine.

However, these same writers go on to assert that reliance is "no longer the key to promissory estoppel" in the United States and their work has been a part of an ongoing debate as to the precise role of "reliance" in founding liability in estoppel. See also Wangerin P.T., "Damages for Reliance"; Becker, M.E., "Promissory Estoppel Damages", (1987) 16 Hofstra Law Review 131; Kostritsky J.P. "A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defence", (1987) 33 The Wayne Law Review 895; Yorio, E. and Thel, S., "The Promissory Basis of Section 90", (1991) 101 Yale Law Journal 111; Feinman, J., "The Last Promissory Estoppel Article", (1992) 61 Fordham Law Review 303.

144 Birks, P., An Introduction to the Law of Restitution revised edn (Oxford: Clarendon Press, 1989) at p.291

145 Ibid at p.291

146 There are doubts even about the extent of this, see Greasley v Cooke [1980] 1 W.L.R. 1306

147 For example, Crabb v Arun District Council (1976) at p.198 per Scarman L.J.

148 Heydon, J.C., Gummow W.M.C., and Austin, R.P., Cases and Materials on Equity and Trusts 3rd edn (Sydney: Butterworths, 1989) at p.423

achieving that goal. Yet almost all the reported cases decided on the basis of proprietary estoppel actually awarded the expectation measure, suggesting that the purpose of the doctrine was in fact to enforce promises.[149] In addition, there was evidence in the cases to support Birks' argument that it was sometimes the purpose of the doctrine to prevent unjust enrichment and that the restitution measure of remedy was being applied.[150] Nowhere in the cases were these three different approaches to remedies at all justified or explained or the seemingly divergent purposes of the doctrine reconciled. It was this uncertainty which made the clear exposition of proprietary estoppel just as difficult as was that of promissory estoppel, estoppel by convention and estoppel by representation proper. The purposes of the various versions of estoppel recognised by antecedent Anglo-Australian law, like the remedies to which they would give rise, were at the very best uncertain.

Thus, adding estoppel, this survey of antecedent Anglo-Australian law concerning the general duty to take reasonable steps to ensure the reliability of induced assumptions can now be summarised as follows:

(i) No single doctrine or group of doctrines can be said to have given adequate expression to the duty to take reasonable steps to ensure the reliability of induced assumptions.

(ii) In particular, the various versions of estoppel (if any one could be defined with sufficient precision) were variously marked by some of the same limitations on application that prevented the doctrines of negligent misstatement and misrepresentation from giving adequate expression to the duty to take reasonable steps to ensure the reliability of induced assumptions. Moreover, it was not even clear to what extent this doctrine operated to protect reliance, far less to enforce the duty to take reasonable steps to ensure the reliability of induced assumptions. This was because estoppel would sometimes yield the expectation, sometimes the reliance, and sometimes the restitution, measure of relief.

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149 See the cases cited in Burrows, A.S., "Contract, Tort and Restitution" at p.242

150 Birks, P., Introduction at pp.277-279

Chapter Three:

Introducing the Four Lacunae

In the first two chapters of this thesis I have (i) identified a general moral duty to take all such steps as are reasonable to ensure that assumptions induced in other people are reliable, (ii) argued that this duty merits at least some legal expression, and (iii) surveyed its treatment by antecedent Anglo-Australian law, demonstrating the inadequacy of that treatment. In this chapter I introduce a number of contexts in which can be seen the results of that inadequacy. In each area the courts were either (i) unable to furnish a remedy even though the duty under discussion had been broken, or (ii) required to patch together a remedy by applying doctrines designed to express other principles and therefore yielding remedies which were perhaps not appropriate. These areas will simply be introduced in this chapter and then considered more fully in Part Three.

As will become clear in Part Three, I am not arguing that the duty to take reasonable steps to ensure the reliability of induced assumptions is the *only* duty which will be important in each of these areas. Rather, I am arguing that the inflexibility with which that duty was handled by the antecedent law meant that situations arose in each of these areas in which a breach of the duty to take reasonable steps to ensure the reliability of induced assumptions had caused harm, relief might have been expected and was either not available or was not available on a sufficiently principled basis.

(1) Pre-Contractual Negotiations and Letters of Intent

During pre-contractual negotiations parties will often induce assumptions about their present or future activities. Under the antecedent law, if these assumptions were induced by statements as to present fact, then a party who had suffered by relying upon them

could sometimes seek compensation under the law of negligent misstatement.[151] This, of course, included some situations in which the relevant statement of fact was that the other party had reasons to support a particular prediction of future events or that he had held a particular intention.[152] In some unusual circumstances the law of estoppel by acquiescence[153] or *quantum meruit*[154] might also have applied. Where *quantum meruit* applied there was some uncertainty as to the basis in principle on which it rested; a problem which will be evident in Part Three when several of the *quantum meruit* decisions are examined.

Usually, however, the antecedent law provided no relief in relation to pre-contractual reliance unless a contract arose out of the negotiations. This was because pre-contractual reliance is usually reliance upon the anticipated success of the proposed deal and the expectations thereby engendered. It is usually reliance upon an induced assumption concerning the future *qua* the future, and in particular, the other party's intentions *qua* intentions. For fear of awarding one party to negotiations the result for which they were unable to bargain, the courts were reluctant to extend negligent misstatement to protect such reliance and even to recognise claims in estoppel or *quantum meruit*. An enormous weight was thereby given to the distinction between assumptions induced by false representations as to present fact and assumptions induced by representations as to the future.

The advantage of this antecedent position was that it drew a sharp distinction between situations in which negotiations gave rise to liability and those in which they did not. This was said to facilitate the negotiation process by providing certainty: by allowing each party to know where he stood at each stage of the proceedings. In the United States - where the law in relation to pre-contractual liability is more developed - the case of

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151 Box v Midland Bank Ltd [1979] 2 Lloyd's Rep. 391

152 Esso Petroleum Co. Ltd v Mardon (1976)

153 See Holiday Inns Inc v Broadhead (1974) 232 E.G. 951 and 1087

154 See, for example, William Lacey (Hounslow) Ltd v Davis [1957] 1 W.L.R. 932; Sabemo Pty Ltd v North Sydney Municipal Council [1977] 2 N.S.W.L.R. 880; British Steel Corp. v Cleveland Bridge & Engineering Co. Ltd [1984] 1 All E.R. 504. These cases are fully discussed in Part Three.

Texaco Inc v Pennzoil Co.[155] has fuelled a new enthusiasm for this sharp "contract/no-contract" distinction.[156] In that case a letter of intent was held to give rise to a U.S.$11.12 billion liability.

Nevertheless, I would argue that there are many situations which arise in the context of pre-contractual negotiations in which the duty to take reasonable steps to ensure the reliability of induced assumptions has been broken to one party's harm and which thereby call for compensation. Indeed, I would argue that the choice the antecedent law made - only to enforce the duty where a representation had induced an assumption of present fact - failed to reflect what negotiating parties themselves often anticipated would be their obligations. I would further maintain that the law countenanced this situation because it lacked a tool with sufficient flexibility to distinguish between situations in which liability ought to have arisen and those in which it ought not to have.[157]

To demonstrate this claim it is necessary to begin with a rough model of pre-contractual negotiation. Farnsworth points out that most modern commercial negotiation is:

> ... a far cry from the simple bargaining envisaged by the classic rules ... which evoke an image of single-issue, adversarial, zero-sum bargaining as opposed to multi-issue, problem-solving, gain-maximizing negotiation.[158]

What this means in practice is that modern commercial negotiation involves at least three stages, rather than the two - "no-contract" and "contract" - envisaged by antecedent theory. These are (i) a stage involving preliminary negotiations in which each party feels perfectly free to withdraw, (ii) a stage in which agreement "in principle" has been reached, that agreement often expressed in a "letter of intent" or similar document, and (iii) a stage in which the contract is complete.[159]

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155 626 F. Supp. 250. (1986); 784 F.2d 1133 (1988)

156 See, for example, Klein, A.R., "Devil's Advocate: Salvaging the Letter of Intent", (1988) 37 Emory Law Journal 139

157 Indeed Farnsworth has called the orthodox law "aleatory" (Farnsworth, E.A., "Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations", (1987) 87 Columbia Law Review 217 at p.221).

158 Ibid at p.219

159 This process is described in Ball, S.N., "Work Carried out in Pursuance of Letters of Intent - Contract or Restitution?", (1983) 99 Law Quarterly Review 572; Farnsworth, E.A., "Precontractual Liability"; Temkin, H.L., "When Does the "Fat Lady" Sing?: An Analysis of "Agreements in Principle" in Corporate Acquisitions", (1986) 55 Fordham Law Review 125.

Parties to such negotiations often seem to expect that activity directed towards performance of the contract will commence at the second of these stages, and that the risks involved in reliance upon the assumption that the agreement will proceed ought to fall, not upon the relying party, but upon the party who has induced the assumption.[160] This may be so whether the agreement "in principle" already reached is almost complete, though not contractual, or much more open textured.[161] Farnsworth stresses that one party's investment in the particular deal may already have become substantial by this stage and may not be of a type which can be spread out over other similar deals.[162]

A good example of commercially justified reliance upon an assumption induced at this second stage of pre-contractual negotiations can be found in the classic United States promissory estoppel decision, Hoffman v Red Owl Stores Inc..[163] This case involved a baker who was induced to sell his business in preparation for being granted a franchise over a grocery store by a particular chain. At the time of the sale, the final franchise agreement had not been signed. Nevertheless, the terms of the deal were fairly firmly set and there is little doubt on the facts of the case that reliance by the baker was expected by both parties and justified in commercial terms. The judge in this case put the following question to the jury: "Ought Joseph Hoffman, in the exercise of ordinary care, to have relied on [representations that the defendants would establish him as a franchise operator of a Red Owl store]?" That question was answered in the affirmative. In this

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160 In support of this contention Ball ("Letters of Intent" at p.580) cites Turiff Construction Ltd v Regalia Knitting Mills Ltd [1972] E.G.D. 257 and Peter Lind & Co. Ltd. v Mersey Docks & Harbour Board [1972] 2 Lloyd's Rep. 234. He might also have pointed to cases such as William Lacey (Hounslow) Ltd v Davis (1957). Farnsworth ("Precontractual Liability" at p.262) cites Gundersen & Son v Cohn 596 F.Supp. 379 (1984), Borg-Worner Corp. v Anchor Coupling Co. 156 N.E.2d 513 (1958) and APCO Amusement Co. v Wilkins Family Restaurants of America Inc. 673 S.W.2d 523 (1984). In the context of the mining industry, Trower points out that parties use letters of intent - even though non-contractual - because they want "an accord which secures their property position, allows drilling to commence, commits the remainder of the year's exploration budget, or otherwise accomplishes their business objective" (Trower, E.A., "Enforceability of Letters of Intent and Other Preliminary Agreements" (1978) 24 Rocky Mountains Minerals Law Institute 347 at p.350). In Holiday Inns Inc v Broadhead (1974) at p.1089 the managing director of Holiday Inns argued that ample justification for reliance in business was the "agreement [of] a man I thought was a gentleman".

161 See Farnsworth, A.E., "Precontractual Liability" at pp.249-264 and the categories of case discussed in Austotel Pty Ltd v Franklins Selfserve Pty Ltd (1989) 16 N.S.W.L.R. 582 at pp.588-616 per Priestley J.A.

162 Farnsworth, E.A., "Precontractual Liability" at p.250

163 133 N.W.2d 267 (1965)

situation, the Supreme Court of Wisconsin applied the flexible United States doctrine of promissory estoppel described above.[164] That doctrine can provide "an equitable remedy ... within the courts discretion ... [in] just such sympathetic cases."[165]

Unlike its United States counterpart, an English or Australian court applying antecedent Anglo-Australian law would have been powerless to compensate Hoffman. It would have been powerless even had it been absolutely clear that Red Owl had broken its duty to take reasonable steps to ensure the reliability of induced assumptions. In Ball's words, it would therefore have been "deficient in failing to reflect the hopes and expectations of businessmen."[166] Ball stresses "that the use made of letters of intent by businessmen differs markedly from the assumptions made by the law about their use".[167]

Of course, I am not arguing that in every situation of reliance at the second stage of pre-contractual negotiations, liability should arise. That would be a mistake equal and opposite to that by which the law is now marked. What Ball calls for, and what I believe the ground of liability described in the next part can provide, is a "more flexible approach"[168] to the legal issues raised by the complexities of pre-contractual negotiations. This "more flexible approach" would have to use with greater subtlety the distinction between assumptions induced by representations as to the present and assumptions induced by representations to the future, and in particular, as to intention, than did antecedent Anglo-Australian law. And the development of such a flexible approach must begin with an acknowledgement that there are many situations involving breaches of the duty to take reasonable steps to ensure the reliability of induced assumptions in the context of pre-contractual negotiations in which compensation would be appropriate but which the antecedent law was ill-equipped to handle.

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164 See above at p.46

165 Temkin, H.L., "Agreements in Principle" at p.145.

166 Ball, S.N., "Letters of Intent" at p.580

167 Ibid at p.580

168 Ibid at p.582

(2) Firm Offers in the Construction Industry

Although the issue of the revocability of "firm offers" to contract arises in many different areas of commercial life, it is in the context of the construction industry that it has received most attention. A Law Commission working paper on firm paints the following scene:

> A wishes to have some building work done and invites builders to submit tenders. The job includes electrical work as well as construction work. B, who is a building contractor, wishes to tender for the job but as he does not employ electricians himself he asks an electrical contractor, C, to quote him a price for doing the electrical work under a sub-contract. C gives a quotation at a moderate price which is expressed to be "Good for two weeks" and B relies on this figure when stipulating the price for which he can do the job for A. Within the two weeks A accepts B's tender for the whole job but, before B has informed C that he is accepting his quotation for the electrical work, C revokes and says that he will want to be paid more than he had previously stated. B is thus caught: he is bound by contract to do the whole job for A at the agreed price but C is not bound by contract to him and on the present state of the law B has no right of redress against C for any loss that C's revocation of his firm offer may cause him, although the revocation was within the two week period.[169]

Here is another factual context in which breaches of the duty to take reasonable steps to ensure the reliability of induced assumptions may arise and yet the antecedent law chose not to remedy them. In the words of one case, the subcontractor was under "no duty vis-à-vis the [general contractor] to make a careful estimation of the price sought".[170] The law did not remedy such breaches of the duty because, outside contract, it did not protect reliance upon assumptions regarding the future *qua* the future, and in particular regarding another party's intentions *qua* intentions. Indeed reliance upon firm offers was even less protected that reliance upon other types of assumptions in the context of pre-contractual negotiations. The doctrine of negligent misstatement did not apply to protect reliance on assumptions induced by firm offers[171] and there is no hint in the cases of estoppel or *quantum meruit* being available to help the general contractor. The

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169 Law Commission, Working Paper No. 60: Firm Offers (1975), at p.3

170 Holman Construction Ltd v Delta Timber Co. Ltd [1972] N.Z.L.R. 1081

171 Ibid

distinction between assumptions induced by false representations of present fact and assumptions induced by representations as to the future was again given great effect.

Of course, it could be argued that the general contractor in this situation was in fact protected by antecedent Anglo-Australia law. It was always theoretically open to him to try and secure an option contract to keep the offer open at the quoted price. However, grounds of convenience in the bidding process make this practice unlikely.[172] In practice, the firm offer context is one in which unreliable assumptions are often induced in breach of the general duty and yet the antecedent law provided no remedy.

The question therefore arises whether this was a *lacuna* in the antecedent law. The work of the Law Commission would suggest that it was. A Law Commission working paper asserted that the trend of opinion, at least since 1937,[173] was in favour of modifying the antecedent law. The working paper claimed that most writers favoured, at least in some circumstances, offering the general contractor compensation for his reliance on the subcontractor's quotation notwithstanding the absence of an option contract.[174] Not only might it be thought that such reliance is justified and ought to be protected, but empirical work suggests that in situations of this type most subcontractors would feel themselves bound to protect the general contractor from the loss involved in a price change.[175] There is no reason why the antecedent law ought not to have reflected those commercial expectations and at least in some circumstances offered protection for the general contractor's reliance.

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172 See Lewis, R., "Contracts Between Businessmen; Reform of the Law of Firm Offers and an Empirical Study of Tendering Practices in the Building Industry", (1982) 9 Journal of Law and Society 153 at pp.162-163

173 When the Law Revision Committee published its Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration) (1937)(Cmd. 5449).

174 Law Commission, Firm Offers at p.13

175 See Lewis, R., "Contracts Between Businessmen" at p.163 and Schultz, F.M., "The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry", (1952) 19 The University of Chicago Law Review 237 at p.283. For evidence of similar expectations in a different field of activity see Sir Robert Goff, "Commercial Contracts and the Commercial Court", [1984] Lloyd's Maritime and Commercial Law Quarterly 382 at p.384

This is not to say that the antecedent law ought simply to have been reversed and that firm offers ought to have been treated as option contracts. This is the solution to the firm offer puzzle of the United States UNIFORM COMMERCIAL CODE §2-205 (1978) which provides that firm offers to buy or sell goods made in signed writing by a merchant are irrevocable for up to three months.[176] It is also the solution favoured by the Law Commission's working paper, at least as concerns firm offers made in the course of a business which it is argued should be binding for a period not exceeding six years.[177] Yet even the development of a legal rule protecting the reliance of the general contractor, let alone a rule enforcing firm offers irrespective of reliance, has been strongly criticised. And such criticism is not difficult to support. For even a rule protecting reliance, and much more a rule simply enforcing firm offers as option contracts, could encourage "bid shopping" and give the general contractor excessive bargaining power.[178]

What may be needed, therefore, is a new doctrine able to operate with greater flexibility than the simple "contract/no-contract" choice of the antecedent law, able to distinguish on a principled basis between situations in which a general contractor's reliance on a subcontractor's bid merits protection and those in which it does not. I would argue that this doctrinal *lacuna* could be filled by the development of Australian estoppel, and that the principle upon which that doctrine could identify situations in which the general contractor should be compensated is the duty to take reasonable steps to ensure the reliability of induced assumptions.[179]

In conclusion, it is worth noting that the United States law of promissory estoppel has again provided a more flexible resource in this area than have the principles of traditional Anglo-Australian law. The application of RESTATEMENT (SECOND) OF CONTRACTS §90 (1979) to reliance on an unaccepted offer was affirmed by the inclusion of §87(2).[180]

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176 See also the N.Y. GENERAL OBLIGATIONS LAW §5-1109 (McKinney 1989)

177 Law Commission, Firm Offers at p.26

178 See below at p.217ff

179 See Chapter Eight

180 §87(2) reads:

Cases such as Drennan v Star Paving[181] have shown that the §90 principle of promissory estoppel can and does provide a solution to the firm offers problem which has neither the difficulty of always favouring, nor of always unfairly prejudicing, the general contractor. Instead the courts "have tended to apply [this] doctrine flexibly, considering the facts and equities in each case."[182] Thus:

> Courts have refused to apply the doctrine of promissory estoppel in cases in which the equities lie with the subcontractor. [For example] some courts have refused to apply promissory estoppel when the subcontractor's bid was so "glaringly low" as to put the general contractor on notice that a mistake had been made. In such cases courts view the general contractor's reliance on the bid as unreasonable.[183]

A principle such as this one which can apply with greater flexibility is precisely what was needed by the antecedent Anglo-Australian law.

(3) Variations of Contract Unsupported by Consideration

Parties to contracts will often wish to vary the terms of their agreements. Under antecedent Anglo-Australian law, a party who had relied upon a purported variation of contract could seek redress only if the variation had taken effect as a contract. In order to take effect as a contract, modificatory agreements were required to be supported by consideration and to be in writing if it was required for the original contract.[184] An

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> An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.

181 233 P.2d 757 (1958). This case now represents the majority United States position, see Northwestern Engineering Co. v Ellerman 10 N.W.2d 879 (1943); Norcross v Winters 25 Cal. Rptr. 799 (1962); Reynolds v Texarkana Construction Co. 374 S.W. 2d 818 (1964); Jaybe Construction Co v Beco Inc 216 A.2d 208 (1965); E.A. Coronis Associates v M. Gordon Construction Co. 216 A.2d 246 (1966); Wargo Builders Inc. v Douglas L. Cox Plumbing & Heating Inc. 268 N.E.2d 597 (1971); Saliba-Kringlen Corp. v Allen Engineering Co. 92 Cal. Rptr 799 (1971); Constructors Supply Co. v Bostrom Sheet Metal Works 190 N.W.2d (1971); Debron Corp. v National Homes Construction Corp. 493 F.2d 352 (1974); S.N. Nielsen Co. v National Heat & Power Co 337 N.E.2d 387 (1975); Janke Construction Co. v Vulcan Materials Co. 527 F.2d 772 (1976); Lyon Metal Products v Hagereman Construction Corp. 391 N.E.2d 1152 (1979); Montgomery Industries International v Thomas Construction Co. 620 F.2d 91 (1980); Allen M. Campbell Co. v Virginia Metal Industries 708 F.2d 930 (1983)

182 McPeters Murphy, J., "Promissory Estoppel: Subcontractor's Liability in Construction Bidding Cases", (1985) 63 North Carolina Law Review 387 at p.395

183 Ibid at p.394

184 Goss v Lord Nugent (1833) B & Act. 58

undertaking to perform a pre-existing contractual duty could not constitute valid consideration.[185] The only qualification to the claim that a contract could only be varied by a contract was that the law would sometimes protect reliance upon induced assumptions to the limited, defensive, extent possible under the doctrine of promissory estoppel.[186]

It is clear that this is yet a third area in which antecedent Anglo-Australian law demonstrated a reluctance to protect reliance upon an assumption regarding the future *qua* the future, and in particular regarding another party's intentions *qua* intentions. It demonstrated a strict adherence to the distinction between assumptions induced by false representations of present fact and assumptions induced by representations as to the future. This meant that reliance upon assumptions induced by a non-contractual variation of contract remained largely unprotected and the duty to take reasonable steps to ensure the reliability of induced assumptions remained largely unenforced in this area.

Once again, then, the question arises as to whether this decision not to give expression to the general duty to take reasonable steps to ensure the reliability of induced assumptions amounted to a *lacuna* in the antecedent law. In order to demonstrate that it did, we must again consider the expectations of parties entering contracts.

Variations of contract arise "over and over again in the ordinary transactions of mankind"[187] and, indeed, are necessary if business dealings are to respond to changing market conditions. As Stoljar points out, it is wrong to imagine that a party requesting variation is necessarily unconscientious or inept.[188] Therefore, in most circumstances of informal contract variation it is to be assumed that the parties imagined their new arrangements were reasonable, that reliance upon them was justified and would, in some way, attract legal protection. Indeed, this expectation has been often recognised by courts

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185 Stilk v Myrick (1809) 2 Camp. 317

186 See above at p.41ff

187 Tyers v Rosedale & Ferryhill Iron Co. (1873) L.R. 8 Exch. 308 at p.318 per Martin B.

188 Stoljar, S. J., "The Modification of Contracts", (1957) 35 Canadian Bar Review 485 at p.485

who are keen to "sustain ... reasonable commercial practice"[189], "reasonable arrangements between businessmen"[190] and have been concerned that antecedent doctrine allowed "a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair and which the person seeking to enforce it has a legitimate interest to enforce".[191] If the parties to purported contractual variations often understand their new arrangements to be reasonable and reliance upon them worthy of legal protection, there is no good reason why such reliance ought not sometimes to be protected.

Of course, this does not mean that all reliance upon modificatory promises ought to be protected, let alone protected to the extent to which contractual liability would do so. Each party's *prima facie* right to performance under the terms of the original contract must be respected. There is also the question whether modificatory agreements are in fact usually new promises, or rather concessions granted on a particular basis by one party to the other. Perhaps the law ought to be more reluctant to enforce such concessions. Finally, there is the danger that modificatory promises might be exacted by the threat of non-performance. It is not at all clear to what extent the law of duress could, can, or ought to, provide protection against this danger. These are all matters discussed in Part Three when the decision in Williams v Roffey Brothers & Nicholls Contractors Ltd[192] will be considered.[193] However it must be recognised at this point that, just as there are good arguments for sometimes protecting a party's reliance upon a contractual variation ineffective for want of consideration, there are equally strong arguments for not doing so as a matter of course.

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189 Cheshire, G.C. and Fifoot C.H.S., "Central London Property Trust v High Trees", (1947) 63 Law Quarterly Review 283 at p.290

190 Furmston M. P., Cheshire, Fifoot and Furmston's Law of Contracts 12th edn (London: Butterworths, 1991) at p.563

191 This quotation is actually taken from a decision concerning the rule that consideration must move from the promisee (Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd. [1915] A.C. 847 at p.855 per Lord Dunedin). However, the objection has equal force with regard to this different effect of the consideration doctrine.

192 [1991] 1 Q.B. 1

193 See Chapter Nine

Once again the "contract/no-contract" choice seems too inflexible. The antecedent law arguably needed a more subtle tool to determine when justified reliance ought to have been protected in these circumstances and when it ought not to have been. And the flexible ground of liability outlined in the following part - a ground giving legal expression to the duty to take reasonable steps to ensure the reliability of induced assumptions - is ideally suited to making just such determinations.

(4) The "Battle of Forms"

The variation of contract cases arguably form a subset of a larger category of case in which two parties have wrongly believed that they have a contract and in consequence one has provided goods or services. In such cases there is clearly a justification for enforcing the duty to take reasonable steps to ensure the reliability of induced assumptions. There are few circumstances in which reliance will (usually) be more justified, and thus the duty (usually) more strong, than the circumstance in which two parties mistakenly believe that they are bound to one another in contract.

One situation in which two parties may have provided goods or services under a purported contract which is void for uncertainty is often tagged "the battle of forms". In this situation a contractual offer may be made in terms of one party's standard terms of business and accepted in terms of another's. This exchange of terms may create confusion sufficient to warrant the finding that the parties enjoy no *consensus ad idem* and that the purported contract between them is void. This is a conclusion the courts are eager to avoid.[194] When it has to be reached, however, the question arises as to whether and if so how, reliance on, or performance towards the completion of, the purported contract should be compensated.

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194 See Butler Machine Tool Co. Ltd v Ex-Cell-O Corp. (England) Ltd [1979] 1 WLR 401; Johnson Matthey Bankers Ltd v State Trading Corp. of India Ltd [1984] 1 Lloyd's Rep. 427

The question therefore arises as to whether the antecedent law ought to have been given more power to handle the battle of forms by the provision of a ground of liability protecting justified reliance. Is this yet another *lacuna* able to be filled (at least in part) by a legal principle expressing more generally the duty to take reasonable steps to ensure the reliability of induced assumptions?

I would argue that this question must be answered in the affirmative. The antecedent law was usually unable to protect reliance in the battle of the forms context because such reliance would usually have been upon an assumption induced by a representation regarding the future *qua* the future, and in particular regarding the other party's intention *qua* intention, and not upon an assumption induced by a false representation of present fact. Neither estoppel nor negligent misstatement would traditionally avail a party who had undertaken activity in reliance upon the validity of a contract that had subsequently proved to be void. Nevertheless, this is clearly a context in which reliance will have been justified and may be deserving of protection on the basis of a more general duty to take reasonable steps to ensure the reliability of induced assumptions. This is yet another area of activity to which the law would be able to provide a more flexible and appropriate response if it recognised a ground of liability similar to that outlined in the following part.

It is worth mentioning that a partial solution to the battle of the forms problem has been identified in the law of restitution for unjust enrichment. However restitution for unjust enrichment is not the only principle which might be useful in this area; a matter which is addressed when the restitutionary approach is more fully explored in Part Three. Although the law of restitution for unjust enrichment may often provide a just response to the parties' position after an unsuccessful battle of forms, it is not intended to protect reliance upon the purported contract. It may *de facto* have this effect, but it will not always do so. The restitutionary response leaves open the question whether a mechanism for protecting reliance in these circumstances would not also be desirable. Even those writers most enthusiastic about a restitutionary approach to the battle of forms admit that

the "law of restitution is not alone in being a fruitful" approach and that "some fruit may be derived from taking an approach based upon reliance".[195] There would still seem room for the operation of a doctrine giving general effect to the duty to take reasonable steps to ensure the reliability of induced assumptions in this context.

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Looking back over the whole of this part, the following conclusions might be drawn. First, there exists a general moral duty to take reasonable steps to ensure the reliability of induced assumptions which is worthy of at least some legal expression. Second, this duty did not received adequate expression in antecedent Anglo-Australian law. There thus existed *lacunae* in various areas of the law: situations in which a breach of the duty had caused harm and relief might have been expected but appropriate relief was either unavailable or available only fortuitously on antecedent principles. Examples of these *lacunae* which have been introduced here and which will be discussed more fully in Part Three arose in relation to (a) pre-contractual negotiations and letters of intent, (b) firm offers in the construction industry, (c) variations of contract unsupported by consideration, and (d) the "battle of forms".

I turn to consider a new doctrine being developed by the Australian courts and capable of enforcing the general duty to ensure the reliability of induced assumptions. I shall then return to each of the specific areas discussed in greater detail and consider the potential operation of the doctrine in each of these areas.

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195 MacKendrick, E., "The Battle of the Forms", (1988) 8 Oxford Journal of Legal Studies 197 at pp.220-221. See also Carter, J.W., "Services Rendered under Ineffective Contracts", [1990] Lloyd's Maritime and Commercial Law Quarterly 495 at pp.498 and 508

PART TWO

THE EMERGENT DOCTRINE OF

AUSTRALIAN ESTOPPEL

Introduction to Part Two

Few would have predicted in 1987 that the High Court of Australia were about to launch "an exciting voyage of discovery ... in ... estoppel".[196] As late as 1986 the High Court had seemed antipathetic to any developments in this area. Central London Property Trust Ltd v High Trees House Ltd[197] was only accepted by the High Court in 1983[198] and then in a case in which the majority of their Honours declined to apply it.[199] Estoppel by representation and by convention had been cast in extremely conservative terms in the 1986 decision of Con-Stan Industries of Australia v Norwich Winterthur Insurance (Australia) Ltd.[200] In 1987 the High Court hardly seemed likely to develop estoppel into a principle that could radically reorganise the law's approach to reliance upon induced assumptions.

Yet in 1987, unobserved though they may have been, the factors that were soon to encourage the court to develop the doctrine of Australian estoppel were already in place. First, the curial tendency almost automatically to conform Australian to English law described in the prologue to this thesis was beginning to break down. The High Court was eager to develop a distinctively Australian common law and, according to Mason C.J., felt English contract principles were too dominated by that country's position as an international commercial and maritime hub to be the centrepiece of Australian contract law.[201] Second, a rich source of material for the development of a new Australian

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196 Sir Anthony Mason, "Themes and Prospects" in P. D. Finn (ed.), Essays in Equity (Sydney: Law Book Company, 1985) p.242 at pp.244-245

197 Central London Property Trust Ltd v High Trees House Ltd (1947)

198 Legione v Hateley (1983)

199 Mason, Brennan and Deane JJ.; Gibbs C.J. and Murphy J. dissenting.

200 Con-Stan Industries of Australia v Norwich Winterthur Insurance (Australia) Ltd (1985-1986) For the current status of this decision see p.96

201 Sir Anthony Mason, "Future Directions" at p.153. This movement towards a distinctly Australian common law was also felt at the State court level after appeals to the Privy Council were abolished. Speaking of the Australia Act 1986 (Cth) Priestley wrote; "This independence means that Australia can, like other nations, decide what its contract law is and is to be, free of the authority of any other country" (Priestley, L.J., "A Guide to a Comparison of Australian and United States Contract Law", (1989) 12 University of New South Wales Law Journal 4 at p.4). See also Ellinghaus, M.P., "An Australian Contract Law?", (1989) 2 Journal of Contract Law 13; Toohey, J.L., "Towards

doctrine of estoppel was being re-discovered in two High Court judgments of Dixon C.J.'s, one in equity and one at common law.[202] Dixon C.J. had been cited by Lord Denning M.R. as the early exponent of a radical understanding of estoppel, keen that estoppel develop into a broad "principle of justice and of equity" built upon assumptions "of fact or law, present or future".[203] Third, there had been a considerable amount of interest in estoppel in the first half of the 1980's. The Australian Case Citator[204] gives just seven references to these two Dixon C.J. judgments for the forty five years prior to 1980. It gives none at all for the period 1960 to 1972. There are then sixteen references for the five year period between 1981 and 1986. Many of the State court decisions in this period reveal quite a readiness for the development of estoppel principles.[205] These then, are factors which led to the radical estoppel developments embodied in cases such as Waltons and Verwayen: developments which are said already to have had a "profound effect on the market place."[206]

Unexpected or not, these developments were arguably welcome. The emergent doctrine of Australian estoppel they introduced is arguably capable of providing Australian law with precisely the means of enforcing the duty to take reasonable steps to ensure the reliability of induced assumptions seen as necessary in Part One. This part therefore explores and suggests a pattern of development for that new doctrine: a pattern of development fitting it to give expression to the duty under discussion.

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an Australian Common Law".

202 Thompson v Palmer (1933) 49 C.L.R. 507 and Grundt v Great Boulder Pty Gold Mines Ltd (1937)

203 Moorgate Mercantile Co. Ltd. v Twitchings (1976) at pp.241-242. While Lord Denning M.R.'s claims may be somewhat overstated, it is surprising that at about the same time Starke and Higgins should have seen Dixon C.J. as an opponent of promissory estoppel citing, incorrectly it is submitted, his lecture "Concerning Judicial Method" (1956) 29 Australian Law Journal 468. See Starke, J.G. and Higgins, P.F.P. (eds), Cheshire and Fifoot's The Law of Contract 4th edn (Sydney: Butterworths, 1974) at pp.674-675.

204 This work claims to be "...a comprehensive case citator covering the entire period of Australian law reporting, based on material used in the Australia Digest service." Australian Case Citator (Law Book Company: Sydney, 1988) at p.v

205 See, for example Hexagon v Australian Broadcasting Commission (1975); Offshore Oil N.L. v Southern Cross Exploration N.L. (1985) 3 N.S.W.L.R. 33; Riches v Hogben [1986] 1 Qd R. 315 (compare Morris v Morris [1982] 1 N.S.W.L.R. 61); Gollin & Co. Ltd v Consolidated Fertilizer Sales Pty Ltd (1982).

206 Nicholson, K., "Two Recent Decisions Following Waltons Stores (Interstate) Ltd v Maher", (1989) 2 Corporate and Business Law Journal 195 at p.197. Nicholson welcomes the "profound effect" of the Waltons decision which he says has lead to "commercially realistic resolutions...of various disputes".

Before turning to this task, however, two preliminaries are necessary. First, the decisions in Waltons and Verwayen should be outlined. These decisions have been central to the development of Australian estoppel and will be referred to throughout the thesis. Thus it will be helpful to set out the facts upon which they were based.[207] Second, the methodology of this part requires some explanation.

(1) The Decisions in Waltons and Verwayen

The facts of Waltons involved negotiations for the lease of retail premises in a New South Wales country town. The apparent terms of the lease were that the lessor, Maher, would demolish an old factory on a certain site and build a retail store to suit the requirements of the lessee, Waltons. Waltons required that the new premises be ready for them as a matter of urgency. Maher's solicitor communicated his client's reluctance to begin demolition of the existing premises until it was certain that the agreement to lease was concluded. When the terms of the agreement had been settled by the solicitors and Waltons' solicitors had notified the other side that they had received verbal instructions that the terms were acceptable, contract documents were sent to Maher's solicitors. A cover letter dated 7 November included the following paragraph:

> You should note that we have not yet obtained our client's specific instructions to each amendment requested, but we believe that approval will be forthcoming. We shall let you know tomorrow if any amendments are not agreed to.

There was no communication between the parties on the following day. On 10 November Waltons became aware that demolition of the factory had begun in order to meet a contract deadline of 5 February. On 11 November Maher's solicitors sent Waltons' solicitors the executed documents "by way of exchange". However, Waltons were reconsidering their position and waited until 19 January - by which time about 40 per

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207 For alternative summaries of the decisions in these two cases see Duthie, A., "Equitable Estoppel, Unconscionability and the Enforcement of Promises", (1988) 104 Law Quarterly Review 362; Spence, M., "Estoppel and Limitation", (1991) 107 Law Quarterly Review 221; Iles, A., "The Commonwealth v Verwayen", (1991) 18 Melbourne University Law Review 186.

cent of the retail store was complete - to inform Maher that they no longer wanted to proceed with the lease. Maher brought an action for specific performance of that lease.

The trial judge and the New South Wales Court of Appeal both found for the lessor. The trial judge held that at the time he commenced demolition of the factory, Maher believed that a valid lease was in existence by way of exchange, that this belief was caused by Waltons' conduct and that they were estopped from denying it. The New South Wales Court of Appeal held that at the time he commenced demolition Maher believed that there was a binding agreement with Waltons, though not necessarily by way of exchange of contract, that this belief was caused by Waltons' conduct and that they were estopped from denying it. Further, each court held that Maher had been entitled to specific performance of that lease at the time at which proceedings had been instituted but that such an award was no longer appropriate at the time of the first instance judgment. Each court held that Maher was therefore entitled to damages in lieu of specific performance, presumably under the Supreme Court Act 1970 (N.S.W.) s.68. The trial court had ordered an inquiry into damages but the case went on appeal before the inquiry was ever instituted.

Waltons appealed to the High Court who dismissed the appeal. Deane and Gaudron JJ. accepted that Maher had believed that a valid lease existed at the time he began demolition, Gaudron J. accepting that Maher had believed that an exchange had taken place. These judges therefore dealt with the case as one of estoppel on an assumption of existing fact.[208] Mason C.J., Wilson and Brennan JJ. dealt with the case as one concerned with the expectation that contracts would in the future be exchanged and applied the doctrine which they called "equitable", but which in this thesis has been called "Australian", estoppel.[209] A short summary of the majority judgments in

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208 Waltons at p.443 per Deane J. and at p.460 per Gaudron J.

209 Ibid at p.398 per Mason C.J. and Wilson J. and at pp.430-431 per Brennan J. On the use of the term "equitable estoppel" see below at p.77

Waltons is given below.[210] The reasoning of the judges will also be considered *passim* in this part.

Verwayen dealt with undertakings made by the Commonwealth of Australia as defendant in an action relating to a collision between two naval vessels. The collision, in which the plaintiff Verwayen was injured, occurred in 1964, approximately twenty years before proceedings in the case were commenced. At the time of the collision, it had been believed that negligence actions could not be brought between members of the armed forces for injuries sustained in the course of duty. However, this position was disapproved in a decision of the High Court of Australia delivered just two years before Verwayen, and several others, brought proceedings against the Commonwealth for negligence.

By its defence, dated 14 March 1985, the Commonwealth admitted liability and put only the question of damages in issue. It did not raise the public policy defence concerning members of the armed forces sustaining injury in the course of duty, nor did it plead the relevant statute of limitation. Indeed, throughout the period November 1983 to November 1985 the Commonwealth made repeated representations both to Verwayen and to others that it would not rely on either defence in actions based on the collision. On several occasions after filing its defence, the Commonwealth joined with Verwayen's solicitors in requesting an expedited hearing of the damages question on the basis that liability was not in issue.

However, in about November 1985, the Commonwealth changed its position in relation to the limitation and public policy defences. Leave to amend was sought and granted, and a new defence was delivered on 29 May 1986 in which both defences were relied on. The plaintiff delivered a reply in which he disputed the existence of the public policy defence, claimed that the Limitation of Actions Act 1958 (Vict.) did not apply to the

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210 See below at pp.77-78. This summary is taken from the judgment of Priestley J.A. in Silovi v Barbaro (1988) 13 N.S.W.L.R. 466 at p.472

Commonwealth and, in the alternative, asserted that the defendant had either waived or was estopped from relying upon either defence.

The trial judge having found for the defendant on the basis of the limitation defence and the Full Court of the Supreme Court of Victoria having overturned his decision on the ground of estoppel, the Commonwealth appealed to the High Court which by a majority of four to three dismissed the appeal. Of the majority, two of the judges, Deane and Dawson JJ., found for Verwayen on the basis of estoppel, and two of the judges, Toohey and Gaudron JJ., dealt with the appeal on the basis of waiver. Two of the minority judges, Mason C.J. and McHugh J., rejected the waiver arguments and found that any equity the plaintiff could establish on the basis of estoppel had been satisfied by an order for costs. The third, Brennan J., also rejected the waiver arguments and held that in the circumstances estoppel did not require that the Commonwealth be kept to its promise, but would have remitted the matter to the trial judge so that the plaintiff could show what detriment was suffered in continuing with the action until the defence was amended.

The importance of this decision can only be seen in the context of recent developments in the Australian law of estoppel. No single understanding of the so-called doctrine of "waiver" receives support across the seven judgments. A fairly coherent picture of the developing Australian law of estoppel does emerge, however, and it is this aspect of the case which is important to this thesis.[211] Once again the reasoning of the judges will be considered *passim* in this part.

Incidentally, the importance of this case to the development of the law of estoppel in Australian is in one sense surprising. Verwayen need not to have had a particular

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211 Of course, "waiver" may well not be an independent doctrine at all (see Ewart, J., Waiver Distributed (Cambridge: Harvard University Press, 1917)). I have argued elsewhere that at common law "waiver" primarily refers to the situation in which a right or remedy has been lost or dispensed with under the doctrine of estoppel or common law election and that in equity it primarily refers to the situation in which a right or remedy has been lost or dispensed with under the doctrine of estoppel or release (see Spence, M., "Equitable Defences" in Parkinson, P. (ed.), The Laws of Australia: Equity (Sydney: Law Book Co., 1993) at p.9). For the argument that "waiver" is a discrete doctrine see Arjunan, K., "Waiver and Estoppel - A Distinction Without a Difference?", (1993) 21 Australian Business Law Review 86.

importance for the development of Australian estoppel at all. The case might just have easily been categorised as one only concerned with issues relating to the abuse of process, in particular to a judge's discretion to grant or refuse leave to amend a defence. A similar fact situation has been treated by the House of Lords only on the grounds of when a judge may exercise his discretion to strike out a claim. In this latter case, Roebuck v Mungovin,[212] it was said that the introduction of concepts of waiver, acquiescence or estoppel into cases essentially concerned with process issues was "merely confusing".[213] That Verwayen was argued and decided as an estoppel case at all, is a sign of how much attention in the wake of Waltons was paid to the doctrine of estoppel in Australia.

These, then, are the facts of the two central Australian estoppel decisions Waltons and Verwayen. I turn now to outline the methodology of the following exploration of Australian estoppel doctrine.

(2) The Methodology of the Part

The methodology of this part is largely necessitated by the current state of the Australian authorities concerning the law of estoppel.

On the one hand, the general significance of those authorities seems quite evident. First, it is apparent that a distinctive doctrine of Australian estoppel exists in some form. The doctrine has been repeatedly described and applied in decisions of both Federal and State courts. Second, there is little doubt as to the broad shape and purpose of that doctrine. In Verwayen Mason C.J. described it as:

> ...one doctrine of estoppel, which provides that a court of common law or equity can do what is required, but no more, to prevent a person who has relied upon an assumption as to a present, past or future state of affairs (including a legal state of affairs), which assumption the party estopped has induced him to hold, from

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212 [1994] 2 A.C. 224

213 Ibid at p.236 per Lord Browne-Wilkinson

> suffering detriment in reliance upon the assumption as a result of the denial of its correctness.[214]

In the same case Brennan J. said:

> [E]stoppel yields a remedy in order to prevent unconscionable conduct on the part of the party who, having made a promise to another who acts on it to his detriment, seeks to resile from the promise...The remedy is to effect ... "the minimum equity to do justice" ... The remedy is not designed to enforce the promise although, in some situations (of which Waltons Stores v Maher affords an example), the minimum equity will not be satisfied by anything short of enforcing the promise.[215]

In passages such as these the broad shape and purpose of the doctrine of Australian estoppel seems identifiable: that purpose roughly equates with expressing the duty to take reasonable steps to ensure the reliability of induced assumptions.

On the other hand, although the broad significance of these recent authorities may seem fairly clear, it is also evident that the Australian "law of estoppel is in a stage of development",[216] "a state of flux".[217] Passages such as those just quoted are cast in the most general terms and leave many questions open, both about the practical application of the new doctrine and its interrelation with other heads of liability. The broad structure of the new doctrine may seem quite clear at a distance but becomes more and more imprecise the more closely it is examined. The decisions of the High Court that have been central to its development have involved multiple judgments often cast in somewhat differing terminology and rarely, if ever, explaining how the various opinions of the judges interrelate. Authorities the central impact of which may be relatively evident, contain minefields of confusion when they come to be applied in particular cases. It was submitted in Commonwealth of Australia v Clark[218] that Verwayen was incapable of yielding a *ratio* and, while none of the judges in the case expressly upheld

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214 Verwayen at p.413

215 Ibid at pp.428-429. Similar passages include Austotel Pty Ltd v Franklins Selfserve Pty Ltd (1989) at p.610 per Priestley J.A. and Waltons at p.404 per Mason C.J. and Wilson J.

216 Lorimer v State Bank of New South Wales New South Wales Court of Appeal, 5 July 1991, unreported, per Kirby P. A digest report of this decision may be found at [1991] A.C.L. Rep. N.S.W. 95

217 P.S. Chellaram & Co. Ltd v China Ocean Shipping Co. Ltd (1991) 1 Lloyd's Rep. 493 at p.502 per Kirby P.

218 [1994] 2 V.R. 333

that claim,[219] the difficulty which the judges in that case had in applying Verwayen to an almost identical fact situation may well lend it some credibility.

The current state of the Australian authorities concerning estoppel means that, while it is possible to argue for a particular formulation of the distinctive doctrine that appears to be emerging, it is not possible to give a precise representation of Australian estoppel as it currently exists. The writers of one text claim that "[i]t would be a bold lawyer who would assert knowledge of what the law of estoppel was today in Australia."[220]

Accordingly, the approach of this part will not simply be to "report" the present state of the doctrine of Australian estoppel. Such an approach would at best be dangerous and may in large part be impossible. Rather, the methodology to be adopted will resemble that of a judge faced with the many recent decisions concerning Australian estoppel, needing to extract from them a doctrinally coherent approach to the subject and then to justify it.

MacCormick[221] shows that this judicial task would involve first proposing a particular formulation of the emergent doctrine and then subjecting it to two distinct types of evaluation. First, the judge would need to consider how the proposed formulation of the doctrine rationalises and makes sense of the recent cases on the subject.[222] This process

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219 There were only two points in the judgments in Commonwealth of Australia v Clark in which the judges came close to accepting the submission that Verwayen yielded no *ratio*. These were (i) a passage in the judgment of Fullagar J. (at p.335) where he said that there was "no clearly binding *ratio decidendi*, either in the High Court's decision in The Commonwealth v Verwayen (1990) 170 C.L.R. 394 or in any case so far, which relieves this court from its duty to follow its own prior decision" in Verwayen v The Commonwealth (No. 2) [1989] V.R. 712, and (ii) a passage in the judgment of Ormiston J. (at p.374) in which he said that "there is a real difficulty in ascertaining the *ratio* of the High Court's decision on the question of estoppel and in particular on the question of detriment." However, it is clear that Fullagar J.'s comments did not deny that there was a *ratio* in Verwayen, simply that there was a *ratio* which was not in line with the approach adopted by the Court of Appeal when it had heard the Verwayen case itself. Similarly, although Ormiston J. claimed that there was difficulty in ascertaining the *ratio* of Verwayen, he offered many pages of careful analysis of the judgments in the case attempting to do just that, because "what [had] been said by the High Court in Verwayen's Case [was] important and [could not there] be properly ignored" (at p.375). Ormiston J. saw his task as being to "try to see what principles [could] be said to be common to [the] judgments" delivered in the High Court in Verwayen (at p.375).

220 Meagher, R.P., Gummow, W.M.C., and Lehane, J.R.F., Equity 3rd edn at p.xi

221 MacCormick, N., Legal Reasoning and Legal Theory (Oxford: Clarendon Press, 1978)

222 Ibid at p.120. MacCormick puts this requirement in terms of a claimant having to show that he has a *legal* claim:

of assessing a proposed formulation of Australian estoppel in light of the recent authorities would be:

> ... in no sense a mechanical or easy task, nor [would it be] an exact science; it [would call] for imagination, understanding of the "feel" of the system, a good knowledge of the law, and expertise in following up useful "leads" in precedents and textbooks and for a slightly odd combination of intellectual boldness and sound judgment.[223]

Second, the judge would also have to consider "consequentialist arguments which are essentially evaluative and therefore in some degree subjective".[224] This would involve him considering the consequences of formulating the doctrine of Australian estoppel in the way proposed and evaluating those consequences in the light of "the needs of civilised society","justice" and ""common sense" as well as ... justice". This stage would involve an "appeal to contemporary positive morality as understood by the judge".[225]

In adopting this methodology, this part will suggest a formulation of the emergent doctrine of Australian estoppel which it will contend is both consistent with the recent authorities and justifiable in consequentialist terms. In Chapter Four each element of that formulation will be separately outlined and assessed in the light of these two criteria. In particular, each element of the doctrine will be expounded in a way which not only is as faithful as possible to the existing law, but which best suits the doctrine to the task of providing a legal vehicle for the general duty to take reasonable steps to ensure the reliability of induced assumptions. In Chapter Five the operation of Australian estoppel as a "discretionary" doctrine will be explored and justified. In Chapter Six the interrelation of the new doctrine and the law of contract, tort and restitution will be discussed.

"The point is...to show that the decision contended for is thoroughly consistent with the body of existing legal rules, and is a rational extrapolation from them...".

223 Ibid at p.122

224 Ibid at p.106

225 Ibid at p.111

Two consequences flowing from this choice of methodology should be emphasised.

First, it is not intended in this part to offer a justification for the proposed formulation of Australian estoppel in terms of antecedent Anglo-Australian law. As the part progresses it will be clear that the doctrine argued to be emerging from the recent Australian cases differs considerably from any of the versions of estoppel outlined in the last part. A contemporary Australian judge attempting to make sense of the recent Australian estoppel authorities would not be required to justify the process whereby the law described in Verwayen was derived from any antecedent position on estoppel. He might rather adopt the approach of Ormiston J. in Commonwealth of Australia v Clark[226] who said at one point that it was "not necessary to examine the earlier cases for they provide no more than the background for the conclusions expressed by the present members of the High Court."[227] For this reason no such justifications will be offered in this thesis.

Second, and notwithstanding this first point, the Australian judge describing, explaining and refining the new doctrine of estoppel would be entitled to make use of English and older Australian authorities in a way not envisaged by antecedent theory. In particular, there are many older English judgments currently being used in the Australian courts in ways in which their authors might have found quite remarkable. English readers must therefore not be surprised to find cases from their home jurisdiction used in this part in a way which might not perhaps be easily defensible in an English court. For example, the cases on the emergent estoppel doctrine claim that its antecedents lie, at least in part, in an amalgamation of promissory and proprietary estoppel principles. The claim is that there was no significant difference between these two antecedent doctrines. The validity of such a process of amalgamation is not a matter for exploration in this thesis and not an essential part of an exposition of the current Australian law. Nevertheless, this claimed derivation of the doctrine must entitle a judge to rely on both antecedent promissory and proprietary estoppel cases in explaining and refining the new Australian

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226 Commonwealth of Australia v Clark (1994)

227 Ibid at p.383

doctrine. This has in fact been the practice of the Australian lower courts in attempting to come to terms with developments in estoppel that have essentially been the work of the High Court. It also reflects a practice with which the judges are familiar in the continual process of doctrinal development. In another area of the law, Young J. once categorised a number of older authorities and then remarked:

> Whilst it may be that some of the learned judges who decided the cases would be surprised to know that their decisions were included by me in this fourth category, it would seem to me that some of the cases that are cited in the textbooks fall into it ... Again the classic case of Craven-Ellis v Canons Ltd [1936] 2 KB 403 may also be put into this category, even though it is quite obvious that the learned judges who decided that case may not themselves have so categorised it.[228]

I turn, therefore, to apply this methodology in a consideration of the emergent doctrine of Australian estoppel.

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228 Monks v Poynice Pty Ltd (1987) 8 N.S.W.L.R. 662 at p.664

Chapter Four:

The Elements of Australian Estoppel

The formulation of Australian estoppel to be offered here can be summarised in fourteen points. They are that:

(1) Australian estoppel is a single doctrine of Common Law and Equity,

(2) able to be used as either a cause of action or defence,

(3) between two parties not necessarily in any kind of pre-existing relationship.

(4) To establish an estoppel one party, A, (or his privy?),

(5) must show that he has held an assumption

(6) regarding the present or the future, of fact or of law,

(7) and that he has acted or refrained from acting,

(8) in reliance upon that assumption,

(9) to his detriment. The detriment which A must show is that he is in a worse position because the assumption upon which he has relied has proved unjustified than he would have been had he never held it.

(10) A must also show that the other party, B, (or his privy?),

(11) induced the relevant assumption

(12) and that, having regard to a number of specified considerations, it would be unconscionable for B not to remedy the detriment that A has suffered by relying upon the assumption.

(13) When these things are established, the court may award a remedy sufficient to reverse the detriment that A has shown.

(14) Defences.

Each of these elements of the emergent doctrine of Australian estoppel will now be examined in turn.

(1) Australian Estoppel Is A Single Doctrine Of Common Law And Equity...

The development of a distinctive doctrine of Australian estoppel has largely occurred in two stages.

The first of these stages came with the decision in Waltons in which the various antecedent categories of estoppel were merged into just two: "common law" and "equitable" estoppel. This nomenclature was far from historically unproblematic.[229] But, as stressed above, the issue of the historical validity of the recent Australian developments is not the concern of this thesis.

The content of these categories of "equitable" and "common law" estoppel was summarised by Priestley J.A. in Silovi v Barbaro:[230]

> The following can I think be distilled from the reasons in Waltons notwithstanding the somewhat different language used by different judges. (1) Common law and equitable estoppel are separate categories, although they have many ideas in common. (2) Common law estoppel operates upon a representation of existing fact, and when certain conditions are fulfilled, establishes a state of affairs by reference to which the legal relation between the parties is to be decided. This estoppel does not itself create a right against the party estopped. The right flows from the court's decision on the state of affairs established by the estoppel. (3) Equitable estoppel operates upon representations or promises as to future conduct, including promises about legal relations. When certain conditions are fulfilled, this kind of estoppel is itself an equity, a source of legal obligation. (4) Cases described as estoppel by encouragement, estoppel by acquiescence, proprietary estoppel and promissory estoppel are all species of equitable estoppel. (5) For equitable estoppel to operate in circumstances such as those of the present case there must be the creation or encouragement by the defendant in the plaintiff of an assumption that a contract will come into existence or a promise be performed, and reliance on that by the plaintiff, in circumstances where departure from the assumption by the defendant would be unconscionable.[231] (6) Equitable estoppel

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229 Spencer Bower and Turner object to the term "equitable estoppel" and claim that:

> ...no satisfactory high authority is discoverable offering any firm foundation for the view that estoppel in equity is different in any essential respect from estoppel at common law, whatever may have been the case in the 19th century when the doctrine was in its embryonic stages.
> (Turner, A.K. (ed.), Estoppel by Representation at p.12.)

However, compare Meagher, R.P., Gummow, W.M.C. and Lehane J.R.F., Equity 3rd edn at p.406

230 Silovi v Barbaro (1988) at p.472. Priestley J.A. concedes that his summary does not refer to the reasoning of Deane J. in Waltons.

231 Priestley J.A. was subsequently to amend point (5) by reading the Privy Council case Att.-Gen. of Hong Kong v Humphrey's Estate (Queen's Gardens) [1987] A.C. 114 alongside Waltons. He held this approach to be permissible because of the treatment that the Privy Council case received in Waltons and re-expressed point (5) in the following

> may lead to the plaintiff acquiring an estate or interest in land; that is, in the common metaphor, it may be a sword. (7) The remedy granted to satisfy the equity (which either is the estoppel or created by it) will be what is necessary to prevent detriment resulting from the unconscionable conduct.

From this summary of the majority approach in Waltons, it can be seen that "common law estoppel" was equivalent to Spencer Bower and Turner's "estoppel by representation proper" as described in the last part. "Equitable estoppel", however, represented an amalgam of their "estoppel by acquiescence or encouragement" with "promissory" estoppel, a doctrine that Spencer Bower and Turner did not classify as a species of estoppel at all. Like "estoppel by acquiescence", equitable estoppel could be a "sword" as well as a "shield", and gave rise to the "minimum equity to do justice" to the party relying upon it. Yet, like "promissory" estoppel, it could be built upon a representation as to the future and could rise to remedies in the expectation measure.

Some question might be raised about the status of estoppel by convention in the Waltons taxonomy of the law of estoppel. This doctrine was referred to explicitly at only three points in the judgments in Waltons and then only very obliquely.[232] However two of these references[233] seem to assume that estoppel by convention was to be included as a type of common law estoppel of the type outlined in Silovi v Barbaro.[234] This also seems to have been the approach of Dixon C.J. in Thompson v Palmer[235] and Grundt v Great Boulder Pty Gold Mines Ltd,[236] the two judgments most central as precedent to the developments in Waltons. Further, this approach seems to be assumed in at least the judgment of Deane J. in Verwayen.[237] To treat estoppel by convention in this way is effectively to treat it as a sub-category of estoppel by representation in the way suggested

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terms:

> For equitable estoppel to operate there must be the creation or encouragement by the defendant in the plaintiff of an assumption that a contract will come into existence or a promise be performed or an interest granted to the plaintiff by the defendant, and reliance on that by the plaintiff in circumstances where departure from the assumption by the defendant would be unconscionable.
> (Austotel Pty Ltd v Franklins Selfserve Pty Ltd (1989) at p.610)

232 Waltons at p.403 per Mason C.J. and Wilson J; at p.427 per Brennan J.; at p.463 per Gaudron J.

233 Ibid at p.403 per Mason C.J. and Wilson J; at p.427 per Brennan J.

234 Silovi v Barbaro (1988) at p.472 per Priestley J.A.

235 Thompson v Palmer (1933) at p.547 per Dixon C.J.

236 Grundt v Great Boulder Pty Gold Mines Ltd (1937) at p.675 per Dixon C.J.

237 Verwayen at p.560 per Deane J.

by Spencer Bower and Turner and outlined above.[238] This would not be possible if estoppel by convention applied in situations in which the party estopped was in no way responsible for the other party's adopting, or continuing in, the assumption which was the basis of their relationship, a suggestion that has sometimes been made. However, it is submitted here, and argued below,[239] that estoppel by convention did not apply in the situation in which parties conducted their relationship on the basis of a common but mistaken assumption which neither party encouraged the other to adopt or to continue to hold. It is submitted, therefore, that estoppel by convention was intended by the judges in Waltons to be treated as a type of common law estoppel.

Athough, after Waltons, Australian law recognised just two categories of estoppel, distinguishing those categories was still considered quite important. At that time, it was stressed that common law and equitable estoppel were bound in their operation by different limitations. Although common law estoppel was capable of preventing departure from an induced assumption, it only operated in relation to assumptions of existing fact and could not be used as a cause of action. Similarly, although equitable estoppel could apply to induced assumptions regarding the future and could found a cause of action, it would only "permit a court to do what [was] required in order to prevent detriment to the party who [had] relied on the assumption induced by the party estopped but no more".[240] These different limitations on each of the doctrines were stressed because they were thought to be a means of preventing either doctrine from becoming a generalised source of liability for representations and usurping the traditional function of contract law. It was thought that:

> A distinction between contract and the operation of estoppel would ... be much more difficult to maintain if the distinction between common law and equitable estoppel is obscured.[241]

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238 See above at p.40

239 See below at p.113

240 Verwayen at p.412 per Mason C.J.

241 Parkinson P., "Equitable Estoppel" at p.60

Notwithstanding these fears however, a second stage in the development of the doctrine of Australian estoppel came with the decision in Verwayen. In this decision three of the judges - Mason C.J., Deane and Gaudron JJ. - argued that "common law" and "equitable" estoppel should themselves be merged into just one "single overarching doctrine".[242] As Kirby P. pointed out in the decision of Lorimer v State Bank of New South Wales, "no clear majority has yet emerged in the High Court for a unified doctrine of estoppel and no holding of that Court so requires."[243] Yet neither was there a clear majority in Verwayen for a continued distinction between "equitable" and "common law" estoppel, and the trend of Australian opinion seems to be that a unified doctrine would be "conceptually simpler and easier of application".[244]

It is to such a unified doctrine that the tag "Australian estoppel" is attached throughout this thesis. However, it should be noted that, even if the move towards a unified doctrine which has begun in Australia and is supported in this section does not continue, the validity of the claims that this thesis makes for Australian estoppel is not threatened. The process of unification envisaged in Verwayen is simply that common law estoppel would be collapsed into equitable estoppel and effectively disappear. The unified doctrine is therefore identical to equitable estoppel and so, if unification is rejected, "equitable estoppel" could simply be substituted throughout this thesis for the term "Australian estoppel".

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242 Verwayen at p.411 per Mason C.J. Deane J. had already rejected the distinction between equitable and common law estoppel in Waltons at p.155 and in Foran v Wight (1989) 168 C.L.R. 385 at pp.434-436. Quaere whether Mason C.J. had also arrived at this point in Foran v Wight (1989) at pp.411-412.

243 Lorimer v State Bank of New South Wales (1991). Hill J. in Avtex Airservice Pty Ltd v Bartsch (1992) 107 A.L.R. 539 at p.563 said that two problems were abundantly clear:

> The first is that there is confusion in the case law as to the precise distinction, if any, between concepts of election, waiver and estoppel; the second is that there is, as yet, no unanimous view as to whether there is a unified doctrine of estoppel applicable both to estoppel by conduct and equitable or promissory estoppel, and including perhaps as well, the doctrine of waiver and election.

Indeed, one court has strongly argued that common law estoppel remains an independent doctrine (McGrath v Fraser (1991) 104 F.L.R. 227).

244 Lorimer v State Bank of New South Wales (1991) per Kirby P. Lunney is right to call the move to a unified estoppel a "logical advance in this area of the law" (Lunney, M., "Towards a Unified Estoppel - The Long and Winding Road" (1992) 56 Conveyancer and Property Lawyer 239 at p.250).

It is submitted that the move towards a unified doctrine of estoppel in Australia is a desirable one. The issue of whether a unified doctrine will usurp the function of contract will be considered later in the thesis when the interrelation of Australian estoppel and contract is considered. At this point two reasons for welcoming the unification of common law and equitable estoppel should be outlined.

The first concerns the distinction between assumptions induced by representations of present fact and assumptions induced by representations as to the future, so important to the claimed distinction between the two doctrines. It is doubtful whether this distinction drawn in Jorden v Money[245] has been a part of Australian law since Foran v Wight.[246] In Verwayen, Mason C.J. simply took the existing law to be "that an assumption as to future fact may ground an estoppel by conduct at common law as well as in equity".[247]

For present purposes it is also desirable that this be the existing law. Those who would want to see Australian estoppel develop as a legal vehicle for the duty to take reasonable steps to ensure the reliability of induced assumptions would, like Mason C.J., find the fact/future distinction "unsatisfactory".[248] On the bases set out in Part One,[249] they would certainly not wish to give this distinction determinative legal effect. Once this fact/future distinction has been abandoned, a central distinction between the Waltons categories of equitable and common law estoppel will have been given up and a step taken towards justifying their unification.

A second justification for the unification of common law and equitable estoppel is that "it is anomalous and potentially unjust to allow the two doctrines to inhabit the same territory and yet produce different results".[250] As described in Waltons, equitable and

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245 (1854) 5 H.L.C. 185

246 Foran v Wight (1989) at p.411 per Mason C.J. and p.435 per Deane J.

247 Verwayen at p.412

248 Ibid at p.410

249 See above at pp.27-30

250 Ibid at p.412 per Mason C.J. In practice this overlap may be resolved in favour of the equity solution under

common law estoppel would often apply in the same fact situations. The question of the remedy to be applied in those situations, and whether effect ought to be given automatically to assumed states of affairs or some more flexible approach taken, is an important matter of remedies that by the time of Verwayen was being considered directly. To hide this important question - and others like it such as whether terms may be imposed on a plaintiff in the award of a remedy[251] - behind artificial categorisations of estoppel as "equitable" or "common law" serves no purpose in a fused legal system. As Deane J. said in Waltons it is:

> ...unduly to preserve the importance of past separation and continuing distinctness as a barrier against the orderly development of a simplified and unified legal system which fusion was intended to advance.[252]

For these two reasons, then, the trend of Australian law towards a unified law of estoppel is to be welcomed and the first element of the doctrine of Australian estoppel is that it is "One single doctrine of common law and equity..."

(2) Able To Be Used As Either A Cause Of Action Or Defence...

As outlined in the last part, one of the limitations upon all the traditional categories of estoppel, except proprietary estoppel, was that they were only rules of evidence and incapable of founding a cause of action. Estoppel was a "shield" and not a "sword", though in the quaint phraseology of one case, plaintiffs could often be seen "thrusting forward with [their] shield handing out some incidental buffeting"![253] This limitation had its roots in the consideration doctrine. It was feared that estoppel might prove a rival to contract and overthrow consideration "by a side wind".[254]

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sections such as s.5 of the Law Reform (Law and Equity) Act 1972 (N.S.W.), see Lorimer v State Bank of New South Wales (1991).

251 See below at pp.130-131.

252 Waltons at p.447. See also Kirk, L., "Confronting the Forms of Action: The Emergence of Substantive Estoppel" (1991) 13 Adelaide Law Review 225.

253 Stevens v Standard Chartered Bank (1988) 53 S.A.S.R. 323 at p.344 per Bollen J.

254 Combe v Combe [1951] 2 K.B. 215 at p.220 per Denning L.J. For a discussion of the interrelation of contract and Australian estoppel see Chapter Six.

An important argument against the imposition of this limitation on the doctrine of Australian estoppel is that it is logically incoherent. In Waltons Brennan J. said:

> [T]here is a logical difficulty in limiting the principle so that it applies only to promises to suspend or extinguish existing rights. If a promise by A not to enforce an existing right against B is to confer an equitable right on B to compel fulfilment of the promise, why should B be denied the same protection in similar circumstances if the promise is intended to create in B a new right against A? There is no logical distinction to be drawn between a change in legal relationships affected by a promise which extinguishes a right and a change in legal relationships effected by a promise which creates one. Why should an equity of the kind to which Combe v Combe refers be regarded as a shield but not a sword?[255]

This logical difficulty will obviously arise wherever estoppel is allowed to affect the enforcement of legal rights and provides good justification for the abandonment of the sword/shield distinction.

What it does not provide is a complete answer to fears about estoppel providing a cause of action that, free of the consideration requirement, could usurp the traditional function of contract law. That issue will be considered below when the interrelation of contract and Australian estoppel is considered in full. In this present context it will be sufficient to demonstrate the trend of the recent Australian estoppel authorities towards the abandonment of the sword/shield distinction, despite the hesitation of two of the High Court judges.[256]

This trend arguably began with Waltons in which at least three judges openly allowed the doctrine as a "sword".[257] The growth of the trend can be demonstrated in two separate aspects of the Verwayen decision.

Ironically, the first is the fact situation given as an example of the sword/shield distinction in that case by Deane J., one of the two High Court judges who seem to favour its continued application. In the context in which A is the owner of Blackacre and promises to transfer it to B in circumstances giving rise to an estoppel, but later refuses

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255 Waltons at pp.425-426

256 See Verwayen at p.437ff per Deane J. and p.459ff per Dawson J.

257 Waltons at p.406 per Mason C.J. and Wilson J. and at pp.425-426 per Brennan J.

to make the transfer, Deane J. claimed that B can use estoppel to prevent A denying the existence of a trust of the land for breach of which he can bring an action. In such a context it is clear that A's promise to transfer and B's consequent reliance are being used as the factual basis of the rights that actually give rise to the remedy. It is surely unhelpful to claim as did Deane J. that the action is essentially "the ordinary one of a beneficiary against a trustee for actual or threatened breach of trust"[258] and that the estoppel is merely being used as a defence. There is no reason why the fiction should be maintained that it is.

Second, Verwayen as a whole provides an interesting example of a case in which it may seem that Australian estoppel was only used as a "shield" and yet in which at least some of the judges went out of their way to see it actually take effect as a "sword". In this case the plaintiff had argued (*inter alia*) that the defendant was estopped from raising particular defences to a negligence action, viz. the denial of a duty of care and the pleading of a statute of limitations. This would have meant that the fact of negligence was still in issue but that certain defences had been removed by means of estoppel. Yet, significantly, the majority encouraged the plaintiff to amend his reply so as to raise estoppel in relation to any denial of liability by the defendant at all[259] and then two of the majority found for the plaintiff on the basis of this doctrine. Thus, for at least those two judges, the defendant's liability effectively arose out of the estoppel and not its negligence.

It is thus becoming clear that the developing doctrine of Australian estoppel is able to be used both as a "shield" and a "sword", both as a cause of action and defence. There is no sense in maintaining the fiction, as two judges of the High Court seem prepared to do, that it is only being used defensively.

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258 Verwayen at p.437

259 Ibid at pp.462-463 per Dawson J. speaking for the majority.

(3) Between Two Parties Not Necessarily In Any Kind Of Pre-existing Relationship.

As outlined above, promissory estoppel is one of the core group of doctrines from which Australian estoppel has been developed. Notwithstanding this, the sometimes mooted promissory estoppel requirement that the parties be in a pre-existing contractual relationship[260] is not a part of the Australian doctrine. The plaintiff and defendant in Waltons were not in any kind of contractual relationship but were merely parties to unsuccessful contractual negotiations. Moreover, subsequent decisions have denied this possible limitation on the application of the doctrine.[261]

What is slightly less clear, however, is whether some other type of legal relationship between the parties might be a necessary pre-condition to the application of Australian estoppel. In Waltons it seemed that the court was denying that any type of legal relationship between the parties was necessary for the application of the Australian estoppel. In Waltons the court seemed to drive "promissory estoppel one step further by enforcing [a non-contractual promise] directly in the absence of a pre-existing relationship of any kind"[262] and it was understood by both judges and academic commentators that the case had abolished this requirement.[263] However, in Verwayen, the issue as to whether the parties to an estoppel must be in some kind of pre-existing relationship seemed still a live issue to at least two of the judges: Mason C.J. and Dawson J. Their judgments might therefore be seen as raising a doubt that the requirement of a pre-existing legal relationship is not altogether abolished.

The better view is that no such relationship should be required for the application of Australian estoppel. Significantly, the two judges for whom the requirement still seemed

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260 For Australian authority concerning this requirement see Legione v Hateley (1983).

261 For example, Citra Constructions Ltd v Allied Asphalt Co. Pty Ltd Supreme Court of New South Wales, 28 March 1990, unreported. For a summary of this case see below at p.231

262 Waltons at p.400 per Mason C.J. and Wilson J. It is surprising, given that Mason C.J. seems to imply that this is the effect of Waltons that he expresses doubt about the point in Verwayen, see below at n.263

263 See, for example, Bobko v Commonwealth of Australia Supreme Court of Victoria, 22 April 1988, unreported, cited in Collin v Holden [1989] V.R. 510 at p.517; Clark, E., "The Swordbearer has Arrived: Promissory Estoppel and Walton Stores (Interstate) Ltd v Maher", (1987) 9 University of Tasmania Law Review 68 at pp.73-74

a live issue in Verwayen also treated it in a way which rendered it almost meaningless. Each of them suggested that the requirement might be satisfied by proof of a relationship of plaintiff and defendant[264] and Dawson J.[265] even suggested that the relationship of tortfeasor and victim might be enough. If these views are right, it is hard to see what value is being given to the term "legal" in the requirement that the parties enjoy a "pre-existing legal relationship".[266]

Moreover, in policy terms, it "is not easy to see why such a relationship should be necessary."[267] While this requirement might have made sense in the context in which promissory estoppel could only be used defensively, its primary justification must have disappeared with the abolition of that restriction on the doctrine.

Further, this requirement is another restriction on the doctrine which ought to be dispensed with if it is to develop into a legal vehicle for the general duty to take reasonable steps to ensure the reliability of induced assumptions. The unnecessarily restrictive effects of making distinctions between various types of relationship dispositive of whether that duty has been broken were seen in Part One.[268] It is therefore suggested that the pre-existing legal relationship requirement ought to be altogether abandoned.

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264 Verwayen at p.403 per Mason C.J. and p.454ff per Dawson J.

265 Ibid at p.455

266 These judges were not the first to arrive at this rather curious conclusion, however. Tadgell J. formed a similar view of the plaintiff-defendant relationship in Collin v Holden (1989) at pp.517-518. His Honour relied on the authority of Fullagar J. in Bobko v Commonwealth of Australia (1988) who in turn "observed that Donaldson J. in Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd [1968] 2 Q.B. 839 had decided that the doctrine of promissory estoppel applied to a promise made between parties whose legal relationship was far less direct and distinct than that of plaintiff and defendant...".

267 Cain, T.E., "Estoppel and Waiver: The Commonwealth v Verwayen in the High Court", (1990) 2 Bond Law Review 241

268 See above at pp.24-25

(4) To Establish an Estoppel One Party, A, (or His Privy?) ...

At a later point we will consider whether one of A's privies may be *bound* by an estoppel even though he is not the party that induced the original assumption. We ought to consider here whether privies may take the *benefit* of such an estoppel.

In Verwayen Deane J. said:

> The persons who may be bound by or who may take the benefit of such an estoppel extend beyond the immediate parties to it, to their privies, whether by blood, by estate or by contract.[269]

This proposition, however, is clearly in need of some refinement.

There are two ways in which a third party might attempt to rely upon an Australian estoppel. Both of these have to do with situations in which it is argued that Australian estoppel ought to give rise to a proprietary remedy, a possibility affirmed below.[270] This is why, in the sentence following that just cited from Verwayen, Deane J. emphasised that Australian estoppel "can be the origin of primary rights of property."[271]

The first way in which a third party might seek to rely upon an Australian estoppel is this: he might claim that an estoppel which could have been argued between the original inducing and relying party has changed the nature of rights in a particular piece of property to which he is successor in title and that he ought therefore to be able to rely directly upon that estoppel. This line of argument would presuppose that a change in the rights relating to a particular piece of property has arisen out of the circumstances giving rise to the estoppel themselves and not just from the compensatory award of a court. If this line of reasoning can be accepted (and the passage cited above seems to lend it support) then third parties ought to be able to rely upon an Australian estoppel directly.

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269 Verwayen at p.444

270 See below at p.133

271 Verwayen at p.444

The second way in which a third party might seek to rely upon an Australian estoppel is this: he might show that the original relying party has himself been awarded compensation from a court in the nature of a proprietary remedy and claim that that award of the court has changed the nature of the rights in a particular piece of property to which he is successor in title. This is no more than a claim that an Australian estoppel is capable of giving rise to a remedy of full proprietary rights: a change *in perpetuum* to rights in a particular piece of property.[272] For example, under an award in Australian estoppel, title to a particular piece of land may be increased by the award of a right of access over a neighbouring piece of property. A successor in title to that land might want to show that the original award was in the nature of a proprietary right capable of running with the land.

The issue of which of these two arguments might prove successful in the Australian courts is a vexed one.[273] There have been some suggestions in the recent cases that the former argument is the one that will prevail: that the circumstances giving rise to an Australian estoppel will sometimes be seen as themselves effecting a change in the rights relating to a particular piece of property.[274]

However, I would argue that it is appropriate to allow third parties to rely upon an Australian estoppel only to the extent entailed in the second of the two arguments outlined above.[275] There is no *prima facie* reason why a party who is not the party who has acted in reliance upon the original assumption ought to be able to argue an Australian estoppel directly against the original inducing party. It would not be compatible with the

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272 See below at p.133

273 It parallels a debate in England as to the extent to which proprietary estoppel and the common intention constructive trust are identical. See Hayton, D.J., "Equitable Rights of Cohabitees", [1990] Conveyancer and Property Lawyer 370; Ferguson, P., "Constructive Trusts - A Note of Caution" (1993) 109 Law Quarterly Review 114; Hayton, D.J., "Constructive Trusts of Homes - A Bold Approach" (1993) 109 Law Quarterly Review 485

274 See the confused judgment of Einfeld J. in Kintominas v Secretary, Department of Social Security (1991) 103 A.L.R. 82 and the difficult judgment of Priestley J.A. in Silovi v Barbaro (1988) (discussed below at p.107ff).

275 Though the only suggestion in the cases that third parties might be restricted to this second argument is that in Winterton Constructions Pty Ltd v Hambros Ltd (1992) 111 A.L.R. 649 (the only reported decision about a third party seeking to rely upon an Australian estoppel). The first argument does not seem to have been even raised and was certainly not discussed as a possibility by the court.

compensatory nature of Australian estoppel to allow him to do so. This would be particularly true if the doctrine can be seen as giving expression to the duty to take reasonable steps to ensure the reliability of induced assumptions. The duty is owed to a particular party: the party in whom the assumption has been induced and who has been exposed to the risk of loss by his activity in reliance on that assumption. It is therefore that party, and no other, who ought to benefit from the doctrine.

(5) Must Show That He Has Held An Assumption...

I come, then, to the first of the elements of the doctrine of Australian estoppel that must be established by a party seeking to invoke it. A party seeking to rely upon Australian estoppel must show that he has held the particular assumption upon which the estoppel is to be based.[276] This requirement raises two important questions.

(a) How specific must the relevant assumption be?

It is important to distinguish this issue from the issue of how clearly and unequivocally a party to be estopped must have induced the relevant assumption.[277] As an example, a party against whom an estoppel is sought may have induced an assumption that a lease would be granted over certain property. Another party may have induced an assumption that a lease would be granted for a period of three years and at a rent of £200 per month, subject to the condition that the property only be used as a hair dressing salon. In either case the assumption may have clearly and unequivocally been induced, yet in each the relevant question is in how general terms it may be cast and still found an estoppel.

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276 See, for example, Gallagher v Pioneer Concrete (N.S.W.) Pty Ltd (1993) 113 A.L.R. 159 at p.192 in which a party seeking to rely on Australian estoppel failed because he could not establish that a relevant assumption had been held.

277 See below at p.110

This question was directly addressed in the decision of the New South Wales Court of Appeal in Austotel Pty Ltd v Franklins Selfserve Pty Ltd. In that case a party seeking to object to an Australian estoppel sought to rely on the following passage from the judgment of Priestley J.A. in Silovi v Barbaro:

> For equitable estoppel to operate in circumstances such as those of the present case there must be the creation or encouragement by the defendant in the plaintiff of an assumption that a contract will come into existence or a promise be performed...[278]

In Austotel Pty Ltd v Franklins Selfserve Pty Ltd it was submitted that this passage referred to a contract or promise "the content of which was known", containing "precise terms describing what [the party seeking to establish the estoppel] expected from the defendant".[279] It was submitted that such a party would be unable to raise an Australian estoppel unless he were able to point to precise details in the assumption induced.

However, this argument was rejected in Austotel Pty Ltd v Franklins Selfserve Pty Ltd. Prietsly J.A. claimed that the passage cited from Silovi v Barbaro did not purport fully to "cover the field" of Australian estoppel.[280] Rather, he divided the existing estoppel cases into two types: those he called "Waltons type" cases and those he called "Plimmer type" cases. He demonstrated that, while in the former category of case the relevant assumption induced was often cast in very specific terms, the assumption relied upon in the latter category of case was much more general in nature, usually simply taking the form that "an interest" in certain property would be granted to the party seeking to raise the estoppel. Into this latter category of case he put many of the decisions traditionally discussed under the rubric "proprietary" estoppel such as Plimmer v The Mayor of Wellington,[281] Ramsden v Dyson,[282] Inwards v Baker,[283] and Crabb v Arun District

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278 Silovi v Barbaro (1988) at p.472

279 Austotel Pty Ltd v Franklins Selfserve Pty Ltd (1989) at p.604

280 Ibid at p.604

281 (1884) L.R. 9 App. Cas. 699

282 Ramsden v Dyson (1866)

283 [1965] 2 Q.B. 29

Council.[284] Priestley J.A. then claimed that Australian estoppel covers both these categories of case and can usually be built upon a general, as well as a specific, assumption. He claimed that the generality of the relevant assumption is in many cases no obstacle to applying a doctrine that gives the courts:

> ... a wide, albeit of course judicial, discretion as to what extent relief should be given and what form it should take.[285]

This judicial discretion to fashion relief will be more fully discussed below.[286]

At this point it is important to ask whether Priestley J.A. can have meant that any assumption, no matter how general, can be the basis of an Australian estoppel. Though generality may usually be no bar, will there ever be a case in which the assumption proved is so general that Australian estoppel will not be applied? This is an issue which Priestley J.A. failed to address directly in Austotel Pty Ltd v Franklins Selfserve Pty Ltd and in relation to which there exists no other authority.

Nevertheless, the answer to this problem may well emerge from two other pre-conditions to the application of the doctrine discussed below. The first is the requirement alluded to earlier that the inducement of the relevant assumption be clear and unequivocal.[287] The more detailed an assumption can be shown to be, the easier it will be to show that it was induced clearly and unequivocally. In the two examples regarding assumptions that a lease would be granted drawn at the outset of this section, either assumption could form the basis of an estoppel. However, as will be clear below, it is more likely that inducement would be found in the context of the second example, than it would in the context of the first. The second pre-condition to the application of Australian which might provide a solution to the problem at hand is the requirement of unconscionability.[288] On the basis of the criteria set out below, withdrawal from an extremely general induced assumption is less likely to be unconscionable than withdrawal

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284 Crabb v Arun District Council (1976)

285 Ibid at p.608. Compare Holiday Inns Inc v Broadhead (1974) at p.1087 per Goff J.

286 See below at p.130ff

287 See below at p.110

288 See below at p.115ff

from a very narrowly framed assumption will be. Thus, while in theory there may be no limit determined by the cases as to the generality of an assumption capable of founding an Australian estoppel, in practice the requirements that the assumption be unequivocally induced and that withdrawal from it be unconscionable will usually operate to preclude the most generally framed assumptions from the ambit of the doctrine.

(b) Must the party holding the relevant assumption honestly have believed its truth?

According to Spencer Bower and Turner, application of the various traditional categories of estoppel required belief by the party seeking to establish the estoppel in the truth of the representation upon which it was to be based and was not possible where there was knowledge, actual or imputed, that the representation was false.[289] In relation to proprietary estoppel this requirement was often expressed in terms of the first of Fry J.'s *probanda* from Willmott v Barber,[290] viz. that a party seeking to establish an estoppel must have made a mistake as to his legal rights, honestly believing them to be different from what they truly were.[291] Yet in whatever terms it was expressed, the requirement was an obvious consequence of the centrality of the reliance element of estoppel. A party cannot be said to have relied upon a particular representation or assumption if he knew that it was false.[292]

Two qualifications need to be made to this general statement of the belief requirement for the various antecedent categories of estoppel. First, it was never applied to estoppel by convention.[293] For this type of estoppel it was sufficient that the parties to a particular transaction agreed that a certain state of facts was to be treated as true as between

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289 Turner, A.K. (ed.), Estoppel by Representation at pp.92 and 130

290 (1880) 15 Ch.D. 96

291 Spencer Bower and Turner (Ibid at p.287) claim that this *probandum* is "identical with or a corollary of, the general rule that no representee can claim to have been misled who knows the general facts".

292 Canadian & Dominion Sugar Co. Ltd v Canadian National (West Indies) Steamships Ltd [1947] A.C. 46 at p.56 per Lord Wright.

293 Turner, A.K. (ed.)., Estoppel by Representation at p.159ff.

themselves. Presumably this was because knowledge of the true state of affairs would not effect proof of reliance in the context envisaged for estoppel by convention. It would be possible sincerely to rely upon a version of affairs known to be false, if it were honestly believed that all parties involved would treat that particular version as true.

Second, Finn has shown that, in practice if not in theory, the belief requirement for proprietary estoppel often applied in a way similar to that in which it did for estoppel by convention rather than in the way it did for estoppel by representation generally. The proprietary estoppel cases often involved the creation or encouragement of an assumption that a right would in the future either be granted or not insisted upon. In such situations the only real sense in which belief in the truth of the assumption can be relevant is once again in the sense of belief that a particular state of affairs will in the future be treated as true as between the parties. It is not helpful to frame the requirement in the terms of Fry J.'s *probandum* that the party seeking to establish the estoppel must be mistaken as to his rights, viz. honestly have believed that he enjoyed particular rights which in fact he did not. As Finn writes:

> Such cases in the main have nothing whatever to do with mistakes and knowledge thereof and can only be translated into the language of mistake by a willing suspension of disbelief. See, for example, the judgment of Scarman L.J. in Crabb v Arun District Council [1976] Ch. 179 where the five probanda were found to be satisfied in such a case![294]

For this reason Goff J. has held that a mistake as to rights is not an essential element of a claim to relief under proprietary estoppel.[295] Once again, even if the requirement of honest belief for proprietary estoppel is treated simply as a requirement of honest belief that a particular assumption will be treated as true as between the parties, and not as a requirement of belief that it is in fact true, the requirement will still serve to buttress the reliance element of estoppel. Thus substituting into proprietary estoppel a requirement of honest belief similar to that used in the estoppel by convention cases, rather than that

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294 Finn, P., "Equitable Estoppel" at p.69

295 Holiday Inns Inc v Broadhead (1974) at p.1087

used in the estoppel by representation cases more generally, would not undermine the principal function of the requirement.

As in the case of each of the various antecedent categories of estoppel, it is reliance which is central to the operation of the Australian doctrine. For this reason, a requirement of honest belief would also play a useful part in the application of Australian estoppel and should be maintained.

The question therefore arises as to the form which such a requirement should take: should it be the general estoppel by representation requirement that the party seeking to establish the estoppel should genuinely have believed in the truth of the assumption upon which it is to be based, or the estoppel by convention and proprietary estoppel requirement that he must have believed it would be treated as true as between the parties? It is submitted that the requirement of honest belief to be adopted for Australian estoppel, capable as it is of being built upon assumptions regarding the future as well as the present and regarding law as well as fact, should be that requirement traditionally applied to estoppel by convention. Grundt v Great Boulder Pty Gold Mines Ltd,[296] a case that has already proved a rich store of material for the development of the doctrine of Australian estoppel in the High Court, contains a classic statement of the estoppel by convention requirement and would provide ample authority for its application to the developing doctrine.[297]

Incidentally, whatever the belief requirement for Australian estoppel, it is unlikely that the concept of constructive notice of falsehood will play a part in the application of the doctrine. The question of whether the plaintiff ought not to have believed that the representation was true, or ought not to have believed that it would be treated as true as between the parties, will be dealt with as a part of the unconscionability issue discussed below.[298]

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296 Grundt v Great Boulder Pty Gold Mines Ltd at p.676 per Dixon J.

297 On the appropriateness of this approach to the earlier estoppel case see pp.74-75 above.

298 See Standard Chartered Bank Australia v Bank of China (1991) 23 N.S.W.L.R. 164 at p.177ff per Giles J.

Having thus considered both the requisite specificity of an assumption upon which an Australian estoppel may be built and the extent to which the party seeking to rely upon it must have believed it to be true, I turn to its possible content.

(6) Regarding The Present Or The Future, Fact Or Law...

In dealing above with the issue of whether equitable and common law estoppel have been subsumed into the single doctrine of Australian estoppel, it was explained that the concept of equitable estoppel, as used in the recent Australian cases, does not recognise a distinction between assumptions regarding the present and assumptions regarding the future. Further, it was shown that this distinction does not, and arguably ought not to, form a part of the doctrine of Australian estoppel as it seems to be developing. These issues, therefore, do not require further discussion and it will be assumed that an Australian estoppel can be built upon an assumption as to the future as well as the present.

A similar issue that does deserve attention here, however, is the claim that estoppel can only be built upon assumptions of fact and not of law. According to Spencer Bower and Turner, the antecedent law of estoppel by representation distinguished two types of situation in which the fact/law distinction could potentially become an issue. First, there were statements of "fact accompanied by, or involving, an inference or proposition of law, where such inference or proposition [was] not distinct or severable from the statement of fact".[299] In these situations the fact that the relevant statement was one of combined fact and law did not prevent the application of estoppel by representation. Second, there were statements of "a rule, principle, or proposition of the general law"[300] or statements of the legal effects of facts which formed the subject matter of quite separate statements. These were treated as essentially statements of opinion and

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299 Turner, A.K. (ed.)., Estoppel by Representation at p.38

300 Ibid at pp.38-39

could therefore only be used as statements of fact to found an estoppel by representation in as much as they represented an implied statement of fact concerning the present state of the speakers mind: "an implied statement by the representor of the fact that the opinion expressed as to the law is actually entertained by him, or by the person to whom it is attributed."[301]

In Con-Stan Industries of Australia v Norwich Winterthur Insurance (Australia) Ltd[302] the High Court of Australia seemed to narrow this formulation of the law by providing that estoppel could not be built upon a mixed representation of fact and law. This decision was subsequently criticised by Samuels J.A. in Eslea Holdings Ltd v Butts where it was pointed out that:

> ... the authorities to which the judgment in Con-Stan refers are not inconsistent with the proposition that a conventional estoppel might rest upon a foundation of assumed law as well as assumed fact.[303]

Thus, in the period immediately preceding Waltons, the Australian law of estoppel seemed to hover on this point between the position presented by Spencer Bower and Turner and Samuels J.A. in Eslea Holdings Ltd v Butts, and the more restrictive position presented in Con-Stan Industries of Australia v Norwich Winterthur Insurance (Australia) Ltd.

It is therefore a sign of how sudden and radical the recent transformation of Australian estoppel law has been, that just four years later a High Court judgment in Verwayen could include this passage concerning the fact/law distinction:

> The assumption may be one as to legal as well as to a factual state of affairs. There is simply no reason to restrict the assumption to a factual matter as there was at the time when the rules of estoppel by conduct were evidentiary. It has already been recognised that an equitable estoppel may relate at least to a matter of mixed fact and law: see Waltons Stores, at 415-416, 420-421, 452; Foran v Wight, at 433-435. Moreover, the distinction between assumptions as to fact and assumptions as to law is artificial and elusive; see the discussion of Oliver J in Taylors Fashions Ltd v Liverpool Trustees Co. [*sic*] at 150-151. So it would be

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301 Ibid at p.39

302 Con-Stan Industries of Australia v Norwich Winterthur Insurance (Australia) Ltd (1988) at pp.244-245

303 Eslea Holdings Ltd v Butts (1986) 6 N.S.W.L.R. 175 at p.188

> productive only of confusion and arid technicality to restrict the operation of the doctrine so as to exclude from its scope an assumption as to a purely legal state of affairs.[304]

Further, in this same decision, Deane J. declared that the assumption founding an Australian estoppel "may be of fact or law, present or future",[305] a position that he had earlier set out in Foran v Wight.[306] In this latter case, he had called the distinction between fact and law "essentially illusory".[307]

It would seem that, far from its earlier position in Con-Stan Industries of Australia v Norwich Winterthur Insurance (Australia) Ltd, the High Court is developing an Australian estoppel altogether free of the fact/law distinction. It is true that this development is not yet complete. Indeed, the decision in Con-Stan Industries of Australia v Norwich Winterthur Insurance (Australia) Ltd has never been overruled on this point; the decision was not even cited in Waltons, Verwayen or Foran v Wight. Nevertheless, the abandonment of the fact/law distinction has been readily accepted by other Australian courts,[308] has been abandoned by the High Court in the context of the restitution of mistaken payments,[309] and can arguably be justified in two ways, each reflecting one of the two traditional reasons for excluding statements of law from estoppel.

The first reason for excluding statements of law from estoppel is, according to Spencer Bower and Turner, that statements of law are statements of opinion.[310] However, it is not immediately apparent that this is true. A statement of "fact" is a statement presenting itself as a verifiable truth. A statement of "opinion" is expressly the statement of a

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304 Verwayen at p.413 per Mason C.J.

305 Ibid at p.445

306 Foran v Wight (1989) at p.435

307 Ibid at p.435

308 See, for example, Burnside Sub-Branch R.S.S.I.L.A. Inc. v Burnside Memorial Bowling Club Inc. (1992) 58 S.A.S.R. 324 at p.344; Inn Leisure Industries Pty Ltd v D.F. McCloy Pty Ltd (1991) 100 A.L.R. 447 at p.463 per French J.; Lorimer v State Bank of New South Wales (1991)

309 David Securities Pty Limited v Commonwealth Bank of Australia (1992) 175 C.L.R. 353. See also in England, Law Commission, Consultation Paper No.120: Restitution of Payments Made Under a Mistake of Law (1991).

310 Turner, A.K. (ed.), Estoppel by Representation at pp.38-39

"judgement or belief based on grounds short of proof."[311] Legal theorists such as MacCormick have shown that statements of law are often capable of clear cut deductive justification[312] and at least in such straightforward cases there may be no real sense in which the relevant statement of law is a statement of less verifiable fact than a statement about the physical world.

In any case, even if statements of law are, in fact, statements of opinion it is still not clear why statements of opinion should not be able to give rise to an assumption founding an Australian estoppel. If Australian estoppel is to be developed into a legal vehicle for the duty to take reasonable steps to ensure the reliability of induced assumptions, the fact/opinion distinction cannot be given dispositive force in determining which types of representation might give rise to an assumption to which the doctrine will apply. It is clearly possible that a party expressing an opinion should have broken this general duty. In practice, we all regularly rely upon the opinions of others. Indeed, given that the distinction between fact and opinion raises enormous epistemological questions and is in no sense clear cut, it would be very difficult *not* to rely upon such opinions. Thus, a party may seek to resile from an assumption concerning his opinion in a way which is as much a source of preventable harm and as incompatible with upholding the processes of trust and communication as it would be to seek to resile from an induced assumption concerning purported fact.

The second reason traditionally advanced for the exclusion of statements of law from the operation of estoppel is that a statement of law is equally verifiable by both parties. As a matter of fact, however, arguments of, and thus statements regarding, law are not equally accessible to all. At least in some circumstances it is patently justifiable to rely upon a statement of law made by another person. That other person ought to be regarded as subject to the duty to take reasonable steps and not exempted from a ground of liability giving it legal expression.

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311 Fowler, H.W. (ed), The Concise Oxford Dictionary of Current English 5th edn (Oxford: Clarendon Press, 1964) at p.848

312 MacCormick, N., Legal Reasoning at p.19ff.

Deane J. would seem justified, therefore, in his claim that Australian estoppel can be built upon assumptions of "fact or law, present or future".

(7) And That He Has Acted Or Refrained From Acting...

This seventh element in the establishment of an estoppel is obviously closely related to the eighth (the element of reliance) and the ninth (the element of detriment). If a person seeking to establish an estoppel has not in any way acted or refrained from acting since the relevant assumption was induced, then he can be said neither to have relied upon that assumption, nor to be in any worse position should it prove unjustified than he would have been had it never been held.

But an initial question arises before the elements of detriment or reliance can be discussed. This is the question of what will count as refraining from action for the purposes of Australian estoppel. A clue to answering this question may be found in an English case, Fontana N.V. v Mautner. In that case Balcombe J. said:

> I am quite positive in my mind on the evidence I have heard that Mr Mautner did nothing, either by action or inaction, in reliance on the representation made by Mr Isaac Sofair.[313]

While less than happily expressed, the phrase "did nothing ... by ... inaction" points to an important distinction between *refraining or forbearing from acting* and merely *not acting*. The antecedent categories of estoppel apply in at least certain circumstances when the party seeking to establish the estoppel can show that he has refrained from adopting a particular course of action.[314] Merely not acting, however, has often been cited as a reason for not recognising a particular estoppel, including an Australian estoppel.[315]

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313 (1980) 254 E.G. 199 at p.207

314 See Turner, A.K. (ed.), Estoppel by Representation at p.106

315 For examples drawn from the traditional categories see Newbon v City Mutual Life Assurance Society Ltd (1935) 52 C.L.R. 723; Fontana N.V. v Mauntner (1980); Cook Industries Inc v Meunerie Liegeois S.A. [1981] 1 Lloyd's Rep 359; Raiffeisen Hauptgenossenschaft v Louis Dreyfus & Co. [1981] 1 Lloyds Rep 345; Bremer Handelsgesellschaft m.b.H. v Deutsche Contihandelsgesellschaft m.b.H. [1983] 1 Lloyd's Rep 689. For an Australian

The difference seems to be between (i) situations in which the party seeking to establish the estoppel has been in a position to adopt a new course of action and has addressed his mind to the possibility of doing so, but, on the basis of the assumption that he has been induced to hold, has not adopted the new course of action, and (ii) situations in which the party seeking to establish the estoppel has either had no opportunity or not addressed his mind to the possibility of adopting any course of action different from that to which he had already been committed. The former of these situations - that of refraining from action - could sometimes clearly be a situation of justified reliance. The latter - that of mere inaction - equally clearly could not.

It would appear, then, that Australian estoppel - like the various antecedent categories - ought only to be applied when the party seeking to establish the estoppel has somehow acted or refrained from acting following the inducement of the assumption upon which the estoppel is to be built. Only such a requirement is consonant with the purpose of the doctrine in protecting reliance upon induced assumptions.

(8) In Reliance Upon That Assumption...

Once again, it is important to distinguish this element of Australian estoppel from another with which it might be confused, that of detriment discussed below.[316] This distinction between reliance and detriment is also a part of the antecedent categories of estoppel and was set out by Parker Q.C. in Coombes v Smith:

> Two questions have, it seems to me, to be asked in relation to each of [the plaintiff's actions]: (1) was it done in reliance on the defendant's assurances or, in other words, on the faith of the plaintiff's mistaken belief, the existence of which I have, for present purposes, to assume? and (2) by doing it, did the plaintiff prejudice herself or otherwise act to her detriment?[317]

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estoppel example on this point see Windrum v Rejilo (1988) 87 A.N.Z Convey. Rep 491 at p.495

316 As an example of a situation in which these two elements of estoppel were confused, see the arguments of counsel in Coombes v Smith [1986] 1 W.L.R. 808 summarised at p.829.

317 Ibid at p.820

Given the underlying purpose of Australian estoppel in protecting reliance upon induced assumptions, the element of reliance is obviously very important to the operation of the doctrine. Only such detriment as flows from reliance upon the induced assumption can be remedied.

Because of the centrality of this requirement, it might seem surprising to suggest that a party seeking to establish an Australian estoppel ought not always to be required to prove reliance. However, in relation to promissory and proprietary estoppel, there was a rebuttable presumption that any action or refraining from action subsequent to the inducement of the assumption was undertaken in reliance upon the assumption,[318] although it is probable that this presumption only arose when the relevant action or inaction was the "natural consequence" of the assumption induced.[319] As regards Australian estoppel this question of the burden of proving reliance has not yet been determined. Yet in as much as cases concerning the antecedent estoppel categories have repeatedly been used as a guide in the development of the Australian doctrine, it is likely that the presumption will also be held to apply in this context. The issue is whether it should.

It is submitted on grounds of convenience that, notwithstanding the centrality of reliance, the presumption of reliance should be allowed to operate in the context of Australian estoppel. Proving reliance would be an almost impossible task for a party seeking to plead Australian estoppel. Both English and Australian courts have dealt with the issue of reliance for estoppel by asking the question: "Despite any other contributing factors, would the party seeking to establish the estoppel have adopted a different course (of either action or refraining from action) to that which he did had the relevant assumption not been induced?"[320] Except for his own personal testimony - which, as Lord

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318 Brikom Investments v Carr (1979); Greasley v Cooke (1980); Re Basham [1986] 1 W.L.R. 1498; Coombes v Smith (1986)

319 Newbon v City Mutual Life Assurance Society Ltd (1935)

320 For examples of English cases see United Overseas Bank v Jiwani [1976] 1 W.L.R. 964; Et Soules & Cie v International Trade Development Co. Ltd [1980] 1 Lloyd's Rep. 129; The Scaptrade [1983] 2 A.C. 694. For an example of an Australian estoppel case that raised this issue after Waltons was decided see Windrum v Rejilo (1988).

Denning M.R. has pointed out, "must be mere speculation"[321] - it is difficult to imagine what type of evidence the party seeking to establish the estoppel could lead to answer such a question in the affirmative.

On the other hand, once reliance has been presumed, there are a number of different ways in which the party against whom an estoppel is sought can rebut the presumption and answer this relevant question in the negative. In particular, he can show (i) that it was impossible for the other party to adopt any course of action or inaction than that which he did adopt, or (ii) that it is improbable that the other party would have adopted a different course to that which he did adopt.

Thus there are cases in which it was shown to be impossible that a party seeking to establish an estoppel relied upon the relevant assumption, because at the time of the supposed reliance the assumption had either not yet been induced[322] or could no longer have been held.[323]

Similarly, situations in which it would not be impossible, but rather highly improbable, that there had been reliance are not difficult to imagine. In Milchas Investments Pty Ltd v Larkin it was shown that reliance had most probably been upon an assumption different to that induced by the party against whom the estoppel was sought.[324] In Austotel Pty Ltd v Franklins Selfserve Pty Ltd parties negotiating a lease were involved in what the defendant called a "cat and mouse" game in which each was "trying to secure the best position for themselves, obtain the commitment of the other parties, but leave an escape

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The approach of the United States promissory estoppel cases is similar: see, for example, Floyd v Christian Church Widows & Orphans Home 176 S.W.2d 128 (1948)

321 Brikom Investments v Carr (1979) at p.482

322 For an Australian estoppel case, see Australian Broadcasting Commission v XIV Commonwealth Games Ltd (1988) 2 B.R. 318. For an earlier Australian case, see Hocking v Western Australian Bank (1909) 9 C.L.R. 738. For analogous English estoppel cases, see Hewlett v London County Council (1908) 24 T.L.R. 331 and Mac Fisheries v Harrison (1924) 93 K.B.D. 811. Another example of factual impossibility can be found in Morrison v Universal Marine Insurance Co. (1873) L.R. 8 Ex. 197

323 Milchas Investments Pty Ltd v Larkin (1989) A.T.P.R. ¶40-956 at p.50,439

324 Ibid at p.50,439

route open for themselves."[325] Although the argument was unsuccessful in Austotel Pty Ltd v Franklins Selfserve Pty Ltd itself, there must often be commercial situations in which the competitive and uncertain atmosphere in which a particular assumption is induced makes reliance highly improbable.

Largely on grounds of convenience, therefore, it is submitted that the rebuttable presumption of reliance that assists parties seeking to establish either promissory or proprietary estoppel should also operate in relation to Australian estoppel. This eighth element would then become less of a potential limitation upon the application of the doctrine than it might otherwise be.

(9) To His Detriment.

As outlined in Part One, the requirement of detriment has been a controversial subject across the various antecedent categories of estoppel. Spencer Bower and Turner argue that for all the antecedent categories of estoppel (including promissory estoppel) proof of detriment was requisite. However, the requisite detriment under this approach was broadly defined to consist in any loss that the party seeking to establish the estoppel would have suffered were the assumption upon which he had relied to have proved unjustified (but not including, where the relevant assumption was that a particular benefit will be granted, the loss of the expected benefit *per se*).[326] In other words, the party seeking to establish the estoppel was required to show that he would have been in a worse position had the relevant assumption proved unjustified than he would have been had it never been induced.[327]

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325 Austotel Pty Ltd v Franklins Selfserve Pty Ltd (1989) at p.614 per Priestley J.A.

326 See above at pp.42-43

327 The relevant detriment must, of course, be detriment to the party seeking to establish the estoppel and not to a third party, see Cairns Festival Faire Pty Ltd v A.E.F.C. Ltd Federal Court of Australia, 3 September 1993, unreported. A digest report of this case is available at [1993] A.C.L. Rep. 110 F.C. 7. In this case a shopping centre project was in financial difficulty and a bank agreed to extend a credit facility if certain other parties invested in the project. The other parties invested in the project but the bank withdrew its credit facility. The owners of the shopping centre brought *inter alia* an action in estoppel seeking damages to remedy the consequences of the bank's withdrawing

The second major antecedent position in this area was that the deriment requisite to found an estoppel by representation was detriment in the narrower sense of a loss suffered even before the relevant assumption had proved unjustified by means of the action or inaction in reliance itself; while the detriment required to found a promissory estoppel was detriment in the sense intended by Spencer Bower and Turner.[328]

It is clear that it is the Spencer Bower and Turner approach to detriment - the "broader" approach - that is to be applied in the context of Australian estoppel. That is, the detriment which a party seeking to establish an Australian estoppel must show is that he would be in a worse position should the assumption upon which he has relied prove unjustified than he would have been had he never held it. The burden of proving such detriment lies with the party seeking to establish the estoppel.[329]

There are three reasons why it is clear that the Spencer Bower and Turner approach to detriment is the one germane to Australian estoppel. First, that approach finds strong support in Thompson v Palmer[330] and Grundt v Great Boulder Pty Gold Mines Ltd,[331] the two Dixon C.J. judgments that were very heavily relied upon in both Waltons and Verwayen.

Second, the existing Australian estoppel authorities plainly prefer the broader approach. For example, in Verwayen Mason C.J. drew a distinction between two types of detriment, in approximate terms the two envisaged by antecedent theory: "detriment which would result from the denial of the correctness of the assumption upon which the person has relied" and "detriment which the person has suffered as a result of his relying on the correctness of the assumption."[332] While Mason C.J. envisaged that the remedy

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its credit facility. However, it was held, *inter alia*, that the only relevant detriment was detriment to the investors and not the owners of the shopping centre who could therefore not succeed in estoppel.

328 See above at p.42

329 Thompson v Palmer (1933) at p.549 per Dixon J.

330 Ibid at p.547 per Dixon J.

331 Grundt v Great Boulder Pty Gold Mines Ltd (1937) at pp.674-675 per Dixon J.

332 Verwayen at pp.415-416

to be awarded under an Australian estoppel would usually be shaped by the second, narrower, sense of detriment,[333] he claimed that detriment in the broader sense would be sufficient to establish the estoppel.[334] That detriment in the broader sense is sufficient to found an Australian estoppel is also clear from the other judgments delivered in Verwayen,[335] from Waltons[336] and from various State court authorities.[337]

Third, it is clear that the broader definition of detriment is the one germane to Australian estoppel because it is the one most consistent with the goal of enforcing the duty to take reasonable steps to ensure the reliability of induced assumptions. As we saw at the beginning of Part One, ensuring the "reliability" of an induced assumption means ensuring that a party who relies upon it is not worse off if the assumption proves unjustified than he would have been had it never been induced. This is the "broader" concept of detriment. Mason C.J. implicitly acknowledged this purpose of the detriment requirement when he said in Verwayen that the broader definition of detriment "makes it clear that the detriment must flow from the reliance upon the assumption."[338]

Certainly, some have claimed that this broad concept of detriment can hardly be a limitation on the application of estoppel at all.[339] And it is certainly true that at its limits the concept may seem like meagre limitation on the application of the doctrine. For example, in Austral Standard Cables Pty Ltd v Walker Nominees Pty Ltd[340] a

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333 An issue discussed below at p.130ff

334 Verwayen at pp.415-416

335 See pp.429-430 per Brennan J. (note here that Brennan J. also underlines that the broad approach to detriment "does not consist in a loss merely attributable to non-fulfilment of the promise". For the effect of this see below at p.162), pp.455-456 per Dawson J., pp.487-488 per Gaudron J., p.501 per McHugh J and compare the similar approach of Deane J. at pp.448-449.

336 Waltons at p.404 per Mason C.J. and Wilson J. and at pp.416, 423, 424 and 429 per Brennan J.

337 See, for example, Citra Constructions v Allied Asphalt Co Pty Ltd (1990); Lorimer v State Bank of New South Wales (1991) per Kirby P.; Commonwealth of Australia v Clark (1994); Austral Standard Cables Pty Ltd v Walker Nominees Pty Ltd (1992) 26 N.S.W.L.R. 524. Further, it should be noted that the Spencer Bower and Turner approach to detriment has a long history of acceptance in Australia in relation to all the various orthodox categories of estoppel. For a list of Australian decisions to this effect see Lindgren, K., "Estoppel in Contract", (1989) 12 University of New South Wales Law Journal 153 at p.175

338 Verwayen at p.417

339 See, for example, Meagher, R.P., Gummow, W.M.C. and Lehane J.R.F., Equity: Doctrines and Remedies 2nd edn (Sydney: Butterworths, 1984) at p.399

340 Austral Standard Cables Pty Ltd v Walker Nominees Pty Ltd (1992)

vendor was able to estop a purchaser from rescinding a contract for the sale of land, for failure by the vendor to give vacant possession on the day fixed for completion, on the basis that the purchaser had induced an assumption that completion would not take place on that day. At the trial the vendor had not established that it would have been able to give vacant possession of the land in any case. However, on a successful appeal at least one judge, Handley J.A., was prepared to find that the loss of a real chance of avoiding detriment - in this case the loss of a real chance of providing vacant possession - constituted detriment for the purposes of Australian estoppel.[341] It is submitted that so attenuated a concept of detriment constitutes almost no detriment at all.

Nevertheless, the broad concept of detriment does not necessarily imply as attenuated a concept of detriment as that recognised by Handley J.A., and the utility of the broad concept in distinguishing between situations that are more or less deserving of relief on the basis of the duty to take reasonable steps to ensure the reliability of induced assumptions will be highlighted in Chapter Nine. In that chapter, the application of the doctrine to the facts of Williams v Roffey Brothers Contractors Ltd[342] and Citra Constructions Ltd v Allied Asphalt Co Pty Ltd[343] is contrasted. In the first case, detriment could most probably be established by a party seeking to rely on Australian estoppel and in the second it could not. The broad concept of detriment has more explanatory power than many would allow.

One final point concerning the detriment requirement is that the relevant detriment need not be pecuniary in nature. In Verwayen, Deane J. said:

> Equity has never adopted the approach that relief should be framed on the basis that the only relevant detriment or injury is that which is compensable by an award of monetary damages.[344]

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341 Ibid at p.540

342 Williams v Roffey Brothers & Nicholls Contractors Ltd (1991)

343 Citra Constructions Ltd v Allied Asphalt Co Pty Ltd (1990)

344 Verwayen at p.448. See also p.416 per Mason C.J.; pp.461-462 per Dawson J; p.504 per McHugh J; Lorimer v State Bank of New South Wales (1991).

His Honour then found for the party relying upon the estoppel on the basis that, had the other party been allowed to resile from the assumption that they had induced, the first party would have suffered aggravated psychiatric damage. In other words, he would have been in a worse position than had the assumption never been induced, not financially, but in terms of his mental health. A similar approach was adopted to detriment that consisted in an anticipated deterioration of the plaintiff's mental health had the defendant been allowed to resile from the assumption he had induced in Commonwealth of Australia v Clark.[345] Thus, not only is the detriment necessary to establish an Australian estoppel a broad concept in the sense outlined earlier in this section, but it also can be built upon non-pecuniary as well as pecuniary detriment.

(10) A Must Also Show That The Other Party, B,[346] (or His Privy?)

It was argued above that an Australian estoppel should only be available to a party who has himself relied upon an induced assumption and not to his privies (unless an award made to the original party or in his name has already altered rights in relation to a particular piece of property).[347] But what of the complementary suggestion that privies of the party inducing the assumption ought to be subject to the burden of the estoppel if they take from the original inducing party with knowledge of the circumstances in which the assumption was induced?[348]

This question arose in the decision in Silovi v Barbaro. In this case the owners of land entered into a ten year lease for a part of their property on which the tenants planted Cocos palms at a cost of $90,500. Cocos palms take approximately ten years to mature. The lease could not be registered because it was for only a part of a lot and for more than five years but the new tenants lodged a caveat to protect their interests and the

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345 Commonwealth of Australia v Clark (1994)

346 Here 'B' is taken to include 'B's' agents: Milchas Investments Pty Ltd v Larkin (1989) at p.50,437

347 See below at p.133

348 Verwayen at p.444 per Deane J

owners of the land assured them that they would not break their lease. They later repeated these assurances. However the owners of the land then entered into an agreement to sell the property to a third party, a rival nurseryman, subject to the tenant's lease. The vendors and purchasers instructed the same solicitors and, at least before completion, the owner knew that the purchasers would evict the tenants. The tenants brought proceedings against both the owners of the land and its purchasers.

Priestley J.A., with whom Hope and McHugh JJ.A. agreed, found that the conduct of the owners in entering into a contract which would permit the exclusion of the tenants was unconscionable. This unconscionable conduct founded an equitable estoppel, the finding of which was not prevented by the relevant statutory provisions that excluded registration of a lease over part of a lot for more that five years. Moreover, they held that the equitable interest which arose was a personal licence coupled with a *profit à prendre* and was sufficient to prevent the later equitable interests of the purchaser, acquired under a contract of sale and with knowledge of the circumstances giving rise to the estoppel, from prevailing.

What is interesting in Silovi v Barbaro is that the equitable interest in the property of the party in whom the assumption was induced is treated as an earlier interest than the interest of the purchaser under the contract of sale: that is, it is seen as having arisen at the time of the events giving rise to the estoppel and as having run with the land to affect whomever took with notice.[349] This is especially interesting because the original inducing party was in fact a party to the action and still registered proprietor of the property, so it may have been that the same result could have been achieved even by recognising that the interest in the land arose later from the compensatory award of the court. The reasoning in Silovi v Barbaro would thus seem to contradict the understanding of how estoppel operates proposed above.[350]

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349 Silovi v Barbaro (1988) at p.475 per Priestley JA

350 See above at p.87ff

I would argue, however, that an approach to Australian estoppel which sees it as sometimes consisting in the simple recognition and enforcement of equitable interests which have arisen from the circumstances of the estoppel themselves and as sometimes consisting in compensatory remedies awarded by a court to remedy unconscionable conduct is incoherent. It is far more coherent to hold that an award in Australian estoppel is always an award of a compensatory nature and that any proprietary interest to which an Australian estoppel might give rise flows from the award of the court.

On this basis, I would suggest that Silovi v Barbaro might have been better approached by asking (i) whether the plaintiff could establish a case in Australian estoppel against the registered proprietor of the land, and (ii) whether an award of a proprietary nature should have been made against that registered proprietor. If an award of a proprietary nature had been made, then the party taking the land by contract would have taken the land subject to the other party's proprietary rights under the usual rules as to priorities. If it had not been possible by the time of the award to remedy the detriment suffered by the party in whom the assumption was induced by means of a proprietary award, then the court would have needed to fashion some other remedy to compensate that party. A third party ought not to become liable for an original inducing party's breach of the duty to take reasonable steps to ensure the reliability of induced assumptions simply because he has knowledge of that breach.

Because of Silovi v Barbaro I have raised the possibility of third parties bearing the burden of an Australian estoppel. I would not, however, choose to see the doctrine develop in this direction.

(11) Induced The Relevant Assumption

A central justification for imposing liability upon the party against whom an Australian estoppel is sought must be that he is in some way responsible for inducing the

assumption upon which the other party has relied. [351] An "inducement" of an assumption for these purposes consists in either the creation or the encouragement of that assumption in the mind of the other party.[352]

An assumption may be induced by "any of the means available for the expression and communication of thought".[353] It may be induced by words; by some type of writing not involving words;[354] or by conduct,[355] including "a nod, or a wink, or a shake of the head, or a smile".[356] Indeed, an inducement need meet only three requirements.

(a) The inducement must have been unequivocal

First, the inducement must have been sufficiently unequivocal. In many of the cases, an Australian estoppel has not been established because the assumption was simply not induced in sufficiently unequivocal terms.[357]

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351 It is for this reason that the following passage from Thompson v Palmer ((1993) at p.547 per Dixon J.) - though requiring modification in that other factors will also influence whether departure from the assumption is unconscionable - has so often been cited in the Australian estoppel decisions (see, for example, Waltons at p. 404 per Mason C.J. and Wilson J. and at p.427 per Brennan J. and Verwayen at p.453 per Dawson J.):

> Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party.

Cases in which an Australian estoppel has not been applied because of a failure to show inducement include Doubikin Holdings Pty Ltd v Grail Pty Ltd (1990-1992) 5 W.A.R. 563 at p.578; Avtex Airservice Pty Ltd v Bartsch (1992) at p.566

352 See, for example, Waltons at p.406 per Mason C.J. and Wilson J., at p.427 per Brennan J.; Verwayen at p.422 per Brennan J.

353 Turner, A.K. (ed.), Estoppel by Representation at p.45

354 For example, by a map or plan. See Espley v Wilkes (1872) L.R. 7 Ex. 298; Dabbs v Seaman (1925) 36 C.L.R. 538

355 See Turner, A.K. (ed.), Estoppel by Representation at pp.46-47

356 Walters v Morgan (1861) 3 De G. F. & J. 718 at p.724 per Lord Campbell L.C.

357 Nepean District Tennis Association Inc v Penrith City Council (1988) 66 L.G.R.A. 440; Sterns Trading Pty Ltd v Steinman & Ors (1988) A.N.Z. Convey. Rep. 493; Windrum v Rejilo (1988); Roy v Waterton (1989) A.N.Z. Convey Rep. 528; Powprop Pty Ltd v Valbirn Pty Ltd (1990) A.N.Z. Convey. Rep. 529; McPhillips v Ampol Petroleum (Victoria) Pty Ltd (1990) A.T.P.R. ¶41-014; P.S. Chellaram & Co. Ltd v China Ocean Shipping Co. Ltd (1991); Sydney Strata Securities Pty Ltd v Elders Finance Ltd [1991] A.C.L. Rep. 45 F.C. 1; Amann Aviation Pty Ltd v Commonwealth of Australia (1991) 100 A.L.R. 267 (affirmed on other grounds (1991) 174 C.L.R. 64). There has even been the suggestion that the inducement of an assumption for Australian estoppel must be more unequivocal than the making of an offer for contract (Windrum v Rejilo (1988)). Such a requirement would be consistent with the suggestions made by Mahoney J.A. in Green v Green (1989) 17 N.S.W.L.R. 343 at p.370 and MacLelland J. in Tie Rack (Aust.) Pty Ltd v Inglon Pty Ltd (1989) Convey. Rep. ¶55-456 that the inducement must unequivocally have

(b) The mode of the inducement must be effective for communication

Second, the mode of the relevant inducement must be effective as a means of communication. This requirement is at the heart of the contentious issue of whether or not silence may induce an assumption upon which an estoppel is to be built.

There is no doubt that silence, as much as any smile or wink, is capable of communicating meaning. But silence is notoriously difficult to interpret. The difficulty for the courts is knowing when silence is so communicative that it can fairly be treated as an inducement of assumption capable of giving rise to an estoppel. As a response to this problem the courts have limited the situations in which silence may give rise to an estoppel (including, so far, an Australian estoppel) to those in which there is a duty to speak.[358]

At first sight, this response to the problem of estoppel and silence seems satisfactory enough. For example, if one party is under a duty to inform another that a particular state of affairs has arisen and he remains silent, then his silence may well be taken to communicate that the particular state of affairs has not yet come about.

However, for those who would wish to see Australian estoppel develop around the duty to take reasonable steps to ensure the reliability of induced assumptions, this approach to estoppel and silence is fundamentally flawed. This is because there is no necessary nexus between a duty to speak and the question of whether silence in any given case has induced a particular assumption.

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evinced an intention to effect legal rights. It is suggested, however, that such analogies with the law of contract are inappropriate and that the preferred approach is that of Priestley J.A. in Austotel Pty Ltd v Franklins Selfserve Pty Ltd (1989) at p.614. Priestley J.A. emphasises that issues relating to contractual intent have no *prima facie* relevance to the application of Australian estoppel. The requirements of contractual intent flow from the basis of contract in "promise" and not from the duty to take reasonable steps to ensure the reliability of induced assumptions which is the basis of Australian estoppel.

358 See, for example, Greenwood v Martins Bank (1932) at p.57 per Lord Tomlin; Waltons; Verwayen at p.444 per Deane J.

Thus, an assumption may have been induced by silence and no duty to speak apply. As outlined in Part One, the antecedent law demonstrated a reluctance to impose liability when an assumption had been induced by silence.[359] Moreover, the Australian estoppel cases have not remedied this situation. For they have been very unclear as to when such a duty might arise. Waltons was a case in which precisely this problem was central and yet no useful test emerges from the decision. In Verwayen, Deane J. spoke elusively of a requirement that the party against whom the estoppel is sought should speak when "it [is] his duty in conscience to do so"![360]

Conversely, a duty to speak may sometimes impose an obligation even in contexts in which no assumption has been induced in one party by another. An example to illustrate this point may be found in the line of cases beginning with Ramsden v Dyson. These cases impose a duty to speak upon a party, A, who knows that another party, B, is building upon A's land in the mistaken belief that the land either already does, or will soon, belong to B.

As Birks points out, these cases, although classified under antecedent theory as cases involving an estoppel, fail to distinguish between "inducing" and "not undeceiving".[361] A can stand by and watch B building in silence and yet effectively communicate his approval of B's work or he can hide from B's sight and fail to inform B that the land in question is in fact his own. Only such of the Ramsden v Dyson cases as involve inducing an assumption - that is, those involving the former situation - can correctly be classified as cases involving liability of the type envisaged by Australian estoppel. If liability is to be imposed in the latter situation it is liability flowing from a duty to speak and not from a duty to remedy detriment caused by reliance upon an induced assumption. Once again, we can see that there is no necessary nexus between a duty to speak and the question of whether silence in any given case has induced a particular assumption. Thus, an

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359 See above at pp.26-27

360 Verwayen at p.444

361 Birks, P., Introduction at p.290ff.

approach to the question of estoppel and silence fashioned around a duty to speak can only be of limited helpfulness.

It is suggested that a better test for determining when silence might give rise to an Australian estoppel is the test, "Was the silence of the defendant causally responsible for the adoption of, or continuance in, the assumption by the plaintiff?"

Of course, it might be objected that this test would allow an Australian estoppel in many situations in which a defendant's silence induced an assumption of which he was totally unaware. I would argue, however, that whether or not a party who has unknowingly induced an assumption by silence ought to be liable under Australian estoppel is a matter going to the question of unconscionability rather than simply to establishing the fact of inducement. If the party who has unknowingly induced the relevant assumption has also breached the duty to take reasonable steps, then it may well be unconscionable for him not to remedy the detriment which the other party has suffered by reason of reliance. If the party who has induced this assumption has not breached the duty to take reasonable steps then he clearly ought not to be liable. In such a case silence would have induced an assumption which would still not found an estoppel.

(c) The inducement must have been the cause of the other party's adoption of, or continuing in, the relevant assumption

It will have become clear that underpinning the inducement requirement is the question of causation. Has the party who is said to have induced the relevant assumption been causally responsible for the other party's having adopted or continued in it? Only if he has can it be right to hold him responsible for the consequences of the other party's having adopted or continued in that assumption. It is probable that the requirement that the inducement be unequivocal, and that the mode of inducement be effective as a means of communication, are just particular consequences of this broader requirement.

The importance of this requirement can be underscored by highlighting its rôle in even the antecedent doctrine of estoppel by convention. Given that estoppel by convention operated in the area of common but mistaken assumptions, it might be thought that the party seeking to establish the estoppel did not need to prove a representation causing him to adopt or continue in the relevant assumption. In fact, this was not the case. As Parkinson has demonstrated,[362] although Lord Denning M.R. sought to argue for a doctrine of estoppel by convention which would apply wherever the parties to a contract were "both under a common mistake as to the meaning or effect of it - and thereafter embark[ed] on a course of dealing on the footing of that mistake",[363] this approach was explicitly rejected in both England and Australia.[364] Moreover, such an approach would be entirely at odds with the rationale for estoppel by convention laid down in Grundt v Great Boulder Pty Gold Mines Ltd that a person has "*played such a part in the adoption of the assumption* that it would be unfair or unjust if he were left free to ignore it."[365] It is clear that even under the antecedent doctrine of estoppel by convention the party to be estopped had to be somehow causally responsible for the other party's adoption of or continuation in the assumption upon which it was sought to found the estoppel.

However, notwithstanding its importance, the issue of causation has so far only received scant attention in the Australian estoppel cases and academic literature. There has been the suggestion in academic literature[366] and in the cases[367] that a particular inducement need only to be *a* cause and not *the* cause of a party's adoption of or continuation in a particular assumption for an estoppel to lie. Yet it is unclear how

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362 Parkinson, P., "Estoppel" in P. Clarke and P. Parkinson (eds), The Laws of Australia: Unfair Dealing (Sydney: Law Book Co., 1993) at p.71

363 Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd (1982) at p.121 per Lord Denning M.R. See also the judgment of Lord Goff in Kenneth Allison Ltd v A.E. Limehouse & Co [1992] 2 A.C. 105 at p.127

364 Keen v Holland [1984] 1 All E.R. 75; K. Lokumal & Sons (London) Ltd v Lotte Shipping Co Pty Ltd [1985] 2 Lloyd's Rep. 28; Coghlan v S.H. Lock (Aust) Ltd (1985) 4 N.S.W.L.R. 158.

365 Grundt v Great Boulder Pty Gold Mines Ltd (1937) at p.675 per Dixon J. (emphasis added)

366 See Munro, J., "The New Law of Estoppel", (1993) 23 Victoria University of Wellington Law Review 273 at p.295

367 See Austral Standard Cables Pty Ltd v Walker Nominees Pty Ltd (1992) at p.540 per Handley J.A.

strong a cause the inducement must be before the doctrine may be invoked. More generally, no clear test has emerged for determining when an inducement may be said to have caused another party to have adopted, or continued in, a relevant assumption. In this context the adoption of the "but-for" limb of the tort law rules as to causation would have much to recommend it.[368] Only if it can be shown that the party in whom the assumption was induced would not have held or continued to have held the relevant assumption had the other party not induced him to do so, ought liability in Australian estoppel to arise. Of course, like reliance, this causation would be more difficult to prove than to disprove, and it may well be that a presumption of causation would be appropriate in this area. It is clear, however, that much remains about the causal link between the inducement and the assumption that needs to be teased out as the case law on Australian estoppel develops.

(12) <u>And That, Having Regard To A Number Of Specified Considerations, It Would Be Unconscionable For B Not To Remedy The Detriment That A Has Suffered By Relying Upon The Assumption.</u>

In Part One it was argued that the antecedent Anglo-Australian law of agreements was inadequate to express the moral duty to take reasonable steps to ensure the reliability of induced assumptions. In examining facts situations in which this inadequacy was evident, the need for a flexible cause of action giving expression to that duty was stressed. In this section Australian estoppel is demonstrated to be just such a flexible, indeed a "discretionary", doctrine.

This section will be divided into two parts. The first will offer definitions of the terms "discretion" and "discretionary" for the purposes of this thesis. The second will outline the criteria to be taken into account by a judge determining whether it would be

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368 For a general summary of the nature of the causal inquiry in tort see Markesinis, B.S. and Deakin, S.F., <u>Tort Law</u> (Oxford: Clarendon Press, 1994) at p.163ff

unconscionable for the party who has induced the relevant assumption not to remedy the detriment caused by the other party's reliance. A discussion of the desirability and dangers of organising protection for reliance by means of a "discretionary" doctrine will be deferred until Chapter Five.

(a) A "discretionary" ground of liability

The terms "discretion" and "discretionary" are ubiquitous, but also extremely difficult to define.[369] Before attempting a definition, it may be helpful to distinguish two senses in which the terms are often used but which are clearly not important here.

First, by "discretion" is not meant what Hart[370] claims that judges have, and Dworkin claims that judges do not have,[371] in "hard cases" when they run out of rules. The type of discretion envisaged is analogous to that which Loughlan[372] and Plater[373] describe in their accounts of the work of the equity judges or to that which Williams[374] describes in his account of how judges deal with criminal confessions. In Dworkin's terminology, this section is concerned with an example of "weak" and not "strong"

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369 As Christie has put it:

> Few terms have as important a place in legal discourse as "discretion". Despite the importance of the term, however, those who use it do not agree on its meaning. It is universally accepted that discretion has something to do with choice; beyond this, the consensus breaks down.
> (Christie, G. C., "An Essay on Discretion", [1986] Duke Law Journal 747 at p.747)

Similarly, Yablon writes:

> Legal thought has always had difficulty developing a satisfactory criterion for distinguishing rule bound judicial actions from discretionary ones and, in turn, distinguishing appropriate exercises of discretion from abuses".
> (Yablon, C.M., "Justifying the Judge's Hunch: An Essay on Discretion", (1990) 41 Hastings Law Journal 231 at p.233)

370 Hart, H.L.A., The Concept of Law (Oxford: Clarendon Press, 1961)

371 Dworkin, R., Taking Rights Seriously (London: Duckworth, 1977) and Law's Empire (Fontana: London, 1982)

372 Loughlan, P., "No Right to a Remedy? An Analysis of Judicial Discretion in the Imposition of Equitable Remedies", (1989) 17 Melbourne University Law Review 132

373 Plater, Z., "Statutory Violations and Equitable Discretion", (1982) 70 California Law Review 524

374 Williams, C.R., "Judicial Discretion in Relation to Confessions", (1983) 3 Oxford Journal of Legal Studies 222 at pp.234-237

discretion.[375] The broad juristic issue of whether judges are sometimes free to determine cases unrestrained by externally imposed standards is not relevant here.

Second, the terms "discretion" and "discretionary" are often used to indicate that a particular decision-maker's findings should be immune from appeal.[376] This sense of the term "discretionary" - a sense focused upon the institutional status of certain types of decision - is not helpful in describing Australian estoppel because it is not intended to signify that the application of the doctrine should be less subject to appeal than the application of any other ground of legal liability.

I turn, then, from two senses in which the terms "discretion" and "discretionary" are not relevant to a description of Australian estoppel, to the sense in which those terms may more helpfully be employed here. By "discretionary" in this context is meant that applying the doctrine of Australian estoppel does not simply involve a judge in the application of legal rules of the type outlined by MacCormick in the first chapters of Legal Reasoning and Legal Theory.[377] That is, the doctrine does not take the form "If conditions A and B are satisfied then the result is Z". Rather, the application of the doctrine will involve the judge turning his mind to a fixed range of considerations, choosing to accord each a relative importance in the fact situation at hand, and thus justifying a particular result. It will take the form, "Having regard to the range of considerations A to G, and in this case laying particular emphasis upon considerations A, D and F, I determine that the result is X". While these two forms of rule may not necessarily be distinguishable in terms of theoretical logic, they do in practice represent two different ways of framing a legal argument: two different ways in which judges have approached their task. They are therefore more distinct to a lawyer than they may be to a logician.

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375 Dworkin, R., "The Model of Rules", (1967) 35 University of Chicago Law Review 14

376 See Galligan, D.J., Discretionary Powers: A Legal Study of Official Discretion (Oxford: Clarendon Press, 1990) at p.12; Christie, G.C., "Essay on Discretion" at p.747; Davis, K.C., Discretionary Justice: A Preliminary Enquiry (Urbana: University of Illinois Press, 1971) at p.4

377 MacCormick, N., Legal Reasoning Ch.'s II and III

An example of these two forms of legal argument may help to highlight the distinction. This example is drawn from the "fair dealing" provisions of the Copyright Act 1968 (Cth). Under that Act it is never a breach of copyright to copy 10% of a published literary, dramatic or musical work of ten or more pages for the purposes of research or study. Under this rule a judge has no discretion in the relevant sense. He simply tots up the number of pages copied, examines the purpose for which that copying was undertaken and, determining that the copying was for the purposes of research or study, finds that no breach has occurred.

However, under the Copyright Act 1968 (Cth), the 10% rule is supplemented by a provision which is indeed discretionary in the relevant sense. Section 40 of the Act provides that it is not an infringement of copyright to copy any amount of a literary, musical, dramatic or artistic work for the purposes of research or study if the judge determines that the copying was a "fair dealing" with the work. In determining whether the relevant copying was a "fair dealing" the judge must have regard to a number of listed considerations:

> (a) the purpose and character of the dealing;
> (b) the nature of the work or adaptation;
> (c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
> (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation
> (e) in a case where only part of the work or adaptation is copied, the amount and substantiality of the part copied taken in relation to the whole work or adaptation.[378]

The judge is free to give each of these considerations different relative importance in each fact situation and has therefore more room to manoeuvre than he does in relation to the 10% rule. For example, under the provision he can allow copying of a small amount of a very freely available work or a huge amount of a less readily available work. It is because the "fair dealing" rule operates in this way and with this type of flexibility that it is "discretionary" in the sense intended in this thesis.

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378 These considerations are listed in s.40(2) of the Act.

(b) The criteria for determining unconscionability in the context of reliance upon induced assumptions

There are six broad criteria which a judge must consider in determining whether or not it would be unconscionable for the party who has induced the relevant assumption not to remedy the detriment which the other party has suffered by reason of his reliance. These six criteria will be outlined in the following pages but how they might be applied in actual cases will emerge as the four problem areas raised in Part One are discussed in Part Three.

Three general points should be made about these criteria. First, they are the considerations which most consistently determine when unconscionable behaviour is actually found in the existing Australian estoppel cases. Second, in large part they reflect the same underlying issues as the distinctions important to the rule structure of the antecedent law discussed in Part One. Third, and most importantly, these criteria are the six most directly relevant to the issue of whether in any given case there has been a breach of the duty to take reasonable steps to ensure the reliability of induced assumptions. Thus the first five are modelled upon the five considerations outlined at the beginning of this thesis as relevant to the issue of what constitute "reasonable steps" for the purposes of the duty. The sixth criterion relates to any "reasonable steps" which the other party might claim he has already taken.

These six criteria ought now briefly to be outlined. They are (i) the mode of the relevant inducement, (ii) the content of the assumption induced, (iii) the relative knowledge of the parties, (iv) any relationship which existed between the inducing and relying parties (where this involves a consideration of the context of the parties' relationship, their relative strength of position and the history of their relationship), (v) the relative interest of the parties in the relevant activities in reliance, and (iv) any steps taken by the party who has induced the assumption to ensure that he does not thereby cause preventable harm.

(i) The mode of the relevant inducement

As outlined in the preceding section, an estoppel can be founded upon an assumption induced by "any of the means available for the expression and communication of thought",[379] provided that the relevant inducement is unequivocal. To make this assertion, however, is not to claim that all modes of inducement are equally as likely to found an estoppel. As Giles J. has put it:

> [T]he precise means whereby the assumption was induced is part ... of assessing the part taken in occasioning the adoption of the assumption and whether or not departure from the assumption would be "unjust and inadmissible".[380]

A court determining whether an Australian estoppel can be found must carefully consider the part the inducing party has played in the adoption of the assumption.[381]

For example, consideration of the other relevant criteria being equal, the courts should be far more ready to intervene in circumstances in which an express representation has been made than they should in contexts in which the assumption has arisen because of the inducing party's conduct or silence. This point seems implicitly to be made in the judgment of Deane J. in Verwayen. In this case His Honour sets out the major categories of situation in which the conduct of a party to be estopped might be regarded as unconscionable. These are situations where the party against whom the estoppel is sought:

> (a) has induced the assumption by express or implied representation;
> (b) has entered into contractual or other material relations with the other party on the conventional basis of the assumption;
> (c) has exercised against the other party rights which would exist only if the assumption were correct;
> (d) knew that the other party laboured under the assumption and refrained from correcting him when it was his duty in conscience to do so.[382]

His Honour then goes on to say:

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379 Turner, A.K (ed.), Estoppel by Representation at p.45

380 Les Edwards & Son Pty Ltd v Commonwealth Bank of Australia Supreme Court of NSW, 14 June 1990, unreported

381 Waltons at p.404 per Mason C.J. and Wilson J., citing Dixon C.J. in Grundt v Great Boulder Pty Gold Mines Ltd (1937) at p.675

382 Verwayen at p.444

> Ultimately, however, the question whether departure from the assumption would be unconscionable must be resolved not by reference to some preconceived formula framed to serve as a universal yardstick but by reference to all the circumstances of the case...[383]

This passage seems to move from the central case example of inducement - the express or implied representation - to modes of inducement which the courts will be less likely in "all the circumstances of the case" to see as founding an estoppel. It moves from the direct to the more indirect modes of inducement in a way which suggests that the courts should be more cautious in dealing with these latter categories.

This approach is easy to support. If the basis of Australian estoppel is taken to be the duty to take reasonable steps to ensure the reliability of induced assumptions, it will be important to ensure that the doctrine only, in fact, applies in circumstances in which the defendant was both causally responsible for the plaintiff's assumption and was in a position reasonably to do something about its reliability. The more indirect the mode of inducement, the greater the danger that this will not have been the case. Moreover, the more indirect the inducement, the less well placed will be the court to determine whether, in fact, it was the case.

(ii) The content of the assumption induced

It has already been demonstrated that the distinction between assumptions as to fact and assumptions as to law and the future is dispositive neither of the issue whether the duty to take reasonable steps to ensure the reliability of induced assumptions has been broken, nor, correspondingly, of the issue whether the doctrine of Australian estoppel ought to be applied. It has also been argued, however, that this distinction is *relevant* to the first of these issues. On this basis it ought also to be relevant to the second.

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383 Ibid at p.445

I would argue that on a sliding scale similar to that just described in relation to modes of inducement, the courts should be less willing to found an Australian estoppel upon assumptions as to law or the future than they are to found an estoppel upon induced assumptions as to existing fact. Once again, this reflects the relative likelihood of the duty to take reasonable steps to ensure the reliability of induced assumptions having been broken in these situations and the relative ability of the courts to assess that question.

Moreover, I would argue once again that there is at least an implied recognition of this point in the existing Australian estoppel cases. It is repeatedly said in those cases that "failure to fulfil a promise does not of itself amount to unconscionable conduct" and that even if the promise has been relied upon "something more would be required".[384] This is said to be because of:

> ... the problem ... that a voluntary promise will not generally give rise to an estoppel because the promisee may reasonably be expected to appreciate that he cannot safely rely upon it.[385]

The courts are saying that an Australian estoppel may be based upon a "promise" or, in the expression that they use interchangeably with the term "promise", an "assumption as to future fact."[386] Yet they are also saying that a party seeking to establish an estoppel upon the basis of an assumption of this type will be less likely to succeed than a party seeking to establish an estoppel on the basis of an assumption as to existing fact. This is clearly the right approach. It will also, incidentally, help to preserve the distinction between contract and estoppel described in Chapter Six.

(iii) The relative knowledge of the parties

A judge applying the doctrine of Australian estoppel and considering the issue of unconscionability must also assess the parties' relative knowledge. Waltons makes it clear that the extent to which the inducing party knew or ought reasonably to have known that

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384 Waltons at p.406 per Mason C.J. and Wilson J.

385 Ibid at p.406

386 See, for example, Verwayen at p.412 per Mason C.J.

the other party would rely upon the assumption induced is central to determining whether an estoppel can be established.[387] Also clearly relevant is the parties' relative knowledge of likelihood that the party in whom the assumption was induced would suffer harm by relying upon it.

Accordingly, there are cases in which an Australian estoppel has not been established because the party against whom the estoppel was sought was in an inferior position as regards knowledge than the party seeking it.[388] Similarly, there have been Australian estoppel cases where the greater knowledge of the party against whom the estoppel was sought has been a factor counting towards a finding of unconscionability.[389]

The extent of the inducing parties' knowledge (actual or imputed) is clearly a consideration relevant to any legal doctrine purporting to enshrine the duty to take reasonable steps to ensure the reliability of induced assumptions. The basis of that duty is at least in part the duty not to cause preventable harm to others. The party inducing the assumption will only be able to prevent it causing harm to the extent which he knew (or can be treated as having known) that the assumption would be relied upon and that reliance might lead to harm. Harm which could not reasonably have been anticipated cannot be said to have been preventable.

(iv) The relationship between the party inducing and the party relying upon the assumption

This fourth is an extremely important criterion for a judge considering unconscionability. This is because the duty to take reasonable steps to ensure the reliability of induced

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387 See Waltons at p.402 per Mason C.J. and Wilson J. and at p.423 per Brennan J. This is also a major focus of the United States doctrine of promissory estoppel which will only apply if a promise can be demonstrated which "the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third party" (RESTATEMENT (SECOND) OF CONTRACTS §90(1) (1979)).

388 See, for example, Doubikin Holdings Pty Ltd v Grail Pty Ltd (1990-1992) at p.578; Avtex Airservice Pty Ltd v Bartsch (1992) at p.566. See also Welch v O'Brian Financial Corp. (1992) 86 D.L.R. (4th) 155.

389 See, for example, Waltons; Marvon Pty Ltd v Yulara Development Co. (1989) 98 F.L.R. 348

assumptions is an essentially relational duty. It is essentially built around such relational goals as promoting trust and good communication in society.

This fourth criterion for identifying unconscionability in the context of estoppel involves considering three separate aspects of the relationship between the party seeking to raise and the party seeking to rely upon the estoppel. These are the context of the parties' relationship, the parties' relative strength of position, and the history of the parties relationship. Each of these considerations should be set out in turn.

First, the judge must consider the context of the parties' relationship. There are some contexts in which reliance upon induced assumptions will not usually be expected unless those assumptions have been given expression as a part of a formal contractual arrangement. In such contexts the duty to take reasonable steps would place a very slight burden upon the inducing party. In particular, judges should be reluctant to protect reliance upon assumptions informally induced in the context of well advised "big business". There is the danger that business-people may not consider reliance which the court chooses to protect as justified in the circumstances of the case. Notwithstanding the arguments of the following chapter, judges should also be somewhat reluctant to apply a "discretionary" doctrine in commercial contexts because "certainty" is extremely important in commercial dealings. As Kirby P. put it in Austotel Pty Ltd v Franklins Selfserve Pty Ltd:

> At least in circumstances such as the present, courts should be careful to conserve relief so that they do not, in commercial matters, substitute lawyerly conscience for the hard-headed decisions of business people ... Such consciences, as the case [sic] show, will typically be refined and sharpened by circumstances arising in quite different relationships where it is more apt to talk of conscience and to provide relief against offence to it.[390]

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390 Austotel Pty Ltd v Franklins Selfserve Pty Ltd (1989) at pp.585-586. Finn has said ("Fair Dealing", (delivered at a BLEC Twilight Seminar, February-March 1990, unpublished) at p.21):

> What Austotel suggests is that before a plaintiff can claim the benefit of estoppel to protect himself from detrimental reliance, that person must show that he has not in the circumstances run (or assumed) the risk of that detriment in acting as he did. In the case of commercial transactions a court may be more inclined to require convincing explanation as to why the plaintiff should not be found to be the risk bearer when it acts in anticipation of, or in the absence of, a contract with the defendant.

See also C.R.A. Ltd v N.Z. Goldfields Investments [1989] V.R. 870 and compare Stefanou v Fairfield Chase Pty Ltd Federal Court of Australia, 10 December 1993, unreported, with Weiss v Barker Gosling [1993] 16 Fam. L.R. 728. In

A second aspect of the parties' relationship which a judge must consider when looking for unconscionability is the parties' relative strength of position. This second aspect is obviously related to the first in that contexts in which parties will be expected not to rely upon one another will often be contexts in which the parties enjoy a certain parity of position. However relative strength of position seems also to have been treated by the courts as a more general consideration in seeking to find unconscionability for Australian estoppel.

Consider the following passage from the judgment of Deane J. in Verwayen:

> [The rationale of the doctrine of estoppel by conduct] is that it is right and expedient to save [people] from being victimized by other people ... In this as in other areas of equity-related doctrine, conduct which is "unconscionable" will commonly involve the use or insistence upon legal entitlement to take advantage of another's special vulnerability or misadventure.[391]

This passage is interesting because it assumes a connection between the concept of unconscionable conduct for Australian estoppel with the concept for which the same label is used under the doctrine of unconscionable or "catching" bargains.[392] Under this latter doctrine, relief from binding contractual obligations will be granted where:

> .. a party makes unconscientious use of his superior position or bargaining power to the detriment of the party who suffers from some special disability or is placed in some special situation of disadvantage eg, a catching bargain with an expectant heir...[393]

The particular idea which unites the two doctrines is that of a "special vulnerability", "special disability" or inequality of bargaining power as between the parties. Like those granting relief against unconscionable bargains, the High Court decisions so far applying Australian estoppel have involved either dealings between two relatively "small" players

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the former of these two cases, the client of a legal firm was estopped from resiling from an agreement that the firm would be retained on particular terms *inter alia* because it was "an experienced company". In the latter of the two cases, on similar facts, a client's status as an individual consumer of legal services was clearly thought to count in his favour in asssessing whether, had the issue arised, he would have been estopped from resiling from such an agreement.

391 Verwayen at pp.440-441

392 This is a connection which has also been made by others: for example, by Sir Anthony Mason in "Future Directions" at p.152. In the course of that lecture, Sir Anthony Mason linked the unconscionable conduct for estoppel described in Legione v Hateley (1983) with the unconscionable conduct for "catching bargains" described in Commercial Bank of Australia v Amadio (1983) 151 C.L.R. 170. For an Australian estoppel case that treats the two doctrines as closely related see Re Christie and Ferdinando Federal Court of Australia, 30 April 1993, unreported.

393 Commercial Bank of Australia v Amadio (1983) at p.461 per Mason C.J.

or between one party with considerable, and another with more limited, resources or access to legal advice. The relative strength of the inducing and relying parties - an issue which is also extremely important to the United States promissory estoppel cases[394] - would therefore seem to be an important aspect of their relationship to consider in finding unconscionability for Australian estoppel.

It is not difficult to demonstrate the relevance of this issue. The duty which I would argue underpins the doctrine of Australian estoppel - the duty to take reasonable steps to ensure the reliability of induced assumptions - must be stronger in contexts in which one party's strength of position makes reliance by the other all the more likely. Mason C.J. implicitly acknowledged this when, in his Fullagar Lecture of 1987, he stressed that Australian law has been more "consumer oriented" than English law and that "this explains why [the courts] have been more inclined to grant equitable relief."[395]

The third aspect of the parties' relationship which a judge must consider when determining whether unconscionability can be found for the purposes of Australian estoppel is the history of that relationship. Clearly contexts of longstanding relationship in which two parties have been very closely associated will imply a stronger duty to take reasonable steps to ensure the reliability of induced assumptions than will a context of inducement as between strangers. This is the intuition that I would argue underpins the antecedent category of estoppel by convention and is plainly relevant to the application of Australian estoppel.

(v) The parties' relative interest in the relevant activities in reliance

Having, therefore, considered these three aspects of the parties' relationship, the next issue for a judge determining the unconscionability question in an Australian estoppel

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394 See, Kostritsky, J.P., "A New Theory of Assent-Based Liability" at p.911ff

395 Sir Anthony Mason, "Future Directions" at p.153.

case would be the parties' relative interest in the activities carried out in reliance upon the induced assumption. The greater the interest of the party inducing the assumption in the other party's activities in reliance, the stronger is his duty to ensure that the other party does not suffer harm thereby. The dangers to trust and good communication and the risk of causing preventable harm is surely far greater when the inducing party has an interest in the other party's reliance.[396] This will be particularly true in contexts in which the inducing party has been left with some benefit as a result of the other party's reliance.

Once again, this point has been made in the literature relating to the United States doctrine of promissory estoppel. Farber and Matheson write:

> It is not surprising to find the courts imposing liability [on the basis of promissory estoppel] when the defendant has made a promise in the expectation of receiving an economic benefit from the plaintiff. Quite apart from any unjust enrichment which might have resulted from the promise, breach of promise seems especially unjust when the promisor was willing to reap economic benefits from the promise but not to pay the price. The simple idea that one must "accept the bitter with the sweet" is a core intuition underlying these cases.[397]

On a similar basis the extent of the inducing party's interest in the other party's activities in reliance must be relevant to the Australian estoppel question whether it would be unconscionable for the inducing party to resile from the assumption he has induced. Thus in Waltons it was a relevant consideration that it was strongly in Waltons' interest that Maher begin building right away, before their contract had been finalised.[398]

(vi) Any steps taken by the party who has induced the assumption to ensure that it does not cause preventable harm

I turn, then, to the sixth and final of the factors that a judge looking for unconscionable conduct for Australian estoppel must consider. This sixth consideration is whether the

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396 Contrast the situation in which the interest of the relying party in the relevant activities is clearly greater; Powprop Pty Ltd v Valbirn Pty Ltd (1990)

397 Farber, D.A., and Matheson, J.H., "Beyond Promissory Estoppel", at p.922

398 See, for example, Waltons at p.407 per Mason C.J. and Wilson J.

party who has induced the relevant assumption has taken any steps to ensure that it does not cause preventable harm.

For example, a party who has induced a particular assumption might give notice to the party in whom that assumption is induced that it is not to be relied upon. Provided that the party in whom the assumption is induced has not already relied upon that assumption to his detriment, it would be unlikely that it could be used as the basis of an Australian estoppel.[399]

In particular, in the context of pre-contractual negotiations, a party may well make it clear that there is to be no reliance upon any induced assumption until the relevant contract is finalised and reduced to writing. This freedom to avoid liability is important and must be respected.[400] In this matter the Australian courts are likely to be influenced by the decision of the Privy Council in Att-Gen of Hong Kong v Humphrey's Estate (Queen's Gardens) Ltd in which it was said:

> It is possible but unlikely that in circumstances at present unforeseeable a party to negotiations set out in a document expressed to be "subject to contract" would be able to satisfy the court that ... some form of estoppel had arisen to prevent the parties from refusing to proceed with the transactions envisaged in the document.[401]

Thus, in Australian Broadcasting Commission v XIVth Commonwealth Games,[402] a television station had been negotiating for Australian television and broadcasting rights for the 1990 Commonwealth Games. Agreement in principle had been arrived at and the A.B.C. had paid half of the agreed fees when the defendant granted the rights to a third party. The judge held both that all of the parties "confidently anticipated ultimate agreement and ... proceeded on this basis" and that "[i]t is well established that an estoppel ... may be constituted by silence."[403] Nevertheless, the party against whom the

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399 If this position is right, it would parallel the law in relation to withdrawal on notice under the old law of promissory estoppel, see Turner, A.K. (ed.), Estoppel by Representation at p.355ff

400 See Holmes, W.H., "The Freedom Not to Contract"

401 Att-Gen of Hong Kong v Humphrey's Estate (Queen's Gardens) Ltd (1987) at pp.127-128

402 Australian Broadcasting Commission v XIVth Commonwealth Games (1988)

403 Ibid at p.337 per Kearney J.

estoppel was sought had made it clear all along that a formal contract would need to be finalised (and this was also understood to have been the case by the party seeking to establish the estoppel). Therefore the plaintiff's activities in reliance were interpreted to have been taken at their own risk. No estoppel was established.

This case may be contrasted, of course, with the decision in Waltons itself. In this case the parties also intended that their dealings be incorporated in a contract expressed in writing. In Waltons, however, the party against whom the estoppel was sought had done nothing to ensure that the assumption induced - that is, the assumption that a contract would be agreed - did not cause preventable harm. Indeed, that party had encouraged the relevant activities in reliance. Two of the judges in Waltons were even able to found the estoppel on a belief induced in Maher that an already existing contract was in place.[404]

While the simple phrase "subject to contract" ought not to be allowed to oust the courts' jurisdiction in every case, the phrase ought not to be lightly ignored. A comparison of Australian Broadcasting Commission v XIV Commonwealth Games and Waltons shows the courts distinguishing circumstances in which these words amounted to a genuine attempt to ensure that the induced assumption did not cause preventable harm from those in which they did not.

I have thus outlined the six principal considerations which a judge must take into account in looking for unconscionable conduct to found an Australian estoppel. Each of these must carefully be balanced against the others in a process always focused upon the question of whether there has been a breach of the duty to take reasonable steps to ensure the reliability of induced assumptions. Each, too, involves a clearly established sliding scale moving from situations in which an estoppel is less likely, to situations in which estoppel is more likely, to be found (for example, the scale in relation to modes of inducement from inducement by silence to inducement by strong express representation).

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404 Waltons at p.443 per Deane J. and at p.460 per Gaudron J.

Whether this process of balancing is a judicial *modus operandi* likely to yield sufficiently predictable results is a matter to be considered in Chapter Five.

(13) When These Things Are Established, The Court May Award A Remedy Sufficient To Reverse The Detriment That A Has Shown.

In Silovi v Barbaro Priestley J.A. summarised the decision of the High Court in Waltons. In his summary, he explained that the remedy to which a finding of Australian estoppel will give rise "will be what is necessary to prevent detriment resulting from the unconscionable conduct."[405] In other words, relief under Australian estoppel will be whatever is necessary to put the party who has acted in reliance in the position in which he would have been had the assumption never been induced. This is the position that has been consistently adopted throughout the Australian estoppel decisions.

In awarding remedies on this basis, the courts should exercise caution and be (as many so far have been) strongly influenced by the concept of the "minimum equity to do justice between the parties."[406] Three examples might be given of situations in which this caution will be particularly important.

First, there may arise situations in which "to do justice between the parties" it is appropriate that a conditional award be made to a party whose claim is founded in Australian estoppel. It is submitted that the flexibility of the concept of the "minimum equity" and its derivation in equity mean that the courts ought to be able to make such conditional awards, even when the party who can establish the estoppel is seeking monetary compensation.[407] An example of a conditional award made on the basis of

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405 Silovi v Barbaro (1988) at p.472 per Priestley J.A.

406 See, for example, the approach of Mason C.J. in Verwayen at p.416 and compare some of the English estoppel cases such as Crabb v Arun District Council (1976).

407 This implied requirement that "he who seeks equity must do equity" highlights the distinction outlined below between Australian estoppel as a discretionary doctrine and contract and tort, see pp. 163 and 166.

Australian estoppel may be found in the first instance judgment in Austotel Pty Ltd v Franklins Selfserve Pty Ltd.[408]

Second, the courts will need to be careful to make sure that the detriment they are remedying is the detriment flowing from the activity of the party estopped in creating or encouraging the assumption held by the other party. This may be particularly difficult in situations in which the inducement of an assumption has involved encouraging the party seeking relief in Australian estoppel to continue with an assumption already held. In such a situation the court will need to be sure that they are remedying detriment arising only as a result of the activities of the party against whom the estoppel is sought and not detriment which would have arisen in any case. Tort law concepts of causation might once again prove useful in this context.[409]

Third, the courts will need to be cautious in situations in which it is claimed that they should enforce expectations as a means of protecting reliance. On the basis outlined by Fuller and Perdue and discussed above, it may sometimes be that fulfilling the expectations of the party in whom the assumption is induced will be the best or only satisfactory way in which to protect reliance and to "prevent detriment resulting from the unconscionable conduct."[410] The High Court has been quite clear that this is an acceptable approach to remedy. The technique of awarding relief in the expectation measure to protect reliance was apparently adopted in Waltons, although it might be argued that this was because the case was for damages in lieu of specific performance and that the issue of alternative approaches to remedy was not directly addressed. The technique of awarding relief in the expectation measure to protect reliance was also an approach adopted in several of the judgments in Verwayen. However, the courts have also been at pains to stress that "the substantive doctrine of estoppel permits a court to do what is required to avoid detriment and does not, in every case, require the making

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408 This award is set out in the report of the appeal, Austotel Pty Ltd v Franklins Selfserve Pty Ltd (1989) at p.603

409 See Munro, J., "The New Law of Estoppel" at p.295

410 See above at p.31

good of the assumption."[411] Expectations ought only to be enforced in situations in which this is the "minimum equity to do justice."

A problem emerges, therefore, as to when a court applying the doctrine of Australian estoppel will in fact enforce the expectations of the party in whom the assumption has been induced. As Young J. pointed out in Eagle Star Trustees Ltd v Tai Ping Trading Pty Ltd (No 2),[412] this was essentially the matter which divided the High Court in Verwayen. Three of the judges in that case appear to have believed that Australian estoppel did require that the plaintiff's expectations be enforced,[413] three of the judges indicated that it did not,[414] and one was only prepared to remit the case for consideration of the point.[415]

From Verwayen, two competing presumptions as to when expectations will be enforced seem to have emerged. The first arises from Mason C.J.'s distinction between detriment in a "broader" and in a "narrower" sense. It will be remembered that detriment in the "broader" sense is that "detriment which would result from the denial of the correctness of the assumption upon which the person has relied."[416] Detriment in the "narrower" sense "is the detriment which the person has suffered as a result of his reliance upon the assumption".[417] Mason C.J. claimed that the remedy to be granted under Australian estoppel "will often be closer in scope to the detriment suffered in the narrower sense".[418] In other words, Mason C.J. was setting up a presumption that compensating actual loss incurred in reliance will put the party who has relied in the position in which he would have been had the assumption not been induced and thereby adequately compensate for a breach of the duty to take reasonable steps to ensure the reliability of induced assumptions.

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411 Verwayen at pp.487-488 per Gaudron J.

412 Supreme Court of New South Wales, 30 October 1990, unreported

413 Deane, Dawson and Gaudron JJ.

414 Mason C.J. and Tooohey and McHugh JJ.

415 Brennan J.

416 Ibid at p.415 per Mason C.J.

417 Ibid at p.415

418 Ibid at p.416

Gaudron J., however, seems to have favoured the opposite presumption. She said:

> ... it may be that an assumption should be made good unless it is clear that no detriment will be suffered other than that which can be compensated by some other remedy.[419]

It is suggested that, of these two approaches, it is that of Mason C.J. which is to be preferred. I would argue that Australian estoppel is not centrally concerned with the enforcement of expectations - the domain of contract - but rather with the duty to take reasonable steps to ensure the reliability of induced assumptions and with the consequent protection of reliance. Enforcing expectations is sometimes the best, or only satisfactory, was of protecting reliance but should be done only as a last resort. It ought first to be presumed that compensating loss already incurred will put the relying party into the position in which he would have been had the assumption not been induced. The burden of proving that this is not, in fact, so and that the enforcement of expectations is necessary to protect reliance in the instant case ought then to fall upon the party seeking to establish the estoppel.

One final point in relation to remedies should be made. This is that the courts have been clear that an Australian estoppel might give rise to the award of an interest in property.[420] This interest will often be transferable[421] and able to be the subject of a caveat.[422]

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419 Ibid at p.487. Indeed Dorney considers this presumption to be the "express basis of decision of the majority in Verwayen" (Dorney, M., "The New Estoppel", (1991) 7 Australian Bar Review 19 at p.38).

420 See, for example, the summary of Waltons offered in Silovi v Barbaro (1988) at p.472. Of course, the courts will not always be prepared to grant rights of this type. Thus, in a New Zealand case heavily reliant upon Waltons in which it might have been expected that the plaintiff would be granted a promised renewal of his lease he was, instead, awarded damages: Dowell v Tower Corp. (1991) A.N.Z. Convey. Report 177

421 In Hill v Moore Supreme Court of New South Wales, 31 August 1990, unreported, Needham J. claimed that this is established by Plimmer v Mayor of Wellington (1884), Ward v Kirkland (1967) Ch. 194 and Hamilton v Geraghty (1901) 1 S.R. (N.S.W.) Eq. 81

422 As it was in Bond Brewing New South Wales Ltd v Reffell Party Ice Supplies Pty Ltd Supreme Court of New South Wales, 9 September 1987, unreported.

(14) Defences.

Against a claim in Australian estoppel, a party may either argue that any one of the elements of the doctrine has not been made out or raise any of the general defences to an equitable suit.[423] The availability of the equitable defences seems to be assumed in the recent authorities because of the supposed origins of the doctrine in equity.

While a general discussion of the equitable defences is not proposed here, one particular defence has received considerable attention in the cases and merits some consideration. This is the defence that the court ought not to exercise its discretion in granting relief on an Australian estoppel where to do so would undermine the effect of a particular statute. Two issues arise in relation to such a defence: (i) the issue of when a court should refuse to exercise its discretion to grant relief because of the danger of undermining a statutory provision, (ii) the issue of whether the complex law of part performance has been rendered otiose in Australia by developments in estoppel, given that a court might sometimes offer relief where a statute might be held otherwise to disallow it and might do so in the expectation measure.

(a) Estoppel and statute.

The problem of when a court should refuse to exercise its discretion to grant relief on an Australian estoppel because to do so would undermine the effect of a particular statute arose in the case of Waltons itself. It was argued on behalf of Waltons that section 54A of the Conveyancing Act 1919 (N.S.W.) precluded the application of Australian estoppel. Section 54A(1) provides:

> No action or proceedings may be brought upon any contract for the sale of or other disposition of land or any interest in land, unless the agreement upon which such action or proceedings is brought, or some memorandum or notice thereof, is

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423 For example, set off, release, delay, the application of a statute of limitations either directly or by analogy, illegality and unclean hands. For a discussion of the general equitable defences with particular reference to Australia see, Spence, M., "Equitable Defences".

> in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.

In considering the effect of the section, Brennan J. held that if the true assumption founding the Australian estoppel was that a binding agreement was in existence (either generally or because exchange had taken place), then that estoppel prevented the denial that the contract was enforceable.[424] A similar approach was adopted by Deane[425] and Gaudron JJ.[426] Alternatively, Brennan J. argued that if the true assumption was that a contract would be concluded in the future, the Australian estoppel gave rise to an equity and did not create a contract to which the section might apply.[427] In short, Waltons failed to offer a convincing solution to the problem of the potential conflict between estoppel and the purpose of the statutory provision requiring writing.[428]

Moreover, no clear answer to this problem was to emerge from Verwayen although, once again, the issue was directly relevant. As outlined above, the plaintiff in Verwayen sought to estop the defendant from raising a statute of limitation in defence.[429] If the assumption upon which the plaintiff had relied in that case was that the defendant would waive the limitation defence, a question logically prior to the application of estoppel was whether the limitation defence was one ever capable of being waived, however its waiver may have been effected, or whether it established a condition precedent to the exercise of jurisdiction by a court. In answering that question, Brennan J. claimed that:

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424 Waltons at p.432

425 Ibid at p.446

426 Ibid at p.464

427 Ibid at p.433

428 A failure which, notwithstanding the reassurances of Mason C.J. and Wilson J. in Waltons at p.405, left some commentators concluding that Australian estoppel would be an easier was of circumventing writing requirements than the doctrine of part performance (see Phillips, J. and Proksch, L., "Waltons Stores (Interstate) Ltd v Maher: Implications for the Law of Contract" (1989) 19 University of Western Australia Law Review 171 at p.184). On the interrelation of estoppel and part performance see A.N.Z. Banking Group Ltd v Widin (1991) 102 A.L.R. 289 and Meagher, R.P., Gummow, W.M.C. and Lehane, J.R.F., Equity 3rd edn at p.417.

429 The relevant provision, s.5(6) of the Limitations of Actions Act 1958 (Vic.) read:

> No action for damages for negligence ... where damages claimed by the plaintiff consist of or include damages in respect of personal injuries to any person, shall be brought after the expiration of three years after the cause of action accrued.

> ... it is a characteristic of a right susceptible of waiver that it is introduced solely for the benefit of one party, a condition precedent to the jurisdiction of a court to grant relief cannot be waived: Park Gate Iron Co. v Coates (1870) LR 5 CP 634.[430]

A similar test was adopted - albeit under sometimes quite differing reasoning and for different purposes - by Mason C.J.,[431] and Dawson,[432] Toohey,[433] Gaudron,[434] and McHugh JJ.[435] None of the judges held that the limitation defence was inherently incapable of being waived.

What is frustrating, however, is that it is not clear what the effect on the plaintiff's argument in Australian estoppel would have been had they done so. Imagine that the plaintiff had been able to establish that he relied upon the assumption, not simply that the limitation defence would be waived, but that the defendant admitted liability and would provide compensation.[436] Could he then have argued that his claim was brought in Australian estoppel and not in negligence and thus not covered by the relevant statutory provision? Could he still have recovered by means of Australian estoppel an amount that he could not have recovered in tort?

To have allowed recovery in such a situation would certainly have been in line with the treatment in Waltons of the writing requirement. Yet to have done so would also arguably have been anomalous. In Verwayen, Gaudron J. claimed that:

> The general principal is that "an individual cannot waive a matter in which the public have an interest": Graham v Ingleby, per Alderson B.[437]

If the justification for holding a statutory provision inherently incapable of being waived is that it has been enacted for public rather than private benefit, is it not equally against the public interest that the provision be circumvented by means of Australian estoppel? If

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430 Verwayen at p.425

431 Ibid at pp.404-405

432 Ibid at p.456

433 Ibid at pp.473-474

434 Ibid at p.486

435 Ibid at p.496

436 As, in fact, Brennan, Deane and Dawson JJ. seem to have thought that he was in Verwayen at pp.428, 447 and 462-463 respectively.

437 Ibid at p.486

Parliament has decided that it is not merely inconvenient for, or even unfair to, defendants but positively against the public interest that a tort be remedied after a particular time period, and has taken jurisdiction to provide such a remedy away from the courts, surely it would be against public policy to entertain a plea that liability has been admitted.[438]

The answer to this dilemma might actually be found in Verwayen itself. It might be found by combining the Verwayen distinction between provisions enacted essentially for private benefit and those in which the public have an interest, with the discretionary nature of relief under Australian estoppel. Surely a relevant consideration in determining whether or not to apply Australian estoppel in any particular fact situation is whether the plaintiff would thereby be circumventing a statutory provision enacted to confer a public benefit. For example, under section 45 of the Builders Licensing Act 1971 (N.S.W) a contract to carry out building work by the holder of a licence is not enforceable "against the other party to the contract unless the contract is in writing signed by the parties ... and sufficiently describes the building work."[439] A court might determine that the purpose of this statutory provision was to protect the public at large (e.g., by improving business practices in the building industry) and not to confer a benefit upon a particular contracting party (e.g., by protecting him from uncertainty as to the precise terms of his contract with the builder). If that were its understanding of the provision, then the court should refuse to apply Australian estoppel wherever to do so would undermine the policy of the statute.

This approach of deciding whether or not to grant relief under a common law doctrine on the basis of whether doing so might undermine the object of a particular statute, is one with which the courts are already familiar even in contexts in which the relevant common law doctrine is not expressly discretionary. It is, for example, the approach to

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438 This dilemma is not dissimilar to the problem that entertaining a plea of estoppel in administrative law could potentially mean requiring an administrative authority to engage in otherwise *ultra vires* activity.

439 Discussion of the policy underpinning this section can be found in Pavey & Matthews Pty Ltd v Paul (1986-87) 162 C.L.R. 221 at pp.228-230 per Mason C.J. and Wilson J.

conflicts between restitutionary claims and statutory provisions adopted by a majority of the High Court of Australia in Pavey & Matthews Pty Ltd v Paul,[440] a case dealing with section 45 of the Builders Licensing Act 1971 (N.S.W). It is also the approach to the enforcement of illegal contracts by an "innocent" party that Devlin L.J. took in the leading case of Archbolds (Freightage) Ltd v S. Spanglett Ltd.[441]

Further, this approach has been the one that has so far been adopted by the Australian courts in dealing with potential conflicts between Australian estoppel and various statutory provisions. In Day Ford Pty Ltd v Sciacca[442] Macrossan C.J. relied upon the decisions in Kok Hoong v Leong Cheong Kweng Mines Ltd[443] and Maritime Electric Co. v General Dairies Ltd[444] to support such an approach. His Honour said that the test to apply was:

> ... "whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interests of the public generally or some section of the public" ... [and that] in deciding whether an estoppel might be set up against the operations of a statute "the Court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provision."[445]

A similar approach was taken in Road Construction Authority v McBeth.[446] In this case, applying Australian estoppel would have meant that a right given to one party by statute was effectively deprived of meaningful operation. This was an important ground for the refusal of relief under the doctrine. In Public Trustee v Kukula,[447] the abolition of the action for breach of promise to marry by section 111A of the Marriage Act 1961 (Cth) was taken to mean that "Courts of Equity cannot treat the repudiation of an executory contract of marriage as unconscionable conduct".[448] In Silovi v Barbaro the

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440 Ibid. See also Beatson, J., "Unjust Enrichment in the High Court of Australia", (1988) 104 Law Quarterly Review 13 at pp.15-16 and Beatson, J., The Use and Abuse of Unjust Enrichment (Oxford: Clarendon Press, 1991) at p.8ff.

441 [1961] 1 Q.B. 374

442 [1990] 2 Qd.R. 209

443 [1964] A.C. 993 at p.1016

444 [1937] A.C. 610 at p.620

445 Day Ford Pty Ltd v Sciacca (1990) at p.216

446 (1988) 68 L.G.R.A. 216

447 (1990) 14 Fam.L.R. 97

448 Ibid at p.101. It is interesting that Handley J.A. should have taken particular care to mention the statute when it

court was careful to enquire whether "the law, in the light of the Local Government Act, s.327AA, prevent[ed] an equity of the kind asserted by the plaintiffs from coming into existence." This was treated as a threshold question involving a consideration of the purpose and operation of the group of provisions of which section 327AA formed a part.[449] Finally, in Webb Distributors (Aust) Pty Ltd v Victoria estoppel was not allowed to override a system of priority between creditors in the winding up of a building society provided for by statute.[450]

It is suggested that this approach to the question of whether the application of Australian estoppel would undermine a statutory provision is appropriate and ought to be continued. It would clearly be against public policy for the courts to provide relief directly in the face of a legislative enactment intended to confer a public benefit.

(b) Estoppel and part performance

Australian estoppel might therefore sometimes be used to give relief where a statute is held otherwise to disallow it, provided that granting relief in such circumstances does not undermine the purpose of the statute. Moreover, Australian estoppel might offer relief in the expectation measure in such circumstances. These two possibilities give rise to the question whether Australian estoppel will render otiose the complex law of part performance in Australia.

The equitable doctrine of part performance, which was abolished in England by sub-section 2(8) of the Law of Property (Miscellaneous Provisions) Act 1989 (U.K.) but which applies in Australia, allows a court to order specific performance, an injunction, or damages in lieu thereof, to enforce a contract which has been rendered unenforcable

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was unlikely that mere failure to perform an executory promise would amount to unconscionable conduct in any case. See above at p.124

449 Silovi v Barbaro (1989) at p.473 per Priestley J.A.

450 (1993) 67 A.L.J.R. 961 at p.970

by a statutory requirement of writing in circumstances in which the contract has been partly performed. This doctrine is, however, of limited application. As Brennan J. described in Waltons:

> In order that acts may be relied on as part performance of an unwritten contract, they must be done under the terms and by the force of that contract and they must be reasonably unequivocally and in their nature referable to some contract of the general nature of that alleged: Regent v Miller (1976) 133 C.L.R. at 683[451]

Part performance seems to have had its origins in some form of estoppel,[452] although at least by the time of the leading case of Maddison v Alderson[453] these doctrines had been distinguished and the shape of the doctrine of part performance outlined by Brennan J. in Waltons was beginning to emerge.

The possibility raised by recent developments in Australian estoppel is obviously that part performance might be absorbed back into a broader doctrine of estoppel. A plaintiff who had partly performed a particular contract which is ineffective for lack of writing might be able to argue that the terms of the apparent contract constituted an assumption induced by the defendant, that he had relied upon that assumption by his acts of part performance, that it would be unconscionable for defendant to resile from that assumption, and that the appropriate way for the court to protect his reliance upon that assumption would be to award him the expectation measure of relief. This argument might be said to have an enhanced chance of success because the courts are used, under the doctrine of part performance, to presuming that insisting upon the statute and resiling from the assumptions induced under the contract is unconscionable in situations in which there has been reliance, albeit reliance of a more narrowly defined type than that allowed by Australian estoppel.[454] The plaintiff would then be able to achieve by way of

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451 Waltons at p.432 per Brennan J.

452 For an account of the process whereby estoppel and part performance came to be distinguished see Mulholland, R.D., "The Equitable Doctrines of Estoppel and Part Performance" (1989) 7 Otago Law Review 69

453 Maddison v Alderson (1883)

454 Although it is sometimes expressed as an independent requirement for the application of the doctrine of part performance (Francis v Francis [1952] V.L.R. 321 at p.340 per Smith J.), the unconscionability inherent in an insistence on the fulfilment of the statutory requirement of writing in face of acts of part performance is usually assumed. As Meagher, Gummow and Lehane claim:

> It may be possible to conceive of a case where the doing of acts of part performance, otherwise sufficient, does not, in particular circumstances, make it inequitable for the defendant to plead the statute ...; but there

estoppel what he might not be able to achieve under part performance because of that latter doctrine's strict requirements that the alleged acts of part performance be "done under the terms and by the force of that contract and ... reasonably unequivocally and in their nature referable to some contract of the general nature of that alleged."[455]

This possibility might be exemplified by reference to Collin v Holden[456] in which a contract which would clearly not have been enforceable under the doctrine of part performance became the assumption founding an Australian estoppel upon which an award in the expectation measure was made. Similarly, Brennan J. did not believe that the purported contract in Waltons was specifically enforceable under the doctrine of part performance, and yet that purported contract induced the assumption founding an Australian estoppel upon which an award in the expectation measure was made.[457]

It is submitted, however, that there is no reason why the doctrine of Australian estoppel, properly understood and applied by the courts, should usurp the function of the doctrine of part performance. As outlined above, awards in the expectation measure ought not normally to be the measure of relief in Australian estoppel.[458] A plaintiff who seeks specific performance of a partly performed contract invalid for want of writing, will therefore be able to place his claim on a firmer footing if he can satisfy the requirements of the doctrine of part performance. Indeed, respect for those requirements may well be a reason for the courts to exercise more than usual caution in making awards in the expectation measure under Australian estoppel. This point was made in the judgment of Mason C.J. and Wilson J. in Waltons in which they said:

> Beacuse equitable estoppel has its basis in unconscioable conduct, rather than the making good of representations, the objection, grounded in Maddison v Alderson, that promissory estoppel outflanks the doctrine of part performance loses much of its sting ... Equitable estoppel, though it may lead to the plaintiff acquiring an estate or interest in land, depends on considerations of a differnet kind from those

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does not seem to be any reported instance.
(Meagher, R.P., Gummow, W.M.C., Lehane, J.R.F., Equity 3rd edn at p.520)

455 Waltons at p.432 per Brennan J.

456 Collin v Holden (1989)

457 Waltons at p432 per Brennan J.

458 See above at pp.131-133

> on which part performance depends. Holding the representor to his representation is merely one way of doing justice between the parties.[459]

The doctrines of part performance and estoppel therefore have arguably distinguishable rôles to play in Australian law.

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459 Waltons at p.405 per Mason C.J. and Wilson J.

Chapter Five:

Australian Estoppel as "Discretionary"

In the first part of this thesis, it was argued that antecedent Anglo-Australian law was inadequate in giving expression to the duty to take reasonable steps to ensure the reliability of induced assumptions.

This inadequacy had much to do with the structure of the rules with which Anglo-Australian law sought to express that duty, and not simply with their content. Doctrines such as negligent misstatement and estoppel were at least in part - though not entirely - comprised of rules taking the form "If conditions A and B are satisfied then the legal result is Z". Limiting conditions - "A" and "B" - included such requirements as that the assumption be induced by a representation regarding existing fact and not the future, or that it be induced by a representation which was false and not true. There has been an assumption that the more precisely these limiting conditions can be identified and applied, the more "deductive" the application of legal rules, the more "certain" or "predictable" the law will be. However, the need to observe limiting conditions of this type meant that antecedent Anglo-Australian lacked the character required to give expression to a complex relational duty such as the duty to take reasonable steps to ensure the reliability of induced assumptions. It was demonstrated in Part One that such distinctions as those between assumptions induced by representations regarding existing fact and not the future, or by representations which are false and not true, are relevant to, but do not dispose of, the question whether the duty to take reasonable steps to ensure the reliability of induced assumptions has been broken. By treating these distinctions as limiting conditions for the application of the relevant doctrines, antecedent Anglo-Australian law thus failed to express with sufficient subtlety the duty to take reasonable steps to ensure the reliability of induced assumptions.

In the preceding chapter the doctrine of Australian estoppel - a doctrine which is arguably built upon the duty to take reasonable steps to ensure the reliability of induced assumptions - was examined. It was shown there that, unlike the antecedent law in this area, Australian estoppel is a doctrine of very flexible application. Indeed so flexible is this doctrine, that I have chosen to call it "discretionary" in nature. At this point some of the desirability and dangers of protecting reliance by means of a discretionary doctrine should be considered.

(1) Australian Estoppel As Discretionary: Desirability And Dangers

If rules of the type "If conditions A and B are satisfied then the legal result is Z" are inadequate to protect justified reliance because they operate with insufficient flexibility, then the advantage of a discretionary doctrine in this area should be immediately apparent. A discretionary doctrine allows the judge a far greater degree of flexibility to respond to the facts of the particular case. He has much more room to manoeuvre in imposing liability in the particular context at hand.

Indeed, discretionary grounds of liability, in this as in other areas, have often met with precisely the complaint that they may offer a judge too much freedom in imposing liability. In this sense, the greatest potential strength of Australian estoppel - its flexibility as a discretionary doctrine - is also its greatest potential weakness. It has been feared that the flexibility of a discretionary doctrine may be bought at too high a cost in terms of certainty and predictability of result. According to one Australian judge, the courts must be very careful that Australian estoppel does not become:

> ... a kind of "palm tree justice" according to which the answer to the critical question in every future case will reside only in the breast of the judge.[460]

Treitel is similarly wary of attempts to unite promissory and proprietary estoppel into a doctrine built upon concepts of unconscionability, claiming that:

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460 Bobko v Commonwealth of Australia (1988) per Fullagar J.

> Attempts to unite [promissory and proprietary estoppel] by posing "simply" the question whether it would be "unconscionable" for the promisor to go back on his promise are, it is submitted, unhelpful as they provide no basis on which a legal doctrine capable of yielding predictable results can be developed.[461]

And Spencer Bower and Turner claim that such a process of unification is one of "robust over-simplification" and may lead, if followed far enough, to palm-tree justice."[462]

Moreover, some of the recent Australian estoppel cases contain comments that must aggravate the fears of those frightened by the prospect of unbridled discretion. To take one example, consider the following comments from P.S. Chellaram & Co. Ltd v China Ocean Shipping Co. Ltd:

> [T]he decision [whether or not to allow an estoppel], being founded upon an appeal to conscience, is partly impressionistic. It represents a reaction to the facts as elaborated. The reaction to the same facts will necessarily differ from one judge to another, as the dissenting opinions in many cases of estoppel show. Such difference may reflect the different experiences of judges, some of whom will evidence a conscience more tender than others.[463]

It would, indeed, be alarming if the outcome of a legal decision should depend upon the extent to which the conscience of any given judge may or may not be described as "tender".

Fortunately, however, such comments do not dominate the recent Australian estoppel decisions. Most of the judgments - including the same judgment from P.S. Chellaram & Co. Ltd v China Ocean Shipping Co. Ltd in a passage following - are keen to emphasise that the decision of a judge whether or not to allow an Australian estoppel "is not at large" and that "[t]here are rules to lay down the criteria and the approach that must be taken by" such a judge.[464] As Dorney puts it, the judges are keen to emphasise that:

> The new equitable estoppel is a carefully confined doctrine which is in no way an invitation to open-ended discretion in the enforcement of promises.[465]

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461 Treitel, G.H., Contract at p.136

462 Turner, A.K. (ed.), Estoppel by Representation at p.309

463 P.S. Chellaram & Co. Ltd v China Ocean Shipping Co. Ltd (1991) at p.512 per Kirby P.

464 Ibid at p.30

465 Dorney, M., "The New Estoppel" at p.46

The advantages of a discretionary ground of liability of the type outlined in this thesis far outweigh its potential dangers. Dorney's claim, that Australian estoppel is not only a flexible doctrine but also capable of yielding predictable results, can be supported on two grounds.

(2) The Certainty Problem: The Type of "Discretion" which Australian Estoppel Entails.

The first of these grounds points back to the nature of the "discretion" which is involved in the application of the doctrine of Australian estoppel. Many of the writers about estoppel who have been wary of discretion have imagined that the factors guiding a discretionary decision are solely a matter for the individual judge. Such uncontrolled discretion might indeed lead to unpredictable results, but this is not the type of discretion envisaged by the Australian estoppel cases.

Rather, these cases envisage discretion of the type outlined in the preceding section. Pursuant to this type of discretion, the factors a judge is to take into account in making a discretionary decision are pre-determined in the sense in which a legal rule, though continually subject to development, is also pre-determined. That is, these cases envisage a discretion of the type "Having regard to the range of considerations A to G, and in this case laying particular emphasis upon considerations A, D and F, I determine that the result is X."

It has long been acknowledged that a discretionary decision of this type - a discretionary decision guided by a sufficiently formulated range of predetermined guidelines - is capable of producing relatively predictable results. For example, Lord Denning M.R. claims that the way to achieve predictability in discretionary decisions is "for the courts to set out the considerations which should guide the judges in the normal exercise of their discretion."[466] DeMott claims it is in this way that the equity courts yielded

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466 Ward v James [1966] 1 Q.B. 273 at p.293

predictable results.[467] Sir Thomas Bingham assumes that a discretionary decision bound by guidelines is one in which the "dragon of arbitrary discretion ... has been domesticated and put on a short leash"[468] and Galligan claims that it is often "a reasonable compromise between certainty and justice".[469] Williams demonstrates that a discretionary decision based upon predetermined considerations is "governed by law just as much as a decision as to the application of a legal rule"[470] and McNicol and Maher believe it to be almost (but not quite) analogous to a decision applying a "rule of law".[471] Section 51AB of the Trade Practices Act 1974 (Cth), which lists criteria for consideration in assessing "unconscionability" in a way not dissimilar to that envisaged under Australian estoppel, has been commended precisely for the relatively predictable results it is believed it will yield.[472] Indeed, it is at least arguable that judges are more anxious to ensure that their decisions are predictable when they reach decisions based upon the open balancing of criteria to guide discretion than they are where their decisions are more specifically rule-based.[473]

Thus, fears about a discretionary doctrine of estoppel yielding wildly unpredictable results may at least in part be allayed by distinguishing the type of discretion upon which such a doctrine might be built.[474]

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467 DeMott, D.A., "Modern Equity: Forward", (1993) 56 Law and Contemporary Problems 1 at p.1

468 Sir Thomas Bingham, "The Discretion of the Judge" The Royal Bank of Scotland Law Lecture (1990) at p.2

469 Galligan, D.J., Discretionary Powers at p.42

470 Williams, C.R., "Judicial Discretion" at p.252. See, similarly, the proposal of guidelines as a way of controlling untrammelled discretion in Robinson, P.H., "Legality and Discretion in the Distribution of Criminal Sanctions", (1988) 25 Harvard Journal on Legislation 393 at p.421. Guidelines will be particularly effective if supported by a clear goal such a the legal expression of the duty to take reasonable steps to ensure the reliability of induced assumptions, see, Berman, J.J., "Sentencing Reform of s 1437: Will Guidelines Work?", (1980) 17 Harvard Journal on Legislation 98. On this type of discretion and the danger of uncertainty, see also Sir Gordon Borrie, "Trading Malpractices and Legislative Policy", (1991) 107 Law Quarterly Review 559 at p.569

471 McNicol S.B. and Maher, F.K.H., "The Range and Limits of Judicial Discretion", (1987) 73 Archiv fur Rechts und Sozial-Philosohpie 37 at p.38.

472 See, for example, Sir Gordon Borrie, "Trading Malpractices" at p.569 and Goldring, J., "Certainty in Contracts, Unconscionability and the TPA: The Effect of Section 52A", (1988) 11 Sydney Law Review 514 at p.535. Section 52A was renumbered section 51AB in 1992

473 Yablon demonstrates that judges in this context are at least keen to appear more cautious: Yablon, C.M., "Justifying the Judges Hunch" at pp.271-272

474 Interestingly, by identifying three criteria (or "variables") Ostas has shown that he is able to predict the outcome of over 93 per cent of cases decided under the United States UNIFORM COMMERCIAL CODE §2-302 (1978): the often criticised unconscionability section (Ostas, D.T., "Predicting Unconscionability Decisions: An Economic Model and an

(3) The Certainty Problem: Australian Estoppel as Balancing "Lawyers'" and "Community" Certainty

The second way in which a discretionary doctrine of estoppel could yield more predictable results than many fear, can be demonstrated by highlighting another important distinction. This is the distinction between two contrasting types of "certainty" or "predictability" which a legal doctrine can provide. A balance between these two types of certainty as goals for the law is desirable and could be achieved by the Australian estoppel doctrine described in this thesis.

(a) The two models of certainty

The following pages describe each of these two types of certainty for which a legal doctrine might aim and by means of which it might be justified. They outline difficulties with either type of certainty as exclusive goals for the law in the context of remedying reliance upon induced assumptions and demonstrate why the doctrine of Australian estoppel can be defended as balancing these two goals.

The first of these categories of certainty is one which I shall call "lawyers' certainty". This certainty is defined with reference to the paradigm of a party planning a particular activity or involved in a particular dispute, going to his lawyer and asking the lawyer to describe the potential legal implications of his position. The certainty desired is that the lawyer can more or less accurately anticipate a court's reaction to the client's situation, give the client a relatively unequivocal answer to his question and thus enable him to plan his activities with a certain amount of security. Thayer describes the lawyer's paradise as a place where, oracle-like, he can "answer all questions without raising his eyes".[475] Usually this type of "lawyers' certainty" is seen as best achieved by clearly

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Empirical Test" (1991) 29 American Business Law Journal 535).

475 Thayer, J., A Preliminary Treatise on the Law of Evidence at the Common Law (London: Sweet & Maxwell, 1898) at pp.428-429

enunciated legal rules of the type "If conditions A and B are satisfied then the result is Z."[476]

This "lawyers' certainty" has been an important goal of at least English common law and perhaps also equity; perhaps, as Sir Anthony Mason has suggested, because of England's position as "an international commercial [and] maritime centre".[477] However, two difficulties with this type of certainty as a goal for the law will arise in several contexts, including that of the protection of justified reliance upon induced assumptions.

First, to yield this type of certainty, legal rules of the type "If conditions A and B are satisfied then the result is Z" must not become a mass of exceptions and thus cannot take too close an account of the particularities of individual fact situations.[478] As was suggested above, the law will often have to make determinative choices between the two sides of morally important, but not determinative distinctions. In a complex area such as the protection of justified reliance, this will mean that injustice might often occur in individual instances; at least injustice in the sense that a result might be obtained which according to the mores of a given community could be criticised as "unfair".[479] It has often been argued that an inability to pay too particular attention to individual cases is an acceptable price to pay for certainty of this kind and that predictable injustice is to be preferred over unpredictable justice. Were this the only difficulty with this first type of

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476 See, for example, Ehrlich, I. and Posner, R.A., "An Economic Analysis of Legal Rulemaking", (1974) 3 Journal of Legal Studies 257 at p.265

477 Sir Anthony Mason, "Future Directions" at p.153

478 Note, however, that this avoidance of sub-rules and exceptions may not even be a possibility. D'Amato argues that it is not and, accordingly, that even (perhaps, particularly) the most "rule-based" systems of law have an inherent tendency to uncertainty (D'Amato, A., "Legal Uncertainty", (1983) 71 California Law Review 1). Eisenberg argues on a similar basis that the apparent certainty of what he calls "classical" contract law is, in fact, illusory (Eisenberg, M.A., "The Responsive Model of Contract Law", (1984) 36 Stanford Law Review 1107 at p.1110).

479 Sir Donald Nicholls has put the point this way;

> [T]hose who would have the law more rigid than flexible, and who would restrict, rather than preserve or enlarge, the area in which judges may exercise their own judgment or discretion, should have in mind, above all, that inevitably this will lead to some cases being decided in a way which no right-thinking person would regard as just.
>
> (Sir Donald Nicolls, "Keeping the Civil Law up to Date: Flexibility and Certainty in the 1990's", [1991] Current Legal Problems 1 at p.12)

certainty, such an argument might be accepted and this first type of certainty might always be considered a desirable goal for the law.

However, a second difficulty with this first type of certainty arises in that it is a certainty available only after the client has consulted a lawyer. The emphasis of this type of certainty is on inflexible rules which a lawyer can easily apply; even if these are sometimes bought at the cost of results in individual cases which a layman might find surprising. Any flexibility in the rules given to a judge to apply is seen as dangerous because such flexibility threatens the process by which the lawyer predicts the outcome of anticipated or actual disputes. Yet most empirical work on how transactional relationships operate in all but very large business practice - not to mention amongst consumers - suggests that lawyers are very rarely consulted at the stage at which such relationships are being planned and only occasionally consulted in the context of a dispute.[480] If it is true that (outside the large maritime and commercial contexts which have arguably dominated English legal culture) lawyers are rarely consulted, then this first type of certainty does not necessarily deliver the security in planning which is its most vaunted advantage. And if it does not, then there is certainly less reason to pay the price of inflexibility in relation to individual fact situations outlined in the last paragraph.

The second model of certainty alluded to above I shall call "community certainty." This model is less dependent upon the rôle of the lawyer and more sensitive to the fact variations of individual cases. It is built upon the desire, not to construct legal doctrines which yield results that can easily be predicted by lawyers, but to obtain results which accord with what Sir Johan Steyn has called "the responses and usages of ordinary right-thinking people."[481] The theory is that if the curial response to any given dispute is governed by considerations that "ordinary right-thinking people" would think relevant

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480 See, for example, Macauley, S., "Non-Contractual Relations in Business: A Preliminary Study", (1963) 28 American Sociological Review 55; Macauley, S., "Elegant Models, Empirical Pictures, and the Complexities of Contract", (1977) 11 Law and Society Review 507; Beale, H. and Dugdale, T., "Contracts Between Businessmen: Planning and the Use of Contractual Remedies", (1975) 2 British Journal of Law and Society 153; Vincent-Jones, P., "Contract and Business Transactions: A Socio-Legal Analysis", (1989) 16 Journal of Law and Society 166

481 Sir Johan Steyn, "The Role of Good Faith in Contract Law: A Hairshirt Philosophy?", The Royal Bank of Scotland Law Lecture (1991) at p.11

and yields results that they might have expected on the basis of those considerations, then it is one that could have been anticipated by the parties themselves in their attempts to resolve their dispute. Further, as the courts search for the responses of "ordinary right-thinking people" to disputes, patterns of result will emerge in particular clusters of fact situation which will themselves lend stability to the law. In these ways a degree of certainty and predictability of result can be achieved that is less dependent on the high-priestly intervention of lawyers.[482]

Just as "lawyers' certainty" depended for its operation upon rules of the type "If conditions A and B are satisfied then the result is Z", so "community certainty" will be more easily achieved by the operation of legal doctrines of a more flexible kind. Given the complex range of factors which might influence "an ordinary-right thinking person" in fashioning a "just" solution to a particular dispute, any doctrine attempting to yield a degree of "community certainty" would need to allow a judge a certain degree of flexibility in its application.

Before outlining the principal difficulties with "community certainty" as a goal for the law, two illustrations of its importance to existing legal doctrines will be considered. One

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482 This type of reasoning, for example, lies behind Pengilley's defence of s.52 of the Trade Practices Act 1974 (Cth):

> Those unblessed with legal knowledge could well regard the law as being quite unusually stupid in relation to some of its common law principles, many of which appear to be aimed, fundamentally, at precluding an assessment by the Courts of the actuality of transactions. For myself, I believe that the development of the law of misleading or deceptive conduct is merely bringing the law into line with what those unblessed with legal training would regard as being a sensible position.
> (Pengilley, W., "How to Change the Length of the Chancellor's Foot (and the Path it Treads) in Twenty-three words or Less: The Statutory Prohibition on Misleading or Deceptive Conduct in Australia - A Model for Law Reform?" (delivered at the 9th Commonwealth Law Conference, April 1990, unpublished)

In a similar vein Sir Robin Cooke ventures:

> ... to suspect that the criterion of fairness can produce more certainty than the *a priori* arguments of technically learned lawyers.
> (Sir Robin Cooke, "Fairness" (1989) 19 Victoria University of Wellington Law Review 421 at p.422)

Finally, Reiter claims that a "functional" approach to consideration in contract (one which depends heavily for its operation upon concepts of community certainty):

> ... operates to promote certainty, predictability and consistency, economy of thought, and justice in judicial decision-making, and to instil in lay persons a sense of respect for the law and pride in the legal processes.
> (Reiter, B.J., "Courts, Consideration and Common Sense", (1977) 27 University of Toronto Law Journal 439 at pp.444-445)

of these illustrations is drawn from the field of United States Constitutional law and the other from the Australian law concerning the regulation of trade practices.[483]

Towards the end of his book, Law's Empire, Dworkin considers the need for certainty, or stability, in the interpretation of the United States Constitution.[484] In the interpretation of certain provisions of the Constitution, such as that providing for the term of the President's office, Dworkin advocates a certainty of the type that I have called "lawyers' certainty." He argues that these are provisions about issues where it matters more "that the law be settled than exactly what the law is."[485]

Yet Dworkin also argues that there is a different type of Constitutional provision, such as that of ensuring equal protection of the laws.[486] Elsewhere he explains that this second type of provision is built upon the *concept* of a value such as "equality" rather than upon particular *conceptions* of that value.[487] Dworkin illustrates the distinction between a *concept* and a *conception* in the following passage from Taking Rights Seriously:

> Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my 'meaning' was limited to these examples, for two reasons. First I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the *concept* of fairness, not by any specific *conception* of fairness I might have had in mind.[488]

In relation to this type of Constitutional provision built upon *concepts* Dworkin argues that:

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483 A further illustration might have been drawn from the United States RESTATEMENT (SECOND) OF CONTRACTS §90 (1979).

484 Dworkin, R., Law's Empire at pp.365ff.

485 Ibid at p.367

486 U.S. CONST. amend. XIV, §1

487 Dworkin, R., Taking Rights Seriously (London: Duckworth, 1987) at pp.132-137

488 Ibid at p.134

> The crucial stability ... is that of integrity: the system of rights must be interpreted, so far as possible, as expressing a coherent vision of justice.[489]

In other words, stability, or certainty, in the law governed by these provisions will be achieved, not by an obsession with "lawyers' certainty", but by ensuring that the decisions reached under them accord with the community's vision of justice expressed in the principles to which as a whole it is fundamentally committed. This is certainty of a kind very similar to the model of "community certainty" I have described.

Frustratingly, Dworkin does not describe how this type of certainty might actually operate. Indeed, he almost concedes the point that this type of certainty is illusory when he suggests that in areas in which the "crucial stability" is that of integrity, "certainty" is a less important consideration.[490] But I believe that Dworkin's distinction between *concepts* and *conceptions* gives us an important clue to how this second type of Constitutional provision can provide predictable results.

Constitutional provisions which lay down *concepts* to be worked out by judges achieve certainty in two ways. First, they yield predictable results because the *concepts* which they encapsulate are generally *concepts* drawn from the political morality of the community. They are therefore *concepts* with which the parties may be expected to be familiar and a certain understanding of which they might already be expected to have. In resolving their dispute the judge will therefore be called upon to ask himself the same questions and to balance the same issues as they would in seeking to resolve their dispute themselves. It is reasonable to assume, therefore, that they might be able to anticipate the curial response to at least many situations. Second, statutes of this type yield predictable results because, over time, *conceptions* (in the form of paradigm cases or clusters of fact situation) emerge which ground the general *concept* and increase predictability of result. The *concept* of "equal treatment" is not at large in the interpretation of the Fourteenth Amendment because three different clusters of paradigm case (typified by those involving

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489 Dworkin, R., Law's Empire at p.368

490 Ibid at p.367

racial classifications, those involving gender classifications and those involving economic or social welfare matters) have emerged.[491]

A second illustration of the importance of "community certainty" to existing legal doctrine is to be found in section 52 of the Trade Practices Act 1974 (Cth): the doctrine of misleading or deceptive conduct. Section 52 reads:

> 52 (1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead to deceive.
> 52 (2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of sub-section (1)

It is true that this doctrine has not been without its critics on the grounds of uncertainty. Although the High Court of Australia has held the words of section 52 to be clear and unambiguous,[492] those words have also been criticised as affording "little practical guidance to those who seek to arrange their activities so that they will not offend against its provisions".[493]

Nevertheless, it is interesting that in the twenty years that this section has been in force, there has been no suggestion that it should be amended or repealed. As recently as 1990 the Australian states enacted provisions which mirror section 52.[494] The Trade Practices Commission has not suggested a restriction in the scope of the section. Even the powerful Australian business lobby has been silent in calling for limitations upon the very broad scope of section 52.[495] At the same time, both the Commission and others have been able to propose compliance strategies for companies concerned not to attract

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491 See Rotunda, R.D. and Nowak, J.E., Treatise on Constitutional Law: Substance and Procedure vol.3 (St Paul: West, 1992) at pp.12ff.

492 Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Pty Ltd (1978) A.T.P.R. ¶40-067

493 Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) A.T.P.R. ¶40-307 at p.43,782 per Gibbs C.J.

494 Fair Trading Act 1985 (Vic) s.11; Fair Trading Act 1987 (SA) s.56; Fair Trading Act 1987 (WA) s.10; Fair Trading Act 1987 (NSW) s.42; Fair Trading Act 1985 (Qld) s.38; Fair Trading Act 1990 (Tas) s.14

495 Healey, D. and Terry, A., Misleading or Deceptive Conduct (Sydney: CCH, 1991) at pp.37-38

liability under section 52.[496] The section seems to operate predictably enough so that few believe it should be abolished.

Indeed, I would argue that an examination of the operation of section 52 in any given area (and I will take that of advertising as my example) reveals what a powerful stabilising influence "community certainty" can be in the law. For in the application of this section can be found both the sources of certainty discussed in the preceding paragraphs.

First, section 52 undoubtedly reflects a general community norm against misleading advertising. As Pincus has put it:

> On the face of it, there is nothing remarkable about attacking misleading or deceptive conduct. From the layman's point of view, it might seem strange that it was necessary to pass such a law.[497]

When a potential plaintiff goes to his lawyer, and eventually to a judge, those people are called upon to apply exactly the same norm of behaviour as the plaintiff himself feels has been broken in assessing whether the conduct in question is actionable. The section gives force to a *concept* with which the parties will already be familiar. It can yield results which could have been predicted by the application of general community norms.

Second, as this process has been interpreted in the cases, clusters of fact situation have developed in which liability will often be found. Healey and Terry[498] list the advertising situations in which the section is repeatedly used as: (i) to restrain a competitor's false description of the attributes of a product,[499] (ii) to restrain a competitor making inaccurate comparisons,[500] (iii) to restrain "knocking copy" which directly or inferentially downgrades a rival's product.[501]

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496 See, for example, The Trade Practices Commission, Advertising and Selling: A Business Guide to Consumer Protection Under the Trade Practices Act (1991) and Healey, D. and Terry A., Misleading and Deceptive Conduct Ch. 10

497 Pincus, C.W., "Trade Practices 1988", (1988) 2 Commercial Law Quarterly 15 at p.15

498 Healey, D. and Terry, A., Misleading or Deceptive Conduct at pp.30-31

499 Colgate Palmolive Pty Ltd v Rexona (1981) A.T.P.R. ¶40-242

500 State Government Insurance Commission v J.M. Insurance Pty Ltd (1984) A.T.P.R. ¶40-465

501 Duracell Australia Pty Ltd v Union Carbide Australia Ltd (1988) A.T.P.R. ¶40-918; Typing Centre of New

Further, within these three areas, clusters of fact situation defined by individual practices common in the advertising industry have come to be understood as either within or without the ambit of section 52. For example, it has come to be understood that section 52 almost entirely precludes comparative advertising in the field of insurance. This is because the relevant comparisons will generally entail a "grab-line" concerning premium costs but these costs will relate to often quite different insurance policies. Thus in a case relating to motor vehicle insurance it was said:

> These present matters illustrate how difficult it is, in an area as complex as the insuring of motor vehicles, to make accurate comparisons, and in particular to ensure that like policies are compared. General statements in advertisements may frequently fall into the category of puffing but the comparison of costs, both oral and visual, in this matter go much further and have very significant impact.[502]

This is precisely the process of developing paradigm cases or *conceptions* which will themselves lend stability to the enacted *concept*. Unlike carefully drawn rules with their limiting conditions this process of grounding a *concept* in paradigm cases allows certainty of meaning without being unduly inflexible. The courts are able both to respond quickly to changing practices in the advertising industry and to provide relatively predictable results. "Community certainty" therefore already seems to operate as a stabilising influence in our law.[503]

However, having explored how "community certainty" may already be an important means of achieving predictability in certain areas of our law, two difficulties in prescribing it as a goal for the law must be set out. Neither of these should be understated. The first difficulty, is that achieving "community certainty" in legal principle depends upon the existence of a relatively coherent community morality; if not generally, then at least in relation to the particular area of activity to be governed by the principle. For the law to accord with "the responses and usages of ordinary right-

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South Wales Pty Ltd v Northern Business College Ltd (1989) A.T.P.R. ¶40-943.

502 State Government Insurance Commission v J.M. Insurance Pty Ltd (1984) at pp.45,362-45,363

503 Compare Cardozo's view of how certainty is to be achieved in law as it is summarised in Powell, H.J., "Cardozo's Foot: The Chancellor's Conscience and Constructive Trusts", (1993) 56 Law and Contemporary Problems 7 at p.20ff

thinking people" we must be certain that such responses and usages exist and can be distinguished from those of people who, according to a particular community code, are not "right-thinking". There has been both in recent Australasian academic writing[504] and in recent Australian case law[505] perhaps too ready an assumption that such a community code can be identified.

The second difficulty with "community certainty" as a goal for the law is that it presupposes, not only that a coherent community morality exists, but that judges are its capable and appropriate exponents. In other words, it assumes a corps of judges endowed with copious amounts of what Llewellyn called "situation-sense",[506] a concept that has itself not been without its critics.[507] Llewellyn's ideal of the judge endowed with "situation-sense" was Lord Mansfield who was to an unusual degree in touch with the customs and morality of the commercial world of his day.[508] It is to be doubted, even supposing that a coherent code of practice now exists, that many judges are as in touch with current mores as was Lord Mansfield with those of the late eighteenth century.

It is not easy to discount either of these difficulties with the concept of "community certainty". One could point to the growing body of work in the field of economics that argues that a coherent community morality with a strong emphasis on trust is essential to the success of an economy.[509] One could point to the emerging study of business

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504 See, for example, Finn, P., "Commerce, the Common Law and Morality", (1989) 17 Melbourne University Law Review 87; Sir Robin Cooke, "Fairness"; Angel, D.N., "Some Reflections on Privity, Consideration, Estoppel and Good Faith", (1992) 66 Australian Law Journal 484

505 Consider, for example, the following passage from a decision of the Supreme Court of New South Wales, Banque Brussels Lambert S.A. v A.N.I. Ltd (Supreme Court of New South Wales, 12 December 1989, unreported):

> Have the prohibitions of Australian law, against unconscionable conduct (Waltons Stores (Interstate) Limited v Maher ((1988) 164 C.L.R. 387)), against misleading or deceptive conduct, or conduct which is likely to mislead or deceive (Trade Practices Act 1974 (Cth) s.52) succeeded in bringing legal obligation into closer alignment with the call of commercial morality?

506 See Llewellyn, K., The Common Law Tradition: Deciding Appeals (Boston: Little, Brown & Co., 1960) at pp.121-57, 206-212, 260-264.

507 See Feinmann, J. M., "Promissory Estoppel and Judicial Method", (1984) 97 Harvard Law Review 678

508 See Twining, W., Karl Llewellyn and the Realist Movement (London: Weidenfeld & Nicolson, 1973) at pp.216-227.

509 See, for example, Casson, M.C., Moral Constraints on Stategic Behaviour (Reading: University of Reading Discussion Papers in Economics, 1990)

ethics; and, in particular, to case studies in which business managers talk about the importance of a morality of trust in commercial life.[510] One could cite the claims of judges that they share with commercial people "a common experience ... which at least tends towards a common approach to the solution of" problems.[511] But none of these approaches could prove either that a coherent community morality exists (even within commercial circles) or that judges are its appropriate exponents.

To demonstrate conclusively that these objections could not scuttle the concept of "community certainty" would require an extensive excursus into jurisprudence. Such an excursus might explore Dworkin's work in discussing what it means to talk about a community's morality and the duty of judges to bring that morality to bear on their decision-making. It might well argue that judges are not only appropriate exponents of the community's morality, but that they cannot avoid the task of interpreting and applying that morality.

Such an excursus is outside the scope of this thesis. For present purposes, it will be sufficient to point to the relative predictability of some statutory provisions that simply enact a *concept* (such as the Fourteenth Amendment to the United States Constitution and section 52 of the Trade Practices Act 1974 (Cth)) to demonstrate that community certainty can be an important (though preferably not exclusive) source of predictability in the law.

I have modelled, then, two different types of certainty for which a legal doctrine might aim. I would argue that the Australian estoppel doctrine outlined in this part neatly balances the two as goals for the law.

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510 See, for example, "Jackson Taylor" in Toffler, B.L., Tough Choices: Managers Talk Ethics (New York: John Wiley & Sons, 1986)

511 Sir Robert Goff, "Commercial Contracts" at p.389

(b) Australian estoppel as providing a balance of "lawyers'" and "community" certainty

On the one hand Australian estoppel incorporates strategies for achieving what I have called "lawyers' certainty". In particular, applying the doctrine involves the consideration of carefully enunciated criteria, each involving a sliding scale of factors encouraging or discouraging the application of the doctrine. There is no reason why these should not guide a lawyer's counsel almost as strongly as might an armoury of available rules.

On the other hand, Australian estoppel also strives for what I have called "community certainty." The question which the doctrine ultimately incorporates is a question about community norms: a question which the parties themselves might be expected to ask in attempting to reach a resolution of their differences. That question is whether, in light of the duty to take reasonable steps to ensure the reliability of induced assumptions, it would be unconscionable for the inducing party not to remedy the detriment which the relying party has suffered. Australian estoppel will also, like other doctrines largely dependent for their justification upon notions of "community certainty", give rise to various clusters of fact situation seen to fall within the ambit of the doctrine. The development of these fact clusters is itself a process conducive to both certainty and flexibility of application.

This blend of the two models of certainty means that Australian estoppel is a doctrine ideally suited to the legal expression of the duty to take reasonable steps to ensure the reliability of induced assumptions. The balancing of these two models means that Australian estoppel is able to achieve both predictability and flexibility of application. It is therefore equipped to handle with both sufficient subtlety and certainty the various distinctions outlined in Part One as important to the question of whether the duty to ensure the reliability of induced assumptions has been broken. It is certainly far more equipped to handle those distinctions than is the antecedent law.

As a postscript, it should be remembered that a tension between certainty and flexibility - though that tension will be especially acute in any appropriate legal treatment of the duty to take reasonable steps - is not one peculiar to this particular sphere of law. Spader has traced this tension as a fault line running right through Western legal thought.[512] Those who are wary of uncertainty in this area must be reminded that excessive certainty can be as dangerous a goal as excessive flexibility in the law. They ought also always to remember that, even if the doctrine proves to be too unpredictable in the courts, it is always open to Parliament to reformulate it.[513]

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512 Spader, D. J., "Rule of Law v Rule of Man: The Search for the Golden Zigzag Between Conflicting Fundamental Values", (1984) 12 Journal of Criminal Justice 379. See also Aristotle, The Nichomachean Ethics v.x

513 Something which Pengilley has emphasised in relation to s 52 of the Trade Practices Act 1974 (Cth), see Pengilley, W., "The Chancellor's Foot"

Chapter Six:

Australian Estoppel, Contract, Tort and Restitution for Unjust Enrichment

If it is accepted that Australian estoppel might yield results which are sufficiently predictable, the question then becomes how the new doctrine might interrelate with established heads of liability in contract, tort and restitution for unjust enrichment.

(1) Australian Estoppel and Contract

There are two questions regarding the interrelation of contract and Australian estoppel that must be considered. First, will Australian estoppel prove too great a rival to contract, providing relief too often in situations in which no contract can be established? This question is particularly important because an assumption founding an Australian estoppel may be induced by a representation of intention *qua* intention and because remedies in the expectation measure can be awarded. A defendant may therefore be prevented from changing his mind and resiling from an assumption that he has induced regarding his intentions by the award of relief in the expectation measure: a form of liability that seems very close to contract but without its limitations. Second, will Australian estoppel too often provide a mechanism for undoing contractual arrangements by not allowing a party to insist upon his contractual rights?

(a) Australian estoppel as a rival to contract

In relation to the first of these issues it is submitted that Australian estoppel will not provide a rival to contract on four grounds.

First, because contract is built upon the duty to keep promises and Australian estoppel is built upon the duty to take reasonable stpes to ensure the reliability of induced assumptions, the two are not coterminous doctrines.[514] A promise is just one of the ways in which an assumption may be induced for Australian estoppel. Conversely, there will be many situations in which a promise (which may or may not be enforceable as a contract) has been broken and yet Australian estoppel is not available.

For example, if I promise to supply widgets at £2 each but fail to do so causing you to purchase them elsewhere at £2.50, you clearly might have an action in contract. It is not clear in this situation, however, that you have suffered any detriment in the sense of being worse off than had the assumption that I would supply the widgets for £2 never been induced. Moreover, it is not clear that my resiling from the promise will represent unconscionable conduct. Mere "failure to fulfil a promise does not of itself amount to unconscionable conduct".[515] Even if the promise has been relied upon "something more would be required".[516]

Second, the remedial consequences of applying contract and Australian estoppel are different. Contract remedies paradigmatically fulfil expectations, while remedies in Australian estoppel compensate for reliance loss.[517] Contract remedies are also not conditional in the way in which remedies for Australian estoppel may be.[518] Parties will generally want to argue in contract where they can because the value of their

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514 It is submitted that comments in the literature such as the following are patently erroneous:

> Advisors should now be aware the *liability for breach of promise* may be based on contract or promissory estoppel.
>
> (Khoury, D., "Promissory Estoppel - A Sword Unsheathed", (1990) 64 Law Institute Journal 1054 at p.1056 (emphasis added))

515 Waltons at p.404 per Mason C.J. and Wilson J.

516 Ibid at p.406 per Mason C.J. and Wilson J.

517 See, for example, the comments of Brennan J. in Waltons at pp.423-424:

> The object of the equity is not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or to abstain from acting thereon.
>
> If this object is kept steadily in mind, the concern that a general application of the principle of equitable estoppel would make non-contractual promises enforceable as contractual promises can be allayed.

518 See above at pp.130-131.

expectations will generally exceed the value of their reliance. This raises, of course, the difficult question of whether, where there has been a contract between two parties concerning the transaction upon which an Australian estoppel is built, the contract price ought to set a ceiling for reliance based recovery. This parallels a similar debate in the field of restitution for unjust enrichment.[519] Although it is early in the development of the doctrine to consider such issues, if it is accepted that there exists a valid distinction between the duty to keep promises and the duty to take reasonable steps to ensure the reliability of induced assumptions, there would seem to be no reason why reliance based recovery should be so limited.

Third, whereas some relief in contract will be available as of right upon proof of breach, relief in Australian estoppel will only be available on a discretionary basis. It is therefore unlikely that many parties will choose to argue their case in Australian estoppel when a cause of action in contract would be available. Thus the editor of the Australian and New Zealand Conveyancing Report made the following comments about relying upon estoppel to ensure the renewal of a lease:

> While estoppel enables the Court in many situations to achieve justice, or to prevent unconscionable behaviour, it is not an acceptable conveyancing solution in actual transactions ... It is suggested that the correct legal advice remains strict adherence to proper conveyancing procedures ...[520]

Fourth, where a party wishes to ensure that his dealings with another party do not attract legal consequences except under the law of contract, he is always free to warn the other party that the assumptions he induces ought not to be relied upon. While such a warning to the other party will not automatically preclude liability in Australian estoppel, it will often amount to an attempt to prevent reliance upon an induced assumption causing harm and therefore count against a finding of unconscionability.[521]

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519 See, for example, Lord Goff of Chieveley and Jones, G., The Law of Restitution 4th edn (London: Sweet & Maxwell, 1993) at pp.426-428; Palmer, G.J., "The Contract Price as a Limit on Restitution for Defendant's Breach", (1959) 20 Ohio State Law Journal 264; Childres, R. and Garamella, J., "The Law of Restitution and the Reliance Interest in Contract", (1969) 64 Northwestern University Law Review 433.

520 (1991) A.N.Z. Convey. Rep. 181

521 See above at pp.127-129

Thus I would argue that Australian estoppel will not prove a rival to contract because (i) the doctrines are built upon different principles and are not coterminous, (ii) the remedial consequences of applying the doctrines will differ, (iii) contract remedies are available as of right while Australian estoppel operates as a discretionary doctrine, and (iv) parties are free to warn those with whom they deal that the assumptions they induce, other than as a part of a contract, ought not to be relied upon.

Indeed, it could well be argued that Australian estoppel is actually contract's appropriate complement rather than its rival. There often seem to be two apparently opposing demands that parties involved in transactions make of any law of agreements. On the one hand, those parties are said to value "sanctity of contract" and to require a high level of certainty in their dealings.[522] On the other hand, they are said to expect a court to treat their dealings with a certainty amount of flexibility and to be able to fashion appropriate remedies in the context of a transactional dispute. Thus Atiyah notes "a desire to escape from the rigidity ... thought inseparable from contract doctrine proper"[523] and a growing body of empirical work questions the model of parties insistent on the letter of their "deal".[524] Indeed, over rigorous notions of certainty have been said to have "highly undesirable consequences" in the commercial world.[525]

It might be, therefore, that a balance can be achieved in the law relating to transactions between a strict doctrine of contract and a more flexible (though still sufficiently predictable) doctrine of Australian estoppel. The former could approach more rigorously the question of when promises ought to be enforced and the latter could approach with more flexibility the duty to take reasonable steps to ensure the reliability of induced assumptions. In this way the two doctrines together might be able to achieve the balance

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522 For an English, an Australian, a Canadian and a U.S. example see Treitel, G.H., Doctrine and Discretion in the Law of Contract (Oxford: Clarendon Press, 1980) at p.20; Lindgren, K.E., Carter, J.W. and Harland D.J. , Contract Law in Australia (Sydney: Butterworths, 1986) at p.7; Coté, J.E., An Introduction to the Law of Contract (Edmonton: Juriliber, 1974) at p.3; Pound, R., An Introduction to the Philosophy of Law (New Haven: Yale University Press, 1922) at p.133.

523 Atiyah, P.S., "When is an Enforceable Agreement not a Contract?", (1967) 92 Law Quarterly Review 174 at p.179

524 For example, Macauley, S., "Non-Contractual Relations in Business"; Beale H. and Dugdale, T., "Contracts Between Businessmen".

525 Freidman, L.M. and Macauley, S., "Contract Law and Teaching", [1967] Wisconsin Law Review 805 at p.816

of certainty and flexibility seen as a desirable in the context of transactional relationships: a balance that neither doctrine could of itself achieve.

(b) Australian estoppel as undoing contractual obligations

The other way in which Australian estoppel might arguably be a threat to contract is as a mechanism for undoing existing contractual obligations. I would argue that this would be less the case, however, than it might be under antecedent estoppel theory.

Under antecedent estoppel theory an existing contractual obligation could be modified by the application of the doctrine of "promissory" estoppel. In relation to existing contractual rights, this doctrine would apply in almost the same situations as will Australian estoppel. The only relevant additional situations in which Australian estoppel might apply are (i) where an assumption has been induced in pre-contractual negotiations and reliance takes the form of entry into a binding contract, and (ii) arguably, in contexts in which assumptions relating to contractual rights are induced by silence. In the majority of cases in which contractual obligations might be affected by an estoppel, however, both promissory and Australian estoppel might equally be applicable.

In such cases, I would argue that traditional promissory estoppel is likely to produce a result more threatening to the security of contractual rights than would Australian estoppel. First, some writers argued that promissory estoppel always modified rights *per se* and thereby automatically protected expectations.[526] Second, even if promissory estoppel did not always modify rights, it was always up to the party against whom the estoppel was sought to show that he was able to revoke his promise and to restore the other party to his original position. It was up to the party against whom the estoppel was sought to show why simply reliance, and not expectations, should have been protected. With Australian estoppel the assumptions are reversed. The emphasis is on protecting reliance and it is up to the party seeking to establish the estoppel to show why his

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526 See above at p.43

expectations should be enforced. His is the burden of proving that enforcing expectations is the only possible way in the relevant case to protect reliance. It is therefore far less likely that an award in Australian estoppel would lead to the permanent modification of existing contractual rights. On this basis, therefore, I would argue that Australian estoppel is far less a threat to security of contract than is the already extant doctrine of promissory estoppel. Fears that Australian estoppel would lead to the undoing of large numbers of contracts would seem simply misplaced.

(2) Australian Estoppel and Tort

The interrelation of Australian estoppel and tort is a somewhat more complicated issue than the interrelation of Australian estoppel and contract. Australian estoppel and the tort of negligent misstatement each potentially deal with the duty to take reasonable steps to ensure the reliability of induced assumptions, and yet they differ in at least two respects. First, Australian estoppel is a discretionary doctrine and can give rise to conditional awards. Second, Australian estoppel is arguably more expansive in its treatment of the duty that is central to this thesis than is negligent misstatement. Read together, the first two parts of this thesis reveal the ways in which the doctrine of negligent misstatement recognised in antecedent Anglo-Australian law was more limited in its application than Australian estoppel. At least some of those limitations on the application of the doctrine have survived its recent developments. For example, negligent misstatement is still not concerned with protecting reliance upon representations regarding the future *qua* the future, and, in particular, regarding the representor's intentions *qua* intentions. It is not concerned with the situation in which a party induces an assumption regarding his future conduct which is perfectly accurate at the time it is made and then simply changes his mind. The interrelation of Australian estoppel and negligent misstatement is a complex issue because the two doctrines doctrines operate in the same field and yet (i) they operate in different ways, and (ii) Australian estoppel is of a potentially broader application.

Given that the interrelation of these two doctrines is potentially a complex issue, it is frustrating that the Australian courts have not yet been asked to resolve it. Australian estoppel tends to be pleaded only in transactional situations in which an assumption has been specifically induced in one person and not in situations in which an assumption has been induced in a potentially larger class of people. Australian estoppel tends also not to be pleaded in situations in which a duty of care has been recognised for some time, such as in situations of professional advice. For this reason the courts have not been forced to reconcile the two doctrines. This is a pity because many issues - such as whether any particular relationship between a person inducing an assumption and a person relying upon it should be required before that reliance is protected - are clearly relevant to each of the doctrines and the courts ought to adopt a coherent approach to their resolution.

Thus, given the purpose of this thesis and the current state of the law, it may be possible only to point out that the doctrines of Australian estoppel and negligent misstatement both give expression to the same moral duty but as yet stand unreconciled, and that the experiment which the Australian courts have undertaken in estoppel might also have been undertaken in negligent misstatement. To assert more than that would involved a detailed analysis of the current scope of the doctrine of negligent misstatement in England and Australia and a comparison of the merits of that doctrine with those of Australian estoppel as an approach to the protection of justified reliance. The ambit of this thesis does not include a detailed comparison of recent developments in estoppel and tort, but simply a justification of Australian estoppel as constituting one acceptable approach to giving legal expression to the duty to take reasonable steps to ensure the reliability of induced assumptions.

(3) Australian Estoppel and Restitution for Unjust Enrichment

The distinction between Australian estoppel and unjust enrichment is not one which *prima facie* would seem problematic. The notion of unjust enrichment has been strictly

tied in academic writing to the restitutionary measure of relief,[527] while the remedy anticipated in Waltons is designed to cure detrimental reliance. Restitutionary remedies seem barely apposite to the stated purpose of the Waltons doctrine.

Yet while this distinction between reliance and enrichment based remedies should be quite clear, two comments have been made members of the High Court suggesting a muddying of this distinction.

The first was made by Deane J. in the course of his judgment in Waltons:

> Notions of good conscience and fair dealing, *enforced by the rationale of legal doctrines precluding unjust enrichment*, point towards a conclusion that, in such circumstances, the prospective lessee should be precluded from departing from the mistaken assumption about his future conduct.[528]

It is not immediately plain what effect His Honour intended to give these comments, except, perhaps, that enrichment might be another indicator of unconscionability.[529] They ought not to be taken as advocating some type of merger of estoppel with unjust enrichment principles.

The second relevant comment occurs in a review by Sir Anthony Mason[530] of Birks' Introduction to the Law of Restitution. As was outlined above,[531] in this book Birks discusses what he calls the "doctrine in Ramsden v Dyson". Birks deplores the "remedial uncertainty" of that estoppel doctrine. He claims that it has been used to remedy two quite different ills and that some of the Ramsden v Dyson doctrine cases are best explained on the basis of restitution for unjust enrichment and some are best explained on the basis of promissory estoppel.[532] Further, Birks pays little attention to the distinction between contract and estoppel claiming that only "[l]ocal difficulties may for a time

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527 See, for example, Birks, P., Introduction

528 Waltons at p.453 Emphasis added.

529 Compare the factor of the parties' relative interest in the relevant activities in reliance discussed above at p.129ff

530 Sir Anthony Mason, "An Introduction to the Law of Restitution", (1989) 1 Journal of Contract Law 265

531 See above at pp.47-48

532 Birks, P. Introduction at p.291

obscure the fact that contracts, like roses, remain the same under all names."[533] Thus the classic estoppel cases come to be seen as an amalgam of restitution for unjust enrichment and the contractual enforcement of expectations, with virtually no room for the reliance base attributed to them in cases such as Waltons. What is surprising is that in his review of Birks' book, Sir Anthony Mason cites with apparent approval a passage at odds with the reliance based approach. He then claims that:

> Waltons Stores (Interstate) v Maher ... would provide a stimulating vehicle for the discussion of these propositions.[534]

Once again the purpose of these comments is not clear. Could Sir Anthony Mason, the advocate of the reliance based approach to estoppel, have been suggesting a Birksean division of the estoppel cases into contract and unjust enrichment? If he was, then two points must be made. First, it is important to underscore the differences of principle dividing these three doctrines. The principles that promises should be kept, that enrichments unjustly made at another's expense should not be retained, and that reasonable steps should be taken to ensure the reliability of induced assumptions, are distinct. To claim that a line of cases concerned with the third of these principles can be explained away on the basis of the first two would not make for coherence in charting the law of obligations. Second, the recent estoppel cases have not supported a division of the doctrine into contract and unjust enrichment. Nor have they spoken of enrichment as a necessary corollary of unconscionable conduct. Rather, they continue to stress reliance as the basis of estoppel. In Foran v Wight, for example, a line was quite carefully drawn between unjust enrichment and estoppel in that each of the judges dealt with estoppel in relation to certain contractual defences and then moved on as quite a separate issue to discuss the restitution of the plaintiffs deposit money.[535] It can be expected that the courts will continue to search for clear lines to draw between estoppel, contract and unjust enrichment: between reliance, expectation and restitution.[536]

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533 Ibid at p.47

534 Sir Anthony Mason, "An Introduction" at p.266

535 Foran v Wight (1989) at p.413 per Mason C.J., at p.432 per Brennan J., at p.438-439 per Deane J. at p.455 per Dawson J. and at p.459 per Gaudron J.

536 These distinctions have also found favour in the state courts, see Update Constructions Pty Ltd v Rozelle Child

(4) Conclusion

In this chapter I have not attempted to draw a detailed map of the law of obligations, although some understanding of how the outlines of that map might be drawn has certainly been suggested. In this chapter I have shown that contract, tort, estoppel and unjust enrichment could have complementary rôles to play in regulating parties' relationships with one another. Each expresses an essentially different, but important, moral principle and the law is capable of holding those moral principles in tension. Moreover, pragmatically, Australian estoppel is unlikely to prove too strong a rival to these other doctrines because it is discretionary in operation.

Care Centre Ltd (1990) 20 N.S.W.L.R. 251 See also generally, Carter, J., "Contract, Restitution and Promisory Estoppel", (1989) 12 University of New South Wales Law Journal 30

PART THREE

AUSTRALIAN ESTOPPEL AND THE FOUR LACUNAE

Introduction to Part Three

In Part One of this thesis a moral duty to take reasonable steps to ensure the reliability of induced assumptions was set out and justified. The duty was said to be worthy of legal expression, but inadequately handled by antecedent Anglo-Australian law. Four areas were shown to be exemplary of situations in which a breach of the duty might cause harm and relief be expected but the antecedent law was unable to furnish an appropriate remedy. In Part Two of the thesis the emergent doctrine of Australian estoppel was described and a pattern suggested for its development that might best shape it for giving legal expression to the duty to take reasonable steps to ensure the reliability of induced assumptions. The task of this third part is to demonstrate the appropriateness of the new doctrine as a vehicle for the duty described in Part One by demonstrating its potential application to the problem areas there exposed.

Each of the areas identified in Part One is discussed in a separate chapter. In discussing these areas, the methodology of the part will be to select a limited range of reported cases[537] and to show why the doctrine of Australian estoppel would have been better suited to handle those cases than the legal doctrines in fact employed. I will show either that existing doctrines were unable to account for the results achieved in those cases and that Australian estoppel could have done so, or that the doctrine of Australian estoppel could there have lead to more satisfactory results. Three issues relating to this choice of methodology should be emphasised.

First, in selecting a limited range of reported cases in each field the part opens itself to the charge of only dealing with those cases most suited to its argument. In rebuttal of such a charge it is stressed that the cases chosen are mostly those cases which dominate

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537 With the one exception of the unreported case Citra Constructions Ltd v Allied Asphalt Co. Pty Ltd (1990), chosen because that case provides a fitting complement to Williams v Roffey Brothers & Nicolls Contractors Ltd (1991).

the discussion of each area in both the reported judgments and the literature. The limited range of cases treated has a certain self-selecting character.

Second, it is not necessary to this methodology that the result actually achieved in each of these cases was inconsistent with the result that might be expected from applying a doctrine expressing the duty to take reasonable steps to ensure the reliability of induced assumptions. I would argue that the result actually obtained in many of the cases did, indeed, have the effect of enforcing this duty. The point is, however, that in each of those decisions this result was achieved almost fortuitously. None of those decisions can be satisfactorily explained on the basis of antecedent legal doctrine and the legal reasoning of each evinced the lack of a doctrine clearly expressing the duty that is central to this thesis.

Third, it is not suggested by this methodology that the doctrine of Australian estoppel and the duty it expresses could ever completely dispose of all the cases which arise in any of these areas. The point is not that there is no place in these areas for, say, contract or restitution. Rather it is that this doctrine is a useful addition to the law which could explain many decisions as yet inadequately justified and provide a useful way forward in many cases.

Chapter Seven:

Pre-Contractual Negotiations and Letters of Intent

I turn to the first of the areas identified in Part One as potentially benefitting from the development of Australian estoppel. Six cases will be considered: four English decisions, one from New South Wales and one from New Brunswick. Arranged chronologically they are Jennings and Chapman Ltd v Woodman, Matthews & Co,[538] Brewer Street Investments Ltd v Barclay's Woollen Co Ltd,[539] William Lacey (Hounslow) Ltd v Davis,[540] Construction Design & Management Ltd v New Brunswick Housing Corporation,[541] Sabemo Pty Ltd v North Sydney Municipal Council,[542] and British Steel Corp v Cleveland Bridge & Engineering Co. Ltd.[543]

Each of these six cases involved one party to negotiations undertaking work at the request of another.[544] In each of the cases negotiation of the final contract broke down before the contract was concluded and the party who had undertaken the work brought an action for the reasonable value of the services. In four of the cases that party was successful and in two - Jennings and Construction Design & Management - he was not.

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538 [1952] 2 T.L.R. 409 (hereafter "Jennings")

539 [1954] 1 Q.B. 428 (herafter "Brewer Street")

540 William Lacey (Hounslow) Ltd v Davis (1957) (hereafter "William Lacey")

541 (1973) 36 D.L.R. (3d) 458 (hereafter "Construction Design & Management")

542 Sabemo Pty Ltd v North Sydney Municipal Council (1972) (hereafter "Sabemo")

543 British Steel Corp v Cleveland Bridge & Engineering Co. Ltd (1977) (hereafter "British Steel")

544 This distinguishes these decisions from Walford v Miles [1992] 2 A.C. 128, a much discussed case which will not be examined in this thesis. A negotiating party sought damages for breach of an alleged contract collateral to the contract for which he was principally negotiating: an agreement for the purchase of a business. It was argued that under the alleged collateral contract the party selling the business had agreed not to enter into negotiations for its sale with anyone other than the party alleging the contract and had also agreed to conduct negotiations with that party in good faith. The alleged contract was said to be operative for a reasonable time period. The House of Lords found that, if any such contract could be proved, it was void for uncertainty. The reason why this case is not relevant to this thesis is that the party alleging the collateral contract had not in any way relied upon the assumption that the other party would refrain from negotiations with anyone else, nor had he relied upon the assumption that the other party would negotiate in good faith. It was a case about the enforcement of expectations and not about the protection of justified reliance.

In none of the cases in which the plaintiff was successful did the judge provide a clear exposition of the basis on which the remedy was being awarded. In one of the cases[545] the judge did not address the question at all, and such explanations as did emerge from the other three cases and their commentators do not account for the decisions made. Five such explanations will be considered. The cases will then be analysed in terms of Australian estoppel to determine whether that doctrine might provide the "missing" justification for the results there achieved. It will also be considered whether Australian estoppel, while still explaining why liability might have arisen in each of these cases, would actually have lead to a more satisfactory result in at least one of them. Before turning to these competing explanations of the cases, however, the facts of each ought to be outlined.

(1) The Facts of the Pre-Contractual Negotiation Cases

Jennings and Brewer Street each involved alterations to property by prospective lessors in anticipation of a lease which the parties were negotiating but into which they never entered. In Jennings the failure to arrive at an agreed lease was because a head lessor, whose consent was required, failed to approve the proposed alterations. The prospective sublessee, a solicitor, had known, because it had been drawn to his attention, that the head lessor's consent was required for the grant of the sublease, but had also known that such consent could not be withheld if he was "responsible or respectable". The prospective sublessee had not known, it not having been brought to his attention, that the head-lessor's consent was also required for the alterations that were proposed. In Brewer Street the failure to arrive at an agreed lease was because of an inability to agree a term in the lease regarding the future sale of the property. The prospective lessees were seeking to include a term giving them an option to purchase the property within sixty days of signing the lease. The prospective lessors were only prepared to grant a lease coupled with a right of first refusal should they have decided to sell the property within

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545 British Steel

two years of the date of the lease. In Brewer Street the Court of Appeal held that the prospective lessors were entitled to recover the cost of the alterations from the prospective lessees and in Jennings it held that the prospective sublessors were not.

William Lacey, Construction Design & Management and Sabemo also provide contrasting outcomes on similar sets of facts. Each case involved negotiations for a building project. In each case the party who was to carry out the building undertook considerably more work in preparing plans and other documents for the party proposing the development than would normally be expected. In William Lacey the owner of premises which had been damaged during the second world war asked a firm of builders, who were led to believe that they would receive the contract for rebuilding the premises, to prepare a least two different sets of estimates of the cost of rebuilding for submission to the War Damage Commission. The owner of the premises subsequently sold them instead of proceeding with the reconstruction and the builders claimed for the reasonable value of their services in preparing the estimates. In Construction Design & Management a public housing corporation called for proposals for the construction of a senior citizen's housing project. An architectural, engineering and building firm submitted a proposal for the project which was accepted, but it was understood that the project would only proceed to contract if the project was approved by another public corporation which was to finance it. Obtaining the approval of the finance corporation took much more time than was expected and involved the builders in considerable work amending their plans. Eventually delay became such that the builders claimed that they could no longer undertake the project at the price originally quoted and, a substantial increase in that price having been rejected by the housing corporation, withdrew from the project. The building firm brought an action for the cost of preparing the plans for the project. In Sabemo a local Council called for proposals for an extremely large project, the construction of a civic centre. A development company submitted a proposal for the project which was accepted. The company and the Council began working closely together on putting the development into place. This close relationship continued for three years, although at no time were the company and the Council contractually bound.

After an enormous amount of work by both parties obtaining planning approval for, and reworking the design of, the civic centre, the Council suffered a political change of heart and the plan was dropped. The company brought an action for the reasonable value of the work that they had done in preparation for the project. In William Lacey and Sabemo the claim of the party who had undertaken the preparatory work was successful and in Construction Design & Management it was not.

In British Steel an engineering company were building a bank at Dammam in Saudi Arabia. As a part of their unusual design for the building, the engineering company required steel nodes which they asked an iron and steel manufacturing company to design and produce. The steel company were required to supply the nodes quickly and so work began on their design and production while contract matters such as price, progress payments and liability for late delivery were still under negotiation. When negotiations broke down and all but one of the nodes had been delivered, the steel company brought a *quantum meruit* action against the engineering company, and the engineering company counterclaimed for damages for breach of contract for late delivery. The value of the counterclaim far exceeded the value of the *quantum meruit*. Goff J. rejected the engineering company's counterclaim and awarded the steel company the reasonable value of the nodes supplied.

(2) Existing Explanations of the Pre-Contractual Negotiation Cases

(a) Contract

The first of the existing approaches to the pre-contractual negotiation cases is contractual in nature: it is argued that a contract collateral to the contract which was the subject of the negotiations in each case provided for payment for the preparatory work undertaken.

Stoljar examines the basis upon which liability arose in William Lacey, Sabemo, and Brewer Street and concludes:

> Where two parties proceed upon a joint assumption that a contract will be entered into between them, and one does work beneficial for the project, but work which normally is not expected to be done gratuitously, the one party is entitled to compensation if the other decides, unilaterally, to abandon the project not because of any bona fide disagreement but for his own reasons alone.
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> It should be clear that this final principle, despite its choice of non-contractual language, is ... decidedly contractual in nature, admitting as it does the parties' agreement that certain preparatory or interim work is to be done for recompense.[546]

In another place Stoljar comments that the claim in these cases was:

> ... an essentially contractual claim, for the simple reason that the claim is both for solicited and renumerative work, being work done in pursuance of an initial agreement.[547]

However, while it would always be open to negotiating parties to make a collateral agreement relating to pre-contractual performance, the argument that these decisions were based on contract is flawed for at least three reasons. First, in each of the decisions contractual reasoning was considered and specifically rejected. Only Somervell and Romer L.JJ. in Brewer Street seem to have based their argument in contract and their contractual reasoning is difficult to justify. As Denning L.J. pointed out, any collateral agreement that could have covered the work undertaken in Brewer Street was an entire one and the work was never completed.

Second, in Brewer Street, as in each of these decisions, it is an odd approach to say that work which was purportedly undertaken in pursuance of an agreement at which the parties never arrived but which they were confident was forthcoming, was in fact undertaken in pursuance of a collateral agreement of which the parties would not even have been aware.[548] In that the parties held liable in these cases promised to assume

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546 Stoljar, S.J., The Law of Quasi-Contract 2nd edn (Sydney: The Law Book Company, 1989) at p.244

547 Ibid at p.193

548 Not only is this an odd approach, but it is also at odds with the reluctance of the courts to imply contracts in contexts in which the parties "might have acted exactly as they did in the absence of a contract" (The Aramis [1989] 1 Lloyd's Rep. 213 at p.224 per Bingham L.J.).

responsibility for the preparatory work, it is submitted that they promised to do so as a part of the responsibilities they were assuming under the anticipated contract and not as a separate obligation. As Barry J. put it in William Lacey they did not:

> ... actually intend to pay for the work otherwise than under the supposed contract, or as a part of the total price which would become payable when the expected contract was made.[549]

Third, a contractual explanation of these decisions is very difficult to reconcile with the apparent flexibility of the principle that was apparently being applied. For example, Somervell L.J. in Brewer Street claimed that the issue of whether the party at whose request the work was done must pay for it, is in some way (but not always) linked to the issue of whose "fault" it was that negotiations for the principal agreement broke down. In this, he said, "[e]ach case must be judged on its own circumstances."[550] The value of this approach based on "fault" will be considered below. At this point it is merely important to highlight the impact of such "fault" considerations upon a contractual explanation of the cases. That impact is that the contractual argument becomes even more tenuous if the courts must imply into the parties' purported collateral agreement an undertaking to pay for preparatory work only if negotiations for the principal contract break down on particular grounds. And it cannot help to claim, as Stoljar does,[551] that this is essentially contractual liability mitigated by a general duty of good faith in contractual bargaining. There is no hint in the cases that the judges intended to introduce such a general duty;[552] nor is it clear why the breach of such a duty in relation to negotiations for one contract, should *prima facie* render void a collateral contract providing for payment for interim performance.

Thus the majority of judges in cases such a Brewer Street, William Lacey and Sabemo would seem to have been justified in their claim that the liability imposed in those cases was essentially non-contractual in nature. In the words of Barry J. in William Lacey:

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549 William Lacey at p.939

550 Brewer Street at p.434

551 Stoljar, S.J., The Law of Quasi-Contract at p.244

552 Moreover, Walford v Miles (1992) at p.138 implicitly rejects the concept.

> ... the court will look at the true facts and ascertain from them whether or not a promise to pay should be implied, irrespective of the actual views of the parties at the time when the work was done or the services rendered.[553]

It is not being argued that a contractual approach to issues of pre-contractual performance will never yield satisfactory results. Rather, it is argued that contractual reasoning cannot adequately handle all the problems which arise in this area, or in fact, give a satisfactory explanation of many of the major cases. The question therefore remains as to how those cases may more helpfully be categorised.

(b) The reasonable expectations of the parties

A second approach to this problem emerges from the decisions themselves. This approach is to say that the liability is based upon the reasonable expectations of the parties. The judge must ask whether it would be reasonable to expect the party who has undertaken the pre-contractual performance to do so gratuitously. Thus in William Lacey an obligation was imposed because:

> The plaintiffs are carrying on a business and, in normal circumstances, if asked to render services of this kind, the obvious inference would be that they ought to be paid for so doing. No one could expect a business firm to do this sort of work for nothing, and again, in normal circumstances, the law would imply a promise to pay on the part of the person who requested the services to be performed.[554]

However, it is a concept novel to English law that a plaintiff should have the right to be paid whenever it is reasonable that he should be. It is also a concept leading to liability of a very uncertain kind. When will it be "reasonable" for a plaintiff to expect payment? If the masked answer to this question provided in this passage from William Lacey is that he ought to expect payment whenever the defendant has promised payment, then the issue becomes why that promise should be enforceable if it is not enforceable as a contract. The concept of reasonable expectation simply begs the question as to why liability is arising in these cases.

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553 William Lacey at p.936

554 Ibid at p.935

(c) Risk allocation

Similarly question-begging is a third approach to the issue of why liability might have arisen in the pre-contractual performance cases. This approach, first enunciated in Brewer Street but taken up in cases such as Sabemo, centres on the question: "On whom should the risk fall?"[555] Stoljar explains why this question has little explanatory power when considered in the light of the relevant cases:

> What this [question] overlooks is that the "risk" now spoken of is not the sort of risk we know in the law of torts, nor indeed a special risk peculiar to restitution; in fact, when everything is said, the so-called risk as it arises in present circumstances is simply the risk we run where an agreement in which nothing is said about renumeration might yet be construed as renumerative, particularly where the work done during that agreement cannot be considered to be gratuitous.[556]

In other words, the question who should bear the risk must be answered by applying an appropriate legal principle; it cannot constitute such a principle in itself.

(d) Fault

A fourth approach to the pre-contractual performance cases might be discerned from an issue that was important to cases such as Brewer Street and Sabemo: the issue of "fault" in the breakdown of pre-contractual negotiations. While it has already been suggested that these cases did not seek to establish a generalised duty of good faith in bargaining, it might be possible to account for the decisions by arguing that the party who should normally bear responsibility for any pre-contractual performance is the party at fault in the breakdown of pre-contractual negotiations.

It is suggested, however, that such a solution to the pre-contractual performance problem would be far from ideal. This is because "fault" in the breakdown of pre-contractual negotiations is very difficult to identify. Jones writes:

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555 Brewer Street at p.437

556 Stoljar, S.J., Quasi-Contract at pp.243-244

> It may be ... unhelpful to conclude that the plaintiff or defendant was or was not "at fault." Fault is a slippery and pejorative concept; for example, is a defendant at fault if he withdraws because of an unexpected financial reversal?[557]

A further example of the uncertainty of the concept of fault may be found in Brewer Street. In this case Denning L.J. found that neither the plaintiffs nor the defendants were at fault while Somervell and Romer L.JJ. claimed that only the plaintiffs were "innocent". It will be recalled that the defendants had wanted to lease certain property with an option to purchase it within 60 days of signing the lease. The plaintiffs were only prepared to grant a lease coupled with a right of first refusal. While negotiations were underway, the plaintiffs undertook certain alterations to the property at the request of the defendants. Somervell L.J. claimed:

> It is plain that the matter went off because of the defendant's own course of conduct in adhering to the condition that they should get an option when it had been made clear to them that the plaintiffs were not willing to grant an option.[558]

Yet surely to adopt such a position is to expose negotiating parties to the constant risk of being found "at fault" for the failure of particular negotiations. There are almost no negotiations in which at least one of the parties involved does not wish to persuade the other to move from a position which he adopts at the beginning of the process. If "fault" lies in failing to realise early enough that the other party is not going to change position, then it is very difficult to know when "fault" will arise. Moreover, each of the parties is usually trying to persuade the other to his point of view. Why was the "fault" in Brewer Street with the defendants for failing to realise that they would only be granted a right of first refusal and not with the plaintiffs for failing to realise that the defendants would not take the lease without the option? It is little wonder that the judges in this case were not able to determine whether any fault arose at all, or that Somervell L.J. conceded that "the area is somewhat difficult".[559] "Fault" is simply too unstable a concept to provide a solution to the pre-contractual performance problem.

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557 Jones, G.,"Claims Arising out of Anticipated Contracts which do not Materialize" (1980) 18 University of Western Ontario Law Review 447 at p.454

558 Brewer Street at p.434

559 Ibid at p.434

(e) Restitution for unjust enrichment

A fifth approach to this problem which has enjoyed some recent popularity is the approach based on the principle of restitution for unjust enrichment. However, I would argue that although restitution for unjust enrichment may provide a satisfactory solution in many cases involving pre-contractual performance, it is unable to account for all such cases, and indeed, for many of the major reported decisions. In this sense it is like the contractual explanation of these cases considered above. In order to justify such a proposition, it will be necessary to consider at some length the rather complex restitutionary accounts of these cases which have emerged in recent years.

The unjust enrichment theorists begin by rebutting the implied contract explanation of cases such as Brewer Street, William Lacey, Sabemo and British Steel. Those cases deal, they claim, with obligations imposed at law, rather than with contracts to pay a reasonable sum implied in fact: "... the concept of implied contract is, in this context, a meaningless, irrelevant and misleading anachronism."[560] They then claim that the obligation imposed in these cases does not begin with the intention of the parties but with the fact of an unjust enrichment of the defendant at the expense of the plaintiff. Wherever the defendant has been unjustly enriched at the plaintiff's expense, he must make restitution of that enrichment or its value in money. The receipt of a benefit by the defendant thus both partly justifies and measures the *quantum meruit* obligation on a rationale similar to that underpinning the action for money had and received.

The central difficulty with this approach to the pre-contractual performance cases is that the relevant pre-contractual performance will often not benefit the party requesting its provision in any immediately apparent way. For example, in Brewer Street it is hard to see how the prospective lessees were benefitted by alterations made to a property in which they had never had any interest. Indeed, in argument the defendants' counsel stressed that the cost of the alterations ought to have fallen on the prospective lessors and

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560 Lord Goff of Chieveley and Jones, G., Restitution at p.10

not the prospective lessees precisely because it was the prospective lessors who benefitted by improvements carried out to their own property. In Jennings, a case with facts very similar to those in Brewer Street, it was said that because the prospective sublessee was never able to take possession of the property and the improvements that he had requested, he had "never, of course, had the slightest benefit or interest in these works."[561]

This difficulty in identifying a "benefit" of which restitution can be made is particularly acute in situations in which the pre-contractual performance has consisted in, and compensation is sought for, the provision of some service. Services do not automatically fit into the concepts of "benefit" or "enrichment". They cannot be restored *in specie*, they may not have any worth independent of that at which the recipient values them, and they need not even result in an end product that has a clear or easily realisable exchange value. Goff and Jones admit that: "[t]he receipt of money always benefits the defendant. But *services* may not do so."[562]

In order to overcome this problem in the analysis of Jennings, Brewer Street, William Lacey, Sabemo and British Steel, Birks relies upon the concept of "free acceptance".[563] Birks argues that "free acceptance" can be used by a plaintiff to establish that services rendered were a benefit to the defendant: to overcome what he calls the problem of "subjective devaluation". He argues that if the defendant freely accepted the services, he must have considered them a benefit at the time of their provision and so cannot now

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561 Jennings at p.413 per Somervell L.J.

562 Lord Goff of Chieveley and Jones, G., Restitution at p.18

563 Birks, P., Introduction at pp.265 ff. Note that in Brewer Street and Jennings even the application of "free acceptance" reasoning requires some degree of ingenuity on Birks's part. He deals with each case by turning it on its head and dealing with it, not as raising issues about why the plaintiff prospective landlord is or is not entitled to a remedy for work done to his own property, but rather as a case dealing with why the landlord is or is not himself liable for the benefit which he has received. The assumption seems to be that in a case where the would-be landlord would not have been liable if the prospective tenant had himself provided the benefit to the landlord's property, the tenant ought to be liable if the landlord renders that benefit and *vice versa*. This is all very well in that reciprocity of rights between situations in which the landlord and the tenant render the relevant benefit is generally desirable. Yet it almost openly abandons the claim that the landlord's rights are somehow based in an unjust enrichment of the plaintiff. It does not solve the problem that Brewer Street involves recovery by a party providing services in a context in which only he, if anyone, can be said to receive a benefit.

deny that they were. Birks also argues that "free acceptance" can sometimes be used to show that the retention of a benefit would be unjust. On the basis of the concept he then develops a three stage pattern of "weak" unjust enrichment. For that pattern to apply:

> (a) the recipient must have requested or acquiesced in the doing of the work; (b) he must have known that the work was not intended to be gratuitous; and (c) the events which have happened must not be events whose risk was borne by the intervener.[564]

It will be clear that each of these criteria will often be satisfied in a context of performance rendered during pre-contractual negotiations. Thus, if the weak unjust enrichment pattern can be accepted, a restitutionary analysis of the existing pre-contractual performance cases may well be possible. Conversely, if unjust enrichment is inadequate to provide an explanation of the pre-contractual performance cases, it must be because of some inherent difficulty with the concept of "free acceptance" itself.[565]

I would argue that there is indeed an inherent difficulty with the concept of free acceptance and that the pattern of "weak" unjust enrichment is an inadequate way of describing many of the pre-contractual performance cases; in particular, those involving the provision of services. This difficulty is that "free acceptance" masks in restitutionary language a justification for the imposition of obligation on a basis other than benefit or enrichment. Under the "free acceptance" analysis, whether that concept is being used at the "unjust" or the "benefit" stage of restitutionary reasoning, "acceptance" or "consent" is doing the work of distinguishing between situations in which liability will arise and those in which it will not. It is surely therefore fictional to say that "benefit" is the source of the relevant obligation.

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564 Birks, P., "Restitution for Services", [1974] Current Legal Problems 13 at p.30

565 Slightly different, but essentially similar to this concept of "free acceptance", at least in relation to the "benefit" stage of unjust enrichment reasoning, is Burrows' notion of the "bargained for" benefit. Burrows claims that at the level of establishing a benefit, "free acceptance" is inadequate to overcome the problem of subjective devaluation because it may be that a person who accepts a service does not regard it as a benefit but is merely indifferent to whether or not it is performed. For this reason he intensifies the concept and requires that the defendant actually has "bargained for" the service or other benefit he receives. See Burrows, A., "Free Acceptance and the Law of Restitution", (1988) 104 Law Quarterly Review 576.

Indeed, that such a claim is fictional has often been acknowledged. Beatson claims that cases such as Brewer Street and British Steel are concerned with "consent", "acquiescence", "reliance", "fault" and "risk" rather than "enrichment" or "benefit", and that grouping cases dependent upon "consent" or "acquiescence" with cases dependent upon "benefit" does not "succeed in grouping together most "like" cases and separating most "unlike" cases."[566] He points out that "[n]ot even a relatively broad use of "enrichment"/"receipt" justifies the treatment of the remedy in cases such as ... Sabemo v North Sydney M.C. as based on the defendant's "receipt" or "enrichment"."[567] Similarly, Hedley writes of the "free acceptance" cases:

> [The defendant] is liable because he created an expectation of payment and encouraged detrimental reliance on that expectation. We can describe this as Contract, or as Restitution, or as both together, but to describe it as "benefit" is simply a random departure from the meaning of that word.[568]

One way in which unjust enrichment theorists have tried to avoid the obvious artificiality of the "free acceptance" approach to restitution has been simply to ignore the most obvious practical issue arising from their analysis. Jones admits that "free acceptance" is just an extended notion of "request".[569] Therefore the question obviously arising when "free acceptance" is used either at the unjust or benefit stage of restitutionary reasoning is just how much "request", "acquiescence", "bargain" or "consent" is necessary to render something a benefit and thus the source of an obligation. Yet Mead points out that Birks fails to explain what steps a recipient must go to in order that he will not come under an obligation to pay and that Birks' notion of a "reasonable opportunity to reject" does not satisfactorily answer this dilemma because of its inherent uncertainty.[570] By failing to give this crucial question its real weight, writers such as Birks deflect attention from the process of acceptance itself and thus from the artificiality of claiming that cases focused upon "acceptance" or "consent" are really about "benefit" and "enrichment".

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566 Beatson, J., "Benefit, Reliance and the Structure of Unjust Enrichment", [1987] Current Legal Problems 71 at p.79 and The Use and Abuse of Unjust Enrichment Ch.2

567 Beatson, J., "Benefit, Reliance and the Structure of Unjust Enrichment" at p.81

568 Hedley, S., "Unjust Enrichment as the Basis of Restitution - An Overworked Concept", (1985) 5 Legal Studies 56 at p.63

569 Jones, G., "Restitutionary Claims for Services Rendered", (1977) 93 Law Quarterly Review 273 at p.295

570 Mead, G., "Free Acceptance: Some Further Considerations", (1989) 105 Law Quarterly Review 460 at p.464

In view of this inherent problem with the concept of "free acceptance", I would argue that restitutionary reasoning may satisfactorily provide an answer to some situations of pre-contractual performance (for example, where money has been paid from one party to another during the course of pre-contractual negotiations) but that it is unable to do so in all such situations (for example, where the pre-contractual performance has primarily consisted in the provision of services). In particular, I would argue that it is unable to provide a convincing explanation of the most important existing cases in this area.

(3) The Pre-Contractual Negotiation Cases and Australian Estoppel

I turn, therefore, from considering five of the current explanations of the pre-contractual negotiation cases to consider whether the doctrine of Australian estoppel might on the same facts more easily justify the results given in those cases, or perhaps dictate a more suitable result.

(a) Jennings, Brewer Street, William Lacey, Construction Design & Management and Sabemo

First I will consider cases in which the doctrine of Australian estoppel could justify the results actually given in the cases more satisfactorily than the reasoning there employed. Jennings and Brewer Street will be examined and then William Lacey, Construction Design & Management, and Sabemo. These two provide useful groups of cases because each group consists of cases of contrasting results on almost identical facts. It is therefore interesting to see whether the application of Australian estoppel would also lead to contrasting results in these cases and, if so, whether it is able to provide a coherent justification for those differing outcomes.

It will be recalled that Jennings and Brewer Street each involved alterations to property by prospective lessors in anticipation of a lease into which the parties did not eventually enter. In Jennings this was because a head lessor, whose consent was required, failed to approve the proposed alterations. In Brewer Street this was because of an inability to agree terms.

Applying Australian estoppel to the facts of these cases, a judge would first have to identify the actual assumptions induced in the cases. In each case, the prospective lessees induced the prospective lessors to rely upon the assumption that the prospective lessees would bear the cost of the alterations by starting work on the alterations before the lease was signed. In Brewer Street it is relatively clear that the assumption induced was that the lessors would be paid whether or not the lease went ahead. For example, as Romer L.J. pointed out, some of the work was paid for directly by the prospective lessees without any suggestion that such payment was to be conditional.[571] In Jennings the assumption induced seems to have been more general.

Having identified the relevant assumption, a judge applying Australian estoppel would then have to consider the reliance and detriment issues. Reliance may be presumed in the manner described in Chapter Four.[572] In any case, in both fact situations the alterations made to the property were to the specific requirements of the potential lessees, a fact which is emphasised in Brewer Street, and so it is likely that the alterations were undertaken in reliance upon the assumption of payment. Further, in each case the detriment suffered by the prospective lessors was easily quantifiable.

A judge applying the doctrine of Australian estoppel on these facts would then finally have to determine whether it would be unconscionable in each case for the prospective lessees not to remedy the detriment suffered by the prospective lessors.

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571 This is made clear in the judgment of Somervell L.J. at p.432. The idea that the defendant might not have been liable if the negotiations were broken off by the plaintiff is only dealt with as a defence; in terms of Australian estoppel it could be said that the assumption induced was clearly that the plaintiff would be paid for the pre-contractual performance even if nothing came of the negotiations, and that the subsequent behaviour of the parties was a matter going to unconscionability.

572 See above at p.100ff

In doing so the judge would have to balance the factors determining the question of unconscionability. First, he would have to consider those factors which in these cases would lead to a finding of unconscionability, or at least not tell against such a finding. Second he would have to consider those factors which in these cases would militate against a finding of unconscionability and then balance the two sets of considerations.

I shall first consider, therefore, those factors in these cases which might support a finding of unconscionability. In relation to the mode of inducement, in each case this was by express representation and thus more likely to give rise to liability in Australian estoppel than it would have been had it been by a less direct mode of inducement. In relation to the parties' relative interest in the activities in reliance, in each case it was the potential lessees who were most interested in the relevant activities in reliance. In Brewer Street, just as in Waltons,[573] the party inducing the assumption was insistent that the work on the premises be completed by a specific time, which time-frame put great pressure on the negotiations. As Romer L.J. emphasised:

> The truth of the matter is that [the prospective lessees] were in a very great hurry to get into these premises because the lease of their own premises was running out, and because of that hurry they did things which in the normal course they would not have done.[574]

In relation to the context of the inducement, in each case the inducement arose in a context in which neither party anticipated any problems at all with the lease going ahead: the context was one of trust and co-operation in which reliance was reasonable. Finally, it is significant that in neither case did the party inducing the assumption take any steps at all to ensure that it did not cause preventable harm. For example, in neither case did the party inducing the assumption warn the party relying upon it that it was not their intention to pay for the works if the lease were not negotiated.

In summary of this first group of criteria I would suggest that, at least in Brewer Street, the strong interest of the prospective lessees in the relevant activities in reliance, together with their express inducement of an assumption that the alterations would be paid for

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573 See above at p.66

574 Brewer Street at p.438

(probably even if the negotiations never came to fruition) could have lead to a *prima facie* conclusion that it would be unconscionable for them not to remedy the detriment that the lessors had suffered by reliance. The remedy *prima facie* available would be the cost of the alterations, the remedy in fact awarded in Brewer Street.

Considering those factors which might militate against a such finding of unconscionability, a judge using Australian estoppel to decide these cases might turn first to the issue of the content of the induced assumption. In each case the induced assumption was one of intention, which type of assumption we have seen ought less often to give rise to liability in estoppel. Against this, however, must be weighed the fact that, at least in Brewer Street, the prospective lessees did not give any indication that they might possibly change their mind: that the induced assumption related to a mere reversible intention. On the contrary, they stressed the urgency of the completion of the work. The prospective lessors could be seen as more justified in relying upon so urgent a statement of intention than they could, say, in relying upon an assumption as to some general plan for the future.

However, there is also a second factor which might militate against a finding of unconscionability in these cases. Indeed, I would argue that this second factor actually accounts for their differing results. This factor is the relative knowledge of the parties. In Brewer Street both the parties had equal knowledge of the likelihood of the reliance leading to the prospective lessors' detriment. In Jennings, however, the parties were not in so equal a position as regards knowledge. Only the prospective sublessors knew that the alterations to the property were subject to approval by a head lessor, and thus only the prospective sublessors knew that there was a very real possibility that the lease would not be finally negotiated. This knowledge would have seriously undermined the prospective sublessee's interest in the relevant activities in reliance, the most important

of those factors counting towards a finding of unconscionability in a case such as Brewer Street. Somervell L.J. said:

> [The prospective sublessee] had not the slightest interest in agreeing with what should be done in these premises unless he was going to be the sublessee of them, and that must have been obvious to the plaintiff.[575]

Indeed, not only did the knowledge of the risk undermine the prospective sublessee's interest in the activities in reliance, it may well have suggested that the relevant activities were primarily in the prospective sublessors' interest. Denning L.J. said:

> The plaintiffs were doing work on their own property which might perhaps be of some use to them if the underlease was not granted, but could be of no possible use to the solicitor unless it was granted.[576]

The relative knowledge of these parties might thus be seen to outweigh their relative interest in the relevant activities in reliance.

I would argue, therefore, that in the balancing of criteria involved in the application of Australian estoppel, a judge deciding Brewer Street might award a remedy laying particular emphasis on the parties' relative interest in the activities in reliance. But equally, a judge deciding Jennings could argue that the issue of the parties' relative interest in the activities in reliance took second place to the issue of their relative knowledge, and thus, all else being equal, that liability ought not to arise. Australian estoppel might therefore more neatly account for these decisions and the difference between them than any of the alternative explanations set out above.

Having seen how Australian estoppel might be deployed on the facts of Jennings and Brewer Street, we turn to consider whether it might similarly be deployed on those of William Lacey, Construction Design & Management and Sabemo.

It will be recalled that each of these cases involved negotiations for building projects. In each case the party who was to carry out the building undertook considerably more work in preparing plans and other documents for the party proposing the development than

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575 Jennings at p.413

576 Ibid at p.414

would normally be expected. In William Lacey, where the relevant pre-contractual reliance involved preparing estimates of the cost of rebuilding for submission to a grant making body, the War Damages Commission, the negotiations did not give rise to a contract because the party proposing the development sold the premises instead of proceeding with the reconstruction. In Construction Design & Management the party which was to carry out the building decided not to proceed with its bid for the project. In Sabemo the party proposing the development, a local council, changed its plans for political reasons. As to remedies: in William Lacey the party which was to carry out the building was awarded the reasonable value of its services; in Sabemo no award was made but the judge suggested that an appropriate award would have been Sabemo's costs in preparing the various building schemes; and in Construction Design & Management the plaintiffs were unable to establish any liability on the part of the defendants.

In applying Australian estoppel to these cases a judge would once again have to ask upon what assumption induced by the defendants the plaintiffs may be said to have relied. This is an important enquiry and it divides these cases from the outset.[577]

In William Lacey the assumption induced was that the plaintiffs be would be remunerated for their pre-contractual performance only under the terms of the anticipated contract, but that the anticipated contract would certainly eventuate. In Sabemo the assumption induced was that the anticipated contract would go ahead unless there was a "bona fide failure to reach agreement on some point of substance in such a complex transaction."[578] Sheppard J. found that the parties understood that an agreement might not eventuate but that the assumption induced by the council was that it would not simply change its mind. Moreover, he found that the detriment for which the plaintiffs were claiming relief arose because this particular assumption, that the Council would not simply change its mind, proved unjustified and that agreement would otherwise have been reached.[579] In

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577 It also, I would suggest, distinguishes them from Brewer Street, in which the assumption induced was that the defendants would bear the cost of the alterations no matter what happened in relation to the central contract.

578 Sabemo at p.901

579 Ibid at p.901

Construction Design & Management there was neither the assumption induced that the plaintiffs would be paid for their pre-contractual performance, nor the assumption induced that a contract would necessarily eventuate.

This distinction between the assumptions induced in the various decisions is important because it shows why liability would not arise in Construction Design & Management even were a judge to apply the doctrine of Australian estoppel. The plaintiffs in that case could not rely upon an assumption that they would be remunerated for the work they did, even that they would be remunerated under an eventual contract for construction, because such an assumption was never induced. As Hughes C.J.N.B. put it:

> The distinction between the Lacey case and the one which we are considering is that in the former the unqualified understanding of both parties was that the building was to be constructed and the plaintiff was to be given the contract ... In the instant case the understanding was qualified.[580]

Leaving this case to one side, therefore, we turn to William Lacey and Sabemo. In these decisions, reliance and detriment would be relatively easy to establish, even without the aid of the presumption regarding reliance.[581] In William Lacey the plaintiffs would not have undertaken the preparation of the estimates if they had not been led to believe that they would be given a contract. In Sabemo, while the plaintiffs may have undertaken the relevant work even in light of the chance that a contract would not have eventuated, it was "unthinkable that the plaintiff[s] would have been prepared to do what [they] did, if [they] had thought that the defendant might change its mind about proceeding with the proposal."[582] In each case the plaintiffs had incurred costs in, and lost alternative income by, working on building plans for the defendants. In Sabemo the work had gone on for three years.

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580 Construction Design & Management at p.646

581 See above at p.100ff

582 Sabemo at p.901

Reliance and detriment thus established, a judge applying the doctrine of Australian estoppel on the facts of these cases would then have to consider the question of unconscionability. Would it be unconscionable in either case for the defendant not to remedy the detriment suffered by the plaintiffs by reason of their reliance upon the assumption induced?

Starting with William Lacey and those aspects of the facts that could count towards a finding of unconscionability, it might be highlighted that the relevant assumption was induced by express representation. It might then be emphasised that the relevant activities in reliance were clearly in the interests of the inducing party. Not only was the work performed at the request of the inducing party but he was able to use the estimates prepared by the plaintiffs to increase the value of the property on sale. It is also clear that the defendant knew that the plaintiffs were relying upon the assumption that the contract would be granted, and for at least some of the relevant period perhaps also knew that he would not be proceeding with the work.[583] However he took no steps to avoid the possible detriment that the plaintiffs would suffer by assuming that the project was going ahead.

Against these factors pointing towards a finding of unconscionability, a judge deciding this case on the basis of Australian estoppel would have to weigh the fact that the parties were of apparently equal bargaining power and the fact that the assumption upon which reliance was placed was an assumption relating to the future. Balancing this latter consideration, however, was the fact that the assumption was not one as to general future plans but one upon which the defendant could be seen to be already taking action: that is, submitting estimates to the War Damage Commission.

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583 This is the factual issue which I would suggest actually swayed the court in William Lacey but which is nowhere directly addressed in the decision. The implication that the defendant never intended to proceed with the re-building work may be drawn from the fact that it told the plaintiff that another firm of builders was being given the work when, in fact, it sold the premises. Presumably, had it been possible to prove that the defendant did not actually ever intend to undertake the rebuilding, an action may have been available in fraud.

Weighing these two sets of factors against each other, I would argue that a judge deciding William Lacey on the basis of Australian estoppel may well arrive at a finding of unconscionability. If he did, he would then have to determine what remedy he might apply in the decision.

In examining remedy I would argue that a judge applying Australian estoppel could enunciate far more clearly the reason for his award than did Barry J. in his judgment. Rather elusively, Barry J. said:

> The plaintiffs are entitled to a fair renumeration for the work which they have done, but they cannot, in my view, quantify their charges by reference to professional scales.[584]

What it seems Barry J. was driving it, was that the plaintiffs were not entitled to expectation damages for the work they had done. They were not entitled to charge what they could usually expect to be paid for providing these estimates. Even on the basis of Australian estoppel their *prima facie* remedy would be reliance damages: compensation for the cost of providing the services. A judge considering the facts on the basis of Australian estoppel could set out more clearly both the reasons for his award and the justification of its amount.

Turning finally to Sabemo a judge would find facts which, on the application of Australian estoppel, would as clearly demand a remedy as did those in Brewer Street and William Lacey. While Australian estoppel could be used to justify the result given on the facts of Sabemo, it would also enable a judge to compare the case more closely with the facts in Brewer Street, upon which decision the judge who decided the case actually based his reasoning.

Considering first those factors which might lead to a finding of unconscionability in this case, the most important is the length of the relationship between the plaintiffs and the defendant. The assumption that the defendant was committed to the building project was reinforced by three years of trust and co-operation. Yet throughout these three years the

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584 William Lacey at p.940

defendant took no steps at all to prevent the plaintiff from suffering harm. There was no suggestion at all that the council might change its mind. It seems to have been this history of trust which particularly impressed the judge in the decision.

Added to this factor might be the fact that the work was in the interests of the council and undertaken at its special request. Sheppard J. highlighted the fact that the pre-contractual performance was in the interests of the council in that it was leading to a project:

> ... which would give it adequate accommodation for its various activities free from any obligation to pay therefor, and with the knowledge that, in due course of time when the lease expired, all would revert to it.[585]

Against this would have to be set the fact that the work was also in the interests of the plaintiffs in that it was leading to a project from which Sabemo hoped to make a substantial profit.

Factors telling against a finding of unconscionability in this case might include the fact that the plaintiffs were at no time expressly assured that the council would not change its mind. At best the assurance was made impliedly, although admittedly over the course of three years. Moreover, these were large commercial negotiations. The parties must be presumed to have had equal knowledge that the defendant was under no legal obligation to continue with the project and that as a local council it was subject to political vicissitudes. Sheppard J. acknowledged:

> It is true that the defendant is a council the members of which are elected from time to time, and that, therefore, it might not be expected necessarily to be as consistent in its approach to problems as a different sort of undertaking.[586]

It will be equally evident from the preceding two paragraphs both that Australian estoppel could be used to justify the decision in Sabemo and that a finding of unconscionability would not *necessarily* be the result were that doctrine applied and the issues brought to light by that doctrine more carefully considered. What should be clear

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585 Sabemo at p.901

586 Ibid at p.901

from this discussion, however, is that analysing the case in terms of the doctrine of Australian estoppel would allow a judge to analyse the facts far more carefully than did a simple application by analogy of the decision in Brewer Street.

Were the doctrine of Australian estoppel in fact applied successfully to this case it would probably yield the remedy which was, in fact, suggested by the judge. Sheppard J. suggested that the plaintiffs were entitled to the:

> ... direct cost to [them] of preparing the various plans and models, and attending the various conferences which were held with the defendant and other authorities in connection with the planning and design of the project.[587]

This is clearly the reliance measure of relief.

(b) British Steel

At this point we should turn from pre-contractual negotiation cases in which the application of Australian estoppel could justify the result achieved in each case, to a case in which the application of the doctrine could arguably have led to a more satisfactory result. That case is British Steel.

It will be recalled that the facts of the case were as follows. An engineering company were building a bank at Dammam in Saudi Arabia. As a part of their unusual design for the building, the engineering company required steel nodes which they asked an iron and steel manufacturing company to design and produce. The steel company were required to supply the nodes quickly and so work began on their design and production while contract matters such as price, progress payments and liability for late delivery were still under negotiation. When negotiations broke down and all but one of the nodes had been delivered, the steel company brought a *quantum meruit* action against the engineering company and the engineering company counterclaimed for damages for breach of contract for late delivery. The value of the counterclaim far exceeded the value of the

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587 Ibid at p.903

quantum meruit. Goff J. rejected the engineering company's counterclaim and awarded the steel company the reasonable value of the nodes supplied.

The interesting thing about the result in British Steel is the enormous disparity with which the plaintiffs and defendants were treated. The reasonable value of the services supplied by the plaintiffs was assessed as a price for the nodes including a reasonable profit element. Accordingly, the plaintiffs received "approximately what [they] always expected".[588] The defendants, however, were left without a remedy because they were unable to establish any contractual or restitutionary claim. The defendants had suffered substantial losses because of the plaintiffs' defective performance which was left to go unremedied, while the plaintiffs were allowed to profit from the project. The only alternative open to the defendants would have been to reject the nodes altogether but, as Ball notes, that would hardly have helped them to build the bank in Saudi Arabia.[589]

Australian estoppel could prove a useful doctrine here. It could provide an effective means for the law to treat the claims of parties in the positions of the plaintiffs and defendants in British Steel with greater equity.

A party in the position of British Steel Corp., who had tendered defective goods or services in the course of pre-contractual negotiations, may well be able to claim payment on the basis of Australian estoppel. That party could well claim that the other party had induced an assumption that he would be paid for the work undertaken and that he had relied on that assumption by commencing work. Provided that all the requirements of the doctrine outlined in Part Two were met, there is no reason why that doctrine ought not to provide compensation to the party who has relied upon the assumption that he would be paid. Of course, that compensation would normally be in the reliance, and not in the expectation, measure. But, given that the party undertaking the work has failed to

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588 Ball, S.N., "Letters of Intent" at p. 577

589 Ibid at p.577

secure the reward for his work that he expects in contractual negotiation, there is good reason for the law to be reluctant to award him more than the reliance measure.

More importantly, however, Australian estoppel, unlike the antecedent law, could also provide a remedy to the party who had received the defective goods or services in the course of contractual negotiations. Defendants in the position of Cleveland Bridge & Engineering Co. Ltd will often suffer damage as a result of reliance upon assumptions induced by the other party to pre-contractual negotiations regarding the timing or quality of pre-contractual performance. Provided that all the requirements of the doctrine described in Part Two are met, there is no reason why that doctrine ought not to provide compensation to protect this justified reliance so that the party who is required to make payment for defective goods or services (on the basis of Australian estoppel or otherwise) will have a counter-claim to make. Of course, this compensation will not *prima facie* be compensation in the expectation measure, but neither will the party who has provided the defective goods or services be likely to receive compensation in that measure.

Approaching a case such as British Steel on the basis of basis of Australian estoppel would give rise to a result that would be more equitable in its treatment of plaintiffs and defendants than was the result actually awarded in that case.

It is submitted therefore, that Australian estoppel would be a useful addition to the treatment of pre-contractual negotiation cases. It both offers a convincing justification of many of the existing cases in which remedies have been awarded on an otherwise inexplicable basis, and could have provided a better guide to a result in at least one of those decisions.

Chapter Eight:

Firm Offers in the Construction Industry

In this chapter I shall consider the application of Australian estoppel to cases involving the firm offer fact situation outlined in Part One. This is the case of a subcontractor quoting a particular price for services to be rendered as a part of a project for which a general contractor is submitting a tender, and then reneging on the quotation after the general contractor has been successful in his bid for the project. The general contractor will want to recover reliance damages from the subcontractor: the difference between the quotation price and the price at which the services were eventually provided.

A slight variation in methodology will be required in this part. This is because there are no reported English cases dealing with the fact situation just outlined. Presumably this is neither because English general contractors do not suffer loss in this way, nor because they feel that the law ought not to compensate such loss; such conclusions would be contrary to the empirical work referred to in Part One. Rather, the dearth of reported English cases in this area can probably be attributed to the certainty which English law has attached to the rule that firm offers - at least for bilateral contracts - may be revoked at any time prior to acceptance. The rule has probably been established since the early nineteenth century,[590] and certainly since Dickinson v Dodds.[591] The effect of this rule would be to preclude recovery by the general contractor in contract, and the antecedent law would have furnished no other doctrine which might have been of assistance to him.

Accordingly, the methodology adopted in this chapter will be to take the facts of four of the most important United States cases in this area and to examine how, were they

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590 See, for example, Routledge v Grant (1828) 4 Bing. 653

591 (1876) 2 Ch.D. 463

presented to an Australian court, Australian estoppel might be applied to those facts. We shall then consider whether Australian estoppel would provide a more satisfactory way of handling those facts than would the simple denial of relief that would usually have been the response of antecedent Anglo-Australian law.

Of these four cases, two are cases in which liability was established on the basis of United States promissory estoppel (Northwestern Engineering Co. v Ellerman,[592] a decision of the Supreme Court of South Dakota, and Drennan v Star Paving Co.,[593] a decision of the Supreme Court of California) and two are cases in which liability was not established on application of the same doctrine (Robert Gordon Inc. v Ingersoll-Rand,[594] a decision of the Circuit Court of Appeals, Seventh Circuit, and MacIsaac & Menke Co v Freeman,[595] a decision of the District Court of Appeals, Second District, California). The facts of these four cases ought briefly to be outlined.

(1) The Facts of the Firm Offer Cases

Taking the cases chronologically, Robert Gordon involved bidding for the project of installing heating and ventilating machinery in a university hall. Robert Gordon Inc and their principal competitor, Mehring & Hanson Co., both made bids based upon an identical sub-bid from Ingersoll Rand regarding the cost of supplying certain refrigeration machinery. Both companies had extensive experience of acquiring and installing machinery of the relevant type. The bidding engineer at Robert Gordon Inc understood the sub-bid to set out a price for the supply of two refrigeration machines. He prepared his company's bid on the basis of that assumption and that bid was accepted by the university. The bidding engineer at Mehring & Hanson Co. thought that the sub-bid was

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592 Northwestern Engineering Co. v Ellerman (1943) (hereafter "Northwestern")

593 Drennan v Star Paving Co. (1958) (hereafter "Drennan")

594 117 F.2d 654 (1941) (hereafter "Robert Gordon")

595 15 Cal. Rptr. 48 (1961) (hereafter "MacIsaac")

vague, but that from his knowledge of the prices of such machines, it could not refer to two machines. He therefore checked with the suppliers and found that the price in the sub-bid was for one machine only. After his company's bid had been accepted, the bidding engineer from Robert Gordon Inc. spoke to the university's consulting engineer who pointed out that the sub-bid could only have been for one machine. The bidding engineer from Robert Gordon Inc. then had a similar conversation with the bidding engineer from Mehring & Hanson Co. The university's consulting engineer agreed to convince the university to allow Robert Gordon Inc to withdraw their bid. However Robert Gordon Inc. decided to continue with their bid and brought proceedings against Ingersoll Rand for breach of contract, relying on the doctrine of promissory estoppel, in failing to supply the two machines at the given price. The action for breach of contract was not successful.

In Northwestern two construction companies entered into a written agreement that, if the first company, Northwestern Engineering Co., was successful in their bid to construct water supply, storage facility, sewerage disposal and treatment works for the United States airforce, the second company, Ellerman & McLain, would undertake the laying of a sewer system at a particular price. As evidence of their good faith, Ellerman & McLain provided a bidder's bond from a surety company, guaranteeing payment of the whole of the amount of the subcontract on execution of any eventual contract for the work as a performance bond. Northwestern Engineering Co. was awarded the head contract by the airforce. Ellerman & McLain, however, refused to proceed on the terms agreed and Northwestern Engineering Co. brought an action for breach of contract, relying again on the doctrine of promissory estoppel, claiming the difference between the price agreed for laying the sewer and the cost of alternative performance. The action for breach of contract was successful.

In Drennan, Drennan was a building contractor bidding on a school construction project. His bid for the construction project had to include the names of almost all subcontractors

and had to be guaranteed by a bond in the amount of ten per cent guaranteeing that he would enter the contract if it was awarded to him. A part of the project involved paving, the cost of which varied around one hundred and sixty per cent in the relevant locality. On the day of the bid, as was customary in the locality, Drennan received sub-bids by telephone from various subcontractors for different parts of the project, including a sub-bid from Star Paving Co. for the paving. This sub-bid was received by a secretary, with Drennan listening in on another telephone, who asked for the sub-bid to be repeated because accuracy was so important. Drennan submitted his bid for the school project on the basis *inter alia* of the Star Paving Co. sub-bid, but was told the following morning that the company would not be able to provide the paving for the given price. Drennan, relying on the doctrine of promissory estoppel, brought an action for breach of contract, claiming the difference between the cost of the paving given in the sub-bid and the price at which he eventually obtained alternative performance. His action was successful.

Finally, MacIsaac involved a bid for the construction of a university building in Los Angeles. The specifications for the project included sections "DD", entitled "Plumbing and Steamfitting", and "EE", entitled "Heating, Ventilating and Cooling". MacIsaac & Menke Co. intended to bid for the project and invited selected subcontractors to submit sub-bids for its different parts. The defendant, Freeman, obtained a copy of the section of the specifications "DD" and one of his employees submitted a sub-bid for the work by telephone. When the employee called MacIsaac & Menke Co. to submit his sub-bid, that company's estimator was very busy and so the two had a conversation lasting less than a minute. Freeman's employee said that the sub-bid was for "Plumbing only. No heating." The estimator understood the sub-bid to relate to all the work described in section "DD" of the specifications for the project and submitted his company's bid for the project on that basis, but Freeman's employee only intended it to relate to the plumbing and not the steam fitting work described in that section. Freeman refused to complete the whole of the work described in section "DD" for the given price and MacIsaac & Menke Co.,

relying on the doctrine of promissory estoppel, brought an action for breach of contract to recover the difference between the given price and the cost of alternative performance. The action was not successful.

(2) Australian Estoppel and the Facts of the Firm Offer Cases

Applying Australian estoppel to these fact situations yields, not surprisingly, results parallel to those achieved by the application of United States promissory estoppel. It has already been suggested that the function of the two doctrines in their respective systems of law is similar and, while a detailed comparison of the two doctrines is outside the scope of this thesis, the parallel results which the two doctrines would achieve in these cases might lend some small weight to that suggestion.

(a) Northwestern and Drennan

Applying Australian estoppel to the facts of these cases, a judge would first have to consider the issues of inducement, reliance and detriment. In Drennan and Northwestern general contractors were induced by express representation to assume that subcontractors would perform work at a particular price. In each case the general contractors clearly relied upon that assumption, though the presumption proposed in Chapter Four would operate to relieve the general contractors of the need to prove reliance. In Drennan the court pointed out that the general contractor neither sought to reopen bargaining with the subcontractors nor delayed acceptance of the subcontractors' offer once the head contract had been awarded; either of which might negatived the presumption of reliance. Moreover, the general contractors' reliance was in both cases clearly such that they would have suffered detriment had the induced assumption proved unreliable. Once again this was particularly true in Drennan in which the general contractor was subject to

forfeiture of a "bid bond" if he did not proceed to contract with the school board to which he had submitted his own bid.

Once a court had determined that there had been an assumption induced by the subcontractors and reliance upon that assumption to the detriment of the general contractors, the question would then become whether it was unconscionable for the subcontractors not to remedy that detriment.

Factors leading to a finding of unconscionability in these cases would start with the mode of the relevant inducement. In Northwestern the assumption was induced by a detailed document which each of the parties believed to have contractual force. The detail of this document was something which clearly impressed the court.[596] Moreover, the document contained a "bid bond" guaranteeing performance by the subcontractors. The mode of the inducement could hardly have been more conducive to a finding of unconscionability. In Drennan the inducement was by repeated oral representation during a telephone call. This mode of inducement might seem less likely to lead to a finding that the defendant had failed to take reasonable steps to ensure the reliability of induced assumptions because a representation made during a brief telephone call is self-evidently less reliable than a representation made as a part of a formal "legal" document. However, the mode of the inducement in Drennan has to be considered in light of a proved local custom for "general contractors to receive the bids of subcontractors by telephone on the day set for bidding and to rely on them in computing their own bid."[597] It is suggested that in these cases the mode of the relevant inducement would be a factor pointing towards a finding of unconscionability.

So, too, would be the relative state of the parties' knowledge in these cases. The defendants in these cases had knowledge of all the relevant circumstances which could

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596 Northwestern at p.884

597 Drennan at p.758

lead to the plaintiffs' harm: they possessed all the information required to make reliable bids and were aware that any bid they did make would be used by the plaintiffs as a part of their tenders. Moreover, it seems probable that in Drennan the defendant knew that the general contractor had to name the subcontractors in his tender and provide a "bid bond" to secure his entry into the head contract. It is submitted that this knowledge was sufficient to impose upon the defendants a relatively strong duty to take reasonable steps to ensure the reliability of the assumption induced. The plaintiff, for his part, had no opportunity to know that reliance upon the assumption might lead to his harm. This is because "there was usually a variance of 160 per cent between the highest and lowest bids for paving in the desert around Lancaster."[598]

Another factor supporting a finding of unconscionability in these cases is that reliance upon the assumption by the general contractors was not only in the interests of the general contractors but was also strongly in the interests of the subcontractors. This is again a point which is made much of in the Drennan judgment:

> Though the defendant did not bargain for this use of its bid neither did defendant make it idly, indifferent to whether it would be used or not. On the contrary it is reasonable to suppose that defendant submitted its bid to obtain the subcontract ... Defendant had reason not only to expect plaintiff to rely on its bid but to want him to. Clearly defendant had a stake in plaintiff's reliance on its bid. ... [I]t was motivated by its own business interest.[599]

Of course, this consideration is not a strong as it would have been had reliance upon the assumption been wholly in the interests of the inducing party, but on the basis of the intuition that one must "accept the bitter with the sweet" it is clearly a relevant consideration.[600]

A final factor pointing towards a finding of unconscionability in these cases is that in neither case did the subcontractors take any steps at all to ensure that the induced

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598 Ibid at p.761

599 Ibid at p.760-761

600 See above at p.127

assumption did not cause preventable harm. Thus, as was again important in the Drennan decision, in neither case did the subcontractors intimate that the induced assumption might be unreliable: that the offer to perform at a particular price might be revoked.

Of course, against these factors lending support for a finding of unconscionability, a judge applying Australian estoppel to the facts of Northwestern or Drennan would have to weigh those factors telling against such a finding. Chief amongst these must be the commercial context of these dealings. There is nothing in either case to suggest a disparity of bargaining power between the plaintiffs and defendants. There is also nothing to suggest that an option contract could not have been negotiated had the parties agreed that the subcontractors should have been bound to keep the offer open. Indeed, the general contractors attempted to negotiate such a contract on the facts of Northwestern. Some might argue, therefore, that the law ought not effectively to award the general contractors what they failed to obtain in open commercial negotiation. Subcontractors will rarely want to withdraw their bids for capricious reasons and it might be argued that the risk of loss arising from an unforeseen need to change bids ought to be allocated by contract or left to lie where it falls. For this reason, and notwithstanding the RESTATEMENT (SECOND) OF CONTRACTS §87(2) (1979) which affirms the application of §90 to reliance on an unaccepted offer, there is a reluctance in a significant minority of United States jurisdictions to apply promissory estoppel to this particular fact situation.[601]

However, I would argue that this issue of the commercial context of these dealings might not tell as strongly against a finding of unconscionability in these particular cases as it might in some other situations. Usually in commercial cases the duty to take reasonable steps to ensure the reliability of induced assumptions places a very low burden on the inducing party because in a competitive environment each party is expected to take a

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601 This minority position focuses on the decision of Learned Hand J. in James Baird Co. v Gimbel Bros. 64 F.2d 344 (1933)

high level of responsibility for the reliability of the assumptions upon which he relies. This is not true in the context of firm offers in the construction industry in which the general contractor will usually be expected to rely upon the subcontractor's bid without securing an option contract. Indeed it might not be possible for the general contractor to secure an option contract in the short time that the bidding process allows. In Drennan evidence was taken to the effect that reliance upon such bids without an option contract was customary amongst prudent business people. Therefore the general contractor following standard construction industry procedure in relation to firm offers is in a position of unusual vulnerability and is not in the position usually occupied by those in commercial dealings. The subcontractor will know of this vulnerable position of the general contractor and therefore owes a higher duty to take reasonable steps to ensure the reliability of induced assumptions than he would in other commercial negotiations.

A further factor weighing against a finding of unconscionability in these cases would be the content of the assumption induced: that the assumption is one relating to the future. Again, however, I would argue that this factor is less important than it might at first appear. In each case the time for reliance came extremely close on the heels of the inducement of the relevant assumption. This was not a vague assumption of general intention which it was evident was less reliable than a statement of present fact. It was an assumption intended to be acted upon immediately.

Weighing these two sets of factors - those telling for and those against a finding of unconscionability - a judge deciding both Northwestern and Drennan would probably decide these cases in favour of the general contractors. Considerations relating to the mode of the relevant inducement, the relative knowledge of the parties, the relative interest of the parties in the relevant activities in reliance, the failure to take any steps at all to prevent the harm to the party relying upon the assumption, would here seem to outweigh the commercial context of the inducement and the fact that the assumption induced was one as to the future. In that there is any doubt that this would be the finding

of such a judge, it is because the facts appear in the reported decisions only as they have been sifted through the filter of a different legal doctrine so that it is difficult to know what might have emerged had the facts been presented within the framework of Australian estoppel.

(b) Robert Gordon and MacIsaac

I turn, then, from two fact situations in which the application of Australian estoppel would probably lead to an award in the reliance measure, to two fact situations in which I would submit that such an award would not be made. I will consider how Australian estoppel might apply to these facts before arguing that Australian estoppel provides a more satisfactory solution to all these fact situations than that available under antecedent Anglo-Australian law.

Considering these situations in turn, I begin with the facts in Robert Gordon. Applying the doctrine of Australian estoppel to those facts, a judge would have to begin with the question of whether the relevant assumption - that the two refrigeration machines would be supplied for $26,450 - was induced by the subcontractors in the mind of the engineer at Robert Gordon Inc. This is not at all clear from the facts of the case and would depend upon the view that the court took of the subcontractors' bid. It may be, for example, that the court would find that the subcontractors' bid was not sufficiently unequivocal in its inducement because of the ambiguous way in which it was expressed. It would have to tell against the general contractors that the engineer at Mehring & hanson Co. regarded the sub-bid as confusing and rang the subcontractors to have its terms clarified.

Assuming, however, that inducement was found on these facts, the next issue would be whether there was detrimental reliance by the general contractors upon the assumption

induced. Here again there was some question on the facts of the case because, although the general contractors clearly relied upon the assumption, that reliance may not have been to their detriment. It was relatively clear from the evidence that the university would have been prepared to allow them to submit a revised tender. Thus the general contractors' reliance need not have been to their detriment.

Yet, again assuming that the hurdle of showing detrimental reliance could be overcome, a judge applying Australian estoppel to the facts of this case would then have to examine the issue of unconscionability. Several factors would count against a finding of unconscionability in this situation. First, this was an assumption regarding the future which was induced in a commercial context, although these factors could probably be discounted in the way in which they were in the earlier discussion of Northwestern and Drennan. Second, and less easy to discount, is the issue of the relative knowledge of the parties. It was clear on the evidence of the case that the general contractors were in just as good a position as were the subcontractors to know that reliance upon the induced assumption was potentially harmful. The general contractors were extremely experienced in the installation of ventilating, heating and air-conditioning machinery and a price of $26,450 would have been "absurdly low"[602] for two machines of this type. It is clear from the evidence that the engineer at Robert Gordon Inc must have known that a mistake had been made in the sub-bid or, in the words of the other bidding engineer, that "there was something screwy about [it]".[603] The conclusion of the court was that the engineer at Robert Gordon Inc "could not have reasonably entertained the belief that the Ingersoll-Rand letter intended the price of $26,450 to refer to two full-capacity machines."[604] Even if the general contractors genuinely held the relevant assumption, they were in just as strong a position of knowledge as the subcontractors to know that a mistake had been made. Third, there is the issue of the steps that the inducing party took

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602 Robert Gordon at p.660

603 Ibid at p.656

604 Ibid at p.660

to ensure that the induced assumption would not cause preventable harm. The subcontractors had taken the precaution of including the following words in red type on the bid: "Quotations subject to change without notice." The subcontractors had taken the step of warning the general contractors that the bid was not necessarily able to be relied upon. Admittedly, this statement was "in small red type, removed somewhat from the body of the letter and not referred to therein, and not as easily readable as the typewritten matter.[605] A court applying Australian estoppel would not necessarily give the inclusion of these words much weight as an attempt to prevent the relying party from suffering harm. Indeed the words were ignored in the Robert Gordon decision itself. Nevertheless, express warnings of this type ought not to be regarded too lightly by the courts and might be taken as a factor weighing against a finding of unconscionability. Taken together, these three factors would make a finding of unconscionablity very unlikely in such a case.

It is clear, then, that a court applying Australian estoppel to the facts of Robert Gordon - a case in which the general contractors would have had difficulty in showing inducement, detriment and unconscionability - would be unlikely to require the defendants to remedy the plaintiffs' detriment.

I turn to consider MacIsaac. In seeking relief on the facts of MacIsaac on the basis of Australian estoppel, the general contractors would again first encounter a problem with the issue of inducement. It is not at all clear on the facts that the subcontractor was causally responsible for the general contractors' assumption that the quotation included all of the work in section "DD". In fact, the court took extensive evidence of industry usage and found that the estimator at MacIsaac & Menke Co. should have understood the bid in the sense in which the subcontractor's employee intended it. It would have been

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605 Ibid at p.661

very difficult in this context to establish unequivocal inducement of the assumption upon which the general contractors relied.

Having established inducement, plaintiffs arguing Australian estoppel on facts identical with MacIsaac would have no difficulty in establishing detrimental reliance.

Such plaintiffs would encounter more problems, however, when unconscionability came to be considered. Two factors may count in favour of a finding of unconscionability. First, there was the fact that the parties were in relatively equivalent positions of knowledge. The subcontractor's bid was high and there was nothing in the circumstances which ought to have alerted the general contractors to their mistake.[606] Second, the subcontractor took no steps to ensure that reliance upon the induced assumption did not cause harm. However, the mode of the inducement, particularly in the light of its context, would surely count against a finding of unconscionability. This was an oral bid made during a telephone conversation of less than one minute's duration. Even given the practice apparently common in the construction industry of taking telephone bids from subcontractors, an assumption induced by a bid during a hurried conversation in which the issue of the work the bid was intended to cover was not discussed, must have been self-evidently less reliable than an assumption induced by a bid in other circumstances. The court in MacIsaac implicitly made this point when it said that the plaintiffs' estimator "at least should have made further inquiry so that there would be no lack of clarity as to what was intended to be included in the bid."[607] Indeed, if Freeman in any way broke his duty to take reasonable steps to ensure the reliability of induced assumptions, it seems partly to have been because his engineer was prevented from taking further steps by the speed with which he was hurried off the telephone. When the mode of this inducement is added to its commercial context and thus the reluctance of the courts to find unconscionable behaviour, I would argue that a court applying Australian

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606 Ibid at p.51

607 Ibid at p.52

estoppel would be unlikely to award the plaintiffs their reliance loss. Even were the general contractors arguing this case in Australian estoppel able to overcome the hurdle of proving inducement, they would surely fail to establish unconscionability.

Having, then applied the doctrine of Australian estoppel to the facts of these four subcontractor cases, it is clear that in two of the cases the general contractors would be awarded a remedy to protect their reliance and in two they would not be. I turn to consider whether these might be more desirable outcomes on these facts than would be the simple denial of relief with which the general contractors would be faced under antecedent Anglo-Australian law.

(3) The Firm Offer Cases, Australian Estoppel and the Antecedent Law

It remains to demonstrate that Australian estoppel constitutes a more satisfactory approach to the subcontractor's bid situation that did the simple "contract/no contract" approach of antecedent Anglo-Australian law. As was suggested in Part One, the difficulty with the "contract/no contract" approach of the antecedent law is that it tended to favour either the general contractor or the subcontractor. Such an approach is unsatisfactory. On the one hand, most subcontractors sometimes feel bound to make good any loss that a general contractor has suffered by relying on their bid and there is no reason why the law ought not to reflect those commercial expectations. There is no reason why the general contractor ought not to be allowed recovery in at least some of those situations. On the other hand, priority ought not to be given to the general contractor in all firm offer situations; not least because always to give the interests of the general contractor priority might encourage "bid shopping". The difficulty with the "contract/no contract" solution to the firm offer puzzle is that it fails to operate with sufficient subtlety to distinguish situations in which relief is appropriate from those in which it is not.

The argument that Australian estoppel would constitute a more satisfactory approach to the firm offer puzzle than the contract/no contract solution of the antecedent law will be advanced in two parts. First I will argue that the moral bases of the duty to take reasonable steps to ensure the reliability of induced assumptions, and therefore the duty itself, can be used to provide a convincing account of why liability ought to be imposed on some subcontractors and not on anothers. For illustration I will once again rely on Northwestern, Drennan, Robert Gordon and MacIsaac. Second, I will argue that compensating general contractors on the basis of Australian estoppel is not likely to encourage "bid shopping".

(a) Firm offers and the moral bases of the duty to take reasonable steps to ensure the reliability of induced assumptions

As was outlined in Part One, there are three moral bases for the duty to take reasonable steps to ensure the reliability of induced assumptions. These are (i) the duty not to cause preventable harm, (ii) the duty to promote trust and co-operation in society, and (ii) the duty to facilitate the processes of communication. I would argue that these three underpinning duties can explain why liability ought to be imposed in some, but not all, of the subcontractor cases; and, in particular, why it ought to be imposed in cases such as Northwestern and Drennan but not in cases such as Robert Gordon and MacIsaac.

Considering these cases in the light of the three underpinning duties, we begin with the duty not to cause preventable harm. An important issue in relation to this duty is just exactly who it is who was in a position to prevent the relevant harm and failed to do so. Take the example given by MacCormick and discussed in Chapter One of MacDonald's duty to save Jones from the incoming tide.[608] Imagine that from his position at the foot

608 See above at p.16

of the cliff Jones, an experienced rock-climber, is clearly able to see that a rope climb up this particular cliff face would be impossible. Jones attempts the climb in any case and fails. He could hardly claim that any detriment he might thereby suffer was attributable to MacDonald's failure not to cause preventable harm. For Jones was in at least as good a position as MacDonald to prevent the harm he suffered.

Significantly, in both Drennan and Northwestern the subcontractors were the only parties practically able to prevent the general contractors suffering harm from their reliance. As Bishop highlights in relation to this type of case: "A general contractor usually does not have the in-house expertise to price accurately all the various parts of the work relating to specialized trades."[609] That is, it is usually the subcontractor who has control of the estimating process and of the relevant information: information the reliability of which will determine the likelihood of harm to the general contractor. It is therefore also the subcontractor who may, or may not, have failed in his duty not to cause preventable harm by failing to take reasonable steps to ensure the reliability of the assumptions he induces in the general contractor. If he has failed to observe those duties then there is good *prima facie* reason for requiring the subcontractor to compensate the general contractor's detriment in relying upon the induced assumption.

Of course, the subcontractor will not always have failed in keeping his duty not to cause preventable harm. The general contractor may himself have caused his own harm. In Robert Gordon and MacIsaac the general contractors were at least as well placed to prevent the relevant harm as were the subcontractors. The general contractors in these cases were possessed of sufficient information to know that reliance would be detrimental and yet went ahead and relied upon the induced assumption in any case. It would be odd for a general contractor to claim that he had suffered as a result of a subcontractor's failure not to cause preventable harm when he, himself, was as in just as strong a

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609 Bishop, D.H., "The Subcontractor's Bid: An Option Contract Arising Through Promissory Estoppel", (1985) 34 Emory Law Journal 421 at p.430

position to prevent the relevant harm and failed to do so. Thus the duty to take preventable harm explains why in some firm offer situations the duty to take reasonable steps to ensure the reliability of induced assumptions dictates that the subcontractor should be liable while in others it does not.

The second and third duties underpinning the duty to take reasonable steps to ensure the reliability of induced assumptions are the duties to promote trust and co-operation and the duty to facilitate the processes of communication. Once again Northwestern and Drennan can be distinguished from Robert Gordon and MacIsaac when those cases are considered in the light of these duties. Once again the duty to take reasonable steps to ensure the reliability of induced assumptions can be seen as giving effect to these underpinning duties in discriminating between situations in which liability ought and ought not to be imposed upon the subcontractor.

The context of the firm offer cases - a context which, although commercial, sees the general contractor placed in a position of particular vulnerability - must suggest that the duty to promote trust and co-operation and the duty to facilitate communication should apply with some stringency. The whole bidding process depends upon a relatively high level of trust and good communication. Thus in Northwestern and Drennan in which there would be no countervailing considerations, these duties may be seen as applying with full force and as supporting liability in Australian estoppel.

In Robert Gordon and Northwestern, however, I would argue that these duties would not apply with the same stringency with which they would apply in the other two cases. This is because trust and communication are co-operative activities: it is impossible to have trust or good communication without the involvement of more than one party. If, therefore, a general contractor receiving bids has himself failed to take seriously his duties to uphold trust and good communication, then he will be less able to complain that the subcontractor has failed in those duties. And that was precisely the case in Robert

Gordon and MacIsaac. In Robert Gordon there was patent confusion in the information that the general contractors had received which their engineer took no steps to clarify. Similarly, the detriment which the general contractors suffered was largely as a result of their failure to ask the university to reconsider their bid, an option which was clearly open. Rather than working for the co-operative benefit of both parties, the general contractors were looking to profit from their breakdown in communications. In MacIsaac the breakdown in communications which occurred seems not to have resulted from any failure to take reasonable steps to ensure the reliability of induced assumptions on the subcontractor's part but from speed with which the general contractors' engineer insisted that the bid be communicated. Therefore on the basis of these two duties - the duty to uphold trust and the duty to facilitate communication - the facts of Northwestern and Drennan are again distinguishable from those in Robert Gordon and MacIsaac.

From the preceding discussion it will be clear that the three duties underpinning the duty to take reasonable steps to ensure the reliability of induced assumptions, provide ample justification for imposing liability in those case in which Australian estoppel would dictate that liability would be imposed, and for not imposing liability in those situations in which it would dictate that liability not be imposed. It can therefore be seen why, in the context of the firm offer problem, Australian estoppel might provide a flexible alternative to the "contract/no-contract" solution offered by antecedent Anglo-Australian law.

(b) The "bid shopping" problem

It has been argued by some writers, however, that the law ought to be more reluctant to compensate a general contractor for his reliance upon a subcontractor's firm offer because to offer such compensation would be to encourage "bid shopping".[610] "Bid

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610 Not surprisingly, this view has been particularly strongly expressed by subcontractors, see Lewis, R., "Contracts

shopping" is a practice whereby a general contractor will try to obtain lower bids for the subcontracts involved in a project even after he has been awarded the head contract. This practice has seriously detrimental effects upon the bidding process.[611] It also gives rise to the reciprocity problem that, although the subcontractor may be bound to protect the general contractor's reliance, the general contractor is free to "shop" for a better deal. Although without explaining why, the decision in Drennan provides that:

> ... a general contractor is not free to delay acceptance after he has been awarded the general contract in the hope of getting a better price.[612]

The question arises as to whether this would also be true under Australian estoppel or whether the application of this doctrine to firm offer situations would necessarily encourage bid shopping.

I would argue that there are at least three ways in which the application of Australian estoppel to protect general contractors could avoid this danger. None of these ways could entirely rule out bid shopping but each could operate as a powerful disincentive to engaging in it. First, where a general contractor has engaged in bid shopping after the award of the head contract, it might be questioned whether he had relied on the subcontractor's specific bid in the preparation of the estimate for the head contract. Rather, he might be said to have relied upon his own belief that he could negotiate a subcontract at the given price or lower. Bid shopping might be taken as evidence rebutting the presumption of reliance. Second, given that the equitable defences are available against a claim in Australian estoppel, bid shopping may be taken as evincing

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Between Businessmen". For a more general discussion of this problem see Lederman, L., "Once Around the Flag Pole: Construction Bidding and Contracts at Formation", (1964) 39 New York University Law Review 816; Gaides, J.B., "The "Firm Offer" Problem in Construction Bids and the Need for Promissory Estoppel", (1968) 10 William & Mary Law Review 212; Schriber. K.L., "The Problem of Offer and Acceptance in the General Contractor-Subcontractor Relationship", (1968) 37 University of Cincinnati Law Review 798; Lambert, P.T., "Bid Shopping and Peddling in the Construction Industry", (1970) 18 University of California, Los Aangeles, Law Review 389; Oertli. R.A., "Construction Bidding Problem: Is there a Solution Fair to both the General Contractor and Subcontractor?" (1975) 19 St Louis University Law Journal 552. See also Llewellyn, K., "What Price Contract? An Essay in Perspective", (1931) 40 Yale Law Journal 704; Closen, M.L. and Weiland, D.G. "The Construction Bidding Cases", (1980) 13 John Marshall Law Review 565.

611 See Lambert, T.P., "Bid Shopping and Peddling"

612 Drennan at p.760 per Traynor J.

the general contractor's present fixed intention to release his claim in Australian estoppel against the subcontractor. There is no reason why such a release ought not to be effective.[613] A general contractor might be less inclined to bid shop if he knew that he was thereby surrendering any claim that he might have against the subcontractor on whose offer he had relied.

The third way in which the application of Australian estoppel to protect general contractors could avoid the danger of bid shopping relates to a countervailing claim that could be brought by the subcontractor. In the usual subcontractor situation, the general contractor will at some point have encouraged the subcontractor whose bid he has used in the belief that, should the head contract be granted, the subcontractor will be given the work. Where this is in fact the case, and where the subcontractor has arranged his affairs on the basis of this assumption but it subsequently proves unjustified, there is no reason why the subcontractor will not himself have a countervailing claim in Australian estoppel. This is how Lambert[614] has argued that the United States doctrine of promissory estoppel should operate to discourage bid shopping. He believes that the opposite responses to the bid shopping problem of always or never protecting the general contractor's reliance are both too inflexible. Rather, he argues that the bid shopping problem can in many cirucmstances be resolved by asking whether the subcontractor can show detrimental reliance which also merits protection.

Of course, there is a way in which the bid shopping problem could be solved more simply. It would always be open to the courts to regard bid shopping as a type of "unclean hands" that could bar the general contractor from relief. This would be unlikely, however, given obvious difficulties in determing the sense in which the practice constitutes "legal" impropriety.[615]

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613 For a discussion of the defenc of release see Spence, M., "Equitable Defences".

614 Lambert, T.P., "Bid Shopping and Peddling"

615 Dering v Earl of Winchelsea (1787) 1 Cox 318 and see Spence, M., "Equitable Defences".

Nevertheless, the bid shopping problem is clearly not insurmountable. It ought not to be allowed to undermine the appropriate application of Australian estoppel to reliance by general contractors in the firm offer situation. The law could clearly respond more flexibly and fairly to the puzzle of firm offers if armed with the doctrine of Australian estoppel.

Chapter Nine:

Variations of Contract Unsupported by Consideration

We come to the third of the areas in which it is sought to demonstrate the usefulness of Australian estoppel. This chapter will involve a detailed examination of just two cases: the decision of the English Court of Appeal in Williams v Roffey Brothers & Nicholls Contractors Ltd[616] and the Australian estoppel decision of the Supreme Court of New South Wales in Citra Constructions Ltd v Allied Asphalt Co. Pty Ltd.[617] In the first section below the actual reasoning of Williams v Roffey will be assessed, and in the second section the potential application of Australian estoppel to the facts both of that case and Citra Constructions will be examined.

In Chapter Seven Australian estoppel was shown to provide a way of justifying the results actually obtained in a particular group of cases that would have been more satisfactory than the reasoning there employed. In Chapter Eight Australian estoppel was shown to provide an appropriate remedy in a type of case in which no remedy would have been available on the antecedent law. In this chapter we will examine Williams v Roffey to show that, had Australian estoppel been available as a pattern of legal reasoning, it would have enabled the court to assess the issues in the case in a more lucid manner than in fact it did and thereby to have arrived at a more satisfactory result. A consideration of Citra Constructions will be used to support this claim.

It may be thought anachronistic to consider Williams v Roffey in this context because it was a case decided long after the date fixed in this thesis for the assessment of the antecedent law. However, given that the case describes the approach to variations of contract most likely to compete for acceptance with Australian estoppel, it would be

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616 Williams v Roffey Brothers & Nicholls Contractors Ltd (1991) (hereafter "Williams v Roffey")

617 Citra Constructions Ltd v Allied Asphalt Co. Pty Ltd (1990) (hereafter "Citra Constructions")

inappropriate to exclude it from consideration. Williams v Roffey provides an alternative approach to an identified *lacuna* in the antecedent law just as, for example, unjust enrichment theorists have suggested alternative approaches to the problems of pre-contractual negotiations[618] and the battle of forms.[619]

(1) The Contractual Reasoning of Williams v Roffey

In Williams v Roffey a general contractor engaged subcontractors to undertake carpentry work on a block of 27 flats for £20,000. The agreed price was too low and the subcontractors failed to supervise their workmen adequately. As a result, the subcontractors were in financial difficulties and there was a danger that they might not complete the work. By the time work to the roof of the block of flats had been completed, some work had been done to all 27 flats and 9 flats had been substantially completed. The general contractor had made part payments totally £16,200. The general contractor was concerned that the head contract contained a penalty clause for late completion and agreed to pay the subcontractors an extra £10,300 at the rate of £575 for every completed flat. However, by the time eight more flats had been substantially completed, the general contractor had paid only an extra £1,500 and the subcontractors ceased work on the flats and brought an action in contract against the general contractor. The general contractor counter-claimed £18,121.46 for breach of the original agreement.

The trial judge found for the subcontractors and awarded them the sum of £3,500 computed in the following way. First he took a figure of £4,600 (8 x £575) for the completed flats, deducted an amount for defective and incomplete items, added a reasonable proportion of the £2,300 outstanding from the original contract sum and

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618 See above at p.183ff

619 See below at p.242ff

arrived at a subtotal of £5,000. He then deducted the £1,500 which the subcontractors been paid after the agreement in variation and awarded them £3,500.

The Court of Appeal affirmed the trial judge's decision, finding for the subcontractors on the basis that the agreement to pay the extra £10,300 was a contractual variation which the general contractor had broken. The difficulty with this argument was, of course, the issue of consideration. In return for the promised additional payments, the subcontractors had promised to do no more than they were already bound to do and, under the long-standing case of Stilk v Myrick,[620] a promise to perform an existing contractual duty does not amount to good consideration. The court overcame this obstacle with the concept of "practical benefit". It was said that although the subcontractors had undertaken to do no more than they were already bound to do, the general contractor had received a benefit greater than a simple promise to perform an existing duty. The general contractor had received the benefit of (i) ensuring that the subcontractors continued work, (ii) avoiding the penalty for delay and, (iii) avoiding the trouble and expense of engaging another subcontractor to complete the carpentry work.

This concept of "practical benefit" picks up on Corbin's frequently cited criticism of the pre-existing duty rule. Corbin asserts that it is either an error of fact or an error of logic to claim that a promise to perform a pre-existing duty does not constitute a benefit to the promisee:

> It is an error of fact to suppose that one gets no benefit when he gets only that to which he had an existing right. A bird in the hand is worth much more than a bird in the bush; and that is why the promisor bargains to pay more in order to get it. ... If it be granted that there [is] benefit ... in fact, but is asserted that there is no "legal benefit" ... then the error is one of logic. The addition of the adjective "legal" simply begs the question. It is merely saying that performance of the duty is not a legally operative consideration because it is not a consideration that is legally operative. The question remains, Why should it not be legally operative, as in the case of other bargained-for equivalents?[621]

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620 Stilk v Myrick (1809)

621 Corbin, A.L., Corbin on Contracts vol. 1A (St Paul: West, 1963) at pp.108-109

I would argue, however, that Corbin's claim can be rebutted, that the concept of "practical benefit" is vacuous, and that Williams v Roffey ought not to have been decided on a contractual basis.

First, in a context such as Williams v Roffey the concept of the "bird in the hand" is misplaced. The party agreeing to the variation in such situations does not receive the "bird in the hand" of actual performance but rather an increased chance that performance to which he is already entitled may eventually be effected. There is no guarantee, of course, that performance will be effected on the varied terms any more than it was on the original terms. If the "practical benefit" the party agreeing to the variation is supposed to be receiving is avoidance of litigation, there is no way of guaranteeing at the time of the modification that he will in fact receive such a benefit. At most he is receiving a calculated improvement in the chance that a promise which he is already entitled to have performed at a lower price will in fact be performed at a higher price and that, perhaps, litigation will be thereby avoided. Seen in these terms it becomes difficult to understand how he is receiving any benefit at all.[622]

This difficulty with the concept of practical benefit also highlights a second problem with the contractual analysis of the Williams v Roffey situation. That situation is not one involving the making of new promises; especially not new "bargain" promises of the type which contract enforces.[623] Rather it is a situation in which one party is granting the other some kind of concession: excusing the other party's inability to perform his contractual obligations on a particular basis.[624] If for some reason the concession were

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622 It is to be noted that the courts have, since Williams v Roffey, been reluctant to extend the application of the concept of practical benefit. See Re Selectmove Ltd [1995] 1 W.L.R. 474

623 For a justification of the enforcement of "bargain" promises only see Patterson, E. W., "An Apology for Consideration" (1958) 58 Columbia Law Review 929

624 As Lücke writes:

> Arrangements which seel to modify a contractual performance are often arrived at in circumstances which indicate that they are not intended to be promissory and contractual but merely to be concessions by one of the parties in recognition of some difficulty faced by the other. Such "forbearance arrangements" cannot be the equivalent of contractual variations of the terms, but they are not entirely without some effect both at common law and in equity.
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> (Lücke, H.K., "Non-Contractual Arrangements for the Modification of Performance: Forbearance, Waiver and Equitable Estoppel", (1991) 21 University of Western Australia Law Review 149 at p.181)

to prove unjustified or unnecessary, it would arguably be more just that the original arrangements should prevail.

However, if a contractual analysis is applied to these cases, the variation takes effect as a binding promise. Accordingly, if the purported variation is given contractual effect it may be binding in contexts in which after variation the party requesting the variation nevertheless completes only part of an arranged project. Imagine that in Williams v Roffey certain of the flats had been completed and then the subcontractors' company had gone into liquidation. Assuming that the obligation to complete each flat was a severable one, the general contractor might still have been bound to pay the higher price for the completed flats even though there was arguably no longer any "benefit" to him. Similarly, the varied terms might be binding in situations in which the whole basis on which the concession was granted disappears. Imagine that in Williams v Roffey the flats were completed without any additional payments having been made at all and the subcontractors were found to have prospered from their work and their company not to have gone into liquidation. Imagine further that their suggestion that the company would go liquidation had involved no type of misrepresentation. The general contractor might still have been bound to pay the higher price even though the whole basis upon which he had granted the concessionary variation would have disappeared.[625] That such results would be unsatisfactory has been recognised by both the English and Ontario Law Reform Commissions.[626]

Indeed, this problem with a contractual approach to the facts of Williams v Roffey may be tacitly acknowledged in the case itself. Chen-Wishart points out that the £3,500 awarded by the court seems much closer to an estimate of the subcontractors' reliance loss than their expectation loss.[627] There would seem to be a reluctance in the case to grant a full contractual remedy in the expectation measure. Perhaps this is because of the

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625 This is the fact situation of Citra Constructions. See below at p.231

626 Law Revision Committee, Sixth Interim Report para. 33-36, 50(3) and 50(4) but particularly 35 and 50(3); Ontario Law Reform Commission, Report on the Amendment of the Law of Contract (1987) at p.12.

627 Chen-Wishart, M., "Consideration, Practical Benefit and the Emperor's New Clothes" in J. Beatson and D. Friedmann (eds), Good Faith and Fault in the Law of Contract (Oxford: Clarendon, 1995), p.123 at p.134

unjust effect of making a concession which is granted on a particular basis binding whether or not that basis proves justified.

Of course, to circumvent this second problem with a contractual approach to the facts in Williams v Roffey, it would be open to a court to infer that the variation constituted a contract conditional upon the completion of the work and the continued validity of the grounds upon which the variation was granted. It is submitted, however, that this would usually be a matter of implication involving quite a degree of artificiality. The parties will not usually have reached any kind of consensus as to what would happen in either of these circumstances. Thus a better approach would be to say that, where parties do not ensure that the variations to which they agree take effect as binding contracts by providing additional consideration, they ought to be treated as mere concessions not giving rise to contractual liability. If the party who has relied upon the concession is to claim relief, it must be relief of a different kind.

A final difficulty with a contractual analysis of Williams v Roffey concerns the interrelation of the pre-existing duty rule and the doctrines of frustration and economic duress. Under the doctrine of frustration, the fact that a contractual obligation becomes more onerous does not excuse performance[628] even if the obligation becomes onerous to the point at which the party of whom performance is required is in danger of bankruptcy. This leads Halson to ask why, in a context such a Williams v Roffey, the "risks" of underpricing or inadequate supervision should not similarly be left with the subcontractor. He answers this question by asserting that in this context the "risks" have been "shifted" by the "freely negotiated modification".[629] The fact that the modification is "freely negotiated" is seen as guaranteed by the modern law of economic duress, which, it is said, guards against the possibility that the party requesting the variation might obtain it by unfairly threatening non-performance.[630] The importance of

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628 Davis Contractors Ltd v Fareham Urban District Council [1956] A.C. 696

629 Halson, R., "Sailors, Sub-Contractors and Consideration", (1990) 106 Law Quarterly Review 183 at p.185

630 On the impact of this idea on the orthodox law see Reiter, B.J., "Courts, Consideration and Common Sense"; Patterson, E.W., "An Apology for Consideration" at pp.936-938.

economic duress is therefore stressed in Williams v Roffey and the doctrine is often seen as obviating much of the need for the pre-existing duty rule.[631]

It is to be questioned, however, whether the doctrine of economic duress is an appropriate tool for determining which particular variations should attract legal consequences and which should not.

First, the doctrine of economic duress will probably only apply in a limited number of purported variation cases. The law of economic duress is in a state of development. In England and a majority of the Australian jurisdictions, the doctrine will only apply where there has been:

> ... some factor "which could in law be regarded as a coercion of his will so as to vitiate consent" ... In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have any alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. ... It must be shown that the payment made or the contract entered into was not a voluntary act.[632]

This position has been much criticised[633] and in New South Wales the doctrine is of slightly broader application. It will apply wherever "any applied pressure induced the victim to enter into into the contract and ... that pressure went beyond what the law is prepared to countenance as legitimate."[634] However even in New South Wales "overwhelming pressure ... will not necessarily constitute economic duress".[635] At least

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631 For example: Williams v Roffey at pp.1163 and 1170; Chen-Wishart, M., "The Enforceability of Additional Contractual Promises: A Question of Consideration?" (1991) New Zealand Universities Law Review 271 at pp.279-280. Fleming suggests that a modification which was not obtained by duress might nevertheless be unenforceable under Williams v Roffey as being involuntary. However, he does not explain the doctrinal basis of this argument and it seems difficult to support, see Fleming, D., "Contract - Consideration - Promise to Perform Existing Duty Owed to Promisee", (1990) 49 Cambridge Law Journal 204.

632 Pao On v Lau Yiu Long [1980] A.C. 614 at pp.635-636

633 For debate as to the appropriateness of the concept of the "overborne will", see Atiyah, P.S., "Economic Duress and the Overborne Will", (1982) 98 Law Quarterly Review 197; Tiplady, D., "Concepts of Duress", (1983) 99 Law Quarterly Review 188; Tiplady, D., "Duress and the Overborne Will Again", (1983) 99 Law Quarterly Review 353.

634 Crescendo Managament Pty Ltd v Westpac Banking Corporation (1989) 19 N.S.W.L.R. 40 at p.46 per McHugh J.A.

635 Ibid at p.46

under the first of these approaches to economic duress, and perhaps also under the second, duress will often be very difficult to prove in the Williams v Roffey situation.[636] The party agreeing to the variation will almost always have had the alternative course of pursuing remedies on the original contract rather than agreeing to the modification. Parties to contractual variations will often have been independently advised. In Williams v Roffey itself there was evidence that the general contractor's own surveyor was the first to suggest the extra payment.[637] In circumstances such as these it will be hard to demonstrate that the party agreeing to the modification was the subject of duress: that he was not merely "acting under great ... commercial pressure, and not anything which in law could be regarded as a coercion of his will so as to vitiate consent"[638] or, perhaps, as "pressure ... beyond what the law is prepared to countenance." [639]

Indeed, take the following example given by Corbin.[640] A contractor purposely bids low in order to get a contract and then refuses to perform after it is too late to obtain another contract without loss and inconvenience, so the party to whom he has submitted his bid agrees to a price variation. It is unlikely that a court applying the now most common understanding of economic duress would find that the will of the party who has agreed to the variation would be sufficiently overborne as to amount to economic duress. The prospect of "loss and inconvenience" is not generally such as to overbear the will.

Second, and more important than the fact that economic duress will often be difficult to prove in this context, is the fact that it is by nature an inappropriate doctrine to apply here. Economic duress will only be found in a limited range of circumstances because

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636 See Brown, I. and Chandler, T., "Consideration and Contract Modification" (1990) 54 Conveyancer and Property Lawyer 209 at p.213; Adams, J.N. and Brownsword, R., "Contract, Consideration and the Critical Path", (1990) 53 Modern Law Review 536 at p.541.

637 Williams v Roffey at p.1170 per Purchas L.J.

638 The Siboen and The Sibotre [1976] 1 Lloyd's Rep. 293 at p.336. See, however, B & S Contracts & Design Ltd v Victor Green Publications Ltd [1984] I.C.R. 419 and Atlas Express Ltd v Kafco (Importers & Distributors) Ltd [1989] Q.B. 467.

639 Crescendo Management Pty Ltd v Westpac Banking Corporation (1988)

640 Corbin, A.L., Contracts at pp.105-106

the courts are rightly wary of undoing contractual arrangements in which each party has received some real benefit: of undoing what the law regards as a bargain. There will be many situations in which (i) the duress appropriately required to undo a bargain promise will not have affected a purported variation, and yet (ii) it would be wrong to say that a variation which was conceded without any benefit to the granting party was a "freely negotiated modification" of the type that Halson claims justifies the transfer of risks assumed under the original contract. It is appropriate to require that a concession be more freely made than a bargain promise if it is to give rise to legal liability.

Indeed, the United States law in this area seems to accept this point. While under both the RESTATEMENT (SECOND) OF CONTRACTS[641] and the UNIFORM COMMERCIAL CODE[642] an agreement modifying a contract is valid without consideration, it is only valid if it is "fair and equitable"; which requirement, the commentators point out, goes beyond requiring absence of coercion to requiring an "objectively demonstrable reason for seeking a modification."[643] The United States law appreciates that enforcing a gratuitous concession will only be just where the concession is made even more freely than bargain promises must be made under the law of economic duress.

Accordingly, it is inappropriate to enforce as contracts variations supported only by a promise to perform a pre-existing contractual duty, and leave the work of undoing unfair variations to the doctrine of economic duress. That doctrine is, and ought to remain, far too blunt a tool to determine which of such variations ought, and which ought not, to give rise to legal liability.

On the basis of this and the preceding two objections it is submitted that a contractual approach to the facts of cases such as Williams v Roffey ought not to be adopted. This conclusion might further be underscored by the seeming injustice of the final outcome of

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641 RESTATEMENT (SECOND) OF CONTRACTS §89 (1979)

642 UNIFORM COMMERCIAL CODE §2-209 (1978)

643 See RESTATEMENT (SECOND) OF CONTRACTS §89 (1979) Comments at p.238 and UNIFORM COMMERCIAL CODE §2-209 (1978) Comments at p.58

that case. This was a situation in which whatever loss had occurred was attributable to the subcontractors' underpricing and poor management. Yet they alone was protected by the decision of the court. The general contractor's quite substantial losses were left unremedied.

A more appropriate approach to this case would arguably have recognised the general contractor's original contractual claim first and then examined the facts to determine whether there was some other basis on which the general contractor was liable to the subcontractors. If so, then those two competing claims could be off-set. We turn now to examine whether an approach to the facts of Williams v Roffey on the basis of Australian estoppel might not have allowed a court to deal with these facts in this way and thereby to have achieved a more satisfactory result.[644]

(2) Australian Estoppel, Williams v Roffey and Citra Constructions

In a fact situation such as that in Williams v Roffey the party requesting the variation is often faced with a very difficult choice: should he break the contract or should he continue with performance? It will often be difficult to tell which of these two options will be the most beneficial, and the party making the decision is in a very vulnerable position as he seeks to weigh the probabilities.

Because of this vulnerability, the party of whom the variation is requested must owe the party requesting the variation some type of duty to take reasonable steps to ensure the reliability of the assumptions he induces regarding the future of their relationship. In the context, the party of whom the variation is requested has considerable opportunity to cause the requesting party preventable harm. The party requesting the variation is

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644 To turn from consideration based on practical benefit to Australian estoppel is to take a path that the Australian courts are very likely to pursue. Already one court has suggested that Ward v Byham [1956] 1 W.L.R.496, which the English Court of Appeal relied upon heavily in Williams v Roffey to establish the concept of practical benefit, ought to be re-interpreted as an estoppel case (Sheahan v Workers' Rehabilitation and Compensation Corp (1991) 56 S.A.S.R. 193 at pp.203-204).

particularly dependent upon the other party's co-operation and commitment to good communication. It is therefore appropriate to determine whether, and how, the doctrine of Australian estoppel might apply to protect the party requesting the variation in fact situations such as those in William v Roffey and the very similar Citra Constructions. This is an issue that is logically separate from the issue of whether the party requesting the variation owes contractual liabilities to the party acceding to the variation.

The facts of Williams v Roffey have already been outlined. In Citra Constructions a contract provided *inter alia* for the supply of materials from overseas. No provision was made regarding the impact of currency fluctuations upon the prices to be paid for those goods in Australian dollars. It was claimed that the company supplying the materials would face liquidiation unless the other company agreed to absorb any losses due to the devaluation of the Australian dollar and so a variation of the contract in these terms was effected. There was no suggestion that those requesting the variation were guilty of any type of misreprentation or economic duress. The variation was held to be unenforceable for want of consideration and Australian estoppel was held not to apply.

Considering these two cases on the basis of Australian estoppel, a judge would first have to determine what the relevant induced assumption was and whether the party requesting the variation had acted in reliance upon it. In each case the relevant assumption was that the party acceding to the variation would pay more for goods and services than had been agreed. In each case the party requesting the variation had acted in reliance upon that induced assumption by continuing performance of the original contractual obligation.

At this point, the difficult issue of detriment would arise. "Detriment" in these circumstances would have to be that the party relying upon the assumption that a higher price would be paid would be worse off if that assumption proved unjustified than that party would have been had it never been induced.

In Citra Constructions it was this issue of detriment which prevented the application of Australian estoppel. The suppliers had not suffered detriment by relying upon the induced assumption, they had prospered by that reliance. All the relevant overseas materials had been purchased and the contract completed. Not a cent of the devaluation claim had been paid and the suppliers had greatly profited from continued performance. There was therefore nothing which the inducing party could be called upon to compensate.

It is important to underscore how much more satisfactory this result in Citra Constructions was than a result giving contractual force to the purported variation would have been. The purchasers acceded to the variation only because they believed that the suppliers were about to "go broke". The suppliers did not "go broke" but sought to rely upon a concession made in circumstances in which it had seemed as if they may "go broke" to gain extra profit from the performance of the original contract. A contractual approach would have allowed the suppliers to recover this windfall profit; a denial of a contractual remedy and an examination of the suppliers' position on the basis of Australian estoppel would have provided a more flexible solution on the facts.

For a judge deciding Williams v Roffey on the basis of Australian estoppel, detriment would prove a more difficult issue. Had the general contractor in that case not induced the assumption that he would pay more for the carpentry work than he was bound to, the subcontractors might have decided to breach the contract. Had they done so, they would presumably have been liable for breach at the measure of the difference between the contract price and the cost of hiring someone else to do the work. Moreover, had the general contractor not been able to find anyone else to do the work within a sufficiently short time period, the subcontractors may well have been liable for extensive damages because of the general contractor's liability to pay a penalty under the head contract. On this set of possibilities the subcontractors might not be able to show that they would have been better off had the assumption never been induced than they would be were it to

prove unreliable. There would simply have been a delay in their accepting the consequences of their underpricing and poor staff management.

Alternatively, the subcontractors might be able to show that they could not have borne the expense of continuing with the contract at the original contract price but that, had they abandoned the contract, they would have been able to acquire sufficiently remunerative work elsewhere to satisfy the general contractor's claim and thereby have been better off. Or perhaps they could show that they could not have borne the expense of continuing with the contract at the original contract price but that, because of some peculiarity of his situation, the general contractor's damages would not have been as great as their costs in providing the service. On either of these sets of possibilities the subcontractors could establish detriment.

The detriment issue was not discussed in Williams v Roffey because, to the regret of at least two of the judges,[645] arguments in estoppel were neither heard in the first instance court nor developed in the Court of Appeal. However, had the detriment issue been fully canvassed, the court might well have been less eager to compensate a promisee who had neither rendered any real additional benefit to the promisor by way of bargain, nor suffered any real loss because of his reliance. Interestingly, Purchas L.J. is the only judge to mention the issue of detriment[646] and he seems the most reluctant to enforce the variation. What is clear is that, had the court not chosen to mask their reasoning in contractual language, but rather acknowledged that no additional bargain was achieved and then examined alternative bases for compensation such as those provided by estoppel, the reasoning of the court would have been more lucid.

I shall assume, however, that a court deciding Williams v Roffey on the basis of Australian estoppel would be able to find detriment if they took evidence concerning the issue. The question then remains whether Australian estoppel would justify the award

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645 Williams v Roffey at p.1163 per Glidewell L.J. and at p.1167 per Russell L.J.

646 Ibid at p.1172

made in the decision. Would it be unconscionable for the general contractor not to remedy the detriment suffered by the subcontractors by reason of their reliance upon the induced assumption?

Again this is an issue which it is not at all easy to determine on the facts contained in the report. Factors seeming to lead towards a finding of unconscionability are that the assumption was induced by express representation and that it was induced a context of co-operation, at least to the extent that both parties had an interest in seeing the subcontractors complete their work. Also pointing towards a finding of unconscionability is the issue of the relative knowledge of the parties. It is clear that the general contractor was aware that the price for which the subcontractors had agreed to do the work was far too low. Accordingly, he might also be taken to have known that, if the subcontractors relied on the induced assumption that a higher price would be paid, they would thereby suffer damage. Finally, the general contractor took no steps to ensure that the subcontractors did not suffer harm by their reliance.

Factors seeming to lead against a finding of unconscionability are that the representation was one concerning intention and that the parties must be taken to have had relatively equivalent interest in the relevant activities in reliance. After all, the subcontractors must be taken to have had an interest in fulfilling their contractual obligations. Also counting against a finding of unconscionability would be the commercial context of the relevant inducement.

If on balancing these sets of factors the court were to determine that it would be unconscionable for the general contractor not to remedy the detriment which the subcontractors might have suffered by their reliance, it would make an award to compensate that reliance. Any damages awarded would then have to be set off against the general contractor's claim for breach of contract. This is a far more satisfactory way of dealing with the ineffective variation of contract problem than is the contractual approach adopted in Williams v Roffey because it isolates the two separate complaints that the

parties in this case might justifiably have had against each other. It also provides a mechanism for resolving and comparing each of those complaints.

While there is insufficient evidence in the report to determine how the issues of detriment and unconscionability would be determined by a court applying Australian estoppel to the facts of Williams v Roffey, it ought to be clear from the preceding discussion that the application of this doctrine would lead to a more lucid analysis of the facts of the case.[647] For this reason it would also presumably lead to a more satisfactory decision than contractual reasoning was able to do.

In this sense Australian estoppel may be seen as able to fill an important *lacuna* in the antecedent Anglo-Australian law regarding variations of contract ineffective for want of consideration. In cases in which no genuine bargain promise has been made of the type which contract enforces, there is no reason to impose liability in contract. There may well, however, still be a justification for imposing liability upon the party who has agreed to the variation; in particular because he has broken his duty to take reasonable steps to ensure the reliability of induced assumptions. Australian estoppel can enable a court to determine when this might be the case and to award a remedy accordingly. It thereby provides a more flexible and just solution to the problem of variations of contract ineffective for want of consideration than the simple contract/no-contract choice.

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647 As Halyk puts it:

> If the courts were to approach future cases similar to Roffey through the doctrine of promissory estoppel, judges would be free to articulate the real reasons underlying their decision ... rather than grasping onto unpredictable and unprincipled notions of practical benefits accruing to the promisor. The judgments of the courts would send a clear signal saying that unconscionable conduct in commercial relations is not to be tolerated.
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> (Halyk, D., "Consideration, Practical Benefits and Promissory Estoppel", (1991) 53 Saskatchewan Law Review 393 at p.414)

Chapter Ten:

The Battle of Forms

I now come to the fourth and final area chosen in Part One as ripe for the application of Australian estoppel: the "battle of forms".

As Atiyah points out, the battle of forms "which must be extremely common in practice, has rarely been litigated in England."[648] Almost all discussion of the battle of forms both in England and Australia has focussed on just one decision, Butler Machine Tool Co. Ltd v Ex-Cell-O Corp. (England) Ltd,[649] which is the only appellate decision dealing with the problem. This chapter will therefore also focus on that decision.

In Butler Machine Tool the sellers of a certain machine offered to deliver it to the buyers ten months from the date of the offer for a provisional price of £75,535. The offer came with a particular set of terms including a price variation clause. Under the price variation clause, the final cost of the machine was to be determined at the time of delivery.

The prospective buyers of the machine wrote accepting the sellers' offer but in terms which "could not be reconciled in any way" with those contained in the sellers' quotation.[650] Most importantly, the purported acceptance contained no price variation

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648 Atiyah, P.S., An Introduction to the Law of Contract 4th edn (Oxford: Clarendon Press, 1989). Of course, it may be that battles of forms do, in fact, occur less frequently in practice than the academic literature assumes. For example, the corporate counsel for I.B.M. Canada has claimed that, although his company entered into 18,000 contracts a year potentially subject to a battle of forms between 1963 and 1980, there was in that period "no single instance where a customer ... tried to repudiate a deal or ... resisted a claim for payment on the grounds that there was no valid contract or the contract contained contradictory terms" (Murray, G., "A Corporate Counsel's Perspective of the "Battle of the Forms"", (1980) 4 Canadian Business Law Journal 290 at p.293).

649 Butler Machine Tool Co. Ltd v Ex-Cell-O Corp. (England) Ltd (1979) (hereafter "Butler Machine Tool") Other recent cases in the area include B.R.S. v Arthur Crutchley & Co. [1968] 1 All E.R. 811; O.T.M. Ltd v Hydranautics [1981] 2 Lloyd's Rep. 211; Uniroyal Ltd v Miller & Co. Ltd [1985] S.L.T. 101; Sauter Automation Ltd v Goodman (Mechanical Services) Ltd (1986) 34 Build. L.R. 81; Chichester Joinery Ltd v John Mowlem & Co. plc (1987) 42 Build. L.R. 100; Buchanan v Brook Walker & Co. Ltd [1988] N.I. 116; Rutterford Ltd v Allied Breweries [1990] S.C.L.R. 186

650 Butler Machine Tool at p.405 per Lawton L.J.

clause; but there were also other material differences between the two sets of terms. For example, the purported acceptance:

(i) provided for installation as an additional item at a cost of £3,100,

(ii) provided for delivery within ten to eleven months, while the sellers' standard terms provided for delivery in just ten,

(iii) stipulated that the price of the goods included the cost of delivery to the buyers' premises while the sellers' standard terms had allocated this cost to the buyers,

(iv) provided that the buyers would be entitled to cancel for delay in delivery while the sellers' standard terms had expressly provided that no liability for delay would be accepted and that cancellation of the order could only be effected with the express consent of the sellers, and

(v) provided that the buyers would be entitled to reject the goods if they were found to be faulty, while this type of liability had been expressly excluded under the sellers' standard terms.

The purported acceptance had a tear-off acknowledgment for signature and return. The sellers returned the slip with a covering letter stating that delivery was to be "in accordance with [their] revised quotation ... for delivery within 10/11 months."

The machine was ready for delivery five months late, and the buyers had to reorganise their production schedule. Accordingly, they were unable to take delivery of the machine until seven months after the anticipated delivery date. The sellers sought to rely on the price variation clause contained in their original offer to charge a price commensurate with the value of the machine as at eighteen months after their original offer. The buyers argued that no price variation clause had been agreed and that the cost of the machine was £75,535. The sellers brought an action for £2,892 allegedly due under the price variation clause of the contract of sale.

Both the trial judge and Court of Appeal sought contractual solutions to this problem. The trial judge found for the sellers and awarded them the £2,892 they claimed. The Court of Appeal reversed this decision, finding that a contract had been concluded on the buyers' terms and that no additional payment was due.

However, the law of contract is not the only possible way of analysing the facts of Butler Machine Tool. Indeed, it is probably not the most satisfactory of the available alternatives. At least one author has argued that the problem might have been solved by application of the law of restitution.[651] And Australian estoppel would arguably have provided a better solution than either contract or restitution to the issues raised by this case. Australian estoppel is not the only doctrine to be applied in "battle of forms" cases, but it would be a useful addition to the armoury of the law in dealing with such situations and it could arguably justify the result achieved in Butler Machine Tool better than the reasoning in fact there employed.

The first section of this chapter will examine the contractual approach to the facts in Butler Machine Tool; the second will examine the restitutionary approach; and the third will consider how those facts might have been analysed on the basis of Australian estoppel.

(1) A Contractual Approach to the "Battle of Forms"

Although Lord Denning M.R. and Lawton and Bridge L.JJ. all agreed that the law of contract was sufficient to solve the dispute in Butler Machine Tool, their reasoning differed.

Lawton and Bridge L.JJ. utilised the traditional "mirror image" approach to contract formation. Because the buyers' purported acceptance was in terms different to those of

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651 McKendrick, E., "The Battle of the Forms"

the sellers' original offer, it took effect as a counter-offer and not an acceptance. This counter-offer was accepted by the sellers' return of the tear-off slip. The phrase "in accordance with our ... quotation" in the letter accompanying the slip was simply intended to confirm the price and the identity of the machine. It was not intended to propose that the other terms of the original offer be incorporated into the contract. A contract was therefore formed on the buyers' terms which did not include the price variation clause.

Lord Denning M.R. claimed that:

> [O]ur traditional analysis of offer, counter-offer, rejection, acceptance and so forth is out of date ... The better way is to look at all the documents passing between the parties - and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points - even though there may be differences between the forms and conditions printed on the back of them ... The terms and conditions of both parties are to be construed together. If they can be reconciled so as to give a harmonious result, all well and good. If the differences are irreconcilable - so that they are mutually contradictory - then the conflicting terms may have to be scrapped and replaced by a reasonable implication.[652]

Applying this approach to the facts, Lord Denning M.R. held that the tear-off slip and accompanying letter were decisive documents making it clear that the contract was being concluded on the buyers' terms.

There have been critics of each of these contractual approaches to the battle of forms.[653] It has been suggested that the traditional approach (i) encourages businessmen

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652 Butler Machine Tool at pp.404-405

653 As there have been of almost all contractual solutions to the battle of forms dilemma internationally. Thus the legislative answer to the problem contained in the U.S. UNIFORM COMMERCIAL CODE §2-207 (1978) has been subject to fierce criticism. For a summary of how this section operates and of recent criticisms of it, see Jacobs, E., "The Battle of the Forms: Standard Term Contracts in Comparative Perspective", (1985) 34 International and Comparative Law Quarterly 297 at pp.308-312; Murray, J.E., "The Chaos of the "Battle of the Forms": Solutions", (1986) 39 Vanderbilt Law Review 1307; Corneill, S., "On Ending the Battle of the Forms: Problems with Solutions", (1991-1992) 80 Kentucky Law Journal 815. Similarly, Article 19 of the United Nations Convention on Contracts for the International Sale of Goods, another attempt to deal with the problem contractually, has also had its critics. For a summary of how this article operates and of recent criticisms of it, see Vergne, F., "The "Battle of Forms" under the 1980 United Nations Convention on Contracts for the International Sale of Goods", (1985) 33 American Journal of Comparative Law 233; Moccia, C., "The United Nations Convention on Contracts for the International Sale of Goods and the "Battle of the Forms"" (1989-1990) 13 Fordham International Law Journal 649. If Von Mehren is right that all contractual solutions to the battle of forms involve a choice between competing notions of intention, then inevitably all such solutions are open to criticism (Von Mehren, A.T., "The "Battle of the Forms": A Comparative View" (1990) 38

to extend the exchange of standard forms in the hope of making the last offer, (ii) puts the party receiving the last offer in a no-win situation in that either there is no contract and he cannot complain of non-performance or there is a contract by reason of his accepting performance and that contract is necessarily on the other party's terms, and (iii) leaves reliance between the time of the last offer and the time of implied acceptance unprotected.[654] The approach of Lord Denning M.R. has been criticised because it has been said to provide too little guidance as to when agreement has been reached.[655] It would therefore "produce a flood of litigation."[656]

Less often criticised is the focus of all the judges in Butler Machine Tool on contract as providing a solution to the battle of forms dilemma. Where a contractual solution to cases such as Butler Machine Tool is readily available, it is generally agreed to be preferable.[657] Although I argue below that Australian estoppel is able to handle the claims of both parties to a battle of forms equitably, the only way in which adequately to protect the expectations of both parties is if a genuine *consensus ad idem* can be found.

What is unclear, however, is just what constitutes a genuine *consensus ad idem* and just how far the courts should go in attempting to discover it. For example, in Butler Machine Tool Bridge L.J. seemed to have little doubt that "there was a complete contract in existence and the parties were ad idem"[658] and Atiyah labels the suggestion there was no contract in this case as "absurd".[659] Yet, as even Atiyah admits, "[t]he truth is that the parties were never really agreed on the terms which were to govern the sale of the machine".[660] The sellers intended to sell a machine on terms which were "contrary in a number of vital respects" to the terms on which the buyers wished to purchase

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American Journal of Comparative Law 265 at p.294ff)

654 See Rawlings, R., "The Battle of Forms" (1979) 42 Modern Law Review 715 at p.717

655 Treitel, G.H., Contract at p.47

656 Rawlings, R., "The Battle of Forms" at p.720

657 See, McKendrick, E., "The Battle of the Forms" at p.220

658 Butler Machine Tool at p.407

659 Atiyah, P.S., Introduction at p.75

660 Ibid at p.73

it.[661] If the truth was that the parties had never reached agreement on the central terms of their arrangement, then it is difficult to see how contract was the appropriate basis of the buyers' liability and how contract could determine whether the price variation clause would apply. It is suggested that the court went too far in Butler Machine Tool in the search for a consensus position.

It is clear from Butler Machine Tool that the court thought that the operation of the price variation clause would have been unfair in the circumstances. Perhaps this was because the sellers had inconvenienced the buyers by delaying delivery and the court felt that any ambiguity in the agreement should be resolved in favour of the party who had not been at "fault". Perhaps it was because the buyers had never expressly agreed to the clause. It was clearly not because the parties had reached a concluded agreement on other terms. The court chose to give priority to the buyers' terms in a way which did not seem to represent any type of agreement on the facts. This is constructing rather than discovering *consensus ad idem*. There is the danger that any agreement constructed on such facts will be artificial in nature and arbitrary in its terms. An artificially constructed consensus, however determined, might give unjustifiable priority to the claims of one party over those of the other.

The critics of the different approaches to offer and acceptance in this case would be better to focus their attentions on the insistence on a contractual solution to the battle of forms itself. A contractual solution to the problem doubtless has its advantages, but on many sets of facts it is simply unavailable. Indeed, as the edition of Cheshire and Fifoot current at the time of Butler Machine Tool put it:

> In theory there is much to be said for the [no contract position] since there is neither agreement nor apparent agreement on the terms of the contract.[662]

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661 Butler Machine Tool at p.407 per Bridge L.J.

662 Furmston, M.P., Cheshire and Fifoot's Law of Contract 9th edn (London: Butterworths, 1976) at p.151. See also Adams, J., "The Battle of Forms" [1983] Journal of Business Law 297 at p.301 where that writer concludes:

> Often the fairest result, as in the Cleveland Bridge case, will be achieved by holding that neither party's terms apply, and by dealing with the apportionment of compensation under the principles of restitution and reliance.

(2) A Restitutionary Approach to the "Battle of Forms"

Largely because of these frequent difficulties with a contractual solution to the battle of forms, an approach to cases such as Butler Machine Tool based on the principle of restitution for unjust enrichment has recently been proposed. In his article, "The Battle of the Forms and the Law of Restitution", McKendrick writes:

> Professor Atiyah was wrong to state that it would have been "absurd" to suggest in a case such as Butler that no contract had been concluded between the parties ... [T]he fact situation in Butler can be accommodated within a restitutionary framework ...[663]

Applying this approach to the facts of Butler and assuming that no contract was agreed, McKendrick argues that the buyers were under an obligation to make restitution of the reasonable value of the machine to the sellers. This was because:

> ... it [was] clear that the buyers were enriched by the receipt of the machine tool because they requested it, that the enrichment was at the expense of the sellers and that it was not unjust that the buyers should recompense the sellers because when they requested the machine tool the buyers knew that the sellers were not doing the work gratuitously.[664]

The reasonable value of the machine would roughly have equated with the value determined under the price variation clause:

> [H]ad no contract been concluded in Butler and the case had been decided on restitutionary grounds, the case may have been decided in favour of the sellers because the benefit would have been valued at the date of delivery of the machine tool. At that date the market price of the machine tool must have been very close to the amount demanded by the sellers because the price variation clause and the sum demanded by the sellers was based upon "prices ruling upon date of delivery".[665]

Thus the sellers might have achieved by way of restitution what they were unable to achieve under the law of contract.

There would no doubt be many situations in which the law of restitution would be able to provide a satisfactory solution to a battle of forms. There are, however, serious

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663 McKendrick, E., "The Battle of the Forms" at p.220

664 Ibid at p.208

665 Ibid at p.219

difficulties both with this approach to the battle of forms in general and to the facts of Butler Machine Tool in particular.

First, McKendrick's approach is necessarily based on the concept of "free acceptance", a concept which is open to all the criticisms outlined in Chapter Seven.[666]

Second, McKendrick acknowledges that the restitutionary approach does not deal well with the claims of the buyers in Butler Machine Tool. The whole point of the case was to decide whether or not there was any ground for payment equivalent to that provided for by the price variation clause. Under a restitutionary analysis this would have become a matter of the time at which the so-called "benefit" was to be assessed. McKendrick argues that this was at the time when the machine was delivered because before that there had been no "benefit" to the buyers.[667] Therefore the suppliers could recover the additional payment. However, such an analysis would entirely ignore any expense which the buyers might have incurred by relying upon the assumption that they would have a machine of a particular type at a particular time in the organisation of their production schedule. It would allow the sellers to benefit from their own failure to comply with the original arrangements by arguing that the machine was of greater value to the buyers than it would have been at the earlier date. Indeed, not even on a contractual analysis did the trial judge in Butler Machine Tool award the sellers as much as they could receive under McKendrick's restitutionary reasoning. For the £2,892 that the trial judge awarded represented the increased price due under the variation clause at the time when the machine *ought to have been delivered*, rather than when it actually was. It is clear that under McKendrick's restitutionary reasoning the sellers' claims would be given unfair priority over those of the buyers.

Moreover, suppose that the production schedules of buyers in the position of the defendants in Butler Machine Tool gave them no choice but to accept a machine which

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666 See above at p.183ff

667 McKendrick, E., "The Battle of the Forms" at p.219

was of a different type to that which they had ordered and which would thereby cause them loss, but which was of the same realisable market value as the machine they had ordered. Their reliance upon the induced assumption that they would receive a machine of a particular type (for example, by not ordering the machine elsewhere or by not organising their production schedule differently earlier) would go without compensation if they were required to make restitution of the same value as the value of the machine that they had assumed they were getting.

McKendrick claims that this problem regarding the buyers' claims can be overcome by a sensitive analysis of the issue of "benefit" on the basis of "free acceptance": an analysis that can take into account the buyers' assumptions about the machine that was to be delivered in determining whether they have freely accepted the machine that was delivered.[668]

The difficulty with this approach, however, is that it uses "benefit" to determine a far broader range of issues than the concept can conceivably handle. McKendrick has an extremely long list of things a court should take into account in determining the value of a "benefit":

> In cases involving the battle of the forms the court must inevitably look to the standard terms issued by both parties. These will no doubt be detailed documents and there may even be agreement reached on certain points. Such documents will provide a useful foundation for the judgment of the court. Where these standard terms conflict then the court must look to other factors. Other factors relevant would be the market value of the goods or services, the terms of the request made by the buyer, the extent of the compliance with the request, the reason for any departure by the seller from the terms of the request and the reasons why no agreement had been reached on a particular point at issue (including an assessment of the "fault" of both parties and whether the risk of such eventuality had been accepted by either party).[669]

This is clearly not the allocation of liability on the basis of unjust enrichment. Liability might be imposed because one party has made a particular request; liability might be imposed because one party was at "fault" in the parties' failure to reach agreement; liability might be imposed because one party has accepted the risk of a certain

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668 Ibid at p.212

669 Ibid at p.219

eventuality. But it is unintelligible to say that these potential justifications for imposing liability - each of which would attract a different measure of relief - can simply be collapsed into the questions of whether one party has received a "benefit" of which he ought to make restitution and the value of that benefit.

This overworking of the concept of "benefit" and corresponding inability to provide a convincing way of taking into account the claims of *both* the parties to a battle of forms, is a strong reason for avoiding a restitutionary analysis in many battle of the forms situations. In particular, a restitutionary analysis of Butler Machine Tool shows how overworking the concept of "benefit" can collapse an important question which should be faced directly (i.e., "Ought the additional payment to be made and why?") into an enquiry which is not obviously related to any of the issues relevant to whether liability ought or ought not to arise (i.e., "At what time should benefit be assessed in restitutionary situations?").

A third difficulty with a restitutionary analysis of many of the battle of the forms cases is worth mentioning for the sake of completeness, though it is not actually an issue in Butler Machine Tool. In many such cases no benefit of any kind at all will have been conferred and yet relief may still be appropriate. In particular, there may be situations in which the duty to take reasonable steps to ensure the reliability of induced assumptions has been broken and yet no restitutionary remedy will be available. The law of restitution simply cannot cover the field of non-contractual battle of forms situations in which relief might arguably be appropriate.

Because of these three difficulties, therefore, a restitutionary analysis can be seen as useful in the context of some, but not all, battle of forms situations. In particular, it is unsatisfactory to handle the facts of Butler Machine Tool and any case where defective performance has been rendered which has caused loss to the party receiving it. We turn, therefore, to consider whether those facts might more adequately be handled by the application of Australian estoppel.

(3) Australian Estoppel and the "Battle of Forms"

In applying Australian estoppel to this case we will first deal with the sellers' claim for payment for the machine delivered to the buyers. We will then consider whether the buyers' might have counter-claimed for losses consequent upon late delivery.

(a) The Seller's Claim for Payment

A judge applying the doctrine of Australian estoppel to the facts of Butler Machine Tool would begin by asking what assumption the buyers induced upon which the sellers might be said to have relied.

In answering this question, three possibilities would present themselves. The buyers might have induced the assumption (i) that the sellers would be paid for the tool, (ii) that the sellers would be paid £57,535 for the tool or (iii) that the sellers would be paid a price for the tool determined by the price variation clause. However, the only assumption which could be found to have been induced here would arguably be that the sellers would be paid for the machine. It is clear that the sellers never held the assumption that they would be paid £57,535 and so the second of these assumptions is not relevant. As to the third, the sellers might argue that the buyers' silence induced in them the assumption that the buyers would pay a price for the machine determined according to the price variation clause. However, in the confusion of the terms of exchange it would be hard to demonstrate that the sellers' price expectations were caused by the buyers' silence and not, for example, by their confidence that their own standard terms of dealing would prevail. Thus the assumption that the buyers in Butler Machine Tool would seem to have induced in the sellers was simply that the sellers would be paid for the machine.

The next task facing a judge applying Australian estoppel to the facts of this case would be to identify how the sellers might be said to have relied upon the induced assumption

that they would be paid for the machine. Possible acts of reliance might be (i) the manufacture and delivery of the tool or, (ii) not selling the tool elsewhere at the date of delivery to obtain the price which would then have pertained. It is suggested, however, that the second of these possibilities could not be sustained on the evidence in the report. This is because in order to argue reliance in not selling the tool elsewhere at the date of delivery the sellers would have to show that they had an opportunity to sell it elsewhere and refrained from doing so. This seems unlikely given that the tool was specially manufactured to meet the requirements of the buyers.

Assuming, then, that the sellers relied upon the induced assumption that they would be paid for the machine tool by manufacturing and delivering the tool to the buyers, the question becomes whether it would be unconscionable for the buyers not to compensate any detriment that the sellers might have suffered by their reliance.

Factors pointing towards a finding of unconscionability in this context would be (i) that the assumption was induced by an express representation, (ii) that the relevant activities in reliance were strongly in the sellers' interest (indeed, that they enjoyed the fruits of those activities in reliance in the whatever use they were able to make of the tool) and (iii) that the buyers took no steps to ensure that the sellers did not suffer the preventable harm by the relevant activities in reliance.

Factors counting against a finding of unconscionability would be (i) that the representation was as to the future, (ii) the commercial context of the dealings and, (iii) that the sellers were in just as strong a position to assess the risk of detriment by reliance as were the buyers. The first of these factors might be somewhat discounted, however, because although the representation was as to intention, reliance on the assumption was intended to follow closely after its inducement. This was not a general statement of intention. It was a statement that was intended to be no less reliable than any statement of present fact. As to the second of these factors, the commercial context of the inducement has to be set against the fact that both parties believed that they were bound

by an existing contract. Thus although *legally* this was a context involving unrelated parties, *factually* it was a context involving a not inconsiderable degree of anticipated trust and co-operation.

Balancing these two sets of criteria, therefore, it would seem that a judge applying Australian estoppel to the facts of Butler Machine Tool would determine that it would be unconscionable for the buyer in this case not to remedy the sellers' reliance upon the induced assumption that he would be paid for the machine.

A final issue to be determined would be the measure of relief that would be required to compensate such reliance. As outlined in the preceding part, the goal of Australian estoppel remedies is to put the party relying upon the induced assumption into as near a position as he would have been had the assumption never been induced. For the sellers in Butler Machine Tool this would *prima facie* be the cost of making and delivering the machine. Of course, the sellers might always argue that this was a case in which the expectation measure of relief ought to be awarded to protect their reliance loss. If this argument was successful, the question would again arise of whether an award in the expectation measure would consist in an award of the provisional price of the machine or the price of the machine determined according to the price variation clause. However, this choice would not be as unrestrained as it could be on contractual reasoning because the court would be choosing between the two *quanta* on the specific basis of which might be said better to reflect the sellers' reliance loss. This is a question which it would be easier to answer *ex post facto* than the question of which *quantum* better reflected the parties' intentions.

(b) The Buyer's Potential Counter-Claim

As outlined above, one of the potential weaknesses of forced contractual and restitutionary solutions to the battle of forms cases is that they tend to give undue priority

to the claims of one party over those of the other. Remember that, although contract is the only way in which fully to compensate disappointed expectations, there is also a problem of the disparity with the which the claims of the buyers and sellers are treated if a *consensues ad idem* is artificially constructed. Forcing a contractual analysis of Butler Machine Tool might arguably have led the court to give undue priority to the buyers' terms. A restitutionary analysis of Butler Machine Tool might be seen as giving undue priority to the claims of the sellers.

The strength of an approach to these cases on the basis of Australian estoppel will often be that the claims of both parties can be considered in a more balanced way. The point that was made in relation to the case British Steel in Chapter 7 needs to be repeated here. In the situation of the battle of forms one party will often be claiming payment for the provision of some goods or services under the invalid contract. The other party may well believe that the provision of those goods or services was in some way defective. No mechanism for providing compensation outside contract can fulfil both parties' expectations: one for payment and the other for performance of a particular quality. Only the law of contract could provide such an outcome and only if a genuine *consensus ad idem* could be discovered. However, the doctrine of Australian estoppel could provide an outcome that could treat the two parties equitably. Both parties may well be able to bring claims to protect their reliance upon assumptions induced by the other. Provided the criteria for liability described in Part Two are satisfied, one party may be able to bring a claim to protect his reliance upon the induced assumption that he would be paid and the other could bring a claim to protect reliance upon the induced assumption that he would receive performance of a particular quality. Even if the claim of the party providing the goods or services were recognised on some other basis, such as the law of restitution, the possibility of a counter-claim in Australian estoppel would increase the equity with which the plaintiff and defendant in such cases would be treated. Forcing a contractual solution or providing for restitution for only one party in the battle of forms situation could rarely achieve so balanced a result.

It is important, therefore, to note that the buyers in Butler Machine Tool might have had a claim in Australian estoppel to set off against any which the sellers could establish. Argument for the most obvious of such claims would seem to run as follows: (i) the sellers induced in the buyers the assumption that the machine tool would be delivered on a particular date, (ii) the buyers relied upon that induced assumption by organising their production schedule in a particular way, (iii) this assumption proved unjustified, and (iv) it would be unconscionable for the sellers not to compensate the losses which the buyers suffered by relying upon the induced assumption.

Of course, the reported facts give far too little information to examine such a claim in any detail. The unconscionability question would be particularly difficult to determine on the state of the given facts. Nevertheless, it is important to recognise that such a claim might potentially exist. The existence of such a claim demonstrates how more equitable an approach to many of the battle of forms cases might be found in the law of Australian estoppel than by artifically constructing a contract or compensating just one party with the law of restitution. Once again this is an area in which the development of the doctrine of Australian estoppel is to be welcomed.

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It has been the is the argument of this part that the law relating to pre-contractual negotiations, firm offers to contract, variations of contract and the battle of forms might all be better handled by a law of obligations that included Australian estoppel than they could be by one that did not. That doctrine has been shown to be capable of filling four important *lacunae* in the antecedent law. Of course, Australian estoppel could not become the only doctrine important in the analysis of any of these areas, nor even the most important doctrine in each, but the law would be better equipped to handle them if the doctrine were to be developed in the form described in Part Two. And this list does not exhaust examples. Legal discourse in many different areas might be rendered more subtle (and its results no less certain) by the development of the doctrine.

EPILOGUE

We are at a new stage in the mapping of the law of civil obligations. Those areas of the map that deal with promissory and restitutionary obligation have been well worked over. A large part of the excitement of the recent Australian developments in estoppel is that, like recent developments in the law of negligent misstatement,[670] they draw attention to the need for obligations dealing with justified reliance, a much neglected part of the map.

Two tasks regarding the protection of justified reliance currently face the Australian courts. The first of these tasks is to find a satisfactory and principled structure for the doctrine of estoppel described in cases such as Waltons and Verwayen. This thesis has proposed a principled structure for the emergent doctrine of Australian estoppel. It has shown that, if that structure is adopted, the doctrine could equip the law better to handle many fact situations until recently unyielding to legal analysis. The second of these tasks facing the Australian courts is to identify how Australian estoppel is to fit with other doctrines that purport to protect justified reliance. This is a task that has been outside the scope of this thesis. But it is a task that is essential if the law of obligations is to develop in a coherent way. Australian estoppel is a doctrine of potentially broad application and it will be important to determine its limits in relation to doctrines such as negligent misstatement if the two are to co-exist. Only if the courts recognise and take up these two tasks will the law of civil obligations come more completely to be charted.

It is appropriate to conclude this thesis with a brief warning about an important and very real danger in the development of the doctrine of Australian estoppel. This danger is that the courts might begin to see Australian estoppel as a panacea for hard cases and be prepared to find detrimental reliance upon an induced assumption or unconscionability wherever doing so would allow them to remedy what is perceived as an "unjust" situation. This danger is acute because, as Stoljar points out, the courts have been

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670 See above at p.5

accustomed to think of estoppel as a "stand-by"[671] doctrine, usefully invoked in deserving cases when the courts are baffled as to how to provide a remedy.

If Australian estoppel is to take on a major rôle in the protection of justified reliance in the way envisaged by this thesis, this danger will have to be recognised and this attitude to the doctrine will have to be abandoned. The elements of the doctrine expounded in this thesis are carefully proscribed. If the courts do not respect the need for proof of those elements, then the doctrine could become a recipe for chaos. For example, there is always the danger that the courts could "uncover" induced assumptions retrospectively where to do so would allow them to offer relief. Similarly, there is always the danger that estoppel could become the worthy plaintiff's contract: that the courts could ignore the criteria for unconscionability set out in this thesis and use Australian estoppel and remedies in the expectation measure to enforce gratuitous promises whenever they want to find for a particular plaintiff. The doctrine is constrained from being the type of palm-tree justice that many fear only as long as the courts take seriously the proof of its various elements.

As long as the courts remember this, however, there is much to suggest that Anglo-Australian law would be greatly enriched by the development of the doctrine of described in this thesis: there is much to suggest that the developments of Waltons and Verwayen are developments to be welcomed.

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671 Stoljar, S.J., "Estoppel and Contract Theory", (1990) 3 Journal of Contract Law 1 at p.2