Situating Equitable Estoppel Within the Law of Obligations

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The expansion of the scope of equitable estoppel in recent years has raised important questions about the role of the doctrine and its place within the framework of the law of obligations. Those theoretical questions have received surprisingly little attention in the Australian commentary. They have, however, received rather more in England, and considerably more in the United States, where a substantive doctrine of promissory estoppel has played a prominent role in the law of obligations for some time.[1] This article aims to examine the nature of the Australian doctrine as presently formulated and to situate it within the law of obligations. In doing so, the article will also draw together and evaluate the contending theories concerning the nature and role of equitable estoppel in Australia.

The first part of the article will deal with the two most important historical theories concerning the role of a reliance-based doctrine of estoppel, classical contract theory and "death of contract" theory. The second part of the article will focus on the contemporary debate as to how equitable estoppel does and should operate, and the place of the doctrine within the law of obligations. The three contending theories are: promise theory (under which equitable estoppel is seen as a doctrine essentially concerned with the enforcement of promises which should be seen as, or adapted to become, part of the law of contract), conscience theory (which sees estoppel as a doctrine which operates, or should operate, primarily by reference to the notion of unconscionability) and reliance theory (which is based on the notion that equitable estoppel is essentially concerned with protecting against harm resulting from reliance on the conduct of others).[2]

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1 At least since the first Restatement of Contracts was promulgated by the American Law Institute in 1932.

2 Two schools of thought relating to the reform of promissory estoppel in the United States have been omitted from this discussion. The first is the "relational contract theory" which Feinman, J, "The Last Promissory Estoppel Article" (1992) 61 *Fordham LR* 303 (drawing on the work of Macneil, I R, "Values in Contract: Internal and External" (1983) 78 *Northwestern ULR* 340) has argued should replace both traditional contract doctrine and promissory estoppel. The second is the work of law and economics scholars such as Goetz, C J and Scott, R E, "Enforcing Promises: An Examination of the Basis of Contract" (1980) 89 *Yale LJ* 1261; Farber, D A and Matheson, J H, "Beyond Promissory Estoppel: Contract Law and the Invisible Handshake" (1985) 52 *U Chic LR* 903 and Katz, A, "When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations"

The central thesis of this article is that equitable estoppel is, and should be, a doctrine which is organised around the concept of detrimental reliance and which is part of the law of wrongs. In the final section of the article, I will argue that the doctrine stems from a duty to prevent harm resulting from reliance on one's conduct. A person who breaches that duty commits an equitable wrong. As I have argued elsewhere, equity's response to that wrong is to provide relief designed to prevent the plaintiff from suffering loss as a result of his or her reliance or which compensates the plaintiff for such loss.[3] Equitable estoppel can, therefore, be seen as a reliance-based doctrine which is properly situated within the equitable branch of the law of civil wrongs.

1. *Historical Theories*

A. *Classical Contract Theory*

It is well accepted that the general common law principles of promise enforcement through contract in existence today were mainly developed in the 19th century,[4] under the influence of free market economics and the philosophy of individualism.[5] The moral, political and social context in which modern contract law developed favoured individualism and free will over government intervention and reliance on others. The general principles of modern contract law were, accordingly, founded on those concepts, which were encapsulated in a political theory labelled "contractualism" by Morris Cohen:

> Contractualism in the law, that is, the view that in an ideally desirable system of law all obligation would arise only out of the will of the individual contracting freely, rests not only on the will theory of contract but also on the political doctrine that all restraint is evil and that the government is best which governs least. This in turn is connected with the classical economic optimism that there is a sort of pre-established harmony between the good of all and the pursuit by each of his own selfish economic gain.[6]

Perhaps the most significant of the principles of contract law developed in the 19th century was the bargain theory of consideration, which holds that a promise will only give rise to contractual obligations if the promisee has provided a benefit or suffered a detriment which can properly be regarded as the

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(1996) 105 *Yale LJ* 1249, who advocate the reform of promissory estoppel in the interests of economic efficiency.

3 Robertson, A, "Satisfying the Minimum Equity: Equitable Estoppel Remedies After Verwayen" (1996) 20 *MULR* 805.

4 See, for example, Horwitz, M J, "The Historical Foundations of Modern Contract Law" (1974) 87 *Harv LR* 917; Greig, D W and Davis, J L R, *The Law of Contract* (1987) at 13; Starke, J G, Seddon, N C and Ellinghaus, M P, *Cheshire and Fifoot's Law of Contract* (6th Aust edn, 1992) at 12. Cf Shatwell, K O, "The Doctrine of Consideration in the Modern Law" (1954) 1 *Syd LR* 289 at 312–3, who argued that the formative period was from the 14th to the 17th century, while the 19th was "the period of settlement in the light of modern commercial needs."

5 The literature on the topic is vast. See, for example, Horwitz, ibid; Atiyah, P S, *The Rise and Fall of Freedom of Contract* (1979); Gordley, J, *The Philosophical Origins of Modern Contract Doctrine* (1991), chs 7 & 8; Williston, S, "Freedom of Contract" (1921) 6 *Cornell LQ* 365.

6 Cohen, M R, "The Basis of Contract" (1933) 46 *Harv LR* 553 at 558.

agreed price of the promise.[7] That theory of consideration denies any contractual obligations arising out of detrimental reliance upon promises where such detrimental reliance cannot be seen as the agreed price of the promise.

Greig and Davis have suggested that "[t]he Victorian age saw itself as the age of self reliance."[8] An emphasis on self reliance has also been observed "in the individualist creed of early nineteenth-century England."[9] Self reliance was both a moral virtue and a necessity in the commercial and social circumstances existing at that time, and those notions were clearly reflected in the laws of the time:

> The fact that the ethos of the times was one of self-reliance did not and could not mean that reliance on others was never justifiable, never legally protected. But what it did mean was that the onus was, as it were, thrown on he who relied to show that his reliance was reasonable; and in an individualist era, reasonableness in reliance was evidently less easy to establish.[10]

The logic of classical contract law required that reliance could never be reasonable, and accordingly could never be actionable, unless the promisee had actually concluded a bargain with the promisor by giving something in exchange for the promise.[11] A broader conception of when reliance on the conduct of another person is reasonable is to be found in the writings of Adam Smith. Smith maintained in the 18th century that a reasonable person does not rely on expectations other than those arising from solemn promises:

> [T]he declaration of the will or intention of a person could not produce any obligation in the declarer, as it did not give the promittee a reasonable ground of expectation. It is the disappointment of the person we promise which occasions the obligation to perform it. What we have solemnly promised to perform begets a greater dependence in the person we promise than a bare declaration of our intention.[12]

Smith's notion of the circumstances in which reliance was reasonable was not, however, reflected in classical contract law. The enunciation of a law of promissory obligations based on will theory and notions of private autonomy left no room for liability based on reliance on the conduct of others, whether that conduct consisted of a promise or a mere declaration of intention.[13] Although the

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7 See *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 at 855 per Lord Dunedin; *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424 at 456-7; *Beaton v McDivitt* (1987) 13 NSWLR 162 at 168-9 per Kirby P and 180-2 per McHugh JA. The nature of the bargain theory and its current relationship with equitable estoppel are discussed in Robertson, above n3 at 812-3.

8 Greig and Davis, above n4 at 22.

9 Atiyah, above n5 at 278.

10 Id at 282-3.

11 Feinman, J M, "Promissory Estoppel and Judicial Method" (1984) 97 *Harv LR* 678 at 685. Similarly, Metzger, M B and Phillips, M J, "The Emergence of Promissory Estoppel as an Independent Theory of Recovery" (1983) 35 *Rutgers LR* 472 at 502, suggest that "promisees who relied without the protection of an enforceable bargain might have been deemed morally unworthy of recompense due to their foolishness."

12 Meek, R L, Raphael, D D and Stein, P G (eds), *Adam Smith Lectures on Jurisprudence* (1978) at 92.

13 That was despite the fact that detrimental reliance on a promise was a foundation of the action of assumpsit as it developed in the 16th and 17th centuries, from which modern contract law evolved: Simpson, A W B, *A History of the Common Law of Contract* (1975)

bargain theory of consideration was not clearly articulated in the English courts until well into the 20th century,[14] there were clear signs that bargain was beginning to be seen as the theoretical basis for enforcing contracts in the middle of the 19th century.[15] The move towards a law of contract based on the bargain concept had an obvious tendency to "narrow the range of promissory liability."[16] For much of the 19th century, reliance was protected only "as part of the general protection of expectations which was accorded by recognition of the executory contract."[17] Unbargained-for reliance, therefore, went largely unprotected.[18]

While the law of contract failed to protect unbargained-for reliance on promises or representations as to future conduct, the equitable jurisdiction to make good representations provided a means by which such reliance could have been protected. Equity was, however, subject to the same philosophical and economic influences as the common law in the latter half of the 19th century. Up to the middle of that century, the equitable jurisdiction to make good representations flourished.[19] But as the common law became straightened, so did equity. Commentators have attributed the demise of the equitable jurisdiction to the increased emphasis on self reliance and "the sanctity of promises through the medium of bargains",[20] and have pointed to four cases as effecting or evidencing that demise.[21] First, the House of Lords in *Maunsell v Hedges* limited the jurisdiction to the enforcement of contractual representations, with

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at 426-34; Metzger and Phillips, above n11 at 482. For a detailed discussion of the role of detrimental reliance in assumpsit, see Ames, J B, "The History of Assumpsit" (1888) 2 *Harv LR* 1.

14 *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 at 855 per Lord Dunedin.

15 Lunney, M, "Jorden v Money – A Time for Reappraisal?" (1994) 68 *ALJ* 559 at 569, citing Erle J's finding in *Oldershaw v King* (1857) 2 H&N 517; 157 ER 213 at 215, that "[i]f the guarantor has had the advantage he bargained for, we must hold him to his promise." See also Atiyah, above n5 at 463.

16 Metzger and Phillips, above n11 at 474.

17 Atiyah, above n5 at 457. As Atiyah suggests, at 461, the idea that reliance could be protected on its own, without also protecting expectations, was "evidently missing in the mid-nineteenth century".

18 Id at 457-64. Jay Feinman, above n11 at 679, has suggested that the rise of the bargain principle in the nineteenth century "drove reliance-based recovery underground." The tensions between the reliance principle and the bargain principle are also examined by Henderson, S D, "Promissory Estoppel and Traditional Contract Doctrine" (1969) 78 *Yale LJ* 343 at 345-50.

19 The jurisdiction is generally regarded as having "reached its zenith" (Greig and Davis, above n4 at 24) in the statement of Lord Cottenham in *Hammersley v De Biel* (1845) 12 Cl & F 45; 8 ER 1312 at 1320 that "a representation made by one party, for the purpose of influencing the conduct of the other party, and acted upon by him, will in general be sufficient to entitle him to the assistance of this court for the purpose of realising such representation." There is a considerable body of literature devoted to the jurisdiction, see Dawson, F, "Making Representations Good" (1982) 1 *Canterbury LR* 329; Finn, P D, "Equitable Estoppel" in Finn, P D (ed), *Essays in Equity* (1985) 59 at 62-71; D Jackson, "Estoppel as a Sword" (Parts 1 & 2) (1965) 81 *LQR* 84 and 223; Sheridan, L A, "Equitable Estoppel Today" (1952) 15 *Mod LR* 325.

20 Greig and Davis, above n4 at 24.

21 Atiyah, above n5 at 458; Finn, above n19 at 64-5; Greig and Davis, id at 24-6; Ridge, P A, "The Equitable Doctrines of Part Performance and Proprietary Estoppel" (1988) 16 *MULR* 725 at 727-9.

both the Lord Chancellor and Lord St Leonards rationalising previous cases, including *Hammersley v De Biel,* as having been decided on the basis of contract.[22] Secondly, in *Jorden v Money*,[23] a majority of the House of Lords held that a promise or representation as to future conduct which was acted upon by the promisee could not be binding except by way of contract.[24] In other words, estoppel at common law and in equity was limited to representations of existing fact. Thirdly, in *Willmott v Barber*[25] Fry J laid down five restrictive probanda for establishing estoppel by acquiescence, including the requirement that the plaintiff had to act under a mistake as to his or her legal rights in order to obtain relief. Greig and Davis point to the decision as an illustration of the decline of equity into a rule based system,[26] which was consistent with the formalism of the age.[27] The fourth limitation imposed on the equitable jurisdiction was the influential statement of Bowen LJ in *Low v Bouverie*[28] that estoppel in equity, like estoppel at common law, could not found a cause of action, but was simply a rule of evidence.[29]

It is clear that reliance-based equitable obligations were not entirely destroyed by those limitations. Mark Lunney has, for example, adduced "considerable evidence to suggest that the equity judges were not prepared to countenance the limitation imposed by *Jorden v Money.*"[30] It is, however, beyond question that the decisions mentioned above had the effect of stifling the equitable jurisdiction to make good relied-upon representations. Proprietary estoppel survived, struggling for some time to escape the influence of the "bargain theory formalism" of Fry J's restrictive probanda[31] and confusion with the law of contract.[32] Although the seeds of promissory estoppel were sown within 35 years of *Jorden v Money*,[33] those seeds lay on fallow ground for over 50 years.[34] It is only now, over 100 years after the series of decisions mentioned above, that a broad based equitable jurisdiction, which provides relief where

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22 (1854) 4 HLC 1039; 10 ER 769 at 776 per the Lord Chancellor, 777 per Lord St Leonards.

23 (1854) 5 HLC 185; 10 ER 868.

24 It should be noted that David Jackson, "Estoppel as a Sword" (Part 1) (1965) 81 *LQR* 84 at 95, has suggested that the limitation imposed by House of Lords in *Jorden v Money* can be attributed to "confusion between the principles of estoppel and contract, in effect, holding that estoppel is so limited because such a representation is a contract."

25 (1880) 15 Ch D 96 at 105-6.

26 Greig and Davis, above n4 at 25.

27 Metzger and Phillips, above n11 at 501, suggest that a trait of classical contract law was "a formalism expressing itself in a system of autonomous, abstract, precise, general, and mechanical rules".

28 [1891] 3 Ch 82 at 105.

29 Again, David Jackson "Estoppel as a Sword" (Part 2) (1965) 81 *LQR* 223, has provided a doctrinal explanation for the development, attributing the decision to confusion between the "indirect" common law principle of estoppel and the "direct" equitable principle.

30 Lunney, above n15 at 570-1.

31 Ridge, above n21 at 729.

32 See Robertson, above n3 at 811-3.

33 *Hughes v Metropolitan Railway Company* (1877) 2 App Cas 439 and *Birmingham and District Land Company v London and North Western Railway Company* (1888) 40 Ch D 268. See Halliwell, M, "Estoppel: Unconscionability as a Cause of Action" (1994) 14 *Leg Studies* 15 at 23.

34 Until taken up by Denning J in *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

promises and representations have been detrimentally relied upon, has re-emerged in Australian law.[35]

In summary, classical contract theory, based on liberal notions of self reliance and the assumption of obligation through bargain, had little tolerance for liability based on reliance on the conduct of others.[36] That intolerance is evidenced by two important doctrinal developments during the latter half of the nineteenth century. First, the development of the notion of bargain as the basis of contractual liability, and the move towards a bargain theory of consideration, eliminated reasonable reliance on a promise as a basis for contractual liability. Secondly, the demise of the equitable jurisdiction to make good representations ensured that equity was, in most cases, similarly unable to protect such reliance. Those developments exerted a constraining influence on the protection of reliance at common law and in equity for over 100 years. Australian law is only now beginning to escape those constraints.

B. "Death of Contract" Theory

The second important historical perspective on estoppel is that provided by members of the "death of contract" school,[37] who suggested in the 1970s that the emerging reliance-based doctrines of estoppel could be seen as an encroachment of tort principles into the domain of contract. That influential movement emerged on both sides of the Atlantic during the 1970s; Atiyah's writings of the period carry a similar message to Grant Gilmore's book, The Death of Contract.[38] Both suggested that the emergence of reliance-based doctrines of estoppel evidenced the end of will theory and a move toward tort based concepts of compensation for harm. In his "Death of Contract" lectures, Grant Gilmore suggested that the law of contract was being reabsorbed into the mainstream of tort, from which it was artificially separated 100 years before.[39] An important indicator of that trend, according to Gilmore, was the rise of liability under section 90 of the Restatement of Contracts, based on detrimental reliance on a promise. Gilmore suggested that detrimental reliance even threatened to overtake the bargain theory of consideration as the primary basis on which promises were enforced.[40] This breach of the enclave of assumed liability, which had been staked out by classical contract theory, "may be taken as remote reflections of the transition from nineteenth century individualism to the welfare state and beyond."[41] Gilmore argued, in other words, that the de-

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35 That jurisdiction has emerged out of the High Court's decisions in *Legione v Hateley* (1983) 152 CLR 406, *Foran v Wight* (1989) 168 CLR 385, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 and *Commonwealth v Verwayen* (1990) 170 CLR 394.

36 Cf the interesting attempt to reconcile a reliance-based doctrine of promissory estoppel with the notions of private autonomy and freedom of contract in: Comment "Once More into the Breach: Promissory Estoppel and Traditional Damage Doctrine" (1970) 37 *U Chic LR* 559 at 572-80.

37 Nolan, D, "The Classical Legacy and Modern English Contract Law" (1996) 59 *Mod LR* 603 at 604. They have also been described as "death of contract theorists" by Fried, C, *Contract as Promise* (1981) at 5 and Pham, P N, "The Waning of Promissory Estoppel" (1994) 79 *Cornell LR* 1263 at 1269.

38 Gilmore, G, *The Death of Contract* (1974).

39 Id at 87.

40 Id at 90.

41 Id at 96.

mise of classical contract law and the rise of a reliance-based promissory estoppel evidenced the "growth of a more interdependent, community-oriented moral climate."[42]

Atiyah made a similar argument that the rise of a reliance-based estoppel can be attributed to a move away from classical contract doctrine and the private autonomy principle.[43] Bargain based contract doctrine, according to Atiyah, protected only "paid for" reliance; that doctrine required a promisee to buy the right to rely through bargain. In giving effect to a reliance-based doctrine of estoppel, the courts are engaged in a redistributive exercise because they are, in effect, giving the right to rely to the plaintiff.[44] This, Atiyah says, is reflected in the requirement that reliance must be reasonable, which is now a community judgment, drawing on "collective moral ideas and even customary practices and redistributive ideologies."[45] In the age of private autonomy, the concept of "reasonableness" took its colour from that principle, and reliance was only justifiable if it was on a promise.[46]

Atiyah is critical of what he calls the "new orthodoxy" in English law, namely the acceptance of the proposition that the performance of an act in reliance on a promise cannot be a good consideration.[47] That orthodoxy would be more defensible, according to Atiyah, if estoppel was only called upon to protect reliance and was not a basis for the fulfilment of expectations. Atiyah's criticism is based in large part on the fact that "the line between promissory estoppel and consideration does not parallel the line between reliance protection and expectation protection."[48] The contemporary Australian doctrine of equitable estoppel is to some extent immune to those criticisms, since a balance has now been established between the perceived purpose of that doctrine, the basis of liability and the way in which relief is determined.[49] The essential purpose of the doctrine is to prevent harm resulting from reliance on the conduct of others; questions of liability turn primarily on reliance, and the courts are required to provide a reliance-based remedy.[50] The only point at which that balance falls down is that, in attempting to protect reliance, the courts have recently shown a strong inclination towards the fulfilment of expectations.[51]

The rise of reliance-based liability in equitable estoppel is, of course, only part of a much broader trend spanning such diverse areas of law as contract, tort, equity, restitution, insolvency law and statutory consumer protection initiatives.

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42 Metzger and Phillips, above n11 at 506-7; above n38 at 95-6.

43 Because "the actual movements in the law have not yet been accompanied by an adequate adjustment of theory", however, the classical model still prevails in theoretical formulations, where reliance is said to be justified only if it is paid for or bargained for: Atiyah, above n5 at 771.

44 Atiyah, P S, "Fuller and the Theory of Contract" in *Essays on Contract* (1986) 73 at 89.

45 Id at 87.

46 Ibid.

47 Atiyah, P S, "Consideration: A Restatement" in *Essays on Contract* (1986) 179 at 238-40.

48 Id at 240.

49 See Robertson, A, "Towards a Unifying Purpose for Estoppel" (1996) 22 *Mon ULR* 1.

50 *Commonwealth v Verwayen* (1990) 170 CLR 394 at 415-7 per Mason CJ, 429-30 per Brennan J, 454 per Dawson J, 475 per Toohey J and 500-1 per McHugh J.

51 Above n3 at 828-36.

Atiyah points to the recognition of the independent tort of negligent misrepresentation, the advent of consumer protection laws and developments in estoppel as the principal areas in which the resurgence of reliance-based liability has been manifested in England.[52] In Australia we can add the extraordinary rise of the statutory prohibition on misleading or deceptive conduct, and civil liability for the consequences of reliance on such conduct, to that list.[53] It is also worth noting that a reliance-based change of position defence has now been recognised in Australia as a defence to restitutionary claims,[54] and that detrimental reliance has emerged as an alternative to valuable consideration in the "good faith" defence to an action to recover voidable preferences under the *Corporations Law*.[55]

It is, therefore, clear that both courts and legislators have moved away from notions of individual autonomy in the law of obligations and are increasingly imposing liability and allowing defences based on the reasonable, unbargained-for reliance on the conduct of others. But that trend does not, of itself, signal the death of contract or justify claims that the kingdom of contract is slowly being absorbed into the empire of tort. Jane Swanton argued in 1989 that what had occurred up to that time in Australia represented only "a relatively modest encroachment of tort on the field of contract."[56] She suggested, however, that a broad based doctrine of promissory estoppel based on detrimental reliance would be "capable of swallowing up and rendering redundant a large part of the law of contract."[57] Despite the expansion of the scope of equitable estoppel and the number of successful cases in recent years, it is clear that contract law is no closer to being absorbed by tort or swallowed up by estoppel.

It now seems clear that Grant Gilmore's report of the death of contract, if it was ever meant to be taken seriously, was greatly exaggerated,[58] and the law of contract is not dead or even dying.[59] On the contrary, contractual

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52 Atiyah, above n5 at 773-8.

53 Misleading or deceptive conduct is prohibited by *Trade Practices Act* 1974 (Cth), s52; *Fair Trading Act* 1987 (NSW), s42; *Fair Trading Act* 1989 (Qld), s38; *Fair Trading Act* 1987 (SA), s56; *Fair Trading Act* 1990 (Tas), s14; *Fair Trading Act* 1985 (Vic), s11; *Fair Trading Act* 1987 (WA), s10; *Consumer Affairs and Fair Trading Act* 1990 (NT), s42; *Fair Trading Act* 1992 (ACT), s12. Damages are recoverable by a person who suffers loss "by" such conduct from the person who engages in it: *Trade Practices Act* 1974 (Cth), s82 and state *Fair Trading Act* equivalents. The word "by" imports a concept of causation which in many cases depends on reliance: *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525 per Mason CJ, Dawson, Gaudron and McHugh JJ. Cf *Janssen-Gilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526 at 530-1.

54 David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353. The reliance basis of the defence is discussed by Bryan, M, "Mistaken Payments and the Law of Unjust Enrichment" (1993) 15 *Syd LR* 461 at 485-7.

55 Corporations Law, s588FG(2).

56 Swanton, J, "The Convergence of Tort and Contract" (1989) 12 *Syd LR* 40 at 73.

57 Id at 51.

58 Campbell, D, "The Undeath of Contract: A Study in the Degeneration of a Research Programme" (1992) 22 *Hong Kong LJ* 20 at 21.

59 See, for example, Coote, B, "The Essence of Contract" (Part 1) (1988) *J Cont L* 91 at 91; *Kastely, A H, "Cogs or Cyborgs?: Blasphemy and Irony in Contract Theories" (1995) Northwestern ULR* 132 at 133. Farnsworth, E A, "Developments In Contract Law During the 1980's: The Top Ten" (1990) 41 *Case Western Reserve LR* 203 at 204 at 219-21.

thinking appears to be entering a period of revival, under the influence of increasingly pervasive libertarian and free market ideologies.[60] While equitable estoppel is enjoying a healthy period of growth in Australia,[61] it has been suggested that in the United States promissory estoppel is going through a phase of contraction, and is being made more compatible with classical contract theory.[62] This may well be a consequence of the "laissez-faire revival" which, Metzger and Phillips have suggested, threatens to "generate a return to something like classical contract doctrine and a diminished role for promissory estoppel."[63]

The work of Gilmore and Atiyah has revealed important connections between developments in a number of areas of the law. More importantly for present purposes, their work helps us to identify equitable estoppel as a doctrine which is properly seen as part of the law of wrongs. I will argue in the second part of this article that equitable estoppel is based on a duty to prevent harm resulting from reliance on one's conduct. Liability in equitable estoppel, like negligent misstatement, depends on reasonable reliance on the conduct of another party, and provides a remedy which protects against the consequences of that reliance. While that liability strictly cannot be described as tortious, since the word "tort" is usually confined to common law wrongs, it is clearly based on the concept of a wrong and is, as Atiyah and Gilmore have shown us, more closely analogous to tort than contract.

2. *The Contemporary Debate*

Peter Birks and Nicholas McBride have recently identified the need to develop a coherent taxonomy or map of the law of obligations.[64] Locating, and debating the location of, a particular doctrine within the law of obligations helps us to understand the nature of that doctrine, and its relationship with other parts of the law. Equitable estoppel has developed in such a way that it

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60 Atiyah, P S, *An Introduction to the Law of Contract* (5th ed, 1995) at 27-34, discusses the resurgence of freedom of contract in England since 1980. The expansion of the role of contract in British society over the last 15 or 20 years and the "vitality of the contractual idea" is also noted by Nolan, above n37 at 604. Metzger and Phillips, above n11 at 554, suggested in 1983 that the previous decade or so had seen "a renaissance of traditional free market thinking, one not without its apparent impact on contract scholarship."

61 The growth of equitable estoppel in Australia is evidenced by the extraordinary number of reported cases in which the doctrine has successfully been relied upon in recent years: see Robertson, above n3 at 828-9, fns 162 and 163.

62 Kastely, above n59 at 139. Farnsworth, above n59 at 219-221, has suggested that "it may be argued that contracts, through liberal interpretation of third party beneficiary doctrine, invaded the domain of tort during the 1980s." "The expansion of the role of reliance, and the simultaneous erosion of the role of formalities, did not continue in the 1980's. Indeed ... the trend appears to be in the other direction." The contraction of promissory estoppel in the United States is discussed in some detail by Kastely, above n59 at 135-139 and Pham, above n37 at 1263-90. Farber and Matheson, above n2 at 905, also suggest that "promissory estoppel is being transformed into a new theory of distinctly *contractual* obligation."

63 Above n11 at 555. Similarly, Pham, above n37 at 1290 has suggested that "[d]espite the claims of death-of-contract scholars, the waning of promissory estoppel provides evidence of the enduring vitality of traditional bargain theory."

64 McBride, N J, "A Fifth Common Law Obligation" (1994) 14 *Leg Studies* 35 at 35-6 and Birks, P, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 *UWALR* 1 at 3-7.

cannot readily be situated on a map of the law of obligations. The fundamental question to be resolved is whether it should be seen as part of the law of contract, as part of the law of wrongs, or as an anomalous category, which is neither contract nor wrong.[65] In mapping the law of obligations we must, as far as possible, refuse to accept the existence of anomalous doctrines which appear to stand outside a coherent framework. The more anomalies we accept, the more difficult it becomes to identify and to deal with duplication and inconsistencies in our legal system.[66]

According to Fowler, the relations between certain words:

> plainly show that the language has not been neatly constructed by a master builder who could create each part to do the exact work required of it, neither overlapped nor overlapping; far from that, its parts have had to grow as they could.[67]

Similarly the relations between estoppel, contract and tort show that the law of obligations has not been neatly constructed. The categories are overlapping, the work to be performed by each remains undefined and each part has, according to the fashions of the day, expanded as it could. The following discussion is premised on the need, identified by Birks and McBride, to attempt to locate equitable estoppel within a coherent taxonomy of the law of obligations, resisting the temptation to label it as an anomaly which defies classification.

A. Promise Theory

In essence, the promise theory of estoppel holds that the doctrine is fundamentally concerned with the enforcement of promises and should, therefore, be seen as, or adapted to become, part of the law of contract. Different varieties of promise theory have been advanced by commentators in Australia,[68] the United States[69] and England.[70] This section will examine three different arguments made by promise theorists. The first question to be addressed is whether, as has been claimed of promissory estoppel in the United States,[71] equitable estoppel in Australia is essentially concerned with the enforcement of promises. Although I will argue that the Australian doctrine is not based on promise, it is an important

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65 Barnett, R E and Becker, M E, "Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations" (1987) 15 *Hofstra LR* 443 at 443 suggest that liability based on promissory estoppel in the United States does not fit neatly into the category of contract law or that of tort law. They argue that some promissory estoppel cases can be seen as contractual, in the sense that the promisor intended to assume a legal obligation, whereas others can be seen as tort-based, imposing liability for promissory misrepresentations. See also Becker, M E, "Promissory Estoppel Damages" (1987) 16 *Hofstra LR* 131.

66 See Birks, above n64 at 7.

67 Fowler, H M and Sir Ernest Gowers, *A Dictionary of Modern English Usage* (2nd edn, 1965) at 625.

68 Mescher, B, "Promise Enforcement by Common Law or Equity?" (1990) 64 *ALJ* 536.

69 Yorio, E and Thel, S, "The Promissory Basis of Section 90" (1991) 101 *Yale LJ* 111; Barnett, R E, "A Consent Theory of Contract" (1986) 86 *Colum LR* 269; Farber and Matheson, above n2.

70 Atiyah, above n60 at 137-41; Birks, above n64 at 60-4.

71 Yorio and Thel, above n69.

question to ask, since it helps us to address the broader question of whether equitable estoppel is essentially contractual in nature. The second and third parts of the section will deal with proposals for changes to contractual principles which would have the effect of bringing equitable estoppel cases within the law of contract.

(i) Is Equitable Estoppel Based on Promise?

Despite some early confusion,[72] the principles of equitable estoppel operating in Australia have for some time been regarded as quite separate from the law of contract.[73] There have been numerous statements by members of the High Court in recent years seeking to distance equitable estoppel from contract.[74] The only connections between equitable estoppel and contract are: first, that liability in estoppel can, like contractual liability, arise from a promise; and, secondly, that the remedies provided by equitable estoppel and contract mirror each other in terms of purpose and effect. Although the purpose of equitable estoppel relief is to protect the representee's reliance interest,[75] the relief granted to give effect to an estoppel will often have the effect of protecting the representee's expectation interest.[76] Conversely, although the purpose of contractual relief is to protect the promisee's expectation interest, the reliance interest will occasionally be protected instead.[77]

The doctrine of equitable estoppel fashioned by the High Court in recent years turns on considerations quite different from those governing the law of contract. Liability depends primarily on reasonable detrimental reliance on an assumption induced by the conduct of another party, rather than on bargained-for consideration being given in return for the promise made by another party. Relief in an equitable estoppel case is discretionary and is designed to satisfy the representee's reliance interest, even though it will often coincidentally protect the representee's expectation interest. In an action for breach of contract, on the other hand, the promisee has a right to an award of damages which will satisfy his or her expectation interest.

Similarly, many commentators in the United States see promissory estoppel as separate from the law of contract.[78] The cause of action is seen to be

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72 Above n3 at 811-13.

73 See *Beaton v McDivitt* (1987) 13 NSWLR 162 at 170 per Kirby P, 182 per McHugh JA.

74 See, for example, *Waltons Stores (Interstate) Pty Ltd v Maher* (1988) 164 CLR 387 at 400-1 per Mason CJ and Wilson J, 423-7 per Brennan J; *Commonwealth v Verwayen* (1990) 170 CLR 394 at 439-40 per Deane J, 453 per Dawson J, 501 per McHugh J.

75 The person claiming the benefit of an estoppel will hereinafter be referred to as the representee, and the person against whom an estoppel is claimed will be referred to as the representor. The expressions are intended to cover all types of conduct from which an equitable estoppel can arise.

76 Above n3, especially at 833-6.

77 See, eg, *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377; *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64.

78 Promissory estoppel is the United States equivalent of equitable estoppel in Australia, protecting reliance on assumptions relating to the future conduct of a representor. The principle of "equitable estoppel" operating in the United States is essentially the same as common law estoppel in Australia. It applies only in relation to representations of existing fact (although that may at times extend to existing legal rights), and can only be raised defensively to prevent the representor from asserting contrary facts (or rights): see

based on protecting promisees against loss resulting from reliance on a promise.[79] In the celebrated case of *Hoffman v Red Owl Stores Inc*, the Supreme Court of Wisconsin suggested that "it would be a mistake to regard an action based on promissory estoppel as the equivalent of a breach of contract action."[80] Despite strong statements such as this, promissory estoppel in the United States can be seen as a form of contractual liability. Promissory estoppel is described in section 90 of the Restatement of Contracts (2d), under the heading "Contracts Without Consideration", as follows:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such 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.

Liability under section 90 can be seen as a form of contractual liability based on detrimental reliance, which exists as an alternative to contractual liability based on bargained-for consideration under section 71 of the Restatement. The remedy under section 90 is also contract-like because detrimental reliance on a promise conditionally renders the promise binding. The only concession in section 90 to a different juridical basis for liability is that the promise is only binding if "injustice can only be avoided by enforcement of the promise" and "the court may alter the remedy as it thinks fit."

Edward Yorio and Steve Thel argue that, although section 90 was conceived and drafted to protect reliance, an examination of the decisions under section 90 reveals that the true basis of liability and remedy under section 90 is promise, not reliance. Their analysis is based on the "legal realist's recognition that the best way to understand law is to analyse what the courts are doing instead of trying to force cases into accepted theories."[81] Turning first to the question of liability, Yorio and Thel argue that, although section 90 requires the promise to induce action or forbearance, courts do not require actual inducement. Nor, they argue, do the courts insist that the promisee suffer a detriment as a result of reliance on the promise.[82] Equally, the courts occasionally deny recovery despite detrimental reliance by the promisee.[83] This suggests, according to Yorio and Thel, that what the courts do in section 90 cases is to respond to an impulse to enforce serious promises,[84] and "[w]hat distinguishes enforceable promises from unenforceable ones under Section 90 are the proof and quality of the promisor's commitment."[85]

While the Australian cases may also appear superficially to be concerned with enforcing serious promises, close examination shows that the basis of liability in Australia is clearly reliance, rather than promise. First, it is clear that the require-

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American Jurisprudence (2nd edn, 1965), vol 28 at 625 *ff* and *Tiffany Inc v WMK Transit Mix Inc* 56 ALR 1028 (1972) at 1224-5 (Arizona Court of Appeals).

79 Yorio and Thel, above n69 at 112.

80 133 NW 2d 267, 275 (1965).

81 Above n69 at 114.

82 Id at 152.

83 Id at 160.

84 Id at 114.

85 Id at 167.

ment of detrimental reliance by the representee is a central element of the Australian doctrine. In *Grundt v Great Boulder Pty Gold Mines Ltd*, Dixon J held that, in establishing an estoppel *in pais*:

> One condition appears always to be indispensable. [The representee] must have so acted or abstained from acting upon the footing of the assumed state of affairs that he [or she] would suffer a detriment if the opposite party were afterwards allowed to set up rights against him [or her] inconsistent with the assumption.[86]

That famous statement has dominated the approach taken by the Australian courts in relation to both common law and equitable estoppel. The requirement of detrimental reliance has consistently been held to be a fundamental element of the doctrine of equitable estoppel in the leading recent judgments in the High Court,[87] and has been applied strictly in numerous other recent cases.[88] Although there are rare cases in which no evidence of detrimental reliance by the representee appears in the reported judgment,[89] the Australian courts are generally consistent in denying recovery where the representee cannot point to a detrimental change of position in reliance on the relevant assumption.[90]

Perhaps the clearest indication that equitable estoppel in Australia is not promise based is the fact that a promise is not required to establish liability.[91] In the United States, liability under the doctrine of promissory estoppel depends on detrimental reliance on a promise which is, or may be,[92] gratuitous, in the sense that consideration which can properly be regarded as the price of the promise has not been given.[93] Although some US courts have construed the promise requirement quite broadly,[94] the potential scope of the

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86 (1937) 59 CLR 641 at 674.

87 *Waltons Stores Interstate Ltd v Maher* (1988) 164 CLR 387 at 404 per Mason CJ and Wilson J, 429 per Brennan J; *Commonwealth v Verwayen* (1990) 170 CLR 394 at 413 per Mason CJ, 429 per Brennan J, 444 per Deane J, 455 per Dawson J, 500 per McHugh J.

88 See, eg, *Je Maintiendrai Pty Ltd v Quaglia* (1980) 26 SASR 101 at 106-7, 113-6; *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466 at 472; *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 5 ASCR 720 at 737; *Re Neal, ex parte Neal v Duncan Properties Pty Ltd* (1993) 114 ALR 659 at 669; *S&E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122 ALR 637 at 652; *Commonwealth v Clark* [1994] 2 VR 333 at 367-81.

89 For example, *Tasita v Papua New Guinea* (1991) 34 NSWLR 691.

90 See, eg, *Je Maintiendrai Pty Ltd v Quaglia* (1980) 26 SASR 101 at 117-21 per Cox J dissenting; *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298 at 305, 307-8; *Territory Insurance Office v Adlington* (1992) 109 FLR 124 at 127-36. See also the cases cited by Parkinson, P, "Estoppel" in Parkinson, P (ed), *The Principles of Equity* (1996) 201 at 244, n229.

91 It is interesting to note that Henderson, above n18 at 361 has justified the US requirement of a "genuine promise" on a reliance basis, suggesting that "promissory estoppel protects reasonable reliance, and ... reliance is only reasonable if it is induced by an actual promise."

92 There have been suggestions that promissory estoppel is being relied on in the United States, in lieu of traditional contract theory, in cases where bargained for consideration has been given: Farber and Matheson, above n2 at 908; Pham, above n37 at 1267-8. That situation could not arise in Australia because a plaintiff who had enforceable contractual rights arising from a promise would not be regarded as suffering detriment as a result of their reliance on that promise.

93 The bargain theory of consideration applied in the US is encapsulated in sections 17 and 71 of the Restatement of Contracts (2d).

94 Section 2 of the Restatement of Contracts (2d) defines a promise as a "manifestation of in-

Australian doctrine may well be broader. Rather than depending on the making of a promise, the Australian doctrine depends on the representor's conduct inducing the representee to adopt an assumption as to the representee's rights or the future conduct of the representor.[95] Several different types of conduct can be held to induce the adoption of such an assumption. An equitable estoppel can be founded on a course of conduct which indicates that the representor will act in a certain way or that the parties have certain rights,[96] a representation as to the representor's intention to act in a certain way or as to the existing legal rights of the parties,[97] or even silence in certain circumstances.[98]

As Hugh Collins has observed, it is difficult to judge whether there is any substantive difference between the US and Australian approaches, since promises can be implied from statements and other conduct.[99] The Australian doctrine does, however, appear to have a greater potential for application to a case of reckless or inadvertent conduct by a representor. Much of the US commentary appears to be based on the assumption that promissory estoppel will arise only in relation to promises deliberately made.[100] The Australian doctrine, on the other hand, appears to have the potential to catch careless conduct by a representor which leads a representee to assume the representor will act in a certain way, but which could not be regarded as conveying a promise or commitment by the representor to act in that way.

A promise is, therefore, just one of several different types of conduct on which an equitable estoppel can be founded. Metzger and Philips have suggested that, in the United States, "estoppel's reliance component may eventually so come to dominate its 'promissory' aspect as to render the latter nugatory."[101] In Australia, it could be argued that the reliance aspect already so dominates the "promise" aspect. The relatively weak requirement as to the type of conduct by a representor which is required to found an estoppel suggests that the fundamental concern of the doctrine is elsewhere, namely on the representee's detrimental reliance.[102]

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tention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." The requirement of an "undertaking", which appeared in the first Restatement, was abandoned in the second. Feinman, above n11 at 690-4, has observed that the US courts have in some cases adopted a flexible interpretation of the "promise" requirement, which has allowed them to infer promises in cases in which no explicit promise has been made. In other cases a strict approach has been taken which requires a definite promise, rather than a mere representation or statement of intention. Metzger and Phillips above n11 at 537-9, advocate a liberal approach to the "promise" requirement on the basis that it is the promisee's reliance, rather than the promise itself, that is fundamental.

95 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 407 per Mason CJ and Wilson J, 428-9 per Brennan J, 453 per Deane J, 458 per Gaudron J; *Commonwealth v Verwayen* (1990) 170 CLR 394 at 412-3 per Mason CJ, 444 per Deane J, 460-1 per Dawson J, 487 per Gaudron J, 500 per McHugh J.

96 See, eg, *S&E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122 ALR 637.

97 See, eg, *Commonwealth v Verwayen* (1990) 170 CLR 394.

98 See, eg, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

99 Collins, H, *The Law of Contract* (2nd edn, 1993) at 71-2.

100 As Feinman, above n11 at 687 has noted, "the typical doctrinal formulation of promissory estoppel holds out as its paradigmatic case a clear promise manifesting a commitment to future action".

101 Metzger and Philips, above n11 at 537.

102 Collins, above n99 at 82-3, also observes that estoppel is not tied to the giving of promises

Yorio and Thel also argue that remedies in promissory estoppel cases are based on promise, rather than reliance. They point to a number of surveys which show that the US courts routinely give effect to promissory estoppel by enforcing promises, by ordering either specific performance or payment of expectation damages.[103] Yorio and Thel show that, even where reliance damages are quantifiable, courts still opt for expectation relief. It is only in rare cases where no clear promise has been made, or expectation damages are difficult to determine, that reliance damages are awarded.[104]

My examination of the recent Australian cases showed a similarly overwhelming preference for expectation relief.[105] That survey covered 24 reported decisions since *Verwayen* in which relief was granted, and showed that expectation relief was granted in all 24 of those cases.[106] In that article, I advanced three reasons why the preference for expectation relief should not lead to the conclusion that equitable estoppel in Australia is promise based.[107] First, equitable estoppel in Australia is not part of the law of contract. As discussed above, Australian courts have consistently distanced equitable estoppel from contract. Secondly, issues of liability in Australia turn on reliance, rather than promise. Thirdly, a substantive, reliance-based equitable estoppel is new to Australia. The instinct for expectation relief that is evoked by the concept of an estoppel should disappear as the new approach adopted by the High Court in *Verwayen* comes to be more widely understood.

A further reliance-based explanation for the regular awarding of expectation relief is that reliance loss is often very difficult to calculate. That explanation is supported by the recent Australian cases.[108] It is only in a limited number of cases that a representee's reliance loss can be quantified with precision. Indeed, of the 24 cases discussed, only three could be argued to have been wrongly decided on the ground that equitable compensation, representing the representee's reliance loss, should have been awarded instead of expectation relief.[109] In cases where reliance loss cannot be quantified with precision, the only way to protect the reliance interest is by granting expectation relief.[110] The regularity with which expectation relief is provided does not, therefore, undermine the reliance basis of the doctrine.

The realist approach of Yorio and Thel sheds considerable light on the state of promissory estoppel in the United States. Since the reliance basis of the doctrine has been widely accepted in those jurisdictions for over 60

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and that "other words and conduct may induce reliance and generate liability." That is, as Collins suggests, an obvious weakness of theories that liability in estoppel is based on moral obligations resulting from promises.

103 Yorio and Thel, above n69 at 130-2.

104 Id at 151.

105 Robertson above n3 at 828-36.

106 Id at 829-30, fn 163.

107 Id at 834-36.

108 Id at 833.

109 Id at 830-33: *Kintominas v Secretary, Dept of Social Security* (1991) 30 FCR 475; *Leda Commercial Properties Pty Ltd v DHK Retailers Pty Ltd* (1993) ANZ Conv 163; *Re Neal; ex parte Neal v Duncan Properties Pty Ltd* (1993) 114 ALR 659.

110 See Fuller, L L, and Perdue, W, "The Reliance Interest in Contract Damages: 1" (1936) 46 *Yale LJ* 52 at 60.

years,[111] it is important to consider whether the courts are in fact deciding cases by reference to reliance. A realist examination also sheds some light on the Australian position. Although a reliance-based doctrine now represents the law in Australia, it is clear that the recent doctrinal developments have not been reflected in the results of the cases since. A truly reliance-based doctrine of equitable estoppel is, however, only six years old in Australia, having only been clearly adopted by the High Court in *Commonwealth v Verwayen*.[112] It is, therefore, far too early to abandon the reliance-based approach on the basis that it is not being applied strictly in the determination of relief.

(ii) Subsuming Estoppel Within Contract

Like Yorio and Thel, PS Atiyah also sees estoppel as essentially concerned with the enforcement of promises, and advocates the expansion of the scope of the law of contract to encompass cases currently decided on the basis of equitable estoppel.[113] The essence of Atiyah's argument is as follows. The enforcement of promises is the province of the law of contract. Tort and equity are often invoked in situations in which it would be perfectly plausible, and more appropriate, to suggest that liability exists in contract.[114] Estoppel is invoked for two reasons: first, simply because it is fashionable, and, secondly, in order to evade the inconvenient technical rules preventing liability from arising in contract, such as uncertainty or lack of writing.[115]

According to Atiyah, in order to overcome those technical rules, the courts should recognise that once an agreement has been acted upon, or relied upon, it may be justifiable to recognise contractual rights which would not have been recognised before such action or reliance.[116] An uncertain agreement, for example, should be enforced in some way when it has been partly performed. If the law of contract recognised action in reliance as changing the situation, then there would be less need for estoppel. Some judges and writers are reluctant to admit that because, in accordance with classical principles, they see contractual liability as stemming from the agreement and consider that action in reliance cannot change the rights of the parties.[117]

What Atiyah is proposing is, in effect, that equitable estoppel be subsumed, wholly or partly, by the law of contract. The result of the relaxation of contract rules in cases where unenforceable promises have been detrimentally relied upon would be to impose contractual liability in many cases in which equitable estoppel presently provides the only remedy. Depending on how many contractual rules were relaxed in the event of detrimental reliance, the need for equitable intervention could disappear completely. The effect of Atiyah's proposal would be similar to the approach articulated in section 90 of the Restatement of Contracts (2d) in the

111 Metzger and Philips, above n11 at 484, suggest that "[t]he new reliance-based doctrine got full recognition in 1932, when the first Restatement of Contracts was published."
112 (1990) 170 CLR 394.
113 Atiyah, above n60 at 137-41.
114 Id at 139.
115 Ibid.
116 Ibid.
117 Id at 140.

United States: where detrimental reliance on a promise gives rise to contractual liability, justifying the "enforcement" of that promise. In fact, Atiyah has gone so far as to suggest that "it may soon be necessary to insist that detrimental reliance is simply an alternative to consideration as a source of contractual rights."[118]

While it has some superficial attraction, there are several reasons why the adoption of Atiyah's proposals is not warranted in Australia. First, Atiyah's attention is focussed on the contractual context, and the role of estoppel in the enforcement of promises. Although Atiyah acknowledges the very considerable role of estoppel outside the realm of promises,[119] his reform proposals do not take that important aspect of estoppel into account. It is clear that equitable estoppel overcomes more fundamental problems than a lack of consideration and a failure to comply with formalities, including the lack of a clear agreement or understanding between the parties[120] and, in many cases, the lack of a promise.[121] Equitable estoppel very often deals with cases in which there is no clear promise and clearly no agreement struck between the parties; it would be extremely artificial to attempt to rationalise liability in such cases on a contractual basis.[122] Promises could be implied in order to bring some cases within the contractual framework, but there are many cases in which a promise could not be implied without considerable artificiality.

Accordingly, the appropriate solution to the inadequacy of contract law in coping with reliance is not to expand contract, but to allow the development of a coherent jurisdiction for the protection of reliance outside contract. An important reason for allowing those developments to proceed outside contract is that detrimental reliance on a promise does not justify the enforcement of that promise according to contractual principles. As Atiyah has conceded elsewhere,[123] there is no obvious reason for protecting the promisee's expectation interest in estoppel cases.[124] Instead, "[t]he remedy should accord with the reason for intervention, which is detrimental reliance."[125]

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118 Id at 141. See also Atiyah, above n47 at 240. This approach is also favoured by Birks, above n64 at 60-64.

119 Id at 148.

120 *Holiday Inns Inc v Broadhead* (1974) 232 EG 951 at 1087 per Goff J, in a passage adopted by the Privy Council in *Attorney-General of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd* [1987] 2 All ER 387 at 391.

121 See, eg, *S&E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122 ALR 637, where liability arose out of a course of conduct by a landlord, during negotiations for the surrender of a lease and the granting of a new lease, which induced the tenant to assume that the relationship of landlord and tenant would continue without the tenant having to exercise an option for renewal. Although the landlord's conduct clearly induced the tenant to adopt the relevant assumption, it is not possible to characterise the landlord's conduct as a promise or a even a representation. Similarly *Hughes v Metropolitan Railway Co* [1877] 2 AC 439 and *Birmingham and District Land Co v London and North Western Railway Co* (1888) 40 Ch D 268.

122 Atiyah has acknowledged this elsewhere: above n44 at 88; see also Collins, above n99 at 83.

123 Atiyah, P S, *Promises, Morals and Law* (1981) at 42. See also Atiyah, above n47 at 240.

124 Fuller and Perdue, above n110 at 64-5. Cf Burrows, A S, "Contract, Tort and Restitution – A Satisfactory Division or Not" (1983) 99 *LQR* 217 at 243-4, 259.

125 Parkinson, P, "Equitable Estoppel: Developments after *Waltons Stores (Interstate) Ltd v Maher*" (1990) 3 *J Cont L* 50, 59.

The point can be illustrated by way of an example of a promise to make a gift. Assume A promises to make a gift of land worth $100,000 to B. In reasonable reliance on that promise, and with A's knowledge, B spends $5,000 on improvements to the land. B's detrimental reliance is substantial, but is out of proportion to the value of the expectation. If A later refuses to make good the promise, then the reason for the court's intervention is not to enforce A's promise to make the gift. It is to protect B against the harm caused by A's unjust departure from the assumption which A's conduct caused B to adopt. As Finn has suggested, there is no obvious imperative in public policy which should give the expectation interest paramountcy in such cases.[126] In a case where a representor has not promised or undertaken to make a gift, but has simply led a representee to believe that one will be made, it is even more clear that the representee's expectations should not be fulfilled, unless it is necessary to do so in order to prevent the representee suffering harm.

As Fuller and Perdue have observed, most of the arguments for awarding expectation damages in the case of bargain promises do not apply in the case of promises which are enforced because they have been relied upon.[127] Fuller and Perdue argue that the main reasons for awarding expectation damages in the case of bargain promises are: to give executory contractual rights a present value for the purposes of trade and credit; to facilitate reliance on business agreements; to provide simple and effective compensation for the loss of opportunities to enter into other contracts; and to provide a more easily administered measure of recovery than reliance damages and, therefore, a more effective sanction against contract breach.[128] None of those policy considerations hold in the case of non-contractual promises which have been relied upon by the promisee.

A final problem with Atiyah's proposal is that the only real mischief he advances to justify reform is the unnecessary complexity of the law in this area.[129] While that may be true of English law, it is less true of Australian law, in which a single, reliance-based doctrine of equitable estoppel is emerging, which operates according to clearly articulated principles.[130] If one accepts the reliance-based framework for equitable estoppel advanced in this article, then the only real complexity is that there are two different types of legal obligation which can arise out of a promise. If estoppel and contract serve fundamentally different purposes,[131] and determine questions of liability and remedy according to fundamentally different considerations,[132] then those differences surely justify the complexity of two different sources of obligation.

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126 Finn, P D, "Equity and Contract" in Finn, P D (ed), *Essays on Contract* (1987) 104 at 122.

127 Fuller and Perdue, above n110 at 64.

128 Id at 59-64.

129 Atiyah, above n60 at 140.

130 The Australian law in this area is now considerably clearer than its English counterpart. The approach to relief provides a good example: while the judgments in *Commonwealth v Verwayen* (1990) 170 CLR 394 have provided us with a clearly articulated approach to relief, the approach taken by the English courts is confusing and even inconsistent, see Robertson, above n3 at 817.

131 As I have argued elsewhere, above n49.

132 See above nn72-77 and accompanying text.

(iii) Abolishing the Doctrine of Consideration

Barbara Mescher's solution to the intrusion of equity into the realm of contract is to abolish the doctrine of consideration.[133] The requirement of an intention to create legal relations would then be left to perform alone the important task of determining which promises to enforce.[134] Abolishing the doctrine of consideration, Mescher says, would "place most of the fact situations found in equitable estoppel cases within the province of contract."[135] Mescher argues that the abolition of consideration is necessary to solve the problem of equity's intrusion into the area of promise enforcement, which, she says, should belong exclusively to the law of contract.

The first problem with Mescher's criticism of equitable estoppel is that it hinges on an oversimplified distinction between assumed and imposed obligations. Mescher argues that in contract the obligations arise from the parties' promises, whereas in estoppel, since there is not necessarily an overt act of acceptance by the promisee, obligations are imposed by the court.[136] In the case of contract, she says, the parties create many of the obligations, whereas in equitable estoppel the obligations imposed by the court "may vary according to the circumstances of the case and the general notions of unconscionability."[137] It should be noted that Mescher's article was published prior to the High Court's decision in *Commonwealth v Verwayen*.[138] The judgments in that case reinforced the reliance framework of equitable estoppel, introducing a measure of certainty into the nature of a representor's obligations, and the nature of the relief granted for breach of those obligations.

The notion that contractual obligations are "within the exclusive realm of private ordering",[139] as distinct from other legal obligations which are imposed by the state through the courts, has been subject to sustained criticism in the US literature over a considerable period.[140] It is, therefore, somewhat artificial to

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133 Above n68 at 562-6.

134 Similarly, Barnett, above n69 at 291-321, has suggested that all contractual liability should be based on a contracting party's "consent to a transfer of alienable rights". A party's consent, Barnett suggests, should be tested by looking for a manifestation of that party's intention to be legally bound. As Sutton, K C T, *Consideration Reconsidered* (1974) at 195-6, has pointed out, the call for an increased emphasis on the "intention to create legal relations" requirement has been echoed by almost every writer who has advocated the abolition of the doctrine of consideration. See also Sutton, K C T, "Promises and Consideration" in Finn, P D (ed), *Essays on Contract* (1987) 35 at 78-80. On the potential role of an "intention to create legal relations" requirement in equitable estoppel, see Coote, B, "The Essence of Contract (Part II)" (1989) 1 *J Cont L* 183, 202-3.

135 Above n68 at 563-4.

136 Id at 547-8.

137 Id at 548.

138 (1990) 170 CLR 394.

139 Feinman, J M, "Critical Approaches to Contract Law" (1983) 30 *UCLA LR* 829 at 834.

140 See, for example, the legal realists Cohen, above n6 at 575-8; Kessler, F, "Contracts of Adhesion – Some Thoughts About Freedom of Contract" (1943) 43 *Colum LR* 629 at 629-33; Dawson, J P, "Economic Duress – An Essay in Perspective" (1947) 45 *Mich LR* 253 at 266-7 and contemporary writers such as Mensch, B, "Freedom of Contract as Ideology" (1981) 33 *Stan LR* 753 at 764-5; Feinman, above n139, and Dalton, C, "An Essay in the Deconstruction of Contract Doctrine" (1985) 94 *Harv LR* 997-1114. See also Atiyah, P S, "Misrepresentation, Warranty and Estoppel" in *Essays on Contract* (1986) 275 at 280-286.

distinguish between contractual liability and liability arising from equitable estoppel on the basis that the former is voluntarily assumed by the parties, whereas the latter is imposed on the parties by the courts. The distinctions between contractual obligations and obligations arising from equitable estoppel are in many cases purely formalistic. The realists showed us that contractual liability is not necessarily consensual[141] and, as Paul Finn has recently observed, many equitable estoppel cases exemplify consensual dealings left without contractual force because of the formalistic restrictions on contractual liability.[142] Even if contractual obligations can be said to be assumed by the parties, the remedies provided by the courts in the event of a breach of those obligations cannot be regarded as consensual. Leaving to one side limited exceptions such as enforceable liquidated damages clauses, the remedies for breach of contract are fashioned by the court, not by the parties.[143] It is, therefore, an oversimplification to suggest that a clear line can be drawn between contractual obligations, which are assumed by the parties, and obligations flowing from equitable estoppel, which are imposed by the court.[144]

A more fundamental problem with Mescher's proposal is that it leaves the central question, which is when liability should be imposed, to be decided according to the arbitrary criterion of whether the promisor intended to create legal relations. As Atiyah has argued, the intention to create legal relations requirement is quite unsuited for this role, since courts arrive at the conclusion that no such intention exists by means of "fictitious reasoning". In most cases where the intention is denied, the courts are really saying that the promise in question is one that ought not to be enforced.[145] That approach is inevitable because, as a reading of any estoppel case shows, parties making informal promises or representations simply do not indicate whether they intend to create legal relations or intend to assume any responsibility for their actions.

The very nature of the inquiry into a party's intention to create legal relations is problematic, as Clare Dalton has explained:

> Any inquiry into a party's intent must confront the problem of knowledge – our ultimate inability to gain access to the subjective intent underlying any particular agreement.[146]

The essence of the problem, as Dalton has explained in some detail,[147] is that a subjective approach to determining the intent of a party leads us to basing liability on an unreliable assertion of intention. The alternative is to approach the question objectively, relying on an objective interpretation of external manifestations of that party's intent. A subjective approach is inherently unreliable, whereas an objective approach involves the imposition of an external standard on

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141 Ibid.

142 Finn, P, "Unconscionable Conduct" (1994) 8 *J Cont L* 37 at 40.

143 Atiyah, PS, "Contracts, Promises and the Law of Obligations" in *Essays on Contract* (1986) 10 at 50-1.

144 Id at 41.

145 Atiyah, above n60 at 150. Similarly, Swan, J, "Consideration and the Reasons for Enforcing Contracts" in Reiter, B J and Swan, J (eds), *Studies in Contract Law* (1980) 23 at 58. Cf Atiyah, above n47 at 241.

146 Dalton, above n140 at 1011.

147 Id at 1039-1066.

the parties,[148] making it difficult to deny that contract law is system of imposed, rather than assumed, obligation.[149] The inevitable tendency to adopt an objective approach to the question of intent deprives the inquiry as to intention of its primary justification, which is that it facilitates the mere implementation of the will of the parties.[150]

The final problem with Mescher's proposal is the absence of a need for reform. Mescher has advocated reform on the basis that promise enforcement should be the exclusive domain of the law of contract. Recent decisions, though, have shown that it is bargains that are the exclusive domain of contract.[151] On the present state of the law, promises will give rise to contractual liability when they have been bargained for, and will give rise to liability in estoppel where they have been reasonably relied upon. The law of contract is certainly narrower than it was in pre-classical times when reliance upon a promise was regarded as a reason for its enforcement, but there is no compelling reason to restore that reliance territory to the empire of contract.

It is also important to note that, since promise theorists are generally only concerned with reconciling equitable estoppel with contract, promise theory gives a misleading impression of the scope and nature of equitable estoppel. The doctrine is much broader than promise theorists indicate, and the relevance of contract to estoppel is somewhat overstated. The concern of equitable estoppel is not the enforcement of promises, but the much broader goal of protecting reliance on the conduct of others. It is becoming clear that the version of equitable estoppel operating in Australia is a reliance-based doctrine, under which questions of liability and remedy are determined by reference to the representee's detrimental reliance. Despite the early confusion between contract and estoppel, estoppel now has little in common with the law of contract. Considering the doctrine in terms of its relationship with contract ignores the breadth of operation of the doctrine outside the field of promises.

B. Conscience Theory

Like promise theory, conscience theory has both descriptive and normative aspects: its proponents suggest that estoppel does and should operate by reference to the concept of unconscionability.[152] Conscience theory is, however, far more elusive than promise theory because, although considerable support can be found in the commentary for the notion that a concern

148 Fried, above n37 at 61. See also Sir Anthony Mason and Gageler, S J, "The Contract" in Finn, P D (ed), *Essays on Contract* (1987) 1 at 8.

149 Dalton, above n140 at 1066.

150 Similarly, Coote, above n59 at 100, has observed that the common law's response to the impossibility of ascertaining the will of the parties has been to apply objective tests of will and intention. While resort to an objective test makes an inquiry into the parties' intention practically possible, it destroys the notion that the parties' will is the basis of the contract, "since it is not necessarily the actual will which is the determinant."

151 *Beaton v McDivitt* (1987) 13 NSWLR 162 at 168-9 per Kirby P and 180-2 per McHugh J.

152 It is important to distinguish here between, on the one hand, proponents of a truly conscience-based doctrine and, on the other hand, those who simply invoke the rhetoric of unconscionability in support of an approach that is clearly reliance-based. For examples of the latter approach, see *Commonwealth v Verwayen* (1990) 170 CLR 394 at 428-9 per Brennan J and 501 per McHugh J.

with unconscionability is,[153] and should be,[154] the basis of equitable estoppel, neither the descriptive claim nor the normative claim has been spelt out in any detail. Only one commentator, Margaret Halliwell, has gone beyond those broad assertions and made a clear argument that equitable estoppel is, and should be, organised around the concept of unconscionability.[155] According to Halliwell:

> It is now necessary to recognise that the organising concept of estoppel is unconscionability because the function of estoppel is to restrain injustice resulting from unconscionable conduct.[156]

Halliwell argues that proprietary estoppel[157] is conscience-based because the cause of action is not a response to the representee's reliance, but to the type of conduct engaged in by the representor.[158] Proprietary estoppel, according to Halliwell, does not seek to compensate for reasonable reliance because the concern of equity, as Lord Evershed has said, is not to do justice, but rather to restrain injustice.[159] Halliwell's advocacy of a conscience-based equitable estoppel is both descriptive and normative. She suggests that the "modern tendency, as evidenced by all case law, is to treat estoppel as a legal response triggered by a cause of action founded upon unconscionability".[160] Halliwell does not, however, make good her descriptive claim. She does not attempt to show that the doctrine operates by reference to unconscionability, rather than reliance. Although she purports to include the Australian cases within her framework, she does not explain why a cause of action which is "not a response to

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153 For example: Clark, E "The Swordbearer has Arrived: Promissory Estoppel and *Waltons Stores (Interstate) Ltd v Maher*" (1987-9) 9 *U Tas LR* 68 at 73 ("unconscionability is the unifying principle which forms the basis of the different heads of equity incorporated under equitable estoppel"); Getzler, J, "Unconscionable Conduct and Unjust Enrichment as Grounds for Judicial Intervention" (1990) 16 *Mon ULR* 283, 305-6 (the "unified principle of equitable estoppel" is "based on the prevention of unconscionable conduct"); Lunney, M, "Towards a Unified Estoppel: The Long and Winding Road" [1992] *Conv* 239, 250 (all forms of estoppel have the prevention of unconscionable conduct as their foundation); Arjunan, K, "Waiver and Estoppel – A Distinction Without a Difference" (1993) 21 *ABLR* 86, 109 ("unconscionability is the undercurrent of equitable estoppel"); Mason, A, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 *LQR* 238 at 254 ("the concept of unconscionability has been at the heart of the doctrinal refinements which have been made" to equitable estoppel); Carter, J and Harland, D, *Contract Law in Australia* (3rd edn, 1996) 133 (unconscionability is "the touchstone for all relevant forms of estoppel").

154 For example: Lunney, ibid, advocates the adoption of "a unified doctrine of estoppel based on unconscionability"; Mason, id at 255 also appears to advocate the "elaboration of the doctrine of estoppel by means of unconscionability."

155 Above n33.

156 Id at 15.

157 It should be noted that Halliwell, id at 15 & 22-30, distinguishes proprietary estoppel, which she suggests is conscience-based, from promissory estoppel which is not based on the concept of unconscionability, but is essentially contractual, representing a limited exception to the requirement of consideration which supports gratuitous variations to contracts.

158 Id at 17.

159 Ibid, citing Evershed, R, "Reflections on the Fusion of Law and Equity After 75 Years" (1954) 70 *LQR* 326 at 329.

160 Above n33 at 33 (emphasis added).

the reliance itself"[161] is so fundamentally concerned with reliance in the determination of questions of liability and remedy.

Since the unconscionability question necessarily involves an examination of the knowledge and conduct of the representor,[162] the essential difference between a cause of action founded on unconscionability and one founded on reliance must be that the former is essentially defendant-focussed (or concerned with the position of the representor), while the latter is essentially plaintiff-focussed (or concerned with the position of the representee). In the case of equitable estoppel, questions of liability and remedy are clearly not determined by reference to the position of the representor. Turning first to questions of liability, a consideration of the conduct of the representor is essential for determining the threshold question whether the representor bears responsibility for the adoption of the relevant assumption, but it is then only regarded as unconscionable to depart from such an assumption if the representee has relied on that assumption to his or her detriment.

> Simply to change one's mind or to break a promise is not of itself unconscionable in the eyes of the law. But it becomes so the more that reliance has been placed on the promisor not changing his or her mind and the greater the consequential detriment that will be suffered.[163]

The question of unconscionability is, therefore, dependant upon detrimental reliance. Indeed, as I will argue in the next part of this article, the approach of the Australian courts to the issue of liability is characterised by its focus on the position of the representee.[164] Accordingly, it is difficult to see how the cause of action can be said to be based on unconscionability, rather than reliance. Similarly, although relief is occasionally said to be shaped by reference to unconscionable conduct,[165] under the approach laid down by the High Court in *Commonwealth v Verwayen*, relief is determined exclusively by reference to the representee's detrimental reliance, with no consideration whatsoever of the knowledge or conduct of the representor.[166]

Turning to the normative claim, Halliwell fails to outline how a conscience-based doctrine of equitable estoppel would operate, except to emphasise the considerable flexibility and discretion the courts have at their disposal in determining equitable estoppel cases.[167] Indeed, it is difficult to see what role conscience can play in a coherent doctrine of equitable estoppel. The first problem is the indeterminacy of the concept of unconscionability, which, as Justice Gleeson has recently said, is too vague a legal standard to be applied consistently or predictably.[168] Attempts in England to unite promissory and proprietary estoppel on the basis that both involve a simple application of the

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161 Id at 17.

162 See *Commonwealth v Verwayen* (1990) 170 CLR 394 at 444 per Deane J; Starke, Seddon and Ellinghaus, above n4 at 160; Getzler, above n153 at 323; Robertson, above n49 at 2.

163 Starke, Seddon and Ellinghaus, id at 158.

164 See below nn177-181 and accompanying text.

165 See, eg, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 419 per Brennan J.

166 *Commonwealth v Verwayen* (1990) 170 CLR 394 at 415-7 per Mason CJ, 429-30 per Brennan J, 454 per Dawson J, 475 per Toohey J and 500-1 per McHugh J. See Robertson, above n3 at 822-6.

167 Above n33 at 32.

168 Gleeson, A M, "Individualised Justice — The Holy Grail" (1995) 69 *ALJ* 421 at 425-7.

question whether it would be unconscionable for a promisor to go back on his or her promise have also been criticised as unhelpful, "as they provide no basis on which a legal doctrine capable of yielding predictable results can be developed."[169] While acknowledging that "unconscionability is very much a matter of fact, degree and value judgment", Sir Anthony Mason has defended the standard, suggesting that it is erroneous to believe that "rigid rules promote clarity and certainty in the law."[170] A middle ground can, however, be found between rigid rules and empty concepts such as unconscionability, which are so devoid of meaning that they do little more than disguise a judicial discretion.[171]

Leaving to one side the indeterminacy of the broad principle of unconscionability, it is difficult to see what role the representor's knowledge and conduct can play in determining liability, beyond the threshold question whether the representor bears sufficient responsibility for the representee's adoption of the relevant assumption. The most significant problem with a conscience-based approach, however, is that the representor's conscience does not provide sufficient guidance in the difficult, but fundamental, question of the relief to be provided to give effect to an estoppel in a particular case. The essential question in the granting of relief in an estoppel case is whether the representor's expectation interest or reliance interest should be protected.[172] While there might be some cases in which the representor's conduct might be seen to be sufficiently reprehensible as to require the fulfilment of the representee's expectations,[173] in most cases the nature of the representor's conduct will not provide clear guidance in choosing between reliance and expectation relief. The adoption of a conscience-based approach to relief would, as Justice Gleeson has suggested, "give rise to difficult questions as to how one distinguishes between the circumstances where conscience requires the representor to make good a representation, and the circumstances where it is sufficient to require the representor to compensate the representee for the loss suffered by reliance upon the representation."[174]

C. *Reliance Theory*

(i) *The Reliance Basis of Equitable Estoppel*

Yorio and Thel describe as "reliance theorists" those commentators who hold that the objective of promissory estoppel is to protect promisees from loss caused by reliance on a promise, and that issues of liability and remedy should turn on reliance.[175] In a recent article on the competing purposes of estoppel, I argued that the fundamental purpose of equitable estoppel is to protect against

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169 Treitel, G H, *The Law of Contract* (9th edn, 1995) 136.

170 Above n153 at 256.

171 See Birks, above n64 at 16-17.

172 See Robertson, above n3 at 806-9.

173 Leopold, A, "Estoppel: A Practical Appraisal of Recent Developments" (1991) 7 *Aust Bar R* 47 at 59, suggests, for example, that where the encouragement offered by the representor to the representee to proceed along a certain course is extensive and of lengthy duration, then such "extreme unconscionability" might justify the grant of expectation relief.

174 Gleeson, above n168 at 427.

175 Yorio and Thel, above n69, esp at 112-15.

the consequences of detrimental reliance on the conduct of others.[176] That article showed that equitable estoppel now operates essentially by reference to the representor's detrimental reliance. The rhetoric of unconscionabilty is, however, often invoked to justify the doctrine and to justify aspects of the doctrine which are truly reliance-based, such as the requirement that the representee's reliance must be reasonable, and the reliance-based approach to relief.

The reliance basis of equitable estoppel was clearly established in the above discussion of the application of Yorio and Thel's claims to the Australian context.[177] That discussion outlined three aspects of the Australian doctrine which clearly establish its reliance basis: first, the strict requirement of detrimental reliance by the representee in the establishment of liability; secondly, the relative weakness of the requirement that the representee's assumption must be induced by the conduct of the representor; and, thirdly, the recent adoption by the High Court of a reliance-based approach to relief. To that list can be added the requirement that the representee's reliance upon the relevant assumption must be reasonable. That reliance-based requirement can be contrasted with the unconscionability-based requirement in the United States that reliance must reasonably be expected by the promisor.[178]

The reliance basis of equitable estoppel is supported by Nicholas McBride's analysis of the fundamental duty underlying equitable estoppel and other doctrines.[179] McBride argues that the doctrines of equitable estoppel recognised in England and Australia, and the doctrine of promissory estoppel recognised in the United States, are manifestations of an "as yet undefined" duty to prevent detrimental reliance on a promise.[180] The duty that emerges from the recent Australian cases is even wider than McBride suggests. Liability under the Australian doctrine does not depend on the making of a promise, but rather on the representee adopting an assumption which is induced by the representor.[181] As discussed above, that assumption can be induced by several different types of conduct, including a representation, a course of conduct and even silence in certain circumstances.[182] Accordingly, the duty on which the Australian doctrine of equitable estoppel is based must be a duty to prevent harm being suffered by those who rely on one's conduct, not just on one's promises.

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176 Robertson, above n49.

177 Above nn86-112 and accompanying text.

178 On the importance of the distinction between the two approaches, see Robertson, above n49 at 15-19.

179 McBride, above n64 at 45-50.

180 Similarly, Metzger and Phillips, above n11 at 536-43, argue that the doctrine of promissory estoppel recognised in the United States is an independent, non-contractual, reliance-based cause of action.

181 Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387 at 407 per Mason CJ and Wilson J, 428-9 per Brennan J, 447-55 per Deane J, 458 per Gaudron J; *Commonwealth v Verwayen* (1990) 170 CLR 394 at 412-3 per Mason CJ, 444 per Deane J, 460-1 per Dawson J, 487 per Gaudron J, 500 per McHugh J.

182 Above nn96-98 and accompanying text.

(ii) Equitable Estoppel as Part of the Law of Wrongs

Having established the nature of the duty created by equitable estoppel, the next step is to locate it within the law of obligations. The traditional classification of common law obligations is threefold, the categories being contract, tort and restitution. If one is dealing with equitable causes of action as well, then the category of tort will need to be expanded to cover all civil wrongs, both common law and equitable. More sophisticated taxonomies have been proposed,[183] and may well be necessary to accommodate all equitable causes of action. The threefold classification is adequate for present purposes, however, since the essential question here is whether the duty established by equitable estoppel should be regarded as part of the law of contract or as part of the law of civil wrongs. Three different means of classifying a cause of action can be identified.[184] First, one can look to the origin of the duty or the source of liability, secondly one can look to its content, or the pattern by which liability is established, and thirdly, one can look to its remedial consequences. Each of those aspects of equitable estoppel will be examined in turn.

An essential characteristic of a wrong, which distinguishes it from contractual liability, is that it is a breach of a primary duty, primarily fixed by law.[185] That is, the duty does not arise by virtue of the consent of the parties or the occurrence of an event. Contractual duties can be seen as arising by virtue of the consent of the parties or, if one does not accept the legitimacy of the distinction between obligations assumed by the parties and those imposed by law, then one can see contractual duties as arising out of an event, which we call the formation of a contract. Restitutionary duties clearly arise by virtue of the occurrence of an event, namely the enrichment of one party, at the expense of another, in circumstances in which the enrichment is regarded as unjust. The duty created by equitable estoppel does not arise by virtue of the consent of the parties, since the courts do not require even objective indicia of consent to the assumption of obligation. Nor does the obligation arise by virtue of an event; the duty to prevent harm resulting from reliance on one's conduct is owed at all times and to all parties with whom one deals.[186]

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183 See, for example, McBride, above n64; Birks, above n64, esp at 8-16 and Birks, P, "The Concept of a Civil Wrong" in Owen, D G (ed), *Philosophical Foundations of Tort Law* (1995) at 31.

184 The first two of these methods are used by McBride, above n64 at 35; the third is used by Burrows, above n124 at 217-9.

185 Winfield, P H, *The Province of the Law of Tort* (1931) at 32; Birks, above n64 at 8-16, 40-42 and Birks, above n183; Dias, R W M et al, *Clerk & Lindsell on Torts* (16th edn, 1989) at 3-4; Castronovo, C, "Liability Between Contract and Tort" in Willhelmsson, T, *Perspectives of Critical Contract Law* (1993) 273 at 273-4. On the distinction between primary (or substantive) duties and secondary (or remedial) duties, see Dias et al, id at 3-5; Birks, above n64 at 10-11 and Birks, above n183 at 37-8.

186 Whether the duty is owed to all persons, or whether some relationship between the parties is required, has not yet been resolved. In *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 and *Commonwealth v Verwayen* (1990) 170 CLR 394, the High Court abandoned the requirement of a pre-existing contractual relationship between the parties, but did not address the question whether *any* relationship between the parties is required. The courts may ultimately recognise that the duty is owed to all persons, since it will rarely, if ever, be reasonable to rely on the conduct of a stranger.

The second characteristic to be examined is the content of the duty, or the pattern by which liability is established. Nicholas McBride suggests that the duty created by equitable estoppel is not contractual in pattern because the defendants in the cases he cites were not under a duty to perform their promises, but merely a duty to prevent their breaches of promise from causing detriment to plaintiffs who had relied on those promises.[187] The fact that a promise is not required to establish liability is an even clearer indication that equitable estoppel is not contractual in pattern.[188] The duty is obviously not restitutionary since it arises independently of any enrichment of the promisor arising out of the promisee's reliance on the promise. McBride also suggests that the duty is not tortious in pattern because tortious duties require a person to constrain his or her conduct in the interests of others, not to ensure that a state of affairs exists, such as ensuring that someone is not made worse off as a result of reliance on one's promise.[189] There does not, however, appear to be any reason to define the class of civil wrongs so narrowly. A pattern for wrongs which would include equitable estoppel is that proposed by Burrows, who suggests that the cause of action in tort is based on wrongful harm, which can be contrasted with the basis of the contractual cause of action in breach of a binding promise and the restitutionary cause of action in unjust enrichment.[190]

A third distinction between wrongs and other sources of civil liability lies in the nature of the legal response to the breach of the primary duty. Burrows has approached the question of classification on the basis of remedy, suggesting that the categories of contract, tort and restitution flow from the three "cardinal principles" of "the fulfilment of expectations engendered by a binding promise, the compensation of wrongful harm and the reversing of unjust enrichment".[191] The traditional response to a breach of contract is to order the contract breaker to perform his or her promise, or to order payment of damages calculated to place the innocent party in the position he or she would have occupied had the contract been performed. The traditional legal response to a wrong, on the other hand, is compensatory: the wrongdoer is compelled to pay damages calculated so as to put the innocent party in the position they would have occupied had the wrong not been committed. Both of those types of response can be identified in the equitable estoppel cases. A court can give effect to an estoppel by means of reliance-based relief, which reverses the detriment suffered by the representee as a result of his or her reliance on the representor's conduct.[192] Reliance-based relief is compensatory in nature and can, therefore, be identified as a typical legal response to a wrong. A court can also give effect to an estoppel by means of expectation relief, which has the effect of fulfilling the expectation induced by the representor's conduct, and which is equivalent to the relief provided by the law of contract.

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187 McBride, above n64 at 49.

188 Above nn91-101 and accompanying text.

189 McBride, above n64 at 49.

190 Burrows, above n124 at 218. Similarly, Castronovo, above n185 at 274, suggests that tort actions protect the interest in freedom from harm, rather than the interest in having promises enforced.

191 Id at 217.

192 The reliance and expectation based approaches to relief in equitable estoppel cases are discussed in Robertson, above n3 at 806-9.

A difficulty faced in rationalising equitable estoppel as a reliance-based wrong lies in the regularity with which the courts grant expectation relief to give effect to equitable estoppel. The tendency of courts to grant expectation relief in estoppel cases, according to Hugh Collins, presents a difficulty for those who hold that harm represented by detrimental reliance not only triggers liability, but also dictates the appropriate remedy.[193] If the appropriate remedy is not designed to protect against harm, but to enforce promises or fulfil expectations, that does tend to suggest that equitable estoppel is contractual in nature.[194]

In England, it is difficult to rationalise equitable estoppel as part of the law of wrongs, given the failure of the courts to articulate the basis on which relief is determined, and the tendency towards expectation relief. Nicholas McBride has attempted to account for the fact that the duty to prevent detrimental reliance is so often enforced by means of enforcement of the promise. He suggests that fulfilling the promisee's expectations is an equally effectual way of preventing the representee from being made worse off as a result of the breach of promise as the more "subtle" grant of reliance damages.[195] Hugh Collins, on the other hand, argues that the rationale for the reliance model might fit the cases better if the requirement of harm was seen as a condition of liability, but not the guiding principle of the remedy.[196] Collins suggests that the approach adopted by the English and Australian courts can be regarded as essentially the same as that applied in the United States where the remedy may go beyond compensation for harm where justice so demands. This leaves equitable estoppel, in Collins' view, as a reliance-based form of contract, albeit one with its own distinctive set of rules and remedies.[197]

In Australia, on the other hand, it is possible to rationalise the approach to remedy in equitable estoppel with its place in the law of wrongs. Although English commentators such as Collins purport to include the Australian cases within their theories, after *Commonwealth v Verwayen*, the position here is entirely different from that in England. In clear dicta in *Commonwealth v Verwayen* the High Court adopted a reliance-based, compensatory approach to giving effect to equitable estoppel, which is the traditional legal response to a wrong.[198] Although the new approach adopted by the High Court has not yet had a great impact on the results of reported cases in the lower courts, the approach clearly characterises equitable estoppel as part of the law of wrongs.

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193 Collins, above n99 at 84-5.

194 Cf Birks, above n64 at 12-15, and above n183 at 34-6, who argues that the legal response to a wrong is a matter of choice, not logic, and the award of compensatory damages just happens to be the response provided in the case of most wrongs.

195 McBride, above n64 at 65-6.

196 Collins, above n99 at 85, argues that it is a mistake to suppose that the same policies and values should determine both questions of liability and the measure and type of remedies available. *Contra* Burrows, above n124 at 265, who says that "the law should not, and if correctly understood, does not show any inconsistency between the basis of liability and the basis for assessing damages."

197 Collins, above n99 at 45, 82.

198 Finn, above n142 at 43, suggests that "the most transparently tort like case is *Commonwealth v Verwayen* [(1990) 170 CLR 394] where some number of the justices would have allowed a pecuniary award to reverse the actual detriment suffered by the plaintiff in reasonably relying on the representation of the defendant."

As I have argued elsewhere, the approach taken by the High Court represents a clear break with the past and cannot sensibly be reconciled with the earlier authorities in which expectation relief was favoured.[199]

Patrick Parkinson has offered support for the view that the remedial approach taken by the High Court identifies equitable estoppel as part of the law of wrongs.[200] Parkinson suggests that where the effect of an estoppel is to provide a plaintiff with a remedy for reliance on a non-contractual promise, then the intervention of equity to reverse the detriment suffered, rather than to fulfil the expectation, differentiates that doctrine from the law of contract.[201] He observes that, under the approach articulated by Mason CJ in *Commonwealth v Verwayen*,[202] which requires proportionality between the remedy and the detriment,

> the role of equity is more analogous to the law of tort than the law of contract. It fulfils expectations only to the extent necessary to reverse a detriment, and its role is to compensate the plaintiff for a wrong rather than to hold the defendant to a promise. In this way the demarcation lines between estoppel and contract are made clear.[203]

The final point to note about the duty created by equitable estoppel is that it remains for the present a purely equitable duty. Peter Birks has argued that, in mapping the law of obligations, there is no legitimate reason to distinguish between wrongs deriving traditionally from the common law and those deriving from equity.[204] There should, Birks suggests, be a single class of wrongs, with a unified remedial regime. For the present, however, the doctrine of equitable estoppel remains distinctly equitable in nature. It is, therefore, properly seen as part of the equitable branch of civil wrongs, taking its place alongside doctrines such as breach of confidence. Leaving to one side the rhetoric of unconscionability, which certainly gives the doctrine an equitable flavour, the doctrine is clearly equitable in substance. Although the doctrine operates by reference to the tort-like concept of reasonable reliance, it is essentially equitable in nature, being subject to equitable defences and a discretionary approach to relief. Equitable defences, such as a lack of clean hands, can be pleaded to prevent an equitable estoppel from arising.[205] Once liability is established, the court's response is classically equitable. Liability in estoppel gives rise to "an equity", which means that the remedy is at large.[206] Although the courts seek to protect a plaintiff's reliance interest, the plaintiff does not have a *right* to relief in damages. Instead, it is within the court's discretion to satisfy the equity as it sees fit, but within certain guidelines. The exercise of that discretion often involves the grant of expectation relief[207] and relief in specie.[208]

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199 Above n3 at 843-7.
200 Parkinson, above n90 at 226-7.
201 Id at 226.
202 (1990) 170 CLR 394 at 413.
203 Parkinson, above n90 at 227.
204 Birks, above n64 at 25-52.
205 See, eg, *Official Trustee in Bankruptcy v Tooheys Ltd* (1993) 29 NSWLR 641.
206 See, eg, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 419 per Brennan J.
207 See Robertson, above n3 at 833-4.
208 Examples include landmark cases such as *Dillwyn v Llewellyn* (1862) 4 De GR&J 517; 45

(iii) Criticism of the Reliance-Based Approach

Randy Barnett has criticised reliance theory as a basis for imposing promissory obligations, on the basis that a focus on reliance does not present us with a clear choice as to which promises should be enforced.[209] He draws on Morris Cohen's comment that not all cases of reliance on the words or conduct of another are actionable, and reliance theory offers no clue as to what distinguishes those that are enforceable from those that are not.[210] The way in which actionable reliance is distinguished from non-actionable reliance is by reference to the question whether the representee's reliance was, in the circumstances, reasonable.

Barnett suggests that the reasonableness question is somewhat circular and fails to address the essential question, which is when reliance should be protected.[211] The question whether reliance in a given situation is reasonable is not, according to Barnett, an assessment we can make independently of the legal rule in the relevant community, because the question whether a reasonable person would rely is affected by their perception of whether or not the promise is enforceable. Enforceability, therefore, depends on reasonableness, while reasonableness depends on enforceability. Barnett suggests that the consequence of that circularity is that a reliance theory ultimately does no more than pose the crucial question, which is whether a promise should be enforced.

Barnett's discussion is not directly applicable in the Australian context, because here reliance-based obligations do not just result from reliance on promises, and reliance does not strictly result in the promise being "enforceable". Barnett does, however, show us that the reliance basis for equitable estoppel does not tell us when reliance by one party on an assumption induced by another should give rise to an obligation in equity to prevent detriment resulting from that reliance. By focussing on reliance, we can determine whether an assumption has been induced by the conduct of another party, we can establish the fact of reliance on that assumption, we can determine what detriment has resulted from reliance, and we can fashion a remedy accordingly. But the only answer to the question: "when should reliance be protected?" is "when it is reasonable."

It is clear that, as Barnett observes, the question of reasonableness assumes great importance in a reliance-based doctrine of estoppel: it determines when reliance should be protected, and requires a representee to act with circumspection when relying on the conduct of others. As Hugh Collins puts it "the real meat of the reliance model lies in the requirement that the reliance must have been reasonable."[212] Barnett's claim that the reasonableness test is circular does not withstand scrutiny, however, because it is not true to say that

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ER 1285 and *Crabb v Arun District Council* [1976] 1 Ch 179 as well as more recent cases such as *Drummoyne Distict Rugby Club Inc v NSW Rugby Union* (1994) Aust Contract Reports 90-039 and *S&E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122 ALR 637.

209 Barnett, above n69 at 274-6.

210 Cohen, above n6 at 579.

211 Similar points have been made by Atiyah, above n143 at 33 and Katz, above n2 at 1254.

212 Collins, H, *The Law of Contract* (1st edn, 1986) at 38.

reasonableness depends on enforceability. It would in fact be quite artificial to decide the question of reasonableness on the basis of enforceability, because a reasonable person could not be said to know when reliance on the conduct of another person is legally protected. Barnett seems to assume that a promisee's decision as to whether to rely on a promise will be based solely on his or her perception of his or her legal rights. One could argue, however, that the fundamental consideration for most promisees is not whether their reliance will be protected by the courts, but whether the promisor can be expected to make good the promise. That argument is supported by Stewart Macaulay's finding that business people often do not act on the basis of legal sanctions which might be available to them in the event of a breakdown in their relationship with the party with whom they are dealing, but will prefer to rely on "common honesty and decency".[213] No doubt that tendency is even more prevalent outside the commercial arena.

Accordingly, the question of reasonableness cannot depend on enforceability. Instead, as Atiyah suggests, the question of reasonableness is a community judgment, which draws on "collective moral ideas and even customary practices and redistributive ideologies."[214] Deciding when to protect reliance will inevitably involve a policy decision as to whether reliance should be protected in the circumstances in question, whether it is in the guise of a question of the reasonableness of the representor's reliance or whether a reasonable representee would have expected reliance.[215] As Hugh Collins suggests, these vague standards simply "alert us to the fact that the court is balancing competing policies when determining the province of legal enforceability."[216]

A second deficiency in Barnett's critique of "reasonableness" as a legal standard is his failure to make a compelling case for an alternative basis for liability. Barnett suggests that reliance should be protected only when it is reliance on "a manifested intent to be legally bound."[217] The problem with that formulation is that, as innumerable estoppel cases have shown us, people who make informal promises and representations tend not to indicate whether they intend to be legally bound. It is doubtful in most cases whether they even put their minds to the question. As discussed above, therefore, one must then choose between an inherently unreliable subjective approach, and an objective approach which destroys the rationale for looking at intention in the first place.[218]

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213 Macaulay, S, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28 *Am Soc R* 55 at 58. See also Beale, H and Dugdale, T, "Contracts Between Businessmen: Planning and the Use of Contractual Remedies" (1975) 2 *Brit J of Law and Soc* 45 at 48-50.

214 Above n44 at 87.

215 The reasonableness of reliance standard is preferable here because it is consistent with the reliance-based nature of equitable estoppel and its essential concern with the position of the representee, rather than that of the representor. See Robertson, above n49 at 15-19.

216 Above n212 at 38.

217 Barnett, above n69 at 315.

218 Above nn145-150 and accompanying text.

(iv) The Balance of the Reliance-Based Approach

The advantage of a reliance-based doctrine of equitable estoppel is that it achieves a balance between various competing factors. There are two clear benefits. The first is that the reliance model achieves a balance between individual liberty and the communitarian value of preventing harm resulting from reliance on the conduct of others. As Hugh Collins explains, on the one hand the reliance model clearly "attaches less weight to the value of personal autonomy than the classical exchange model."[219] On the other hand, the requirement that reliance must be reasonable "allows the courts to preserve a realm of liberty within which parties enjoy room for manoeuvre without incurring legal obligations."[220]

The second advantage of the reliance-based approach is that it achieves a balance between what Feinman has called "factual particularisation and normative abstraction".[221] On the one hand, the relianc- based approach provides a clear basis for determining questions of liability and remedy in estoppel cases. On the other hand, the requirement of reasonableness in the determination of liability, and the discretion retained by the court in the granting of relief, ensure that courts are not solely concerned with abstracted questions. Under a reliance-based approach, liability turns on a balanced combination of the abstracted question of detrimental reliance (whether the representee has acted to his or her detriment on the faith of an assumption induced by the representor's conduct) and the particularised notion of reasonableness of reliance (whether the representee's reliance was reasonable in the circumstances).[222] In the granting of relief, a balance is achieved by, on the one hand, the exclusive focus on the consequences of the representee's reliance and, on the other, the discretion which allows the court to do what is necessary to prevent or reverse the detriment resulting from that reliance. Those finely balanced combinations allow questions of liability and remedy to be clearly enunciated and consistently and predictably applied, while retaining the flexibility necessary to do justice in individual cases.

3. *Conclusions*

As this article has shown, there are three important aspects to the current debate in relation to equitable estoppel. The first relates to the way in which the doctrine, as presently applied by the courts, can best be characterised, the second relates to its place within the law of obligations, and the third relates to the way in which the doctrine should operate. Those questions are closely connected, because the operation of the doctrine will inevitably be shaped by the role it is seen to play within the law of obligations, and its place within the law of obligations is at least partly determined by the way in which it operates.

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219 Above n212 at 40.

220 Ibid.

221 Feinman, above n11 at 698.

222 As Getzler, above n153 at 325, has observed in a broader context, a reliance-based principle of obligation provides a "framework for reasoned resolution of issues" while giving the court "a sophisticated policy discretion in the ascription of ... responsibility."

There is also, of course, inevitable overlap between descriptive and normative claims.[223]

The resurgence of contract law as a basis for liability is evidenced by the volume of recent commentary suggesting that equitable estoppel should be regarded as, or adapted to become, part of the law of contract. The province of equitable estoppel is now being seen by some commentators as a potential new territory for the expansion of the empire of contract, rather than as evidence of its contraction. The recent re-orientation of equitable estoppel by the High Court, however, makes it clear that the doctrine is based on concepts of reliance, rather than promise, and is part of the law of wrongs, rather than the law of contract.

While the rhetoric of unconscionability has dominated the recent cases and commentary on equitable estoppel, claims that the doctrine is organised around the concept of unconscionability are not supported by the approach taken in these cases. The characterisation of the representor's conduct as unconscionable justifies the intervention of equity in estoppel cases, but as the doctrine is currently formulated and applied, questions of conscience have a limited role to play in the operation of the doctrine. The knowledge and conduct of the representor are only relevant to the threshold question whether the representor bears responsibility for the representee's adoption of the relevant assumption. Questions of liability and remedy are otherwise determined by reference to the representee's reliance. Advocates of a truly conscience-based doctrine need to articulate the basis on which such a doctrine would operate and, most importantly, need to overcome the limitations of the concept of unconscionability in the determination of relief.

This article shows that equitable estoppel, as currently applied by the courts, is best seen as a doctrine which enforces a duty to prevent harm resulting from reasonable reliance on one's conduct. The doctrine is organised around the concept of reliance and, until a unified doctrine is accepted, should be regarded as part of the equitable branch of the civil law of wrongs. Although difficulties inhere in all of the different approaches proposed, the reliance-based approach best balances the competing factors. The reliance based approach balances the liberal desire for individual freedom of action against the communitarian need to protect reasonable reliance on the conduct of others. It provides clear principles for the determination of questions of liability and relief, while allowing courts the measure of flexibility required to do justice according to the facts of each particular case.

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223 As Campbell, T, "Liberalism and the Law of Contract" in Gamble, A J (ed), *Obligations in Context* (1990) 111 at 111, has noted in relation to theories of contract, the various theories of estoppel "are regularly claimed to capture the essential logic of existing bodies of legal rules and principles as well as to point the way towards desirable developments ... The attempt to combine explanatory and justificatory enterprises [makes] for serious equivocation between the "is" and the "ought" within the contending theories".