ESTOPPEL IN CONTRACT

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I. INTRODUCTION

> The principle in *Waltons* v. *Maher* (1988) 164 CLR 387 is not to be implied as a back-up submission in every case where parties have failed to obtain a binding exchange of contracts. This, unfortunately, is tending to be the stance taken in almost every case of this nature.[1]

The concern of this article is Australian contract law in the light of recent cases. It is divided into five sections:
(1) Introduction;
(2) Terminology and concepts;
(3) Recent cases and reformulations of doctrine;
(4) Particular contract-related issues; and
(5) Conclusions.

II. TERMINOLOGY AND CONCEPTS

A. ESTOPPEL *IN PAIS*

The common law recognised three forms of estoppel: estoppel of record, estoppel by deed and estoppel *in pais*. The first, under which the doctrines of res judicata (or 'cause of action estoppel' or 'merger in judgment estoppel'), issue estoppel and the 'principle of *Henderson* v. *Henderson*'[2] (recognised in Australia in *Port of Melbourne Authority* v. *Anshun Pty Ltd*[3])

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1 *Milchas Investments Pty Ltd* v. *Larkin* unreported, Supreme Court of New South Wales, 8 June 1989, *per* Young J.
2 (1843) 3 Hare 100; 67 ER 313.
3 (1981) 147 CLR 589.

are not of present concern. *Coke's Littelton*[4] refers to "estoppel by matter of writing" as the second class of estoppel, but 'estoppel by deed' was intended, since 'writing' as such does not occupy a special position under the general law, and in the absence of special statutory provision, writing has no special attributes in the present context beyond its evidentiary function.

'Estoppel *in pais*' signifies 'estoppel at large' or 'estoppel by conduct', and thus, as a matter of language, is capable of referring to all estoppels other than those limited by reference to record or form. However, the range of meaning of the expression 'estoppel *in pais*' seems to have varied from time to time. Prior to the development of the equitable doctrines of proprietary estoppel and estoppel by acquiescence and encouragement, 'estoppel *in pais*' signified only the remainder of the field of estoppel at common law. The expression is now commonly regarded as embracing those equitable doctrines also.[5] But the expression is not yet comfortably used to refer to the equitable doctrine of 'promissory estoppel'.

The recent cases which are the focus of the concern of this article indicate a process of integration and rationalisation of doctrine and of an attempt to expose a unifying broad principle underlying the 'informal' estoppels, whether originating at common law or in equity. It is suggested that as a result, the expression, 'estoppel *in pais*' will and should, without embarrassment, be used to denote all 'informal' estoppels, irrespective of their historical and jurisdictional origins.

B. ESTOPPEL AT COMMON LAW

It was well established that estoppel could not be founded on a promise, as distinct from a representation as to past or existing fact.[6] The word 'representation' in the expression 'estoppel by representation' conveniently emphasised this requirement. As well, it directed attention to what was, sequentially, the first element to occur in that kind of estoppel, rather than, for example, the effect of the representation on the mind of the representee or his reliance on the representation.

'Estoppel by representation' was not the only basis in which estoppel *in pais* operative at common law was conceived of and referred to. 'Estoppel by convention' was another. And there were others. In two most important passages for the purpose of this article, Dixon J. referred to a principle which was common to the various forms of estoppel *in pais*. The first occurs in *Thompson* v. *Palmer*:[7]

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4 At 352a.

5 See *Legione* v. *Hateley* (1983) 152 CLR 406, 430 *per* Mason and Deane JJ.

6 *Jorden* v. *Money* (1854) 5 HLC 185; 10 ER 868 (hereinafter *Jorden* v. *Money*); *Maddison* v. *Alderson* (1883) 8 App Cas 467, 473; *Chadwick* v. *Manning* [1896] AC 231; *George Whitechurch Ltd* v. *Cavanagh* [1902] AC 17, 130; *Craine* v. *Colonial Mutual Life Insurance Co. Ltd* (1920) 28 CLR 305, 324; *Yorkshire Insurance Co. Ltd* v. *Craine* (1922) 31 CLR 27, 38.

7 (1933) 49 CLR 507.

> [t]he object of estoppel *in pais* is to prevent an unjust departure by one person from an *assumption* adopted by another as the basis of some act or omission which, unless the *assumption* be adhered to, would operate to that other's detriment. Whether a departure by a party from the *assumption* should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the *assumption* because it formed the conventional basis upon which the parties entered into contractual or other mutual relations, such as bailment; or because he has exercised against the other party rights which would exist only if the *assumption* were correct ...; or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the *assumption;* or because he directly made representations upon which the other party founded the *assumption.* But, in each case, he is not bound to adhere to the *assumption* unless, as a result of adopting it as the basis of action or inaction, the other party will have placed himself in a position of material disadvantage if departure from the *assumption* be permitted [emphasis added].[8]

And the same judge in *Grundt* v. *Great Boulder Pty Gold Mines Ltd*[9] said,

> [t]he principle upon which estoppel *in pais* is founded is that the law should not permit an unjust departure by a party from an *assumption* of fact which he has caused another party to adopt or accept for the purpose of their legal relations. This is, of course, a very general statement. But it is the basis of the rules governing estoppel. Those rules work out the more precise grounds upon which the law holds a party disentitled to depart from an *assumption* in the assertion of rights against another [emphasis added].[10]

In these passages Dixon J. took as the starting point for his analysis of estoppel *in pais,* the "assumption" made by the party seeking to set up the estoppel, rather than the conduct of the party sought to be estopped. Except for the reference to "assumption of fact" in the second passage, the "assumption" referred to is not confined to an assumption as to past or present fact. As will be shown below, his Honour's emphasis on the assumption made by the party who subsequently seeks to set up an estoppel proved to be important for rendering less important the distinction between promissory conduct and representational conduct as the catalysts for the assumption made.

The forms of "conduct giving rise to an assumption" to which Dixon J. referred in *Thompson* v. *Palmer*[11] may be summarised as 'estoppel by convention', 'estoppel by exercise of rights', 'estoppel by acquiescence in another's mistake', 'estoppel by negligence' and 'estoppel by representation'. The notion of the making of a promise has no place in any of these. But that of the making of an 'assumption' conforms as well to the state of mind brought about by that which the other party says he *will* do, as to that brought about by his representation as to a past or present matter of fact or state of affairs.

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8 *Id.*, 547.
9 (1937) 59 CLR 641.
10 *Id.*, 674.
11 Note 7 *supra.*

'Estoppel by convention' has been characterised by the learned author of *Spencer Bower and Turner's Estoppel by Representation* as a kind of 'estoppel by representation' by treating the 'convention' as involving mutual representations made by each contracting party to the other.[12] apparently because the learned author regarded representation of fact as the *sine qua non* of estoppel at common law. But this artificial device is unnecessary since there is at hand, as Dixon J. has said, a unifying and underlying principle which takes as its starting point, not the nature and quality of the temporally first element in an estoppel (the conduct of the party sought to be estopped), but the *effect on the mind of the party setting up the estoppel.* The notion of 'the assumption made' provides a unifying element for 'estoppel by representation' and 'estoppel by convention' and, for that matter, estoppels arising in the other situations to which Dixon J. referred.

At common law, estoppel by representation was a rule of evidence, the rule being that in litigation between the parties to the estoppel, one party would not be permitted to set up the disparity between the true facts and those which the other party had been caused to 'assume' to be the facts.[13] This meant that estoppel by representation was not a cause of action; it was a 'shield' and not a 'sword'.

As was observed by Mason and Deane JJ. in *Legione* v. *Hateley*[14] and by Mason C.J. and Wilson J. in *Waltons Stores (Interstate) Ltd* v. *Maher.*[15] Mr Justice Dixon's references in *Thompson* v. *Palmer*[16] and in *Grundt* v. *Great Boulder Pty Gold Mines Ltd*[17] to "representations" and "assumptions" do not unequivocally refer to representations and assumptions as to existing fact as distinct from representations and assumptions as to future conduct. In *Waltons Stores (Interstate) Ltd* v. *Maher,*[18] Mason C.J. and Wilson J. concluded, however, that if there was any basis for holding that common law estoppel can arise where there is a mistaken assumption as to future events, *Jorden* v. *Money*[19] must be reversed. Their Honours did not find it necessary to undertake that "formidable exercise"[20] and proceeded to invoke the distinctly equitable doctrine of promissory estoppel on which the respondents to the appeal had relied. The continuing authority of *Jorden* v. *Money* and *Chadwick* v. *Manning*[21] remains a doctrinal obstacle

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12 See G.Spencer Bower and A.V.Turner, *Estoppel by Representation* (3rd ed., 1977), 28, fn. 2.

13 *Low* v. *Bouverie* [1891] 3 Ch 82, 101 *per* Lindley L.J.; note 12 *supra,* 7-8; *Waltons Stores (Interstate) Ltd* v. *Maher* (1988) 164 CLR 387, 458 *per* Gaudron J.

14 (1983) 152 CLR 406, 432.

15 *Id.,* 398-9.

16 (1933) 49 CLR 507, 547.

17 (1937) 59 CLR 641, 674.

18 (1988) 164 CLR 387 (hereinafter *Waltons).*

19 Note 6 *supra.*

20 Note 18 *supra,* 399.

21 Note 6 *supra.* See now *Foran* v. *Wight* (1989) 64 ALJR 1, *per* Mason C.J.

to a total synthesis and rationalisation of common law estoppel and equitable estoppel.

In that same case, Brennan J. noted that *Jorden* v. *Money* established that estoppel *in pais* did not compel adherence to "representations of intention"[22] but thought that statements that estoppel *in pais* was merely a rule of evidence and not a cause of action needed explanation. In particular, if the assumption which A caused B to make was that a contract existed between them, their legal relationship was to be determined by reference to that assumption. The effect might be, because of the events which had transpired, that a cause of action on the assumed contract would be available to B.[23] Justice Deane's reasoning was similar in this respect.[24]

C. ESTOPPEL IN EQUITY

In 1946 in *Central London Property Trust Ltd* v. *High Trees House Ltd,*[25] Denning J. enunciated "the equitable doctrine of promissory estoppel". What was involved was a landlord's promise not to insist for a time on its contractual entitlement to the extent of half the rent payable. His Lordship characterised the case as involving a promise intended to create legal relations, intended to be acted on, and in fact acted on. He noted that this was not "estoppel in the strict sense" but was an estoppel in the limited sense that the courts, although not giving a cause of action in damages for breach of such a promise, refused to allow the promisor to act inconsistently with it. The *High Trees* doctrine was founded on cases decided since *Jorden* v. *Money*[26] including *Hughes* v. *Metropolitan Railway Co.*[27] in the House of Lords and *Birmingham & District Land Co.* v. *London & North Western Railway Co.*[28] in the Court of Appeal. Both of those cases concerned the carrying on of negotiations between parties to a subsisting contract, A and B, which caused A to "assume", "suppose" or "believe" that B would not enforce his contractual entitlement against A. They did not involve express promises to suspend enforcement of the contract, but since B had caused A to assume that B's rights "would not be enforced", B's conduct was necessarily promissory rather than representational.

Two observations are called for here. First, in *High Trees* and its

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22 Note 18 *supra,* 415.

23 And "the assumed state of affairs to which a party may be bound to adhere may be more than a state of mere facts; it may include the legal complexion of a fact as well as the fact itself, *i.e.* a matter of mixed fact and law": *ibid.*

24 *Id.,* 445.

25 [1947] 1 KB 130 (hereinafter *High Trees).*

26 Note 6 *supra.*

27 (1877) 2 App Cas 439 (hereinafter *Hughes).*

28 (1888) 40 Ch D 268 (hereinafter *Birmingham).*

progenitors *Hughes* and *Birmingham,* the first matter which was inquired into was A's state of mind and the second was B's role in relation to it. Secondly, in *Birmingham* Bowen L.J. observed that it should not be assumed that the estoppel being considered was not also a principle that was recognised at common law as well as in equity.[29]

Following *High Trees,* the "equitable doctrine of promissory estoppel" as precluding the enforcement of contractual rights was recognised by the House of Lords and the Privy Council[30] and by, or at least in, the High Court of Australia in *Legione* v. *Hateley.*[31]

The equitable doctrine of promissory estoppel as recognised in the English authorities, was, like common law estoppel, not a cause of action, and in particular, did not make a promise enforceable in the absence of consideration.[32] True, the notions of 'promise' and 'estoppel' did not sit comfortably together, and the notion of 'estoppel' drawn from the common law coupled with the doctrine of consideration caused the doctrine of promissory estoppel to be seen as a defence rather than as a cause of action.

'Proprietary estoppel' and 'estoppel by encouragement or acquiescence' are also forms of equitable estoppel.[33] In *Legione* v. *Hateley,*[34] Mason and Deane JJ. said that estoppel *in pais* was "commonly regarded as also including the overlapping equitable doctrines of proprietary estoppel and estoppel by acquiescence or encouragement".[35] But their Honours seem to have thought it premature to classify the limited doctrine of promissory estoppel which they were in the process of recognising as part of Australian law as a species of 'estoppel *in pais*':

> [n]or is it necessary, for the purposes of the present case, to consider whether the doctrine of promissory estoppel should be treated as an extension of estoppel *in pais* into a field where the doctrine of consideration otherwise predominates or whether it should be seen as an independent equitable doctrine. In either case, it is clear that there is general correspondence between the 'grounds of preclusion' of an ordinary estoppel by representation and the 'grounds of preclusion' of a promissory estoppel and that a number of rules which have been established as applicable to estoppel in pais are also applicable to promissory estoppel.[36]

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29 *Id.,* 286.

30 *Tool Metal Manufacturing Co. Ltd* v. *Tungsten Electric Co. Ltd* [1955] 2 All ER 657, 660, 674, 685-6; *Ajayi* v. *R.T.Briscoe (Nigeria) Ltd* [1964] 3 All ER 556, 559; *Woodhouse AC Israel Cocoa Ltd SA v. Nigerian Produce Marketing Co. Ltd* [1972] AC 741, 757-8, 762, 767-8.

31 Note 14 *supra,* 434-5 *per* Mason and Deane JJ. and, perhaps, implicitly, 420-1 by Gibbs C.J. and Murphy J. As early as 1906, in *Barns* v. *Queensland National Bank Ltd* (1906) 3 CLR 925, 938 the High Court had recognised the principle of *Hughes* v. *Metropolitan Railway Co.* note 27 *supra,* that negotiations between contracting parties leading one to believe that the other was suspending enforcement of his rights might give rise to an estoppel.

32 See, for example, *Central London Property Trust Ltd* v. *High Trees House Ltd* note 25 *supra,* 134; *Combe* v. *Combe* [1951] 2 KB 215, 224, 225; *Ajayi* v. *R.T.Briscoe (Nigeria) Ltd* note 30 *supra,* 559F.

33 For a discussion of these doctrines, see P.D. Finn, "Equitable Estoppel" in P.D.Finn (ed.), *Essays in Equity* (1985), Ch. 4.

34 Note 14 *supra,* 430.

35 *Ibid.*

36 *Id.,* 435.

Their Honours proceeded to apply two of those common rules, namely that in order to found an estoppel, a representation (likewise a promise) must be clear, and that the party setting up an estoppel must have placed himself in a position of material disadvantage if there should be a departure from the assumption made that the representation was true or that the promise would be fulfilled.

In *Reed* v. *Sheehan*[37] Deane J. (with whom Blackburn J. had agreed) had said that where law and equity are fused with equity prevailing, such an equitable doctrine of promissory estoppel can, if accepted, conveniently be treated as an emanation of estoppel *in pais* in an area where the doctrine of consideration would otherwise have prevailed. However, his Honour proceeded to sound a cautionary note to the effect that any assimilation of promissory estoppel with established forms of estoppel in pais must not be allowed to "cloud or foreclose" questions of principle such as the "shield/sword" question. Thus, in *Reed* v. *Sheehan*[38] his Honour had reserved until another day the possibility that promissory estoppel might found a cause of action.[39]

The "shield/sword" issue was not referred to in any of the judgments in *Legione* v. *Hateley*[40] but had been referred to in earlier Australian decisions, in addition to *Reed* v. *Sheehan*[41] noted above, with some support for the proposition that the doctrine could operate only as a shield.[42] That promissory estoppel might itself constitute a cause of action was perhaps the principal holding of the High Court in *Waltons Stores (Interstate) Ltd* v. *Maher*[43] discussed extensively below.

As a matter of language there is no difficulty in the use of the expression 'estoppel *in pais*' to refer to the forms of estoppel originating both at common law and in equity, except of course estoppel of record and estoppel by deed. This would, it is thought, subject to Justice Deane's warning, facilitate the unification of principle which is evident in the recent Australian cases to be noted and remove one source of confusion in the discussion of estoppel in contract.

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37 (1982) 39 ALR 257, 276-7.
38 *Ibid.*
39 See the discussion of Justice Deane's judgment in *Waltons Stores (Interstate) Ltd* v. *Maher* note 18 *supra,* accompanying text at note 96 *supra.*
40 Note 14 *supra.*
41 Note 37 *supra.*
42 *Dewhirst* v. *Edwards* [1983] 1 NSWLR 34, 51-2; *Strada Estates Pty Ltd* v. *Harcla Hotels Pty Ltd* (1980) 25 SASR 284, 298 *per* Williams J.; *Gollin & Co. Pty Ltd* v. *Consolidated Fertilizer Sales Pty Ltd* [1982] Qd R 435.
43 Note 18 *supra.*

III. RECENT CASES AND REFORMULATIONS OF DOCTRINE

A. *LEGIONE* V. *HATELEY*[44]

A contract for the sale of land provided for payment of the balance of the purchase price on 1 July 1979 and declared time to be of the essence of the contract, but provided that neither party should be at liberty to enforce any right or remedy arising out of the other's default without first giving not less than 14 days notice to remedy the default. On 26 July the vendors served such a notice which was to expire on 11 August. On 9 August the purchasers' solicitor told the secretary for the vendors' solicitors that his clients had arranged bridging finance from a bank which required a week to carry out searches and would be ready to settle by Friday 17 August, to which the secretary replied "think that'll be alright but I'll have to get instructions". On the same day, 9 August, the purchasers' solicitors wrote to the vendors' solicitors referring to the telephone conversation and confirming that "the bank should be in a position to settle on the 17th August 1979". On 14 August the vendors' solicitors gave notice that the contract had become rescinded upon expiry of the notice on 11 August. On 15 August the purchasers' solicitors tendered payment, which was refused. There was evidence that bridging finance had been obtained from the bank and that funds had in fact been available to enable settlement on 9 August.

In the Supreme Court of Victoria, Murray J. sustained the rescission. The Full Court by majority held that the vendors were estopped from asserting a rescission before 15 August when the tender had been made, and so ordered specific performance.

In the High Court on the promissory estoppel issue, Gibbs C.J. and Murphy J. observed that it had not been submitted that the doctrine had not been available to the Full Court. After noting the reference which had been made to *Hughes* v. *Metropolitan Railway Co.*[45] by the High Court in *Barns* v. *Queensland National Bank Ltd,*[46] their Honours concluded that the occasion was not an appropriate one on which to consider fully the limits of the doctrine and that there would be an estoppel in the present case if four factual matters were established. These may be summarised as being:

(i) that the purchasers' solicitors had believed that the vendors' right to rescind would be kept in abeyance until instructions were obtained and communicated, and had been intended to act on that belief;

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44 Note 14 *supra.*
45 Note 27 *supra.*
46 (1906) 3 CLR 925, 938.

(ii) that the vendors were bound by the secretary's words;
(iii) that the purchasers' solicitors acted on the inducement by desisting from paying the balance of purchase price within the 14 day period although they would otherwise have done so; and
(iv) that it would be inequitable to allow the vendors to rescind without first advising that no extension would be granted and giving the purchasers a reasonable opportunity to pay.

Their Honours found all four matters established, and so would have held the vendors estopped.[47]

Mason and Deane JJ., after reviewing authorities, concluded that:

> [t]he clear trend of recent authorities, the rationale of the general principle underlying estoppel *in pais*, established equitable principle and the legitimate search for justice and consistency under the law combine to persuade us to conclude that promissory estoppel should be accepted in Australia as applicable between parties in [a pre-existing contractual] relationship ...[48]

Their Honours found it unnecessary to consider whether the doctrine should be accepted as having an application outside a pre-existing contractual relationship. Importantly for the purposes of this article, they referred to the "general correspondence" between the "grounds of preclusion" of an estoppel by representation operating at common law and the "grounds of preclusion" of a promissory estoppel. Both shared requirements that the representation (promise) be clear, and that the party setting up the estoppel must have placed himself in a position of material disadvantage if repudiation should be allowed. Seemingly with some hesitation, their Honours found the second element present, in that the purchasers' solicitor had not arranged settlement prior to expiry of the notice in reliance on what they had been told. However, their Honours did not find the first element present on the facts, in that the secretary had not made "any clear and unequivocal representation to the effect of that suggested as the basis for a promissory estoppel".[49]

Brennan J. agreed with Mason and Deane JJ. that the vendors were not estopped from relying upon the rescission on the ground that no promise or representation of an indulgence could be inferred from the secretary's words, and as well on the ground that their solicitors had had no apparent or implied authority to countermand or qualify the effect of the notice.

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47 The other members of the court did not held the vendors estopped. Gibbs C.J. and Murphy J. joined Mason and Deane JJ. (Brennan J. dissenting) in holding that the Court had jurisdiction to relieve the purchasers against forfeiture of their interest notwithstanding the passing of an essential time for completion, and in remitting the proceedings to the Supreme Court of Victoria for trial of the issue whether such relief should be granted. This article is not concerned with this aspect of the case.

48 Note 14 *supra*, 434-5.

49 Note 14 *supra*, 440.

B. *ATTORNEY-GENERAL OF HONG KONG* V. *HUMPHREYS ESTATE (QUEEN'S GARDENS) LTD*[50]

This case is perhaps an illustration of the obvious. But it is noted briefly so that its relationship with the recent Australian cases discussed in this article can be observed. The defendants as representatives of the Government of Hong Kong Land Co. group of companies which included the plaintiff company (HKL), negotiated for the Government to acquire 83 flats in premises owned by HKL in exchange for the grant of a lease of Government property to HKL with a right to develop that property and adjoining property of HKL. An agreement in principle 'subject to contract' was reached in January 1981 and was set out in letters of offer and acceptance.

The Government took possession of HKL's property, fitted out the flats which constituted it, moved civil servants into the flats, and disposed of residences formerly occupied by them. HKL took possession of the Government's property, demolished the existing buildings on it and adjoining land with a view to redevelopment, and paid to the Government $103,865,608 being the agreed difference between the values of the properties to be exchanged. By February 1984 the necessary documents had been drafted and agreed upon, with exceptions of no importance, so that there was no difficulty in a court's devising an order for specific performance. In April 1984 HKL purported to withdraw. Had the agreement in principle become 'binding by estoppel'?

The Privy Council accepted that the Government had acted to its detriment to the knowledge of HKL in the hope that HKL would not withdraw, but held that in order to establish an estoppel, it must show that HKL had encouraged the Government's belief or expectation that it would not withdraw, and further that the Government had relied on that belief or expectation. Their Lordships agreed with the Court of Appeal of Hong Kong that the Government failed in both respects.

The Privy Council's conclusion is expressed in the following passage:

> In the present case the government acted in the hope that a voluntary agreement in principle expressly made 'subject to contract' and therefore not binding would eventually be followed by the achievement of legal relationships in the form of grants and transfers of property. It is possible but unlikely that in circumstances at present unforeseeable a party to negotiations set out in a document expressed to be 'subject to contract' would be able to satisfy the court that the parties had subsequently agreed to convert the document into a contract or that some form of estoppel had arisen to prevent those parties from refusing to proceed with the transaction envisaged by the document. But in the present case the government chose to begin and elected to continue on terms that either party might suffer a change of mind and withdraw.[51]

With the facts of this case may be compared and contrasted, in particular, those of both *Waltons Stores (Interstate) Ltd* v. *Maher*[52] and

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50 [1987] 1 AC 114 (hereinafter *Humphreys Estate*).
51 *Id.*, 127-8.
52 Note 18 *supra*.

Austotel Pty Ltd v. *Franklins Selfserve Pty Ltd*[53] discussed below. In the former, the content of the proposed contract had been agreed but there was no express right to withdraw being insisted upon. In the latter, agreement on the content of an important term had not been reached and the Court held that implicitly the parties were insisting on that term. In the former, there was held to be an agreement 'binding by estoppel', in the latter not.

C. *WALTONS STORES (INTERSTATE) LTD* V. *MAHER*[54]

The Mahers negotiated to lease premises at Nowra to Waltons. The proposal would involve demolition of existing buildings and construction of new ones which were to be the subject of the lease. Waltons required that the new premises suit its requirements and that they be completed by 15 January 1984. On 21 October 1983, Waltons' solicitors sent to the Mahers' solicitors a form of deed of agreement for lease to which was annexed a form of lease. They reserved the right to make amendments and pointed out that a schedule of finishes had yet to be annexed to the deed.

On 7 November 1983, the Mahers' solicitors advised Waltons' solicitors that the agreement would have to be concluded within the next day or two, otherwise it would be impossible for Mr Maher to complete the new building in time. The reply was that the latter had been verbally instructed by Waltons that certain requested amendments were acceptable and that he would obtain formal instructions from Waltons. On the same day, 7 November, Waltons' solicitors sent to the Mahers' solicitors fresh documents incorporating the agreed amendments and advised that formal instructions had still not been obtained from Waltons to each amendment, although it was believed that approval would be forthcoming. A schedule of finishes was also enclosed. The letter said, "[w]e shall let you know tomorrow if any amendments are not agreed to."

Waltons' solicitors did not again communicate with the Mahers' solicitors on that matter but on 11 November 1983, the latter forwarded "by way of exchange" the documents as submitted together with a schedule of finishes for approval and annexing to the deed prior to exchange. Those documents were received by Waltons' solicitors three days later on 14 November. The Mahers began demolition work. Waltons became aware of the demolition work on 10 December. In the meanwhile, Waltons had ascertained from its solicitors that as exchange had not occurred, it was not bound to proceed. For commercial reasons Waltons instructed its solicitors to "go slow". Accordingly, Waltons' solicitors did not respond to the Mahers' solicitors' letter dated 11 November 1983 until 19 January 1984, retaining in the meanwhile the documents executed by the Mahers.

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53 (1989) 16 NSWLR 582.
54 Note 18 *supra*.

In early January 1984, Mr Maher commenced building in accordance with Waltons' plans and specifications. By letter dated 19 January 1984, Waltons' solicitors advised the Mahers' solicitors that Waltons did not intend to proceed. By then the new building was approximately 40% completed.

Although exchange had not occurred, the trial judge, Kearney J., the Court of Appeal of New South Wales and the High Court all held that Waltons was estopped from denying that it was bound. It was not a necessary element in this conclusion, at least for a majority in the High Court, that the Mahers had believed that exchange had occurred or that a contract had been made, both matters of fact, or at least of mixed fact and law, which might serve to found an estoppel *in pais* operative at common law.

Mason C.J. and Wilson J. thought that the conduct of Waltons and its solicitors was such that the Mahers were entitled to assume that Waltons accepted the amendments and "that exchange of contracts was a mere formality."[55] Their Honours stated the principle necessary for the decision of the present case in the following terms:

> [t]he doctrine [of promissory estoppel] extends to the enforcement of voluntary promises on the footing that a departure from the basic assumptions underlying the transaction between the parties must be unconscionable. A failure to fulfil a promise does not of itself amount to unconscionable conduct, mere reliance on an executory promise to do something, resulting in the promisee changing his position or suffering detriment, does not bring promissory estoppel into play. Something more would be required. *Humphreys Estate* suggests that this may be found, if at all, in the creation or encouragement by the party estopped in the other party of an assumption that a contract will come into existence or a promise will be performed and that the other party relied on that assumption to his detriment to the knowledge of the first party. *Humphreys Estate* referred in terms to an assumption that the plaintiff would not exercise an existing legal right or liberty, the right or liberty to withdraw from the negotiations, but as a matter of substance such an assumption is indistinguishable from an assumption that a binding contract would eventuate.[56]

Their Honours distinguished from the position so stated, that which obtains in the United States as expressed in section 90 of the *Restatement, Second, Contracts*:

> 90(1) 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 be enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Their Honours suggested that the American doctrine of promissory estoppel is broader than the Anglo-Australian one for the reason that the doctrine of consideration, to which promissory estoppel developed as a response, is more stringent in America than in England or Australia. Be that as it may, clearly;

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55 *Id.*, 395.
56 *Id.*, 406.

(a) section 90 refers to the promisor's reasonable expectation that his promise will induce action or forbearance rather than to the promisor's encouragement of an expectation in the mind of the promisee by something over and above the mere making of the promise; and
(b) the specific equitable notion of the promisor's unconscionability is absent, its place being taken by the broader concept of "injustice".

Brennan J. discussed at some length the nature, object and function of estoppel *in pais* and of equitable estoppel. His Honour said that:

> the effect of an estoppel *in pais* is not to create a right in one party against the other; it is to establish the state of affairs by reference to which the legal relationship between them is ascertained.[57]

His Honour cited, in particular, a passage from the judgment of Dixon J. in *Grundt* v. *Great Boulder Pty Gold Mines Ltd*[58] commencing with the passage quoted earlier in this article. Brennan J. was using the expression 'estoppel *in pais*' to refer to informal estoppel operating at common law precluding unjust departure from an assumption of fact. His Honour observed that unlike estoppel *in pais,* equitable estoppel is a source of legal obligation:

> [i]t is not enforceable against the party estopped because a cause of action or ground of defence would arise on an assumed state of affairs; it is the source of a legal obligation arising on an actual state of affairs. An equitable estoppel is binding in conscience on the party estopped, and it is to be satisfied by that party doing or abstaining from doing something in order to prevent detriment to the party raising the estoppel which that party would otherwise suffer by having acted or abstained from acting in reliance on the assumption or expectation which he has been induced to adopt. Perhaps equitable estoppel is more accurately described as an equity created by estoppel.[59]

For his Honour, the element which attracted the jurisdiction of a court of equity and shaped the remedy to be given, was "unconscionable conduct on part of the person bound by the equity",[60] and, helpfully, he listed the elements necessary to be proved by a plaintiff seeking to rely upon equitable estoppel as founding a cause of action:

> [i]n my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the

57 *Id.*, 414.
58 (1937) 59 CLR 641, 674-5.
59 Note 18 *supra,* 416.
60 *Id.*,419.

> defendant's property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs.[61]

For Brennan J., the judgment of the trial judge was supported by equitable estoppel based on the Mahers' assumption, fostered by Waltons, that Waltons *would exchange*, not by estoppel *in pais* at common law based on an assumption that exchange *had* in fact occurred. For his Honour, there were alternative bases on which Mr Justice Kearney's judgment for the Mahers might be supported, according to how the Mahers' state of mind was properly to be analysed. Their assumption might, alternatively to an assumption that *Waltons would exchange*, have been that a contract already existed in terms of the counterpart deed which they had executed, or that Waltons were under a present legal obligation to complete the exchange and thereby bring a contract into existence. On the former basis there was an estoppel *in pais*, and the assumed contract could not be repudiated by Waltons. On the latter basis, there was an equity which was to be satisfied by regarding Waltons as occupying the position it would have occupied if it had exchanged.

The judgment of Deane J. first disposes of the appeal[62] then discusses generally estoppel by conduct at common law and in equity.[63] His Honour agreed with the concurrent findings of the trial judge and of the Court of Appeal that the facts established an estoppel precluding Waltons from denying the existence of an agreement for lease. But this raised the question whether estoppel could generate a cause of action. His Honour thought so:

> [t]he authorative expositions of the doctrine of estoppel by conduct (or, in more obscure language, *in pais*) to be found in judgments in this Court have been consistently framed in general terms and lend no support for a constriction of the doctrine in a way which would preclude a plaintiff from relying upon the assumed or represented mistaken state of affairs (which a defendant is estopped from denying) as the factual foundation of a cause of action arising under ordinary principles of the law ... There is no basis in principle for such a constriction of the doctrine. In so far as decisions or statements in judgments in cases in other courts would support a contrary view, they should not be accepted in this country. It follows that a plaintiff in the position of the Mahers in the present case is entitled to plead and rely upon the facts giving rise to an operative estoppel by conduct which precludes the defendant from denying the existence of a binding contract for the purpose of affirmatively establishing the foundation for the case to be dealt with on the basis of the assumed fact that there was such a contract. That being so, such estoppel provides the factual foundation of an ordinary action for enforcement of that 'contract' notwithstanding that those facts demonstrate that no binding contract was actually made.[64]

After dealing with the Statute of Frauds point,[65] Deane J. embarked upon a general discussion of estoppel by conduct at common law and in equity,

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61 *Id.*,428-9.
62 *Id.*,433-46.
63 *Id.*,446-55.
64 *Id.*, 445.
65 See below discussion accompanying note 76.

elements of which are referred to later in this article.

Gaudron J. distinguished between common law estoppel and equitable estoppel in these terms:

> [c]ommon law or evidentiary estoppel compels adherence to an assumption of fact by denying the person estopped the right to assert a contrary matter of fact. By so doing, it may operate to fashion a set of facts by reference to which is imposed a liability which otherwise does not exist ... Equitable estoppel operates so as to compel adherence to an assumption as to rights. Sometimes that adherence can only be compelled by the recognition of an equitable entitlement to a positive right in the person claiming the benefit of estoppel and the enforcement of correlative duties on the part of the person against whom the estoppel is successfully raised ... Where equity compels adherence to an assumption in this manner, the resulting estoppel is generally referred to as 'proprietary estoppel'. On other occasions adherence to an assumption as to rights may be compelled by precluding the person estopped from asserting existing rights. It is in this manner that 'promissory estoppel' has generally operated ...[66]

Her Honour referred to the three possible assumptions by the Mahers which had been canvassed, namely that exchange would occur (an assumption as to future fact or future conduct and also as to future rights), that exchange had occurred (an assumption of fact), and an assumption that there was a binding agreement on foot (an assumption as to existing rights and duties which, on the facts of the particular case, her Honour thought indistinguishable from an assumption that exchange had occurred). Her Honour's conclusion was that because of Waltons' imprudence in failing to inform the Mahers that exchange might not occur, they had adopted and acted upon the assumption that exchange had occurred and that it would be "unjust or unfair" to allow a departure from that assumption. Thus her Honour was able to hold for the Mahers on the basis of common law estoppel *in pais*.

The particular case necessitated a close analysis of the assumptions of the party setting up the estoppel. Certainly this is required if it is necessary to decide whether the assumption is as to present or past fact or as to future conduct. But, importantly, the Court would have compelled Waltons to make good the assumption in either case. It is the presence of unconscionable conduct which produces that result.

D. *SILOVI PTY LTD* V. *BARBARO*[67]

This case and the next one to be noted mark an important attempt by Priestley J.A. in the New South Wales Court of Appeal to analyse common law and equitable estoppel in the light of *Waltons'*.

In the case, landowners executed a memorandum of lease over part of their land in favour of their neighbours, the plaintiffs. The memorandum of lease could not be registered for lack of approval of the subdivision involved. The plaintiffs were let into possession and planted cocos palms and installed an irrigation system at considerable cost, and paid rent. The landowners contracted to sell to Silovi Pty Ltd (Silovi) whose principal

66 Note 18 *supra*, 458-9.
67 (1988) 13 NSWLR 466 (hereinafter *Silovi*).

knew in general terms of the above facts. If Silovi were to become registered as proprietor under the Real Property Act 1900 (N.S.W.), the indefeasibility provisions of that Act would defeat the plaintiffs.

At first instance, Powell J. declared that the plaintiffs were entitled as against the landowners to use the land for the term of the unregisterable lease, and he restrained, subject to conditions, the landowners and Silovi from completing their contract.

The High Court delivered judgment in *Waltons* between the date of Mr Justice Powell's judgment and that of the Court of Appeal. The leading judgment in the Court of Appeal was delivered by Priestley J.A. with whom Hope and McHugh JJ.A. agreed. In an important passage, Priestley J.A. expressed the view that the following propositions could be distilled from the reasons in *Waltons*:

> (1) Common law and equitable estoppel are separate categories, although they have many ideas in common.
> (2) Common law estoppel operates upon a representation of existing fact, and when certain conditions are fulfilled, establishes a state of affairs by reference to which the legal relation between the parties is to be decided. This estoppel does not itself create a right against the party estopped. The right flows from the court's decision on the state of affairs established by the estoppel.
> (3) Equitable estoppel operates upon representations or promises as to future conduct, including promises about legal relations. When certain conditions are fulfilled, this kind of estoppel is itself an equity, a source of legal obligation.
> (4) Cases described as estoppel by encouragement, estoppel by acquiescence, proprietary estoppel and promissory estoppel are all species of equitable estoppel.
> (5) For equitable estoppel to operate in circumstances such as those of the present case there must be the creation or encouragement by the defendant in the plaintiff of an assumption that a contract will come into existence or a promise be performed, and reliance on that by the plaintiff, in circumstances where departure from the assumption by the defendant would be unconscionable.
> (6) Equitable estoppel may lead to the plaintiff acquiring an estate or interest in land, that is, in the common metaphor, it may be a sword.
> (7) The remedy granted to satisfy the equity (which either is the estoppel or created by it) will be what is necessary to prevent detriment resulting from the unconscionable conduct.[68]

Applying these principles, Priestley J.A. held that the case was an instance of equitable estoppel arising from unconscionable conduct by the owners entering into a contract the carrying through of which would enable Silovi to defeat the assumption encouraged by the owners in the plaintiffs that they had rights to the use and occupation of the land until the expiry of 'the lease'.

E. *AUSTOTEL PTY LTD* V. *FRANKLINS SELFSERVE PTY LTD*[69]

A property developer (Austotel) negotiated with a supermarket operator

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68 *Id.*, 472D-F. His Honour set out the references to *Waltons* which supported the seven propositions, in a schedule at the end of the judgment. In relation to his Honour's fifth proposition, see the discussion in *Austotel Pty Ltd* v. *Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582. See below discussion accompanying note 69.

69 (1989) 16 NSWLR 582 (hereinafter *Austotel*).

(Franklins) for the lease of space in a new property development. There was a course of negotiation in the form of letters passing between the parties which contemplated the entering into of a formal lease. Franklins did considerable work by way of acquiring equipment and fittings and the setting up of the premises, and notified the lessor under its current lease of nearby premises that it would not exercise its option to renew that lease. Moreover, for its part Austotel was physically creating the store to a standard plan produced by Franklins. The issue was whether Austotel was estopped from denying the existence of an agreement for lease. The trial judge, Needham J., had declared that Franklins was entitled to the grant of a lease and ordered that one be executed.

His Honour had accepted, correctly in the view of the Court of Appeal, that no rent had ever been settled for the area which had ultimately been agreed to be the subject of the proposed lease. This was a larger area (by about 9%) than that which had been the subject of discussion initially and for which rent had been agreed. Doubtless, Franklins had hoped that Austotel would not revise the rental when the documentation was prepared since this could only have been to Franklins' disadvantage.

The estoppel arguments were twofold. The first was that Austotel was estopped from denying that an agreement in terms of certain letters from Franklins had been made. Needham J., and all three judges in the Court of Appeal, rejected this argument since the letters could not constitute an 'agreement' in the absence of a concluded term as to rent for the enlarged area. However, Needham J. upheld Franklins' second estoppel submission by holding that Austotel's conduct in declining to enter into a lease with Franklins was in the circumstances unconscionable, and that as a result, an equity arose in Franklins on the *Waltons* principle. His Honour had ordered that Austotel execute a lease on the terms and conditions set out in Franklins' letters, the amount of the rental falling to be determined, if the parties could not agree on it, by an expert valuer or by the Court.

Priestley J.A. pointed out that in *Waltons* and in *Silovi,* there was no dispute about the terms of the contemplated agreement, the question being whether relief could be obtained by means of estoppel where the parties had not yet agreed to be contractually bound. This led his Honour to distinguish between two classes of case: "*Waltons* type cases" in which there was no dispute about the terms of the proposed agreement; and cases of which *Plimmer* v. *Wellington Corp.*[70] is an instance, in which a plaintiff has been held entitled to equitable relief of a proprietary kind notwithstanding his inability to point to concluded terms of agreement.[71] Mr Justice Priestley's conclusion from the authorities was that by reading the advice of the Privy Council in *Attorney-General of Hong Kong* v.

70 (1884) 9 App Cas 699.

Humphreys Estate (Queen's-Gardens) Ltd,[72] and in particular its review of the English cases on proprietary estoppel and estoppel by encouragement or acquiescence, alongside *Waltons,* proposition number (5) in *Silovi*[73] should be amended to read as follows:

> 5. For equitable estoppel to operate there must be the creation or encouragement by the defendant in the plaintiff of an assumption that a contract will come into existence or a promise be performed *or an interest granted to the plaintiff by the defendant,* and reliance on that by the plaintiff, in circumstances where departure from the assumption by the defendant would be unconscionable [emphasis added].[74]

Upon reviewing the judgments in *Waltons'* Priestley J.A. concluded that they provided no reason to suggest that the English cases reviewed in *Humphreys Estate* did not represent the law in Australia, and accordingly his Honour thought that his seven propositions in *Silovi,* the fifth being expanded as above, summarised the law concerning common law and equitable estoppel in Australia following *Waltons.*

On the facts, Priestley J.A. thought that by the time Franklins placed orders for delivery of materials for incorporation in the supermarket, it had committed itself to leasing it, and that it had been induced by Austotel's conduct to rely to its disadvantage on the belief that it would become lessee of the supermarket. His Honour considered Franklins entitled to relief, and Mr Justice Needham's formulation of relief appropriate.

Kirby P. and Rogers A-J.A. emphasised that the parties had deliberately refrained from committing themselves to a contract. Kirby P. thought that one inference to be drawn from their failure to agree upon a rental for the enlarged area was that they were keeping their options open as to whether a lease should be entered into at all. Rogers A-J.A. thought that Franklins, in particular, had chosen to run a risk that Austotel would not increase the rent for the enlarged area and said that:

> [t]he deliberate gamble that the plaintiff had embarked on failed and it is not for equity to put the plaintiff into the position it would have been in had it never embarked on its gamble. The magnitude of the risk may not have been manifest but that is not the point. There is, in my view, a fundamental difference between a situation where the parties simply fail to address a question necessary for a complete and concluded agreement and the present, where there is a deliberate and conscious decision to refrain from coming to agreement on the term. It is in this respect that the present case is completely and fundamentally different from all the decisions referred to in the judgment of Priestley J.A.[75]

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71 The "*Plimmer*-type" cases are illustrated by *Jackson* v. *Cator* (1800) 5 Ves Jun 688; 31 ER 806; *Duke of Beaufort* v. *Patrick* (1853) 17 Bev 60; 51 ER 954; *Ramsden* v. *Dyson* (1866) LR 1 HL 129; *Plimmer* v. *Wellington Corporation* (1884) 9 App Cas 699; *Inwards* v. *Baker* [1965] 2 QB 29; *Holiday Inns Inc.* v. *Broadhead* (1974) 232 ER 951; and *Crabb* v. *Arun District Council*; [1976] 1 Ch 179. His Honour also referred to *Taylors Fashions Limited* v. *Liverpool Trustees Co.* [1982] QB 133 and *Amalgamated Investment & Property Co. Ltd* v. *Texas Commerce International Bank Ltd* [1982] QB 84, 104.

72 [1987] 1 AC 114.

73 See above, discussion accompanying note 67.

74 Note 69 *supra,* 610.

Like Kirby P., his Honour rejected the submission that Austotel's conduct gave rise to an equity in Franklins.

IV. PARTICULAR CONTRACT-RELATED ISSUES

It is profitable to consider the essential elements of contract formation, namely agreement, consideration and the intention to create legal relations, in the context of the five recent cases just noted.

A. AGREEMENT

Humphreys Estate, Waltons and *Silovi* all involved negotiations in which the terms of the proposed contract were agreed upon. In *Waltons* and *Silovi,* unconscionable behaviour provided the basis for equitable intervention which, in broad terms, was designed to satisfy the innocent party's expectation interest. In those cases, there was not an enforceable commitment to contract, and promissory estoppel was used as a sword.

In *Humphreys Estate,* although contractual terms were agreed, the express reservation 'subject to contract' and the absence of conduct derogating from that stipulation, prevented an equity from arising. In *Austotel,* the absence of agreement on a rental for the enlarged area, performed for the majority of Kirby P. and Rogers A-J.A., the same function as the 'subject to contract' stipulation in *Humphreys Estate.* But this was because of the inference which their Honours drew from the absence of agreement on rental, namely a deliberate stopping short of reaching agreement for commercial advantage.

Although Priestly J.A. pointed out in *Austotel* that it is not only when the defendant has encouraged in the plaintiff an assumption that a contract will come into existence or a promise be performed that an equity can arise, it seems clear that his Honour would have reached the same conclusion as the majority if he had drawn the same inference from the absence of agreement on rent.

The "*Waltons*-type" estoppel is founded upon a defendant's creating or encouraging an assumption by the plaintiff that he shall have a *contract*; whereas the "*Plimmer*-type" estoppel is founded upon the defendant creating or encouraging an assumption by the plaintiff that he shall have an *interest.* Consistently with authority, in the latter class of case, there need not have been agreement on all the terms of the interest. But in the case of "*Waltons*-type" estoppels, there must be agreement on all essential terms, otherwise there is no contemplated 'contract' which the defendant

75 *Id.,* 620.

encouraged the plaintiff to assume that he would have. But it is submitted that in either case, a plaintiff's deliberate withholding, for commercial advantage, from concluding terms (of the agreement or of the interest) will prevent an equity from arising.

B. CONSIDERATION

It is at least reasonably arguable that the enforcement of informal contracts was founded historically upon justifiable reliance on the promise. But the concept of consideration as 'the price of a promise' came into prominence in the late Nineteenth and Twentieth Centuries. Although that theory has never been authoritatively adopted in Australia as 'the doctrine of consideration', it has enjoyed some acceptance.[76]

Is promissory estoppel of the "*Waltons*-type" reconcilable with a bargain theory of consideration? Yes and no. The point is that the question may wrongly assume that the only basis in law for the enforcement of a promise is the contractual one. This is an erroneous assumption. Clearly absence of consideration remains a defence to actions based purely in contract notwithstanding *Waltons*, and promissory estoppel is not generally available as a basis for the enforcement of promises. Essential to the *Waltons* estoppel are elements which are not general requirements of contract formation. These are the assumptions made by the plaintiff (a subjective matter), the unconscionability of the defendant disowning with impunity the assumption which he fostered or helped to foster, the plaintiff's change of position in reliance on the assumption, and the injustice of leaving the plaintiff without relief. Essential to the bargain theory of consideration is an element not requisite in promissory estoppel, namely that the promisee's change of position should have been 'bargained for' or 'requested' by the promisor as the quid pro quo for his promise.

Thus, consideration remains necessary for enforcement of a promise on the contractual basis but not in those cases constituting a promissory estoppel. Whilst both contract and the *Waltons* estoppel are concerned with the enforcement of promises, they operate in different fields.

C. INTENTION TO CREATE LEGAL RELATIONS

In *High Trees*[77] and *Combe* v. *Combe*,[78] Denning L.J. placed emphasis on the requirement that the promisor should have intended to affect the parties' legal relations. Less strictly, the *Restatement, Second, Contracts* insists that the promisor should have "reasonably expected" his promise to induce action or forbearance. It is submitted, in the light of *Waltons*,

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76 See, for example, *Australian Woollen Mills Pty Ltd* v. *Commonwealth* (1954) 92 CLR 424, 456-8, 461; *Rothwells Ltd* v. *Nommack (No.100) Pty Ltd* (1988) 13 ACLR 421, 424.

77 [1947] 1 KB 130.

78 [1951] 2 KB 215, 220.

that what Australian law requires is the creation or encouragement by the defendant of an assumption by the plaintiff, coupled with an expectation by the defendant that the plaintiff will act or forbear from acting in reliance on that assumption. This formulation differs from an intention to affect legal relations.

In *Waltons,* Brennan J. said that if a party raising an estoppel is induced by the other party's promise to adopt an assumption or expectation, "the promise must be intended by the promisor and understood by the promisee to affect their legal relations",[79] and that the doctrine of promissory estoppel had:

> no application to an assumption or expectation induced by a promise which is not intended by the promisor and understood by the promisee to affect their legal relations.[80]

His Honour cited the 'subject-to-contract agreement in principle' of *Attorney-General of Hong Kong* v. *Humphreys Estate.*[81] In *Tie Rack (Aust.) Pty Ltd* v. *Inglon Pty Ltd,*[82] McLelland J. in the Supreme Court of New South Wales, citing these passages from the judgment of Brennan J., declined to give effect to an alleged promissory estoppel.

Brennan J., alone of the members of the Court in *Waltons*, seems to have adverted to the issue of "intention to affect legal relations". In a case of a promised suspension of the enforcement of contractual rights, it seems appropriate to insist upon the presence of such an intention, but not, it is submitted with respect, generally and in all contexts.

Of course, the expressions "intention to create legal relations" and "intention to affect legal relations" are apt, in any event, to cause confusion. Neither in the context of contract formation nor in that of promissory estoppel, is it necessary that the actor direct his attention to the law. What is required in the former case is such a seriousness of intention that each party must be taken to know that his promise will be understood by the other as an assurance safe to be acted upon. In the latter case, promissory estoppel, it is submitted that the issue of intention to affect legal relations should not be seen as an element necessary to be proved by a party raising an estoppel, but as a factor, the absence of which may prevent an estoppel from arising.

D. PART PERFORMANCE AND THE PAROL EVIDENCE RULE

In *Waltons*, it was contended that Waltons' implied promise to take the lease of the Mahers' property was not enforceable for lack of writing satisfying the Statute of Frauds requirement. In that case, that requirement found expression in section 54A of the Conveyancing Act 1919 (N.S.W.) which, so far as material, read as follows:

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79 Note 18 *supra,* 421.
80 *Ibid.*
81 [1987] AC 114.
82 (1989) Conv R 55-456.

> 54A(1)No action or proceedings may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action or proceedings is brought, or some memorandum of note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.
> (2) This section ... does not affect the law relating to part performance ...

The language of the section suggests two responses to the contention: first, that an action founded on the kind of estoppel in question is not brought "upon any contract"; secondly, that there has been part performance by the promisee.

Brennan and Deane JJ., and to a lesser extent Gaudron J., dealt with the issue.[83] Kearney J. and the Court of Appeal had disposed of the contention on the basis that there had been part performance, a conclusion with which Deane J. expressed agreement. Brennan J. disagreed on the ground that the Mahers' acts did not satisfy that doctrine's requirement that such acts:

> must be done under the terms and by force of [the] contract and they must be unequivocally and in their nature referable to some contract of the general nature of that alleged.[84]

His Honour cited *Regent* v. *Millett.*[85] However, his Honour considered the implications for the submission of the two possible inferences to be drawn from the facts as to what Waltons had caused the Mahers to assume. If the assumption was that a binding contract had come into existence, the assumed contract was a written contract. If the assumption was that Waltons would proceed to exchange, there was an equity in the Mahers to be satisfied by treating Waltons as if it had executed and delivered the deed.

Importantly, the Mahers' equity did not arise out of the induced assumption alone, in which case either writing or part performance would need to exist. But:

> the equity is to be satisfied by avoiding a detriment suffered in reliance on an induced assumption, not by the direct enforcement of the assumption. Equitable estoppel does not create a contract to which s.54A might apply, ... The action to enforce an equity created by estoppel is not brought 'upon any contract', for the equity arises out of the circumstances. This is not to say that there is an equity which precludes the application of the statute. It is to say that the statute has no application to the equity.[86]

Deane J. also thought that section 54A had no application to the facts of the case. His Honour's conclusion was as follows:

> in the circumstances of the present case, the estoppel precluding the denial of the binding agreement extends to preclude the assertion of the unenforceability of the assumed agreement in that the word 'binding' is used in the sense of valid and enforceable. That being so, the estoppel outflanks the provisions of s.54A in that there is no room for their intrusion into the assumed facts to contravert the assumed existence of a binding agreement which Waltons is estopped from denying.[87]

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83 Note 18 *supra,* 408 *per* Mason C.J. and Wilson J., saying simply, "[a]lso, as the other judgments demonstrate, there is no substance in the argument based on s.54A of the Conveyancing Act 1919 (N.S.W)".
84 *Id.,* 432.
85 (1976) 133 CLR 679, 683.
86 *Id.,*433.

Gaudron J. held that Waltons was estopped from denying that "exchange" had occurred with the result that the parties' rights and liabilities were to be determined on the basis that it had taken place. Thus, the Court had to proceed on the assumption that the deed was validly executed by Waltons.

Their Honours' approach to the Statute of Frauds issue underlines the importance of identifying with precision the assumption made as the springboard for the resolution of estoppel-related questions. Yet again, regardless of which of the various formulations might be adopted, Waltons is to be bound, and any obstacle to this result falls away. With this aspect of the case may be compared the overcoming of the prohibition of subdivision without approval in *Silovi Pty Ltd* v. *Barbaro*.[88]

E. 'CHANGE OF POSITION RELIANCE' OR 'DETRIMENTAL RELIANCE'?

Something more than the mere making of the relevant assumption is required to give rise to an estoppel. At least the party making the assumption must have changed his position in reliance on it.[89] Must that change of position be a detriment to him? The Australian answer is that it must appear that detriment *would be* suffered if the party who participated in the occasioning of the assumption were to resile from it.[90]

The elements of "unconscionability", "material disadvantage if the assumption were allowed to be resiled from" and "injustice" overlap. Given that the party sought to be estopped has in some way occasioned the making of the assumption and that the other party has changed his position because of the assumption, what next falls to be considered is what his position would be if the other party were allowed to resile from the assumption. It must be hypothesised that the party who occasioned the making of the assumption departs from it. Contemplating that position, the questions whether it would be unconscionable to allow the departure and whether "injustice" can be avoided only by the granting of relief, raise the question whether "detriment" or "material disadvantage" *would have been* suffered. The answering of this question may be difficult as a case such as *Je Maintiendrai Pty Ltd* v. *Quaglia*[91] shows. However, this will be so, no matter which formulation of the question is invoked.

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87 *Id.*,446.

88 (1988) 13 NSWLR 466.

89 *W.J. Alan Ltd* v. *El Nasr Export & Import Co.* [1972] 2 QB 189, 213 *per* Lord Denning M.R.; *Gollin & Co. Ltd* v. *Consolidated Fertilizer Sales Pty Ltd* [1982] Qd R 435.

90 See, for example, *Thompson* v. *Palmer* (1933) 49 CLR 507, 547 *per* Dixon J.; *Grundt* v. *Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674 *per* Dixon J.; *Je Maintiendrai Pty Ltd* v. *Quaglia* (1980) 26 SASR 101, 105-7 *per* King C.J., 110-6 *per* White J., 116-7, 120 *per* Cox J.; *Reed* v. *Sheehan* (1982) 56 FLR 206; *Legione* v. *Hateley* (1983) 152 CLR 406, 437 *per* Mason and Deane JJ.; *Waltons Stores (Interstate) Ltd* v. *Maher* note 18 *supra*, 404 *per* Mason C.J. and Wilson J., 416, 423, 424, 429 (element (5)) *per* Brennan J.

91 (1980) 26 SASR 101.

V. CONCLUSIONS

The recent cases mark an attempt to unify the previously distinct, and to locate underlying principles shared by the various forms of estoppel.

First, *Waltons* shows that promissory estoppel, like other forms of equitable estoppel: (a) can be used as a sword; and (b) is not limited by a requirement that there be a subsisting contractual or other legal relationship between the parties. No longer is it adequate to conceive of promissory estoppel merely by reference to its familiar form of the promised suspension of the enforcement of contractual rights. Moreover, *Waltons* marks at least a coalescence of the previously recognised categories of *equitable* estoppel. The principle, which is found to pervade them is that:

> equity will come to the relief of a plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party to the transaction has 'played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it'.[92]

Secondly, *Legione* v. *Hateley*[93] and *Waltons,* both cases of equitable estoppel (the former defensive, the latter offensive), were resolved by reference to Mr Justice Dixon's formulations in similar language of the doctrine of estoppel *in pais* in *Thompson* v. *Palmer*[94] (a case of alleged estoppel by representation inducing detrimental reliance heard in the equitable jurisdiction of the Supreme Court of New South Wales) and *Grundt* v. *Great Boulder Pty Gold Mines Ltd*[95] (a case of a defence of estoppel by convention in the Warden's Court exercising jurisdiction under the Mining Act 1904 (W.A.). Those formulations require: (a) the making of an assumption by the party setting up the estoppel; (b) the occasioning of that assumption, at least in part, by the party to be estopped (*e.g.* by, but not only by, the making of a representation as to past or present fact); and (c) that it should be unconscionable, in all the circumstances, for the latter to depart from the assumption because the other party would then be in a position of material disadvantage.

Identification of the assumption actually made should now be accepted as the appropriate starting point for determining the existence and nature of estoppel by conduct. Neither the notion of 'assumption' which characterised the judgments referred to, with one exception noted earlier,

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92 Note 18 *supra,* 404 *per* Mason C.J. and Wilson J., citing Dixon J. in *Grundt* v. *Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 675.

93 Note 14 *supra.*

94 Note 7 *supra.*

95 Note 9 *supra.*

the language of or concepts in them, necessarily predicate an assumption of present or past fact as distinct from an assumption as to the future. But where the assumption is identified to be as to past or present fact, or mixed fact and law such as the existence of a contract, equitable estoppel can operate to make the assumed contract enforceable.

Thirdly, it is important to distinguish between the question whether a case for relief is established, and the question what form of relief is appropriate. Flexibility is available, not so much through the concept of 'unconscionability' but through the court's discretion as to the remedy to be fashioned. The primary aim is to remove the detriment which the plaintiff would otherwise suffer. But if the only or the most appropriate way of doing this is to enforce the promise, this is the remedy which will be made available, notwithstanding the absence of consideration, subject always to the promisee's 'doing equity'.

Fourthly, it is submitted that the fusion of the administration of law and equity, at least, make it appropriate to designate all the informal estoppels, whether derived historically from the common law or from equity, 'estoppel *in pais*' or 'estoppel by conduct'.

Fifthly, the second half of the judgment of Deane J. in *Waltons* explicates and rationalises many of these themes and gives direction for the future. The judgment repays close analysis. His Honour commenced by demonstrating the unity of principle which pervaded estoppel by conduct at common law and in equity, even prior to the Judicature system, a unity which had been "consistently assumed" in the High Court.[96] His Honour then suggested that it is a mistake, at least in a fused system, to conceive of promissory estoppel as exclusively equitable or as raising a conflict between law and equity. Both at law and in equity the doctrine of consideration should be understood as the reason for the prima facie exclusion of representations or assumptions about future conduct from the scope of estoppel by conduct. Accordingly, for his Honour, 'the principle of *Jorden* v. *Money*' should be understood as having been a principle applying to estoppel in equity as much as to common law estoppel, and the modern rejection of that principle in the form of 'the equitable doctrine of promissory estoppel' should be accepted as a rejection of the principle at common law too.

His Honour concluded his discussion of promissory estoppel by affirming the view which he had expressed only in a tentative and qualified way in *Reed* v. *Sheehan*[97] that the doctrine should "be treated as an emanation of estoppel *in pais* in an area where the doctrine of consideration would otherwise have prevailed".[98] It followed, for his

96 Note 18 *supra*, 447.
97 (1982) 56 FLR 206, 230.
98 Note 18 *supra*.

Honour, that *Legione* v. *Hateley*[99] must be understood as being inconsistent with *Jorden* v. *Money*[100] and *Chadwick* v. *Manning*[101] which therefore no longer represented the law in Australia.

It remains to be seen whether the High Court will yet conclude that the doctrine of estoppel by conduct should be extended "to include an assumption of fact or law, present or future."[102] Deane J. indicated an inclination to take that step but thought it preferable that promissory estoppel, for the time being, be understood in Australia in the conservative manner laid down in *Legione* v. *Hateley*.[103] Even so, and accepting that the Mahers' assumption was that exchange *would* occur, his Honour thought that the case fell within the equitable doctrine of estoppel by encouragement or acquiescence or was analagous to the paradigm instance of such an estoppel.

It remains to be seen to what extent further incursions into the doctrine of consideration will be made by the High Court through equitable principles activated by the presence of unconscionable conduct. *Waltons* marks an attempt to synthesise and rationalise both of the situations in which those incursions have been allowed to date (proprietary estoppel or estoppel by acquiescence and encouragement on the one hand and promissory estoppel on the other), and the bases alternative to consideration on which promises are enforceable.

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99 Note 14 *supra.*
100 Note 6 *supra.*
101 *Ibid.*
102 *Moorgate Ltd* v. *Twitchings* [1976] QB 225, 242. See now *Foran* v. *Wight* (1989) 64 ALJR 1.
103 Note 14 *Supra.*