EQUITABLE ESTOPPEL IN THE 21ST CENTURY:
REVISITING THE LESSONS OF
WALTONS STORES V MAHER

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*Acknowledgement:* this thesis is dedicated to Jasmine Chia, and ___?, who were both immensely supportive even in the face of 4am finishes; and to Brian Harris, Karen Andersson, and Nanna Shirley for their encouragement; and to Robyn Honey, without whom this thesis could never have started or finished.

‘When these ghosts of the past stand in the path of justice, clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.’¹

Equitable estoppel is a doctrine which puts ‘legal clothing on the adage that you should not lead people up the garden path.’²

¹ *United Australia Ltd v Barclay's Bank* [1941] AC 1, 29.
This thesis is presented for the degree of Bachelor of Laws with Honours, of Murdoch University, in 2014.

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Thesis Title: Equitable Estoppel in the 21st Century: Revisiting the Lessons of Waltons Stores v Maher

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In *Waltons Stores (Interstate) v Maher*, the High Court revolutionised both promissory estoppel and proprietary estoppel by establishing a cohesive doctrine of equitable estoppel. This paper demonstrates this doctrine by a strict analysis of the ratio decidendi of the High Court cases. The doctrine identified operates as a cause of action, is capable of attracting positive remedies, can operate without any express representation or upon an unclear representation, focusses on unconscionability and is not constrained by many of the technical requirements of either proprietary or promissory estoppel. The paper applies the same analysis of ratio decidendi to subsequent High Court cases to demonstrate that the doctrine of equitable estoppel has not been limited, and has instead been strengthened. The paper demonstrates that state courts are applying the doctrine of equitable estoppel inconsistently with the High Court precedent, which results in differing approaches being taken to the doctrine. The paper demonstrates that this is unfortunate because the doctrine established by the High Court is effective and not in need of revision.

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3 (1988) 164 CLR 387 ('*Waltons Stores*').
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I INTRODUCTION

In Waltons Stores (Interstate) v Maher, the High Court revolutionised both promissory and proprietary estoppel by establishing a cohesive doctrine of equitable estoppel. This doctrine operates as a cause of action, attracts positive remedies, does not require an express representation and is not confined to parties in a contractual relationship. Subsequent High Court cases have only strengthened this doctrine. By contrast, State courts have not applied this doctrine consistently. Academic commentary on the subject provides little guidance as it is rife with conflicting views. Confusion persists with respect to fundamental doctrinal questions, such as whether the doctrines of promissory estoppel and proprietary estoppel have been amalgamated or survive as separate doctrines.

This paper will explore the origins and development of equitable estoppel before carefully articulating the doctrine as it has emerged from Waltons Stores and subsequent High Court decisions. The conflicting constructions of the doctrine being applied in lower courts will be explored and challenged. The paper will then argue that the doctrine of equitable estoppel, as articulated by the High Court, needs no revision. It will be demonstrated that this is a common sense, coherent and restrained principle, which achieves its proper equitable objectives without unduly impinging upon the common law doctrine of consideration. It will be argued that lower courts would do better to refine this doctrine in its application than to attempt to revise it.

A What’s in a Name?

It is commonly acknowledged that clarity within the law of estoppel has been hampered by a lack of consensus in the terminology used. It has been aptly said that ‘the naming and categorising of different estoppels is a parlour game for legal

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1 (1988) 164 CLR 387 (‘Waltons Stores’).
academics, which obfuscates rather than illuminates. For the sake of clarity, the term ‘equitable estoppel’ will be used in this paper to refer to an estoppel which combines both proprietary and promissory estoppel. In Chapter II we will discuss in detail the historical origins of estoppel by representation, promissory and proprietary estoppels. Simply stated, the term equitable estoppel is used in this paper to refer to:

[T]he principle 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" …

The classic example of facts which give rise to an equitable estoppel can be found in Waltons Stores, where one party suffered detriment because the other party acted unconscionably in inducing/allowing the other to assume that a contract would be executed.

In this paper, the term estoppel by conduct will be used interchangeably with the term estoppel in pais. Either of these terms is used to refer to the entire family of estoppels which rely upon the conduct of the parties.

The term ‘unified estoppel by conduct’ will be used to refer to a doctrine which fuses together each of the species of estoppel within the family of estoppel by conduct. It is beyond the scope of the paper to form an opinion on the

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5 Sometimes, the term equitable estoppel is used to refer to a promissory estoppel only. See, eg, Nicholas Seddon, 'Is Equitable Estoppel Dead or Alive in Australia?' (1975) 24(3) International and Comparative Law Quarterly 438.
6 Estoppel by representation is relevant for our purposes because it has common origins with equitable estoppel. ‘[M]ost common law estoppels in fact commenced in equity’. Peter W Young, Clyde Croft and Megan Louise Smith, On Equity (Thomson Reuters, 1st ed, 2009), 809.
9 This is a gross oversimplification; we shall discuss the facts of the case in detail in Chapter III.
10 'estoppel by conduct (or, in more obscure language, in pais) …’ Waltons Stores (1988) 164 CLR 387, 445. ‘Estoppel in pais, or estoppel by conduct, includes a number of subspecies of estoppel, some of which are equitable and others that are recognised at common law’. Young, Croft and Smith, above n 6, 805–6.
11 As distinct from estoppel by record or estoppel by deed, etc.
existence of this estoppel, but judgments which contemplate it must be considered.\textsuperscript{12}

The term ‘common law’ estoppel by conduct shall be used to refer to all of the species of estoppel by conduct other than promissory estoppel, proprietary estoppel, and equitable estoppel.

B Format of the Thesis

This thesis shall prove that \textit{Waltons Stores}\textsuperscript{13} established a doctrine of equitable estoppel which operates as a cause of action, that the High Court has not substantially modified this doctrine, that the State Courts are not consistently applying this doctrine, and that the doctrine is not in need of modification. To achieve this end, Chapter II of the thesis will frame the objectives of both equity and estoppel generally. Chapter III will demonstrate that this background resulted in the development of equitable estoppel in \textit{Waltons Stores}.\textsuperscript{14} Chapter IV will confirm that the High Court has not since significantly modified the doctrine of equitable estoppel after \textit{Waltons Stores}.\textsuperscript{15} Chapter V will demonstrate that State Courts have applied the doctrine inconsistently despite the High Court developments. Chapter VI will demonstrate that this is undesirable because equitable estoppel achieves well the objectives of an equitable doctrine.

C Methodology: A Focus on the High Court

As the source of the law, the High Court judgments will form the foundation of our enquiry into equitable estoppel. Determining the law of equitable estoppel by reference to academic writing would be impossible.\textsuperscript{16} Therefore, academic writing will not be relied upon except to clarify the judgments themselves.\textsuperscript{17}

\textsuperscript{12} See, eg, \textit{Commonwealth v Verwayen} (1990) 170 CLR 394, 443.
\textsuperscript{13} (1988) 164 CLR 387.
\textsuperscript{14} Ibid.
\textsuperscript{15} Ibid.
\textsuperscript{16} ‘There is a lack of consensus as to what the current law is, in light of which it comes as no surprise to find an absence of agreement as to how it ought to be developed.’ Hopkins, above n 3, 220.
\textsuperscript{17} ‘I do not need to seek the aid of the discussion in the foregoing materials in the present case because for it like many cases in Australian courts, what has either been decided or authoritatively
Nevertheless, academic writing is a very significant contributor to the development of Australian law. Unfortunately, the literature on the topic contains many disagreements, and estoppel has been flagged as ‘a fertile area for the writers of PhD’s, without providing any comfort to the solicitor’. One reason for the lack of consensus may be that there is a trend in the literature to discuss equitable estoppel without adequate reference to the Australian case law. For example:

It is now well accepted that in Australian law a distinction is no longer drawn between promissory and proprietary estoppel.

As opposed to:

[S]ome eminent judges flirted with the idea that there was one overarching principle governing all cases of equitable estoppel. This heresy … has now been jettisoned.

Both of these statements are made without direct reference to case law. For example, the second quote above, from On Equity, cites another text, Estoppel by Conduct and Election. This type of indirect reasoning will be avoided in this paper.

D Methodology: A Review of the Doctrine

Although this paper focusses on the High Court cases to determine the law, the literature remains relevant to our analysis of the merits of the doctrine. It is important to address the literature because different views of the doctrine of equitable estoppel impact the way that lawyers and judges view and apply the

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18 This is evidenced by the tendency of the High Court to cite academic writing. See W M C Gummow, 'Comment: Legal Education' (1988) 11(3) Sydney Law Review 439.
21 Young, Croft and Smith, above n 6, 829.
22 Ibid.
23 Kenneth Handley, Estoppel by Conduct and Election (Sweet and Maxwell, 1st ed, 2006).
In addition, arguments contained in the literature often reveal issues which impact on what it is that equitable estoppel should do in practice. In order to address these issues with the doctrine, Chapter VI of this paper will conduct an analysis on the merits of equitable estoppel. We will take the doctrine identified by Chapters III and IV and ask, in light of the literature, whether the doctrine should be changed. In doing so, we will consider both legal tradition and public policy. This will require that the doctrine must operate effectively in a practical sense among other competing doctrines.

E Assumptions and Limitations

1 No Comparative Element

This enquiry focuses upon the Australian case law. Therefore, cases from other jurisdictions will generally not be considered other than to frame the development of the Australian case law.

2 No Need to Resolve the Fusion Debate

It is acknowledged that there is continuing debate as to whether the Supreme Court of Judicature Act has united equity and the common law into a single

24 ‘The revival (if such it is) of the ‘shield or sword’ debate in new terminology has a significant, though largely unremarked, impact on the Australian estoppel case law. Promissory estoppel cases, never common, are today rare almost to the point of extinction.’ Michael Bryan, ‘Almost 25 Years on: Some Reflections on Waltons v Maher’ (2012) 6(2) Journal of Equity 131, 133 (citations omitted).


29 1873 (UK) 36 & 37 Vict, c 6.
fused jurisdiction. More specifically, there is debate as to whether distinctions between equity and common law remain relevant in relation to estoppels. This is beyond the scope of this paper to address. The more limited scope of equitable estoppel has been chosen in the hope of providing a clear and certain indication of the law. In order to do so, the dualist view is preferred, namely that the effect of the Supreme Court of Judicature Act 1873 was to allow a single judicial body to administer the separate and distinct bodies of law and equity in the one venue.

This paper is premised upon this dualist perspective, and recognises the separateness of the equitable jurisdiction as identified in Chapter II.

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32 There is great complexity and little certainty involved in this query. See generally Tilbury, above n 30; Hughes, above n 31; Burns, 'The “Fusion Fallacy” Revisited', above n 31.
33 (UK) 36 & 37 Vict, c 6.
34 See generally Young, Croft and Smith, above n 6, 68.
II ESTOPPEL, EQUITY, AND EQUITABLE ESTOPPEL

Before the impact of Waltons Stores\textsuperscript{35} can be assessed, it is necessary to consider the broader context of equity and estoppels in general. This will create a frame of reference through which to view the development of the doctrine of equitable estoppel. For the reasons set out in Chapter I, a dualist perspective is assumed. Therefore, an equitable doctrine must be considered in its broader equitable context. To this end, this chapter will demonstrate that estoppel by representation, originally an equitable doctrine, was made rigid by the common law before being severely restricted in Jorden v Money.\textsuperscript{36} This rigidity was partly avoided through the operation of proprietary estoppel. However, promissory estoppel developed to extend into areas which proprietary estoppel could not assist.

A Equitable Estoppel in Context: The Nature of Equity and Equitable Doctrines

To determine what equitable doctrines do, we must consider the objectives of equity itself. Equity arose from the Court of Chancery, which was ‘seen as the tribunal which ameliorated, in particular cases, the harshness of the application of common law’.\textsuperscript{37}

The recognition of equity as a separate body of principle, … is a reflection of equity’s role in preventing unconscionable insistence on strict legal rights, thus giving effect to certain values that are antithetic to the common law. Those values – adherence to standards of conscionable behaviour notwithstanding strict legal rights – form part of our legal and social identity. By denying their separateness, we lose part of our legal culture and history, and more: to lose sight of the distinction of the doctrines of equity is to diminish their significance.\textsuperscript{38}

It is respectfully submitted that this is the correct approach. However, these antithetical values actually extend far beyond the mere restraint of strict legal...

\textsuperscript{35} (1988) 164 CLR 387.
\textsuperscript{36} Jorden v Money (1854) 10 ER 868.
\textsuperscript{37} Young, Croft and Smith, above n 6, 21.
This can be seen in the many equitable doctrines created to enforce, to borrow the words used above, ‘standards of conscienceable behaviour notwithstanding legal rights’. These include the creation of trusts, breaches of fiduciary duties, equitable interests in property, the ability to assign choses in action etc. These doctrines are not confined to mere defences against legal rights, but instead create entirely new ways of dealing.

As alternate ways of dealing, equitable doctrines are often in tension with the rigid common law. This tension is caused by the core objective of equity, which is to ‘soften and mollify the extremity of the law’.

The Cause why there is a chancery is, for that Mens Action’s are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every act, and not fail in some Circumstances.

In responding to the circumstances of a particular case, equity will generally grant the judge a wider discretion than the common law might. Despite this focus on discretion, equitable doctrines are bound by ‘settled principles’. These settled principles are not necessarily equivalent to common law principles, and include the maxims of equity. One such maxim is that ‘equity will not suffer a wrong to be without a remedy’. In order to achieve this objective, equity must adapt to changes in the common law which result in wrongs without remedies. The need for equity to be responsive to change is increased by the cyclical interaction between equity and the common law. Equitable doctrines are adopted by the common law, they become condensed into fixed rules and no longer suit the

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39 But see ibid 650. ‘[E]quity’s concern is to prevent unconscientious insistence on strict legal right, not the avoidance of detriment.’
40 Ibid 651.
41 See Young, Croft and Smith, above n 6, 13–5.
44 Young, Croft and Smith, above n 6, 44.
45 See Jill E Martin, Modern Equity (Sweet & Maxwell, 15th ed, 1997), 25; Young, Croft and Smith, above n 6, 163–6.
46 As stated above, this view relies heavily on the assumption that equity and the common law have not been fused. But see Waltons Stores (1988) 164 CLR 387, 448. Deane J argues that the ‘common perception that the doctrine of ”promissory estoppel” should be seen as exclusively equitable and to the resulting tendency to see a dichotomy between common law and equitable principle in a field where it did not exist even before the Judicature Acts system was first introduced in England’ is mistaken.
purposes of equity.\textsuperscript{47} Estoppel by representation is an excellent illustration of this principle.\textsuperscript{48}

\textbf{B Equity Created, and Then Lost Estoppel by Representation}

Although estoppel by representation is generally considered a common law estoppel, it was imported from the Court of Chancery.\textsuperscript{49} Early equity applied the doctrine as a method of enforcing representations.\textsuperscript{50} Much like equitable estoppel, this original equitable doctrine of estoppel by representation operated as a cause of action, focussed on the representation itself rather than a separate cause of action.\textsuperscript{51} Initially, the common law doctrine was close to its equitable counterpart,\textsuperscript{52} focussing on the ‘rationale that it is unfair for a party to resile from a representation upon which he has induced another to rely if the other will thereby suffer’.\textsuperscript{53} However, over time, the doctrine of estoppel by representation became more focussed on technical rules than on the discretion which the justice of the case called for:

\begin{quote}
A conspicuous example of the acquisition of a legal shell by an equitable principle is furnished by the law of estoppel. We now regard precedent as at least of equal weight with the equities of the case on questions of equitable estoppel. It may be said that estoppel is an equitable principle borrowed by the law, and that its fate is an incident of the general absorption of rules of equity by the law.\textsuperscript{54}
\end{quote}

This type of process would eventually prevent the once equitable doctrine from meeting its prior objective:

\begin{footnotes}
\item[48] Ibid 33.
\item[49] See Bower et al, above n 31, 10; \textit{Legione v Hateley} (1983) 152 CLR 406, 430.
\item[50] This doctrine ‘existed alongside the jurisdiction at common law to enforce “contracts”’. See Linda Kirk, ‘Confronting the Forms of Action: The Emergence of Substantive Estoppel’ (1991) 13(2) \textit{Adelaide Law Review} 225, 228–33.
\item[51] Ibid 230–2.
\item[52] ‘Even before the fusion of law and equity, there was general consistency, both in content and rationale, between common law and equitable principle in relation to estoppel by conduct. Waltons Stores (1988) 164 CLR 387, 447.
\item[53] See Bower et al, above n 31, 10; Young, Croft and Smith, above n 6, 810.
\item[54] Pound, above n 47, 33. It is unclear to which estoppel Pound is referring. Given the year of the publication, it is likely to have been estoppel by representation.
\end{footnotes}
So soon as a system of law becomes reduced to completeness of outward form, it has a natural tendency to crystallize into a rigidity unsuited to the free applications which the actual circumstances of human life demand.\textsuperscript{55}

The growing rigidity of estoppel by representation could be seen in its operation as a rule of evidence.\textsuperscript{56} As a rule of evidence, estoppel by representation establishes the facts by which legal rights are determined. It does not establish the rights themselves. Although the modern doctrine has remained somewhat true to its equitable origins,\textsuperscript{57} the doctrine has been so constrained by strict technical requirements as to require a new equitable doctrine to ameliorate it.

C \textit{The Rule in Jorden v Money}

The primary constrictions to estoppel by representation were created by the rule in \textit{Jorden v Money}.\textsuperscript{58} The majority decision in this case limited estoppel by representation to representations of present fact. Representations as to the future could no longer found an estoppel. Although the case was an appeal from an equitable jurisdiction,\textsuperscript{59} both common law and equitable estoppel by representation were restricted.\textsuperscript{60} The case was as significant for ‘the unity of the doctrine of estoppel by conduct at law and in equity, as for its exclusion of …
The assumption about future action or inaction. The case undermined the equitable jurisdiction to fulfil expectations, and was ‘the first step in the doctrine’s destruction’.

In the facts of the case, the defendant repeatedly promised not to enforce a debt against the plaintiff. She later changed her mind and sought to enforce the debt. The court held that an estoppel could not assist the plaintiff because her promise had related to the future:

I have no doubt she made them the promise in honour, but that she made this distinction: “It shall be in honour only, or binding in honour only, but that the bond, or that which constitutes the legal right, I will retain.”

The court held that an estoppel could not arise with respect of ‘a statement of something which the party intends or does not intend to do’. One of the reasons for this decision was that all that the plaintiff had to do to protect his interests was to enter into a written contract.

It is likely that the underlying basis for the decision was to bring estoppel in line with the doctrine of consideration. Consideration had begun to be construed very narrowly. By contrast, estoppel by representation had begun to operate as a rule of evidence, and could therefore enforce assumptions in full. Kirk suggests that it was the similarities between the equitable estoppel by representation and the law of contract which led to the downfall of the equitable doctrine.

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62 ‘The support for the exercise of a general equitable jurisdiction to make good expectations created or encouraged by a defendant … was undermined by the insistence in Jorden v. Money on a representation of existing fact …’ ibid 404–5 (Mason CJ and Wilson J) (citations omitted).
63 See Kirk, above n 50, 232.
64 Jorden v Money (1854) 10 ER 868, 884.
65 Ibid 882.
66 Ibid 882, 884; See also Lunney, ‘Jorden v Money - A Time for Reappraisal?’, above n 59.
68 ‘[T]he doctrine of consideration had been defined in singularly narrow terms to exclude all non-bargain promissory transactions. This emergence of the bargain theory of contracts meant that all promises in which the promisor did not specifically bargain for a return promise or performance went un-enforced even if the promisee had suffered substantial detriment as a result of her reliance on the promise.’ Joel M Ngugi, ‘Promissory Estoppel: The Life History of an Ideal Legal Transplant’ (2007) 41 University of Richmond Law Review 425, 428.
70 Cf the argument that estoppel by representation may actually be substantive law, eg Bower et al, above n 31, 12–5.
71 Kirk, above n 50, 231–3.
Limitation of the doctrine to representations of present fact was necessary to ensure that contract remained the primary method of promise enforcement.\textsuperscript{71} The limitation was a common-sense development which made it clear that the law of contract, as well as estoppel would not ‘protect expectations through detrimental reliance’.\textsuperscript{72}

The limitation in this case made it clear that estoppel would not protect expectations, but it also emasculated the ability of equity to protect detrimental reliance.\textsuperscript{73} The objective of estoppel by representation had been the prevention of an unjust departure from an assumption.\textsuperscript{74} The rule in \textit{Jorden v Money}\textsuperscript{75} created the obvious potential for unjust departures from assumptions about the future. In fact, the result was unjust even in the case itself: Lord St Leonard provided a ‘striking illustration of the arbitrary nature of the distinction’\textsuperscript{76} and expressly stated that denying the plaintiff a remedy was against the ‘justice of the case’.\textsuperscript{77} He argued that the distinction created between fact and future was ‘utterly immaterial’.\textsuperscript{78} The logic behind granting an estoppel for present fact and not future acts has been challenged repeatedly since.\textsuperscript{79} In any case, the rule in \textit{Jorden v Money}\textsuperscript{80} created an obstacle which equity judges would later attempt to avoid.\textsuperscript{81}

\textbf{D The Development and Operation of Proprietary Estoppel}

Proprietary estoppel was unaffected by the rule in \textit{Jorden v Money}\textsuperscript{82} and operates on assumptions which relate to the future.\textsuperscript{83} Because of this, proprietary

\begin{itemize}
\item \textsuperscript{72} Lunney, 'Jorden v Money - A Time for Reappraisal?', above n 59, 573.
\item \textsuperscript{73} Finn, above n 28, 526.
\item \textsuperscript{74} \textit{Thompson v Palmer} (1933) 49 CLR 507, 547; Bower et al, above n 31, 24–5.
\item \textsuperscript{75} (1854) 10 ER 868.
\item \textsuperscript{76} See Verwayen (1990) 170 CLR 394, 410.
\item \textsuperscript{77} \textit{Jorden v Money} (1854) 10 ER 868, 898.
\item \textsuperscript{78} Ibid 895.
\item \textsuperscript{79} See, eg, Bower et al, above n 31, 33: ‘It is submitted that an incorrect statement as to the rights and obligations between the parties, on which reliance is (actually or presumptively) intended, where all the relevant facts are known to both parties, should be treated in the same way as an undertaking or promise conferring those rights or assuming those obligations’; Lunney, 'Jorden v Money - A Time for Reappraisal?', above n 59.
\item \textsuperscript{80} (1854) 10 ER 868.
\item \textsuperscript{81} See Lunney, 'Jorden v Money - A Time for Reappraisal?', above n 59, 570–1.
\item \textsuperscript{82} (1854) 10 ER 868.
\item \textsuperscript{83} \textit{Crabb v Arun District Council} [1976] Ch 179, 187.
\end{itemize}
estoppel is a powerful and popular equitable doctrine. As the name suggests, proprietary estoppel relates to claims regarding property. The doctrine extends beyond express representations and can arise from a party’s silence. Proprietary estoppel operates as an independent cause of action rather than a rule of evidence. This doctrine attracts a discretionary remedy which will depend on the facts of the case. Lord Kingsdown’s dissenting judgement in Ramsden v Dyson succinctly outlines one operation of proprietary estoppel:

If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation.

It is unclear why proprietary estoppel avoided the limitation in Jorden v Money. This could not be explained by the equitable nature of proprietary estoppel: Jorden v Money itself was an appeal from Chancery. Furthermore, estoppel by representation was originally an equitable doctrine, yet it has clearly been limited. Another argument is that proprietary estoppel ‘escaped the scythe of Jorden v Money … due to its being totally overlooked in England in the first half of the 20th century.’ This is also an unsatisfactory answer given that proprietary estoppel has a longer heritage than promissory estoppel. A third

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84 ‘Promissory estoppel cases, never common, are today rare almost to the point of extinction. On the other hand, proprietary estoppel is flourishing to the extent that it is embracing cases which might once have been classified as instances of promissory estoppel.’ Bryan, ‘Almost 25 Years on: Some Reflections on Waltons v Maher’, above n 24, 133 (citations omitted).
85 Bower et al, above n 31, 327.
86 See ibid 327–30.
87 Plimmer v Mayor of Wellington (1884) 9 App Cas 699; Dillwyn v Llewellyn (1862) 4 De GF & J 517.
89 Ramsden v Dyson (1866) LR 1 HL 129, 170 (emphasis added).
90 (1854) 10 ER 868.
91 Ibid.
93 Finn, above n 28, 526.
94 Regarding the history of proprietary estoppel, see Mark Pawlowski, The Doctrine of Proprietary Estoppel (Sweet & Maxwell, 1st ed, 1996), 5.
argument is that this operation of proprietary estoppel arose by mistake. Given the developments which we will discuss in Chapter III, it is beyond the scope of this paper to attempt to resolve this. We may conclude that these unanswered questions are indicative of the uncertainty which is common with estoppels grounded in equity.

Proprietary estoppel is restricted to assumptions which relate to proprietary rights. Therefore, the doctrine is not available for assumptions which involve non-proprietary rights, such as contractual rights. This created the need for promissory estoppel.

E The Need for Promissory Estoppel

It has been suggested that the doctrine of promissory estoppel arose only in recent times in response to the rigidity of the other estoppels, rather than being a historical doctrine re-discovered. It is beyond the scope of this paper to go further along this line. Instead, it should be acknowledged that, immediately prior to the development of promissory estoppel, no estoppel operated on assumptions of future, non-proprietary interests. Proprietary estoppel could not apply to non-proprietary interests. Because of the rule in *Jorden v Money*, estoppel by representation could not apply to assumptions of the future. This is a good indication that promissory estoppel (and therefore equitable estoppel) should be considered in light of the developments which resulted from the rule in *Jorden v Money*. This approach is supported by the difficulties this situation created for

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95 Lord Kingsdown’s dissent above was relied upon as a statement of the majority, when it is actually wider. ‘The dissent of Lord Kingsdown was wider [than the majority in that decision], and extended the remedy to cases where the innocent party had an expectation ... that he would have an interest in land. On its face this seems inconsistent with *Jorden* and with the majority. There is clearly a difference between the two views. ... Yet it is Lord Kingsdown’s judgment that is cited in *Plimmer v Mayor of Wellington* as representing the law because, it was said, there was no difference between the judgments of the members of the House on the substantive law. ... Thus another line of decisions arose which were inconsistent with *Jorden.*’ Lunney, ‘*Jorden v Money* - A Time for Reappraisal?’, above n 59, 571–2 (citations omitted) (emphasis in original).


97 *Coombes v Smith* [1986] 1 WLR 808; See also Hopkins, above n 3, 202–3.

98 See Kirk, above n 50, 243–5.

99 (1854) 10 ER 868.

100 (1854) 10 ER 868.
judges, who strained to cast promises as statements of fact in order to allow an estoppel to arise. The need to moderate these restrictions created the background for the development of promissory estoppel in Central London Property Trust Ltd v High Trees House Ltd.

F Central London Property Trust Ltd v High Trees House Ltd

In High Trees, the landlord, Central London Property Trust Ltd, agreed that the tenant needed to pay only half the rent specified in the lease. This reduction was made because of difficulties obtaining rents during the war. The landlord’s representation did not result in a variation of the lease: there was no new and additional consideration for the promise to accept reduced rent, and the lease could only be varied by deed. After the war ended, the landlord brought proceedings to recover the full rent. Because the promise to accept a reduced rent was not supported by consideration, no action for breach of contract was available. Estoppel by representation could not assist, because the landlord’s promise had been one of future intention. Proprietary estoppel was not argued.

In obiter, Denning J relied upon Hughes v Metropolitan Railway Company to support a new doctrine of estoppel, although it is unclear if at the time he saw it as anything more than an extension of estoppel by representation. In either case, a clear exception to the rule in Jorden v Money was created:

The law has not been standing still since Jorden v. Money. There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise,

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102 [1947] KB 130 (‘High Trees’).
103 [1947] KB 130.
104 An argument that the reduced rent formed a new lease and therefore a new proprietary interest may have had some possibility of success.
105 (1877) 2 App Cas 439.
106 ‘It is doubtful whether at this stage Denning J considered the principle which he was articulating to be a form of estoppel or an extension of the doctrine of estoppel by representation.’ Bower et al, above n 31, 448.
107 (1854) 10 ER 868.
was going to be acted on by the person to whom it was made, and which was in fact so acted on.\textsuperscript{108}

Denning J’s obiter in \textit{High Trees}\textsuperscript{109} has now been credited with creating promissory estoppel.\textsuperscript{110} It is clear that promissory estoppel was centred on enforcing the promise,\textsuperscript{111} and was therefore able to apply to promises of future conduct that are intended to affect legal relations.\textsuperscript{112} The remedy given was to enforce the promise by preventing the landlord from exercising his strict legal rights. The later case of \textit{Combe v Combe}\textsuperscript{113} made it clear that the doctrine operated only to defend against the insistence of legal rights.\textsuperscript{114}

G \textit{Promissory Estoppel in Australia}

At the time of its inception into Australian law, promissory estoppel was not yet ‘a coherent body of doctrine’.\textsuperscript{115} Instead, it was a ‘new and growing chapter of our law’.\textsuperscript{116} There were still many uncertainties about the doctrine created in \textit{High Trees},\textsuperscript{117} such as whether detriment was required to be suffered by the promisee, whether the estoppel must be temporary in nature, and whether promissory estoppel could be applied to non-contractual obligations.\textsuperscript{118} None of these questions needs to be considered further at this stage. However, it should be acknowledged that, in calling for an answer, they provided the impetus for the development of equitable estoppel.

Promissory estoppel was not warmly received in Australia and it appears that it initially met with a ‘hostile reaction from … judges … and commentators’.\textsuperscript{119}

\begin{itemize}
\item \textsuperscript{108} \textit{Central London Property Trust Ltd v High Trees House Ltd} [1947] KB 130, 134 (citations omitted).
\item \textsuperscript{109} [1947] KB 130, 133–6.
\item \textsuperscript{110} See, eg, Seddon, above n 5, 438; Bower et al, above n 31, 448.
\item \textsuperscript{111} ‘I prefer to apply the principle that a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply.’ \textit{Central London Property Trust Ltd v High Trees House Ltd} [1947] KB 130, 136 (Denning J).
\item \textsuperscript{112} \textit{Combe v Combe} [1951] 2 KB 215, 220.
\item \textsuperscript{113} [1951] 2 KB 215.
\item \textsuperscript{114} See also Cooke, \textit{The Modern Law of Estoppel}, above n 101, 126.
\item \textsuperscript{115} \textit{Legione v Hately} (1983) 152 CLR 406, 420.
\item \textsuperscript{116} \textit{Olsson v Dyson} (1969) 120 CLR 362, 387.
\item \textsuperscript{117} [1951] 2 KB 215.
\item \textsuperscript{118} Cooke, \textit{The Modern Law of Estoppel}, above n 101, 38-42.
\item \textsuperscript{119} Seddon, above n 5, 459. Writing in 1975, Nicholas Seddon wondered whether the doctrine was ‘jinxed’.
\end{itemize}
Despite the initial reluctance, High Trees\textsuperscript{120} was eventually cited by the High Court in Carr v JA Berriman Pty Ltd\textsuperscript{121} as support for the following rather narrow proposition:

Where time is of the essence, and the date is allowed to go by, a form of estoppel operates. The promisee cannot resile summarily from that position.\textsuperscript{122}

The High Court’s gradually shifting stance towards promissory estoppel was indicated in Tropical Traders Ltd v Goonan,\textsuperscript{123} where the court avoided utilising the doctrine notwithstanding that it was available on the facts of that case:

It may be that repeated acquiescence by one party to a contract in non-observances by the other of stipulations as to time may amount, … to an assent to time being treated for the future as not of the essence, … and in such a case it may not matter whether the result is described as a promissory estoppel or a waiver or a variation of the contract…\textsuperscript{124}

Although Olsson v Dyson\textsuperscript{125} was decided on other grounds, Windeyer J stated his opinion that promissory estoppel acted as a defensive doctrine and may assist the plaintiff against a counter-claim but not in her primary cause of action.\textsuperscript{126} The doctrine was also mentioned in several other cases which were also decided on other grounds but offered little clarification.\textsuperscript{127}

\textbf{H Legione v Hateley}

The acceptance of the doctrine of promissory estoppel finally occurred in Legione v Hateley.\textsuperscript{128} The facts of the case concerned a contract for the purchase of a property, the terms of which required the balance of payment to be made on

\textsuperscript{120}[1951] 2 KB 215.
\textsuperscript{121}(1953) 89 CLR 327.
\textsuperscript{122}Ibid 333 (Dixon CJ).
\textsuperscript{123}(1964) 111 CLR 41.
\textsuperscript{124}Ibid 52 (Kitto J).
\textsuperscript{125}(1969) 120 CLR 365.
\textsuperscript{126}‘She might perhaps turn to estoppel in answer to a claim against her by the appellants if these proceedings be regarded as of that nature’. Olsson v Dyson (1969) 120 CLR 362, 387 (Windeyer J).
\textsuperscript{128}(1983) 152 CLR 406.
the 1st of July 1979. The contract stipulated that, should the purchaser fail to pay on time, the vendor would be entitled to terminate the contract on 14 days’ written notice. The purchasers were late in payment, and their solicitors contacted the vendor’s solicitors to enquire whether settlement after the expiry of those 14 days would be acceptable. The secretary for the vendor’s solicitor responded by saying ‘I think that’ll be all right but I’ll have to get instructions.’

On the basis of that conversation, the purchasers did not attempt to settle on time. After the notice period had expired, the vendors claimed that the contract had been rescinded and that they were entitled to the purchasers’ deposit. The purchasers claimed that the vendors should be estopped from this claim.

The case signifies the more open attitude of the High Court. The Court applied a promissory estoppel, even though it may have been open to determine the case based on proprietary estoppel. Gibbs CJ and Murphy J directly addressed the fact that there was not yet ‘a coherent body of doctrine’, but regrettably felt that the facts of the case were not appropriate to ‘consider fully the limits of the principle’. Nevertheless, they made a finding on the basis of promissory estoppel, firmly cementing its availability in Australia between parties to a legal relationship. In contrast to later cases, their judgment makes no reference to unconscionability. Their Honours were entirely concerned with the detrimental reliance of the purchasers, and considered that the appropriate remedy was a grant of specific performance. This approach differed from High Trees because it gave a positive remedy – one that enforces rights rather than merely precluding rights from being exercised. This is arguably the basis for the later doctrine of equitable estoppel operating as a cause of action.

In contrast, Mason J and Deane J did not grant an estoppel because of uncertainties in the representation. However, they addressed the doctrine of promissory estoppel directly. Their Honours noted that courts were already

130 The vendor’s representation encouraged the plaintiff to assume that they would receive an interest in land.
133 ‘For these reasons we consider that the purchasers were entitled to specific performance and that the appeal should be dismissed.’ Legione v Hateley (1983) 152 CLR 406, 423.
134 [1947] KB 130.
avoiding the rule in *Jorden v Money* by ‘distorting a representation as to future conduct into a strait jacket of present descriptive fact’. It was clear from the tenor of their judgment that they accepted that *Jorden v Money* was no longer good law, at least within the category of promissory estoppel:

‘The 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 such a relationship.’

In accepting the doctrine, their Honours were careful not to determine whether this was a new doctrine or an extension of estoppel by representation. Nevertheless, their Honours’ reference to established equitable principle and to the search for justice suggests that they conceptualised the doctrine as an equitable one. They also signalled and approved the underlying policy which estoppel by representation and equitable estoppel share, noting that ‘there is a general correspondence between the “grounds of preclusion” of an ordinary estoppel by representation and … a promissory estoppel’. This idea of fusion of estoppels laid the framework for the fusion of promissory and proprietary estoppel which was to follow in *Waltons Stores*.

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135 (1854) 10 ER 868.
137 (1854) 10 ER 868.
139 ‘Nor 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.’ *Legione v Hateley* (1983) 152 CLR 406, 435 (Mason J and Deane J).
III EQUITABLE ESTOPPEL – WALTONS STORES

In Waltons Stores,142 the High Court took the development of the doctrine of promissory estoppel much further than the law in England.143 These developments have not yet been replicated elsewhere.144 The binding ratio decidendi of the case unified proprietary and promissory estoppels in a uniquely Australian doctrine called equitable estoppel.145

A The Details of the Case

1 The Facts

The facts of the case are well known. Waltons Stores (Interstate) Pty Ltd (‘Waltons’) and the Mahers had all but concluded negotiations for a lease over the Mahers’ land. This lease would require the Mahers to demolish an existing building and to build a new one to Waltons’ specifications. On 12 October, Waltons’ authorised decision maker informed Mr Maher that:

We seem to have agreed on everything subject to receipt of proper architectural plans and specifications, and appropriate documentation being prepared, approved and executed.146

Certain details about the construction remained to be confirmed including a document called the schedule of finishes.147 The timeframe for completion was particularly tight, and the building initially needed to be ‘available for fitting-out purposes by 15 January’.148 On 2 November, the Mahers requested amendments to the lease document.149 On 7 November, the Mahers indicated that although they had commenced demolition, they were unwilling to demolish a newer part of the building prior to a binding agreement. Accordingly, Mahers’ solicitors applied

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142 Ibid.
143 Nolan, above n 28, 207.
144 See ibid; Finn, above n 28.
145 See Bower et al, above n 31, 23; Nolan, above n 28.
147 ‘You will note that a schedule of finishes remains to be annexed to the deed’. Maher v Waltons Stores (Interstate Ltd) (1984) 1 BCL 187, 190–1.
pressure on Waltons’ solicitors to get the amendments agreed. Waltons’ solicitors informed the Mahers’ solicitors that the amendments had been orally approved, but that they would advise the next day if ‘any amendments [were] not agreed to’. The schedule of finishes had not been provided at this time.

On 9 November, the Mahers’ solicitors had not received any communication from Waltons’ solicitors. The Mahers executed their copy of the deed, attached the schedule of finishes for the first time, and sent these to Waltons’ solicitors ‘by way of exchange’. This method of conveyancing required an original and a counterpart copy to be signed and exchanged. As a result, the Mahers’ solicitors expected that they would receive the executed copy back from Waltons and that they (the Maher’s solicitors) would organise for the stamp duty to be paid. They never received the executed copy.

Around 16 November, Waltons had begun to question whether they would proceed with the lease. On 21 November, they advised their solicitors to ‘go slow’. Although Waltons knew that the Mahers were constructing the building, they did not inform the Mahers that they may not wish to proceed. Around 18 January, Waltons decided not to go ahead with the lease, and the Mahers’ solicitors were advised on 19 January. By this stage, the old building had been demolished and construction of the new building was 40% complete.

2 The Procedural History

(a) The First Instance: Maher v Waltons Stores (Interstate) Ltd

This was a case in the Equity Division of the Supreme Court of New South Wales. The Mahers argued unsuccessfully that exchange of contracts was not necessary, and that a concluded agreement already existed. Given that no

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151 Ibid 193.
152 Ibid 193.
154 Ibid 197.
155 Ibid 194.
156 Ibid.
157 Ibid.
binding agreement did in fact exist, Kearney J considered whether Waltons was ‘estopped by its conduct from denying that there [was] a binding contract by in effect being precluded from denying that exchange occurred’.

It appears that Kearney J at times considered slightly different assumptions. The first was that ‘the plaintiffs believed that they had an agreement’. However he may also have considered an assumption of future conduct:

They were entitled, in my view, to assume that the exchange *would* be duly completed by the defendant, and in those circumstances properly considered that they were bound to proceed … with the building project for [Waltons].

At any rate, the estoppel relied upon by Kearney J was a common law estoppel which precluded denial of the existence of ‘an enforceable contract effected by exchange’. Kearney J granted damages in lieu of specific performance.

(b) The First Appeal: Waltons Stores (Interstate) Pty Ltd v Maher and Another

Waltons Stores appealed to the New South Wales Court of Appeal. The appeal was unanimously dismissed. The judgment was delivered by Priestley JA, with Samuels JA agreeing, and Glass J agreeing except with respect to the costs order.

There is some disagreement as to whether the judgment of Priestley JA differed from the earlier finding of Kearney J. Priestley JA based his common law estoppel *in pais* on the assumption that Waltons were already bound even though the lease document had not been executed. Difficulties with identifying the assumption in this case would play a significant role in the later High Court

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159 Ibid 196.
160 Ibid 197 (emphasis added).
161 Ibid 198.
162 Ibid 199.
164 Ibid 408.
165 See *Waltons Stores* (1988) 164 CLR 387, 412–3 (Brennan J); 437 (Deane J).
166 ‘However, the opinion that I have formed after reviewing Kearney J’s findings of fact and the evidence in the case generally is that certainly by the time the respondents actually began building in Berry Street at the beginning of January the appellant had caused the respondents to assume that the fact was that notwithstanding they had never been notified of the exchange of agreements (and notwithstanding that no exchange of agreements had occurred) the deal that had been agreed between Mr Maher and Mr Elvey on the one hand and representatives of the appellant on the other was an agreement binding both the respondents and the appellant’. Ibid 421 (Brennan J).
decision. It was clear that the assumption was seen as one of present fact. Waltons argued unsuccessfully that ‘a representation must be clear before it can found an estoppel in pais’. Priestley JA held that common law estoppel in pais could arise on an assumption in the absence of a direct representation.

B The Arguments before the High Court

On appeal to the High Court, Counsel for Waltons argued that common law estoppel in pais could not arise because the assumption was one not one of present fact. They argued that the Mahers’ had assumed that the agreement would be executed in the future. They also argued that no express representation was made, and that the Mahers’ solicitor had actual knowledge that the exchange had not occurred. They argued that promissory and proprietary estoppel could not apply outside of a contractual relationship and that the estoppel could not act as an independent cause of action. They also argued that no proprietary estoppel could arise because the Mahers did not expect to gain a proprietary right.

Counsel for the Mahers argued firstly that there was a common law estoppel by conduct which arose from an implied representation. They argued that ‘[t]he representation was that there was a binding contract in existence’. Alternatively, they argued that a promissory estoppel arose with respect to the ‘representation that an exchange would take place as a matter of course’. They argued that the doctrine of promissory estoppel operated as a cause of action even outside of a contractual relationship.

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167 ‘The 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.’ Grundl v The Great Boulder Pty Gold Mines Ltd (1937) 59 CLR 641, 674 (emphasis added), quoted in Waltons Stores (Interstate Ltd) v Maher (1986) 5 NSWLR 407, 418–9.
169 ‘Before dealing with the other submissions for the appellant, I point out that neither in Thompson nor in Grundl did Dixon J use the word “representation” as indicating a necessary element in his formulation of estoppel in pais. One of the ways in which the relevant assumption may arise is by the direct representation of the person sought to be estopped …’ Waltons Stores (Interstate Ltd) v Maher (1986) 5 NSWLR 407, 420 (emphasis in original). ‘All this, in my opinion, shows with quite sufficient clarity that the respondents had adopted a mistaken assumption and that the appellant had caused them to believe that such assumption was factually correct’, at 422.
171 Ibid 392.
C A Summary of the Judgments

All four judgments found for the Mahers, and there was no dissenting judgment.\textsuperscript{172} We shall examine each below:

1 Mason CJ & Wilson J – Equitable Estoppel

Mason CJ and Wilson J delivered a joint judgment which they based entirely on equitable estoppel. Their Honours saw equitable estoppel as a source of rights.\textsuperscript{173}

Their Honours held that the Mahers’ assumption was ‘that exchange of contracts would take place as a matter of course, not that exchange had in fact taken place’.\textsuperscript{174} Their Honours did not accept that there was an assumption that the deed was already executed, and went on to say that such an assumption would not have been a reasonable belief.\textsuperscript{175} Their Honours did not require an express representation, and considered that Waltons’ silence was relevant. The estoppel applied to the ‘implied promise to complete the contract’.\textsuperscript{176} Therefore, their judgment was based on an assumption as to the future.

Mason CJ and Wilson J did not view the doctrine as a rule of evidence, as demonstrated by their description of the discretion required when tailoring the remedy.\textsuperscript{177}

\textsuperscript{172} Each of the judgments concurs in the order to dismiss the appeal. See Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387, 408, 433, 455, 464.

\textsuperscript{173} ‘[T]he doctrine of promissory estoppel … extends to the enforcement of voluntary promises …’ Ibid 405–6.

\textsuperscript{174} ‘[T]he respondents were entitled to assume … that the appellant accepted the amendments and that exchange of contracts was a mere formality’. Waltons Stores (1988) 164 CLR 387 395. See also at 398.

\textsuperscript{175} Ibid 396–7.

\textsuperscript{176} ‘The appellant's inaction, in all the circumstances, constituted clear encouragement or inducement to the respondents to continue to act on the basis of the assumption which they had made’. Ibid 407–8 (emphasis added).

\textsuperscript{177} ‘Holding the representor to his representation is merely one way of doing justice between the parties’. Ibid 405.
2 Brennan J – Equitable Estoppel

Brennan J applied an equitable estoppel to the facts to reach his finding. Brennan J’s judgment considers the possibility of several assumptions:

The first basis is an expectation by Mr. Maher that Waltons would duly complete the exchange; the second basis is an assumption by Mr. Maher that Waltons had duly completed the exchange; the third basis is an assumption by Mr. Maher that there was a binding contract in existence whether or not an exchange had been completed.

However, Brennan J’s orders arose as a result of the assumption that Waltons would execute the contract. Brennan J did not require an express representation before an equitable estoppel could arise, and he made it clear that silence could be sufficient in certain circumstances. However, Brennan J did consider that, before an estoppel could arise based on an inducement, the promisor would need to have knowledge or intention that the other party would rely on the assumption. Brennan J outlined the following requirements to establish an equitable estoppel:

(I) 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 defendant’s property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff’s reliance

178 ‘In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that … This is such a case, as a brief recapitulation of the facts will show.’ Ibid 428–9.

179 Ibid 413.

180 ‘That equity is to be satisfied by treating Waltons as though it had done what it induced Mr. Maher to expect that it would do, namely, by treating Waltons as though it had executed and delivered the original deed. … The [other two possible assumptions] may be disposed of briefly. Waltons Stores (1988) 164 CLR 387, 430 (emphasis added).


182 Ibid 423.
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.183

Brennan J applied the doctrine of equitable estoppel as a substantive source of rights and an independent cause of action.184 He viewed the remedy for an equitable estoppel as going ‘no further than is necessary to prevent unconscionable conduct’,185 and operating to avoid the detriment rather than to fulfil the expectation.186

3  Deane J – Common Law Estoppel by Conduct and Equitable Estoppel

Deane J’s judgment was on the primary basis of common law estoppel by conduct.187 Deane J’s decision focussed on the assumption that a binding contract already existed.188 In this regard, he held that an express representation was not required,189 and that it was the imprudence of Waltons which created the assumption.190

Deane J’s concept of common law estoppel by conduct could complete a separate cause of action but could ‘not of itself constitute an independent cause of action’.191 This is in apparent conflict with Deane J’s view that it was a mistake to view common law estoppel by conduct as only a rule of evidence.192

Deane J also relied upon promissory estoppel as an additional ground for his decision, although he viewed the doctrine as an extension of common law

184 ‘[E]quitable estoppel almost wears the appearance of contract … But there are differences between a contract and an equity created by estoppel’. Ibid 424–5 (emphasis added).
185 Ibid 419.
186 Ibid 423.
188 ‘[T]he operative finding for the purposes of the present case was that the Mahers … believed that there was a binding agreement …’. Ibid 438.
189 Ibid 443.
190 Ibid 444.
192 ‘It suffices to say that in the ordinary case of an estoppel by conduct precluding denial of an assumed or represented fact, particularly in the context of mistaken notions that estoppel by conduct was but a rule of evidence, there was neither point nor practicability in seeking to maintain independent equitable and common law doctrines under a fused system’. Ibid 448.
estoppel by conduct. Deane J disagreed with the collective approach of Mason CJ, and Wilson and Brennan JJ, who had found, as a question of fact, a different assumption to the one found by the trial judge. Despite his reluctance to consider this different assumption, Deane J decided on a second ground, that the Mahers had assumed that Waltons would execute the deed, or else that execution was a mere formality. In so doing, he argued that equitable and common law estoppels were facets of a single principle, and held that common law estoppel by conduct should not be limited to representations of future conduct. However, Deane J stopped short of creating a unified estoppel by conduct, and instead found that a promissory estoppel arose. The promissory estoppel applied by Deane J could arise without an express representation. Deane J did not view the doctrine as a cause of action, but accepted that it would prevent Waltons from denying the existence of a binding agreement, because:

i) the prospective lessee has induced the mistaken belief; (ii) the prospective lessee is aware of the existence of the mistaken belief, of the fact that it is mistaken and of what the owner is doing on the basis of it; (iii) the prospective lessee stands by so that the opportunity of entering into the lease and the advantage of use of the building will be available to him if he decides to go ahead with the lease.

4 Gaudron J – Common Law Estoppel

Gaudron J applied common law estoppel as an evidentiary rule, which operated ‘to fashion a set of facts by reference to which is imposed a liability

193 ‘That being so, promissory estoppel should … continue to be seen … as an extension of the doctrine of [common law] estoppel by conduct to representations or assumptions of future fact in at least certain categories of case. Ibid 452–3.
194 ‘This Court should hesitate before venturing to review findings made by a trial judge …. If the matter were for me alone, I would decline to go beyond the concurrent findings that the Mahers believed there was a binding agreement and that that belief had been effectively caused by the conduct of Waltons. Since other members of the Court see the matter differently, however, I consider it to be desirable that I embark upon a review of those findings’. Ibid 435 (Deane J).
195 ‘One need go no further than the circumstances of the present case to provide a further illustration of the fact that, once regard is paid to substance, the principles of [common law] estoppel by conduct can be applied as effectively to a representation or induced assumption of future conduct as they can to one of existing fact.’ Ibid 450.
196 Ibid 452.
197 ‘An extension of the doctrine of estoppel by conduct to representations or assumptions of future fact …’ Ibid 452 (emphasis added).
198 ‘Obviously, the general availability of remedies will not assist a plaintiff in circumstances where the operation of an estoppel precluding departure from a represented or assumed state of affairs leaves him with no identifiable entitlement to relief.’ Ibid 449.
199 Ibid 453.
which otherwise does not exist’. Gaudron J considered that the dividing line between common law and equitable estoppel was that common law estoppel operates on assumptions of fact, and equitable estoppel operates on assumptions of rights. Gaudron J gave tentative support for the view that promissory estoppel and proprietary estoppel are not ‘discrete categories of equitable estoppel based on definitional differences’ but are ‘illustrative of different assumptions as to rights’. However, Gaudron J based her decision on an assumption that exchange had already taken place and therefore did not further explore equitable estoppel.

D On Determining the Ratio of Waltons Stores

1 On Determining the Ratio: The Law of Precedent

The High Court delivered four separate judgments, each dismissing the appeal. Each judge held that an estoppel existed, however the nature of the estoppel differed significantly. In determining whether any of these formulations of estoppel constituted the law of estoppel in Australia, it is necessary to identify the ratio decidendi of the case and to separate that from judicial remarks which are merely obiter dicta.

It is fundamental to the ascertainment of the binding rule of a judicial decision that it should be derived from (I) the reasons of the judges agreeing in the order disposing of the proceedings; (2) upon a matter in issue in the proceedings; (3) upon which a decision is necessary to arrive at that order.

Notwithstanding the simplicity of this definition, there is usually room for debate as to which reasons were necessary to arrive at the order and which were not. Furthermore, multiple judgments make the task of determining a ratio

200 Ibid 458.
201 Ibid 459.
203 Ibid 461.
more difficult. Nevertheless, it is submitted that there is a clear ratio in Waltons Stores. 207

It is necessary to consider in detail those findings on issues in dispute which were common to the judgments. 208 Although a ratio cannot be determined simply by adding judgments or reasons together, 209 it is not necessary that the ratio of a case is common to all of the judgments:

Even so great a Justice of this Court as Dixon J cannot speak for the Court unless his reasoning attracts the support, express or implied, of a majority of the participating Justices . . . . Even then, the remarks will not be part of a binding rule unless they relate to an issue in contention which had to be decided by the Court to reach its order. 210

Although all five judges found for the Mahers on the basis of estoppel, there was disagreement as to the type of estoppel that arose. Three of the judges, Mason CJ, Wilson and Brennan J based their findings upon an equitable estoppel. Deane J relied primarily on a common law estoppel by conduct, but also relied upon a promissory estoppel as an additional ground. Gaudron J based her decision on common law estoppel by conduct only.

2 On Determining the Ratio: The Majority Judgment

The binding ratio of the case is contained in the judgments of the three justices who found an equitable estoppel: Mason CJ, Wilson J, and Brennan J. Although two separate judgments were delivered by these three judges, when read together, the joint judgment of Mason CJ and Wilson J and the judgment of Brennan J form a majority judgment. 211 This is because the doctrine of equitable estoppel applied

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206 See generally Bagaric and McConvill, above n 205.
209 ‘[A] common reason for decision could not be constructed by adding views of single Justices to form a conglomerate.’ Dickenson’s Arcade Pty Ltd v Tasmania (1974) 130 CLR 177, 188.
to the facts is practically identical between the two judgments.\textsuperscript{212} Out of the five justices, these three concurring justices form a majority. We shall demonstrate this in detail below. Before doing so however, we should address arguments which suggest that this approach is not correct.

No binding ratio concerning equitable estoppel can exist if either of these two judgments did not rely upon equitable estoppel.\textsuperscript{213} One argument which would have this result suggests that Mason CJ and Wilson J did not rely upon equitable estoppel in order to reach their decision. Cooke suggests that the final statement in the judgment of Mason CJ and Wilson J, that they ‘therefore think that the Court of Appeal was correct in its conclusion’\textsuperscript{214} indicates that their decision relied upon contract.\textsuperscript{215} This cannot be correct. We have demonstrated above that, although their Honours agreed with the conclusion (the orders) of the Court of Appeal, they reached this agreement by applying the doctrine of equitable estoppel. It suffices to say that there is nothing in the nature of that final sentence which limits the reasons for their decision.

A second challenge arises from the suggestion that Brennan J applied a common law estoppel.\textsuperscript{216} The impact of this would be to combine with the judgments of Deane J and Gaudron J to form a majority concerning a common law estoppel. However, this is not the case. Brennan J’s orders were expressly based upon equitable estoppel:

\begin{itemize}
\item Unconscientiousness and Remedy - The “Minimum Equity” (2013) 7(3) Journal of Equity 171;
\item Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387, 408.
\item ‘The judgment of Mason CJ and Wilson J actually reaches a very different, and radical conclusion about the use of estoppel as a cause of action; but then it moves abruptly to a bland affirmation of the decision below. … Brennan J alone travels direct from his reasoning – estoppel as a cause of action,… – to his decision.’ Cooke, The Modern Law of Estoppel, above n 101, 161 (citations omitted). It is interesting that Cooke does not take similar issue with the order of Brennan J that ‘[t]he appeal should be dismissed.’ Ibid 433.
\item ’It is not clear, despite elaborate discussion of promissory estoppel, whether he upheld an expanded promissory estoppel, an estoppel by silence (at 427), or a proprietary estoppel (at 428-9’). Handley, ’The Three High Court Decisions on Estoppel 1988-1990’, above n 71, 728.
\end{itemize}

37
As the Mahers would suffer loss if Waltons failed to execute and deliver the original deed, an equity is raised against Waltons. … The equity is fully satisfied by ordering damages in lieu of specific performance. The judgment of Kearney J. is supported by the first basis of estoppel [the equitable estoppel which arises from the assumption that the contracts would be exchanged].

Brennan J also clearly concluded that the Mahers could not have assumed that the contract had already been executed. Because the assumption relates to the future, a common law estoppel was not available. He also found it ‘extremely doubtful’ that the Mahers had assumed that a contract existed even before the contracts were exchanged, but ultimately made no finding on this point. The lack of a finding on this second common law estoppel ground is a clear indication that Brennan J’s decision did not turn on common law estoppel, and was made solely on the basis of equitable estoppel.

E The Ratio in Waltons Stores

The ratio of Waltons Stores is contained in the reasoning which ‘attracts the support, express or implied, of a majority of the participating Justices … [and relates] to an issue in contention which had to be decided by the Court to reach its order’. Although Brennan J sets out a clear list of elements for his conceptualisation of equitable estoppel, not all of these elements were applied to the facts. Not all of these elements were considered by Mason CJ and Wilson J. Instead of repeating those elements, we shall instead set out those aspects the two judgments had in common which were applied to the facts of the case in order to reach the decision:

218 ‘The better analysis of the evidence is that Mr. Maher expected that Waltons would execute and deliver the original deed, and that view precludes a finding that he assumed that Waltons had done so. … I think it is extremely doubtful whether there is evidence to support a finding that Mr. Maher adopted the [assumption that a contract existed]. But it does not matter.’ Ibid 430–1.
219 Ibid.
221 For the elements, see Waltons Stores (1988) 164 CLR 387, 428–9 (Brennan J).
- an equitable estoppel arises as a cause of action, capable of producing rights not previously in existence, including non-contractual rights, and thereby assisted the Mahers despite the lack of a contractual relationship.

- an equitable estoppel arises where ‘a plaintiff … has acted to his detriment on the basis of a basic assumption [where]… it would be unconscionable conduct on the part of the other party to ignore the assumption.’ The Mahers suffered detriment by demolishing the building, and the conduct of Waltons was unconscionable. Unconscionable conduct is a question of fact, and in this case this was established by the ‘element of urgency’, the inducement caused by Waltons’ failure to correct the assumption, and Waltons’ knowledge of the Maher’s assumption.

- an equitable estoppel can arise from acquiescence, does not require a representation, and in the facts of the case arose from Waltons’ acquiescence without requiring an express representation.

- an equitable estoppel applies to assumptions of future conduct, and in the facts of the case arose in favour of the Mahers’ assumption that the deed would be executed.

1 Equitable Estoppel Unites Proprietary and Promissory Estoppels

This ratio established a new doctrine of equitable estoppel which subsumed both proprietary and promissory estoppel. There can be no doubt that Brennan J viewed proprietary and promissory estoppel as a unified doctrine of equitable

222 Ibid 400, 405–6 (Mason CJ and Wilson J); Equitable estoppel … does not operate by establishing an assumed state of affairs. Unlike an estoppel in pais, an equitable estoppel is a source of legal obligation.’ Ibid 416 (Brennan J). See also ibid 419, 424–5 (Brennan J).
224 ‘[B]y enforcing directly in the absence of a pre-existing relationship of any kind a non-contractual promise on which the representee has relied to his detriment.’ Ibid 400 (Mason CJ and Wilson J).
225 Waltons Stores (1988) 164 CLR 387, 404 (Mason CJ and Wilson J) (emphasis added); See also at 419–420 (Brennan J).
229 ‘[T]he appellant is estopped in all the circumstances from retreating from its implied promise to complete the contract’. Waltons Stores (1988) 164 CLR 387 397, 405–6 (Mason CJ and Wilson J), 430 (Brennan J).
estoppel, as he expressly stated the futility in maintaining the two separate categories of the doctrine:

If cases of equitable estoppel are in truth but particular instances of the operation of the general principles of equity, there is little purpose in dividing those cases into the categories of promissory and proprietary estoppel which are not necessarily exhaustive of the cases in which equity will intervene.  

Brennan J criticised the logical difficulties which arose from the separation of the doctrines, particularly in allowing proprietary estoppel to enforce non-contractual promises while failing to allow promissory estoppel to do the same. Mason CJ and Wilson J identified equivalent reasoning for combining promissory and promissory estoppels into the single doctrine of equitable estoppel, citing *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* as support for the proposition that the Court in *Crabb v Arun District Council* saw the two ‘categories’ of estoppel as ‘mere facets of the same general principle’.  

The creation of this new doctrine has not been universally accepted. The basis of equitable estoppel as a new doctrine has been challenged by Handley, who argues that Mason CJ and Wilson J were labouring under a ‘confusion of promissory and proprietary estoppel’. Handley argues that Mason CJ and Wilson J made an error by referring to *Crabb v Arun District Council* as a case of promissory estoppel, when it was actually a case of proprietary estoppel. This argument ignores the entire tenor of the judgment. When read in light of their Honours’ explanation, it is clear that their Honours were not ‘confused’ and were instead drawing together the separate doctrines of promissory and proprietary estoppels into equitable estoppel. The doubt which Handley casts
upon the case is unfounded. However, in practice it does not matter whether or not equitable estoppel was a new doctrine. Even if the case only affected promissory and/or proprietary estoppel, the effect is the same. *Waltons Stores* homogenised proprietary and promissory estoppels:

One may therefore discern in the cases a common thread which links them [promissory and proprietary estoppels] together, namely, the principle 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.”

Although a gross simplification, we have summarised the differences in the following table.

<table>
<thead>
<tr>
<th></th>
<th>Proprietary Estoppel</th>
<th>Promissory Estoppel</th>
<th>Equitable Estoppel</th>
</tr>
</thead>
<tbody>
<tr>
<td>Can arise by acquiescence, without a representation</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Only operates between parties in a contractual relationship</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Can create new rights and operate as a cause of action</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Is limited to assumptions of proprietary interests</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

Equitable estoppel appears to be more closely related to proprietary estoppel than promissory estoppel. However, the confinement of proprietary estoppel to an proprietary interest in the plaintiff, that proprietary interest came into existence as the only appropriate means by which the defendants could be effectively estopped from exercising their existing legal rights.’ *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 403 (Mason CJ and Wilson J) (emphasis added).

Handley has faced similar criticisms before: ‘the accuracy of … [Handley’s] account of the existing law may occasionally be compromised by his desire to defend its traditional limits.’ Ben McFarlane, ‘Estoppel by Conduct and Election’ (2007) 123(Oct) *Law Quarterly Review* 667, 668.

assumption of a proprietary interest is at the core of the doctrine.\textsuperscript{242} We do not presently need to resolve the argument that Walton Stores\textsuperscript{243} was a case of proprietary estoppel.\textsuperscript{244} However, the better view is provided by Andrew Robertson, who concludes that ‘[t]his rationalisation of Walton Stores v Maher as a decision based on proprietary estoppel is clearly inconsistent with the judgments.’\textsuperscript{245} In either case, we can be certain that if Walton Stores\textsuperscript{246} did not create a new doctrine of equitable estoppel, then it either:

- extended promissory estoppel to act as a cause of action, applying to acquiescence, outside of a contractual relationship, or
- extended proprietary estoppel to apply to non-proprietary interests.

The ratio of the case is identical regardless of the name used.

(a) Support from the Minority Judgments

Gaudron J’s judgment does not readily contribute to the ratio in spite of her statements in support of equitable estoppel.\textsuperscript{247} Like Deane J, Gaudron J disagreed with the majority and found an assumption of present fact.\textsuperscript{248} Although not affecting the orders made, Gaudron J stated that there was ‘much to be said’ for the view that proprietary and promissory estoppel were not discrete categories and ‘are merely illustrative of different assumptions as to rights’.\textsuperscript{249} These remarks provide implied support for the reasoning of the majority judges.\textsuperscript{250} By contrast, Deane J saw promissory estoppel as an extension of common law estoppel by

\textsuperscript{242} See generally Pawlowski, above n 94.
\textsuperscript{243} (1988) 164 CLR 387.
\textsuperscript{245} Robertson, ‘Three Models of Promissory Estoppel’, above n 211, 231–3. The following statement also suggests that Brennan J did not see the case as one of proprietary estoppel: ‘The Statute of Frauds and similar provisions prescribing formalities affecting proof of contracts have never stood in the way of a decree to enforce a proprietary estoppel … and, in principle, there is no reason why such provisions should apply when any other equity is created by estoppel’. Walton Stores (1988) 164 CLR 387, 433.
\textsuperscript{246} (1988) 164 CLR 387.
\textsuperscript{247} See ibid 458–9.
\textsuperscript{248} ‘The suggestion that there was no basis in the evidence for a finding that the Mahers believed that a binding contract existed is, in my view, mistaken.’ Ibid 439 (Deane J); ‘… I have formed a view favourable to the respondents on the basis of the second assumption, … [that exchange had occurred] …The assumption that exchange had taken place is an assumption of fact…’: at 458–9 (Gaudron J).
\textsuperscript{249} Ibid 459–60.
conduct. At one point he may have contemplated the relationship between promissory and proprietary estoppel as one and the same. If anything more can be drawn from Deane J’s judgment to support the unification of promissory and proprietary estoppels, it is that he supported the rationalisation and unity of estoppel doctrines. If he viewed all estoppels as unified, then it stands to reason that he would view promissory and proprietary estoppel as unified.

2 Equitable Estoppel Operates as a Cause of Action

If equitable estoppel had operated as a rule of evidence, the Mahers could not have obtained a remedy. As demonstrated above, the assumption found by the majority was one of future conduct. A rule of evidence estoppel would not assist because Waltons would only have been prevented from denying that they momentarily intended to execute a deed. Even enforcing the assumption that this intention was binding would not result in a remedy because an oral agreement to execute a deed is not a valid contract by virtue of section 54A of the Conveyancing Act 1919 (NSW). Based on the assumptions found by the majority, no external cause of action could have arisen if equitable estoppel operated as a rule of evidence. The granting of a remedy shows that the equitable estoppel was its own independent cause of action.

The fact that equitable estoppel is a cause of action is readily demonstrated by the reasoning in the majority judgments. Brennan held that ‘[u]nlke [a common
law] estoppel in pais, an equitable estoppel is a source of legal obligation’. He stated in detail that promissory estoppel acts ‘as both a sword and a shield’, and declared that there was a ‘logical difficulty in limiting the principle [of promissory estoppel] so that it applies only to promises to suspend or extinguish existing rights.’ He applied discretion when determining the appropriate remedy, which would not be required with a rule of evidence. If the estoppel Brennan J was applying did not operate as a cause of action, and merely completed another cause of action, then there could be no discretion available, and matters would simply be decided by reference to the assumed facts. The decision must therefore be viewed as establishing a cause of action.

Mason CJ and Wilson J also did not view the doctrine as a rule of evidence, as demonstrated by the discretion applied when determining the remedy. Although their Honours did not discuss whether the Mahers might receive a lesser remedy, they made it clear that equitable estoppel’s purpose was not to ‘overcome non-compliance with the formal requirements for the making of contracts’. If the doctrine operated as a rule of evidence this discussion would not have been required. By contrast, if Mason CJ and Wilson J had applied equitable estoppel as a rule of evidence, their Honours would surely have included reasoning to demonstrate in detail the separate cause of action (ie breach of contract) which was completed. Instead, they exercised the discretion by applying a remedy which fulfilled the Mahers’ expectation.

3 Equity Estoppel Operates Upon Acquiescence

Unlike promissory estoppel, equitable estoppel does not require an express promise or representation. This is especially clear because the lack of an express

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256 Ibid 416. Brennan J uses the term estoppel in pais in a narrow sense as excluding the equitable estoppels. See Young, Croft and Smith, above n 6, 806.
258 Ibid 425.
259 ‘But, as we have seen, 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.’ Ibid 433.
260 ‘Until the decision of this Court in Waltons Stores (Interstate) Ltd v Maher it was generally said that equitable estoppel could serve only as a shield and not a sword.’ ABC v Lenah Game Meats Pty Ltd (2001) 208 CLR 199, 313 (citations omitted).
261 ‘Holding the representor to his representation is merely one way of doing justice between the parties’ Waltons Stores (1988) 164 CLR 387, 405.
262 Ibid 405.
representation was an argument advanced by Waltons. Mason CJ and Wilson J considered that Waltons’ silence was sufficient to give rise to an equitable estoppel and applied the following reasoning in order to reach their order:

The appellant's inaction, in all the circumstances, constituted clear encouragement or inducement to the respondents to continue to act on the basis of the assumption which they had made.263

Brennan J also directly addressed the question of the ‘whether silence is capable of inducing the adoption of the assumption or expectation’.264 He applied the following reasoning to reach his judgment:

Clearly an assumption or expectation may be adopted not only as the result of a promise but also in certain circumstances as the result of encouragement to adhere to an assumption or expectation already formed or as the result of a party's failure to object to the assumption or expectation on which the other party is known to be conducting his affairs.265

He also considered that, before an estoppel could arise based on an inducement, the promisor would need to have knowledge or intention that the other party would rely on the assumption.266 However, this was framed as a question of unconscionability, of ‘[w]hat would make it inequitable to depart from such an assumption or expectation?’267 It was clear that Brennan J considered silence was sufficient.268 The majority reasoning on this matter creates a binding ratio to that effect because it relates ‘to an issue in contention which had to be decided by the Court to reach its order’.269

The judgment of Deane J also lends support for the operation of equitable estoppel upon an assumption created without an express representation. Deane J’s judgment is generally considered to be outside of the ratio because he did not base

264 Ibid 427.
265 Ibid 428.
266 Ibid.
267 Ibid.
268 ‘Waltons’ silence induced Mr Maher to continue either on the assumption that Waltons was already bound or in the expectation that Waltons would execute and deliver the original deed as a matter of obligation’. Ibid 430 (Brennan J) (emphasis added).
his findings on equitable estoppel.\(^\text{270}\) However, this is overly simplistic. Deane J actually considered two separate grounds for his decision, and held that a promissory estoppel arose.\(^\text{271}\) Deane J arguably agreed with the majority on the point that there is no need for an express representation.\(^\text{272}\) The fact that there were two alternate grounds for his decision does not mean that the second ground cannot contribute to the ratio of the case, provided that it supports the majority.\(^\text{273}\) This aspect of Deane J’s judgment lends additional force to our conclusion that equitable estoppel applies to acquiescence, to assumptions rather than representations.

4  \textit{Not Confined to Assumptions of Present Fact}

As identified above, Mason CJ, Wilson and Brennan JJ all held that the relevant assumption was one of future intention, rather than present fact.\(^\text{274}\) Waltons was estopped ‘from retreating from its implied promise to complete the contract’,\(^\text{275}\) as distinct from denying that the contracts had already been executed as a matter of fact. The assumption that the deed would be executed formed the basis of their orders.

There is also an argument that Brennan J’s judgment in \textit{Waltons Stores}\(^\text{276}\) was based upon an assumption that Waltons were already bound to proceed.\(^\text{277}\) This would be an assumption of present fact or law. There is some merit to this argument. The ‘first basis’ of Brennan J’s judgment is the assumption that Waltons would execute the contract in the future, but this also includes the

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\(^{270}\) ‘For reasons arising from the history of Waltons at first instance, in the Court of Appeal and in the High Court, it is only the joint judgment of Mason CJ and Wilson J, and the judgment of Brennan J that can be the source of any ratio of the High Court decision in \textit{Waltons}.’ Campbell, above n 211, 172; See generally ibid.

\(^{271}\) \textit{Waltons Stores} (1988) 164 CLR 387, 452.

\(^{272}\) Promissory estoppel should be seen as ‘an extension of the doctrine of estoppel by conduct to representations or assumptions of future fact’. Ibid 452 (Deane J) (emphasis added).

\(^{273}\) See \textit{Bondi Beach Astra Retirement Village Pty Ltd v Gora} [2011] NSWCA 396, 712–3.

\(^{274}\) ‘[I]t is impossible to sustain the finding that the respondents were labouring under a misapprehension that contracts had been exchanged’ \textit{Waltons Stores} (1988) 164 CLR 387 395 (Mason CJ and Wilson J); See also: at 430–433 (Brennan J).

\(^{275}\) Ibid 408.

\(^{276}\) (1988) 164 CLR 387.

\(^{277}\) See \textit{Silink}, above n 212; \textit{EK Nominees Pty Ltd v Woolworths Ltd} [2006] NSWSC 1172, [242]–[247].
assumption that they were ‘not free to withdraw’. However, it is clear that this concept should be viewed as referring to a moral rather than legal obligation. This is because the assumption that a legal obligation existed was rejected elsewhere under an entirely separate head as the ‘third basis’ of his judgment.

5 No Requirement for a Contractual Relationship

The doctrine of equitable estoppel operates as a cause of action outside of a pre-existing contractual relationship. This is evident from the barest facts of the case: Waltons Stores and the Mahers were not contractually bound. It may be argued that Brennan J considered that there was a requirement that the assumption ‘must at least involve a promise that such a relationship will come into existence’. However, because Mason CJ and Wilson J do not apply this requirement it could not form a part of the ratio of the case.

6 The Remedy to an Equitable Estoppel is Discretionary

The majority judgments both contain reasoning about tailoring the remedy for an equitable estoppel. However, the two majority judgments took different approaches. Brennan J applied a remedy which would reverse the detriment. It is not certain whether Mason CJ and Wilson J also applied this approach, or considered that the prima facie remedial response was to enforce the expectation. Because of the later High Court developments which we will discuss in the Chapter IV, there is no need to consider this matter further. It is sufficient to have demonstrated that the majority judgment agreed that the remedy

279 Neuberger, above n 4, 53–4.
280 The ‘third basis’ was an ‘assumption by Mr. Maher that there was a binding contract in existence whether or not an exchange had been completed’ Waltons Stores (1988) 164 CLR 387, 413 (Brennan J). Brennan J held that it was ‘extremely doubtful whether there is evidence to support [this] finding …’ at 431.
284 ‘The foregoing review of the doctrine of promissory estoppel indicates that the doctrine 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.’ Ibid 406 (Mason CJ and Wilson J) (emphasis added). But cf ‘The object of equitable estoppel is not to overcome defects in the formation of contract and its basis is not “the making good of representations”’: at 405. See also Mason CJ’s later views in Verwayen (1990) 170 CLR 394, 413.
was discretionary, and that the doctrine did not act as a rule of evidence and automatically fulfil an expectation.

F Conclusion

In conclusion, Waltons Stores\textsuperscript{285} created a powerful new doctrine of equitable estoppel. It doesn’t matter whether this doctrine was a new doctrine, or a radical change to promissory or proprietary estoppel, the effect is the same. The binding ratio contained in the majority decision of Mason CJ, Wilson, and Brennan JJ established a doctrine which operates as a cause of action rather than a rule of evidence, and is focused on whether ‘a plaintiff … has acted to his detriment on the basis of a basic assumption [where]… it would be unconscionable conduct on the part of the other party to ignore the assumption’.\textsuperscript{286} The doctrine is extremely flexible, and can operate on assumptions of future conduct and assumptions which were induced by silence. It can operate on assumptions other than proprietary interests, and operates outside of pre-existing contractual relationships.

\textsuperscript{285} (1988) 164 CLR 387.

\textsuperscript{286} Ibid 404 (Mason CJ and Wilson J) (emphasis added); see also at 419–20 (Brennan J).
IV THE HIGH COURT POST-WALTONS

Although we have demonstrated the ratio of *Waltons Stores* on the basis of the judgment itself, ultimately, the ratio of a case may be clarified, explained or modified by subsequent cases. However, later High Court cases have not diminished the doctrine of equitable estoppel. The following discussion of the cases will be confined to their reflection, amplification and/or modification of the doctrine of equitable estoppel.

In the 25 years since the decision in *Waltons Stores* was handed down, the High Court has never explicitly denounced or re-formulated the doctrine of equitable estoppel. However, aspects of the operation of the doctrine have been clarified. There have been five key cases which have had the potential to modify the doctrine of equitable estoppel. These are *Foran v Wight*, *Commonwealth v Verwayen*, *Australian Securities Commissioner v Marlborough Gold Mines Ltd*, *Giumelli v Giumelli*, and *Sidhu v Van Dyke*.

A Foran v Wight

*Foran v Wight* did little to develop the doctrine of equitable estoppel. The facts fit squarely within the requirements of a promissory estoppel as established by *Legione v Hateley*. Therefore, none of the powerful new aspects of equitable estoppel were required.

288 Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515, 542–3. At the extreme, it can be argued that it is those subsequent cases which disclose the ratio, see Jones v Bartlett (2000) 205 CLR 166, 225.
292 (1990) 170 CLR 394 (‘Verwayen’).
293 (1933) 177 CLR 485. (‘Marlborough’)
294 (1999) 196 CLR 101 (‘Giumelli’).
The briefest facts of the case are that it involved an express representation between parties to an existing contract for the purchase of land. The vendors were unable to complete the registration of a right of way in time for the date for settlement. The vendors advised the purchasers of this fact two days before settlement was due. The purchasers gave the vendors a notice of rescission two days after settlement was due. The purchasers did not finalise their finances because of the vendor’s representation that they could not complete. The purchasers brought an action to recover their deposit from the vendors, but the vendors argued that the purchasers were not ready to perform on the date for settlement and so could not rescind the contract. The purchasers argued that they either were, or did not need to be, ready and willing. Neither party advanced an estoppel argument.

Five separate judgments were delivered. Deane, Dawson, Brennan and Gaudron JJ each found for the plaintiffs. Mason CJ dissented and found for the vendors. The reasoning applied varies significantly between these judgments.

1 Decisions Based on Estoppel

The judgment of Dawson J included a finding that an estoppel arose in favour of the purchasers. Dawson J applied the ‘traditional view’ of promissory estoppel as completing a separate cause of action.\textsuperscript{298} However, this did not mean that he held a limited view on the operation of equitable estoppel. Dawson J acknowledged the existence of the doctrine of equitable estoppel:

Of course, this Court has gone further in \textit{Waltons Stores (Interstate) Ltd. v. Maher} in discerning a broader foundation for promissory estoppel and in giving it an application beyond the context of pre-existing contractual rights. For present purposes it is unnecessary to rely upon that case.\textsuperscript{299}

\textsuperscript{298} ‘I should add that although the purchasers were the plaintiffs in the action, this does not offend against the traditional view that estoppel cannot found an action - can be used only as a shield and not as a sword. Even upon that view, a plaintiff may rely upon an estoppel if he has an independent cause of action …’ \textit{Foran v Wight} (1989) 168 CLR 385, 450 (Dawson J) (citations omitted) (emphasis added).

\textsuperscript{299} Ibid (Dawson J) (citations omitted).
This passage demonstrates Dawson J’s acceptance that in Waltons Stores, Mason CJ and Wilson J went ‘one step further’ than this traditional view. However, the facts of the case did not require these new developments.

Deane J applied a unified estoppel by conduct, as opposed to an equitable estoppel. Deane J saw equitable estoppel and common law estoppel by conduct as having merged, and operating as a rule of evidence to ‘preclude departure from a represented or assumed future ‘state of affairs’. He made it clear that this estoppel would assist a plaintiff, but considered that a representation could give rise to ‘a unified estoppel by conduct only when it is clear.’

2  Decisions Based on Contract

Gaudron J based her decision on ordinary contractual principles and not on estoppel. Although Gaudron J appeared to consider that estoppel could operate as a rule of evidence, this cannot be ratio as it did not contribute to her orders made. Brennan J’s judgment was also based on ordinary contractual principles and not estoppel. It should be noted that Dawson J’s decision included an additional ground which did not rely upon estoppel.

300 ‘But the respondents ask us to drive promissory estoppel one step further by enforcing directly in the absence of a pre-existing relationship of any kind a non-contractual promise on which the representee has relied to his detriment’. Waltons Stores (1988) 164 CLR 387, 400 (Mason CJ and Wilson J).
302 “[I]t is unnecessary to decide whether the vendors’ representation related to a present or future state of affairs or whether the purchasers are seeking to use estoppel as a sword rather than a shield.’ Ibid.
304 ‘However, in my view, a consideration of estoppel is unnecessary in the present case’. Ibid 457 (Gaudron J).
305 ‘If an intimation that it is futile to tender performance were to operate to preclude an assertion that performance had not been tendered, it would operate to enable a person who had not in fact tendered performance to recover damages on the basis that he or she had done so.’ Ibid 456–7 (Gaudron J).
306 Ibid 432.
307 His reasoning was that the purchasers had met their requirements by not being incapacitated from performance at the time of repudiation. See ibid 454.
3 The Dissenting Judgment of Mason CJ

In his dissenting judgment, Mason CJ explained that Waltons Stores\(^\text{308}\) was decided ‘by reference to promissory estoppel which extends to representations or promises as to future conduct.’\(^\text{309}\) This is at odds with the doctrine of equitable estoppel, which was based on an assumption rather than a representation. It is submitted that Mason CJ had a change of view about the operation of estoppel. He advises that a lack of argument in Waltons Stores\(^\text{310}\) restrained his development of principle in that case.\(^\text{311}\) However, despite the absence of an estoppel argument in Foran v Wight, he went on to suggest that common law estoppel should be extended to assumptions of future conduct.\(^\text{312}\) Ultimately, Mason CJ found that the purchasers had not demonstrated sufficient reliance or detriment in order to give rise to an estoppel. This dissenting judgment cannot contribute to the ratio.\(^\text{313}\)

4 No Ratio Regarding Estoppel

In summary, the Court delivered one judgment on promissory estoppel, one judgment on unified estoppel by conduct, three judgments on contractual principles and one dissent. No ratio can be found from the distinctly different judgments in this case. Dawson J decided on ordinary contractual principles,\(^\text{314}\) and on the further ground of promissory estoppel.\(^\text{315}\) Deane J applied a unified estoppel by conduct. Gaudron and Brennan JJ both found for the plaintiffs on

\(^{308}\) (1988) 164 CLR 387.

\(^{309}\) Foran v Wight (1989) 168 CLR 385, 411.

\(^{310}\) (1988) 164 CLR 387.

\(^{311}\) 'In the absence of argument we declined to embark on that course [reversing Jorden v Money] and instead decided the case by reference to promissory estoppel which extends to representations or promises as to future conduct … On further reflection it seems to me that we should now recognise that a common law estoppel as well as an equitable estoppel may arise out of a representation or mistaken assumption as to future conduct’. Foran v Wight (1989) 168 CLR 385, 411 (Mason CJ) (citations omitted).


\(^{313}\) 'An expression of disagreement would not undercut the status of the majority’s proposition as a binding decision. That is so partly because it would be a dissenting opinion, and the binding status of a precedent in this Court is not affected by the existence of dissenting opinions.’ Aktas v Westpac Banking Corp Ltd [No 2] (2010) 241 CLR 570, 574. See also Garcia v National Australia Bank Ltd (1998) 194 CLR 395, 417–8; Andrew Lynch, ‘Dissent: Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia’ (2002) 24(4) Sydney Law Review 470.

\(^{314}\) Foran v Wight (1989) 168 CLR 385 454.

\(^{315}\) Ibid 450.
ordinary contractual principles. Mason CJ’s dissenting judgment cannot contribute to the ratio of the case. It is beyond the scope of this paper to attempt to draw a ratio for this case. As this was a case of estoppel between parties to an existing contract, no aspect of Foran v Wight\(^\text{316}\) diminished the developments in Waltons Stores.\(^\text{317}\)

### B Commonwealth v Verwayen

Ultimately Verwayen\(^\text{318}\) is a case without a ratio.\(^\text{319}\) Verwayen\(^\text{320}\) represents a missed opportunity for the High Court to have developed and clarified the doctrine of equitable estoppel. This is because, much like Waltons Stores,\(^\text{321}\) Verwayen\(^\text{322}\) was a case where the plaintiff sought to use an estoppel outside of a contractual relationship. While the case did provide support for the doctrine of equitable estoppel, it did little to clarify or modify the doctrine.

The facts of the case are as follows. Mr Verwayen had been injured in an accident whilst a member of the Australian Navy. The Commonwealth represented that it would not plead certain arguments which were available to it – primarily that the limitation period had expired. Mr Verwayen brought an action against the Commonwealth in negligence. The Commonwealth submitted their defence without pleading the limitation period, but later amended their pleadings, arguing that they were not liable to Mr Verwayen by virtue of the limitation period. The High Court held that the Commonwealth was estopped from using the defences available to it.

In Verwayen, it was actually the defendant, the Commonwealth, who plead equitable estoppel.\(^\text{323}\) They argued that if an equitable estoppel arose, the remedy should only operate to remedy the detriment. This would include Mr Verwayen’s

\(^{316}\) (1989) 168 CLR 385.

\(^{317}\) (1988) 164 CLR 387.

\(^{318}\) (1990) 170 CLR 394.


\(^{320}\) (1990) 170 CLR 394.


\(^{322}\) (1990) 170 CLR 394.

\(^{323}\) Ibid 396–7.
legal costs, but not an amount for the damages he would have received for a successful claim. By contrast, the plaintiff argued on the basis of estoppel by representation, submitting that the Commonwealth had represented as a matter of fact that they had waived their right to rely on the defences.

The court was divided four to three in favour of Mr Verwayen. Of the four judgments which contributed to the result, Deane and Dawson JJ each decided upon estoppel, while Toohey and Gaudron JJ each decided upon waiver. The seven separate judgments cannot be readily condensed into a majority judgment. 324

Dawson J applied only an orthodox promissory estoppel. 325 In stark contrast, Deane J found a unified estoppel by conduct. 326 It appears at first glance that Deane J’s estoppel is quite different from equitable estoppel. However, Deane J re-formulated his earlier concept of a unified estoppel by conduct to largely reflect the doctrine of equitable estoppel. 327 Unlike in Foran, 328 Deane J considered that silence or inaction could give rise to the estoppel. 329 More importantly, he no longer saw the doctrine as a strict rule of evidence, and considered that the doctrine would not fulfil an expectation where it would be ‘inequitably harsh’ to do so. 330 In making this change, he added a discretionary element to the remedy for his doctrine of unified estoppel by conduct and acknowledged that the ‘relief appropriate to a case of estoppel by conduct may vary according to the circumstances’. 331 This construction of the doctrine is extremely similar to the doctrine of equitable estoppel identified above. However,

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324 See generally Bagaric and McConvill, above n 205.
325 ‘But it is, I think, unnecessary to go beyond Legione v Hateley for the purposes of this case’. Verwayen (1990) 170 CLR 394, 455 (Dawson J).
327 He expressly credits the judgments of Mason CJ and Wilson J and Gaudron J in Waltons Stores when outlining his doctrine. See Verwayen (1990) 170 CLR 394, 444.
329 The estoppel can arise from an ‘implied representation’ and also where one party ‘knew that the other party laboured under the assumption and refrained from correcting him when it was his duty in conscience to do so’. Verwayen (1990) 170 CLR 394, 444–5.
330 Ibid 443.
331 Ibid. This discretion would be necessary where: ‘good conscience could not reasonably be seen as precluding a departure from the assumed state of affairs if adequate compensation were made or offered by the allegedly estopped party for any detriment sustained by the other party’: at 441. See also Kirk, above n 50, 281–3.
one key difference was that unified estoppel by conduct could not give rise to a cause of action.\textsuperscript{332}

Mason CJ also applied a unified estoppel by conduct,\textsuperscript{333} but dissented because he held that allowing the remedy to enforce Mr Verwayen’s expectation would be disproportionate.\textsuperscript{334} Brennan J relied upon equitable estoppel,\textsuperscript{335} and he too dissented with regards to the remedy.\textsuperscript{336} Both of these judgments arguably applied or extended the doctrine of equitable estoppel. However, neither can contribute to a ratio because they dissented as to the orders made. At any rate, no ratio can be found in attempting to form a ‘conglomerate’ of the different judgments.\textsuperscript{337} Of the judges who agreed with the orders made, Deane J relied upon a unified estoppel by conduct, Dawson J upon a promissory estoppel, while Toohey and Gaudron JJ relied upon waiver. Therefore, there is ‘no reason for decision common to the majority of the Justices’.\textsuperscript{338} For the purposes of our discussion, nothing binding can be drawn from these threads to undo or modify the doctrine of equitable estoppel established by the ratio in \textit{Waltons Stores}.\textsuperscript{339} However, as we shall see in the next case, the High Court would later draw together and clarify the operation of \textit{Verwayen}.\textsuperscript{340}

\begin{itemize}
\item \textsuperscript{332} ‘Estoppel by conduct does not of itself constitute an independent cause of action.’ \textit{Verwayen} (1990) 170 CLR 394, 445. However, this may still be reasonably close in operation to equitable estoppel. Deane J may simply mean that the estoppel cannot give rise to novel causes of action especially. A plaintiff can still use the doctrine, especially considering the example given that the ‘defendant in an action for a declaration of trust is estopped from denying the existence of the trust’, at 445. See also Kirk, above n 50.
\item \textsuperscript{333} ‘The result is that it should be accepted that there is but one doctrine of estoppel’ \textit{Verwayen} (1990) 170 CLR 394, 413 (Mason CJ).
\item \textsuperscript{334} Ibid 417.
\item \textsuperscript{335} ‘The ordinary principles of equitable estoppel which might apply to a promise of this kind were discussed in \textit{Waltons Stores v. Maher}’. Ibid 428 (Brennan J).
\item \textsuperscript{336} Ibid 429–31.
\item \textsuperscript{337} See \textit{Dickenson's Arcade Pty Ltd v Tasmania} (1974) 130 CLR 177, 188.
\item \textsuperscript{338} Ibid.
\item \textsuperscript{339} (1988) 164 CLR 387.
\item \textsuperscript{340} (1990) 170 CLR 394.
\end{itemize}
In *Australian Securities Commission v Marlborough Gold Mines Ltd*, the High Court took advantage of the opportunity to clarify the application of *Verwayen*. In contrast to the cases above, the judgment was delivered per curiam.

The facts of the case involved a scheme of company arrangement proposed by Marlborough. The Commission had the opportunity to object to this scheme before the proposal, but neither confirmed nor denied whether they would object. However, the Commission raised an objection at a later stage. Marlborough sought an estoppel ‘of the kind considered in *The Commonwealth v Verwayen*’. In their joint judgment, Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ referred to an ‘equitable estoppel’. They refused to grant Marlborough an equitable estoppel because it was *unreasonable* for Marlborough to have relied on the assumption.

In these circumstances, the Commission's departure from the position which it took up at the first hearing and in its communications with the Company before that hearing was neither "unjust" nor "unconscionable", to use the expressions found in *Thompson v. Palmer* and *Verwayen*. In this statement of principle, the Court cited six page references within *Verwayen* to illustrate the meaning of ‘unjust’ and ‘unconscionable’. Each of those page references in *Verwayen* contains a citation in support of *Waltons Stores*. We have briefly set these out below:

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342 (1990) 170 CLR 394.
343 Marlborough (1933) 177 CLR 485, 503. One might wonder what kind that would be exactly.
344 Ibid.
345 Ibid 506.
So, in *Waltons Stores*, a majority of this Court concluded that equitable estoppel entitled a party only to that relief which was necessary to prevent unconscionable conduct and to do justice between the parties.\(^{349}\)

The judgments of a majority of the Court in *Waltons Stores v. Maher* held that equitable estoppel yields a remedy in order to prevent unconscionable conduct on the part of the party who, having made a promise to another who acts on it to his detriment, seeks to resile from the promise.\(^{350}\)

[E]stoppel generally, and promissory estoppel in particular, can establish an ingredient of an action, … (see, generally, *Waltons Stores ...*) … That equity is … to preclude departure by the other party from the assumed state of affairs if departure would, in all the circumstances, be unconscionable.\(^{351}\)

For the reasons which I indicated in *Waltons Stores* when read in the context of what I have written above, it appears to me that the courts of this country should recognize a general doctrine of estoppel by conduct which encompasses the various categories of "equitable estoppel" and which operates throughout a fused system of law and equity. The doctrine of estoppel by conduct is founded upon good conscience. … The notion of unconscionability is better described than defined.\(^{352}\)

But, as was recognized in *Waltons Stores (Interstate) Ltd v Maher*, the basic considerations underlying both common law estoppel and equitable estoppel have always been the same. … The object of estoppel *in pais* is to prevent … [t]he "unjust departure ... from an assumption" …\(^{353}\)

Equitable estoppel is aimed at preventing unconscionable conduct and seeks to prevent detriment to the promisee. As Brennan J. pointed out in *Waltons ...*\(^{354}\)

Each of these references contains an expression of the unity of promissory and proprietary estoppel, and some go farther. This exercise by the High Court is an example of the later case disclosing the ratio of the earlier case.\(^{355}\) The multiple references above clearly demonstrate the High Court’s approval for the doctrine of equitable estoppel established in *Waltons Stores*,\(^{356}\) as affirmed in *Verwayen*.\(^{357}\)

\(^{349}\) *Verwayen* (1990) 170 CLR 394, 411 (Mason CJ)

\(^{350}\) Ibid 428–9 (Brennan J).

\(^{351}\) Ibid 436 (Deane J)

\(^{352}\) Ibid 440 (Deane J).

\(^{353}\) Ibid 453 (Dawson J).

\(^{354}\) Ibid 501 (McHugh J).

\(^{355}\) See generally *Jones v Bartlett* (2000) 205 CLR 166, 225.

\(^{356}\) (1988) 164 CLR 387.
The ratio of Marlborough also achieves this: the term and principles of equitable estoppel are used,358 and the order to dismiss the appeal was made because of this reasoning. Without fanfare, Marlborough359 has affirmed Waltons Stores.360

D Giumelli v Giumelli

Giumelli v Giumelli361 offers little assistance to our enquiry of equitable estoppel because it falls within the traditional operation of proprietary estoppel. The brief facts of the case involve a family property, on which the son was encouraged to work by his parents, the owners. In return for his work, the son would receive an interest in the land. He was encouraged to build a house on a portion of the land, which was to be subdivided and transferred to him. The family relationship broke down before this subdivision occurred. The son received nothing.

No part of the decision is inconsistent with the doctrine of equitable estoppel which we have identified. There is some development to approach taken in tailoring the remedy. However, Waltons Stores only established that the remedy was discretionary.362 The remedy in Giumelli remains discretionary.363 The High Court held that the orders made by the lower court should be reduced to ‘a money sum to represent the value of the equitable claim of the respondent to the promised lot’.364 This remedy was less than what the plaintiff would receive if the promise was fulfilled.365

357 (1990) 170 CLR 394.
358 ‘The Company's alternative argument is that the facts give rise to an equitable estoppel of the kind upheld in Verwayen.' Marlborough (1993) 177 CLR 485, 506 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).
359 Ibid.
363 This can be seen in the statement that equitable estoppel does ‘not establish an immediate right to positive equitable relief as understood in the same sense that a right to recover damages may be seen as consequence upon a breach of contract’ Giumelli v Giumelli (1999) 196 CLR 101, 113. See Campbell, above n 211.
365 Aitken, above n 19, 218.
Handley AJA makes the claim that the High Court in *Giumelli* ‘rejected dicta of Mason CJ, Brennan and Deane JJ in *Waltons Stores*.\(^{366}\) Conversely, it has been argued that ‘any expansive comments in *Giumelli* about expectation are dicta only’:\(^{367}\) We do not need to conclude on this point. The better approach is to focus on the discretion itself, regardless of whether the approach begins by reversing the detriment or fulfilling the expectation.\(^{368}\)

We can conclude that, excluding possible changes to the remedial approach, ‘neither the decision nor dicta disapproved or qualified the reasoning in *Waltons v Maher*’.\(^{369}\) This is further supported by the Court using the language of equitable estoppel rather than reverting to proprietary estoppel in a case well within its traditional limits. Instead, the Court considered both unconscionability and detriment and utilised their discretion to tailor the remedy. This is in line with the doctrine of equitable estoppel identified above.

**E The Latest Development: Sidhu v Van Dyke**

In *Sidhu v Van Dyke*,\(^{370}\) the High Court significantly clarified the remedial response to an equitable estoppel. The Court made it clear that no part of *Waltons Stores*\(^{371}\) should be relied upon in determining the proper objective of the remedy. No other changes were made which would be relevant to this enquiry.

The facts of the case involved a romantic affair between a landlord and tenant. The landlord made and repeated a promise to subdivide a part of the property and to gift it to the tenant. The tenant made improvements to and worked on the property. The relationship later broke down and the property was not transferred. The tenant brought an action for proprietary estoppel but was unsuccessful at first.

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\(^{366}\) *DHJPM Pty Limited v Blackthorn Resources* [2011] NSWCA 348, [123].

\(^{367}\) Aitken, above n 19, 218.

\(^{368}\) In 2014 the remedy is still regarded as discretionary: ‘As a substantive rule of law, there is no reason to consider that the doctrine should be confined to producing an all-or-nothing consequence where that consequence would undermine the rationale for its operation. To the contrary, "the substantive doctrine of estoppel permits a court to do what is required to avoid detriment and does not, in every case, require the making good of the assumption."’ *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14, 69 [153].

\(^{369}\) Bryan, ‘Almost 25 Years on: Some Reflections on *Waltons v Maher*’, above n 24, 135 (citations omitted).

\(^{370}\) [2014] HCA 19.

instance. The tenant successfully raised a proprietary estoppel on appeal to the New South Wales Court of Appeal. Surprisingly, the judgment of the New South Wales Court of Appeal contained the following dictum which is inconsistent with the doctrine of equitable estoppel:

The doctrine of proprietary estoppel enables a court to grant positive relief to a promisee by, for example, ordering a transfer of promised property by the promisor. Promissory estoppel, by contrast, entails restraint upon enforcement of existing legal rights inconsistently with a promise.

The case was then appealed to the High Court, who unfortunately did not directly address this dictum. Despite this, no support can be found in the High Court case for the Court of Appeal’s dictum. The language of the High Court decision supports the unity of equitable estoppel: Although the High Court introduces the titles of ‘promissory estoppel, proprietary estoppel and estoppel by acquiescence’, the separate labels are not repeated elsewhere in the judgment. The High Court consistently refers to the estoppel as a ‘category of equitable estoppel’ as opposed to proprietary estoppel. The Court cites with obvious approval the judgment of Mason CJ in Verwayen:

In The Commonwealth v Verwayen, Mason CJ described estoppel as "a label which covers a complex array of rules spanning various categories." His Honour went on to say of "titles such as promissory estoppel, proprietary estoppel and estoppel by acquiescence" that they are all "intended to serve the same fundamental purpose, namely 'protection against the detriment which would flow from a party's change of position if the assumption (or expectation) that led to it were deserted'.

The High Court chose to cite the extremely broad judgment of Mason CJ in Verwayen. In Verwayen, Mason CJ expressly stated that all categories of estoppel both in equity and at common law are part of a 'single overarching doctrine'. This is a clear signal from the High Court that the approach taken by

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373 Van Dyke v Sidhu [2013] NSWCA 198, [39].
374 Ibid (citations omitted).
375 (1990) 170 CLR 394.
377 (1990) 170 CLR 394.
378 Ibid 409–12.
the Court of Appeal was incorrect. Promissory and proprietary estoppels do not give rise to hard procedural differences in the manner suggested by the Court of Appeal.

Apart from the above, the High Court decision has a significant impact on the doctrine of equitable estoppel. It makes clear that *Waltons Stores* has nothing to say on determining the remedial response:

The appellant's argument, rightly, sought no support from the discussion in cases decided before *Giumelli v Giumelli* of the need to mould the remedy to reflect the "minimum relief necessary to 'do justice' between the parties"... While it is true to say that "the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct", where the unconscionable conduct consists of resiling from a promise or assurance which has induced conduct to the other party's detriment, the relief which is necessary in this sense is usually that which reflects the value of the promise.

This does not limit or modify the doctrine of equitable estoppel which we have identified.

**F Conclusion**

As this chapter has demonstrated, the High Court has only built upon the doctrine of equitable estoppel established by the majority in *Waltons Stores*.

Despite the lack of development in *Foran v Wight*, Verwayen contained considerable support for equitable estoppel, but did not contain a ratio. *Marlborough* overcame this difficulty and identified the elements of Verwayen which confirmed the ratio of *Waltons Stores*. This reasoning was

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379 However, the High Court does not expressly state this, perhaps because the grounds of appeal were limited to the question of the remedy and whether a presumption of reliance exists. Both are beyond the scope of this paper.
381 *Sidhu v Van Dyke* [2014] HCA 19, [85] (citations omitted).
384 (1990) 170 CLR 394.
386 (1990) 170 CLR 394.
applied to the facts of *Marlborough* and formed the ratio of that case. By contrast, *Giumelli* and *Sidhu v Van Dyke* both contained support for the doctrine of equitable estoppel but did not significantly strengthen the developments we have identified. However, they did nothing to diminish them. It has been accurately stated that the ‘core elements of equitable estoppel are relatively settled in Australia since their articulation in *Waltons Stores v Maher*’. Unfortunately, this doctrine of equitable estoppel is not being applied consistently in the Lower Courts. This will be demonstrated in the next chapter.

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391 Silink, above n 212, 256.
V The State Courts After Waltons

The State Courts are not applying the doctrine of equitable estoppel in accordance with the High Court precedent. In fact, the application of equitable estoppel in the lower courts is entirely inconsistent, and the different states appear to have developed their own separate views of the doctrine. This chapter contains a limited selection of cases. These cases have been selected to which identify the extent of the differences between the doctrine of equitable estoppel laid down by the High Court and the courses adopted by state Supreme Courts. This chapter does not present an exhaustive review of the different developments or approaches taken. Nor is it the intention of the author to critique the merits of these decisions. Rather, the objective is to demonstrate that the decisions are inconsistent with High Court precedent and the doctrine of stare decisis.

It could be argued that differing views in the state courts have arisen because of a lack of clarity in the High Court’s decisions. There may be some truth to this. It is notoriously difficult to extract a ratio from decisions such as Verwayen.\textsuperscript{392} However, this offers no excuse for not following Waltons Stores.\textsuperscript{393} If the authoritative weight of a case were diminished merely by the fact that cases which followed it were vague and internally conflicted, then the doctrine of stare decisis would be seriously compromised. It has been demonstrated that despite the lack of ratio in Verwayen,\textsuperscript{394} Marlborough\textsuperscript{395} makes it clear that the doctrine of equitable estoppel was confirmed by that case. Nothing in any of the later High Court cases diminishes this, apart from minor changes to the remedial approach.

A Stare Decisis

We have already considered the doctrine of precedent as it applies when determining a ratio. However, before we can proceed further we must consider the doctrine as it applies to a lower court following a ratio of the High Court. The law in this area is not entirely settled. Recent statements by the High Court have

\textsuperscript{392} (1990) 170 CLR 394.
\textsuperscript{393} (1988) 164 CLR 387.
\textsuperscript{394} (1990) 170 CLR 394.
\textsuperscript{395} (1993) 177 CLR 485.
‘somewhat strained the institutional and personal cordiality that should exist between the two tiers of appellate courts in Australia’. While it is clear that the intermediate courts of appeal have a responsibility for the development of the law, this should not allow them to conflict directly with High Court precedent.

No explicit argument appears to have been made in any lower court that Waltons Stores is no longer good law. Yet as we shall see, judges in the Supreme Courts have tended to simply ignore the law handed down in Waltons Stores. No case identified has suggested that Waltons Stores is bad law. Seldom does a court even attempt to distinguish the case before them from Waltons Stores. Instead, they simply ignore it, tending to pick through the various dicta that has emerged from both the High Court and overseas jurisdictions in order to support their own purpose. It is submitted that this is unacceptable. It is not for lower courts to decide which High Court authorities they will and will not follow. As the High Court has remarked, ‘it is for this Court alone to determine whether one of its previous decisions is to be departed from or overruled’.

Even if it was argued that the majority judgment in Waltons Stores did not constitute ratio decidendi, lower courts would still not be excused for ignoring the case. Although the precise effect of High Court obiter is not entirely settled, the High Court has said that High Court obiter binds lower courts provided that it was ‘seriously considered dicta’. There can be no doubt that the estoppel carefully enunciated by Brennan J and the formulation (based on the well-known and accepted dicta of Dixon J) handed down by Mason CJ and Wilson J were

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397 Ibid 308–11.
399 Ibid.
400 Ibid.
401 Ibid.
402 Garcia v National Australia Bank Ltd (1998) 194 CLR 395, 403–5; See also Mason, above n 396.
405 High Court dicta will generally be binding provided that it was ‘seriously considered dicta.’ See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 91.
carefully considered. At the very minimum, it ought to be accepted that lower courts will be bound by High Court ‘dicta that conforms with long-established authority’.\textsuperscript{406} As we have demonstrated, the unification of proprietary and promissory estoppel has historical origins in the equitable doctrine of estoppel by representation. The judgments of Mason CJ, Wilson and Brennan JJ all draw heavily on long-established authority. Therefore, even if equitable estoppel only existed in obiter, it would still be binding on lower courts.

One further possible explanation for divergence between the High Court and the Supreme Courts on this issue is that the Supreme Courts may hold the view that the High Court has since departed from its stance in \textit{Waltons Stores}.\textsuperscript{407} It is possible for the High Court to depart from its own judgments without expressly signalling this.\textsuperscript{408} However, no High Court decision or dictum has even come close to recanting the ratio of \textit{Waltons Stores}.\textsuperscript{409} Therefore, it is submitted that, although the High Court cases which followed \textit{Waltons Stores} are not always clear, it cannot be credibly asserted that the High Court has implicitly abandoned the doctrine of equitable estoppel. There is simply no line of authority which suggests that this is so.

It follows from this reasoning that the following cases do not represent the law of equitable estoppel in Australia where they conflict with \textit{Waltons Stores}.\textsuperscript{410}

B \textit{New South Wales}

Other than \textit{EK Nominees Pty Ltd v Woolworths Ltd}\textsuperscript{411} the New South Wales Supreme Court has a tendency to ignore equitable estoppel and to conceive of promissory estoppels narrowly. Promissory and proprietary estoppels are treated

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\textsuperscript{407} (1988) 164 CLR 387.
\textsuperscript{409} (1988) 164 CLR 387.
\textsuperscript{410} Ibid.
\textsuperscript{411} [2006] NSWSC 1172.
\end{flushright}
as separate doctrines.\textsuperscript{412} This approach cannot stand, according to the analysis which we have conducted above.

1 \textit{EK Nominees Pty Ltd v Woolworths Ltd}\textsuperscript{413}

This case is generally consistent with \textit{Waltons Stores}.\textsuperscript{414} It presents a stark contrast with the cases which shall follow. The New South Wales Supreme Court applied equitable estoppel as a cause of action which attracted positive remedies. The facts of the case were almost identical to \textit{Waltons Stores},\textsuperscript{415} concerning a breakdown in negotiations for the construction and lease of a supermarket on the plaintiff’s land. The plaintiff suffered detriment by expending money before the lease was formally agreed with the defendant. An equitable estoppel arose on the basis that the defendant had represented that they would enter into the lease. White J aptly stated that the ‘starting and finishing point is \textit{Waltons Stores (Interstate) Ltd v Maher}.’\textsuperscript{416} He held that equitable estoppel was a cause of action, and granted the lessor, EK Nominees, equitable compensation which is a positive remedy.\textsuperscript{417}

2 \textit{Saleh v Romanous}

\textit{Saleh v Romanous}\textsuperscript{418} involved a classic promissory estoppel scenario, where the defendant had made oral representations that if a third party did not join in the venture, the plaintiff could end the contract without penalty and receive their deposit back. This was never included in the written contract.

In \textit{Saleh}, Handley AJA held that promissory estoppel was a ‘restraint on the enforcement of rights, and thus, unlike a proprietary estoppel, must be negative in

\textsuperscript{412}See generally Bryan, 'Almost 25 Years on: Some Reflections on Waltons v Maher', above n 24, 135.
\textsuperscript{413}[2006] NSWSC 1172.
\textsuperscript{414}(1988) 164 CLR 387.
\textsuperscript{415}Ibid.
\textsuperscript{416}EK Nominees Pty Ltd v Woolworths Ltd [2006] NSWSC 1127, [219] (citations omitted).
\textsuperscript{417}‘Accordingly, the fact that not all of the terms of the proposed agreement for lease had been finally resolved does not preclude E K Nominees from pursuing its claim … to give effect to its cause of action on the basis of an equitable estoppel.’ \textit{EK Nominees Pty Ltd v Woolworths Ltd} [2006] NSWSC 1172, [278].
\textsuperscript{418}(2010) 79 NSWLR 453 (‘\textit{Saleh}’).
substance. It is surprising that such a controversial statement does not require a detailed review of the High Court precedents, particularly given that the trial judge in Romanous v Saleh had considered promissory estoppel sufficient to allow rescission. No High Court cases are cited to support the separation or restriction of promissory estoppel. This restriction meant that although a promissory estoppel arose, it did not entitle the plaintiff to a return of their deposit. The estoppel would only grant the plaintiff an injunction. This created an example of the ‘logical difficulty’ identified in Waltons Stores:

The practical effect of applying the distinction between positive and negative relief was to leave the contract in a remedial limbo: the vendor was unable to enforce it against the purchaser, and any attempt to do so could be restrained by injunction, but it could not be set aside by the purchaser.

This distinction is also inconsistent with the outcome of Legione v Hateley, in which the purchasers were able to receive their deposit back, at least partially on the basis of promissory estoppel. Furthermore, the case is in direct conflict with the positive remedy given in EK Nominees Pty Ltd v Woolworths Ltd. Neither of these contradictions are acknowledged or explained in Saleh.

It may be the case that Handley AJA did not consider Waltons Stores to be a case of equitable estoppel at all. This would be consistent with his Honour’s extra-judicial writings. However, no explanation was given in Saleh. Thus, Saleh ‘would appear to stand alone and be of doubtful application.’ At any rate,
the comments on estoppel in the case are obiter dicta because the Court ultimately ruled on the basis of a statutory remedy. Nevertheless, this case is noteworthy for its surprising and illogical departure from High Court precedent. It has since been judicially acknowledged that it is ‘difficult to reconcile the decision in Saleh with what was said by the High Court in the Waltons Stores decision…’ Indeed, it is submitted that it is impossible to reconcile, because Saleh is entirely inconsistent with Waltons Stores.

3 DHJPM Pty Limited v Blackthorn Resources

DHJPM Pty Limited v Blackthorn Resources provides a telling example of the logical difficulties in maintaining a distinction between promissory and proprietary estoppels. The case involved a refusal by a potential tenant to enter into a lease. The landlord argued that an estoppel arose. Meagher JA, Macfarlan JA agreeing, held that ‘[t]he estoppel claimed by [the landlord], if made out, could be supported as an orthodox proprietary estoppel, by which [the tenant] created and encouraged an expectation that an interest by way of reversion on a sub-lease would come into existence.’ This is somewhat absurd: the lease would only create a contractual right for the landlord. In fact, the landlord’s proprietary interests would be diminished. The circuitous logic in this case is entirely at odds with the law as stated by the High Court. Michael Bryan argues that this strained logic was applied ‘in order to overcome the perceived limitation that only ‘negative’ relief can be awarded in promissory estoppel.’ This demonstrates the artificial and illogical nature of a rigid distinction between proprietary and promissory estoppels, and also the difficulty created by inconsistency between the lower courts and the High Court.

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437 DHJPM Pty Limited v Blackthorn Resources [2011] NSWCA 348, [48].
Tipperary Developments Pty Ltd v the State of Western Australia

Tipperary Developments Pty Ltd v the State of Western Australia

is an example of a case which is largely consistent with the High Court precedent. In this case, the Western Australian Court of Appeal accepted that Waltons Stores created a doctrine of equitable estoppel which operates as a cause of action. The briefest facts of the case are as follows. Tipperary entered into a contract with a third party, based on an oral assurance by the State that the State would repay a loan if the third party could not. When the third party eventually defaulted, the State refused to pay the loan. Tipperary brought an action for an equitable estoppel, amongst other grounds. The equitable estoppel operated on an assumption of a non-proprietary right and operated as a cause of action. McLure JA, Newnes JJA agreeing, recognised that ‘equitable estoppel does not require a correspondence between the assumption (that an exchange of parts would take place) and the conduct estopped (the promisor was prevented from denying the existence of a binding contract)’. The court acknowledged that the doctrine operates as a cause of action which attracts a broad discretionary remedy, rather than as a rule of evidence which merely sets up a state of affairs.

Westpac Banking Corporation v The Bell Group Ltd (in liq) (No 3)

Yet, just three years later, the Supreme Court of WA took an entirely different approach in Westpac Banking Corporation v The Bell Group Ltd (in liq) (No 3) and applied a rigid distinction between promissory and proprietary estoppels. The case arose in the context of a complicated arrangement of loans. The estoppel was plead by the banks, who essentially claimed that one part of the Bell Group had represented that a right to repayment of a loan was subrogated to the bank’s right to repayment.

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440 Tipperary Developments Pty Ltd v the State of Western Australia (2009) 38 WAR 488.
442 Tipperary Developments Pty Ltd v the State of Western Australia (2009) 38 WAR 488, 518–22.
443 And arguably Wheeler JA also agreeing.
444 Tipperary Developments Pty Ltd v the State of Western Australia (2009) 38 WAR 488, 521.
445 (2012) 44 WAR 1 (“Bell”).

69
Drummond AJA held that a promissory estoppel required a clearer representation than would be required for a proprietary estoppel:

[V]ague and imprecise conduct is often enough to give rise to an equitable proprietary estoppel. However, certainty of the representation or promise remains a requirement of a promissory estoppel. That was the opinion of Mason and Deane JJ in Legione v Hateley…

Contrary to what Ipp J said in Australian Crime Commission v Gray (at [196]-[199]), I do not regard Waltons Stores as providing any support for the proposition that a representation capable of more than one reasonable meaning is sufficient for a promissory estoppel. … It is true as Ipp J points out that they [the members of the High Court in Waltons Stores] each thought different representations were established. But it is not correct that any thought that the particular representation each held was established, was uncertain or ambiguous or that any paid any attention to the fact that other members of the court reached different conclusions about the content of the particular representation each relied on.446

This passage is in direct conflict with the High Court in Waltons Stores.447 As we have seen, the majority judgment in Waltons Stores448 focussed on the Mahers’ assumption and the Waltons’ silence, rather than a representation. Brennan J was explicit that Waltons’ silence could give rise to two different assumptions.449 Mason CJ, Wilson and Brennan JJ each spent a great deal of effort considering the multiple assumptions possible from that silence. It is therefore perplexing that Drummond AJA claims that the majority in Waltons Stores450 did not ‘pay any attention to the … different conclusions’ concerning the assumption.451

In the passage above Drummond AJA cites Legione v Hateley in support of the limitation of estoppel to clear representations, yet apparently ignores the following passage from that case:

448 Ibid.
449 ‘Waltons’ silence induced Mr Maher to continue either on the assumption that Waltons was already bound or in the expectation that Waltons would execute and deliver the original deed as a matter of obligation’.Ibid 430 (Brennan J) (emphasis added).
450 Ibid.
451 Their Honours clearly had the benefit of the other judgments. ‘Also, as the other judgments demonstrate, there is no substance in the argument based on …’ Ibid 408 (Mason CJ and Wilson J).
The requirement that a representation as to existing fact or future conduct must be clear if it is to found an estoppel in pais or a promissory estoppel does not mean that the representation must be express. Such a clear representation may properly be seen as implied by the words used or to be adduced from either failure to speak where there was a duty to speak or from conduct. Nor is it necessary that a representation be clear in its entirety. 452

D  GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd

GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd 453 is the most striking example of a decision made inconsistently with the High Court precedent. The case was an interlocutory application, and almost no facts were disclosed or explained. Nevertheless, the case reveals the surprising views of Gyles J of the Federal Court; to the effect that estoppel absolutely cannot operate as a cause of action: 454

The second respondent … is correct in submitting that the applicant … pleads a bare estoppel. It is not pleaded in aid of some other cause of action - it stands alone as if it supplies a right to equitable compensation. An estoppel does not provide an independent cause of action in equity for relief for compensatory damages or otherwise (Commonwealth v Verwayen (1990) 170 CLR 394, per Deane J at 439-440). His Honour is there stating a fundamental and well accepted principle. It could not be said that his Honour was a crusty conservative on the issue of estoppel. Prayer 1(a) of the application and para28 of the statement of claim will be struck out. 455

E  Conclusion

The cases outlined above demonstrate that no consistency can be found even within the same state. It is submitted that courts have applied the doctrine of equitable estoppel according to their own idiosyncratic views of the doctrine, with insufficient regard for the need to follow the High Court precedent. This disagreement is surely weakening of the credibility of the doctrine of precedent and causing detriment to our legal system. This is arguably the reason why

454 See generally Robertson, ‘Three Models of Promissory Estoppel’, above n 211.
455 GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd [2000] FCA 875, [3].
academic writing on equitable estoppel does not give ‘any comfort to the solicitor’.

What good is academic writing if the Supreme Courts do not follow the judgment of the High Court? Priestley JA had it right in 1986 when he said that.

The rules emerging from what the High Court has said are clear and there is no particular purpose to be served in deciding the present case by seeking to categorise them in terms of contemporary debate.

Nevertheless, the failure of the state courts to follow this advice suggests that a brief exploration of the contemporary debate is justified.

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456 Aitken, above n 19, 217.
VI  AN ANALYSIS OF THE MERITS OF EQUITABLE ESTOPPEL

This chapter will demonstrate that the doctrine of equitable estoppel is a sensible and coherent doctrine, which does not unduly infringe on commercial certainty. The doctrine as handed down by the High Court has sufficient merit and does not need to be modified by lower courts.

A  On Evaluating the Doctrine of Equitable Estoppel

For our present purposes we shall assume that an equitable doctrine is successful if it maximises the justice of a case without causing undue disharmony with other doctrines, or causing excessive uncertainty. The following statement by Deane J provides an excellent yardstick for the underlying objective of estoppel:

The object and operation of the doctrine of estoppel by conduct is to avoid the injustice which would result from the application or inadequacy of other laws in the circumstances which would be disclosed if departure were permitted from the relevant represented or assumed state of affairs.\(^{458}\)

Andrew Robertson argues that there are actually three theoretical bases for the doctrine of equitable estoppel:

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).\(^{459}\)

\(^{459}\) Robertson, ‘Situating Equitable Estoppel within the Law of Obligations’, above n 25 (emphasis added).
These three overlap to a large extent. For example, *Waltons Stores* could be viewed through any of these lenses. This paper will assume that promise theory remains the realm of contract, not estoppel. Similarly, reliance theory may be better seen as the domain of negligence. However, the paper will assume that reliance is relevant as an aspect of conscience theory. Although at a very high level of abstraction, the following reasoning outlines the core of estoppel according to conscience theory:

> [The] question which must be answered is, should this man be allowed to go back on his promise? If the doctrine of consideration produces a manifestly unjust answer, then there is something wrong. And to answer the question by trotting out the technical rules of consideration is unrealistic because it avoids the real issue. On the other hand equitable estoppel faces the real issue, because it gives the answer, "No, if it would, be unfair," or "Yes, if no injustice would be done."  

This paper will now assess the merits of equitable estoppel according to conscience theory.

1 *Certainty and Predictability*

Conscience alone is not a satisfactory standard by which to judge equitable estoppel. This is because it leaves the matter up to the judge’s subjective assessment as to what conscience dictates. This would be highly unpredictable. Given that equitable estoppel results in a dramatic alteration to the rights between the parties, unpredictability is problematic – both for the parties themselves and as a matter of public policy. Indeed, unpredictability is one of the main criticisms of estoppel, because ‘[c]ommercial certainty demands a high degree of judicial reticence before commercial negotiations are interfered with.’ For this reason, a more technical conception of the doctrine is required in order to provide a reasonably predictable outcome and certainty in the development of legal principles. However, excessive focus on ‘technicalities can lead to a degree of strictness inconsistent with the fundamental aims of equity’.

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461 Seddon, above n 5, 448.
462 Silink, above n 212, 287.
463 *Thorner v Major* [2009] 3 All ER 945.
[E]quity, in developing one of its doctrines, refuses to be fettered by the concept upon which the doctrine is based if to do so would make the doctrine unfair or unworkable. After all, it is of the essence of a doctrine in equity that it should be equitable, and, I may add, that it should work: equity, like nature, does nothing in vain.\textsuperscript{464}

It is submitted that equitable estoppel is a useful doctrine because it strikes a balance between the competing requirements of conscience theory and the need for certainty in the law. The law of contract already places a premium on certainty. By contrast, equitable estoppel acts to soften the effect of contract’s rigid rules to prevent them from operating more harshly than conscience will bear. Therefore, the doctrine of equitable estoppel must:

- be focused at its core on whether someone \textit{should} be allowed to deny an assumption according to the ‘standards of conscionable behaviour’ of the day,\textsuperscript{465}
- be tempered and moderated according to fixed principles which give sufficient certainty, and
- remain flexible enough to overcome deficiencies in contract and neighbouring doctrines.\textsuperscript{466}

Equitable estoppel achieves each of these objectives because of its sensitivity to the facts of the case; capacity to act as a cause of action; and facility to provide a discretionary remedy tailored to suit the parties’ particular circumstances.

B \textit{Equitable Estoppel as a Cause of Action}

The doctrine of equitable estoppel extracted from the High Court cases operates as a cause of action which gives positive remedies. However, this appears to be the aspect of the doctrine which is causing the most resistance in the lower courts. The cases which are most significantly inconsistent with the High

\textsuperscript{464} \textit{Brunner v Greenslade} [1971] Ch 993, 1006.
\textsuperscript{465} See Brereton, above n 38, 651; Seddon, above n 5, 448.
\textsuperscript{466} For a discussion of the neighbouring doctrines, see \textit{Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd [No 2]} (1987) 16 FCR 410. 'Tort and contract today are separated by rather less than clear bright lines. … Like s 52, and unlike deceit, equity operates without the necessity to prove any misleading intention by the defendant. Like s 52, and unlike negligence, equity does not require the existence of a duty of care. And the width of the equity jurisdiction is balanced by the general power to impose terms on a successful plaintiff', at 420–1 (citations omitted).
Court doctrine contain a ‘sword vs shield’ debate which suggests that equitable estoppel cannot assist a plaintiff to obtain a positive remedy. 467 These limited views of the doctrine may be result from a conception of the doctrine as a rule of evidence which acts as an all-or-nothing doctrine by fulfilling another cause of action: 468

If promissory estoppel does no more than provide the foundation for another cause of action, then that cause of action must necessarily dictate the remedy that is granted. If, on the other hand, the remedy is shaped by reference to the detriment that the promisee would suffer as a result of action taken in reliance on the promise of those other rights, then it is the estoppel, and not that other cause of action, that is generating the remedy. If the estoppel governs the remedy in this way, then the estoppel is the source of the rights that are being enforced. 469

It is submitted that it is the discretionary remedy for an equitable estoppel which allows it to act as a cause of action. Discretion is not required for a rule of evidence. 470 Furthermore, it is this discretion which allows positive remedies to be awarded. After all, what is the dividing line between a negative and a positive remedy? Even for a defensive equity such as that in the classic High Trees 471 case, the tenant effectively gains a positive right against the landlord. This positive right allows them to pay reduced rent while the estoppel operates. This is because the defensive equity effectively prevents the landlord from asserting otherwise. 472 There is no good policy reason as to why a tenant should need to wait to defend an action from a landlord before they can raise the estoppel. This in itself would create uncertainty.

It has been aptly suggested that the real reason for the sword vs shield debate lies ‘in an attempt to defuse the purist’s objection that the doctrine of promissory estoppel undermines the doctrine of consideration.’ 473 In fact, the principle

468 See generally McFarlane, ‘The Limits to Estoppels’, above n 281.
471 [1947] KB 130.
473 Ibid.
objection to equitable estoppel operating as a cause of action in its own right is that: ‘It would cut up the doctrine of consideration by the roots, if a promisee could make a gratuitous promise binding by subsequently acting in reliance on it’.474 This argument ignores the fundamental differences between equitable estoppel and contract. Equitable estoppel operates to avoid detriment,475 rather than to enforce promises.476 However, it is true that courts often fulfil a plaintiff’s expectation.477 Accordingly, there remains a disagreement between whether the purpose of the remedy is to address the reliance or the expectation.478 Nevertheless, this argument overlooks the substance of the matter. Both formulations require discretion. This is a significant differentiator between estoppel and contract, even if the expectation is regularly fulfilled. By contrast, a claim for breach of contract carries an entitlement to damages. By contrast, a claim for equitable estoppel will only grant the plaintiff whatever the equity of the case demands.479 An example of the effective operation of that discretion is in the different approach taken between domestic and commercial cases.480 The discretionary nature of equitable estoppel prevents it from threatening the primacy of contract.

Not only is equitable estoppel no threat to contract, but it actually supports it. Although it is rarely acknowledged, it is submitted that the doctrine of equitable estoppel allows the doctrine of consideration to operate smoothly:

474 Commonwealth v. Scituate Savings Bank (1884) 137 Mass 301.
476 Ibid 426.
477 ‘While the equity cases talked about fraud as the basis of granting relief, the relief that they actually gave was the fulfilment of the expectation in toto.’ Lunney, ‘Jorden v Money - A Time for Reappraisal?’, above n 59, 573–74. See generally Fiona R Burns, 'Giumelli v Giumelli Revisited : Equitable Estoppel, the Constructive Trust and Discretionary Remedialism' (2001) 22(2) Adelaide Law Review 123.
479 ‘The measure of a contractual obligation depends on the terms of the contract and the circumstances to which it applies; the measure of an equity created by estoppel varies according to what is necessary to prevent detriment resulting from unconscionable conduct.’ Waltons Stores (1988) 164 CLR 387, 425 (Brennan J).
480 See, eg, Aitken, above n 19.
[T]he extension of the existing applicability of estoppel by conduct ... would, if anything, strengthen the overall position of the doctrine of consideration by overcoming its unjust operation in special circumstances with which it is inadequate to deal.  

It was rightly suggested via obiter in *Esanda Finance Corp Ltd v Peat Marwick Hungerfords* that *Waltons Stores* may reflect ‘the quest for an alternative to consideration’. It should be clarified that it is an alternative, and not a replacement.

Before leaving this point, we should briefly question why the doctrine of consideration must be doggedly protected above all else. ‘[I]t is submitted that a venerable doctrine is no more respectable than a modern doctrine. The proper question to ask is: does it suit today's conditions?’ We can conclude that consideration must be protected because it is gives certainty. However, this does not justify prioritising certainty at the expense of sacrificing individualised justice in every instance. It is the strict operation of consideration which creates the impetus for the doctrine of equitable estoppel. Equitable estoppel suits today’s conditions because it provides a method to assess cases which fall outside of consideration’s bright line.

C  *Promissory and Proprietary Estoppels Work Better Together*

There is no reason why equitable estoppel should, as a rule, have different requirements for different assumptions. There is no rationale for a rigid separation of promissory and proprietary estoppel:

If it be unconscionable for an owner of property in certain circumstances to fail to fulfil a non-contractual promise that he will convey an interest in the property to another, is there any reason in principle why it is not unconscionable in similar circumstances for a person to fail to fulfil a non-contractual promise that he will confer a non-proprietary legal right on another? It does not accord with principle to hold that equity, in seeking

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482 (1988) 164 CLR 387.
484 Seddon, above n 5, 447.
485 See generally Gleeson, above n 27.
486 Seddon, above n 5, 450.
to avoid detriment occasioned by unconscionable conduct, can give relief in some cases but not in others.\textsuperscript{487}

There is no logical reason for a stark contrast between assumptions of proprietary and non-proprietary rights. In fact, the accuracy of these classes of rights has been challenged:

This distinction – that the subject matter of the estoppel is property – is not, however, without difficulty. A proprietary estoppel may not result in the conferral of any interest in property: compensation, or a licence over property, may be awarded. …Contractual rights … are themselves, as choses in action, a form of property, yet all promissory estoppels are not proprietary estoppels.\textsuperscript{488}

Any distinction between proprietary and promissory estoppel should be viewed only as guiding principles which may assist in guiding the court in tailoring the response to the estoppel.\textsuperscript{489}

I do not find it generally helpful to divide into classes the cases in which an equity created by estoppel has been held to exist. However, the familiar categories serve to identify the characteristics of the circumstances which have been held to give rise to an equity in the party raising the estoppel.\textsuperscript{490}

Allowing these categories to become rigid procedural rules does little to benefit the objectives we have identified. This inconsistency is demonstrated by the strained logic applied in \textit{DHJPM Pty Limited v Blackthorn Resources}\textsuperscript{491} and the unusual remedy given in \textit{Saleh v Romanous}.\textsuperscript{492} An overly rigid distinction between promissory and proprietary estoppels will provide a disproportionate remedial outcome for cases which relate to proprietary interests. This creates an incentive to plead proprietary instead of equitable estoppel.\textsuperscript{493} It is submitted that this further encourages lower courts to depart from the High Court doctrine. Justice is not promoted by allowing substantially similar cases to receive vastly different outcomes. The distinction also does nothing to settle the perceived

\begin{flushleft}
\textsuperscript{487} \textit{Waltons Stores} (1988) 164 CLR 387, 426. \\
\textsuperscript{488} Bower et al, above n 31, 20. \\
\textsuperscript{489} But see \textit{DHJPM Pty Limited v Blackthorn Resources} [2011] NSWCA 348, [43]. \\
\textsuperscript{490} \textit{Waltons Stores} (1988) 164 CLR 387, 420. \\
\textsuperscript{491} [2011] NSWCA 348. \\
\textsuperscript{492} (2010) 79 NSWLR 453. \\
\textsuperscript{493} Bryan, 'Almost 25 Years on: Some Reflections on \textit{Waltons v Maher}', above n 24, 133.
\end{flushleft}
conflict between estoppel and consideration because fulfilling ‘one kind of promise subverts the doctrine of consideration as much, or as little, as the other.’

D Certainty of the Representation

There will always be a tension between certainty and justice. A conceptualisation of equitable estoppel which requires a clear representation in all circumstances will support certainty, but will not provide adequate justice. It is submitted that adequate certainty is instead provided by equitable estoppel’s focus on unconscionability. ‘The requirement for reasonableness is linked with the underlying principle of unconscionability’. For example, the fact that reliance is unreasonable may be sufficient to defeat an estoppel claim. Equitable estoppel has long been controlled by the need for the reliance to be reasonable. For example, in Legione v Hateley, Brennan J considered whether the statement could have been ‘understood reasonably as making a promise or representation’, and considered that ‘whether a conversation which engenders such an expectation amounts to a promise or representation binding … depends upon all the relevant circumstances.

There is no reason that silence or an unclear representation should be absolutely barred from giving rise to an equitable estoppel. Besides, the requirement for an express representation is not as bright a line as it may appear: determining the nature and meaning of even an express representation is often not an easy task. In Western Australia this is compounded because a statement capable of multiple meanings may not be sufficient to found an estoppel. The

495 See generally Gleeson, above n 27.
496 Tipperary Developments Pty Ltd v the State of Western Australia (2009) 38 WAR 488, 520.
498 The point is that, generally speaking, a plaintiff cannot enforce a voluntary promise because the promisee may reasonably be expected to appreciate that, to render it binding, it must form part of a binding contract Waltons Stores (1988) 164 CLR 387 403 (Mason CJ and Wilson J) (emphasis added).
500 Ibid 453.
problem with this approach is that it hides a process of discretionary reasoning which would be better conducted in the open: all representations are capable of more than one meaning at a high enough level of abstraction. Unconscionability is arguably a better investigation into whether a representation is sufficiently clear. The enquiry may be made:

[B]y reference to the question whether the promisor ought reasonably to have expected that the promisee might act on the promise in such a way that he or she might suffer detriment if the promise is not fulfilled. This has the disadvantage of requiring a normative judgment to be made on the facts of each case by reference to a broad standard. It has the advantage, however, that it goes directly to the question of justice between the parties.\(^{503}\)

It is submitted that silence, or an unclear representation, must be sufficient to raise an equitable estoppel in appropriate circumstances.

E  A Legal Relationship Should not be Required

It has been suggested that *Waltons Stores*\(^{504}\) contained a requirement that the parties be in a pre-existing legal relationship or believe that such a relationship would arise.\(^{505}\) This requirement is anachronistic, and is linked to doctrine which operates as a rule of evidence only:

If the concern of the doctrine of promissory estoppel is to prevent the enforcement of legal rights ...[then] the doctrine does not come into play unless there is an existing legal relationship between the parties giving rise to enforceable rights and duties. On the other hand, if the doctrine is extended ...to promises to confer new rights, then there is no logical reason for insisting on a subsisting legal relationship between the parties. The requirement of a legal relationship between the parties reflects, therefore, the traditional limits of the doctrine to the suspension or modification of existing legal (and normally contractual) rights.\(^{506}\)

Ben McFarlane gives an illuminating example of the problem with maintaining this distinction. ‘[I]t would be perverse if a claim cannot arise as a result of

\(^{503}\) Robertson, ‘Three Models of Promissory Estoppel’, above n 211, 247.

\(^{504}\) (1988) 164 CLR 387.

\(^{505}\) See *Settlement Group Pty Ltd v Purcell Partners* [2013] VSCA 370.

\(^{506}\) Bower et al, above n 31, 467.
promise … to pay a sum of money …, but can arise as a result of a promise to enter into a [deed] to make such a payment …\textsuperscript{507}

Instead, the presence of a pre-existing legal relationship should only be interpreted as one facet of the unconscionability and reasonable reliance principles considered above. It could well be argued that it is more reasonable to rely on a representation that a contract will be produced than another type of promise. Still, this should not give rise to a rigid procedural requirement. Instead, the non-existence of a contractual relationship should be dealt with as one more aspect of the relevant circumstances which need to be considered.\textsuperscript{508}

\textsuperscript{507} McFarlane, ‘The Limits to Estoppels’, above n 281, 271.

VII CONCLUSION

It has been demonstrated that Waltons Stores509 created a powerful doctrine of equitable estoppel which comprised a fusion of proprietary and promissory estoppels. Despite some difficulties in interpreting the later High Court cases, it is now clear that the binding ratio of Waltons Stores510 has not been limited in subsequent binding decisions. Indeed, it has only been built upon. Unfortunately, the state courts are now in disarray on this issue. Multiple cases have been decided inconsistently and without reference to the High Court precedent. This is difficult to understand, given that the doctrine of equitable estoppel is common sense and does not infringe on the doctrine of consideration. These inconsistencies are a significant problem, which result in the law being applied differently in each state. This undermines the doctrine of precedent, and means that two plaintiffs in similar circumstances will receive vastly different relief. Despite the continued endorsement of equitable estoppel by the High Court in Sidhu v Van Dyke,511 it is altogether likely that state courts will continue to decide cases without adequate reference to the doctrine of equitable estoppel. Therefore, the High Court might consider explicitly stating the application of the doctrine at its next opportunity. In closing, this could be viewed as a call to action for the High Court to grant leave special leave to appeal in any case which has the potential to further clarify the situation. At any rate, one may only hope that the common sense doctrine of equitable estoppel established in Waltons Stores512 continues to survive the assault in the lower courts:

Twenty-five years on, it remains unclear whether Waltons Stores is a leading decision on the enforcement of relied-on promises. Perhaps its legacy will be more secure after 50 years, but only if courts take more seriously the project of harmonising private law doctrine.513

510 Ibid.
VIII BIBLIOGRAPHY

A Articles/Books/Reports


Bagaric, Mirko and James McConville, 'The High Court and the Utility of Multiple Judgments' (2005) 1(1) The High Court Quarterly 13


Birks, Peter, 'Equity in the Modern Law: an Exercise in Taxonomy' (1996) 26(1) University of Western Australia Law Review 1


Burns, Fiona, 'The "Fusion Fallacy" Revisited' (1993) 5(2) Bond Law Review 152


Carter, J W, Contract Law in Australia (LexisNexis Butterworths, 6th ed, 2012)

Clark, Eugene, 'The Swordbearer has Arrived: Promissory Estoppel and Walton Stores (Interstate) Ltd v Maher' (1987) 9(1) University of Tasmania Law Review 68


Handley, Kenneth, *Estoppel by Conduct and Election* (Sweet and Maxwell, 1st ed, 2006)


Lunney, Mark, 'Towards a Unified Estoppel - The Long and Winding Road' (1992) 4 *Conveyancer and Property Lawyer* 239


McFarlane, Ben, 'The Limits to Estoppels' (2013) 7(3) *Journal of Equity* 250


Pawlowski, Mark, The Doctrine of Proprietary Estoppel (Sweet & Maxwell, 1st ed, 1996)


Robertson, Andrew, 'Three Models of Promissory Estoppel' (2013) 7(3) Journal of Equity 226

Robertson, Andrew, 'Towards a Unifying Purpose for Estoppel' (1996) 22(1) Monash University Law Review 1

Seddon, Nicholas, 'Is Equitable Estoppel Dead or Alive in Australia?' (1975) 24(3) International and Comparative Law Quarterly 438

Silink, Allison, 'Equitable Estoppel in 'Subject to Contract' Negotiations' (2011) 5 Journal of Equity 252

Spence, Michael, Protecting Reliance: The Emergent Doctrine of Equitable Estoppel (Hart, 1st ed, 1999)


Thomas, Susan Barkehall and Vicki Vann, 'Estoppel Doctrine Not Clarified: Court Refuses to Grant Expectation Relief' (1999) 4(1) Newcastle Law Review 87

Tilbury, Michael, 'Fallacy or Furphy?: Fusion in a Judicature World' (2003) 26(2) University of New South Wales Law Journal 357


Young, Peter W, Clyde Croft and Megan Louise Smith, On Equity (Thomson Reuters, 1st ed, 2009)

B Cases

ABC v Lenah Game Meats Pty Ltd (2001) 208 CLR 199

ACN 074 971 109 (as Trustee for Argot Unit Trust) v National Mutual Life Association of Australasia Ltd (2008) 21 VR 351

Agricultural and Rural Finance Pty Ltd v Gardiner (2008) 238 CLR 570

Aktas v Westpac Banking Corp Ltd [No 2] (2010) 241 CLR 570

Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd [2014] HCA 14


Bondi Beach Astra Retirement Village Pty Ltd v Gora [2011] NSWCA 396

Bowman v Durham Holdings Pty Ltd (1973) 131 CLR 8

Brodie v Singleton SC (2001) 206 CLR 512

Carr v JA Berriman Pty Ltd (1953) 89 CLR 327

Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130

CGU Insurance Ltd v AMP Financial Planning Pty Ltd (2007) 235 CLR 1

Character Design Pty Ltd v Kohlen [2013] WASC 112
Coleman v Power (2004) 220 CLR 1

Combe v Combe [1951] 2 KB 215

Coombes v Smith [1986] 1 WLR 808

The Commonwealth v Cornwell (2007) 229 CLR 519

Commonwealth v Verwayen (1990) 170 CLR 394

Crabb v Arun District Council [1976] Ch 179

DHJPM Pty Limited v Blackthorn Resources [2011] NSWCA 348

Dickenson’s Arcade Pty Ltd v Tasmania (1974) 130 CLR 177

Dillwyn v Llewellyn (1862) 4 De GF & J 517

Earl of Oxford’s Case (1615) 1 Rep Ch 1

EK Nominees Pty Ltd v Woolworths Ltd [2006] NSWSC 1172

Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd [No 2] (1987) 16 FCR 410

Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89

Federation Insurance Ltd v Wasson (1987) 163 CLR 303

Foran v Wight (1989) 168 CLR 385


Giumelli v Giumelli (1999) 196 CLR 101

GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd [2000] FCA 875

Grundt v Great Boulder Proprietary Gold Mines Limited (1937) 59 CLR 641

Hughes v. Metropolitan Railway Co (1877) 2 App Cas 439

Jennings v Rice [2003] 1 P & CR 100


Jones v Bartlett (2000) 205 CLR 166

Jorden v Money (1854) 10 ER 868
KD Morris & Sons Pty Ltd (in liq) v Bank of Queensland Ltd (1980) 146 CLR 165

Legione v Hateley (1983) 152 CLR 406

Low v Bouverie [1891] 3 Ch 82

Maher v Waltons Stores (Interstate) Ltd (1984) 1 BCL 187

Mobil Oil Australia Ltd v Lyndel Nominees Pty Ltd (1998) 81 FCR 475

New South Wales v Lepore (2003) 212 CLR 511

Northside Developments Pty Ltd v Registrar-General (1990) 170 CLR 146

Olsson v Dyson (1969) 120 CLR 365

Plimmer v Mayor of Wellington (1884) 9 App Cas 699

Ramsden v Dyson (1866) LR 1 HL 129

Saleh v Romanous (2010) 79 NSWLR 453

Settlement Group Pty Ltd v Purcell Partners [2013] VSCA 370

Laws Holdings Pty Ltd v Short (1972) 46 ALJR 563

Sidhu v Van Dyke [2014] HCA 19

Supreme Court of Judicature Act 1873 (UK) 36 & 37 Vict, c 66

Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd [1982] QB 133

Thompson v Palmer (1933) 49 CLR 507

Tipperary Developments Pty Ltd v the State of Western Australia (2009) 38 WAR 488


Tropical Traders Ltd v Goonan (1964) 111 CLR 41

United Australia Ltd v Barclay's Bank [1941] AC 1

Waltons Stores (Interstate Ltd) v Maher (1986) 5 NSWLR 407

Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387
Westpac Banking Corporation v the Bell Group Ltd (In Liq) [no 3] (2012) 44 WAR 1

Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515

C Legislation

Conveyancing Act 1919 (NSW)

Supreme Court of Judicature Act 1873 (UK) 36 & 37 Vict

D Other

Westlaw Australia, The Laws of Australia, (at 15 April 2013) 25 Interpretation and Use of Legal Sources