Towards a Unifying Purpose for Estoppel

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INTRODUCTION

In what has recently been described as a classical statement of the doctrine of estoppel in pais,[1] Dixon J said in *Grundt* v *Great Boulder Pty Gold Mines Ltd* that 'the basal purpose of the doctrine .... is to avoid or prevent a detriment to the party asserting the estoppel'.[2] The aim of this article is to consider the extent to which the prevention of detriment resulting from reasonable reliance on the conduct of others (in other words, protecting against detrimental reliance) can, and should, be seen as the basal purpose of the various doctrines of estoppel operating in Australia today. While some judges[3] and commentators[4] have advocated unification of those doctrines, it is clear that they cannot be unified unless they have a unifying purpose. This article argues that protecting against detrimental reliance can, and should, be seen as that unifying purpose.

The first part of the article will, for the purpose of the subsequent analysis, summarise the current state of estoppel in Australia. That summary will focus on the acceptance of discrete doctrines of common law estoppel, equitable estoppel and a unified doctrine operating at common law and in equity. The examination will show that, despite the recent differences of opinion between members of the High Court as to whether the distinctions between the various categories remain, the various doctrines serve essentially the same purpose. Accordingly, I would argue that it is useful to consider the relationship between the purpose and operation of the various doctrines together, differentiating between them only in relation to the relief to be provided.

The second part of the article will briefly outline the three competing purposes of estoppel which have been articulated by judges and commentators. The three purposes which can be identified are: providing protection

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[1] *Legione* v *Hateley* (1983) 152 CLR 406, 430 per Mason and Deane JJ; *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, 414 per Brennan J. The statement was also cited with approval in *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 501 per McHugh J as a statement of the purpose of both the common law and equitable doctrines of estoppel.

[2] (1937) 59 CLR 641, 674.

[3] Notably *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, 451 per Deane J; *Foran* v *Wight* (1989) 168 CLR 385, 435 per Deane J; *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 440 per Deane J, 413 per Mason CJ.

[4] Notably M Lunney, 'Toward a Unified Estoppel — The Long and Winding Road' [1992] *The Conveyancer* 239.

against detrimental reliance;[5] preventing unconscionable conduct;[6] and fulfilling assumptions or making good expectations.[7] Those three purposes are not mutually exclusive. Indeed it can be argued that the purpose of estoppel is to prevent unconscionable conduct by making good the assumptions adopted by those who have relied on them to their detriment. There are, however, areas of tension between the three purposes. The third part of the article will examine the manifestations of the three purposes in the application of the doctrines of estoppel, and will highlight the conflicts between them. Those conflicts arise in relation to the requirements for proof of reliance, reasonableness of reliance and, most clearly of all, in the determination of relief.

The essence of the problem is the question of whether the doctrines of estoppel should operate by reference to the representee's reliance,[8] the representor's conscience or the representee's expectation. A conscience based doctrine should focus on the knowledge and conduct of the representor, whereas a reliance based doctrine should focus on the knowledge and conduct of the representee. An expectation based doctrine should aim to provide relief which fulfils the representee's expectations. The conflicts highlighted in this article arise because conscience, reliance and expectation are variously emphasised by different judges in different aspects of the doctrines. The doctrines of estoppel are in desperate need of a basal purpose which is consistently applied in the formulation and application of the constituent principles.

The article concludes that the conflicts can best be resolved if the various doctrines are seen as operating to protect against detrimental reliance, rather than to prevent unconscionable conduct,[9] or to fulfil expectations. Sir Anthony Mason has recently suggested that 'the underlying values of equity

[5] *Thompson* v *Palmer* (1933) 49 CLR 507, 549 per Dixon J; *Grundt* v *Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674 per Dixon J; *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, 423, 426, 427 per Brennan J; *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 409, 410, 415–6 per Mason CJ, 423 per Brennan J, 501 per McHugh J.

[6] *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, 416, 419, 423 per Brennan J, 434, 453 per Deane J; *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 428–9 per Brennan J, 440, 444 per Deane J. For a discussion of the various meanings of unconscionable conduct and the increasing importance of the concept, see P Finn, 'Unconscionable Conduct' (1994) 8 *Journal of Contract Law* 37.

[7] *Thompson* v *Palmer* (1933) 49 CLR 507, 547 per Dixon J. Making good assumptions is generally seen as the effect of an estoppel, rather than the purpose of the doctrines, see eg *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, 404 per Mason CJ and Wilson J; *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 443 per Deane J. Making good assumptions is so often the result of a successful plea of estoppel, however, that it cannot be disregarded in an examination of the purposes of estoppel. That point is developed further in the third part of this article in the examination of the relief provided to give effect to an estoppel.

[8] In this article, the person claiming the benefit of an estoppel will be referred to as the representee, and the party against whom an estoppel is claimed will be referred to as the representor. The expressions are intended to cover all types of estoppel, including those founded on conduct other than representations.

[9] Although equitable estoppel, at least, can be seen to be founded on unconscionable conduct in the sense that it is unconscionable conduct which attracts the jurisdiction of a court of equity: *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, 419 per Brennan J.

centred on good conscience will almost certainly continue to be a driving force in the shaping of the law.'[10] Despite that, as Michael Bryan earlier pointed out in relation to constructive trusts, 'unconscionability is not a notion that makes hard cases easier to decide.'[11] For that reason, and for the reasons explored in this article, detrimental reliance provides a superior reference point for resolving the current difficulties in estoppel.

There are two reasons in particular why a resolution of the fundamental purpose of estoppel may be useful. First, as Deane J pointed out in *The Commonwealth of Australia* v *Verwayen*,[12] the conceptual foundations of a legal doctrine constitute an essential basis of judicial decision in a borderline case. As this paper shows, a clarification of the conceptual foundations of estoppel would in fact make the resolution of a number of fundamental issues considerably easier, rendering the application of the doctrines more predictable. Secondly, if the prevention of detrimental reliance is seen as the basal purpose of the doctrine of equitable estoppel, that orientation could provide a basis for overcoming the differences between the approaches to relief taken by members of the High Court in *Verwayen*. The approach to be taken to relief was the principal difference between the approaches taken by Mason CJ and Deane J in relation to the unification of common law and equitable estoppel in *Verwayen*.[13] Accordingly, a resolution of the purpose to be pursued in granting relief may perhaps facilitate the more widespread acceptance of such a unification, providing much needed simplification of this area of the law.

THE STATE OF ESTOPPEL TODAY

Before embarking upon an examination of the various purposes of estoppel, it is necessary briefly to note the various forms of estoppel recognised in Australia, the principal differences between them, and the extent to which it is useful to look for a basal purpose of estoppel.

Broadly speaking, the various doctrines of estoppel operate to provide relief where a party can make out three elements: assumption, inducement and detrimental reliance. In order to claim the benefit of estoppel at common law or in equity, a representee must show that he or she has adopted an assumption (assumption), as a result of inducement by the representor (inducement), and that he or she has acted or refrained from acting, in reliance on that assumption, so that detriment will be suffered if the representor departs from the assumption (detrimental reliance). That analysis fits within the leading statements of common law estoppel,[14] equitable estoppel[15] and a unified

[10] The Hon Sir Anthony Mason, 'The Role of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 LQR 238, 258.
[11] M Bryan, 'The Conscience of Equity in Australia' (1990) 106 LQR 25, 28.
[12] (1990) 170 CLR 394, 443.
[13] Id 415–6 per Mason CJ, 441–3 per Deane J.
[14] *Grundt* v *Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674–5 per Dixon J; *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, 414 per Brennan J.
[15] *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, 428–9 per Brennan J.

estoppel.[16] In common law estoppel, however, the nature of the assumption is restricted to an assumption as to an existing state of affairs.[17]

In the two most significant decisions of the High Court on estoppel, *Waltons Stores (Interstate) Ltd* v *Maher*[18] and *Verwayen*, two distinct views on the current state of estoppel emerged. The first, more traditional, view is that there are currently two doctrines of estoppel operating in Australia, common law estoppel and equitable estoppel. The second view is that there is but one doctrine of estoppel operating both at common law and in equity. Within each of those approaches, important differences arise.

Although the facts of *Verwayen* will be more than familiar to most readers, I will summarise them here, and will return to them in order to illustrate some distinctions later in the article. Mr Verwayen was a member of the Royal Australian Navy who suffered injuries in the collision between the HMAS Voyager and the HMAS Melbourne in 1964. In 1984 Mr Verwayen instituted proceedings against the Commonwealth, claiming damages for negligence. In its defence, the Commonwealth did not plead that the action was statute barred, nor did it deny that it owed a duty of care to Mr Verwayen. The appeal to the High Court was concerned with the Commonwealth's right to raise those defences when it later sought to do so. One of the arguments made by Mr Verwayen was that the Commonwealth was estopped from relying on either defence because representations made by the Commonwealth had indicated that 'a deliberate and considered decision had been made whereby the limitation defence and the defence of no duty of care would not be pleaded in any of the ensuing actions brought by survivors of the collision.'[19]

Although Mr Verwayen was successful, only two members of the High Court upheld his claim that the Commonwealth should be prevented from raising the relevant defences on the basis of estoppel.[20] The first two of the three elements mentioned above were clearly made out. Mr Verwayen had adopted an assumption that the Commonwealth would not claim the benefit of the defences in question, and his adoption of that assumption was induced by the representations made by the Commonwealth.[21] The contentious question was whether he had acted on that assumption, so that he would suffer detriment if the Commonwealth departed from it. Dawson J found that:

> By falsely raising his hopes, the appellant led the respondent to continue with the litigation and forgo any exploration of the possibility of settlement

[16] *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 413 per Mason CJ, 444 per Deane J.

[17] *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, 388–9 per Mason CJ and Wilson J, 413 per Brennan J, 458–9 per Gaudron J. But compare the discussion by Deane J, 448–52.

[18] (1988) 164 CLR 387.

[19] *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 414 per Mason CJ.

[20] Id 462 per Dawson J, 446 per Deane J. The other members of the majority, Toohey and Gaudron JJ, based their decisions on waiver, 475 and 487 respectively. Brennan J would have upheld the plea of estoppel, but would have allowed the Commonwealth to raise the relevant defences on payment of fair compensation to Mr Verwayen for the detriment he suffered in continuing with the action, 431.

[21] Id 414 per Mason CJ, 447 per Deane J, 461 per Dawson J, 504 per McHugh J.

> thereby subjecting himself to a prolonged period of stress in an action in which the damages claimed were for, amongst other things, a high level of anxiety and depression.[22]

Deane J similarly found that, on the basis of the relevant assumption:

> Mr Verwayen proceeded with the preparation and prosecution of his action. He expended both time and money thereon. Far more important, he subjected himself to the stress, anxiety and inconvenience which were inevitably involved in the pursuit of the proceedings.[23]

Mason CJ and McHugh J dissented on the basis that there was no evidence of any non-financial loss, and so an order for costs would have been a sufficient recompense for the detriment suffered.[24] Brennan J found that any non-financial detriment flowed from non-fulfilment of the Commonwealth's promise, rather than any act of Mr Verwayen in reliance on the promise,[25] and would have ordered an inquiry into Mr Verwayen's out of pocket costs.[26]

1. Equitable Estoppel

The doctrine of equitable estoppel was recognised in both *Waltons Stores*[27] and *Verwayen*[28] as a doctrine of general application, which encompassed the various doctrines of estoppel operating in equity.[29] In its most recent decision on estoppel, the High Court in a joint judgment considered the operation of 'an equitable estoppel of the kind upheld in *Verwayen*',[30] thereby deftly avoiding discussion of what Sir Anthony Mason has called 'the unfortunate diversity of opinion' expressed in the judgments in *Verwayen*.[31] The operation of the doctrine was succinctly described by Brennan J in *Verwayen*, when he said that 'an equity arising by estoppel precludes a person who, by a promise, has induced another party to rely on the promise and thereby to act to his detriment from resiling from the promise without avoiding the detriment.'[32]

Although two commentators have argued that equitable estoppel can cover all of the ground covered by common law estoppel,[33] there remains some doubt as to whether equitable estoppel will apply to representations of

[22] Id 462.
[23] Id 447.
[24] Id 416–17 per Mason CJ, 504 per McHugh J.
[25] Id 429.
[26] Id 430.
[27] Id 404–5 per Mason CJ and Wilson J, 416 per Brennan J, 458 per Gaudron J (who limited its application to an assumption of rights).
[28] (1990) 170 CLR 394, 428–9 per Brennan J, 453–4 per Dawson J, 500–1 per McHugh J.
[29] In *Silovi* v *Barbaro* (1988) 13 NSWLR 466, 472, Priestley JA held that the decision in *Waltons Stores* allows us to say that cases described as estoppel by encouragement, estoppel by acquiescence, proprietary estoppel and promissory estoppel are all species of equitable estoppel.
[30] *Australian Securities Commission* v *Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 506 per Mason CJ and Brennan, Dawson, Toohey and Gaudron JJ.
[31] Mason, op cit (fn 10) 254.
[32] (1990) 170 CLR 394, 422.
[33] A Leopold, 'Estoppel: A Practical Appraisal of Recent Developments' (1991) 7 *Australian Bar Review* 47, 51; Lunney, op cit (fn 4) 246.

existing fact, in addition to promises as to future conduct.[34] While McHugh J in *Verwayen* suggested that 'equity, like the common law, also will not permit an unjust departure from an assumption of fact which one person has caused another to adopt for the purpose of their legal relations',[35] Gaudron J in *Waltons Stores* indicated that equitable estoppel operates only by reference to an assumption of rights.[36]

2. Common Law Estoppel

The continued existence of a separate doctrine of common law estoppel, or estoppel in pais, received support in both *Waltons Stores*[37] and *Verwayen*.[38] The doctrine differs from equitable estoppel in that it only applies to representations of existing fact,[39] and provides relief by holding the representor to the relevant representation and preventing the representor from asserting rights inconsistent with the assumption adopted by the representee.[40] A plea of common law estoppel was not open to Mr Verwayen because the assumption he adopted was an assumption in relation to the Commonwealth's future conduct (that it would not seek to take advantage of the relevant defences), rather than an assumption as to an existing fact.

The primary difference between common law and equitable estoppel is in the relief provided. The reason for that difference is that, although both doctrines originated as evidentiary principles, common law estoppel continues to have an essentially evidentiary operation, preventing the representor from denying the truth of the representation. Equitable estoppel, on the other hand, is a substantive doctrine, giving rise to rights or equities which are satisfied by the granting of appropriate relief. In *Verwayen*, three members of the High Court pointed to the evidentiary nature of the common law doctrine as the basis of that difference between the two doctrines.[41] Although common

[34] In *Silovi Pty Ltd* v *Barbaro* (1988) 13 NSWLR 466, 472, Priestley JA distinguished the doctrines of common law and equitable estoppel on the basis that common law estoppel operates upon representations of existing fact, while equitable estoppel operates upon representations or promises as to future conduct, including promises as to legal relations. Implicit in that distinction is a denial of the operation of equitable estoppel in relation to representations of existing fact.

[35] (1990) 170 CLR 394, 500 citing Dixon J in *Grundt* v *Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674.

[36] (1988) 164 CLR 387, 459.

[37] Id 397–9 per Mason CJ and Wilson J (who called it common law estoppel), 413–5 per Brennan J (estoppel in pais), 458–9 per Gaudron J (common law or evidentiary estoppel).

[38] (1990) 170 CLR 394, 453–4 per Dawson J, 499–500 per McHugh J. See also *Silovi Pty Ltd* v *Barbaro* (1988) 13 NSWLR 466, 472 per Priestley JA.

[39] *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, 388 per Mason CJ and Wilson J, 415 per Brennan J, 458 per Gaudron J; cf *Foran* v *Wight* (1989) 168 CLR 385, 411–12 per Mason CJ.

[40] *Grundt* v *Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674 per Dixon J; *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, 414 per Brennan J, 458 per Gaudron J; *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 454 per Dawson J, 501 per McHugh J.

[41] (1990) 170 CLR 394, 411–13 per Mason CJ, 454 per Dawson J, 500 per McHugh J.

law estoppel has recently begun to be seen by some as a substantive doctrine,[42] it does not yet provide a remedy which is consistent with a substantive operation. The remedy is still essentially evidentiary, since it holds the representor to the truth of the representation.

3. A Unified Estoppel

A unified doctrine of estoppel, operating at common law and in equity, was applied by Deane J in *Waltons Stores*,[43] *Foran* v *Wight*[44] and *Verwayen*[45] and by Mason CJ in *Verwayen*.[46] Although the doctrines applied by Mason CJ and Deane J operate in essentially the same circumstances, their Honours' approaches diverge in relation to the relief to be provided. Mason CJ held in *Verwayen* that the single doctrine 'provides that a court of common law or equity may do what is required, but no more' to prevent a party suffering detriment as a result of reliance upon an assumption which the party estopped has induced him or her to hold.[47] Deane J, on the other hand, held that the operation of a general doctrine of an estoppel by conduct is, prima facie,

> to preclude departure from the assumed state of affairs. It is only where relief framed on the basis of that assumed state of affairs would be inequitably harsh, that some lesser form of relief should be awarded.[48]

4. Commonality of Principle

The question remains, then, whether there is any utility in considering together the purposes of common law estoppel, equitable estoppel and a unified estoppel. One needs to look no further than the decisions of the High Court in *Waltons Stores*[49] and *Verwayen*[50] to find a plethora of dicta to the effect that there is a commonality of principle and purpose between the various forms of estoppel.

The historical basis for that commonality of purpose was explored by Dawson J in *Verwayen*. His Honour explained that:

> Although the basic considerations underlying both common law estoppel and equitable estoppel have always been the same .... [t]he only thing standing in the way of their parallel development has been the persistence of the

[42] *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, 448 per Deane J; *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 412 per Mason CJ. Some commentators (such as Leopold, op cit (fn 33) 152 and judges (such as McHugh J in *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 500) still see common law estoppel as having an evidentiary operation, notwithstanding the fact that a claim of common law estoppel must be pleaded.

[43] (1988) 164 CLR 387, 451.

[44] (1989) 168 CLR 385, 435.

[45] (1990) 170 CLR 394, 440.

[46] Id 413.

[47] Ibid.

[48] Id 443.

[49] (1988) 164 CLR 387, 418–19 per Brennan J, 447 per Deane J, 458 per Gaudron J.

[50] (1990) 170 CLR 394, 409 per Mason CJ, 440 per Deane J, 453 per Dawson J, 501 per McHugh J.

view at common law that to succumb to a doctrine of promissory estoppel would be to undermine the foundations of the law of contract.[51]

Clearly the unification of common law and equitable estoppel proposed by Deane J and Mason J could only proceed on the basis that the essential purpose of the two doctrines was the same. Supporting that conclusion in *Waltons Stores*, Deane J said that '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.'[52] The 'central principle'[53] of the unified doctrine proposed by Deane J was drawn from a statement of Dixon J in *Grundt* v *Great Boulder Pty Gold Mines Ltd*[54] which, according to Deane J, 'seems to have been predicated upon the assumption that the doctrine of estoppel by conduct operated consistently at law and in equity'.[55]

In *Verwayen*, Mason CJ referred to the 'complex array of rules' covered by the label estoppel, and the divisions between the various categories. His Honour concluded that:

> All of these categories and distinctions are 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'.[56]

Accordingly, in the next part of this article, the purposes of the three doctrines will be considered together, and references to 'estoppel' should be regarded as a reference to common law estoppel, equitable estoppel and the unified doctrines of both Mason CJ and Deane J. The fundamental difference between the various estoppels, of course, arises in relation to relief, which is considered at the end of the third part of this article. For the purpose of that discussion, the approaches taken to relief in common law estoppel, equitable estoppel and the unified doctrines will be considered separately.

[51] Id 453. Deane J also commented in *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 386, 447, that '[e]ven 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.'

[52] Id 447.

[53] Id 444:

> The central principle of the doctrine is that the law will not permit an unconscionable — or, more accurately, unconscientious — departure by one party from the subject matter of an assumption which has been adopted by the other party as the basis of some relationship, course of conduct, act or omission which would operate to that party's detriment if the assumption be not adhered to for the purposes of the litigation.

[54] (1937) 59 CLR 641, 674.

[55] *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 434.

[56] Id 409, quoting *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, 419 per Brennan J and citing *Grundt* v *Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674–5 per Dixon J.

THREE COMPETING PURPOSES

In this part of the article I will outline the nature of the three purposes of estoppel: protecting against detrimental reliance; preventing unconscionable conduct; and fulfilling assumptions. I acknowledged in the introduction to the article that the three purposes are not mutually exclusive. Equally, it should be acknowledged that the acceptance of one of the three as the basal purpose of estoppel does not exclude consideration of the other two purposes in the application of the doctrine. The extent of the detriment suffered by the representee is not, for example, irrelevant to a doctrine which is based on preventing unconscionable conduct by the representor. In the operation of estoppel, however, there are instances which require a clear choice between the three purposes, or require one purpose to be favoured over the others. Those instances are examined in the third part of this article.

If one of the three purposes is favoured over the others, then that would provide a simple means of solving the difficult questions which arise in estoppel, such as the approach which should be taken to relief. Once it is acknowledged that one purpose is favoured, then logically that purpose should be emphasised in all areas in which the various purposes conflict. It is, therefore, instructive to examine the way in which the three purposes have been articulated by judges and commentators, notwithstanding the somewhat artificial nature of the distinction between them.

1. Protecting Against Detrimental Reliance

There have been a number of recent statements by members of the High Court that the role of estoppel is to prevent the suffering of detriment as a result of reasonable reliance on the conduct of others; in short, to protect against detrimental reliance.[57] In *Verwayen*, for example, Mason CJ said that 'the fundamental purpose of all estoppels [is] to afford protection against the detriment which would flow from a party's change of position if the assumption that led to it were deserted'.[58] The reliance basis of estoppel was also emphasised by Brennan J who, in distinguishing estoppel from election and waiver, said that 'estoppel or equitable estoppel ensures that a party who acts in reliance on what another has represented or promised suffers no unjust detriment thereby'.[59] Each of the various forms of estoppel, therefore, appears to be designed to prevent a person from suffering detriment as a result of relying upon a certain form of conduct engaged in by another.

One of the most formative influences in the development of both common law and equitable estoppel has been the perceived need to avoid encroachment into the territory of contract. One aspect of that influence has been the way in which a role has been found for estoppel which serves to distinguish it

[57] Lunney, op cit (fn 4).
[58] (1990) 170 CLR 394, 410.
[59] Id 423.

from the law of contract.[60] The protection of reliance can be seen as both a legitimate, and legitimising, role for estoppel. It is legitimate because it ensures that the fulfilment of promises and the making good of expectations are not the primary concerns of estoppel. Having the protection of reliance, through the avoidance of detriment, as the purpose of estoppel legitimises estoppel by distancing it from the fulfilment of expectations, which can remain the exclusive province of the law of contract.

The protection against detrimental reliance is also a popular justification for promissory estoppel in the United States under s 90 of the *Restatement of Contracts* (2d).[61] Edward Yorio and Steve Thel have, in a recent article, criticised American supporters of a reliance based theory of estoppel on the ground that such supporters either conclude that the law is incoherent or fail to address many of the reported cases.[62] Yorio and Thel adopt the legal realist view that 'the best way to understand law is to analyse what courts are doing instead of trying to force cases into accepted theories.'[63] The aim of this article is not to force the Australian estoppel cases into a theory but rather, at a time when the law of estoppel is undergoing fundamental change, to suggest that estoppel should operate consistently to fulfil an essential purpose.

If the basal purpose of estoppel is to prevent detriment being suffered by the representee as a result of reliance on the relevant assumption, then the doctrine must operate essentially by reference to the position of the representee. The conscience of the representor need not be irrelevant, but the focus of the court's inquiry must be the representee. Relief, on that basis, must be determined by reference to the primary objective of preventing, or reversing, the representee's detriment.

2. Preventing Unconscionable Conduct

The unconscionability basis of estoppel is supported by the joint judgment of Mason CJ and Wilson J in *Waltons Stores*. In that judgment, their Honours held that 'equitable estoppel has its basis in unconscionable conduct, rather than the making good of representations'.[64] Like the protection against detrimental reliance, the prevention of unconscionability is a purpose which justifies estoppel by distancing it from the law of contract.[65]

Although protection against detriment is regularly cited as the purpose of estoppel, few would deny that, in the case of the equitable doctrine, it is

[60] See eg *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, 423–4 per Brennan J; *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 455 per Dawson J.

[61] Section 90(1) provides that:

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

[62] E Yorio and S Thel, 'The Promissory Basis of Section 90' (1991) 101 *Yale L J* 111, 113–14.

[63] Id 114, citing K Llewellyn, 'Some Realism about Realism — Responding to Dean Pound' (1931) 44 *Harv L R* 1222.

[64] (1988) 164 CLR 387, 405.

[65] Ibid.

unconscionability which attracts relief. In *Waltons Stores*, Brennan J held that the element which 'both attracts the jurisdiction of a court and shapes the remedy to be given is unconscionable conduct on the part of the person bound by the equity'.[66] Interestingly, Deane J found a similar basis for the general doctrine of estoppel by conduct notwithstanding its operation at common law:

> The doctrine of estoppel by conduct is founded upon good conscience. Its rationale is not that it is right and expedient to save persons from the consequences of their own mistake. It is that it is right and expedient to save them from being victimised by other people.[67]

A number of commentators favour the prevention of unconscionability over the prevention of detrimental reliance as the primary purpose of estoppel. Carter and Harland point to unconscionability as a key component in the unification or rationalisation of estoppel and as 'the touchstone for all relevant forms of estoppel.'[68] Writing on the decision in *Waltons Stores*, Charles Bagot appeared to regard the abhorrence of equity to unconscionable conduct as 'the fundamental policy' which drove the Court in that case 'to interfere in situations it previously avoided'.[69] Paul Finn also sees the task of equitable estoppel as being the prevention of unconscionable insistence upon a right.[70]

The authors of *Cheshire and Fifoot's Law of Contract* see some importance in the link between detrimental reliance and unconscionability. They indicate that detrimental reliance is essential for an estoppel to operate 'for in that reliance is found the inequity (or unconscionability) which moves a court to prevent the promisor from enforcing his or her strict legal rights.'[71] No doubt reliance by another party on one's conduct is essential to make resiling from that conduct unconscionable. An important question, however, is the extent to which an examination of the representee's reliance can be determinative of the offence to the representor's conscience.

Sir Anthony Mason has recently advocated 'the elaboration of the doctrine of estoppel by means of unconscionability' despite the fact that it 'is a concept not readily susceptible of precise definition'.[72] If the doctrine is to operate by reference to unconscionable conduct, then the focus of the court's inquiry must be the conscience of the person whose conduct is in question; namely, the representor. As the authors of *Cheshire and Fifoot* suggest, 'the unconscionability question necessarily involves a consideration of the behaviour of

[66] Id 419. See also *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 428–9 per Brennan J.

[67] *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 440.

[68] J Carter and D Harland, *Contract Law in Australia* (2nd ed, 1991) 121. See also D Butler, 'Equitable Estoppel: Reflections and Directions' (1994) 6 CBLJ 249.

[69] C Bagot, 'Equitable Estoppel and Contractual Obligations in the Light of Waltons v Maher' (1988) 62 ALJ 926, 928.

[70] P Finn, 'Equitable Estoppel' in P Finn (ed), *Essays in Equity* (1985) 75.

[71] J Starke, N Seddon and M Ellinghaus, *Cheshire and Fifoot's Law of Contract* (6th Aust ed, 1992) 153.

[72] Mason, op cit (fn 10) 255. M Halliwell, 'Estoppel: Unconscionability as a Cause of Action' (1994) 14 *Legal Studies* 15, has also suggested that unconscionability is the 'organising concept' for the doctrine of estoppel.

the promisor.'[73] That is not to say that the position of the representee cannot be considered, but the essential operation of a conscience based doctrine must be determined by reference to the knowledge and conduct of the representor.

Finally, mention must be made of the question of whether unconscionability can legitimately play a part in common law estoppel or in a unified estoppel which is to operate at common law. Michael Evans has questioned whether a notion of unconscionability could be incorporated into common law estoppel, since it is a foreign concept in the common law.[74] Unconscionable conduct in equitable estoppel can, however, be regarded as having its parallel in common law estoppel in the prevention of unjust conduct.[75] Sir Anthony Mason has argued convincingly that there is little justification for separate sets of principles for unjust conduct and unconscionable conduct since, 'in the end, "unjust departure" in the context of common law estoppel is in essence describing conduct which is unconscionable.'[76] That also appears to be the view taken by Deane J in *Verwayen*. Although Deane J's doctrine of estoppel by conduct operates at common law, and appears to draw heavily on common law estoppel, his Honour appears untroubled by the notion that the representee's conscience is fundamental to that doctrine.[77]

3. Fulfilling Expectations

If estoppel is designed to prevent unconscionable conduct, or the suffering of detriment resulting from reliance on that conduct, then the making good of assumptions or the fulfilment of expectations should be, at most, an occasional consequence of such prevention.

In the terms of Fuller and Purdue's classification of contract damages, in protecting against detrimental reliance, estoppel should protect the reliance interest of the representee, and not the expectation interest.[78] In order to prevent relevant detriment being suffered by the representee, the representee need only be compensated for the harm which his or her reliance on the representation has caused.[79] Protection against detrimental reliance does not require that the representee be placed in the position which he or she would have occupied had the representor not departed from the representation. As

[73] JG Starke et al, op cit (fn 71) 160.
[74] M Evans, *Outline of Equity and Trusts* (1993) 77.
[75] See *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 453 per Dawson J.
[76] Mason, op cit (fn 10) 256.
[77] (1990) 170 CLR 394, 444.
[78] L Fuller and W Purdue, 'The Reliance Interest in Contract Damages: 1' (1936) 46 *Yale L J* 52, 53–4.
[79] In *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 428–9, Brennan J held that equitable estoppel yields a remedy which gives effect to the minimum equity needed to avoid the relevant detriment. His Honour defined relevant detriment as follows:

> The relevant detriment in a case of equitable estoppel is detriment occasioned by reliance on a promise, that is, detriment occasioned by acting or abstaining from acting on the faith of a promise that is not fulfilled. The relevant detriment does not consist in a loss attributable merely to non-fulfilment of the promise.

Fuller and Purdue have pointed out, however, in some circumstances the reliance interest and expectation interest will coincide, and will provide identical or nearly identical measures of recovery.[80]

In *Waltons Stores* and *Verwayen*, members of the High Court sought to make clear that the purpose of promissory estoppel is not to enforce promises. In *Verwayen*, for example, McHugh J said that 'the enforcement of promises is not the object of the doctrine of equitable estoppel. The enforcement of promises is the province of contract.'[81] The other two purposes of estoppel discussed in this article are emphasised by the courts because they serve to distance estoppel from contract and distinguish the operation of promissory estoppel from the enforcement of a non-contractual promise. The object of avoiding detriment was claimed by Brennan J in *Waltons Stores* to allay concerns that 'a general application of the principle of equitable estoppel would make non-contractual promises enforceable as contractual promises'.[82] Dawson J in *Verwayen*, on the other hand, pointed out that when the requirement for a pre-existing contractual relationship for equitable estoppel was abandoned, 'the protection of the law of contract was seen to lie in the requirement of unconscionable conduct and the discretionary nature of the relief'.[83]

The fulfilment of assumptions is, however, at the forefront of the object of estoppel in pais in the following statement of Dixon J in *Thompson* v *Palmer*.[84] The statement was cited with approval in *Verwayen* as being 'equally applicable to common law estoppel and equitable estoppel':[85]

> The object of estoppel in pais is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment.[86]

As I will discuss in the third part of this article, it is when one considers the determination of relief that estoppel appears, according to some formulations, to be designed to fulfil expectations, rather than to relieve detriment. That is certainly the case in common law estoppel, where the effect of the estoppel is to hold the representor to the assumption adopted by the representee. It is also the case in certain formulations of the relief provided by equitable estoppel and a unified estoppel, which give the representee a prima facie right to have the relevant assumption made good.[87]

[80] Fuller and Purdue, op cit (fn 78) 73–5.
[81] (1990) 170 CLR 394, 501.
[82] (1988) 164 CLR 387, 423.
[83] (1990) 170 CLR 394, 455. Cf Deane J, 439–40, who appears to see the protection of contract as lying in the flexible nature of the relief and the fact that estoppel does not of itself provide an independent cause of action for compensatory damages for non-fulfilment of a promise.
[84] (1933) 49 CLR 507.
[85] (1990) 170 CLR 394, 453 per Dawson J. The statement was also cited at 438 per Deane J and at 471 per Toohey J.
[86] (1933) 49 CLR 507, 547. A similar purpose was articulated by Dixon J in *Grundt* v *Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674–5.
[87] See *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 441–3 per Deane J.

CONFLICTS BETWEEN THE COMPETING PURPOSES

As mentioned in the introduction to this article, there are several points in the operation of the doctrines of estoppel at which a choice is required between the three competing purposes. In this part of the article, three points of conflict will be examined. First, the requirement for proof of reliance will be considered. That examination highlights the tension between an unconscionability based approach and a reliance based approach. The second area of conflict which will be examined is the requirement that reliance, in order to found an estoppel, must be reasonable. That requirement, which is essentially reliance based, will be contrasted with the unconscionability based requirement in the United States that reliance must be reasonably expected by the promisor. Finally, the greatest conflict arises in the determination of relief. The examination of relief will show that relief can be determined on a detrimental reliance basis, an unconscionability basis or an expectation basis, but one of those bases must be preferred in order to provide a consistent approach to relief. I will argue that, for reasons of principle, policy and authority, a detrimental reliance basis should be preferred.

1. Proof of Reliance

The requirement for reliance in estoppel is effectively a requirement for a causal link between, on the one hand, the assumption induced by the representor's conduct and, on the other hand, the action taken by the representee and resulting detriment suffered. As Mason CJ said in *Verwayen*, 'the detriment must flow from the reliance upon the assumption'.[88] Clearly, it is not sufficient for the representee simply to prove that he or she took action after being induced to make the relevant assumption. The representee must prove that he or she took action because he or she was induced by the representor to make the relevant assumption. In many cases proving reliance will be a simple matter of the representee alleging that he or she took the action in question in reliance upon the assumption induced by the representor's conduct. There will often be no basis on which the representor can challenge such evidence and it will be accepted without more. In *Waltons Stores*, for example, the relevant evidence cited by Mason CJ and Wilson J was that given by Mr Maher that he would not have 'gone ahead and done the work' had he been aware of the true state of affairs.[89] Similarly, in *Verwayen*, Mason CJ found that 'there is no reason to doubt the respondent's assertion that he made the assumption and continued his action against the Commonwealth in reliance on it.'[90]

Of more interest in the context of this article, however, is the situation in which detrimental action is taken by a representee for a number of reasons, only one of which involves reliance upon the actions of the representor. The interesting issue is the approach which should be taken to proving that the

[88] Id 415.
[89] (1988) 164 CLR 387, 386.
[90] (1990) 170 CLR 394, 414.

reliance caused the detrimental conduct in question. Where more than one reason motivated the representee to take the relevant action or inaction, must the representee prove that reliance on the representor's conduct was a substantial motivation, or that, but for the conduct, the representee would not have acted to his or her detriment?

The extent to which the reliance must be causative has not been fully explored in Australia.[91] It has been observed by Robert Goff J in England, however, that if there are several reasons for the representee's detrimental actions, the relevant question is whether the representee's conduct 'was so influenced by the encouragement or representation ... that it would be unconscionable for the representor thereafter to enforce his strict legal rights.'[92] His Lordship's approach can be seen as unconscionability based, since it focuses on the extent to which the representor's conduct was influential, and tests that influence by reference to the representor's conscience. According to that approach, the court should look at the nature of the representor's conduct in order to determine whether the encouragement was causative.

While the nature of the representor's encouragement is clearly relevant to questions of the unconscionability of the representor's conduct, it is difficult to see what effect that has on the question of reliance. The extent of the influence is clearly an important question in such a case, and the conduct of the representor must clearly be disregarded if it is not sufficiently causative. But it is equally clear that the question of the causation of a representation must be concerned with the party taking action in reliance on that representation. Accordingly, attention should be focussed on the representee for that purpose, applying a 'but for'[93] or 'substantial motivation'[94] test from the perspective of the representee. Even if the prevention of unconscionable conduct is seen as the principal purpose of estoppel, it is difficult to see how notions of unconscionability can be relevant to the question of causation.

2. The 'Reasonableness' Requirement

The second area of tension between the purposes of estoppel is in the requirement which limits the availability of a plea of estoppel. There are two possible approaches to limiting the circumstances in which estoppel will be available. The limit which has been adopted in Australia requires that the assumption on which the estoppel is founded must be reasonably made, and reasonably relied upon, in order to form the basis of a plea of estoppel. An alternative is the requirement adopted in the United States that reliance must be reasonably expected by the promisor. The Australian 'reasonableness of reliance'

[91] For further discussion of the approach of the English courts to the question of reliance, see E Cooke, 'Reliance and Estoppel' (1995) 111 LQR 389.

[92] *Amalgamated Investment & Property Co Ltd* v *Texas Commerce International Bank Ltd* [1982] QB 84, 104.

[93] A 'but for' test would ask whether, but for the representor's conduct, the representee would have taken the relevant detrimental action.

[94] A 'substantial motivation' test would ask whether the representor's conduct was a substantial motivation for the representee's detrimental action when considered in the light of other motivating factors.

requirement is commonly justified on the basis that it is not unconscionable to depart from an assumption unless the assumption was reasonably adopted and reasonably relied upon.[95] In other words, it is justified as an unconscionability based requirement. In this part of the article, however, I will argue that the reasonableness of reliance requirement, given its focus on the representee, is in fact a reliance based requirement. The requirement adopted in the United States, being focussed on the representor's expectation of reliance, is a limit which is more consistent with an unconscionability basis.

(a) *Reasonableness of Reliance*

The reasonableness of reliance requirement in Anglo-Australian law appears to have its origins in the statement of Parke B in *Freeman* v *Cooke* that:

> If whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it as true, the party making the representation would be equally precluded from contesting its truth.[96]

Although the reasonableness requirement is clearly an important limit on the application of estoppel, it has not been the subject of a great deal of discussion in either recent cases or recent commentary in Australia.[97] In *Standard Chartered Bank Aust Ltd* v *Bank of China*, Giles J noted that the question of reasonableness was 'inherent in reliance, although not always enunciated'.[98] His Honour indicated in that judgment that there were two requirements: first, that it must be reasonable for the representee to adopt the assumption; and secondly, that it must be reasonable for the representee to act in reliance on the assumption.[99] Both requirements are evident in the passage of Parke B extracted above.[100]

Recent High Court authority for the existence of a reasonableness requirement is to be found in dicta in the judgments of Mason CJ and Wilson J in *Waltons Stores*,[101] in relation to equitable estoppel, and Deane J and Mason CJ in *Verwayen*,[102] in relation to a unified doctrine operating at law and in equity. The existence of the requirement was confirmed when it formed the

[95] *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 445 per Deane J; *Australian Securities Commission* v *Marlborough Gold Mines Pty Ltd* (1993) 177 CLR 485, 506 per Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ.

[96] (1848) 2 EX 654, 681; 154 ER 652, 663.

[97] Two exceptions are: Leopold, op cit (fn 33) 63–4; and A Robertson, 'The "Reasonableness" Requirement in Estoppel' (1994) 1 *Canberra Law Review* 231.

[98] (1991) 23 NSWLR 164, 180.

[99] Id 180–1.

[100] Quite a different requirement was put forward by Jordan CJ in *Franklin* v *Manufacturers Mutual Insurance Ltd* [1935] 36 SR (NSW) 76, 82:

> In order that [estoppel by representation] may arise, it is necessary that ... a representation of fact should be made ... in such circumstances that a reasonable man would regard himself as invited to act on it in a particular way.

[101] (1988) 164 CLR 387, 397, 403, 406.

[102] (1990) 170 CLR 394, 414 per Mason CJ, 445 per Deane J.

basis of the High Court's rejection of a plea of estoppel in its recent decision in *Australian Securities Commission* v *Marlborough Gold Mines Ltd.*[103]

The reasonableness requirement was explained by Deane J in *Verwayen* as being based on unconscionability:

> Ultimately, however, the question whether departure from the assumption would be unconscionable must be resolved ... by reference to all the circumstances of the case, including the reasonableness of the other party in acting upon the assumption.[104]

The relationship of the reasonableness requirement to unconscionability in equitable estoppel was confirmed by the High Court in *Australian Securities Commission* v *Marlborough Gold Mines Ltd.*[105] The relevant issue in that case was whether an equitable estoppel 'of the kind upheld in *Verwayen*'[106] arose where the Australian Securities Commission, having indicated that it would not oppose an application to approve a scheme of arrangement under s 411 of the Corporations Law, subsequently sought to oppose the application. The attitude of the Commission changed when it became aware of a decision of the Full Federal Court which indicated that the Corporations Law did not authorise the approval of the arrangement. In those circumstances, the High Court held that the Commission's departure from the position it had originally taken was 'neither "unjust" nor "unconscionable"', to use the expressions found in *Thompson* v *Palmer*[107] and *Verwayen*[108] because 'it would have been unreasonable for the Company to assume that the Commission would continue to maintain the same attitude once the [Full Federal Court's] interpretation of the [Corporations] Law came to its attention.'[109] Accordingly, the Court's decision seems to be based on the principle that it is not unconscionable for a representor to depart from an assumption in circumstances in which it was unreasonable for the representee to adopt that assumption.

As I will argue below, however, an inquiry into the reasonableness of the representee's reliance is not a good indicator of whether departure from the assumption in question would offend the conscience of the representor. An inquiry as to whether a reasonable person in the position of the representor would have expected reliance upon the relevant assumption is more directly concerned, although in an objective way, with the representor's conscience. Accordingly, a 'reasonable expectation' inquiry would seem to have more bearing on the question of whether it was or would be unconscionable for the representor to depart from that assumption.

[103] (1993) 177 CLR 485, 506 per Mason CJ and Brennan, Dawson, Toohey and Gaudron JJ.
[104] (1990) 170 CLR 394, 445.
[105] (1993) 177 CLR 485, 506 per Mason CJ and Brennan, Dawson, Toohey and Gaudron JJ. For a discussion of the decision and its consequences, see Robertson, op cit (fn 97).
[106] Ibid.
[107] (1933) 49 CLR 507, 547.
[108] (1990) 170 CLR 394, 410–11 per Mason CJ, 429 per Brennan J, 436 and 440–1 per Deane J, 453–4 per Dawson J, 500–1 per McHugh J.
[109] (1993) 177 CLR 485, 506.

(b) *Reasonable Expectation of Reliance*

In the United States, s 90(1) of the *Restatement of Contracts* (2d) provides that a voluntary promise is binding only if the promisor should reasonably expect the promise to induce action or forbearance on the part of the promisee.[110] The focus on the reasonable expectations of the promisor tends to indicate that s 90 is primarily concerned with the prevention of unconscionable conduct, rather than with the prevention of detriment. As I have argued in the second part of this article, the primary focus of an estoppel doctrine 'founded upon good conscience'[111] should be on the knowledge and conduct of the representor, while one based on the avoidance of detriment should primarily direct attention to the representee. Indeed, in *Waltons Stores*, Mason CJ and Wilson J examine the reasonable expectation requirement of s 90 and make the point that the requirement 'makes it clear that the promise is enforced in circumstances where departure from it is unconscionable.'[112]

The focus on the promisor can be contrasted with the requirement in Australia that reliance by the representee on the relevant assumption must be reasonable. In each case the state of mind, or the interpretation of events, of one of the parties is tested against objective standards; in Australia it is the state of mind of the representee and in the United States it is the state of mind of the representor. It is interesting to note that at least one American commentator, Melvin Eisenberg, has advocated the replacement of the present reasonable expectation requirement in s 90 with a requirement that the representee's reliance be reasonable.[113] Eisenberg has proposed that change on the ground that the reasonable reliance requirement

> is cleaner, does not embody a questionable distinction between donative promises as a class and those donative promises upon which reliance can reasonably be expected, and properly focuses attention on the reasonableness of the innocent promisee's reliance rather than on the contours of the promise breaker's expectation.[114]

The distinction between the two requirements has considerable significance in highlighting the fact that s 90, as presently drafted, does not have as its primary focus the prevention of detriment, as Yorio and Thel make clear:

> If the objective of Section 90 is to protect reliance, then reasonable reliance alone justifies a remedy. But if ... the goal of Section 90 is to enforce certain non bargain promises, it is critical to provide standards for determining which promises should be enforced.[115]

The contrast between an unconscionability based doctrine, and a requirement that the party injured as a result of that conduct act reasonably, was

[110] Restatement of Contracts (2d), s 90(1).
[111] *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 440 per Deane J.
[112] (1988) 164 CLR 387, 402.
[113] M Eisenberg 'Donative Promises' (1979) 47 *University of Chicago Law Review* 1, 20–2.
[114] Id 22.
[115] Yorio and Thel, op cit (fn 62) 124.

clearly appreciated by Paul Finn when he suggested that more attention should be paid to the question of whether a complainant takes reasonable steps to protect their own interests:

> Unconscionability based doctrines are now being used to thwart exploitative conduct. But, as their reach is extended, we must inevitably confront the question of the level of responsibility a complainant must have to take reasonable steps to protect his or her own interests or else suffer the consequences of a failure to do so.[116]

The Australian 'reasonableness of reliance' requirement ensures that estoppel only protects reliance which is reasonable, and only protects against detriment which is suffered as a result of reasonable changes of position. That test focuses on the matrix of circumstances as seen from the perspective of a reasonable person in the position of the party claiming the benefit of the estoppel. The s 90 reasonable expectation test, on the other hand, is concerned with the perspective of the representor, and the expectations of a reasonable person in that position. Both requirements serve to limit the circumstances in which an estoppel claim will be available; but the American test is conscience based, while the Australian test is reliance based.

3. The Determination of Relief

The three purposes outlined in the second part of this article conflict most clearly in determining the relief which is provided to give effect to an estoppel. The nature of the remedies provided by estoppel can be compared with the measure of damages awarded for breach of contract. In the United States, commentators regularly compare the two remedies, although in those jurisdictions the comparison is more direct, since s 90 estoppel applies only to promises, and the effect of a successful plea of s 90 estoppel is that the promise can be enforced. The remedy provided to give effect to estoppel can, like contractual remedies, protect the reliance interest or the expectation interest of the representee. When the remedy has the effect of making good the representee's assumption, the courts protect his or her expectation interest as well as his or her reliance interest. Remedies such as specific performance of a contract, damages in lieu of specific performance, or an order for the transfer of a promised interest in land will have that effect. When the courts limit the remedy to preventing or reversing the detriment suffered by the representor as a result of acting on the assumption, then the remedy does not extend to the loss of the assumption itself. In other words, the representor is not compensated for the loss of an expectation. A good example of such a remedy is that proposed by Brennan and McHugh JJ in *Verwayen*, for the payment by the defendant of fair compensation for the detriment suffered by the plaintiff.[117]

It is instructive to examine in turn the approaches to relief in common law estoppel, equitable estoppel and a unified estoppel.

[116] Finn, op cit (fn 6) 45.
[117] (1990) 170 CLR 394, 431 per Brennan J, 504 per McHugh J.

(a) *Common Law Estoppel*

The remedy provided by common law estoppel is clearly an expectation based remedy. It does not operate by reference to the detriment suffered in reliance on the relevant assumption and is not concerned with notions of unconscionability. According to Brennan J in *Waltons Stores*, 'the effect of an estoppel in pais ... is to establish the state of affairs by reference to which the legal relationship between [the parties] is ascertained'.[118] In *Verwayen*, Mason CJ explained why common law estoppel had, or has, that effect:

> Being an evidentiary principle, estoppel by conduct achieved, and could only achieve, the object of avoiding the detriment which would be suffered by another in the event of departure from the assumed state of affairs by holding the party estopped to that state of affairs.[119]

Although the avoidance of detriment has for quite some time been seen as the 'basal purpose' of the common law doctrine of estoppel,[120] the remedy provided is less than precise in its fulfilment of that purpose. Common law estoppel operates to avoid detriment by preventing the estopped party from departing from the relevant assumption or compelling that party to adhere to it.[121] That purpose could, of course, be fulfilled more precisely by providing a remedy which serves only to prevent or reverse the detriment suffered by the representee. If the prevention of detriment is the purpose of common law estoppel, then that purpose is fulfilled in an unnecessarily oblique manner by making good the relevant assumption.

Mark Lunney has claimed that the result of the 'all or nothing'[122] nature of common law estoppel is that 'the party misled may recover more than the actual loss suffered by that party.'[123] That argument assumes, however, that 'actual loss' is limited to reliance loss and does not include the loss of an expectation. The remedy provided by common law estoppel simply protects the representee's expectation loss as well as his or her reliance loss. That loss is no less 'actual' in the case of estoppel than in the case of a breach of contract, but a number of policy reasons have been advanced for protecting against expectation loss only in the case of a breach of contract.[124]

As the analysis of Dawson J in *Verwayen* makes clear,[125] it is for historical, rather than practical, reasons that the aim of common law estoppel has been pursued by the 'crude expedient'[126] of fulfilling the relevant assumption. Given that common law estoppel seems to be likely to be subsumed by equitable estoppel or a unified doctrine in the near future, however, it seems unlikely that either the operation of, or the remedy provided by, that doctrine

[118] (1988) 164 CLR 387, 414.
[119] *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 411 per Mason CJ.
[120] *Grundt* v *Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674 per Dixon J.
[121] Ibid.
[122] *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 454 per Dawson J.
[123] Lunney, op cit (fn 4) 241, citing *Greenwood* v *Martin's Bank Ltd* [1932] 1 KB 371; and *Avon County Council* v *Howlett* [1983] 1 All ER 1073.
[124] See Fuller and Purdue, op cit (fn 78) 57–71.
[125] (1990) 170 CLR 394, 453–4. See also Lunney op cit (fn 4), 241–2.
[126] Finn, op cit (fn 70) 91.

will change. More important questions arise in relation to the suitability of the remedy provided by equitable estoppel, and the remedy which is likely to be provided by a unified doctrine.

(b) *Equitable Estoppel*

Since equitable estoppel has had a substantive, rather than evidentiary, operation, the courts have been afforded more flexibility in providing relief. Rather than the estoppel 'establish[ing] the state of affairs by reference to which the legal relationship between [the parties] is ascertained',[127] equitable estoppel raises an equity in favour of the representee. According to the judgment of Scarman LJ in *Crabb* v *Arun District Council*,[128] having established that an equity has arisen by way of estoppel, the court must determine the extent of the equity, and the relief appropriate to satisfy the equity. The High Court in *Verwayen* was unanimous in recognising the flexible nature of the relief provided by equitable estoppel.[129]

The exercise of that flexibility can, however, be approached in at least three ways. The first, detrimental reliance based, approach sets out only to prevent the representee from suffering detriment as a result of his or her reliance, and to reverse any such detriment which has been suffered. The second, expectation based, approach allows the representee a prima facie right to relief based on the assumed state of affairs. The third, unconscionability based, approach determines relief by reference to the reprehensibility of the representor's conduct.

(i) *Relief based on detrimental reliance*

The first approach is that the court should seek to provide a remedy which operates only to reverse the detriment suffered by the representee, and not to fulfil his or her expectation. The object of that approach was outlined by Brennan J in *Waltons Stores* v *Maher*:

> The object of the equity [created by equitable estoppel] is not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or to abstain from acting thereon.[130]

The approach articulated by Brennan J in *Waltons Stores*,[131] was based on the statement of Scarman LJ in *Crabb* v *Arun District Council*[132] that the court must give effect to 'the minimum equity necessary to do justice' to the representee. Accordingly, the assumption adopted by the representee should only be made good if it is necessary to do so in order to avoid the suffering of

[127] *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, 414 per Brennan J.
[128] [1976] Ch 179, 192–3.
[129] (1990) 170 CLR 394, 411–12 per Mason CJ, 429 per Brennan J, 439, 442 per Deane J, 444 per Dawson J, 475 per Toohey J, 487 per Gaudron J, 501 per McHugh J.
[130] (1988) 164 CLR 387, 423.
[131] Id 427.
[132] [1976] Ch 179, 198.

detriment by the representee as a result of reliance on the representation. The approach found support in the judgments of Mason CJ[133] and Brennan,[134] Dawson,[135] Toohey[136] and McHugh JJ[137] in *Verwayen*.[138]

The leading judgment on the detriment based approach to relief is that of Brennan J in *Verwayen*. His honour held that giving effect to the minimum equity means providing relief which has the effect of avoiding the 'relevant detriment' suffered by the representor:[139]

> The relevant detriment in a case of equitable estoppel is detriment occasioned by reliance on a promise, that is, detriment occasioned by acting or abstaining from acting on the faith of a promise that is not fulfilled. The relevant detriment does not consist in a loss attributable merely to non-fulfilment of a promise.[140]

In the nomenclature of Fuller and Purdue, the relevant detriment is the representee's reliance loss, and does not include his or her expectation loss.[141]

The approach taken by Brennan J is consistent with the interpretation of Scarman LJ's remarks by the authors of *Cases and Materials on Equity and Trusts*[142] as requiring that the remedy granted protects the representee's detriment, rather than make good his or her expectation, unless the expectation is of less value than the detriment[143] or special circumstances require an expectation remedy rather than a detriment remedy.[144] Those authors clearly consider that 'detriment' consists of reliance loss only, and does not extend to the loss of an expectation.

A reliance based approach, therefore, takes the representee's detriment as a starting point for the determination of relief. Expectation relief is only granted where 'the minimum equity will not be satisfied by anything short of enforcing the promise',[145] or, in other words, 'as a means of avoiding the

[133] (1990) 170 CLR 394, 411. Although the Chief Justice ultimately applied a unified estoppel, his Honour supported this approach to relief in the application of the equitable doctrine.

[134] Id 429.

[135] Although Dawson J awarded relief based on the assumed state of affairs on the basis that 'the equity raised by the appellant's conduct was such ... that it could only be accounted for by the fulfilment of the assumption upon which the respondent's actions were based', 462, his Honour agreed, at 454, with Brennan J's observations in *Waltons Stores (Interstate) Ltd* v *Maher* that the object of the equity is 'not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or abstain from acting thereon': (1988) 164 CLR 387, 423.

[136] Id 475.

[137] Id 500–1, 504.

[138] The approach was followed by Ormiston J in *Commonweath* v *Clark* [1994] 2 VR 333, 383 on the basis that it was favoured by at least five members of the High Court in *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394; and was consistent with the judgments in *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387.

[139] Id 429.

[140] Ibid.

[141] Fuller and Purdue, op cit (fn 78) 54.

[142] J Heydon, W Gummow and R Austin, *Cases and Materials on Equity and Trusts* (4th ed) 421.

[143] As in *Crabb* v *Arun District Council* [1976] Ch 179.

[144] As in *Pascoe* v *Turner* [1979] 2 All ER 945.

[145] *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 429 per Brennan J.

detriment and only to the extent necessary to achieve that object.'[146] That approach to the fulfilment of assumptions is consistent with Fuller and Purdue's remarks on the occasional coincidence between protection of the reliance and expectation interests.[147] If the court sets out to provide a remedy which protects reliance only, in some cases that remedy will coincidently provide expectation relief. That approach is similar to that provided in the United States. Under s 90 of the *Restatement of Contracts* (2d), the promise is binding if injustice can be avoided only by enforcement of the promise.

Interestingly, the remedy advocated by Brennan J is said to be shaped by unconscionability.[148] The justification for equity's limited relief is that equity yields a remedy to prevent unconscionable conduct[149] and, once the detriment has ceased or been paid for, there is nothing unconscionable in a representor insisting on reverting to his or her former relationship with the representee and enforcing his or her strict legal rights.[150] Therefore, 'in moulding its decree, the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct.'[151]

The relief is, however, determined solely by reference to the detriment suffered by the representee, and does not depend on any question of the representor's knowledge of that detriment. In determining the nature of the relief required, the focus of the inquiry is the position of the representee. That focus on the representee illustrates that, although the 'minimum equity' principle may have its basis in the prevention of unconscionable conduct, the nature of the relief is determined by reference to detrimental reliance, rather than by reference to unconscionability. It is perhaps more accurate to say that the remedy is shaped by reference to detrimental reliance, rather than unconscionability.

The approach taken by Ormiston J in the Victorian Full Court's decision in *Commonwealth* v *Clark* provides a good illustration of the relationship of unconscionability to detrimental reliance in the determination of relief. His Honour's discussion of relief appeared under the heading, 'Unconscionability' and was concerned with 'the test as to unconscionability'.[152] Nevertheless, the nature of the relief granted was determined by reference to the detriment suffered or likely to be suffered by the representee, rather than by reference to the conduct or knowledge of the representor.[153]

The facts of that case were, for present purposes, almost identical to those in *Verwayen*. A significant difference was that, in *Clark*, there was clear evidence of the detriment which the plaintiff would suffer, as a result of his reliance on the relevant assumption, if the Commonwealth did not adhere to it. Ormiston J, with whom Fullagar J agreed, accepted that the equity raised by estoppel 'is designed primarily to avoid the detriment which the court sees as likely to

[146] *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, 427 per Brennan J.
[147] Fuller and Purdue, op cit (fn 78) 73–5.
[148] *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, 419.
[149] *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 428–9 per Brennan J.
[150] Id 501 per McHugh J.
[151] Ibid.
[152] [1994] 2 VR 333, 381.
[153] Id 384.

flow from the non-fulfilment of the assumption.'[154] Nevertheless, his Honour held the Commonwealth to the assumption which it had induced because of the uncertainty as to the extent of detriment which would otherwise be suffered.[155] On that basis, Ormiston J reached the conclusion that it would be unconscionable not to hold the Commonwealth to the relevant assumption. The remedy in that case was based on relieving detriment, but was justified by reference to unconscionability.

(ii) *Expectation based relief*

A second approach to relief in equitable estoppel entitles the representee to a remedy based on the assumed state of affairs, unless that would cause injustice to the representor. In *Verwayen*, that approach was favoured by Deane J,[156] with the possible support of Gaudron J.[157] Deane J regarded equitable principles as entitling the representee to relief based on the assumed state of affairs unless 'the circumstances are such that it would represent a denial rather than a vindication of equity to preclude any departure at all from the assumed state of affairs.'[158] In other words, the representee has a prima facie right to have the assumption made good. Such an approach, which sets out to provide expectation based relief, is clearly capable of yielding considerably different results to one which sets out only to relieve detriment.

The contrast is exemplified by the approaches of Deane and McHugh JJ in *Verwayen*. Deane J found that Mr Verwayen's prima facie right to have his assumption made good was not displaced. His Honour found that the relevant detriment to Mr Verwayen was 'of such a nature and extent that it cannot properly be said that it exceeds the requirements of good conscience or is unjust to the Commonwealth to hold it to the assumed state of affairs'.[159] Accordingly, the Commonwealth was held to that assumed state of affairs. McHugh J, on the other hand, would not have granted expectation based relief if he had been satisfied that Mr Verwayen had suffered worry and stress as a result of his reliance on the Commonwealth's representations. His Honour said in obiter that:

[154] Id 383. Ormiston J felt bound to adopt such an approach on the basis that it was favoured by at least five members of the High Court in *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394.

[155] Id 383–4.

[156] (1990) 170 CLR 394, 439. Although Deane J ultimately applied a unified doctrine, his Honour's remarks were clearly made in relation to the relief provided in equity. In *Commonwealth* v *Clark* [1994] VR 333, 383, Ormiston J was 'inclined to favour Deane J's analysis in that it would more evenly place the competing considerations on the scales'.

[157] Gaudron J's approach, in *The Commonwealth of Australia* v *Verwayen* 170 CLR 394, 487, differed slightly from that of Deane J and was concerned with the 'substantive doctrine of estoppel', and not specifically with equitable estoppel. Her Honour's approach is discussed below, under the heading, 'A unified estoppel'.

[158] Id 439.

[159] Id 449.

> Even if the plaintiff had sought to make out a case along these lines, his equity would be satisfied by an award of compensation for that additional worry and stress and would not require that the Commonwealth be estopped from relying on the Limitation Act.[160]

In each case, the prima facie position was not displaced and, consequently, would have determined the nature of the remedy.

(iii) *Unconscionability based relief*

In an essay written prior to the High Court's decision in *Waltons Stores*, Paul Finn outlined an unconscionability based approach to relief in equitable estoppel.[161] Finn argued that the suggestion that giving effect to the minimum equity means preventing or reversing detriment ignores the fact that, in moulding relief, the courts have regard to the conduct of the representor, in addition to concerns with the detriment suffered by the representee.[162] According to Finn, therefore, the question of remedy revolves around 'what, in the circumstances it would be unconscionable for the [representor] to insist upon given the responsibility he bears in or for the [representee's] actions.'[163]

On that basis, Finn made some 'tentative suggestions' to explain the granting of relief, which divided the cases into three categories, essentially on the basis of the extent of the representor's responsibility for the assumption adopted by the representee. So, if the representor positively encourages the adoption of the assumption, according to Finn, the assumption should be made good. Where the representor stands by with knowledge of the mistaken assumption, the court's concern should be to ensure that the representor does not obtain any benefit from the representee's actions. Thirdly, where the representor encourages the representee to believe that certain rights of the representor will not be exercised, then the court should be concerned to impose terms which will allow the representor to insist on those rights, while preventing any disadvantage accruing to the representee.[164]

Finn's approach was clearly based primarily on the proprietary estoppel cases, and could not have anticipated the direction which the High Court was to take to equitable estoppel in *Waltons Stores* and *Verwayen*. The approaches taken to relief in those cases, as outlined above, indicate that any reference to unconscionability in the determination of relief is a reference to the unfairness of departing from an assumption where to do so would cause detriment to the representee.[165] Unconscionability has not been used, as Finn proposed, in shaping relief by reference to the reprehensibility of the representor's

[160] Id 504.
[161] Finn, op cit (fn 70), 90–3.
[162] Id 91–2.
[163] Id 92.
[164] Id 92–3.
[165] *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, 423 per Brennan J; *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 411 per Mason CJ, 428–9 per Brennan J, 501 per McHugh J.

conduct.[166] Nevertheless, Finn's analysis is interesting because, rather than justifying a detrimental reliance based approach to relief on the basis of unconscionability, it suggests an approach which actually determines relief by reference to unconscionability.

(c) *A Unified Estoppel*

The major difference between the supporters of a unified estoppel in *Verwayen* arose in relation to the nature of the relief which should be provided by the unified doctrine. Essentially, the difference is whether the relief provided by the unified doctrine should be detrimental reliance based, providing relief which sets out to relieve detriment, or expectation based, providing a prima facie right to have the relevant assumption made good.

Mason CJ in *Verwayen* favoured a unified doctrine which operates in much the same way as the first approach to equitable estoppel outlined above. According to the Chief Justice, a central element of the unified doctrine of estoppel is that:

> There must be a proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and unjust to insist upon a disproportionate making good of the assumption.[167]

The Chief Justice made it clear that 'doing justice' in this context means protecting only against the representee's reliance loss. In distinguishing between detriment in the broad sense (detriment which flows from the denial of the correctness of the assumption induced by the representor) and detriment in the narrow sense (detriment which flows from the representee's change of position), Mason CJ made it clear that 'the detriment against which the law protects is that which flows from reliance upon the deserted assumption'.[168]

The other supporters of a unified estoppel in *Verwayen*, Deane and Gaudron JJ, on the other hand, saw the unified estoppel as operating primarily to fulfil expectations. According to Deane J, the doctrine operates by making good the relevant assumption unless to do so would 'exceed what could be justified by the requirements of good conscience and would be unjust to the estopped party.'[169] Gaudron J's approach differed slightly from that of Deane J. Although her Honour noted her agreement with Mason CJ that 'the substantive doctrine of estoppel permits a court to do what is required to avoid detriment and does not, in every case, require the making good of the assumption', Gaudron J considered that 'it may be that an assumption should

[166] It should be noted that an unconscionability based approach to relief has been advocated by at least one author since *Verwayen*. Leopold, op cit (fn 33) 59 suggested that a more extensive remedy should be given in cases of 'extreme unconscionability', such as where the encouragement offered by the representor is extensive and of lengthy duration.

[167] (1990) 170 CLR 394, 413.

[168] (1990) 170 CLR 394, 415–16: 'So, while detriment in the broad sense is required to found an estoppel, ... the law provides a remedy which will often be closer in scope to the detriment suffered in the narrower sense.'

[169] Id 445–6.

be made good unless it is clear that no detriment will be suffered other than that which can be compensated by some other remedy.'[170]

Although both Gaudron and Deane JJ saw the representee as having a prima facie right to have the assumption made good, there was a difference between them as to the circumstances in which that right would be lost. On Gaudron J's view, the prima facie right could be lost if the representor could prove that another remedy would clearly compensate the representor for all of the detriment suffered. Deane J, on the other hand, would focus on the representor. His Honour would overturn the prima facie right only if to do so would be 'inequitably harsh'[171] for the representor.

(d) *Resolving the Differences*

The difference of opinion as to remedy is a major obstacle facing proponents of a unified estoppel, but can be resolved by reference to the essential purpose of the doctrine. If the object of the unified doctrine is to provide protection against detrimental reliance, then the remedy proposed by Mason CJ is more apt to fulfil that purpose. The detriment itself must be the focus of the court's inquiry, and the starting point in the determination of relief.

If, on the other hand, the guiding objective of estoppel is the prevention of unconscionable conduct, then the relief granted ought to be consistent with that objective. The proposals outlined by Finn formed an approach to relief which focuses on the conscience of the representor, essentially determining the extent of the relief by the blameworthiness of the representor's conduct. A difficulty with that approach is the argument that assuaging that representor's conscience requires only that the representor does not insist on an unconscionable insistence upon rights. The representor's conscience, therefore, does not provide any real guidance as to whether the courts should provide reliance or expectation relief. Despite the support given to such an approach since *Waltons Stores* and *Verwayen*,[172] an approach to relief based on conscience would require a significant departure from the direction taken in those cases, which clearly favours a reliance based approach. It is also inconsistent with the reliance based reasonableness requirement discussed above.

Finally, if the object of estoppel is the fulfilment of assumptions, then the approach favoured by Deane J and Gaudron J is most apt to fulfil that purpose. That approach would require the representor to make good the relevant assumption unless to do so would cause injustice to the representor or unless it was clear that the detriment could be avoided in some other way. Against such an approach are, first, the policy considerations advanced by Fuller and Purdue in favour of restricting expectation relief to situations where the parties

[170] Id 487.
[171] Id 443.
[172] Leopold, op cit (fn 33) 59.

have entered into binding contracts,[173] and, secondly, the fact that a reliance based approach to relief in equity had clear majority support in the High Court in *Verwayen*.[174]

CONCLUSION

As Fuller and Purdue pointed out in relation to promissory estoppel in the United States almost sixty years ago, 'by leaving the matter of the controlling motive in this ambiguous state, we have unsettled questions of very considerable practical importance.'[175] Since the controlling motive of estoppel is still in an ambiguous state in Australia, three principal areas of conflict between the competing motives remain.

The first area of conflict is in the test for determining whether the conduct of the representor caused the representee to adopt, and act upon the relevant assumption. The test suggested by Robert Goff J in *Amalgamated Investment & Property Co Ltd* v *Texas Commerce International Bank Ltd*[176] determines questions of causation by reference to the conscience of the representor. Given that it is the representee's adoption of the assumption which is in question, it would seem more appropriate to determine such questions by tests which focus on the representee's reliance.

The requirement that the representee's reliance must be reasonable strongly indicates a focus upon the representee's reliance, rather than the representor's conscience. If, contrary to the arguments presented in this article, estoppel is truly conscience based, then the 'reasonable expectation' test pursued under s 90 of the *Restatement of Contracts* (2d) in the United States would seem to be more apposite.

The most serious difficulty is in the area of the remedy to be granted in the case of equitable estoppel and a unified estoppel. The remedy could proceed on a detrimental reliance basis[177] (dependant upon the extent of detriment suffered in reliance); on an unconscionability basis[178] (dependant upon the reprehensibility of the representor's conduct); or on an expectation basis[179] (through a prima facie right to expectation relief). As I have argued above, the determination of relief on a detrimental reliance basis is justified on the bases of principle, policy and authority.

[173] Fuller and Purdue, op cit (fn 78) 57–71.

[174] (1990) 170 CLR 394, 411 per Mason CJ, 429 per Brennan J, 454 per Dawson J, 475 per Toohey J, 500–1 per McHugh J. The approach was followed by a majority of the Victorian Court of Appeal in *Commonwealth* v *Clark* [1994] 2 VR 333, 383–4 per Ormiston J, with whom Fullagar J agreed.

[175] Fuller and Purdue, op cit (fn 78) 69.

[176] [1982] QB 84.

[177] As advocated in *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 415–17 per Mason CJ, 429–30 per Brennan J, 454 per Dawson J, 475 per Toohey J, 500–1 per McHugh J.

[178] As advocated by Finn, op cit (fn 70) 90–3; and Leopold, op cit (fn 33) 59.

[179] As advocated in *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, 441–3 per Deane J, 487 per Gaudron J.

If the doctrines of estoppel are seen to be based on protecting against detriment resulting from reliance, then the ambiguities can be readily resolved. Causation should clearly be determined by an examination of the representee's reliance, the reasonableness of reliance test can legitimately be retained, and relief can properly be determined by reference to detrimental reliance. That resolution of the basal purpose of estoppel would lend a unity of principle to the various doctrines which would, perhaps, facilitate the transition to a unified estoppel.