REASONABLE RELIANCE IN ESTOPPEL BY CONDUCT

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The basis on which an estoppel by conduct is established is a keenly debated question. Theories based on promise and conscience have recently been propounded in the literature: Michael Pratt has argued that equitable estoppel must be based on promise,[1] while Michael Spence has argued that the central criterion of estoppel by conduct is unconscionable conduct.[2] In advancing these promise and conscience-based theories, both Pratt and Spence have questioned the importance of establishing reasonable reliance, which is at the heart of the reliance-based model of estoppel. The aim of this article is to explore the nature of the requirement of reasonable reliance, and the role it plays in common law and equitable estoppel. This article helps to define the reliance-based theory of estoppel, which is based on the idea that the founding principle of estoppel by conduct, and the essential element in the establishment of an estoppel, is reasonable reliance.

In order to consider the foundation of estoppel by conduct, it is necessary to start with the elements by which an estoppel is established.[3] An estoppel by conduct arises where one person (the representor) induces another (the representee) to adopt and act upon an assumption of fact (common law estoppel) or an assumption as to the future conduct of the representor (equitable

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1 M Pratt, "Defeating Reasonable Reliance" (2000) 18 *University of Tasmania Law Review* 181.

2 M Spence, *Protecting Reliance*, Hart (1999).

3 These elements emerge from the judgments in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 384 ("*Waltons Stores*") and *Commonwealth v Verwayen* (1990) 170 CLR 394 ("*Verwayen*").

estoppel).[4] An estoppel will only arise where the representee has acted on the assumption in such a way that he or she will suffer detriment if the representor acts inconsistently with the assumption. At common law, the estoppel prevents the representor from denying the truth of the assumption in litigation between the parties, so the rights of the parties are determined by reference to the assumed state of affairs. In equity, the estoppel prevents the representor from acting inconsistently with the assumption, without taking steps to ensure that the departure does not cause harm to the representee. Those steps might include compensating the representee for any financial loss, or giving the representee reasonable notice of the intention to depart from the assumption, so that the representee can resume his or her original position. If the representor acts inconsistently with the assumption without taking any such steps, then the court must fashion relief by which to give effect to the estoppel.

In determining whether an estoppel has arisen, three essential elements must be established: an induced assumption, detrimental reliance and reasonableness. A fourth element, unconscionability may also be required. The threshold issue is a factual question, albeit one that necessarily involves a value judgment:[5] did the representor cause the representee to adopt the assumption on which the estoppel is based? Detrimental reliance also involves a factual question: did the representee act on the assumption in such a way that he or she will suffer detriment if the assumption is not adhered to? The requirement of reasonableness is more complex. It raises for consideration issues of the blameworthiness of the conduct of the representor and the representee, and whether the representee's reliance should be protected in the circumstances. The requirement that it must be unconscionable or unjust for the representor to depart from the assumption adds very little to the other three elements. It can be argued that all it adds is a requirement that, in cases where the assumption is induced by silence, the representor must reasonably expect reliance.[6]

Whether under the guise of reasonableness or the unconscionability requirement, the court must make a normative judgment about the limits of estoppel. The question which must be answered is whether the representee's reliance in a given situation should be protected, given the circumstances in which the assumption was adopted and the circumstances and nature of the action taken in reliance on that assumption. There are two normative questions here which are really two sides of the same coin. The first is: does the representor deserve blame? In other words, should responsibility for the representee's loss be attributed to the representor? The second normative question is: does the representee deserve protection? In other words, should the representee bear responsibility for his or her own loss? Each of those questions requires the court to make a judgment about 'acceptable' standards of behaviour,

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4 An assumption as to the legal rights of the representee can give rise to either form of estoppel by conduct, but is more likely to give rise to an equitable estoppel; see A Robertson, "Estoppel by Conduct: Unresolved Issues at Common Law And in Equity" [1999] *National Law Review* 7 at [46]-[49].

5 See *March v E & M H Stramere Pty Ltd* (1991) 171 CLR 506 at 515, per Mason J.

6 A Robertson, "Knowledge and Unconscionability in a Unified Estoppel" (1998) 24 *Monash University Law Review* 115.

whether for those engaging in conduct which might be relied upon, or for those relying on the conduct of others.

Reasonable reliance is the core of the reliance-based model of estoppel by conduct. The question of what the 'reasonableness' inquiry involves is, therefore, of central importance to the reliance-based model and is the principal concern this article. The role and nature of the reasonableness requirement can only be understood, however, in light of the threshold requirement, since the threshold requirement provides an alternative basis on which to limit the availability of an estoppel. Accordingly, the threshold requirement will be examined in the first part of this article, and the reasonableness requirement in the second.

I. THE THRESHOLD REQUIREMENT

The starting point in establishing an estoppel by conduct is that the representee must show that he or she was induced by the conduct of the representor to adopt an assumption. The threshold for a doctrine of estoppel could be formulated in two ways: either by emphasising the type of conduct engaged in by the representor, or by emphasising the effect of the representor's conduct on the representee. The former approach requires that the representor has made a promise or a representation, while the latter requires only that the representee has been induced to adopt an assumption as to some fact or future matter. The distinction between the two is only slight in practical terms, perhaps having some effect at the margins, but is important philosophically, helping us to determine whether the doctrine is essentially concerned with the conduct of the representor or the plight of the representee.

A. The 'Induced Assumptions' Requirement

In Australia, it is very clear that the weaker 'induced assumptions' approach dominates the cases, both at common law and in equity. Although the language of representations had been used in earlier decisions of the Privy Council[7] and the House of Lords,[8] in his leading judgments of the 1930s, Dixon J consistently described both the object of estoppel *in pais* and its operation in terms of one person being induced to adopt an assumption by another.[9] While there have been occasions on which a higher threshold has been applied,[10] the weak threshold articulated by Dixon J has dominated not only the cases at common law, but also

7 *Sarat Chunder Dey v Gopal Chunder Laha* (1892) 19 LR Ind App 203 at 215.

8 *Greenwood v Martins Bank Ltd* [1933] AC 51 at 57, per Lord Tomlin.

9 *Thompson v Palmer* (1933) 49 CLR 507 at 547, per Dixon J; *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723 at 734-5, per Rich, Dixon and Evatt JJ; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641. Compare the approach of Starke J in *Newbon* (1935) 52 CLR 723 at 738.

10 See, for example, *Legione v Hateley* (1983) 152 CLR 406 at 438-9; *Foran v Wight* (1989) 168 CLR 385 at 411-2, per Mason CJ; at 435-6, per Deane J; at 449, per Dawson J; *Commonwealth v Verwayen* note 3 *supra* at 423, 429-30, per Brennan J.

those in equity. In *Waltons Stores* all varieties of estoppel applied by members of the High Court: equitable estoppel,[11] a unified doctrine[12] and common law estoppel,[13] were based on a threshold requirement that the representee must have been induced by the representor's conduct to adopt a relevant assumption. In *Commonwealth v Verwayen*, the induced assumptions approach also dominated.[14]

As Kevin Lingren has noted, this movement towards a foundation for estoppel which requires an assumption, rather than a particular type of conduct on the part of the representor, has a tendency towards unifying the various types of estoppel operating at common law.[15] Equally, it can be said that the movement has a tendency towards unifying common law and equitable estoppel, since it renders less important the distinction between promissory conduct and representational conduct. After *Waltons Stores* and *Verwayen*, it is clear that both the equitable and common law doctrines are founded on the adoption of an assumption by the representee, rather than on a particular type of conduct being engaged in by the representor.[16]

B. The Significance of the Distinction

The High Court's decision in *Legione v Hateley*[17] provides a good illustration of the significance of the distinction between the two approaches to the threshold requirement, because the choice between an assumption-based approach and a representation-based approach may well have affected the result in that case. The former approach was adopted by Gibbs CJ and Murphy J, who found that an estoppel did arise, while the latter was followed by Mason and Deane JJ, who held that no estoppel arose. The case concerned a contract for the sale of land. The purchasers failed to complete the purchase on the due date. The vendors then served a notice of intention to rescind the agreement if the purchase was not completed by 10 August. On 9 August, the purchasers' solicitor telephoned the vendors' solicitors and informed a Miss Williams, the secretary dealing with the matter, that the purchasers would be able to complete the purchase on 17 August. Miss Williams responded that she thought that would be all right, but would have to get instructions. As a consequence of that assurance, the purchasers did not attempt to tender the purchase price before the notice of rescission expired. The relevant issue for the court was whether an estoppel arose which prevented the

11 *Waltons Stores*, note 3 *supra* at 458-63, per Gaudron J; at 397-9, per Mason CJ and Wilson J; at 413, per Brennan J.

12 *Ibid* at 444-52, per Deane J.

13 *Ibid* at 407, per Mason CJ and Wilson J; at 428-9, per Brennan J.

14 *Verwayen*, note 3 *supra* at 413-7, per Mason CJ; at 444-9, per Deane J; at 453-60, per Dawson J; at 500-2, per McHugh J. Justice Brennan, at 423-30, discussed equitable estoppel exclusively in terms of representations, in contrast to the approach he adopted in *Waltons Stores*.

15 K Lindgren, "Estoppel in Contract" (1989) 12 *UNSWLJ* 153 at 156.

16 The position may be different in England. In *Sledmore v Dalby* (1996) 72 P & CR 196 at 207, Hobhouse LJ suggested that the emphasis in estoppel by representation is on the representation, which must be clear and unequivocal, and "provided there is reliance, the detriment element may be limited". In proprietary estoppel, he suggested, the emphasis is the other way around, and while the detriment "must be distinct and substantial", the conduct of the representor "may be no more than acquiescence".

17 Note 10 *supra* at 421, per Gibbs CJ and Murphy J.

vendors from insisting on the deadline and thus treating the contract as rescinded on 11 August.

Chief Justice Gibbs and Murphy J did not require a particular type of conduct on the part of the representor, but held that an estoppel would arise if it were established that Miss Williams, by saying she would get instructions, had induced the purchasers' solicitors to believe that the vendors' right to rescind the contract would be kept in abeyance until instructions were obtained.[18] The threshold question for the establishment of the estoppel was not whether the representor had made a promise or a representation, but whether the representor's conduct had led the representee to believe that some right of the representor's would not be enforced. Chief Justice Gibbs and Murphy J found that that such a belief had been induced by Miss Williams' conduct, and the purchasers had altered their position on the faith of that belief by failing to tender the purchase moneys, which were available on 9 August.[19] Accordingly, they would have held that the vendors were estopped from treating the contract as rescinded.[20]

Although Mason and Deane JJ quoted liberally from the judgments of Dixon J in *Thompson v Palmer* and *Grundt v Great Boulder Pty Gold Mines Ltd*, the principle of promissory estoppel which they applied was not based on the 'induced assumptions' approach laid down by Dixon J in those cases. Instead, Mason and Deane JJ held that a promissory estoppel could only result from a clear representation made by the representor as to his or her future conduct.[21] They found that Miss Williams did not, by her words or conduct, make any clear and unequivocal representation to the effect that the purchasers could disregard the time fixed by the notice of rescission.[22] Accordingly, no estoppel arose against the vendors, despite the finding that the purchasers had acted to their detriment on the faith of Miss Williams' representation.[23] The fifth member of the Court, Brennan J, held that the vendors' solicitors had no actual or implied authority to vary the effect of the notice of intention to rescind, and thus could not extend the time for completion. Since the purchasers' solicitors must be taken to have known of the limit of Miss Williams' authority, no promise or representation that the time for completion was to be extended could be inferred from Miss Williams' conduct.[24] The finding that no estoppel arose thus commanded a majority.

The difference between the conclusions reached by the minority and majority judges in *Legione v Hateley* appears to be entirely attributable to the differing

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18 *Ibid* at 421.

19 *Ibid* at 422.

20 *Ibid* at 423, Gibbs CJ and Murphy J did not name the type of estoppel which arose, but referred to the principles articulated by Lord Cairns LC in *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 at 448 and Bowen LJ in *Birmingham and District Land Co v London and North Western Railway Co* (1888) 40 Ch D 268 at 286, as developed in *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 and affirmed by the House of Lords in *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657 and by the Privy Council in *Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 3 All ER 556 at 559.

21 *Legione v Hateley*, note 10 *supra* at 438.

22 *Ibid* at 440.

23 *Ibid* at 438.

24 *Ibid* at 453-5.

threshold requirements. Justices Mason and Deane focussed on the conduct engaged in by the representor, and required a particular type of conduct, namely a clear and unequivocal representation.[25] The threshold requirement applied by Gibbs CJ and Murphy J, on the other hand, focussed on the effect of the representor's conduct on the representee and, accordingly, required only that the conduct of the representor had induced a belief in the representee. The difference between the two judgments is that the doctrine applied by Mason and Deane JJ appeared to be one based on promise, in which the obligation arose from the promise itself. Such a doctrine must require an unequivocal promise.[26] Chief Justice Gibbs and Murphy J, on the other hand, appeared to be applying a doctrine of estoppel which was essentially concerned with the representee's reliance, rather than the representor's conduct. The weak threshold requirement they applied is consistent with the notion that the doctrine is essentially concerned with reliance.

Greig and Davis have also observed a philosophical difference between the two judgments.[27] They see the judgment of Mason and Deane JJ as exemplifying the philosophy of those who regard promissory estoppel as an extraordinary means of giving effect to promises made without consideration. On such a view it is necessary to require a higher standard of proof than is the case with a contractual promise, since the latter is supported by consideration. The judgment of Gibbs CJ and Murphy J, on the other hand, embodies the philosophy of judges and commentators who more readily accept promissory estoppel "as a normal part of the law" and are, therefore, "content to state its requirements in terms of what a reasonable person in the position of the promisee would understand from the words or conduct of the promisor".[28] Greig and Davis suggest that the difference between the two approaches should be resolved in favour of the objective approach of Gibbs and Murphy JJ, 'based on the overriding concept of reasonable reliance.'[29]

Greig and Davis' interpretation of the philosophical divide in *Legione v Hateley* is consistent with the above analysis of the case in terms of a divergence between a promise-based, representor-sided approach and a reliance-based, representee-sided approach to the threshold requirement. As the above discussion shows, later decisions of the High Court have tended to favour the reliance-based approach advocated by Greig and Davis. If that approach had been favoured by a majority of the High Court in *Legione v Hateley* then, since the representor's conduct clearly induced a belief on the part of the representees, and the representees clearly relied on that assumption to their detriment, the crucial issue should have been whether it was reasonable for the representees to adopt and act upon the assumption as they did.

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25 Although Brennan J did not discuss the requirements of an estoppel, the relevant inquiry he made was whether a promise or representation could be inferred, *ibid* at 454.

26 This is similar to Lord Denning's conception of promissory estoppel as an essentially contractual source of obligation which is based on promise, rather than reliance: see AT Denning, "Recent Developments in the Doctrine of Consideration" (1952) 15 *Modern Law Review* 1.

27 D Greig and J Davis, *The Law of Contract*, Law Book Company (1987) pp 149-57.

28 *Ibid*, p 149.

29 *Ibid*, p 155.

Although the result in *Legione v Hateley* was arguably affected by the application of a strong threshold test by Mason and Deane JJ, the High Court has clearly embraced the weaker threshold of an induced assumption in its subsequent decisions.[30] Michael Pratt's claim that the reasons for enforcing expectations in estoppel "relate to the conduct of the promisor in encouraging them"[31] is not supported by the approach taken by the High Court. If the relatively low threshold of an induced assumption is all that is required to found an estoppel by conduct, then that suggests that the fundamental concern of the doctrines is elsewhere; either on the reasonable detrimental reliance of the representee, or the unconscionable conduct of the representor.

II. REASONABLENESS

Just as all promises cannot be enforced by the law of contract, it is clear that representors cannot always be held responsible for loss resulting from reliance on assumptions induced by their conduct, when they act inconsistently with those assumptions. The courts must limit the circumstances in which representors will be held responsible for such loss. There are three ways in which such a limit could be imposed in a doctrine of estoppel. First, it could be imposed by way of a strict threshold requirement, which requires that an estoppel be based on a clear promise or representation. Secondly, it could be imposed by way of a standard which focuses on the circumstances of the representor's departure from the assumption, upholding a plea of estoppel only where the representor's conduct could be regarded as 'unconscionable', or where a reasonable person in the representor's position would have expected reliance.[32] Thirdly, the limit could be imposed by way of a standard that focuses on the position of the representee, requiring that his or her reliance be reasonable. Although there is some vacillation between the three approaches, the third approach dominates the Anglo-Australian case law on estoppel by conduct.

The reasonableness requirement is closely linked to the threshold requirement in two ways. First, it is an alternative means of limiting the availability of estoppel. If a doctrine of estoppel required a particular type of conduct as the threshold requirement, such as a clear promise or a clear representation, then there would be less emphasis on the reasonableness requirement. Reasonableness could even, as Michael Pratt has suggested,[33] be dispensed with altogether if the threshold requirement were sufficiently strong. The reasonableness requirement thus occupies ground left vacant by the weak threshold requirement. Secondly, reasonableness raises for re-consideration many of the factors considered at the threshold: the reasonableness of adopting a

30 See notes 11-16 *supra* and accompanying text.

31 M Pratt, "Identifying the Harm Done: A Critique of the Reliance Theory of Estoppel" (1999) 21 *Adelaide Law Review* 209 at 218.

32 On the nature of the unconscionability requirement, and the role of the 'reasonable expectation of reliance' question in establishing an estoppel, see A Robertson, note 6 *supra*.

33 Note 1 *supra*.

given assumption will depend, inter alia, on the type of conduct engaged in by the representor which is claimed to have induced that adoption.[34]

Michael Pratt has complained that "reliance theorists do little to explain the concept of reasonable reliance".[35] Redressing that deficiency is the first task that will be undertaken below. The second task will be to trace the development of the reasonableness requirement and to identify the important role it plays in estoppel. This task is necessary because at least one commentator has denied the importance of the requirement.[36] Finally, the potentially important role of the reasonableness requirement in preventing estoppels arising between strangers will be considered.

A. The Reasonableness Inquiry

(i) The reasonableness standard

Although the nature of the reasonableness inquiry has not been considered in any detail in the estoppel cases or literature, assistance can be derived from the law of negligence which is, of course, structured around the norm of 'reasonable care'.[37] It is generally accepted in the law of negligence that the reasonableness question requires the court to make a policy decision as to what is prudent and sensible behaviour, taking into account the behavioural norms of the time and place.[38] Although evidence as to the standard practice of those engaged in a particular activity may be relevant,[39] the question of reasonableness is clearly not entirely, or even predominantly, a factual question, because standard practice may itself be regarded by the courts as deficient.[40] As Francis Trindade and Peter Cane have observed, it is a function of the law of negligence to identify which

34 This connection between reasonableness and the threshold requirement is implicit in the argument made by D Greig and J Davis, note 27 *supra*, pp 149-55 that the alternative to a restrictive threshold requirement, requiring an unequivocal promise or representation, is an objective approach, "based upon the overriding concept of reasonable reliance". A restrictive threshold requirement is unnecessary in a doctrine that requires a representee to act reasonably in adopting and acting upon the relevant assumption.

35 M Pratt, note 1 *supra* at 187.

36 M Spence, note 2 *supra* 55.

37 Assistance can also be derived from the reasonable person standard in the rule in *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 145. LL Fuller and W Perdue, "The Reliance Interest in Contract Damages: 1" (1936) 46 *Yale Law Journal* 52 at 86 suggest that stating the remoteness of damage problem in terms of the reasonable person "creates a bias in favour of exempting *normal* or *average* conduct from legal penalties". Similarly, it could be said that restricting the availability of estoppel by reference to reasonableness creates a bias in favour of protecting those who engage in normal or average conduct from the particular harm with which estoppel is concerned. For a detailed examination of the use of the reasonable person standard in contract law and its ecclesiastic and philosophical foundations, see L DiMatteo, "The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment" (1997) 48 *University of Southern California Law Review* 293.

38 MA Millner, "Tort: Cases and Materials by BA Hample" (1976) 92 *Law Quarterly Review* 131 at 133.

39 *Neill v NSW Fresh Food and Ice Pty Ltd* (1963) 108 CLR 362 at 368, per Taylor and Owen JJ.

40 *Mercer v Commissioner for Road Transport and Tramways (NSW)* (1936) 56 CLR 580, especially at 589, per Latham CJ. In *F v R* (1983) 33 SASR 189 at 194, King CJ said that the ultimate question is whether the defendant's conduct conforms to the standard of care required by the law, not whether it accords with the practice of the defendant's profession.

risks are socially acceptable, and this is a 'social question' which must ultimately be answered by the courts.[41] Peter Cane has developed this point further:

> Reasonableness is not a question of what people actually do but of what courts think is a reasonable standard of conduct for society to enforce against its citizens through the mechanism of tort law. What people actually do provides a starting point for this inquiry, but it is only a starting point. The courts have a constitutional responsibility to establish standards of conduct for society.[42]

Jules Coleman has suggested that this approach is inherent in the principle of corrective justice. Coleman has argued that corrective justice is a principle which is neither entirely independent of human practices, nor entirely fixed by the practices existing at any given time.[43] A reliance-based doctrine of estoppel is founded on the principle of corrective justice. The reasonableness requirement in estoppel must, therefore, require the courts to determine the circumstances in which reliance on another person's conduct is socially acceptable, and the extent of reliance that is socially acceptable in particular circumstances. The reasonableness standard imposes responsibility on a representee to take care to protect his or her own interests, and defines the standard of care that must be taken.[44] As Patrick Atiyah has observed, reliance on a promise alone cannot justify the imposition of liability on the promisor; something extra is required.[45] The reasonableness standard provides that extra element, ensuring "compliance with some socially acceptable values which determine when ... [reliance is] sufficiently justifiable to give some measure of protection".[46] The application of the reasonableness standard thus involves a sophisticated policy question which requires the court, while taking into account community standards, to establish norms of conduct.[47] In defining the limits of the neighbourhood responsibility of representors for harm resulting from the reliance of others on their conduct, the reasonableness standard implicitly imposes a level of individual responsibility on representees to take care to prevent harm to themselves.[48] The development of those standards of acceptable behaviour and acceptable reliance necessarily involves the allocation of risk and responsibility.

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41 F Trindade and P Cane, *The Law of Torts in Australia*, Oxford University Press (2nd ed, 1993) p 428.

42 P Cane, *The Anatomy of Tort Law*, Hart (1997) p 42.

43 J Coleman, "The Practice of Corrective Justice" in David Owen (ed), *Philosophical Foundations of Tort Law* (1995) 53 at 69-72.

44 The plaintiff's failure to take care to protect his own interests was one of the reasons for the failure of the plea of estoppel by acquiescence in *Dann v Spurier* (1802) 7 Ves 231; 32 ER 94. The plaintiff expended a considerable sum of money in repairing demised premises after he had been told by the landlord that his acceptance as a tenant was not assured. Lord Chancellor Eldon held that "the plaintiff has not used the degree of circumspection and caution, that the Court can act upon the latter part of the prayer of this bill, consistently with the reasonable security of the affairs of mankind", at 95.

45 PS Atiyah, *Promises, Morals and Law*, Clarendon Press (1981) p 68.

46 *Ibid.*

47 D Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 *Harvard Law Review* 1685 at 1688 describes reasonableness as a standard, the application of which "requires the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard".

48 P Finn, "Commerce, the Common Law and Morality" (1989) 17 *MULR* 87 at 97-8.

(ii) Reasonableness and unconscionability

If it is accepted that the reasonableness standard is essentially a policy question, then it is important to ask whether that policy question is better framed as a question of reasonableness, or as a question of unconscionability, as Michael Spence has advocated.[49] It might be argued that the policy work performed by the reasonableness question could equally well be done by asking whether it was or would be unconscionable for the representor to depart from the relevant assumption.

The modern Australian cases on equitable estoppel indicate that questions of both reasonableness and unconscionability are relevant to establishing an estoppel. It could be said that the representee's adoption of, and reliance upon, the relevant assumption must be reasonable, and the representor's departure from the assumption must be unconscionable. Close consideration of the contents of those requirements shows that they are doing much the same work.[50] Both provide bases on which to limit the ambit of equitable estoppel, and to deny liability where the courts have determined that reliance should not be protected in the circumstances. An example is provided by the judicial reluctance to find equitable estoppels arising between well-advised parties negotiating in a commercial setting.[51] Michael Spence has indicated that this reluctance can be justified on the basis that the nature and context of the parties' relationship is a factor which must be taken into account in determining whether the unconscionability requirement is satisfied.[52] But it can also be justified on the basis of reasonableness: it might be said that it is unreasonable in most situations to adopt and act upon an assumption as to the future conduct of another party to commercial negotiations in the absence of a formal agreement.[53]

The choice between conscience and reasonableness as the limiting factor in equitable estoppel goes to the heart of the philosophy of a doctrine of estoppel. If the doctrine is conscience-based, and is principally concerned to prevent wrongful conduct on the part of the representor, then the limiting factor should be an unconscionability requirement. That requirement focuses on the position of the representor, and is considered from the point of view of the representor. If the doctrine is principally concerned to protect harm resulting from reliance on the conduct of others, then the limiting factor should be reasonableness. That requirement focuses on the position of the representee, and is considered from the representee's perspective.

There are two reasons why the reasonableness requirement should be preferred to unconcionability as the limiting factor. First, estoppels by conduct are plaintiff-sided doctrines which, although based on fault, are more concerned

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49 M Spence, note 2 *supra*, p 55.

50 See A Robertson, note 6 *supra* and "Reliance, Conscience and the New Equitable Estoppel" (2000) 24 *MULR* 218 at 225-8.

51 See *Austotel v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 at 585-6, per Kirby P.

52 M Spence, note 2 *supra*, p 63.

53 Although there are situations where it is reasonable to do so, such as in *Waltons Stores*, note 3 *supra*.

with the plight of the representee than the misconduct of the representor.[54] Consistent with this approach, the limiting factor should be considered from the point of view of the representee, rather than the representor. The reasonableness requirement focuses the court's attention on the circumstances of the factual core of the estoppel, which is the representee's detrimental reliance. Secondly, as will be explained below, the reasonableness requirement is a more sophisticated and more precisely defined inquiry than the question of unconscionability.

(iii) The two-part inquiry

The reasonableness test is not an open-ended question whether liability should be imposed in the circumstances. Rather, the court's attention is directed to the position of the representee for the purposes of a two-part inquiry. The first question relates to the adoption of the relevant assumption by the representee. The question whether it was reasonable for the representee to adopt the assumption in question directs the court's attention to the conduct of the representor, and to the relationship between the parties.[55] Michael Pratt cites the example of a 'delusional plaintiff' who relies on a promise 'I won't' to imply 'I will'.[56] Pratt notes that a promise requirement would preclude liability in such cases, and suggests that the burden of the reliance thesis is to "identify an alternative criterion by which to deny recovery in such cases".[57] If a representor says 'I will not transfer this land to you', then it is possible that a delusional representee might be induced by such language to assume that the land will be transferred. The threshold requirement is satisfied because the representor's conduct has caused the representee to adopt the assumption. But there can be no doubt that a court would find it unreasonable for the representee to adopt the assumption in those circumstances. The representor's conduct is not sufficiently blameworthy that she should be required to bear the loss; the representee must be required to take better care protect his own interests, or bear any loss that results from a failure to do so.

The second aspect of the reasonableness requirement relates to the reasonableness of the action taken by the representee in reliance on the assumption. If the court finds in a particular case that it was reasonable for the representee to adopt the relevant assumption, the court then needs to consider whether it was reasonable for the representee to act on the assumption in the way

54 See A Robertson, "Towards a Unifying Purpose for Estoppel" (1996) 22 *Monash University Law Review* 1; "Situating Equitable Estoppel Within the Law of Obligations" (1997) 19 *Sydney Law Review* 32.

55 An example of this is provided by *Coffs Harbour City Council v Kelly* (Unreported, Supreme Court of New South Wales, Hidden J, 10 April 1997). In order to protect local residents from the noise of proposed building work, the Council offered to provide air conditioning and asked them to obtain quotations. Hidden J held that it was unreasonable for the residents to assume that the council would pay for expensive and sophisticated systems. He said that: "it does not appear to me that the initial dealings between the Council and the respondents could reasonably have led them to believe any more than that the Council was prepared to pay for air conditioning to cater for the restriction on ventilation necessitated by the work, that it would receive quotations for that purpose, and pay the amount of those quotations if it found them acceptable".

56 M Pratt, note 1 *supra* at 185.

57 *Ibid.*

he or she did. This will depend on the nature of the action taken by the representee, in the context of the relationship between the parties and the other circumstances of the case.

The distinction between the two aspects of the reasonableness requirement may well be important. The first question involves a consideration of the conduct engaged in by the representor, and the impression it would have on a reasonable person in the representee's situation. The second question involves a consideration of the action taken by the representee, and whether it was reasonable for the representee, having adopted the relevant assumption, to have taken the (ultimately detrimental) action which was taken. The court may regard it as reasonable in certain circumstances to adopt a certain assumption, and reasonable to act on the faith of that assumption in a limited way, but not reasonable in the circumstances to take such detrimental action as that taken by the representee. Two examples will suffice to illustrate the point. First, where a party to a contract indicates to another that he or she does not intend to enforce a particular term of the contract, then it may be reasonable to assume that the term will not be enforced. It may not, however, be reasonable to expend a large amount of money on the basis of that assumption without formally varying the contract.[58] Secondly, where a bank makes an informal commitment to fund a new business, it might be reasonable for the borrower to incur modest expenditure in preparing to establish the business. It may, however, be regarded as unreasonable for the borrower to undertake substantial commitments to builders or suppliers before the borrower has entered into a formal loan agreement with the bank.

If it is possible in a given situation that some action in reliance will be protected while other action will not, then the reasonableness requirement must be linked to the remedy granted to give effect to the estoppel, at least if one accepts a reliance-based approach to relief.[59] If only reasonable reliance is protected by a doctrine of estoppel, and in a particular case only some acts of reliance are regarded as reasonable, then only the detriment flowing from those acts of reliance that are reasonable should be prevented or compensated by the court.

B. Origins of the Reasonableness Requirement

The requirement that the representee's reliance must be reasonable before an estoppel will arise can be said to have been implicit in some of the earliest estoppel cases at common law and in equity.[60] The requirement only emerged as an express requirement, however, in the common law estoppel cases in the middle of the 19th century, as a means of softening the requirement that the representor must intend reliance. The first clear articulation of the reasonableness requirement was in the judgment of the Court of Exchequer

58 Cf *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84 at 106-7, per Robert Goff J.

59 On the reliance-based approach to relief, see A Robertson, "Satisfying the Minimum Equity: Equitable Estoppel Remedies after *Verwayen*" (1996) 20 *MULR* 805; "Reliance and Expectation in Estoppel Remedies" (1998) 18 *Legal Studies* 360.

60 See, for example, the discussion of *Dann v Spurier*, note 44 *supra*.

Chamber in *Freeman v Cooke*,[61] where Parke B qualified Chief Justice Lord Denman's statement in *Pickard v Sears*[62] that the representor must 'wilfully' induce the representee's assumption. Baron Parke suggested that reasonableness of reliance on the part of the representee was an adequate substitute for an intention to induce reliance on the part of the representor. It was, he said, sufficient if the representor conducted himself so that a reasonable man would take the representation to be true and believe he was meant to act upon it as true.[63]

The representee's failure to fulfil the reasonableness requirement was in fact one of the principal reasons for the failure of the defendant's plea of estoppel in *Freeman v Cooke*. The plaintiffs in that case were the assignees of a bankrupt, William Broadbent, who brought an action in trover against a sheriff in connection with the seizure of goods under a writ of *fieri facias*. The relevant issue was whether an estoppel arose to prevent William Broadbent from asserting his ownership of the goods, since he had represented to the sheriff's officers that the goods were owned by his brother Benjamin. William represented that the goods were Benjamin's in the belief that the officers were executing a writ against William himself, but when he found that they were in fact executing a writ against Benjamin, he said the goods were owned by another brother, Joseph. When he found the writ was also against Joseph, William truthfully claimed the goods as his own. The goods were then seized by the sheriff's officers and sold under the writ as the goods of Benjamin.

The Court of Exchequer Chamber overturned the decision of Alderson B at first instance and held that no estoppel *in pais* was made out, and William was entitled to sue in trover. Although the jury found that the sheriff's officers had been induced by the false representation to seize the goods, that was held to be insufficient to establish an estoppel. The Court held that there was no proof that William intended to induce the officers to seize the goods as those of Benjamin, as required by *Pickard v Sears*. If any such intention existed, it was negatived by William's withdrawal of the representation before the seizure took place. "Nor could it be said that any reasonable man would have seized the goods on the faith of the bankrupt's representation, taken altogether."[64] The finding of the jury was, therefore, insufficient to invoke the rule, either on the terms enunciated in *Pickard v Sears*, or as expounded in Baron Parke's judgment. The judgment thus indicated that an estoppel *in pais* could be made out in two ways: first, on the basis that the representation in question was made with the intention that it be

61 (1848) 2 Ex 352; 154 ER 652.

62 (1837) 6 A & E 469; 112 ER 179 at 181.

63 (1848) 2 Ex 352; 154 ER 652 at 663:

> By the term "wilfully", however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and 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; and conduct by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise to disclose the truth, may often have the same effect.

64 *Ibid* at 657.

acted upon by the representee and, secondly, in the absence of such intention, on the basis that it was reasonable in the circumstances for the representee to act upon the representation.

The approach laid down in *Freeman v Cooke* was applied in *Pierson v Altrincham Urban Council.*[65] The appellant in that case represented himself to be the executor of his father's will in discussions with the respondent Council in relation to his father's statutory liability for the cost of certain works. The Council sought to hold the representor liable as executor for the cost of the works even though the Council knew that the Public Trustee was in fact the executor. The finding of an estoppel by the Court of Quarter Sessions was overturned by three members of the King's Bench Division sitting *in banc* on the basis that, although the representor's conduct had induced reliance, there was no finding that the representor intended the representation to be acted upon, and nor was there a finding that the representee's reliance was reasonable. Viscount Reading CJ was concerned with the reasonableness of the representee's adoption of the relevant assumption: he held that the court should infer an intention that a representation be acted upon where the representee's assumption that a particular state of affairs existed was reasonable. No such inference should, the Chief Justice said, be drawn here.[66] Justice Lush, on the other hand, was concerned with the reasonableness of the representee's reliance: he held that no estoppel was established because there was no finding that the representation was made with the intention that it should be acted upon, and no inference that it was reasonably acted upon.[67]

The early text book writers adopted the notion that reasonableness of reliance on the part of the representee was an effective substitute for an intention to induce reliance on the part of the representor. Writing in 1888, Michael Cababé suggested that it was unnecessary that the representor should intend reliance, and his or her conduct could establish an estoppel if a reasonable outsider looking at the conduct would take the representation to be true, and believe that it was meant that it should be acted upon.[68] The explanation for the rule, according to Cababé, was that a person is taken to intend the ordinary consequences of his or her actions. This, Cababé said, was exemplified by the principle of agency by estoppel, which remains a useful illustration today. It is clear in such cases that the principal does not intend the agent to act in contravention of the powers conferred by the principal, but the estoppel arises from reasonable reliance on the principal's representation that the agent has greater powers than he or she in fact has.[69]

The approach articulated by Cababé was echoed by Spencer Bower and Turner, who maintained that an intention on the part of the representor that the representation be acted upon was required to establish an estoppel by representation. They suggested, however, that such an intention must generally

65 (1917) 86 LJ KB 969.
66 *Ibid* at 972.
67 *Ibid* at 973.
68 M Cababé, *The Principles of Estoppel*, W Maxwell & Son (1888) pp 61-4.
69 *Ibid*, p 65.

be inferred from the use of conduct which was of such a nature as to induce a normal person in the circumstances to act as the representee acted.[70] In addition to *Freeman v Cooke* and *Pierson v Altrincham Urban Council*,[71] the approach outlined by Spencer Bower and Turner is also supported by the statement of Lord Esher MR in *Seton, Laing, & Co v Lafone*, that it is not necessary that the representor intended the representee to act in a particular way upon the statement: "it is enough if it was reasonable, as a matter of business, for the plaintiff to do what he did as a result of his belief in the defendant's statement".[72]

Although the equity judges did not explicitly require that the representee's reliance be reasonable, Francis Dawson has suggested that the requirement was inherent in the early cases where relied upon representations were made good. The doctrine was made workable, he said, because equity judges carefully defined the sort of conduct in reliance which was to be protected. He suggests that *Maunsell v Hedges*[73] provides "a particularly good illustration of a representation being couched in such terms that the representee could not be said to have reasonably placed reliance upon it".[74]

The notion of reasonableness was expressly referred to by the Court of Appeal in the equity case of *Low v Bouverie*.[75] The plaintiff in *Low v Bouverie* proposed lending money to a borrower on the security of the borrower's beneficial life interest in certain property. The plaintiff's solicitors wrote to the defendant, who was one of the trustees of the property, to inquire whether the borrower had mortgaged or parted with his life interest in the property. In his reply, the defendant disclosed the existence of two encumbrances on the property, but failed to disclose the existence of several others of which he had received notice, but forgotten. On the faith of that assurance, the plaintiff entered into the proposed transaction. The borrower was subsequently declared bankrupt and, as a result of the prior mortgages, the plaintiff's security was worthless. Lord Justice Bowen held that the representee's interpretation of the language used by the representor must be reasonable. Lord Justice Bowen qualified his statement that the language on which estoppel is founded must be "precise and unambiguous" by explaining that the language need not be open to only one construction, but must be "such as will be reasonably understood in a particular sense by the person to whom it is addressed".[76] On the facts, Bowen LJ found

70 G Spencer Bower and Sir A Turner, *The Law Relating to Estoppel by Representation*, Butterworths (3rd ed, 1977) pp 94-5.

71 (1917) 86 LJ KB 969 at 972, per Lord Reading CJ; at 973, per Lush J: "that an intention to induce reliance may be inferred as a fact if the representation was such as would reasonably have the effect of inducing the representee to believe and act upon it as true".

72 (1887) 19 QBD 68 at 72.

73 (1854) 4 HLC 1039; 10 ER 769. The representee in that case married in reliance on his uncle's representation that "my county of Tipperary estate will come to you at my death, unless some unforeseen occurrence should taken place". The House of Lords upheld the decision of the court below that, although the representee had acted on the faith of it, the representation was not capable of giving rise to an enforceable obligation.

74 F Dawson, "Making Representations Good" (1982) 1 *Canterbury Law Review* 329 at 334-5.

75 [1891] 3 Ch 82.

76 *Ibid* at 106.

that the representor's language would be reasonably understood as a representation of *his belief* that there were no encumbrances on the property in question other than those disclosed, rather than as an assertion that there were *in fact* no other encumbrances. Similarly, Kay LJ held that where no fraud is alleged, the representee must show "that the statement was of such a nature that it would have misled any reasonable man".[77] The representee in *Low v Bouverie* failed to discharge that onus since the "only fair meaning" which could be attributed to the representor's statements was that the encumbrances disclosed were all the representor was aware of at the time of writing.[78] The approaches of Bowen and Kay LJJ to the question of reasonableness are consistent with the finding of Lindley LJ that the representee "too hastily inferred" that no encumbrances existed other than those disclosed by the representor.[79]

Although the reasonableness of the representee's adoption of the relevant assumption was called into question in *Pierson v Altrincham Urban Council* and *Low v Bouverie*, Spencer Bower and Turner have asserted that:

> It will not lie in the mouth of the representor to say that the representation was one which should not reasonably have been believed by the representee ... the representor cannot offer as a defence the contention that the representee should not have believed his representation, or was negligent in doing so.[80]

When one looks at the cases on which that statement is based, however, it is clear that the relevant principle is considerably narrower. A more accurate statement of the principle, which is consistent with *Freeman v Cooke*, is that where an express representation is made with the intention that it be acted upon, then the representor cannot avoid the estoppel on the basis that the representee should not reasonably have believed the representation. That principle was first applied by the House of Lords in *Bloomenthal v Ford*,[81] which was followed by Astbury J in *Gresham Life Assurance Society v Crowther*,[82] and by the High Court of Australia in *Western Australian Insurance Co Ltd v Dayton*.[83] In *Bloomenthal v Ford*, Lord Halsbury LC made it clear that the principle was limited to situations where a representation was made with the *intention* of inducing reliance.[84] That restriction must necessarily have been accepted by Isaacs ACJ in *Western Australian Insurance Co Ltd v Dayton*, when he quoted with approval the statement of Kay LJ in *Low v Bouverie* that: "It is essential to show that the statement was of such a nature that it would have misled any reasonable man, and that the plaintiff was misled by it."[85]

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77 *Ibid* at 113.
78 *Ibid* at 115.
79 *Ibid* at 104.
80 Note 70 *supra*, p 96.
81 [1897] AC 156 at 161-2, per Lord Halsbury LC; at 168, per Lord Herschell.
82 [1914] 2 Ch 219 at 228.
83 (1924) 35 CLR 355 at 375-6, per Isaacs ACJ, with whom Gavan Duffy J agreed.
84 [1897] AC 156 at 161-2.
85 [1891] 3 Ch 82 at 113, quoted in *Western Australian Insurance Co Ltd v Dayton*, *ibid* at 375, per Isaacs ACJ.

C. The Contemporary Australian Approach

Despite the explicit consideration of the reasonableness of the representee's reliance in such well-known cases as *Freeman v Cooke* and *Low v Bouverie*, considerations of reasonableness have only occasionally played a role in the outcome of estoppel cases.[86] The reasonableness requirement has, however, become far more prominent in the contemporary Australian cases.[87] This increased emphasis on reasonableness may well be the result of the relaxation of other barriers to the establishment of an estoppel. First, as noted above, the lower threshold requirement of an 'induced assumption' applied in Australia makes it easier to establish the basic elements of an estoppel than if a promise or representation were required. Accordingly, the availability of a plea of estoppel must be limited in another way. A second, and more significant, extension of estoppel in Australia has been the relaxation of the principle that a promissory estoppel can only arise where the parties are in a pre-existing contractual relationship. Since an estoppel based on an assumption as to the representor's future conduct is now available in the absence of a pre-existing legal relationship, a limit must be imposed to ensure that such estoppels do not arise too frequently. In each case, close scrutiny of the reasonableness of the representee's reliance provides a means by which the applicability of a potentially broad principle can be circumscribed.

In *Standard Chartered Bank Aust Ltd v Bank of China*, Giles J observed that the question of reasonableness was "inherent in reliance, although not always enunciated".[88] His Honour indicated in that judgment that there were two separate requirements: first, it must have been reasonable for the representee to adopt the assumption and, secondly, it must have been reasonable for the representee to take the relevant action in reliance on the assumption.[89] Both

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86 As Lord Hailsham LC said in *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741 at 756, the proposition for which *Low v Bouverie* is "rightly cited as authority" is that the language on which an estoppel is founded must be precise and unambiguous.

87 In addition to the cases discussed in the text, the reasonableness question appeared to play a role in the rejection of a plea of equitable estoppel by the Full Court of the Supreme Court of Queensland in *Valbairn Pty Ltd v Powprop Pty Ltd* [1991] 1 Qd R 295 at 297. The Full Court upheld the finding of the trial judge that no equitable estoppel arose from the appellant's assumption that a lease would be entered into between the parties. The decision appeared to be based in part on the conclusion that "neither party could reasonably have believed that a lease was likely" given the lack of agreement between the parties on certain crucial matters.

88 (1991) 23 NSWLR 164 at 180.

89 *Ibid* at 180-1. Justice Giles referred to questions of "the reasonableness of the conduct of the representee *in adopting and acting upon* the assumption", *ibid* at 180 (emphasis added) and "whether the representee *reasonably adopted and relied upon* the representation", *ibid* at 181 (emphasis added). Quite a different requirement was put forward by Jordan CJ in *Franklin v Manufacturers Mutual Insurance Ltd* (1935) 36 SR NSW 76 at 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".

requirements find support in the early cases discussed above.[90] As noted above, the distinction between the two requirements may well be important.

Recent statements in the High Court support the notion that the reasonableness of the representee's reliance is a relevant consideration in estoppel cases, both at common law and in equity. The failure of the respondents to satisfy the reasonableness requirement was one of the reasons Mason CJ and Wilson J gave in *Waltons Stores* for rejecting the respondents' claim to an estoppel based on assumption of existing fact. Even if the respondents could establish that they had assumed that contracts had been exchanged or a binding contract had come into existence, such a belief "could scarcely be described as a reasonable belief" in the absence of confirmation from their solicitors.[91] While Mason CJ and Wilson J regarded it as unreasonable for the respondents to believe that contracts *had* been exchanged, they did see it as reasonable for the respondents to assume that contracts *would* be exchanged.

> This assumption was a reasonable assumption because the terms of [a letter from the appellant's solicitors] coupled with the failure to communicate any refusal by the appellant to agree to the amendments justified the inference that the appellant agreed to the amendments with the result that exchange would follow as a matter of course.[92]

Thus, while a common law estoppel could not arise from any assumption of existing fact made by the respondents, an equitable estoppel did arise from the respondents' assumption relating to the appellants' future conduct. Chief Justice Mason and Wilson J also observed in *obiter dictum* that a voluntary promise was generally unenforceable because the promisee may reasonably be expected to appreciate that a promise will only be binding if it forms part of a contract.[93]

Although a reasonableness requirement was not discussed in any detail in *Verwayen*, Mason CJ noted that the assumption adopted by Verwayen was a reasonable assumption for a person in his position to make, since the circumstances pointed to the existence of a definitive government policy which had been followed to the point of judgment on other occasions.[94] The relevance of that observation was, however, restricted to the question whether there was

90 The notion that the representee's assumption must be reasonable is supported by the statement of Bowen LJ in *Low v Bouverie* [1891] 3 Ch 82 at 106 that the representor's language "must be such as will reasonably be understood in a particular sense by the person to whom it is addressed". That statement was quoted with approval in *George Whitechurch Ltd v Cavanagh & Co* [1902] AC 117 at 145, per Lord Brampton; *Canada & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46 (PC). G Spencer Bower and Sir A Turner, note 70 *supra*, pp 83-4, observe that the *dictum* was subjected to searching re-examination, but ultimately left untouched, by the House of Lords in *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] 2 All ER 271. G Spencer Bower and Sir A Turner, note 70 *supra*, pp 82-3, suggest that the onus of proof is on a person seeking to set up an estoppel to show "that the representation was *reasonably* understood by the representee in a sense, whether primary or secondary, materially inconsistent with the allegation against which the estoppel is now set up". The second requirement is supported by statements of principle in *Freeman v Cooke* (1848) 2 Ex 352; 154 ER 652 at 657; *Pierson v Altrincham Urban Council* (1917) 86 LJ KB 969 at 972 and 973; *Seton, Laing, & Co v Lafone* (1887) 19 QBD 68 at 72.

91 *Waltons Stores*, note 3 *supra* at 397.

92 *Ibid.*

93 *Ibid* at 403.

94 *Verwayen*, note 3 *supra* at 414.

reason to doubt the veracity of Verwayen's assertions as to his adoption of, and reliance upon, the relevant assumption.

The existence of a reasonableness requirement in Australian law was confirmed when it formed the basis of the High Court's rejection of a plea of estoppel in *Australian Securities Commission v Marlborough Gold Mines Ltd.*[95] The relevant issue in that case was whether "an equitable estoppel of the kind upheld in *Verwayen*"[96] arose where the Australian Securities Commission, having indicated by letter that it would not oppose an application for court approval of 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, which involved the conversion of a limited liability company to a no liability company. 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*[97] and *Verwayen*,[98] because "[i]t 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".[99] Accordingly, the decision in *ASC v Marlborough Gold Mines Ltd* seems to have been based on the principle that it is not unconscionable for a representor to depart from an assumption which it was unreasonable for the representee to have adopted.[100]

The reasonableness requirement is now routinely applied in cases of both common law and equitable estoppel. An example of the rejection of a plea of estoppel on the basis of a failure to fulfil the requirement is provided by the decision of Bryson J in *Paull v Civil Aviation Safety Authority.*[101] The plaintiff was an employee of the defendant. In the course of his employment, the plaintiff was implicated in an aircraft accident which was to be the subject of a coronial inquiry. The defendant asked the plaintiff to resign, and after some negotiation wrote him a 'factual' letter confirming that the defendant would be represented at any coronial proceedings "and would also legally represent the interests of its employees and former employees". The plaintiff resigned after receiving the

95 (1993) 177 CLR 485 at 506, per Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ ("*ASC v Marlborough Gold Mines*").

96 *Ibid* at 506, per Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ.

97 (1933) 49 CLR 507 at 547.

98 Note 3 *supra* at 410-1, per Mason CJ; at 429, per Brennan J; at 436 and 440-1, per Deane J; at 453-4, per Dawson J; at 500-1, per McHugh J.

99 Note 95 *supra* at 506.

100 Cf *Fleming v State Bank of New South Wales* (Unreported, Supreme Court of New South Wales, Young J, 10 November 1997) at 8-11, where Young J suggested that it may be unconscionable to depart from an assumption which has unreasonably been adopted, where the representor knows that it has been relied upon to the representee's detriment. It is difficult to imagine a situation in which it would be regarded as unreasonable to rely on an assumption, where the representor is aware of both the adoption of the assumption and the acts of reliance. The representor's very act of standing by would surely lend sufficient weight to the assumption and the acts of reliance to make the representee's reliance reasonable.

101 Unreported, Supreme Court of New South Wales, Bryson J, 16 October 1997.

letter. He subsequently claimed that a promissory estoppel arose against the defendant, which prevented it from denying an obligation to indemnify the plaintiff for costs relating to representation at the coronial inquiry. Bryson J rejected the plea of estoppel on the basis that neither of the two reasonableness requirements discussed above was satisfied: it was not reasonable for the plaintiff to assume he would be indemnified, and nor was it reasonable for the plaintiff to act as he did. Bryson J held that the letter did not provide an assurance to the plaintiff that any benefit would be conferred on him in the future, and if he did conclude that he had an assurance on which he could rely, "he was reaching a conclusion which was not reasonably available".[102] Justice Bryson also found that, since the contents of the letter and the subject of resignation were not closely connected, the plaintiff's resignation was not 'a reasonable response' to the letter.[103]

In *Salienta Pty Ltd v Clancy*[104] the reasonableness requirement was invoked by Bryson J as the basis for rejecting a plea of proprietary estoppel. The representee in that case was the proposed purchaser of a rural property who went into possession under a licence granted by the vendor. The purchaser originally held an option to purchase the property; a contract of sale was later entered into which was itself superseded by a later contract. The vendor terminated the ultimate contract of sale following breaches by the purchaser, and sought possession of the property. The purchaser argued that he had made payments to the vendor and spent money improving the property on the assumption that the payments and improvements would be credited to the purchase price. He also argued that he expended the moneys in reliance on the expectation that the vendor would sell him the property at a 'fair price', which was lower than those prices specified in the option and the contracts. Justice Bryson held that it was not reasonable for the purchaser to adopt these assumptions, given that the basis on which the vendor was prepared to sell the property was at all relevant times set out in writing.[105] Accordingly, it was not unconscionable in the circumstances for the vendor to assert its title to, and right to possession of the land.[106]

A final point to note about the application of the reasonableness requirement in Australian law is that in *W v G* Hodgson J suggested that it was not necessary for a representee to establish affirmatively that his or her conduct was reasonable or for a judge to make a positive finding that the representee's reliance was reasonable:

> I do not understand it to be an independent part of the plaintiff's cause of action that she establish that her reliance was reasonable and I do not consider it necessary for me to make a positive finding that the plaintiff's conduct was reasonable. However, I do not consider that there was any such element of unreasonableness as to prejudice the finding that there was reliance and this was intended by the defendant.[107]

102 *Ibid* at [15].
103 *Ibid* at [16].
104 [1999] NSWSC 916.
105 *Ibid* at [79]-[90].
106 *Ibid* at [87].
107 (1996) 20 Fam LR 49 at 66.

Those remarks are interesting for two reasons. First, since reasonableness seems clearly to be a policy question, rather than a factual question, Hodgson J must certainly be right to say that it is not an independent part of the plaintiff's cause of action. Secondly, it is rare to see a modern judgment in which the question of reasonableness is linked with the representor's intention, as it was in the last sentence of the above quotation. Justice Hodgson appears to be alluding to the approach taken in *Pierson v Altrincham Urban Council*, where the reasonableness of the representee's reliance was regarded as a basis on which the representor's intention to induce reliance could be established. In the other contemporary Australian cases in which the reasonableness question has arisen, it appears to have lost its tenuous connection with the question of the representor's intention to induce reliance.

D. Estoppels Between Strangers

An important role the reasonableness requirement might play is in preventing estoppels from arising between strangers. In *Waltons Stores* the High Court relaxed the rule that a promissory estoppel could only arise between contracting parties: "a pre-existing contractual relationship was held not to be a prerequisite to the application of the doctrine of promissory estoppel".[108] Despite the paucity of explicit discussion of the issue in the judgments, on its facts the case provides authority for the proposition that promissory estoppel can arise in the absence of a pre-existing legal relationship.[109] If any pre-existing relationship was required, then that between parties involved in pre-contractual negotiations was sufficient. Mason CJ and Wilson J expressed the opinion that the doctrine could operate in circumstances where a person attempts to depart from a representation that he or she would not enforce a non-contractual right.[110] They did not, however, consider whether a promissory estoppel could arise so as to create rights between parties who were not in a pre-existing legal relationship of any kind.[111] Justice Brennan, on the other hand, indicated that there could be no limit on the availability of a plea of promissory estoppel if it was seen to be based on the

108 *Verwayen*, note 3 *supra* at 455, per Dawson J. The question whether promissory estoppel could apply outside a pre-existing contractual relationship had explicitly been left open in *Legione v Hateley*, note 10 *supra* at 435, per Mason and Deane JJ.

109 A Leopold, "Estoppel: A Practical Appraisal of Recent Developments" (1991) 7 *Australian Bar Review* 47 at 65.

110 *Waltons Stores*, note 3 *supra* at 399.

111 The New Zealand Court of Appeal has gone a step closer to recognising that an equitable estoppel can arise between strangers. In *Burbery Mortgage Finance & Savings Ltd v Hindsbank Holdings Ltd* [1989] 1 NZLR 356, the Court of Appeal held that an equitable estoppel arose between parties whose only relationship was that they had interests in the same subject matter. The representee refrained from taking possession of farm machinery over which it held security on the faith of an assurance, given by a receiver appointed by a mortgagee of the farm land on which it was situated, that the machinery would be used only to assist in the sale of the farm. The receiver subsequently discovered that he had a right of distress against the chattels for unpaid rent. The Court of Appeal held that an equitable estoppel arose which prevented the receiver from distraining against the chattels without first giving the representee the opportunity of resuming its former position. At common law, estoppels commonly arise between parties connected only by virtue of having an interest in the same subject matter: see, for example, *Thomas Australia Wholesale Vehicle Trading Co Pty Ltd v Marac Finance Australia Ltd* [1985] 3 NSWLR 452.

same equity as proprietary estoppel. The enforcement of promises to create new proprietary rights could not, he said, be reconciled with a limitation on the enforcement of other promises under the rubric of promissory estoppel.[112]

In *Verwayen*, Dawson J regarded as unresolved the question whether a pre-existing *legal* relationship was required before a promissory estoppel could arise, but held the relationship between litigating parties to be sufficient for this purpose. As Dawson J noted, while the parties were not in a contractual relationship, they "were in a legal relationship which began at least with the commencement of the action" by Mr Verwayen against the Commonwealth.[113] There was, he said, no reason why an estoppel could not arise where the legal relationship between the parties was a non-contractual one.[114] The estoppel that arose in *Verwayen* was in a sense quite conventional, since it simply operated to prevent the Commonwealth from exercising pre-existing rights which the Commonwealth's representatives had promised not to exercise. The doctrine was used in an innovative way in *W v G*, however, since the estoppel in that case operated as an independent source of rights, and the only pre-existing relationship between the parties was as cohabitees.[115]

The question that remains, then, is whether a representee must establish some form of legal relationship between the parties, or whether an estoppel can potentially arise between parties who are not in any sort of legal relationship. It seems from the remarks made by Brennan J in *Waltons Stores* quoted above, and from the broad terms in which the doctrines of equitable estoppel were described in *Waltons Stores* and *Verwayen*, that the better view must be that no particular type of pre-existing relationship is required. This view is supported by the decisions in *W v G* and *Lee Gleeson Pty Ltd v Sterling Estates Pty Ltd.*[116]

The question of reasonableness is an appropriate means by which a relationship between the parties can be required, while retaining sufficient

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112 *Waltons Stores*, note 3 *supra* at 426:

> 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 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 to avoid detriment occasioned by unconscionable conduct, can give relief in some cases but not in others.

113 *Verwayen*, note 3 *supra* at 455.

114 *Ibid.*

115 Note 107 *supra*. The representee in *W v G* conceived and bore two children on the faith of an assumption that the representor would act with the representee as parent of the children, and would contribute to raising them for as long as was necessary. Hodgson J held that the representee was entitled to relief on the basis of equitable estoppel. For a discussion of the use of equitable estoppel as an independent cause of action see A Robertson, "Estoppel by Conduct: Unresolved Issues at Common Law And in Equity", note 4 *supra* at [50]-[59].

116 (1991) 23 NSWLR 571 ("*Lee Gleeson*"). In *Lee Gleeson*, Brownie J treated equitable estoppel as a proper basis on which to enforce a gratuitous promise made to a person with whom the promisor was not in a contractual or other legal relationship. The representee was a builder who completed certain building works for a property owner in financial difficulties on the faith of an assurance by the owner's bank that the builder would be paid from the sale proceeds of the property. Justice Brownie held that it would be unconscionable in those circumstances for the bank to deny the existence or the binding quality of its representation to the builder.

flexibility in the doctrine to account for the decisions in *Waltons Stores*, *Verwayen*, *W v G* and *Lee Gleeson*. The relationship between the parties should be a crucial factor in determining whether it is reasonable to adopt and act upon an assumption in a particular situation.[117] Where the pre-existing relationship between the parties is tenuous, then it will be less likely that any substantial action on the faith of the assumption would be regarded as reasonable.[118] Assume, for example, that A feels that B needs a holiday, and promises to give her $5000 the following day to pay for it. On the faith of that promise, B incurs liability for a holiday she could not otherwise afford. If A and B were merely acquaintances, then no estoppel would arise because, even if it were considered reasonable for B to assume that the money would be paid, it would certainly not be reasonable for B to incur expenditure on the faith of that assumption. If, on the other hand, A was a close friend of B's, was very wealthy, and was in the habit of giving extravagant gifts to B, then the situation may well be different. Although A and B are not in any sort of legal relationship, even such as existed in *Waltons Stores*, *Verwayen* or *W v G*, it may well be reasonable in the circumstances for B to assume the gift will be made and to incur expenditure on the faith of that assumption.[119]

III. CONCLUSION

Michael Pratt has distinguished between two different conceptions of reasonable reliance,[120] based on Martin Hollis' two varieties of trust: predictive and normative.[121] A representee trusts a representor in a predictive sense if the representee predicts that the representor will not disappoint the assumption. A representee trusts a representor in a normative sense if the representee believes that the representor ought to adhere to the assumption, according to community norms of conduct. Pratt argues that the reasonableness requirement in estoppel is "either redundant or absurd",[122] depending on whether one accepts a predictive or normative conception of reasonableness. In making that argument, however, Pratt falls into the trap of believing that reasonableness involves an inquiry into

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117 The reasonableness of the representee's reliance was unsuccessfully challenged by the representor in *W v G*, note 107 *supra* at 66, on the basis that it was highly unlikely the relationship between the parties would endure.

118 M Spence, "Australian Estoppel and the Protection of Reliance" (1997) 11 *Journal of Contract Law* 203 at 206-7 and 216-7 and note 2 *supra*, p 64, also sees the length of the relationship between the parties as relevant to the establishment of an estoppel, although he sees it as one of the criteria for determining whether it is unconscionable for the representor to depart from the relevant assumption.

119 The example of an estoppel arising from reliance on a promise to fund an overseas trip was used by J Weinstein, "Promissory Estoppel in Washington" (1980) 55 *Washington Law Review* 795 at 810, who observed that the reasonableness of reliance will depend on the sincerity of the promise and the setting in which it was made, as well as the relationship between the parties.

120 Note 1 *supra* at 187-9.

121 M Hollis, *Trust Within Reason*, Cambridge University Press (1998) pp 10-14.

122 Note 1 *supra* at 187.

the representee's reasons for adopting and relying on the relevant assumption.[123] This article has shown that the reasonableness requirement does not involve an inquiry into the representee's motivations, or an inquiry into the representee's perceptions of what the representor will or ought to do. Rather, reasonableness raises the broader policy question of whether reliance should be protected, given the circumstances in which the assumption was adopted, and the nature and circumstances of the representee's reliance. Reasonableness of reliance is a normative requirement, but the norms that govern liability in estoppel are those determined by the courts, not those perceived by the parties.

123 See A Robertson, "Situating Equitable Estoppel Within the Law of Obligations", note 54 *supra* at 61-2 for criticism of a similar argument that reasonableness of reliance on a promise must depend on the enforceability of the promise.