

# CAN PROMISSORY ESTOPPEL BE AN INDEPENDENT SOURCE OF RIGHTS?

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*This article addresses persistent uncertainty in relation to the question, ‘Can promissory estoppel be an independent source of rights under Australian law?’ A split has developed between intermediate courts of appeals in some jurisdictions on this question. This article considers the operation of stare decisis in relation to a decision of an intermediate appellate court that departs from the ratio of the High Court, and the approach which is likely to be taken by the High Court to resolving the conflict between the states.*

## I INTRODUCTION

This article addresses persistent uncertainty in relation to the question, ‘Can promissory estoppel be an independent source of rights under Australian law?’<sup>1</sup> There is evident confusion as to the correct law. In Queensland<sup>2</sup> and Victoria,<sup>3</sup> and in the Federal Court,<sup>4</sup> *Waltons Stores (Interstate) Ltd v Maher*<sup>5</sup> (“*Waltons Stores*”) has been applied as authority for the principle that promissory estoppel can be an independent source of rights. However, in New South Wales, the Court of Appeal has held that promissory estoppel is negative in substance and restricted to restraining the defendant from exercising legal rights.<sup>6</sup> Accordingly, there is ‘a conflict of authority between intermediate courts of

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<sup>1</sup>The concept of being an ‘independent source of rights’ in equity means that the estoppel itself is capable of giving rise to equitable rights and obligations: the claim is not limited to establishing the facts from which another cause of action might arise as estoppel by representation does; see for example, Jessica Hudson, “The True Purpose of Estoppel by Representation” (2015) *Journal of Contract Law* 275. Nor is it limited to restraining the defendant from exercising existing strict legal rights, which has been the traditional domain of promissory estoppel: see for example *Equititrust Ltd (formerly Equitiloan Ltd) v Franks* (2009) 259 ALR 388, 401 per Handley JA; *DHJPM Pty Limited v Blackthorn Resources Limited* (2011) 285 ALR 311, 323 per Meagher JA.

<sup>2</sup> *Wright v Hamilton Enterprises* [2003] QCA 36.

<sup>3</sup> *ACN 074 971 109 Pty Ltd (as Trustee for the Argot Unit Trust) v The National Mutual Life Association of Australasia Ltd* (2008) 21 VR 351.

<sup>4</sup> *Yarrabee Chicken Company Pty Ltd v Steggles Limited* [2010] FCA 394 per Jagot J. Note this decision was not appealed on the estoppel finding but was successfully appealed in relation to findings in related proceedings in relation to the findings on the construction of contract: [2011] FCA 750.

<sup>5</sup> (1988) 164 CLR 387.

<sup>6</sup> *Saleh v Romanous* (2010) 79 NSWLR 453.

appeal in this country that requires resolution.<sup>7</sup> To add to the confusion, there have been recent statements by courts to the effect that ‘it is not yet finally resolved in Australia whether promissory estoppel can operate as a cause of action,’<sup>8</sup> and that it is ‘an open question, whether the doctrine of promissory estoppel constitutes a foundation of legal rights independently of any other cause of action,’<sup>9</sup> suggesting that the common law of Australia is not clearly decided on this issue.

The contribution of this article to these present uncertainties is to make three central arguments which start from the proposition that there is ‘one common law’<sup>10</sup> of Australia, including equitable principles, not a separate common law of each state. This perspective assists in clarifying how the jurisdictional differences in relation to the ability of promissory estoppel to be an independent source of rights ought to be resolved.

Firstly, it is argued that there ought to be no uncertainty about the ability of promissory estoppel to be an independent source of rights under Australian law because this was the *ratio* of the High Court’s decision in *Waltons Stores*, not simply *dicta* as has also been recently suggested.<sup>11</sup> This *ratio* has not been varied or overturned by the High Court. Accordingly, on one level, the unity of the common law on this question ought to be clear.

To say that the law is clear with respect to the *ability* of promissory estoppel to be a source of rights is not to deny the ongoing debate as to the circumstances in which such an equitable estoppel might arise.<sup>12</sup> These issues

<sup>7</sup> As there was in *New South Wales v Lepore* (2003) 212 CLR 511 [6] per Gleeson CJ, warranting clarification by the High Court.

<sup>8</sup> *Mineralogy Pty Ltd v Sino Iron Pty Ltd* (No 6) [2015] FCA 825 per Edelman J.

<sup>9</sup> *Harrison v Harrison* [2011] VSC 459, [370] per Kaye J. See also *Worthington v Worthington [No 2]* [2014] WASC 448 at [26] per Kenneth Martin J where his Honours describes it as an ‘unresolved and controversial debate’, and *Australian Communications Corporation & Anor v Coles Group Ltd* [2011] VSC 490, per Cavanough J at [321], [321] There is some uncertainty as to whether promissory estoppel constitutes an independent cause of action, or whether it is a doctrine by which one party is estopped from denying an element of a cause of action relied on by another.’; and

*Equuscorp Pty Ltd and Anor v Glengallan Investments Pty Ltd and Ors* [2006] QCA 194, McPherson JA said at [31], ‘The doctrine of promissory estoppel may, I realise, no longer now be confined to the suspension of existing contractual relations but is capable of affecting entry into new legal relations: see *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, at 406–407, 428–429.’ (emphasis added).

<sup>10</sup> See for example *Kable v DPP (NSW)* (1996) 189 CLR 51 at 112–113 per McHugh J.

<sup>11</sup> *Ashton v Pratt* [2015] NSWCA 12; (2015) 318 ALR 260, 287 [138] per Bathurst CJ.

<sup>12</sup> The features of the different models of promissory estoppel which can be found in Australian case law have been examined in detail by Andrew Robertson. Andrew Robertson, ‘Three models of promissory estoppel’ (2013) *Journal of Equity* 226. In particular, there is an important but unresolved question as to whether it is necessary for the plaintiff to have assumed that a *legal relationship* already existed with the defendant, or would come into existence between them, from which the defendant would not be free to withdraw. This was a requirement identified by Brennan J as the first element of the six elements necessary to establish to raise an equitable

have been discussed elsewhere.<sup>13</sup> However, in relation to the more basic, primary question as to whether promissory estoppel can be an independent source of rights in relation to non land-based promises, it is respectfully suggested that this is not an ‘unresolved’<sup>14</sup> issue under Australian law.

The second issue explored is the nature and effect of the jurisdictional split between New South Wales and other jurisdictions. The New South Wales Court of Appeal in *Saleh v Romanous* restated the principle of promissory estoppel as negative in substance (in other words, *not* an independent source of rights). Since that decision, lower courts in New South Wales have regarded themselves bound to apply this contrary principle, notwithstanding the apparent conflict with *Waltons Stores*. It is argued that under the principles of *stare decisis*, lower courts in New South Wales are bound to apply the decisions of the Court of Appeal, despite the fact that it is apparently contradictory to the *ratio* of the High Court in *Waltons Stores*.<sup>15</sup> The effect of this is to entrench the apparent fracture in the common law. The same set of facts can now be potentially decided according to quite different principles depending on the jurisdiction in which the proceedings are brought. It is argued that in theory, this jurisdictional split does not undermine the ‘one common law principle’. The High Court has said that where differences in the common law emerge between intermediate appellate courts, it does not mean that the unity of the common law does not exist, rather it means that one or more intermediate courts of appeal will have not applied the law correctly.<sup>16</sup> However, in practice, there is no unity of common law principle being applied across Australia. Accordingly, unless the New South Wales Court of Appeal reverses its earlier decision in *Saleh v Romanous*, this jurisdictional split can only be corrected by the High Court.

The final issue considered in this article is the relevant approach to

estoppel see *Waltons Stores (Interstate) Ltd v Maher* (1988) 167 CLR 384, 428-429 per Brennan J. However, it was not required to be established by Mason CJ and Wilson J in their joint judgment at 406.

<sup>13</sup> For further discussion see, for example, *EK Nominees Pty Ltd v Woolworths Limited* [2006] NSWSC 1172; *Construction Technologies Australia Pty Ltd v Doueih* [2014] NSWSC 1717, contra *DHJPM Pty Ltd v Blackthorn Resources Limited* [2011] NSWCA 348 and *TMA Australia Pty Ltd v Indect Electronics & Distribution GmbH* [2015] NSWCA 343; see also A Silink, “Estoppel in Subject to Contract Negotiations” (2011) 5 *Journal of Equity* 252.

<sup>14</sup> *Mineralogy Pty Ltd v Sino Iron Pty Ltd* (no 6) [2015] FCA 825, [769] per Edelman J.

<sup>15</sup> This arises because of the application of the principle in *Miliangos v Goerge Frank Textiles* [1976] AC 443, 478.

<sup>16</sup> *Lipohar v R* (1999) 200 CLR 485 [45] per Gaudron, Gummow and Hayne JJ, ‘Different intermediate appellate courts within that hierarchy may give inconsistent rulings upon questions of common law. This disagreement will indicate that not all of these courts will have correctly applied or declared the common law. But it does not follow that there are as many bodies of common law as there are intermediate courts of appeal.’

resolving this jurisdiction split if a case in which it is raised is granted leave to appeal the High Court.<sup>17</sup> It is important to remember that the issue will not be whether the current High Court necessarily agrees with the development in the law of promissory estoppel which took place in the era of the Mason High Court. It is not an open question for the High Court to determine afresh as it is under English law.<sup>18</sup> The relevant question now is whether there are grounds upon which the current High Court would reverse its earlier decision in *Waltons Stores*. In light of the well-known considerations applied by the High Court in deciding whether to reverse an earlier decision, it is argued that it is unlikely that the High Court would overturn *Waltons Stores* on this point. However, in the current climate of uncertainty, it is to be hoped that a suitable vehicle to clarify both the ability and scope of promissory estoppel to be a source of rights under Australian law, arrives soon.

## II THE RATIO OF WALTON STORES

In light of the above it is therefore clearly necessary to return to this most basic question: what is the *ratio* of *Waltons Stores*?<sup>19</sup>

### A *Reasons for judgment in Waltons Stores*

The majority in the High Court (Mason CJ and Wilson J in a joint judgment, and Brennan J in a separate judgment) found that *Waltons* was estopped from denying that it had impliedly promised to complete the contract for lease of the Mahers' property. Orders made by the trial judge that *Waltons* was required to pay equitable damages in lieu of specific performance of the lease were upheld and the appeal was unanimously dismissed. The other members of the court (Deane J and Gaudron J) agreed in dismissing the appeal, but found on the basis of a common law estoppel and accordingly, their reasons are not the focus of this part identifying the *ratio* of the decision.<sup>20</sup>

<sup>17</sup> The resolution of such jurisdictional differences would be a significant factor in favour of being granted leave to appeal: *New South Wales v Lepore* (2003) 212 CLR 511 [6] per Gleeson CJ.

<sup>18</sup> For a discussion of the considerations in relation to the possible future development of English law in relation to equitable estoppel arising from non-land based promises, see Ben McFarlane, 'The limits to estoppels' (2013) 7 *Journal of Equity* 250.

<sup>19</sup> (1988) 164 CLR 387.

<sup>20</sup> *Ibid* 444 per Deane J. Deane J found that the facts sufficed to found a common law estoppel precluding *Waltons* from denying the existence of a binding agreement for lease. His Honour developed his support for a unified estoppel by conduct which applied to representations of fact and future intention (at 450-452). This view has not been adopted and is not developed further here for present purposes. Gaudron J (at 460) also found for the Mahers on the basis of a common law estoppel as her Honour accepted that the Mahers had made an assumption that exchange had occurred. However, her Honour discussed the nature of equitable estoppel and in obiter, indicated her support for the view that equitable estoppel could be extended to deal with

1 *Mason CJ and Wilson J*

Mason CJ and Wilson J<sup>21</sup> found that the evidence did not support the claim that the Mahers believed that contracts had already been exchanged or that a binding contract had already come into existence.<sup>22</sup> Rather, the evidence supported the finding that Mr Maher believed that contracts *would be* exchanged – an assumption as to the future.<sup>23</sup> Their Honours said, “This brings us to the doctrine of promissory estoppel on which the respondent relied in this Court.”<sup>24</sup> Their Honours noted that promissory estoppel extended to representations of future conduct, but that so far the doctrine had been mainly confined to ‘precluding departure from a representation in a pre-existing contractual relationship that [the defendant] will not enforce his contractual rights.’<sup>25</sup> Their Honours said that ‘[i]n principle there is certainly no reason why the doctrine should not apply so as to preclude departure by a person from a representation that he will not enforce a non-contractual right.’<sup>26</sup> Their Honours observed that there had been an historical reluctance to allow promissory estoppel to become the vehicle for the positive enforcement of a representation by a party that he would do something in the future.<sup>27</sup> But they noted that this was the relevant issue in the proceedings.<sup>28</sup>

These introductory observations make it clear that their Honours were addressing the expansion of promissory estoppel. They noted the historical objection to such a development on the basis of the threat it posed to the doctrine of consideration.<sup>29</sup> However, they also considered the argument in favour of it:

True it is that in the orthodox case of promissory estoppel, where the promisor promises that he will not exercise or enforce an existing right, the elements of reliance and detriment attract equitable intervention on the basis that it is unconscionable for the promisor to depart from his promise, if to do so will result in detriment to the promisee. And it can be argued (see, e.g., Greig and Davis, *Law of Contract*, p. 184) that there is no justification for applying the doctrine of promissory estoppel in this situation, yet denying it in the case of a non-contractual promise in the absence of a pre-existing relationship. The

assumptions as to future contractual rights that were not within the scope of proprietary estoppel.

<sup>21</sup> *Ibid* from 392.

<sup>22</sup> *Ibid* 397.

<sup>23</sup> *Ibid*.

<sup>24</sup> *Ibid* 399.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid* 399.

<sup>27</sup> *Ibid* 400.

<sup>28</sup> *Ibid*.

<sup>29</sup> *Ibid*.

promise, if enforced, works a change in the relationship of the parties, by altering an existing legal relationship in the first situation and by creating a new legal relationship in the second.<sup>30</sup>

After a review of a number of both promissory and proprietary estoppel cases, finding in them a ‘common thread which links them together’, their Honours concluded:

The foregoing review of the doctrine of promissory estoppel indicates that the doctrine extends to the enforcement of voluntary promises on the footing that a departure from the basic assumptions underlying the transaction between the parties must be unconscionable. As failure to fulfil a promise does not of itself amount to unconscionable conduct, mere reliance on an executory promise to do something, resulting in the promisee changing his position or suffering detriment, does not bring promissory estoppel into play. Something more would be required...<sup>31</sup>

Their Honours then referred to the ‘application of *these principles* to the facts of the present case.’<sup>32</sup> Their Honours found that in the circumstances of the urgency of the transaction and the silence of Waltons whilst in receipt of the signed counterpart of the contract for lease, it was unconscionable for Waltons, knowing that the Mahers were exposing themselves to detriment, ‘to adopt a course of inaction which encouraged them in the course they adopted.’<sup>33</sup> Their Honours finally concluded that, ‘To express the point in the language of promissory estoppel, the appellant is estopped in all the circumstances from retreating from its implied promise to complete the contract.’<sup>34</sup> The joint judgment was thus clearly an endorsement of an expanded promissory estoppel capable of being used as a source of rights.

## 2 *The reasons for judgment of Brennan J*

Brennan J<sup>35</sup> also found that Mr Maher had assumed that a binding agreement *would be* brought into existence and that Mr Maher expected that execution and delivery of the original deed would take place as a matter of course<sup>36</sup> and noted that this basis for a claim of estoppel was ‘radically different’ to the other two alternative bases that had been argued, namely, that Waltons had completed the exchange, or that there was a binding contract in existence. The future promise could be supported, if at all, only by equitable estoppel, whereas

<sup>30</sup> Ibid 401.

<sup>31</sup> Ibid 405.

<sup>32</sup> Ibid 406.

<sup>33</sup> Ibid 407-408.

<sup>34</sup> Ibid 408.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid 410.

the other two fell within the scope of estoppel *in pais*.<sup>37</sup>

In relation to the assumption that Waltons *would* complete the exchange, Brennan J posed the rhetorical question whether the Mahers' circumstances were such as to raise an equity of the kind described by Danckwerts LJ in *Inwards v Baker*, 'an equity created by estoppel, or equitable estoppel, ... by which the person who has made the expenditure is induced by the expectation of obtaining protection, and equity protects him so that an injustice may not be perpetrated.'<sup>38</sup>

Brennan J observed that whilst he did not find it generally helpful to divide into classes the cases in which an equity created by estoppel had been held to exist, they served to 'identify the characteristics of the circumstances which have been held to give rise to an equity in the party raising the estoppel.'<sup>39</sup> He noted the traditional scope of promissory estoppel, in which 'the equity binds the holder of a legal right who induces another to expect that right will not be exercised against him,' and proprietary estoppel, where 'the equity binds the owner of property who induces another to expect that an interest in the property will be conferred on him.'<sup>40</sup> It is important to appreciate that Brennan J at no point rejected the existence of these recognised classes or suggested that 'equitable estoppel' was to be regarded as a different principle. Rather, his discussion of the principles of equitable estoppel confirms that certain common principles underpin these recognised classes of equitable estoppel.

Brennan J then discussed these common features of the equity created by an equitable estoppel and against this background, then considered the traditional limitations upon the scope of the remedy offered by promissory estoppel.<sup>41</sup> His Honour noted that it had been limited to preventing the enforcement of existing legal rights.<sup>42</sup> However his Honour then reasoned:

<sup>37</sup> Ibid 413. Estoppel *in pais* refers to estoppel by representation at common law. Brennan J dismissed the second and third bases in short reasons. The second basis was dismissed on the grounds that the evidence demonstrated that the Mahers' solicitor, Mr Elvy, their agent for the purposes of effecting a binding agreement, knew there had been no exchange. In relation to the third basis, that a binding contract was in existence, Brennan J reasoned that the belief that there was an existing agreement was capable of two meanings: one that there was a contract in existence or the other being that there was binding obligation on Waltons to do what was necessary to complete the "formality". His Honour thought it was extremely doubtful that there was any evidence to support the first meaning, and that the second meaning gave rise to an equity covered under the reasons dealing with the assumption that exchange would take place. (at 430-431).

<sup>38</sup> [1965] 2 QB 29, 38. Although *Inwards v Baker* was a proprietary estoppel case, it is clear that Brennan J was not proposing that the circumstances of the case fell within the scope of proprietary estoppel as such. His Honour was rather addressing the nature of *the 'equity' created by an equitable estoppel*, which he then developed in detailed reasons.

<sup>39</sup> *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 418.

<sup>40</sup> Ibid 420.

<sup>41</sup> Ibid

<sup>42</sup> Ibid.

...But there is a logical difficulty in limiting the principle [of promissory estoppel] so that it applies only to promises to suspend or extinguish existing rights. If a promise by A not to enforce an existing right against B is to confer an equitable right on B to compel fulfilment of the promise, why should B be denied the same protection in similar circumstances if the promise is intended to create in B a new legal right against A? There is no logical distinction to be drawn between a change in legal relationships effected by a promise which extinguishes a right and a change in legal relationships effected by a promise which creates one. Why should an equity of the kind to which *Combe v Combe* refers be regarded as a shield but not a sword? The want of logic in the limitation on the remedy is well exposed in Mr David Jackson's essay "Estoppel as a Sword" in (1965) 81 *Law Quarterly Review* 84, 223 at 241-3.

Moreover, unless the cases of proprietary estoppel are attributed to a different equity from that which explains the cases of promissory estoppel, the enforcement of promises to create new proprietary rights cannot be reconciled with a limitation on the enforcement of other promises. If it be unconscionable for an owner of property in certain circumstances to fail to fulfil a non-contractual promise that he will convey an interest in the property to another, is there any reason in principle why it is not unconscionable in similar circumstances for a person to fail to fulfil a non-contractual promise that he will confer a non-proprietary legal right on another? It does not accord with principle to hold that equity, in seeking to avoid detriment occasioned by unconscionable conduct, can give relief in some cases but not in others.<sup>43</sup>

This passage clearly demonstrates that Brennan J rejected the dichotomy under which only estoppel arising from land-based promises could be a source of rights and that other types of promises, the subject of promissory estoppel, could not.

His Honour emphasised that the object of equitable estoppel was the prevention of detriment rather than the enforcement of promises and that as the satisfaction of the equity calls for the enforcement of a promise only to the extent necessary to remove detriment, "equitable estoppel does not elevate non-contractual promises to the level of contractual promises and the doctrine of consideration is not blown away by a side-wind."<sup>44</sup> His Honour imposed no limitation on whether such non-contractual promises had to relate to land or not. His Honour postulated the now familiar six elements necessary to establish an equitable estoppel, whether promissory or proprietary,<sup>45</sup> and found

<sup>43</sup> Ibid 425-426.

<sup>44</sup> Ibid 427.

<sup>45</sup> Ibid 428-429 per Brennan J, "In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship

that the Mahers' assumption was 'such a case'.<sup>46</sup>

The detriment arising from Waltons' failure to fulfil its promise to complete could only be remedied by means of an expanded promissory estoppel: it was not a promise relating to the grant of an interest in land within the scope of proprietary estoppel as defined earlier in his Honour's reasons, and was not a representation of existing fact which would fall within the scope of estoppel by representation. Brennan J held that as the Mahers would suffer loss if Waltons failed to execute and deliver the original deed as promised, there was an equity in the Mahers which was to be satisfied by treating Waltons as if it had executed and delivered the original deed.<sup>47</sup> The first basis for relief identified by Brennan J in relation to the Mahers' assumption of Waltons Stores' future intention therefore succeeded. Equitable estoppel was therefore applied in a manner which necessitated expanding the traditional limitations of promissory estoppel to afford relief in the Mahers' case.

Finally, in the context of discussing the fact that the Statute of Frauds would have no operation in relation to the equitable relief to be ordered, Brennan J again made it clear that he was dealing with relief arising from an equity that arose from a promissory, not proprietary, estoppel. His Honour held:

The Statute of Frauds and similar provisions prescribing formalities affecting proof of contracts have never stood in the way of a decree to enforce a proprietary estoppel (see *Crook v. Corporation of Seaford*) and, in principle, there is no reason why such provisions should apply when any other equity is created by estoppel.<sup>48</sup>

This reasoning only makes sense as an endorsement of the positive scope of promissory estoppel to create new rights in the same way that a proprietary estoppel is capable of creating new rights which are not defeated by Statute of Frauds provisions. Otherwise, the comparison drawn with proprietary estoppel would be meaningless.

would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise."

<sup>46</sup> Ibid 429-430.

<sup>47</sup> Ibid 430.

<sup>48</sup> Ibid 433.

### B Conclusion as to the ratio of *Waltons Stores*

Did this expansion of promissory estoppel approved by Mason CJ and Wilson J, and Brennan J, form part of the *ratio* of the case? The *ratio* in a case identifies the reasons for decision in that particular case<sup>49</sup> - or as has been said, the principle or principles upon which the case was decided: *Osborne v Rowlett*.<sup>50</sup> The definition of a *ratio decidendi* given by Cross and Harris in *Precedent in English Law* is often cited: 'any rule expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury.'<sup>51</sup> In *Garcia v National Australia Bank Ltd*, Kirby J stated that:

It is fundamental to the ascertainment of the binding rule of a judicial decision that it should be derived from (1) the reasons of the judges agreeing in the order disposing of the proceedings; (2) upon a matter in issue in the proceedings; (3) upon which a decision is necessary to arrive at that order.<sup>52</sup>

There can be no doubt that the expansion of the scope of promissory estoppel was squarely in issue in the case: without it the Mahers could not succeed in relation to their assumption as to the future intentions of the defendant. This analysis of the reasons of the majority demonstrates that the court lifted the restrictions on promissory estoppel to enable it to be a source of rights, and applied this equitable estoppel to grant positive relief to the Mahers.

The relief granted was in the form of equitable damages in lieu of specific performance of the contract that *Waltons Stores* had induced the Mahers to assume it would enter. It is important to recognise that relief did not flow from another cause of action (such as breach of contract) arising from a state of affairs established by the estoppel, as would be the case if estoppel by representation had applied. Whilst Deane J and Gaudron J would have found on this basis, it was not an available basis for relief for the majority because the nature of the operative assumption was held to relate to future intention, not a matter of fact. Nor was equitable relief granted in respect of a proprietary estoppel arising from a promise as to the grant of an interest in land. Whilst it has been suggested that it might have been possible to argue the case as an unusual claim in proprietary estoppel<sup>53</sup> it was neither argued on this ground,

<sup>49</sup> *Idya Pty Ltd v Anastasiou* [2008] NSWCA 102 [28] per Beazley JA, Mason P agreeing.

<sup>50</sup> (1880) 13 Ch D 774, 785.

<sup>51</sup> R Cross and JW Harris, *Precedent in English Law* (Clarendon Press 4<sup>th</sup> ed, 1991) 72, cited in *Klewer v Attorney General in and for the State of New South Wales* [2010] NSWCA 219 [20].

<sup>52</sup> (1998) 194 CLR 395, [56]. His Honour reiterated this approach in *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [224]. This was cited with approval in *Idya Pty Ltd v Anastasiou* [2008] NSWCA 102 at [28] per Beazley JA, Mason P agreeing. See also *Coleman v Power* (2004) 220 CLR 1, [79] per McHugh J, cited with approval by Kirby J in *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [226].

<sup>53</sup> KR Handley, *Estoppel by Conduct and Election*, (Sweet & Maxwell, London 2006) [11-030]-[11-034]; [11-040]-[11-041].

nor were reasons given addressing this argument.

Accordingly, it is argued that the reasons of the majority in *Waltons Stores* in relation to an expanded promissory estoppel were not just ‘significant dicta’,<sup>54</sup> but comprised the *ratio* of the case: it was the principle of law expressly treated by the majority in *Waltons Stores* as a necessary step in reaching their conclusion that *Waltons* was estopped from denying the implied promise to complete the contract for lease and gave rise to positive equitable relief. However, even if this analysis is wrong, there is no doubt that these reasons constitute ‘seriously considered dicta uttered by a majority’ in the High Court on this issue.<sup>55</sup> It therefore ought to be followed unless it has been overturned by the High Court subsequently.<sup>56</sup>

There is (at least) one question of taxonomy in relation to equitable estoppel under Australian law which has arisen from the decision in *Waltons Stores*. That is whether the majority should be seen as having unified the doctrines of promissory and proprietary estoppel into a single doctrine of ‘equitable estoppel’ or not.

It has just been demonstrated that promissory estoppel was shorn of its restrictive limitations by the majority and applied as a source of rights in a manner which would not have fallen within the scope of proprietary estoppel or the traditional scope of promissory estoppel. As a consequence, at a certain level of generality, the essential elements of equitable estoppel were identified by the majority as being the same for both proprietary and promissory estoppels, though in slightly different formulations.

However, it is argued that it does not follow from this that *Waltons Stores* requires the rejection of the different classes of ‘equitable estoppel’.<sup>57</sup> It is true, as already noted, that Brennan J said that he did not find it generally helpful to divide into classes the cases in which an equity created by estoppel had been held to exist. However, his Honour also noted that they served to ‘identify the characteristics of the circumstances which have been held to give rise to an equity in the party raising the estoppel.’<sup>58</sup> Neither Mason CJ and Wilson J, nor Brennan J, clearly held that it was a necessary part of the development of the law that the recognised classes of case, promissory and proprietary, should be abandoned, even if they shared common elements to be established. However, what is clear, for present purposes, is that equitable estoppel under Australian law is no longer defined by a dichotomy between land-based assumptions which *can* be a source of rights and other assumptions which *cannot*.

<sup>54</sup> *Ashton v Pratt* [2015] NSWCA 12; (2015) 318 ALR 260, 287 [138] per Bathurst CJ.

<sup>55</sup> *Farah Constructions v Say-Dee* (2007) 230 CLR 89 [134], [158].

<sup>56</sup> See for example *Garcia v National Australia Bank* (1998) 194 CLR 395, [17] per Gaudron, McHugh, Gummow and Hayne JJ; [56]-[58] per Kirby J; [107] per Callinan J; *Gett v Tabet* (2009) 254 ALR 504, [272].

<sup>57</sup> *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 420.

<sup>58</sup> *Ibid.*

### C *Ratio has not been overturned by the High Court subsequently*

The cases on equitable estoppel decided by the High Court since *Waltons Stores* have not overturned the *ratio* of that case. *Commonwealth v Verwayen*<sup>59</sup> was decided two years after *Waltons Stores*. As is well known, *Verwayen* lacks a clear *ratio*.<sup>60</sup> However, the context of the claim was clearly a voluntary, non-contractual promise rather than a claim falling within the traditional scope of proprietary estoppel. There was no division in the court as to the scope of equitable estoppel under the law to be a source of rights in this promissory, as opposed to proprietary, context. The positive scope of equitable estoppel accepted in *Waltons Stores* was expressly or impliedly approved by Mason CJ<sup>61</sup> (with whom Gaudron J agreed<sup>62</sup>), by Brennan J,<sup>63</sup> Dawson J<sup>64</sup> (with whom Deane J agreed,<sup>65</sup>), Toohey J<sup>66</sup> and McHugh J.<sup>67</sup> McHugh J noted expressly that both promissory and proprietary estoppels were sources of rights in equity:

One important difference between the common law doctrine of estoppel in pais and the equitable doctrines of promissory and proprietary estoppel is that the common law doctrine is concerned with the rules of evidence, notwithstanding that a common law claim of estoppel must be pleaded, while the equitable doctrines are concerned with the creation of new rights between the parties. .... the equitable doctrines of estoppel create rights. They give rise to equities which are enforceable against the party estopped. The equitable doctrines result in new rights between the parties when it is unconscionable for a party to insist on his or her strict legal rights.<sup>68</sup>

Indeed, three years later in *Australian Securities Commission v Marlborough Gold Mines Ltd*<sup>69</sup> the High Court referred to “an equitable estoppel of the kind upheld in *Verwayen*”.<sup>70</sup> The claim was a claim to hold the

<sup>59</sup> (1990) 170 CLR 394.

<sup>60</sup> Of the four judges in the majority, two judges (Deane and Dawson JJ) found that the Commonwealth was estopped from denying that it had promised not to rely upon the limitation defence, whilst two judges (Toohey and Gaudron JJ) found that the Commonwealth had waived its rights to rely upon the limitation defence.

<sup>61</sup> (1990) 170 CLR 394, 410, 412.

<sup>62</sup> *Ibid* 487.

<sup>63</sup> *Ibid* 422.

<sup>64</sup> *Ibid* 454.

<sup>65</sup> *Ibid* 431, though also expressing his own view of a new model of estoppel by conduct.

<sup>66</sup> *Ibid* 475-476.

<sup>67</sup> *Ibid* 500-501.

<sup>68</sup> *Ibid* 500.

<sup>69</sup> (1993) 112 ALR 627.

<sup>70</sup> *Ibid* 639. The respondent was granted an order from the Supreme Court of Western Australia under s 411(1) of the Corporations Law that a meeting be convened to consider a scheme of arrangement under that section which would change the company's status from that of a company limited by shares to that of a no liability company. The appellant had indicated that it would not make submissions in opposition to the scheme. However, after the meeting had been

Australian Securities Commission to a non-contractual assurance that it would not object to a scheme of arrangement which would change the respondent's status from that of a company limited by shares to that of a no liability company. The High Court did not raise any doctrinal objection to the nature of the claim.<sup>71</sup>

In *Giumelli v Giumelli*<sup>72</sup> the joint judgment cited with approval the reference in *Marlborough's* case to "an equitable estoppel of the kind upheld in *Verwayen*"<sup>73</sup> even though both *Marlborough* and *Verwayen* were promissory estoppel cases. Although this was a proprietary estoppel case, nothing said in the judgments contradicted the scope of equitable promissory estoppel to be a source of positive rights. The most recent consideration of equitable estoppel by the High Court was in *Sidhu v Van Dyke*.<sup>74</sup> Although it was another proprietary estoppel case, nothing said by the plurality or by Gageler J otherwise overturned or questioned the *ratio* of *Waltons Stores* with respect to the scope of promissory estoppel.<sup>75</sup>

This review of High Court consideration of *Waltons Stores* demonstrates that the High Court has not expressly or impliedly overturned that development since it was decided.

### III JURISDICTIONAL SPLIT – NEW SOUTH WALES

A number of intermediate courts of appeal have applied or discussed *Waltons Stores* as authority for an expanded promissory estoppel capable of giving rise to positive rights: see for example *Australian Crime Commission v Gray*;<sup>76</sup>

held, it became aware of the decision of the Full Federal Court in *Windsor v National Mutual Life Association of Australasia Ltd* in which it was held that was beyond the scope s. 411. The appellant then changed its position and opposed the scheme when approval was sought from the court.

<sup>71</sup> *Ibid*, 640. The Court found that on the facts, the conduct of the Australian Securities Commission was "neither "unjust" nor "unconscionable" to use the expressions found in *Thompson v Palmer* and *Verwayen*." The High Court referred to the following references in *Verwayen's* case: (1990) 170 CLR, at 410–11, 429, 436, 440–41, 453–4, 500–1.

<sup>72</sup> (1999) 196 CLR 101.

<sup>73</sup> *Ibid* [7].

<sup>74</sup> [2014] HCA 19.

<sup>75</sup> Whilst *Sidhu* concerned a proprietary estoppel claim, it may be noted that in dealing with the requirement for a plaintiff to prove detrimental reliance to establish a claim in equitable estoppel, the plurality (French CJ, Kiefel, Bell and Keane JJ) said at [58], "It is actual reliance by the promisee, and the state of affairs so created, which answers the concern that equitable estoppel not be allowed to outflank *Jorden v Money* by dispensing with the need for consideration if a promise is to be enforceable as a contract." This statement is consistent with an acceptance of promissory estoppel as a source of rights as *Jorden v Money* and the issue of outflanking contract are irrelevant to positive relief in proprietary estoppel.

<sup>76</sup> [2003] NSWCA 318.

*Wright v Hamilton Enterprises*;<sup>77</sup> *ACN 074 971 109 Pty Ltd (as Trustee for the Argot Unit Trust) v The National Mutual Life Association of Australasia Ltd*<sup>78</sup>; and *Tipperary Developments Pty Ltd v Western Australia*.<sup>79</sup> In jurisdictions other than New South Wales, there is evidence of ongoing acceptance of *Waltons Stores* as authority for promissory estoppel as a source of positive rights: see for example, in the Federal Court of Australia, *Yarrabee Chicken Company Pty Ltd v Steggle's Limited*,<sup>80</sup> in Victoria, *Leading Synthetics Pty Ltd v Adroit Insurance Group Pty Ltd & Anor*,<sup>81</sup> *Eccles -v- Koolan Iron Ore Pty Ltd*,<sup>82</sup> and in South Australia, *Karthurmary Pty Ltd v Facac Pty Ltd*.<sup>83</sup>

In New South Wales too, the Court of Appeal had previously accepted that promissory estoppel was capable of being a source of rights.<sup>84</sup> However, in *Saleh v Romanous*<sup>85</sup> the New South Wales Court of Appeal restated the principle as operating as a restraint on the exercise of rights only, not an independent source of rights. This section explores this change in the law in New South Wales, the possible reasons for it, and its consequences.

#### A *Saleh v Romanous*

*Saleh v Romanous* concerned a property development venture which did not go according to plan. The defendants, Mr and Mrs Saleh, were the owners of a property in Sydney which they had purchased in early 2002 with a view to developing. Mr Saleh's brother, Edmund Saleh ('Eddie') who was not a party to the proceedings, owned the adjoining property. The defendants had a plan to demolish the existing buildings on both properties and build eight, strata-titled two-storey townhouses in their place. At the heart of the proceedings was the promise found to have been made by Mr Saleh to Mr Romanous, the prospective purchaser of the land, to the effect that:

Michael said "Leave Eddie up to me. I'm taking responsibility for Eddie. If Eddie doesn't want to build you don't have to buy and you'll get your money back".<sup>86</sup>

<sup>77</sup> [2003] QCA 36.

<sup>78</sup> (2008) 21 VR 351, [171].

<sup>79</sup> (2009) 258 ALR 124, although in that case the claim failed for other reasons.

<sup>80</sup> [2010] FCA 394 per Jagot J. Note this decision was not appealed on the estoppel finding but was successfully appealed in relation to findings in related proceedings concerned the findings on the construction of contract.

<sup>81</sup> [2011] VSC 467.

<sup>82</sup> [No 3] [2013] WASC 418 per Le Miere J at [91] (note: the estoppel claim did not succeed as reliance was not proven but the principle was described in terms relying upon *Waltons Stores* and accepting it as a source of rights).

<sup>83</sup> [2013] SASC 90 per Nicholson J at [85]-[95].

<sup>84</sup> *Australian Crime Commission v Gray* [2003] NSWCA 318.

<sup>85</sup> [2010] NSWCA 274; (2010) 79 NSWLR 453.

<sup>86</sup> [2009] NSWSC 1166, [47].

In May 2004, the defendants entered into a contract for the sale of the property to Mr and Mrs Romanous. The purchase price was \$670,000. On exchange, Mr and Mrs Romanous paid the deposit of \$67,000 but no agreement with Eddie for the development was reached and the contract was never completed.

### 1 *Romanous v Saleh - Judgment at First Instance*

The estoppel claim in the proceedings had at its heart the pre-contractual assurance alleged to have been given by Mr Saleh.<sup>87</sup> Forster J treated it as an application of promissory estoppel, citing the reasons of the majority in *Waltons Stores* for the elements of the doctrine of promissory estoppel.<sup>88</sup> His Honour found that the circumstances of the case satisfied both the formulation of the doctrine by Brennan J and that of Mason CJ and Wilson J.<sup>89</sup> His Honour held that the defendants were estopped from denying their obligation arising from Michael Saleh's promise to repay the moneys advanced by Mr and Mrs Romanous and from enforcing the contract and suing them for its breach.<sup>90</sup> It is important to consider the nature of the relief to which Forster J found Mr and Mrs Romanous were entitled. The obligation upon the defendants to repay moneys advanced to them by Mr and Mrs Romanous was *positive* relief – requiring them to do something. Estopping the defendants from enforcing the contract or suing for its breach was *negative* relief – restraining them from exercising contractual rights. Forster J held both types of relief were available upon the proper application of the doctrine as stated in *Waltons v Maher*. In the result, the scope of the positive equitable relief granted to remedy the equity which arose from the promissory estoppel was limited to the refund of the deposit of \$67,000.

### 2 *Appeal – Saleh v Romanous (2010) 79 NSWLR 453*

On appeal, Mr and Mrs Saleh challenged the findings of fact made below, particularly the finding that a promissory estoppel arose in the circumstances. There was no ground of appeal concerning the positive scope of relief awarded by the trial judge, or in relation to the application of *Waltons Stores* as authority

<sup>87</sup> Ibid [152]-[153]. There were also claims based on abandonment, frustration, innocent misrepresentation, misleading and deceptive conduct, repudiatory breach of the contract, relief against forfeiture in relation to the \$200,000, relief under s 55(2A) of the Conveyancing Act 1919 (NSW) in relation to the \$67,000 deposit, claims based on unjust enrichment, a claim in debt for the recovery of the \$200,000 loan and a quantum meruit claim in respect of plumbing services provided to the Salehs.

<sup>88</sup> *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 399, 404 per Mason CJ and Wilson J; 428-9 per Brennan J.

<sup>89</sup> [2009] NSWSC 1166, [167]-[177].

<sup>90</sup> Ibid [178]-[179].

for the principle that promissory estoppel could be used as a source of rights. However, in the Court of Appeal, Handley AJA (with whom Giles JA and Sackville AJA agreed) rejected the principle of law applied by Forster J that a promissory estoppel could give rise to positive relief.<sup>91</sup> Handley AJA stated that, ‘A promissory estoppel is a restraint on the enforcement of rights, and thus, unlike a proprietary estoppel, it must be negative in substance.’<sup>92</sup>

Handley AJA referred to two statements of principle in English cases for the scope of promissory estoppel. The first was *Hughes v Metropolitan Railway Company*,<sup>93</sup> where Lord Cairns LC in his ‘classic statement of principle’ said: ‘[T]he person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.’<sup>94</sup> The second was *Birmingham and District Land Company v London & North Western Railway Company*.<sup>95</sup> Handley AJA also referred to discussion to the same effect in his own text *Estoppel by Conduct and Election*.<sup>96</sup> *Waltons Stores* was not discussed in relation to the scope of promissory estoppel. Handley JA concluded:

The Judge held that the promissory estoppel entitled the purchasers to rescind and recover their deposit. In my judgment positive relief was not available on that ground but his decision that the promissory estoppel prevented the vendors enforcing the contract entitled the purchasers to an order under s55(2A). The Judge’s orders .. can be affirmed without a formal order under the section.<sup>97</sup>

Accordingly, the Court of Appeal used this statutory power to justify the order for the return of the deposit. The appeal was dismissed. The result in *Saleh* was ultimately the same purely by reason of the nature of the relief sought in the case and the fact that there existed a statutory power to order the return

<sup>91</sup> (2010) 79 NSWLR 453 per Handley JA, (Giles JA and Sackville AJA agreeing), 462 [73].

<sup>92</sup> Ibid [74]. See A Robertson, “Three models of promissory estoppel” (2013) *Journal of Equity* 226 for a detailed discussion of both the nature of the principle of promissory estoppel advanced by Handley in his book *Estoppel by Conduct and Election* (Sweet & Maxwell, London, 2006) and applied by the Court of Appeal in *Saleh*, and the authorities which are inconsistent with this “restraint on rights model” of promissory estoppel.

<sup>93</sup> (1877) 2 App Cas 439.

<sup>94</sup> *ibid* 448. His Honour noted that this passage had been quoted by Lord Wilberforce in *Bank Negara Indonesia v Hoalim* [1973] 2 MLJ 3, a decision of the Privy Council.

<sup>95</sup> (1888) 40 Ch D 268, 286 per Bowen LJ: ‘If persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before.’

<sup>96</sup> (2010) 79 NSWLR 453, [74]-[76] referring to KR Handley, *Estoppel by Conduct and Election*, (Thomson Sweet & Maxwell, London 2006) at 201–203, 214–225.

<sup>97</sup> (2010) 79 NSWLR 453 per Handley JA, (Giles JA and Sackville AJA agreeing), 462[81]

of the deposit.<sup>98</sup>

### 3 Where was *Waltons Stores*?

The ‘elephant in the room’ in the reasons for decision in the Court of Appeal in *Saleh* was the status of *Waltons Stores* as authority for the capacity of promissory estoppel to be an independent source of rights. It is striking that there is no direct reference to, or consideration of *Waltons Stores*; only reference to English authority. It is all the more so given the fact that the trial judge had expressly referred to and relied upon passages in the judgments of the majority in *Waltons Stores* and applied them on the basis that they set out the relevant principle for promissory estoppel under Australian law. The reasons given do not explain the basis on which it was open to the court to restate the principle of promissory estoppel in a contrary manner in light of the decision of the High Court in *Waltons Stores*. There was no discussion as to why these passages were not statements of principle binding on Australian courts. Nor did the Court of Appeal give any reasons addressing the error in earlier decisions of its own<sup>99</sup> or of the other intermediate appellate courts<sup>100</sup> which had applied *Waltons Stores* as authority for promissory estoppel as a source of rights and why those cases ought not to be followed.

The principles of the doctrine of precedent ordinarily prevent such a sharp change in direction in the law without detailed reasons. Intermediate appellate courts are bound to apply the *ratio* of the High Court<sup>101</sup> and are also required to follow ‘seriously considered’ obiter dicta of the High Court.<sup>102</sup> They do not lightly overturn a decision of their own court unless persuaded it is ‘plainly wrong’ and then only in accordance with particular criteria.<sup>103</sup> Likewise, decisions of other intermediate appellate courts are followed unless demonstrated to be clearly wrong.<sup>104</sup> These principles ordinarily ensure that

<sup>98</sup> However, if the payments made by Mr and Mrs Romanous which were the subject of the promise had not fallen within the scope of s.55(2A), the Court of Appeal made it clear that there was no scope for positive relief.

<sup>99</sup> See for example *Australian Crime Commission v Gray* [2003] NSWCA 318.

<sup>100</sup> See for example *Wright v Hamilton Enterprises* [2003] QCA 36; in *Victoria ACN 074 971 109 Pty Ltd (as Trustee for the Argot Unit Trust) v The National Mutual Life Association of Australasia Ltd* (2008) 21 VR 351. The only reference by the Court of Appeal of any of these cases was the statement at [69] that in *Wright v Hamilton Enterprises* [2003] QCA 36, ‘the relief granted should have been negative in substance, restraining the owner from determining the agreements unless the licensees were in breach.’ However this was in the context of discussing the relationship between promissory estoppel and the rule in *Hoyt’s v Spencer*, not the scope of promissory estoppel as discussed in *Waltons Stores* or other intermediate appellate court decisions.

<sup>101</sup> *Garcia v National Australia Bank* (1998) 194 CLR 395.

<sup>102</sup> *Farah Constructions v Say-Dee* (2007) 230 CLR 89 [134], [158].

<sup>103</sup> See for example *Gett v Tabet* [2009] NSWCA 76; (2009) 254 ALR 504, at [294]-[295].

<sup>104</sup> *Ibid.*

where a change to established principle is permissible, the process gives rise to very careful examination of the decided cases in the reasons for judgment.

The reasons of the New South Wales Court of Appeal for restating the principle of promissory estoppel in its traditional scope without addressing the status of *Waltons Stores* on the scope of promissory estoppel under Australian law are not known. However, Handley AJA who delivered the reasons for judgment (in which Giles JA and Sackville AJA agreed) referred to his extra-judicial writing on the topic of promissory estoppel<sup>105</sup> and in this and other articles written extra-judicially, his views about the decision in *Waltons Stores* are developed. He has observed:

It seems therefore that four of the Judges upheld an expanded promissory estoppel, four a proprietary estoppel, and three an estoppel by representation based on silence, with the decision on proprietary estoppel based on orthodox principles. The decision is an example of a hard case making bad law. No judge at any level found for the company. The reasoning in favour of an expanded promissory estoppel was contrary to principle and authority, and unnecessary. ... The radical development in *Waltons Stores* was the enforcement of a promissory estoppel where there was no legal relationship between the parties. Hitherto, promissory estoppel had been a negative and defensive equity which restrained enforcement of the promisor's existing rights to protect the promise from detriment caused by his change of position. It was not a freestanding right of the promise but a restraint on an existing right of the promisor. Such an equity would not have helped the owners in *Waltons Stores*.<sup>106</sup>

Handley concluded that, '[n]either promissory estoppel nor estoppel by encouragement form a principled basis for the creation of freestanding equitable rights in personam.'<sup>107</sup>

There can be no doubt that the development of an expanded promissory estoppel was indeed a radical change to the previously accepted scope of the principle. Views may differ as to the merits of developing promissory estoppel as capable of being an independent source of rights in relation to promises not concerning the grant of interests in land.<sup>108</sup> However it is not the purpose of this article to debate the different views as to the merits of the development.

<sup>105</sup> *Saleh v Romanous* (2010) 79 NSWLR 453, [76], 'The topic is considered in Handley 'Estoppel by Conduct and Election' 2006 at pp 201-3, 214-225.'

<sup>106</sup> Hon Justice KR Handley, 'The three High Court decisions on estoppel 1988-1990' (2006) 80 *Australian Law Journal* 724, 729.

<sup>107</sup> *Ibid.*

<sup>108</sup> For example, Ben McFarlane has suggested that another way of achieving the same end without requiring a change to promissory estoppel is to develop what he describes as 'the promise-detriment principle,' which he identifies as a strand of both promissory and proprietary estoppels, so that it can operate as a cause of action in circumstances not restricted to promises relating to land: See Ben McFarlane, above n 18, 268, 284.

The purpose of this analysis is rather to highlight the fact that regardless whether the expanded principle of promissory estoppel was the *ratio* of *Waltons Stores*, or ‘seriously considered dicta uttered by a majority’, departure from this principle by an intermediate court of appeal is difficult to justify.

*Equitable Relief and the Rule in Hoyt’s v Spencer*

The only other reason given by the Court of Appeal as to why promissory estoppel could not give positive relief related to a perceived conflict with the rule in *Hoyt’s v Spencer*.<sup>109</sup> Handley AJA observed that the promissory estoppel which had been found was ‘not the equitable equivalent of a contract’ and so could give the purchasers positive rights to rescind and recover their deposit as would have been the case if it had contractual force. His Honour held that, ‘[a] pre-contractual promissory estoppel which conferred positive rights of that nature would be contrary to *Hoyt’s* case.’<sup>110</sup> This argument does not explain the wholesale rejection of promissory estoppel as capable of being an independent source of rights. However, to the extent that the rule in *Hoyt’s v Spencer* is given as a reason for not permitting positive relief from the promissory estoppel in the circumstances of the case, it needs to be analysed.

*Hoyt’s v Spencer*<sup>111</sup> is authority for the proposition that an informal collateral contract made in consideration for entering into the principal contract cannot be inconsistent with the terms of the principal contract. That common law principle with respect to the enforceability of collateral contracts is not in doubt. However, does it follow that where a promissory estoppel is made out, positive equitable relief that enforces a pre-contractual promise inconsistent with the contract contravenes the rule in *Hoyt’s v Spencer*? In *Waltons Stores*, Mason CJ and Wilson J noted this concern.<sup>112</sup> Brennan J, whilst not dealing directly with *Hoyt’s* case, specifically dealt with the fact that there are significant differences between positive equitable relief and contractual rights, noting that the equity required unconscionability and that in moulding the appropriate relief the court ‘goes no further than is necessary to prevent unconscionable conduct.’<sup>113</sup> Brennan J’s analysis confirms that the enforcement of a promise as the most appropriate way to satisfy an equity arising from a promissory estoppel is not *in origin* contractual, nor is it enforced as a contract. Brennan J explained that:

... [T]he object of the principle can be seen to be the avoidance of that detriment and the satisfaction of the equity calls for the enforcement of a promise only as a means of avoiding the detriment and only to the

<sup>109</sup> (1919) 27 CLR 133.

<sup>110</sup> *Saleh v Romanous* (2010) 79 NSWLR 453, [73].

<sup>111</sup> (1919) 27 CLR 133

<sup>112</sup> (1988) 164 CLR 387, 400-401 per Mason CJ and Wilson J.

<sup>113</sup> (1988) 164 CLR 387, 419.

extent necessary to achieve that object. So regarded, equitable estoppel does not elevate non-contractual promises to the level of contractual promises and the doctrine of consideration is not blown away by a side wind.<sup>114</sup>

In other words, as relief is not contractual but equitable, the equitable enforcement of a promise – even a promise of a right to rescind – does not breach the common law rule dealing with inconsistent contractual provisions.

Handley JA accepted that a promissory estoppel is not enforced as a contract, and that enforcement of a pre-contractual promissory estoppel is not barred by *Hoyt's* case.<sup>115</sup> However, this was only accepted in the context of promissory estoppel operating as an 'equitable restraint on the exercise or enforcement of the promisor's rights.'<sup>116</sup> If promissory estoppel was an independent source of rights, this was apparently inconsistent with *Hoyt's* case.<sup>117</sup> However, *Wright v Hamilton Enterprises*<sup>118</sup>, a case referred to in *Saleh*,<sup>119</sup> dealt with this very point. In *Wright*, the appellants had each made oral agreements with the respondent that they would conduct respectively a restaurant and a bar at the Hamilton Island resort. They later entered into written agreements described as 'licences'. The written licence agreements said nothing about renewal. However, prior to entering into the written licence agreements, it was accepted that representatives of the respondent had promised each of them that provided they had the interests of the resort at heart, provided a good restaurant or bar, paid their accounts to the respondent on time, and complied with the requirements of their respective licence, the licences would be renewed at the licensee's request and be ongoing. The written licence agreements themselves however were expressed to be for a finite period of five years. Pursuant to Article 14 of the licence, in the absence of any written agreement, a holding over period was provided for which could be cancelled on the giving of six months' written notice by either party.

At trial, Thomas J found for the licensees primarily on the basis of estoppel. However, his Honour also found that the promises made constituted a collateral contract. On appeal, McMurdo P and Mackenzie J found that the promises said to constitute a collateral contract were inconsistent with Article 14 and therefore could not be enforced as a collateral contract by reason of the rule in *Hoyt's v Spencer*. However, on appeal it was unanimously<sup>120</sup> found that there was no error by the trial judge in his findings that a promissory estoppel had been made out. Both McMurdo P and Jerrard JA specifically found that

<sup>114</sup> *Ibid* 426-427.

<sup>115</sup> *Saleh v Romanous* (2010) 79 NSWLR 453, [62].

<sup>116</sup> *Ibid*.

<sup>117</sup> *Ibid* [73].

<sup>118</sup> [2003] QCA 36.

<sup>119</sup> *Saleh v Romanous* (2010) 79 NSWLR 453, [69].

<sup>120</sup> [2003] QCA 036, per McMurdo P, Jerrard and Mackenzie JJA.

the rule in *Hoyt's v Spencer* did not preclude the finding of a promissory estoppel even if the content of the promise was inconsistent with the later contract.<sup>121</sup> Jerrard JA engaged in a detailed analysis of the reasons for judgment of Mason CJ and Wilson J, and of Brennan J, and found:

These citations from *Waltons v Maher* make clear that all three of the judgments in that case which relied upon a promissory or equitable estoppel in dismissing the appeal in that case considered with care and dismissed the argument that reliance upon such an estoppel, to enforce what was described as a voluntary promise and particularly about future conduct, undermined the settled principles of consideration, and alternatively were inconsistent with *Hoyt's v Spencer*.<sup>122</sup>

In *Saleh*, Handley AJA referred to *Wright's* case<sup>123</sup> but made no reference to these reasons addressing the effect of the rule in *Hoyt's v Spencer* on promissory estoppel as a source of rights. *Wright's* case is inconsistent with the reasoning in *Saleh* that to enforce a promise by way of granting positive relief in equity is contrary to the rule in *Hoyt's v Spencer*.

4 *Was the negative restatement of promissory estoppel the ratio of Saleh v Romanous?*

The question then arises whether this restatement of the scope of promissory estoppel as negative in substance and not capable of being a source of rights was part of the *ratio* of the decision of the Court of Appeal. At trial, the scope of promissory estoppel to be an independent source of rights was not argued as an issue between them. However, agreement by the parties as to a proposition of law does not bind a court.<sup>124</sup> The court can raise or question a principle of law

<sup>121</sup> [2003] QCA 036, [12]-[13], McMurdo P found; 'I am not persuaded, however, that the doctrine of promissory estoppel, which involves the concept of unconscionability, cannot extend to promises which are inconsistent with a later contract entered into between the parties because of those promises. The subsequent contract may well cause evidentiary problems for the promisee but where the necessary requirements of promissory estoppel are established, including unconscionability if the promise is not met, then the subsequent inconsistent written contract will not preclude a finding of promissory estoppel: see *SRA New South Wales v Heath Outdoor Pty Ltd*.'

<sup>122</sup> *Ibid*, [51]

<sup>123</sup> *Saleh v Romanous* (2010) 79 NSWLR 453, 461 [69].

<sup>124</sup> *Patorno v The Queen* (1989) 166 CLR 466, 473 per Mason CJ and Brennan J applied in *Soia v Bennett* 2014] WASCA 27 [80] per Pullin JA. Mason CJ and Brennan J observed: 'When the parties to an adversarial proceeding agree on a proposition of law and conduct their cases on that basis, their agreement does not bind the trial judge. If the judge determines the law to be different, he may apply the law as he determines it to be, but he must inform the parties of the view he has formed when that is necessary to give them an opportunity to address new issues arising from the judge's departure from the proposition of law on which the case was conducted. Otherwise both parties are taken by surprise: see *Fairmount Ltd. v. Environment Secretary* (citation omitted).'

regardless of whether its scope is otherwise agreed between the parties. It must follow that any such determination of a principle of law is capable of forming part of the *ratio* of a decision even if it was not ‘in issue’ as such between the parties, if it forms part of the principle of law used to determine the proceedings.

In *Saleh v Romanous*, the Court of Appeal expressly raised and determined that the principle of promissory estoppel was different in scope to that explained and applied by the trial judge. Furthermore, the scope of the principle was a matter upon which a decision was necessary for the Court of Appeal to reject the positive equitable relief ordered by the trial judge and instead, to refund the deposit under its power pursuant to s. 55(2A). Therefore the restatement of principle was a ‘necessary step’ in the decision of the Court of Appeal and the orders that were made, and thus constituted a *ratio* of the decision.<sup>125</sup>

### 5 *Refusal of leave to appeal*

In 2011 the High Court refused leave to appeal<sup>126</sup> from *Saleh v Romanous*.<sup>127</sup> However, the issue identified on the special leave application did not relate to the ability of promissory estoppel to be a source of rights.<sup>128</sup> The refusal of special leave has been noted by the NSW Court of Appeal in the context of confirming the negative scope of the principle in New South Wales.<sup>129</sup> However it cannot be taken as an indirect endorsement of the contrary principle expressed by the Court of Appeal. Mason CJ, writing extra-judicially, once observed that:

There has been a tendency on the part of the profession and some judges to treat the refusal by the High Court of special leave to appeal as an endorsement of the decision below. However, the High Court, like the House of Lords, has declared that refusal of special leave is not

<sup>125</sup> Cf Robertson, above n 92, 231.

<sup>126</sup> [2011] HCTrans 101.

<sup>127</sup> *Saleh v Romanous* (2010 79 NSWLR 453).

<sup>128</sup> [2011] HCTrans 101. It related to the issue argued before the Court of Appeal as to whether promissory estoppel ought to be permitted to trump the parole evidence rule. The issue was put in oral submissions by counsel in the following way: “We submit that if you look at the foundation of the parole evidence rule and the consequence which it has for the certainty of commercial contracts, in particular, it would be appropriate for this Court to, in effect, set a limit to the doctrine of promissory estoppel so that it does not conflict with it. That is essentially the issue which we propound in this case.”

<sup>129</sup> *DHJPM Pty Limited v Blackthorn Resources Limited (formerly called AIM Resources Limited)* (2011) 83 NSWLR 728 at [93] per Handley AJA, ‘The appellant relied on an equitable, that is a proprietary estoppel, particularly an estoppel by encouragement. Its arguments strayed at times into promissory estoppel but, as this Court unanimously held in *Saleh v Romanous* [2010] NSWCA 274 (special leave refused [2011] HCATrans 101), a promissory estoppel must be negative in substance. It is an equitable restraint on the enforcement of the promisor’s rights.’

an affirmation of the decision or of the reasons for decision below. This is because the fate of the application may depend on any one or more of a number of reasons. The question sought to be argued may not be of public or general importance; it may raise no question of general principle; it may not be a suitable vehicle for the determination of such a question; the case may depend on its own facts.<sup>130</sup>

The High Court recently confirmed that reasons for refusal of special leave create no binding principle.<sup>131</sup> Accordingly, nothing can be taken from the refusal of leave in relation to the view the High Court might take of the decision.

B *Does Saleh bind lower courts in New South Wales? The principle in Milangos v George Frank (Textiles) Ltd*

If it is correct to conclude that the restatement of the principle of promissory estoppel was a *ratio* of the Court of Appeal, then the question is whether this judgment binds the courts below the Court of Appeal in the New South Wales hierarchy of courts, regardless of the view that may be taken by a primary judge as to whether *Saleh* conflicts with the *ratio* of the High Court in *Waltons Stores*. In the House of Lords in *Miliangos v George Frank (Textiles) Ltd*, Lord Simon of Glaisdale observed:

It is the duty of a subordinate court to give credence and effect to the decision of the immediately higher court, notwithstanding that it may appear to conflict with the decision of a still higher court. The decision of the still higher court must be assumed to have been correctly distinguished (or otherwise interpreted) in the decision of the immediately higher court ... Any other course is not only a path to legal chaos but in effect involves a subordinate court sitting in judgment on a decision of its superior court. That is contrary to law.<sup>132</sup>

If this is also the law in Australia, this principle requires a primary judge to follow a decision of an intermediate court of appeal, notwithstanding the existence of an earlier contrary decision in the High Court. Therefore, lower courts in New South Wales are required to apply the *ratio* in *Saleh v Romanous*, notwithstanding the conflict with the *ratio* of *Waltons Stores*.

The principle in *Miliangos v George Frank (Textiles) Ltd* has been applied in Australia to this effect at first instance in *Pettigrew v Federal Commissioner of*

<sup>130</sup> The Hon Sir Anthony Mason KBE, “The Use and Abuse of Precedent” (1988) 4 *Australian Bar Review* 93, 96-97, citing at footnote 8 the Editorial Notes to *Blackmore v Linton* [1961] VR 374, 380; *Mihaljevic v Longyear (Australia) Pty Ltd* (1985) 3 NSWLR 1 at 25; Sir Anthony Mason, “Where Now?” (1975) 49 *Australian Law Journal* 570, 575; and *Wilson v Colchester Justices* [1985] 2 All ER 97, 100.

<sup>131</sup> *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited*; [2015] HCA 37, see in particular [112], [119].

<sup>132</sup> [1976] AC 443, 478.

*Taxation*,<sup>133</sup> *New Cap Reinsurance Corporation Ltd v AE Grant*<sup>134</sup> and *Huntingdale Village Pty Ltd v Corrs Chambers Westgarth*.<sup>135</sup> In *New Cap Reinsurance*, White J concluded that the decision of the New South Wales Court of Appeal in *Box Valley Pty Ltd v Kidd*<sup>136</sup> in relation to the scope of s 95A of the Corporations Act was inconsistent with the *ratio* of the High Court on the same issue in *Bank of Australasia v Hall*.<sup>137</sup> It was submitted by the liquidator that the earlier *ratio* of the High Court should be followed in preference to the Court of Appeal.<sup>138</sup> However, his Honour held that on the principle in *Miliangos v George Frank (Textiles) Ltd*, he was bound to apply the contrary decision of the Court of Appeal.<sup>139</sup> In *Huntingdale*, Le Miere J applied the same principle and said:

Where a single judge of this court is faced with a decision of the Court of Appeal and a later conflicting decision of the High Court, as a general rule the High Court decision will be followed. However, where one of the parties argues that the ratio of a decision of the Court of Appeal is in conflict with the ratio of an earlier decision of the High Court, the duty of a single judge of this court is to follow the decision of the Court of Appeal.<sup>140</sup>

In essence, the *Miliangos* principle simply reinforces the requirements of *stare decisis* in the face of what might seem to be a competing duty. It confirms the duty of a lower court to apply the *ratio* of a decision of a court immediately superior in the hierarchy even where there is an earlier, conflicting *ratio* of the ultimate appellate court in that hierarchy of courts. However its application to a federation of states, such as Australia, gives rise to a potential problem for the unity of the ‘one common law’ of Australia that does not arise in the same way within the English judicial hierarchy. The potential exists for a change in the common law by one intermediate appellate court to become binding within that jurisdiction despite contrary High Court authority, whilst other jurisdictions continue to follow the relevant High Court authority and any conforming authority of their own intermediate appellate courts. The High Court has said that where there is a difference between intermediate appellate courts, it does not mean that the unity of the common law does not exist, it simply means that one or more intermediate courts of appeal will have not

<sup>133</sup> (1989) ATC 4475, 4484-5 per Murphy J.

<sup>134</sup> (2008) 68 ACSR 176 per White J.

<sup>135</sup> [2011] WASC 44, [23] – [24] per Le Miere J.

<sup>136</sup> (2006) 24 ACLC 471.

<sup>137</sup> (1907) 4 CLR 1514. The issue concerned whether if the company’s insurance liabilities were to pay unliquidated damages for breach of contract, the court was bound to ignore them for the purposes of determining the company’s ‘debts’ under s 95A.

<sup>138</sup> (2008) 68 ACSR 176, [71] per White J.

<sup>139</sup> At [71].

<sup>140</sup> *Ibid* [24].

applied the law correctly.<sup>141</sup> However, the *Miliangos* principle has a very real impact upon the *practical* unity of the common law in Australia, in the sense that the same set of facts might then be required to be decided according to entirely contrary principles in different jurisdictions. This problem does not arise in its application under English law.

The High Court has not had the opportunity to consider the application of the *Miliangos* principle in Australia. There are statements of principle with respect to the doctrine of precedent which on one view, appear to reject any limitation upon the requirement of all courts, intermediate courts of appeal and trial courts, to apply the *ratio* and seriously considered dicta of the High Court. For example, in hearing an application for leave to appeal in *Western Export Services Inc v Jireh International Pty Ltd*,<sup>142</sup> the High Court referred to the obligation of primary judges to apply the precedent of the High Court even in the face of contrary views of intermediate courts of appeal. In that case, Gummow, Heydon and Bell JJ observed:

Acceptance of the applicant's submission, clearly would require reconsideration by this court of what was said in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*<sup>8</sup> by Mason J, with the concurrence of Stephen and Wilson JJ, to be the "true rule" as to the admission of evidence of surrounding circumstances. Until this court embarks upon that exercise and disapproves or revises what was said in *Codelfa*, intermediate appellate courts are bound to follow that precedent. *The same is true of primary judges, notwithstanding what may appear to have been said by intermediate appellate courts.*<sup>143</sup> (emphasis added)

This could be interpreted as inconsistent with the principle expressed in *Miliangos*,<sup>144</sup> but as it was a leave disposition and not a judgment delivered following a hearing, it creates no binding precedent.

In *Lipohar v R*, Gaudron Gummow and Hayne JJ observed that:

The ultimate foundation of precedent which binds any court to statements of principle is, as Barwick CJ put it, "that a court or tribunal higher in the hierarchy of the same juristic system, and thus able to reverse the lower court's judgment, has laid down that principle as part of the relevant law". *Until the High Court rules on the matter*, the doctrines of precedent which bind the respective courts at various levels below it in the hierarchy will provide a rule for decision.<sup>145</sup> (emphasis added)

<sup>141</sup> *Lipohar v R* (1999) 200 CLR 485 [45] per Gaudron, Gummow and Hayne JJ.

<sup>142</sup> [2011] 282 ALR 604.

<sup>143</sup> *Ibid* [3].

<sup>144</sup> This was noted in *Lew Footwear Holdings Pty Ltd v Madden International Ltd* [2014] VSC 320 per Elliot J at [117].

<sup>145</sup> (1999) 200 CLR 485, [45].

It is perhaps arguable that this statement of principle is broad enough to cover the situation in which the High Court has already ruled on a matter *before* an intermediate court of appeal rules on the same matter in different terms. However, these general statements cannot be read as dispositive of the *Miliangos* question in the absence of it being considered directly.

It is argued that it is likely that the High Court would endorse the principle to avoid the same vice identified by Lord Simon of Glaisdale in *Miliangos*: to permit otherwise would put a judge at first instance in the invidious position of sitting in judgment on the correctness of a decision of his or her immediately superior court and would fundamentally alter the doctrine of *stare decisis*. If a primary's judge's decision refusing to apply the *ratio* of the Court of Appeal in that jurisdiction were appealed to that Court of Appeal, the appeal would be almost certainly doomed to fail. Ultimately, the appeal process permits leave to be sought to bring an appropriate case from an intermediate appellate court to the High Court to clarify the law and particularly to resolve differences between intermediate courts of appeal in relation to the common law. For present purposes, it is clear that lower courts in New South Wales regard themselves as bound by the decision of the Court of Appeal in *Saleh v Romanous*.<sup>146</sup>

### C Subsequent consideration of *Saleh* by the New South Wales Court of Appeal

The New South Wales Court of Appeal is of course not bound by its earlier decision in *Saleh*.<sup>147</sup> However, to date, it has not departed from the principle applied in *Saleh* and has affirmed it in *DHJPM Pty Ltd v Blackthorn Resources Ltd*<sup>148</sup>, *Hammond v JP Morgan Trust Australia Ltd*,<sup>149</sup> *Van Dyke v Sidhu*<sup>150</sup> and *Ashton v Pratt*. The reasons in these decisions do not contain any discussion of the *ratio* in *Waltons Stores*. *Hammond v JP Morgan Trust Australia Ltd*<sup>151</sup> and *Van Dyke v Sidhu*<sup>152</sup> did not concern promissory estoppel issues, the former being an orthodox promissory estoppel case seeking to restrain the exercise of existing rights and the latter an orthodox proprietary estoppel case. Accordingly, the analysis in this part focusses on the two decisions in *DHJPM Pty Ltd v Blackthorn Resources Ltd* and *Ashton v Pratt* in which the scope of

<sup>146</sup> See for example, *GE Healthcare Australia Pty Ltd v Medica Radiology and Nuclear Medicine Pty Ltd* [2013] NSWSC 414, [8]; and *Van Dyke v Sidhu* [2012] NSWSC 118 per Ward J.

<sup>147</sup> See for example *Nguyen v Nguyen* (1990) 169 CLR 245, 268-9 per Dawson, Toohey and McHugh JJ.

<sup>148</sup> (2011) 285 ALR 311.

<sup>149</sup> (2012) 16 BPR 30,901 at [26] per Meagher JA with whom Basten JA and Bergin CJ in Eq agreed).

<sup>150</sup> (2013) 301 ALR 769, at [39] per Barrett JA, with whom Basten JA and Tobias AJA agreed).

<sup>151</sup> (2012) 16 BPR 30,901 at [26] per Meagher JA with whom Basten JA and Bergin CJ in Eq agreed).

<sup>152</sup> (2013) 301 ALR 769, at [39] per Barrett JA, with whom Basten JA and Tobias AJA agreed).

promissory estoppel to be an independent source of rights arose directly.

1 *DHJPM Pty Ltd v Blackthorn Resources Ltd – recharacterising Waltons Stores as a proprietary estoppel case*

*DHJPM Pty Ltd v Blackthorn Resources Ltd*<sup>153</sup> concerned facts which were not dissimilar to *Waltons Stores* in the sense that it was a claim by an intending lessor to enforce, as against an intended lessee, its expectation that a lease would be entered into. On appeal from the District Court, Meagher JA (with whom Basten JA agreed) held that the primary judge had correctly found that no estoppel arose because in the circumstances of the lack of agreement as to essential terms, it was not unreasonable for the prospective lessee to refuse to enter into an agreement on the proposed terms. However, his Honour's discussion of the basis for the estoppel claim conformed to the scope of the doctrine expressed in *Saleh*. Meagher JA referred to the identification in *Waltons Stores* of the traditional distinction between promissory and proprietary estoppels,<sup>154</sup> but not to the reasons given by the Mason CJ and Wilson J, or by Brennan J, for rejecting the traditional limitation upon the scope of promissory estoppel. Rather, his Honour said that, 'In this context I note that this court said in [*Saleh*] that a promissory estoppel operates as an equitable restraint on the exercise or enforcement of contractual and other rights and is negative in substance.'<sup>155</sup>

Interestingly, Meagher JA referred to *Waltons Stores* as an application of equitable estoppel to enforce *proprietary rights*.<sup>156</sup> However, ultimately, in his Honour's view, the outcome of the appeal in *DHJPM* did not turn on whether the equitable estoppel relied upon was "a proprietary estoppel or a promissory estoppel with respect to a promise to create new rights."<sup>157</sup> Meagher JA reasoned that Brennan J's propositions applied to an 'orthodox proprietary estoppel' and if the claim in that case had been supported by the evidence, it could have been supported as 'an orthodox proprietary estoppel by which [the respondent] encouraged an expectation that an interest by way of reversion on a sublease would come into existence.'<sup>158</sup>

Handley JA noted that the appellant in *DHJPM* had relied upon an "equitable, that is proprietary estoppel, particularly an estoppel by encouragement."<sup>159</sup> His Honour observed that:

<sup>153</sup> (2011) 285 ALR 311.

<sup>154</sup> *Ibid* 322 [43].

<sup>155</sup> *Ibid* [47].

<sup>156</sup> *Ibid* 321 [40].

<sup>157</sup> *Ibid* [48].

<sup>158</sup> *Ibid*.

<sup>159</sup> *Ibid* 333 [93].

its arguments strayed at times into promissory estoppel but, as this court unanimously held in *Saleh v Romanous* ... (special leave refused [2011] HCATrans 101), a promissory estoppel must be negative in substance.<sup>160</sup>

His Honour also discussed in detail the principles of, and cases on, proprietary estoppel by encouragement.<sup>161</sup> His Honour noted that such estoppels have ‘a long pedigree’ and in this context also, also appeared to treat *Waltons Stores* as a case of estoppel by encouragement. His Honour described *Waltons Stores* as one of only two cases to his knowledge where, ‘an estoppel by encouragement has been held to create an executory contract.’<sup>162</sup>

This re-characterisation of *Waltons Stores* as a proprietary estoppel case raises an important issue. Robertson has argued, rightly it is submitted, that ‘this rationalisation of *Waltons Stores* as a proprietary estoppel case is clearly inconsistent with the judgments.’<sup>163</sup> No judge in *Waltons Stores* gave any express reasons for finding that the case could be disposed of by application of an orthodox proprietary estoppel. Even if one accepts that it might be possible to reconceptualise the issues in *Waltons Stores* as falling within an unconventional application of an estoppel by encouragement, treating the express reasons of the majority in favour of expanding promissory estoppel as *obiter dicta*, or ignoring those reasons altogether, fundamentally undermines the authority of the decision.

In *Deakin v Webb*<sup>164</sup> decided in 1904, Griffiths CJ emphasized the regard to be had to the actual reasons for judgment of the High Court, even where an alternate basis for the disposition of the issues might be said to exist. His Honour said:

A court of law performs the double function of declaring the law, and of applying it to the facts. When the legal principles which govern the case are in controversy, it is the practice of English Courts not to content themselves with a statement of their conclusion, but to express their reasons, which, in the case of Courts of Appeal, are ordinarily accepted by other courts upon whom the decision is binding, as an authoritative exposition of the law on the point under consideration. If the reasons may be disregarded and treated as mere *obiter dicta*, because, in the opinion of the court, the same conclusion might have been reached by another road, the value of judgments as expositions of the law would be sensibly diminished.<sup>165</sup>

Accordingly, it is respectfully suggested that even if *Waltons Stores* can be

<sup>160</sup> *Ibid.*

<sup>161</sup> *ibid* 334-335 [100]-[124].

<sup>162</sup> (2011) 285 ALR 311, 335 [106].

<sup>163</sup> Robertson, above n 92, 232.

<sup>164</sup> (1904) 1 CLR 585.

<sup>165</sup> (1904) 1 CLR 585, 604-5.

reconceptualised as an estoppel by encouragement case and ‘the same conclusion reached by another road’, the recognition of an expanded promissory estoppel was a *ratio* of the case which cannot be ignored.

## 2 *Ashton v Pratt*<sup>166</sup>

In these proceedings, one of Ms Ashton’s claims was that from late 2003 she did not return to the escort industry and remained Mr Pratt’s mistress on the assumption that he would pay her various sums and settle money on trust for her children.<sup>167</sup> Bathurst CJ noted that the claim was put on the basis of equitable estoppel, and was not a claim in proprietary estoppel.<sup>168</sup> In addressing the law, his Honour set out Brennan J’s reasons on the elements of equitable estoppel<sup>169</sup>, and also referred to the reasons of Mason CJ and Wilson J<sup>170</sup>, and Deane J<sup>171</sup>. However, he expressed no view as to the *ratio* of *Waltons Stores*. His Honour instead noted that propositions 3, 4 and 5 of Priestley JA’s summary of the propositions that could be derived from *Waltons Stores* (in *Silovi v Barbaro*<sup>172</sup>, reformulated in *Austotel v Franklins*<sup>173</sup>) ‘seem to extend the boundaries of promissory estoppel beyond what was suggested by Handley AJA in *Saleh*.’<sup>174</sup> His Honour also referred<sup>175</sup> to *Saleh* and *DHJPM*,<sup>176</sup> and to the decision of the House of Lords in *Thorner v Major*<sup>177</sup> in which Lord Walker confirmed the distinction under English law between promissory and proprietary estoppels. Bathurst CJ concluded that:

This analysis of the authorities demonstrates two significant obstacles to Ms Ashton’s claim based on equitable estoppel. First, there is a significant body of authority in this Court, as well as at least one decision of the House of Lords, which has maintained the distinction between the scope of promissory and proprietary estoppel. These cases indicate that the former only acts as a restraint on the enforcement of legal rights whilst the latter can be a source of obligation. However, it

<sup>166</sup> *Ashton v Pratt* [2015] NSWCA 12.

<sup>167</sup> The claim was that Mr Pratt would settle \$2.5 million on trust for each of her children, pay her an allowance of \$500,000 per annum, pay her \$36,000 for rental accommodation and \$30,000 per annum for business expenses.

<sup>168</sup> [2015] NSWCA 12, [108].

<sup>169</sup> *Waltons Stores*, per Brennan J at 428-429.

<sup>170</sup> *Ibid*, at 406.

<sup>171</sup> *Ibid* at 450-452.

<sup>172</sup> (1988) 13 NSWLR 466, 472.

<sup>173</sup> (1989) 16 NSWLR 582.

<sup>174</sup> *Ashton v Pratt* [2015] NSWCA 1, [128].

<sup>175</sup> *Ibid* [133]-[136].

<sup>176</sup> *Saleh v Romanous* [2010] NSWCA 274; (2010) 79 NSWLR 453, and *DHJPM Pty Ltd v Blackthorn Resources Ltd* [2011] NSWCA 348; (2011) 83 NSWLR 728.

<sup>177</sup> [2009] 1 WLR 776.

must be acknowledged that there is significant *dicta* contrary to this limitation on promissory estoppel.<sup>178</sup>

Bathurst CJ found it unnecessary to resolve the issues as Ms Ashton had failed to establish that she had suffered detriment as a result of Mr Pratt resiling from the promises. Similarly Meagher JA did not find it necessary to decide the estoppel question, but also noted that:

One question is whether the doctrine of equitable estoppel extend to assumptions or expectations created in relation to the fulfilment of promises which are not negative in substance and do not suspend or extinguish existing contractual or other rights as Brennan J considered to be the position in *Waltons Stores* ...<sup>179</sup>

Meagher JA made no reference to the reasons of Mason CJ and Wilson J, or the *ratio* of *Waltons Stores*. Neither Bathurst CJ or Meagher JA discussed whether this ‘seriously considered dicta’ by the High Court in *Waltons Stores* ought to be binding or not, or the reasons for not following it.

#### IV WOULD THE HIGH COURT OVERTURN WALTONS STORES?

The High Court has made it clear there is one ‘common law’ of Australia, not a different common law in each jurisdiction.<sup>180</sup> In *Kable v The Director of Public Prosecutions for New South Wales*, McHugh J observed, “Unlike the United States of America where there is a common law of each State, Australia has a unified common law which applies in each State but is not itself the creature of any State”.<sup>181</sup> His Honour confirmed the High Court’s role in ‘maintaining a unified system of common law.’<sup>182</sup> This underpinned the High Court’s direction in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* that courts of appeal should not depart from decisions in intermediate appellate courts in other jurisdictions on a principle of common law unless convinced that the decision is plainly wrong.<sup>183</sup> In *Lipohar v R*, the High Court noted that where different intermediate courts of appeal give inconsistent rulings upon questions of

<sup>178</sup> *Ashton v Pratt* [2015] NSWCA 12, [138].

<sup>179</sup> *Ibid*, [236] per Meagher JA.

<sup>180</sup> In *PGA v The Queen* (2012) 245 CLR 355, French CJ, Gummow, Hayne, Crennan and Kiefel JJ discussed the different meanings of ‘common law’ citing at [20] with apparent approval from the contribution by Professor A W B Simpson under the heading “common law” in *The New Oxford Companion to Law*, in which he distinguished five senses in which that term is used. The primary sense is that body of non-statutory law which was common throughout the realm and so applicable to all, rather than local or personal in its application. Their Honours further noted at [25] that the common law which was received in the Australian colonies was not disintegrated into six separate bodies of law.

<sup>181</sup> *Kable v DPP (NSW)* (1996) 189 CLR 51 at 112 -113 per McHugh J.

<sup>182</sup> *Ibid*.

<sup>183</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [135]; see also *PGA v The Queen* (2012) 245 CLR 355 at [111] per Heydon J.

common law, this demonstrates not that there is more than one common law, but that one or other of the courts will not have correctly applied or declared the common law. The Court emphasised its role in determining such disputes.<sup>184</sup> The current disagreement between the intermediate courts of appeal with respect to the ability of promissory estoppel to be a source of rights is such a problem which is likely to attract leave to appeal.<sup>185</sup>

If it is correct that the *ratio* of *Waltons Stores* was that promissory estoppel can be used as a source of rights, then the question is no longer an open one for the High Court to consider, as it is in other jurisdictions such as England.<sup>186</sup> If an appropriate vehicle arises to bring this current lack of unity between the states as to the scope of promissory estoppel before the High Court, the real question will be whether there are considerations which warrant overturning *Waltons Stores*.

The considerations that the High Court takes into account in deciding whether to overturn a previous decision do not immediately suggest that it should be overturned. There is of course no dispute as to the High Court's capacity to depart from its earlier decisions. Although there is 'no very definite rule' as to the circumstances in which the High Court will do so, there are a number of recognised considerations which will be relevant. These considerations include whether the earlier decision 'did not rest upon a principle carefully worked out in a significant succession of cases'; differences in the reasons of the justices constituting the majority; whether the earlier decisions had 'achieved no useful result but on the contrary had led to considerable inconvenience' and whether the earlier decisions had been independently acted on in a manner which militated against reconsideration: *John v FCT*.<sup>187</sup> Guided by these principles, it is unlikely that a differently composed court would lightly depart from *Waltons Stores* on the scope of promissory estoppel. The development in the law propounded by the majority in *Waltons Stores* was the result of detailed and deliberate reasoning, taking into account the relevant cases at the time and the rationale for the equity which underpinned them, and it has been considered and (largely) 'worked out' in a succession of cases since. There was no significant difference in the reasoning of the judges in the majority (other than in relation to the requirement for an assumption as to a legal relationship), and a review of the history of its application in the last 25 years does not demonstrate that its

<sup>184</sup> *Lipohar v R* (1999) 200 CLR 485, [45] per Gaudron, Gummow and Hayne JJ.

<sup>185</sup> See for example *New South Wales v Lepore* (2003) 212 CLR 511 [6] per Gleeson CJ, in relation to leave granted in the appeal. That case concerned three proceedings heard concurrently arising from an appeal brought from the New South Wales Court of Appeal which had not been followed by the Queensland Court of Appeal, giving rise to 'a conflict of authority between intermediate courts of appeal in this country that requires resolution.'

<sup>186</sup> See Ben McFarlane, above n 18.

<sup>187</sup> (1989) 166 CLR 417, 438-439.

application has led to ‘considerable inconvenience’ of the type that has been understood as warranting the overturning of a previous decision.

In *Wurridjal v Commonwealth* French CJ confirmed that the High Court in such situations should be ‘informed by a strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law.’<sup>188</sup> On this note, in *Baker v Campbell*, Brennan J observed:

To regard the judgments of this Court as open to reconsideration whenever a new argument is found more attractive than the principle expressed in a standing decision is to overlook the function which a final court of appeal must perform in defining the law. In difficult areas of the law, differences of legal opinion are inevitable ....It is not to the point to argue in the next case that, leaving the particular decision out of account, another solution is better supported by legal theory. Such an approach would diminish the authority and finality of the judgments of this Court. As the function of defining the law is vested in the Court rather than in the justices who compose it, a decision of the Court will be followed in subsequent cases by the Court, however composed, subject to the exception power which resides in the Court of permit reconsideration.<sup>189</sup>

Referring to these principles with approval, Hayne J in *Lee v New South Wales*<sup>190</sup> cited Horrigan observing that, ‘the previous decision is to be treated as the primary premise from which other arguments follow, not just as one potential premise among an aggregate of competing premises.’

## V CONCLUSION

Notwithstanding recent judicial expressions of uncertainty as to the scope of promissory estoppel to be a source of rights under Australian law, it was the *ratio* of *Waltons Stores* that promissory estoppel is capable of being a source of rights under Australian law. As such, the ‘one common law’ of Australia on this question is not unclear. Even if the reasons of the majority in that case are no higher than strongly considered *dicta*, the reasoning ought to be followed. Accordingly, the law is not in an ‘unresolved’ state in which it is open to trial judges, or intermediate courts of appeal, to apply a contrary principle.

However, the difficulty for Australian law is that there is no *practical* unity of the common law since the contrary decision of the Court of Appeal in New South Wales in *Saleh v Romanous*, which now binds lower courts in New South Wales. The result is that the same claim can be decided according to entirely contrary principles, depending on whether proceedings are commenced in New

<sup>188</sup> *Wurridjal v The Commonwealth of Australia* [2009] HCA 2, [70] per French CJ.

<sup>189</sup> *Baker v Campbell* (1983) 153 CLR 52, 102-103.

<sup>190</sup> (2013) 302 ALR 363 at [66], citing B Horrigan, ‘Towards a Jurisprudence of High Court Overruling’ (1992) 66 *Australian Law Journal* 199, 208.

South Wales or another state. Accordingly, unless the Court of Appeal reconsiders its position, it is to be hoped that a suitable vehicle for the resolution by the High Court of these jurisdictional differences arrives soon.