CASE NOTES

THE COMMONWEALTH v. VERWAYEN[1]

INTRODUCTION

During the past several years, there has been considerable judicial activity in reconsidering the traditional doctrine of equitable estoppel. Such activity occurs in the context of an emerging equitable involvement in the field of commercial transactions. There is a movement away from the traditional view of the legal characteristics of a consensual relationship as consisting of the formal rights and obligations of that relationship, and towards a greater focus on the conduct of the relationship.[2] Yet judicial review of equitable estoppel has tended to be unsettled in its principles. While there has been an expansion in the scope of equitable estoppel, the criteria for its application to a particular factual situation have not clearly been outlined, producing some confusion as to the elements that must be demonstrated in order for estoppel to operate.

Historically, there was a strict distinction between common law and equitable estoppels.[3] Although these species of estoppel were derived from the same underlying rationale (that the object of estoppel is to prevent the unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment[4]), they had diverging criteria and consequences. Common law estoppel was restricted to operating as a rule of evidence in the sense that it could merely preclude a person from denying an assumption of fact made by another person. As such, it produced an 'all or nothing' outcome in enforcing the assumption. In contrast, equitable estoppel in its *High Trees*[5] manifestation could encompass representations as to future conduct even though it remained inapplicable to pre-contractual representations. It was more flexible since the remedy did not necessarily require that a person who had suffered detriment in relying upon an assumption should have the full benefit of that assumption. The role of equitable intervention was simply to avoid the detriment experienced by that person. A dramatic transformation of equitable estoppel doctrine was begun by the High Court in *Waltons Stores (Interstate) Ltd v. Maher*.[6] In that case, equitable estoppel was held to be capable of constituting a cause of action in itself and thus could be invoked even in the absence of a pre-existing legal relationship between the parties. Unconscionable conduct was the only element that could justify such an equitable intervention.

In *The Commonwealth v. Verwayen*,[7] the High Court has now provided some clarification as to the rationale of equitable estoppel. There is a consensus that the objective of equitable estoppel is to alleviate the detriment generated by unconscionable conduct. This has important consequences for the character of the remedy which can be fashioned by the court, in that it is to rectify the detriment and no further. There must be proportion between detriment and remedy. Yet the High Court produces diverging views upon what can legitimately constitute detriment, with the consequence that two Justices find that there is indeed sufficient detriment to render proportionate the estoppel proposed to be imposed upon the Commonwealth, while three other Justices find no such proportionality.[8] In turn, Mason C.J. and Deane J. continue their movement towards a fusion of common law and equitable estoppel under a single principle; a movement that is, however, not

1 (1990) 170 C.L.R. 394.
2 Paul Finn, 'Commerce, The Common Law and Morality' (1989) 17 *M.U.L.R.* 87, 96.
3 An account of this historical development can be found in Parkinson, P., 'Equitable Estoppel: Developments after *Waltons Stores (Interstate) Ltd v. Maher*' (1990) 3 *Journal of Contract Law* 50.
4 See Dixon J. in *Thompson v. Palmer* (1933) 49 C.L.R. 507.
5 *Central London Property Trust Ltd v. High Trees House Pty Ltd* [1947] K.B. 130.
6 (1988) 164 C.L.R. 387.
7 (1990) 170 C.L.R. 394.
8 Mason C.J., McHugh and Brennan JJ. find no proportionality, whereas Deane and Dawson JJ. do.

necessarily accepted by the rest of the Court. Each of these issues will be examined below. Finally, the relationship between estoppel and waiver remains unclear, since Toohey and Gaudron JJ. appear to accept that a form of 'waiver' exists which can be distinguished from both estoppel and election, and so favour Mr Verwayen as part of the majority opinion. Waiver, however, is a discrete topic and will not be discussed below.

THE FACTS

Verwayen, while a serving member of the Royal Australian Navy, was injured during a collision between HMAS Voyager and HMAS Melbourne in 1964. Subsequently, the survivors of the collision did not commence legal proceedings against the Commonwealth, believing that prevailing legal opinion held that a member of the armed forces could not recover damages for the negligence of another member of the armed forces in the course of service for public policy reasons. Such an opinion was disapproved of by the High Court in a 1982 case,[9] encouraging the survivors to contemplate legal action. There was correspondence between solicitors acting for some survivors and representatives of the Commonwealth, implying that the Commonwealth would not seek to raise either the defence that the prospective legal action was barred by the Statute of Limitations or the public policy defence against negligence. These solicitors came to act on behalf of other survivors, including Verwayen. The Australian Government Solicitor advised Verwayen's solicitors in writing that the Commonwealth proposed to admit liability in negligence and to waive the Statute of Limitations. After the defence had been filed, the Australian Government Solicitor joined with the plaintiff in seeking an expedited hearing of the damages issue. The Ministry of Defence made a number of statements supporting the above actions. Eventually, the Commonwealth sought leave to amend its defence to raise both defences, and this was granted subject to payment of Verwayen's abortive costs.

Verwayen then delivered a reply that the Commonwealth had either waived any such defences or was estopped from asserting them. At trial in the Victorian Supreme Court, O'Bryan J. found that even if there had been a waiver, it was nevertheless revocable. He also relied upon the proposition that equitable estoppel could not be invoked as an independent cause of action.[10] On appeal to the Full Victorian Supreme Court,[11] it was held by the majority that the trial judge should be overruled on the latter point, since the High Court had handed down its decision in *Waltons Stores*[12] during the intervening period.

At the High Court level, the Commonwealth argued that the Full Supreme Court had erred in granting an estoppel remedy which was disproportionate to the detriment resulting from Verwayen's dependence on its representations. In turn, Verwayen contended either that the estoppel doctrine had been correctly applied by the Full Court or, contrary to the Full Court, that the Commonwealth had waived irrevocably the benefit of its potential defences.

THE RATIONALE OF EQUITABLE ESTOPPEL

Although individual judgments vary in their expression, it is evident that the High Court has re-affirmed the conclusion in *Waltons Stores* that the objective of equitable estoppel is to intervene to protect persons from experiencing detriment as an outcome of the unconscionable conduct of other persons. Thus unconscionable conduct has become the main criterion for the discretionary intervention of equity. Dawson J. states that: 'An estoppel will occur only where unconscionable conduct on the part of one gives rise to an equity on the part of another. The estoppel will then operate to take account of that equity'.[13] Such a requirement has now been clearly accepted by the High Court as constituting a protection against any possible undue intrusion of estoppel into the law of contract. It is emphasized that a voluntary promise or representation cannot in itself generate an estoppel. Yet it is

[9] *Groves v. The Commonwealth* (1982) 150 C.L.R. 113.

[10] O'Bryan J. held that the case was statute-barred before any empanelling of the jury had occurred.

[11] [1989] V.R. 712.

[12] *Supra*. n. 6.

[13] *The Commonwealth v. Verwayen* (1990) 170 C.L.R. 394, 453-4. His Honour is citing *Allcard v. Skinner* (1887) 36 Ch. D, 145, 182.

not so clear what role 'detriment' serves in estoppel. Mason C.J. had seemed to accept a broad unconscionable conduct principle as governing equitable estoppel in *Waltons Stores*, resulting in a relatively flexible view of the role of 'detriment'. Here, he appears to have reduced the scope of such a broad principle by stating that the various estoppel categories are intended to achieve 'protection against the detriment which would flow from a party's change of position if the assumption (or expectation) that led to it were deserted'.[14] In contrast, Deane J. appears to ascribe a more subordinate role to detriment as being part of a broad unconscionable conduct principle. Clarification is required.

Deane J. is the only judge to examine the character of unconscionable conduct itself in more detail. Alluding to *Allcard v. Skinner*, he explains that estoppel doctrine is founded upon good conscience, to the extent that it is right and expedient to protect people from being victimized by other people.[15] The notion of unconscionability is better described than defined since it remains dependent upon particular factual situations, and so, '[t]he most that can be said is that "unconscionable" should be understood in the sense of referring to what one party "ought not, in conscience, as between [the parties] to be allowed" to do'.[16] It will often refer to the use of legal entitlement to take advantage of another's special vulnerability or misadventure in a way that is unreasonable and oppressive to an extent that affronts ordinary standards of fair dealing. It is always a judgment of value whether unconscionability exists (especially in a borderline case as this one). One important factor in constructing unconscionability will be the extent to which the allegedly estopped party has contributed through his or her conduct to the formation of the assumption which the other party has adopted as the basis of a relationship.[17] The estopped party must have played such a part in the adoption or continuation of the assumption that he or she would be guilty of 'unjust and oppressive conduct' if he or she were to depart from it.

Several of the judgments make interesting points that may be redundant when the High Court consolidates its understanding of estoppel in the future. Dawson J. added little to the development of estoppel because he accepted the *Legione v. Hateley* formulation of equitable estoppel as being sufficient for the particular facts that characterized this case.[18] That formulation applied to parties who were in a pre-existing contractual relationship. Dawson J. argued that the parties here, while not in a contractual relationship, were nevertheless in a legal relationship which began with the commencing of the action against the Commonwealth. Such a legal relationship consisted of the legal rights and duties with regard to each party arising during a process of litigation; one of the Commonwealth's rights was to plead the Statute of Limitation as a defence. Thus Dawson J. seeks to expand the notion of a pre-existing relationship to include legal as well as contractual manifestations.

In turn, Deane J. engaged in some highly paradoxical reasoning in the course of his judgment. He stated that any form of estoppel does not in itself constitute an independent cause of action, but merely establishes an assumed state of affairs which a party is estopped from denying.[19] That assumed state of affairs may be used either defensively or aggressively as the factual foundation of an action with the entitlement to relief arising from that foundation. It does not negate the flexibility of equitable remedies in being framed according to the assumed state of affairs and according to whether it would be equitable to adhere to that assumed state of affairs. Deane J. justifies his proposition by arguing that it would confound the doctrine of consideration (and perhaps override the law of contract in having compensatory damages for detriment exceed damages for loss of bargain), were it otherwise.[20] Dawson J. appears to agree with him, saying that a plaintiff can use estoppel only if the cause of action is not one in which estoppel is an ingredient.[21] This case was described as an excellent example in that the estoppel arose at a later stage in the course of litigation and was pleaded, in a

14 *Ibid.* 409.
15 *Ibid.* 440.
16 *Ibid.* 441. His Honour is quoting Story, J., *Commentaries on Equity Jurisprudence* (2nd ed. 1892), para. 1219.
17 *Ibid.* 444.
18 *Ibid.* 45. His Honour is citing *Legione v. Hateley* (1983) 152 C.L.R. 406.
19 *Ibid.* 437, 439.
20 *Ibid.* 439.
21 *Ibid.* 459.

defensive manner as a reply. Yet such a contention appears unnecessarily narrow in relation to the High Court's movement towards a highly flexible and responsive estoppel framework. If there is no independent cause of action, then it may be that a full state of affairs will be imposed upon an estopped party when the detriment incurred was only minimal.

It is also interesting to note the conservative construction by McHugh J. of the criteria which must be satisfied in order for an equitable estoppel to be imposed. In *Waltons Stores*, two alternative characterizations of these criteria had been expounded, covering the same doctrinal area but diverging in the process of analysis each required. While Mason and Wilson JJ. sought to create an encompassing principle of unconscionability that focused upon the need for equitable estoppel[22] (in line with Deane J.'s comments above) to be flexible in its application to varying factual situations, Brennan J. had set down an intricate sequence of elements that must each be established before the next element could be ascertained.[23] McHugh J. adopted the latter characterization.[24] It is submitted that such a sequence of elements is excessively rigid and fails to comprehend the essential quality of equity: to be adaptable and discretionary.

DETRIMENT AND REMEDY

It had been stated by Brennan J. in *Waltons Stores* that 'the remedy which both attracts the jurisdiction of a court of equity and shapes the remedy to be given is unconscionable conduct on the part of the person bound by the equity, and the remedy required to satisfy an equity varies according to the circumstances of the case'.[25] All the Justices in *Verwayen* accepted this proposition. Thus the relief associated with equitable estoppel is that which reverses the detrimental effect of the unconscionable conduct.

The distinction between common law estoppel and equitable estoppel again becomes significant in the context of remedy. Common law estoppel was described by Mason C.J. as achieving its objective of avoiding the detriment which would be suffered by another in the event of departure from the assumed state of affairs by holding the estopped party to that state of affairs. The rights of the parties were ascertained and declared by reference to the state of affairs.[26] In contrast, equitable estoppel was said to do what was necessary to prevent the occurrence of detriment, and to do more would contradict its objective of reversing the unconscionability present.[27] In some cases, it may be appropriate for equitable estoppel to enforce the assumption or promise, and to that extent there is an overlap. Where there is an overlap and a conflict between possible remedies, equity will prevail over common law (as was stated by McHugh J.).[28] Deane J. emphasized that equitable relief must be moulded to do justice between the parties, so that an unqualified enforcement of the assumption or promise may exceed the requirements of good conscience and be unduly oppressive of the other party.[29] The relief associated with an assumed state of affairs is merely the 'outer limit' within which courts will mould a remedy. Of all the judges, Deane J. was alone in proposing that the *prima facie* outcome of estoppel operation is to maintain the assumed state of affairs and that only where there was inequity in enforcing that state of affairs would there be any lesser relief.[30]

Verwayen's principal difficulty was to establish the existence of detriment which could justify the intervention of equity in the form of a full estoppel imposed upon the Commonwealth. Mason C.J. suggested that two distinct types of detriment could be discerned in any estoppel situation: a broad detriment which arises from the denial of the assumption itself; and a narrower detriment which a person suffers as the outcome of reliance upon the assumption.[31] Historically, common law estoppel was in a sense concerned with the broader concept of detriment (as in the *Grundt*[32] statement that the

22 *Waltons Stores (Interstate) Ltd v. Maher* (1988) 164 C.L.R. 387, 406 *per* Mason and Wilson JJ.
23 *Ibid.* 428-9 *per* Brennan J.
24 *The Commonwealth v. Verwayen* (1990) 170 C.L.R. 394, 502.
25 *Waltons Stores (Interstate) Ltd v. Maher* (1988) 164 C.L.R. 387, 419.
26 *The Commonwealth v. Verwayen* (1990) 170 C.L.R. 394, 411.
27 *Ibid.* 411.
28 *Ibid.* 500.
29 *Ibid.* 441.
30 *Ibid.* 442-3.
31 *Ibid.* 415.
32 *Grundt v. Great Boulder Pty Gold Mines Ltd* (1937) 59 C.L.R. 641, 674.

real detriment from which the law seeks to protect is that which would flow from the change of position caused by abandoning the assumption that supported it). In turn, equitable estoppel focused upon the detriment flowing from the reliance upon the assumption, but its relief was not necessarily limited to that detriment alone. Thus, while detriment in the broader sense is needed to ground an estoppel, the law provides a remedy which will often be closer in scope to the detriment experienced in the narrower sense.[33]

In contrast, Brennan J. took a narrower view. He identified relevant detriment as

> detriment occasioned by reliance upon a promise, that is, detriment occasioned by acting or abstaining from acting on the faith of a promise that is not fulfilled. The relevant detriment does not consist in a loss attributable merely to non-fulfilment of the promise.[34]

Here, there had been no allegation that the exacerbation of Verwayen's emotional condition flowed from some act done or omission made by him in dependence upon the Commonwealth's promise to admit liability. Verwayen's loss of the expectation of successful litigation likewise did not flow from such a personal act or omission. Such supposed 'detriment' had actually derived from the Commonwealth's mere failure to fulfil its promises. Thus the only relevant detriment consisted of the legal costs which Verwayen incurred in relation to initiating litigation.[35] Brennan J. bases his argument upon a particular view of the factual situation and it is arguable that there was indeed a personal act or omission involved. As Dawson J. said: 'It is a fair inference that [Verwayen] would not have commenced his action had he not expected, in the light of the treatment afforded his fellow servicemen, to receive the assurance he sought.'[36]

It was necessary to determine what relief was appropriate to satisfy the estoppel successfully raised here. Mason C.J. noted that 'it is not correct to make an assessment of the moral rectitude of the actions of the parties in a manner divorced from a consideration of the legal consequences and attributes of those actions.'[37] The breaching of a promise is morally reprehensible but not unconscionable in a manner justifying equitable intervention. Each case was one of degree. Here, there was no evidence of detriment flowing from the Commonwealth's pleading of the defences. As far as Verwayen's emotional condition was concerned, it was mere speculation to contend that his dependence upon the Commonwealth's actions caused a deterioration of that condition.[38] Thus, to hold the Commonwealth fully estopped from arguing its defences would be disproportionate to the detriment, which could be reversed by a simple order for costs in favour of Verwayen and remission to the trial judge for determination. McHugh J. made the point that Verwayen had not led any evidence as to any detriment suffered as a result of being induced to alter his position as a consequence of the Commonwealth's actions but he failed to recognize that it was the trial judge who had prevented such evidence from being led at first instance.[39]

In contrast, both Deane and Dawson JJ. took the approach that equity has never adopted the position that relief should be framed upon the basis that the only relevant detriment is that which is compensable by an award of monetary damages. If the Commonwealth were permitted to depart from the assumed state of affairs, the detriment which Verwayen would suffer would not be capable of being measured in terms of legal costs: the stress and inconvenience experienced in the course of litigation would not be recompensed.[40] Courts should not refuse to determine detriment merely because it has not been precisely quantified. Dawson J. said: 'By falsely raising his hopes, the appellant led the respondent to continue with the litigation and forgo any exploration of the possibility of settlement thereby subjecting himself to a prolonged period of stress'.[41] As a consequence, this was indeed a situation where (as Mason C.J. had suggested as an example in his own judgment[42]) there was detriment that could not be satisfactorily compensated or remedied. Dawson and Deane JJ.

33 *The Commonwealth v. Verwayen* (1990) 170 C.L.R. 394, 415-6.
34 *Ibid.* 429.
35 *Ibid.* 429-30.
36 *Ibid.*
37 *Ibid.* 416.
38 *Ibid.* 461.
39 *Ibid.* 504.
40 *Ibid.* 448, *per* Deane J.
41 *Ibid.* 462.
42 *Ibid.* 416, *per* Mason J.

seem not to consider the standard of detriment itself in any great detail. Nevertheless, it is submitted that their wider approach to detriment is more creative and adaptable than the narrow perspective of Mason C.J. and Brennan J.

While Gaudron J. found in favour of Verwayen on the ground of waiver, she found it convenient to 'note [her] agreement with Mason C.J. that the substantive doctrine of estoppel permits a court to do what is required to avoid detriment and does not, in every case, require the making good of the assumption.'[43] This is a highly ambiguous statement which does not indicate the extent to which she may concur with Mason C.J.'s movement towards a paradigmatic principle of estoppel. In turn, Gaudron J. refused to decide conclusively on the issue of whether the mere possibility of increased stress and anxiety would favour the assumption that liability would not be contested by the Commonwealth.[44]

A PARADIGMATIC ESTOPPEL PRINCIPLE?

It is now convenient to examine more closely the interaction between common law and equitable estoppels. It has been demonstrated that these forms of estoppel may generate diverging remedies; it is also important to note, again, that they operate under different circumstances. In the defensive mode, there is little difference between their operation, since, respectively, they will prevent a party from denying or refusing to admit an assumed factual situation upon which the transaction between the parties was based. A plaintiff can simply plead estoppel as a reply to the defendant's actions (as here), and if that estoppel is proven the defendant's actions are negated. Nevertheless, equitable estoppel (according to the existing law) can also operate to generate substantive rights for the plaintiff in the form of substantive relief considered to be appropriate to the circumstances. It is also crucial to understand that common law estoppel is currently operative only in circumstances where there is an assumption as to some existing fact or representation. This cannot be otherwise if its evidentiary character is to be maintained. In contrast, equitable estoppel can operate in the domain of both existing states of affairs and expectations as to future events, and so it overlaps with common law estoppel only with regard to the former.

It may be that a situation will arise (as in *Waltons Stores*)[45] in which any assumption is indeterminate in nature: not clearly either existing fact or future event. Thus, in the existing law, it is often wise to plead both forms of estoppel concurrently. Such a one-sided overlap between the forms of estoppel causes uncertainty as to the character of the remedy which may be provided by a court in response to a particular factual situation. It may be better in some cases to invoke common law estoppel as a means of obtaining a 'full' remedy, while it may be better in other cases to use equitable estoppel because the facts do not support a common law estoppel. The need to clarify this situation is recognized by some members of the High Court.

The judgment of Mason C.J. is particularly intriguing. Originally, he had stated in *Waltons Stores* that common law and equitable estoppels remained separate doctrines because it would be too formidable a challenge to entrenched case authorities.[46] But then Mason C.J. reconsidered his position in *Foran v. Wight*, where he said that 'Given the recognition of promissory estoppel and the fact that the doctrine may preclude the enforcement of rights at least between parties in a pre-existing contractual relationship, the dam wall has fractured at its most critical point with the result that we should accept that a representation or a mistaken assumption as to future conduct will in appropriate circumstances create a common law estoppel as well as an equitable estoppel.'[47] Thus, he moved towards a recognition of the respective estoppels as having concurrent jurisdictions. This, however, raised the problem that different outcomes could be produced by each doctrine in an identical factual situation: a problem that only occurs in connection with concurrent jurisdictions. Mason C.J. said in response: 'But since the function of equitable estoppel has expanded and it has become recognized that an assumption as to future fact may ground an estoppel by conduct at common law as well as in

43 *Ibid.* 487.
44 *Ibid.* 487-8.
45 *Waltons Stores (Interstate) Ltd v. Maher* (1988) 164 C.L.R. 387.
46 *Ibid.* 399.
47 (1989) 168 C.L.R. 385, 411-2.

equity, it is anomalous and potentially unjust to allow the two doctrines to inhabit the same territory and yet produce different results'.[48]

Mason C.J. concluded that:

> There is no longer any purpose to be served in recognizing an evidentiary form of estoppel operating in the same circumstances as the emergent rules of substantive estoppel. The result is that it should be accepted that there is but one doctrine of estoppel, which provides that a court of common law or equity may do what is required, but not more, to prevent a person who has relied upon an assumption as to a present, past or future state of affairs (including a legal state of affairs), which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness.[49]

In turn, Deane J. adverted to his previous judgments relating to equitable estoppel, and then stated that the insistence in judgments by other High Court judges upon a dichotomy between common law and equitable estoppels had caused him to 'reconsider' the issue of their interaction.[50] He nevertheless refused to abandon his view that equitable estoppel is merely one component of a paradigmatic principle supported by the modern judicature system. Struck by the apparent 'inadequacy' of his previous judgments, Deane J. attempted to codify the operation of substantive estoppel as a conceptual framework, in order to guide him in this borderline case.[51] In that conceptual framework, the unifying of estoppels was justified as giving the whole doctrine 'a degree of flexibility which it might lack if it were an exclusively common law doctrine'.[52]

Brennan J. adhered to the position of separate doctrines that he enuciated in *Waltons Stores*.[53] In turn, McHugh J. expressly stated that it was unnecessary to decide the point since common law estoppel doctrine did not advance Verwayen's position any further than the doctrine of equitable estoppel (although he appears to implicitly treat the estoppels as separate).[54] Toohey J. did not advert to the issue at all; because Dawson J. invoked the *Legione v. Hateley* formulation, he did not find it necessary to discuss the point. As a consequence, it is not feasible to assert that the movement of Mason C.J. and Deane J. towards a paradigmatic principle constitutes part of the *ratio* at all.

CONCLUSION

It is possible to construe the High Court judgments in *Verwayen* as further clarifying the elements of equitable estoppel which must be demonstrated in order for a party to become estopped. It is clear that equitable estoppel is a substantive doctrine whose eventual remedy must be proportionate to the detriment experienced by a party, so that an assumption or promise may not necessarily warrant enforcement in full. Yet the character of the detriment which is considered material is not fully explicated. There is disagreement as to whether emotional conditions may be material detriment, and as to whether any detriment should arise from the loss of expectation itself. There is also a tension between the different emphases given to elements such as detriment or unconscionability in the conceptual approaches deployed by individual judges, perhaps leading to different interpretations of the one factual situation. This tension is also seen in the differing characterizations of the process of ascertaining whether an estoppel operates: between the broad principle of Mason C.J. and Wilson J. and the more structured sequence of Brennan J.

More importantly, the High Court did not take this opportunity to clarify other significant ambiguities inherent in equitable estoppel. For instance, Deane J. makes reference to the reasonableness of the conduct of an 'innocent' party in acting upon the assumption adopted by that party as the basis of some relationship.[55] None of the other judges appear to advert to this issue. It needs to be further explicated in order to identify the circumstances of a particular case which may support the imposition of an estoppel. In turn, there has been considerable debate in other courts as to the

48 *The Commonwealth v. Verwayen* (1990) 170 C.L.R. 394, 412.
49 *Ibid.* 413.
50 *Ibid.* 432.
51 *Ibid.* 444-6.
52 *Ibid.* 445.
53 *Waltons Stores (Interstate) Ltd v. Maher* (1988) 164 C.L.R. 387, 413.
54 *The Commonwealth v. Verwayen* (1990) 170 C.L.R. 394, 499.
55 *Ibid.* 444.

feasibility of permitting equitable estoppel to enter the domain of commercial transactions. It was emphasized by a majority of the New South Wales Court of Appeal in *Austotel Pty Ltd v. Franklins Selfserve Pty Ltd*[56] that equitable estoppel will rarely be available to well-advised, well-resourced commercial corporations because the notion of unconscionable conduct is arguably incompatible with the self-interested actions of business people. The High Court did not comment upon such emerging 'limitations', partly because the facts did not require comment in a commercial context, so that there is a need for clarification in future. While in *Latondis v. Casey* there was some encouraging expansionist activity, the case was marked by a relatively conservative approach.

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[56] (1989) 16 N.S.W.L.R. 582.

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