From:	Ms Jennifer Jacomb
To:	Community Affairs, Committee (SEN);
Cc:	
Subject:	Estoppel In Pais
Date:	Thursday, 8 March 2018 10:15:01 AM
Attachments:	Commonwealth v Verwayen - Voyager Estoppel.doc Original Defence Abuse Reparation Scheme Guidelines.docx

Dear Members of the Committee,

As per the undertaking given to Senator Watt, Please find attached a copy of **Commonwealth v Verwayen ("Voyager case") [1990] HCA 39; (1990) 170 CLR 394 (5 September 1990).**

In essence what it means is as follows:-

1. A person is entitled to place reliance on the announcements of public officials.

2. Having acted upon that reliance the Commonwealth is estopped from changing its mind on the matter once the person has acted
upon the announcement.

*"'Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity. It comes
to this: when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will
not be allowed to go back on it when it would be unjust or inequitable for him to do so"*

Paragraph 12, Deane J

Under the Terms and Conditions of the Reparation Payment for the Defence Abuse Response Task Force only a Court or Tribunal could reduce the amount payable by what was received from the Defence Abuse Response Task Force. It specifically stated that your common law and statutory rights remain unaffected.

On that basis, we say, the Commonwealth is estopped in pais from deducting Defence Abuse Response Task Force payments from the National Redress Payments.

Yours Respectfully

Jennifer Jacomb

ADF Command is not the solution, it is the Problem!

That is why we need:-

The Plan

The Whole Plan and

Nothing But The Plan

Ms Jennifer Jacomb

Secretary and Public Officer Victims Of Abuse In The Australian Defence

Force Association Inc. A0059257W

The Australian Defence Force And Abuse:-

"It was Hubris that made Angels into Devils.

It is obstinacy that keeps them in Hell"

Commonwealth v Verwayen ("Voyager case") [1990] HCA 39; (1990) 170 CLR 394 (5 September 1990)

HIGH COURT OF AUSTRALIA

THE COMMONWEALTH v. VERWAYEN (1990) 170 CLR 394
F.C. 90/036

Estoppel

High Court of Australia
Mason C.J.(1), Brennan(2), Deane(3), Dawson(4), Toohey(5), Gaudron(6) and McHugh(7) JJ.

CATCHWORDS

Estoppel - Waiver - Action against Commonwealth by serviceman injured in collision between Australian naval vessels engaged in combat exercises - Defence - Failure to plead expiration of limitation period or absence of duty of care - Statements by Commonwealth that it would not rely on either defence - Subsequent amendment of defence to plead both grounds - Whether Commonwealth estopped from relying on defences - Whether defenced waived - Limitation of Actions Act 1958 (Vict.), s. 5(6).

HEARING

1990, February 8, September 5. 5:9:1990
APPEAL from the Supreme Court of Victoria.

DECISION

MASON C.J. On the night of 10 February 1964 a collision took place between H.M.A.S. **Voyager** and H.M.A.S. Melbourne upon the high seas in the vicinity of Jervis Bay. The respondent was at the time a member of the Royal Australian Navy serving on board H.M.A.S. **Voyager**. He is one of a number of people who subsequently brought actions against the Commonwealth for damages for injuries sustained as a result of the collision, alleging that their respective injuries had been caused by the negligence of the officers and crew of one or both of the ships.

2. It is not necessary for present purposes to describe in detail the circumstances surrounding the collision. It is convenient instead to set out the history of the ensuing litigation between the respondent and the Commonwealth. The most significant aspect of that history is that the respondent did not issue a statement of claim until 2 November 1984. The reason for this delay appears to have been that legal opinion after the time of the collision was influenced by certain remarks made by Windeyer J., by way of obiter, in Parker v. The Commonwealth [1965] HCA 12; (1965) 112 CLR 295 at pp 301-302, to the effect that, for reasons of public policy, a member of the armed forces could not recover damages for the negligence of another member of the armed forces in the course of duty. Those remarks were disapproved by the Court in Groves v. The Commonwealth [1982] HCA 21; (1982) 150 CLR 113 at pp 118-119, 133-134, 136, 137. That decision broadened the ambit of the law of negligence in the context of the activities of members of the armed forces.

3. By its defence, dated 14 March 1985, the Commonwealth admitted the allegations made in the statement of claim, except that it did not admit that the respondent had been injured or had suffered loss or damage as a result of the collision. In this way, liability was admitted but the question of

damages remained in issue. The Commonwealth did not plead that the action was barred by the Limitation of Actions Act 1958 (Vict.) ("the Act"). Nor did it plead that it owed no duty of care to the respondent by reason of the decision in Groves. It is conceded by the respondent that the time period specified in the Act in relation to his cause of action had expired before the statement of claim was issued. Whether or not the Commonwealth owed a duty of care to the respondent on the facts of the present case is one of the questions with which this appeal is concerned.

4. The Commonwealth's action in not pleading these two defences was preceded by correspondence between solicitors acting for other persons seeking damages as a result of the collision and representatives of the Commonwealth. The early correspondence concerned a plaintiff named Robert Palmer, whose solicitors had been advised on 21 November 1983 by the Deputy Crown Solicitor that the Commonwealth would not rely on the Act in his case. Indeed, the Commonwealth did not seek to invoke the Act in Mr Palmer's case. Nor, it seems, did the Commonwealth raise the Groves defence in his case.

5. Mr Palmer's solicitors came to act on behalf of many other survivors of the collision, including the respondent. On 6 September 1984 they wrote to the Secretary of the Department of Defence on behalf of the respondent and four other claimants requesting that he "waive the Statute" in their cases. The Australian Government Solicitor (formerly the Crown Solicitor) advised the solicitors on 25 January 1985 that the Commonwealth proposed to admit liability and to waive the Statute of Limitations defence; this advice was later confirmed in writing.

6. After the defence had been filed, the Australian Government Solicitor joined with the respondent's solicitors on several occasions in making applications for an expedited hearing of the damages question on the ground that liability was not in issue. Moreover, in a number of statements by Ministers of the Commonwealth, it was made clear that the Commonwealth had adopted a policy not to contest liability and not to plead the Statute of Limitations. Many of these statements were not addressed directly to the respondent or his solicitors, but on 27 November 1985 the Minister Assisting the Minister for Defence wrote to the respondent in relation to a proposed settlement of all claims, which his solicitors had suggested. The letter stated in part:
"As you have pointed out, the Commonwealth has admitted
negligence and is not pressing the statutory limitation
period as a defence. Nevertheless, it still expects
claimants to show that they have suffered injury ... and to
prove the extent of their injuries and resultant loss, in
order to justify an award of damages."
that the Commonwealth had "waived the absolute defence open to it" under the Statute of Limitations in relation to the claims of the various plaintiffs.

7. At some time in or around November 1985, the Commonwealth decided to reconsider its policy in relation to the claims arising from the collision. From that point the Commonwealth began to plead defences based upon the Act and upon the argument that no duty was owed to the plaintiffs because of the decisions in Parker and Groves. This action was taken pending a final decision as to the position which the Commonwealth should adopt. Ultimately it was decided that both defences should be raised in each case.

8. Accordingly, the Commonwealth sought and was granted leave to amend its defence to the respondent's claim so as to raise both defences. The Master ordered that the Commonwealth pay the respondent's taxed costs of the application for leave to amend and the costs, if any, rendered abortive by reason of his order. Costs were otherwise reserved for the trial judge. An amended defence was delivered on 29 May 1986. At that time the trial would have been shortly due to commence. The respondent delivered a reply on 5 June 1986 in which he maintained that no defence was disclosed pursuant to the decisions in Parker and Groves and that the Act did not apply to the Commonwealth. In the alternative, he asserted that the Commonwealth had waived any such defences. The respondent also claimed that the Commonwealth was estopped from relying on either defence.

9. On 10 September 1986 in the Supreme Court of Victoria the matter came before Vincent J. who ordered that various issues of fact and law arising out of the pleadings be disposed of before the trial of the action. The respondent successfully appealed against this order and the matter came on for trial

before O'Bryan J. on 4 November 1987. His Honour required counsel to argue the questions of law raised by the amended defence and the reply before a jury was empanelled, upon the basis that the relevant facts were not in issue or would not be seriously disputed at the trial.

10. O'Bryan J. held that the public policy defence based on Groves was not available to the Commonwealth on the established facts. However, he also held that, if the Commonwealth had waived the limitation defence, such waiver was revocable and indeed had been revoked. Further, no estoppel operated because the parties had not been in a relevant pre-existing legal relationship and the respondent had not been materially disadvantaged because any legal costs incurred would be recoverable by an appropriate costs order. Judgment was therefore entered for the Commonwealth. His Honour's consideration of the concept of pre-existing legal relationship took place prior to this Court's decision in Waltons Stores (Interstate) Ltd. v. Maher [1988] HCA 7; (1988) 164 CLR 387. Since that case, if a pre-existing legal relationship is needed in order to found a promissory estoppel, it is clearly present in the plaintiff-defendant relationship in this case. However, this is not sufficient to dispose of the appeal.

11. The respondent appealed to the Full Court of the Supreme Court which allowed the appeal by majority (Kaye and Marks JJ.; King J. dissenting). The Court unanimously rejected the respondent's argument that the Commonwealth had waived its defences, but the majority held that the Commonwealth was estopped from resiling from its promise not to plead the Statute. King J. would have held that the respondent was entitled only to receive an amount representing the out-of-pocket costs and expenses incurred by him as a result of the change of mind by the Commonwealth. Kaye and Marks JJ. also dismissed a cross-appeal by the Commonwealth against O'Bryan J.'s decision that the public policy defence was not available to the Commonwealth. Accordingly, it was ordered that judgment for the Commonwealth be set aside and that the proceedings be remitted for trial.

12. In this Court, Mr Black Q.C., for the Commonwealth, argued that the majority in the Full Court had erred in granting to the respondent a remedy on the grounds of estoppel which was disproportionate to the detriment resulting from the respondent's reliance upon the Commonwealth's representation that it would not rely on the Act or the Groves defence. He also contended that, on grounds of public policy flowing from the decision in Groves, there was no duty of care owed towards the respondent in the circumstances of the case. The Groves issue does not arise if Mr Black's first argument is accepted. Moreover, the failure of the first argument would prevent the Commonwealth from relying upon the Groves defence even if it would otherwise have been available on the facts of the case. It is convenient therefore to concentrate first upon the effect of the Commonwealth's statements as to the defences it would not plead.

13. Mr Thomson Q.C., for the respondent, contended that the majority in the Full Court had correctly applied the law relating to estoppel. In the alternative, he argued, contrary to the decision of the Full Court, that the Commonwealth had voluntarily and irrevocably waived the benefit of a statutory right, namely its right to plead the Act as a complete defence. He also contended that O'Bryan J. and the Full Court had been correct in holding that the Commonwealth could not avail itself of the public policy defence based on Groves. Although the respondent did not file a notice of contention giving notice of his intention to rely upon the second of these arguments, the Commonwealth did not object to the course which the argument took. In any event, the dividing line between waiver and estoppel is, to say the least of it, by no means clear cut.

14. Putting estoppel to one side for the moment, it is desirable to consider, as Mr Thomson invited, the existence of a doctrine of "waiver of the benefit of a statutory right". Undoubtedly, some statutory rights are capable of being extinguished by the person for whose benefit they have been conferred: Sandringham Corporation v. Rayment [1928] HCA 13; (1928) 40 CLR 510 at p 527; Wilson v. McIntosh (1894) AC 129 at pp 133-134. However, some statutory rights may also operate as a condition precedent to a court's jurisdiction: Park Gate Iron Co. v. Coates (1870) LR 5 CP 634; Kammins Co. v. Zenith Investments (1971) AC 850. More importantly, some rights may be conferred for reasons of public policy so as to preclude contracting out or abandonment by the individual concerned: see Lieberman v. Morris (1944) 69 CLR 69. It is therefore necessary to examine the relevant statutory provision in this case in order to ascertain whether it is susceptible to extinguishment in this way.

15. Section 5(6) of the Act provided:

"No action for damages for negligence ..., where the damages claimed by the plaintiff consist of or include damages in respect of personal injuries to any person, shall be brought after the expiration of three years after the cause of action accrued."

This sub-section was repealed by s.3(c) of the Limitation of Actions (Personal Injury Claims) Act 1983 (Vict.). However, s.11(2) of that Act provided:

"The Acts amended by this Act shall apply as in force immediately before the commencement of this Act to a cause of action arising more than six years before the date of commencement of this Act."

That Act was proclaimed to commence on 11 May 1983.

16. Although the terms of s.5(6) are such that it is susceptible of being read as going to the existence of the jurisdiction of a court to hear and determine an action of the kind described, limitation provisions similarly expressed have not been held to limit the jurisdiction of courts. Instead, they have been held to bar the remedy but not the right and thus create a defence to the action which must be pleaded: Dawkins v. Lord Penrhyn (1878) 4 App Cas 51 at pp 58-59; The Llandovery Castle (1920) P 119 at p 124; Dismore v. Milton (1938) 3 All ER 762; Ronex Properties v. John Laing (1983) QB 398; Ketteman v. Hansel Properties (1987) AC 189 at p 219.

17. On the footing that the right to plead the statute as a defence is a right conferred by statute, the respondent's contention that the right is capable of waiver hinges on the scope and policy of the particular statute: Admiralty Commissioners v. Valverda (Owners) (1938) AC 173 at p 185. The issue is not whether the relevant provisions are beneficial to the public, but whether they are "dictated by public policy" and enacted "not for the benefit of any individuals or body of individuals, but for considerations of State": at p 185. Although, in one sense, all statutes give effect to some public policy (see Lieberman v. Morris at pp 82, 84), the critical question is whether the benefit is personal or private or whether it rests upon public policy or expediency: Brown v. The Queen [1986] HCA 11; (1986) 160 CLR 171 at p 208.

18. In this case there is the public policy that there should be finality in civil litigation. However, the Parliament has seen fit to implement this policy, not by imposing a jurisdictional restriction, but by conferring on defendants a right to plead as a defence the expiry of the relevant time period. In these circumstances and having regard to the nature of the statutory defence, I conclude that the purpose of the statute is to confer a benefit upon persons as individuals rather than to meet some public need which must be satisfied to the exclusion of the right of access of individuals to the courts. On that basis, it is possible to "contract out" of the statutory provisions, and it is equally possible to deprive them of effect by other means such as waiver. Put differently, the provisions are procedural rather than substantive in nature, which suggests that they are capable of waiver: Admiralty Commissioners v. Valverda, at p 185.

19. But, granted that some statutory rights can be waived, the mere existence of cases in which statutory rights have been held to be susceptible to waiver does not signify that those cases are all exemplifications of one concept or doctrine. As often as not, the term "waiver" is used to describe the result of the application of various principles rather than to designate a particular legal concept or doctrine. The consequence is that the expression "waiver" has been the subject of robust criticism, notably by Dr Ewart in his work Waiver Distributed, (1917); see also Bysouth v. Shire of Blackburn and Mitcham (No. 2) [1928] VicLawRp 81; (1928) VLR 562 at p 579; Larratt v. Bankers and Traders' Insurance Co. (1941) 41 SR (NSW) 215 at p 226; Kammins, per Lord Diplock at pp 882-883. This is because "waiver" is an imprecise term capable of describing different legal concepts, notably election and estoppel.

20. It has been doubted that waiver exists as a defence or answer in any case except where it is used as an alternative designation for some other defence or answer, for example, election, estoppel or new agreement: Bysouth, per Lowe J. at p 579. Generally speaking, as Jordan C.J. pointed out in Larratt (at pp 226-227), an existing legal right is not destroyed by mere waiver in the sense of an express or

implied intimation that the person in whom the right is vested does not intend to enforce it: see Mulcahy v. Hoyne [1925] HCA 17; (1925) 36 CLR 41 per Isaacs J. at pp 55-56; Atlantic Shipping and Trading Co. v. Louis Dreyfus and Co. (1922) 2 AC 250 per Lord Sumner at pp 261-262. In these cases, unless consideration is present, something in the nature of an election or an estoppel is required.

21. According to its strict legal connotation, waiver is an intentional act done with knowledge whereby a person abandons a right by acting in a manner inconsistent with that right: Craine v. Colonial Mutual Fire Insurance Co. Ltd. [1920] HCA 64; (1920) 28 CLR 305 at p 326; Grundt v. Great Boulder Pty. Gold Mines Ltd. [1937] HCA 58; (1937) 59 CLR 641 at p 658. However, the better view is that, apart from estoppel and new agreement, abandonment of a right occurs only where the person waiving the right is entitled to alternative rights inconsistent with one another, such as the right to insist on performance of a contract and the right to rescind for essential breach: see Kammins, at p 883. This category of waiver is an example of the doctrine of election.

22. Another category of waiver is one in which a person is prevented from asserting, in response to a claim against him, a particular defence or objection which would otherwise have been available. Here waiver is said to arise when the person agrees not to raise the particular defence or so conducts himself as to be estopped from raising it: see Kammins, at p 883.

23. In these circumstances, the authorities dealing with waiver of statutory rights do not call for special consideration. They speak with different voices, sometimes in the language of election, at times in that of estoppel and at other times in terms of unconscionability: see, for example, Ward v. Raw (1872) LR 15 Eq 83; Phillips v. Martin (1890) 11 NSWLR 153 at pp 157-158, 159; Wilson v. McIntosh. Quasi-estoppel by acquiescence is another approach which has found favour: Willmott v. Barber (1880) 15 Ch D 96, at pp 105-106; Kammins at pp 884-885. The old references to unconscionability may be taken today as forerunners of the modern principles of estoppel, now that prevention of unconscionable conduct has been identified as the driving force behind equitable estoppel: Waltons Stores, at pp 404, 419, 450.

24. It is necessary to consider whether, first, the doctrine of election and, secondly, the principles of estoppel (including quasi-estoppel by acquiescence) apply in the present case. The broad principles of election are not in doubt. They were formulated by this Court, under the title of waiver, in Craine v. Colonial Mutual, at p 326; see also O'Connor v. S.P Bray Ltd. (1936) 36 SR (NSW) 248 at pp 257-264. In Sargent v. A.S.L. Developments Ltd. [1974] HCA 40; (1974) 131 CLR 634 Stephen J. explained (at p 641):

"The doctrine only applies if the rights are inconsistent the one with the other and it is this concurrent existence of inconsistent sets of rights which explains the doctrine; because they are inconsistent neither one may be enjoyed without the extinction of the other and that extinction confers upon the elector the benefit of enjoying the other, a benefit denied to him so long as both remained in existence."
See also per Mason J. at p 656.

25. The respondent contends that the Commonwealth was required to elect between two inconsistent rights, namely, the right to plead and the right not to plead. The defences could be either pleaded or not pleaded; and a choice needed to be made as to which course to follow. But that is by no means the end of the matter because it is not clear that one of these "rights" could not be enjoyed without the extinction of the other. Indeed, the Commonwealth argues that, subject to the grant of leave to amend the pleadings, there was nothing to prevent it from adopting the right which the respondent claims was extinguished. The essential preliminary question is therefore whether or not the Commonwealth was required to make an irrevocable choice between two alternative positions; if it was not, then the two cannot be said to have been relevantly inconsistent, and the doctrine of election would not come into play.

26. The respondent's contention is that, by filing a defence omitting reference to the Act and the Groves defence, the Commonwealth had irrevocably elected not to plead the defences available to it. The

immediate difficulty with that contention is that it does not account for the possibility that leave may be granted to amend the pleadings for the purpose of including the defences. The respondent could not point to any authority in which the filing of a defence was said to amount to an election in this way. Indeed, there is support for the contrary view, based upon the following passage from the judgment of Viscount Simon LC. in United Australia Ltd. v. Barclays Bank Ltd. (1941) AC 1 at pp 18-19:

"No doubt, if the plaintiff proved the necessary facts, he could be required to elect on which of his alternative causes of action he would take judgment, but that has nothing to do with the unfounded contention that election arises when the writ is issued. There is nothing conclusive about the form in which the writ is issued, or about the claims made in the statement of claim. A plaintiff may at any time before judgment be permitted to amend. ... At some stage of the proceedings, the plaintiff must elect which remedy he will have. There is, however, no reason of principle or convenience why that stage should be deemed to be reached until the plaintiff applies for judgment."

See also per Lord Atkin at pp 29-31. That case involved the quite different question whether the initiation of proceedings against one defendant precluded the bringing of an action against a second defendant on the basis of the same facts. Of course, the decision provides no support for the view that a defendant will not need to elect whether or not to plead a defence until the plaintiff seeks judgment. Nonetheless, the general statements in relation to the plaintiff's opportunities to amend the pleadings have at least equal force when applied to a defendant.

27. This is not a case in which it could be said that the defendant was required by a certain point in time to elect whether or not to plead the defences. If there was no need to make an election when the defence was first filed, there is no reason why the comparatively insignificant proceedings which followed gave rise to such a need and precluded the reversal of the previous decision. If the facts give rise to a conclusion that the Commonwealth's decision was irrevocable, then the reason is not to be found in the principles of election.

28. That brings me to estoppel, a label which covers a complex array of rules spanning various categories. There are the divisions between common law and equitable estoppel, between estoppel by conduct and estoppel by representation, and the distinction between present and future fact. There are titles such as promissory estoppel, proprietary estoppel and estoppel by acquiescence. Yet all of these categories and distinctions are intended to serve the same fundamental purpose, namely "protection against the detriment which would flow from a party's change of position if the assumption (or expectation) that led to it were deserted": Waltons Stores, per Brennan J. at p 419. See also per Mason C.J. and Wilson J. at p 404; Grundt, at pp 674-675.

29. At common law the principle of estoppel by conduct or representation ("estoppel in pais") provided that protection by preventing the party estopped from unjustly departing from an assumption of fact which his conduct had caused another party to adopt or accept for the purpose of their legal relations: Grundt, at pp 657, 674; Thompson v. Palmer [1933] HCA 61; (1933) 49 CLR 507 at p 547; Waltons Stores, at pp 397-399, 413-415, 443, 458. But it was well established that, in order to support an estoppel by conduct, the representation (or assumption) must be a representation of an existing fact, a promise or representation of intention to do something being insufficient for that purpose: Yorkshire Insurance Co. v. Craine (1922) 2 AC 541 at p 553.

30. The principle of estoppel by conduct or representation applied in equity, as at common law, though in equity the principle was known as equitable estoppel: Jorden v. Money (1854) 5 HLC 185 at pp 210, 212-213 (10 ER 868 at pp 880, 881); Thompson v. Palmer, at pp 519-520, 547, 558; Waltons Stores, at pp 447-448. And in equity it was also well settled that the representation (or assumption) must be of an existing fact, not of future fact or mere intention. That is what Jorden v. Money decided, despite the fact, as Bowen LJ. pointed out in Edgington v. Fitzmaurice (1885) 29 Ch D 459 at p 483, that "the state of a man's mind is as much a fact as the state of his digestion". This limitation upon the principle of estoppel was seemingly founded upon the notion that to hold a person to an assumption which his conduct has caused another to adopt or accept was tantamount to enforcing a voluntary promise in the

absence of consideration. The need to avoid this consequence was an important aspect of the majority reasoning in Jorden v. Money.

31. However, neither the decision nor the reasoning in that case can now be sustained. Promissory estoppel, recognized by this Court in Legione v. Hateley [1983] HCA 11; (1983) 152 CLR 406, has undermined the idea that voluntary promises cannot be enforced in the absence of consideration. What is more, promissory estoppel has an extensive area of operation now that it is acknowledged that the doctrine is not confined to pre-existing contractual relationships: see Waltons Stores, at pp 399-406. Furthermore, the acceptance of the doctrine of promissory estoppel has been accompanied by a recognition that the distinction between present and future fact is unsatisfactory and produces arbitrary results instead of serving any useful purpose: Moorgate Ltd. v. Twitchings (1976) QB 225 at p 242; Waltons Stores, at pp 398-399, 450-451, 452; Foran v. Wight [1989] HCA 51; (1989) 64 ALJR 1 at pp 12, 22-23; [1989] HCA 51; 88 ALR 413 at pp 430-431, 448-449. Indeed, the difference between the majority and Lord St Leonards in Jorden v. Money was a striking illustration of the arbitrary nature of the distinction.

32. In conformity with the fundamental purpose of all estoppels to afford protection against the detriment which would flow from a party's change of position if the assumption that led to it were deserted, these developments have brought a greater underlying unity to the various categories of estoppel. Indeed, the consistent trend in the modern decisions points inexorably towards the emergence of one overarching doctrine of estoppel rather than a series of independent rules: see Waltons Stores, at pp 403-404, 447-451; Foran v. Wight, at pp 12, 22-23; pp 430-431, 448-449 of ALR; Collin v. Holden [1989] VicRp 48; (1989) VR 510 at pp 515-516; Taylors Fashions Ltd. v. Liverpool Trustees Co. (1982) QB 133 at p 153; Amalgamated Property Co. v. Texas Bank (1982) QB 84 at p 122; Attorney-General of Hong Kong v. Humphreys Estate (1987) AC 114 at pp 123-124.

33. One obstacle to the existence of a single overarching doctrine is a suggested difference in the nature of estoppel by conduct on the one hand and equitable estoppel (including promissory estoppel) on the other and in the character of the protection which they respectively provide. Traditionally, estoppel by conduct has been classified as a rule of evidence, available where there is a cause of action, to prevent a person from denying what he previously represented, and has not itself constituted a cause of action: Grundt, at p 658; Low v. Bouverie (1891) 3 Ch 82 at pp 101, 105. Being an evidentiary principle, estoppel by conduct achieved, and could only achieve, the object of avoiding the detriment which would be suffered by another in the event of departure from the assumed state of affairs by holding the party estopped to that state of affairs. The rights of the parties were ascertained and declared by reference to that state of affairs. On the other hand, equity was more flexible. Equity was concerned, not to make good the assumption, but to do what was necessary to prevent the suffering of detriment. To do more would sit uncomfortably with a general principle whose underlying foundation was the concept of unconscionability. So, in Waltons Stores, a majority of this Court concluded that equitable estoppel entitled a party only to that relief which was necessary to prevent unconscionable conduct and to do justice between the parties. Mason C.J. and Wilson J. referred (at p 404) to the statement of Scarman L.J. in Crabb v. Arun District Council [1975] EWCA Civ 7; (1976) Ch 179 at p 198, that the court should determine what was "the minimum equity to do justice to the plaintiff". We went on to state (at p 405):

"Holding the representor to his representation is merely one way of doing justice between the parties."

Similarly, Brennan J. said (at p 419):

"The element 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. As Robert Goff J. said in Amalgamated Property Co. v. Texas Bank (1982) QB 84 at p 103: 'Of all doctrines, equitable estoppel is surely one of the most flexible.' ... However, in moulding its decree, the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct."

34. It follows that, as a matter of principle and authority, equitable estoppel will permit a court to do what is required in order to avoid detriment to the party who has relied on the assumption induced by the party estopped, but no more. In appropriate cases, that will require that the party estopped be held to the assumption created, even if that means the effective enforcement of a voluntary promise. To that extent there is an overlap between equitable estoppel generally and estoppel by conduct in its traditional form. 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 equity, it is anomalous and potentially unjust to allow the two doctrines to inhabit the same territory yet produce different results. Moreover, as I have already indicated, the fact that estoppel by conduct has expanded beyond its evidentiary function into a substantive doctrine means that there is no longer any justification for insisting on the making good of assumptions in every case.

35. In any event, there is a very strong case for saying that equity had discarded earlier the notion that the purpose of the rules of estoppel by conduct was to make good the relevant assumption. As Professor Finn points out in his essay "Equitable Estoppel" in Finn (ed.), Essays in Equity, (1985), at p 68, "the language of expectations (was) forsaken entirely for that of 'equities'" in Crabb v. Arun District Council. Lord Denning M.R. had qualified the language of expectations in E.R. Ives Investment Ltd. v. High (1967) 2 QB 379 at pp 394-395, by stating that the "court will not allow (the) expectation to be defeated when it would be inequitable so to do" (emphasis added). That qualification, made repeatedly in cases which can be traced back to the Privy Council's statement in Plimmer v. Mayor, and, of Wellington (1884) 9 App Cas 699 at p 714, that "the Court must look at the circumstances in each case to decide in what way the equity can be satisfied", has transformed the basis of the equitable principles of estoppel: see Finn, at pp 62-71.

36. In these circumstances, it would confound principle and common sense to maintain that estoppel by conduct occupies a special field which has as its hallmark function the making good of assumptions. 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. A central element of that doctrine is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption. (See also the conclusion of Lord Denning M.R. in Amalgamated Property Co. v. Texas Bank, at p 122.)

37. The assumption may be one as to a legal as well as to a factual state of affairs. There is simply no reason to restrict the assumption to a factual matter as there was at the time when the rules of estoppel by conduct were evidentiary. It has already been recognized that an equitable estoppel may relate at least to a matter of mixed fact and law (see Waltons Stores, at pp 415-416, 420-421, 452; Foran v. Wight, at p 22; p 448 of ALR). Moreover, the distinction between assumptions as to fact and assumptions as to law is artificial and elusive; see the discussion of Oliver J. in Taylors Fashions Ltd. v. Liverpool Trustees Co., at pp 150-151. So it would be productive only of confusion and arid technicality to restrict the operation of the doctrine so as to exclude from its scope an assumption as to a purely legal state of affairs. It is therefore not surprising that long ago the Judicial Committee recognized that a representation as to the legal effect of an agreement can give rise to an estoppel: Sarat Chunder Dey v. Gopal Chunder Laha (1892) LR 19 Ind App 203; Calgary Milling Co. Ltd. v. American Surety Co. of New York (1919) 3 WWR 98; see also Amalgamated Property Co. v. Texas Bank, at pp 106-107.

38. Turning to the facts of the present case, at least in so far as the statutory defence is concerned, the difficulty facing the respondent at the outset is to establish that the required assumption was induced by the Commonwealth. What must be established is either that the Commonwealth represented that it had decided not to plead the Statute or the Groves defence and that it did not regard itself as free to change its decision (cf. Waltons Stores, at pp 422-423) or that the Commonwealth represented that it would not plead those defences.

39. In an ordinary case, the nature of pleadings and their susceptibility, whether by leave or otherwise, to amendment would make it most unlikely that it could be inferred from the pleadings alone that the pleader had induced another party to make an assumption that a particular matter would or would not be pleaded. The other party might reasonably be expected to appreciate that no inference can be drawn from the state of the pleadings alone at a particular time as to the future course which the pleader may decide to take. Still less would it be reasonable to assume that an implied promise not to amend the pleadings, if such a promise could be identified, would be enforceable in the absence of consideration: see Waltons Stores, at p 403.

40. However, in the present case the respondent is able to point to more than the mere filing and serving of the defence by the Commonwealth. There were clear indications that a deliberate and considered decision had been made whereby the limitation defence and the defence of no duty of care would not be pleaded in any of the ensuing actions brought by survivors of the collision. Those indications apparently included express representations to some claimants followed by the assessment and award of damages on the footing that no defence was pleaded. In the respondent's case, the Commonwealth had joined in making applications for an expedited hearing of the damages issue.

41. In all the circumstances the proper conclusion to be drawn is that the respondent had been induced by the Commonwealth's conduct to assume that the Commonwealth had made a decision not to plead the limitation defence or the Groves defence and that that decision would not be changed. The fact that the circumstances pointed to the existence of a definitive government policy which had been followed to the point of judgment on other occasions supports the conclusion that that assumption was a reasonable assumption for a person in the respondent's position to make. The relevance of this conclusion is that there is no reason to doubt the respondent's assertion that he made the assumption and continued his action against the Commonwealth in reliance on it.

42. The element of detriment presents more difficulty. Of course the respondent would suffer detriment in reliance on the assumption if the Commonwealth were to depart from it, at least in the sense that he would fail in his action for damages. However, the question of detriment is not as simple as such an answer would suggest, and is closely related to the other elements of the claim of estoppel.

43. When a person relies upon the correctness of an assumption which is subsequently denied by the party who has induced the making of the assumption, two distinct types of detriment may be caused. In a broad sense, there is the detriment which would result from the denial of the correctness of the assumption upon which the person has relied. In a narrower sense, there is the detriment which the person has suffered as a result of his reliance upon the correctness of the assumption.

44. The cases concerning estoppel by conduct, at least at common law, were in one respect concerned with the broader concept of detriment. So, Dixon J. said in Grundt, at p 674, that "the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it". This makes it clear that the detriment must flow from the reliance upon the assumption (see Foran v. Wight, at p 12; p 431 of ALR), but goes further and suggests that the relief granted by virtue of the estoppel (in that context, the making good of the assumption) corresponds with the detriment which would be suffered were the assumption to be deserted. However, that further suggestion was dictated by the then existing confines of the rules of estoppel by conduct; Dixon J. was plainly stating that a person's "change of position" could not be allowed to "operate as a detriment": at p 674. His Honour's exposition is now instructive as an indication that the detriment against which the law protects is that which flows from reliance upon the deserted assumption, even though at that time the evidentiary rule operated to hold the representor to the assumption created.

45. In the same way, cases of equitable estoppel have been concerned to grant relief where detriment would be suffered if the assumed state of affairs upon which reliance had been placed was held not to exist. But, as we have seen, the relief which equity grants is by no means necessarily to be measured by the extent of that detriment. So, while detriment in the broader sense is required in order to found an estoppel (and it would be strange to grant relief if such detriment were absent), the law provides a remedy which will often be closer in scope to the detriment suffered in the narrower sense.

46. It remains only to determine what relief is appropriate to satisfy the estoppel which the respondent has successfully raised in this case. When a court approaches the task of ascertaining the minimum relief necessary to "do justice" between the parties, 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. Thus it must be borne in mind that a voluntary promise is generally not enforceable and that pleadings are susceptible of amendment. The breaking of a promise, without more, is morally reprehensible, but not unconscionable in the sense that equity will necessarily prevent its occurrence or remedy the consequent loss. In the same way, with estoppel, something more than a broken promise is required.

47. Each case is one of degree. Reliance upon an assumption for an extended period may give rise to an estoppel justifying a court in requiring that the assumption be made good. The same result may follow from substantial and irreversible detriment suffered in reliance upon the assumption or from detriment which cannot satisfactorily be compensated or remedied. In the present case the detriment suffered by the respondent in reliance on the assumption induced by the Commonwealth appears to be of a more limited nature. The procedure adopted for the determination of this case in the Supreme Court means that we have no finding or evidence of the detriment, flowing from his reliance upon the assumption, which the respondent would suffer from the Commonwealth's pleading of the limitation defence or the Groves defence. It must be assumed, however, that that detriment would include significant expense and inconvenience. However, as far as the respondent's emotional condition is concerned, it is sheer speculation to suggest that his reliance on the Commonwealth's actions after commencement of the action caused any deterioration of that condition. Evidence of detriment must be affirmatively demonstrated; this is not a case involving the exercise of judicial discretion: cf. Murray v. Munro [1906] HCA 25; (1906) 3 CLR 788 at p 796; Ketteman v. Hansel Properties, at p 220.

48. The question then is whether an order for costs is a sufficient recompense for the respondent in respect of the detriment suffered by him. An order for costs has traditionally been regarded as a sufficient adjustment to meet prejudice in terms of expense and inconvenience occasioned by the pleading of new defences and I am not persuaded that principle or circumstance call for any different answer in the present case. There is no material before the Court to justify a conclusion that the respondent commenced his action on the basis of any express or implied representation on the part of the Commonwealth. The respondent's solicitors inquired of the Secretary of the Department of Defence in September 1984 whether he would agree to waive the Statute of Limitations and admit liability. The relevant Minister replied on 29 October 1984, stating that the matter had been referred for consideration to the Australian Government Solicitor. The statement of claim was issued on 2 November 1984. It can hardly be said that these circumstances establish the existence of an assumption on the part of the respondent that liability was not in issue. Indeed, the Minister's letter alerted the respondent's solicitors to the fact that, although the defences had not been pleaded when the question had previously arisen, the Commonwealth still saw fit to refer the question for legal advice on this occasion. If anything, this suggests the absence of a definite and unambiguous policy at the time when the respondent commenced his action.

49. To hold the Commonwealth to its representations, thereby depriving it of defences which were available to it by statute or the general law, would be a disproportionate response to the detriment suffered by the respondent in reliance upon the assumption that the defences would not be pleaded. True it is that the representations reflected a deliberate policy decision made by government at ministerial level at least. That circumstance gave the representations the quality of apparent reliability and went to the issue of reliance. But the apparent reliability of the representations does not enlarge the nature or scope of the detriment which the respondent has suffered in reliance on the representations following the denial of the assumption generated by them. Likewise, the fact that the Commonwealth is the party against whom an estoppel is pleaded is not in this case a point of distinction. It was not argued that any special rule of estoppel applies to assumptions induced by government, either so as to expand or so as to contract the field of operation of the doctrine.

50. In the result I conclude that the respondent's case of waiver and estoppel has not been made out and that the Full Court of the Supreme Court was wrong in holding otherwise. The appeal should be allowed.

BRENNAN J. The plaintiff issued a writ out of the Supreme Court of Victoria on 2 November 1984 claiming damages against the Commonwealth for injuries sustained by him, a leading electrical mechanic in the Royal Australian Navy and one of the complement of H.M.A.S. **Voyager**, in a collision between H.M.A.S. Melbourne and H.M.A.S. **Voyager** on 10 February 1964. By his statement of claim, the plaintiff alleged that he had suffered injury, loss and damage as the result of the negligence of the officers and crew of each ship. At the time of the collision, the two ships were engaged in training manoeuvres off Jervis Bay. Negligence was also alleged against officers and servants of the Commonwealth in allowing the ships to go to sea whilst in an unseaworthy condition.

2. The Commonwealth delivered a defence admitting the allegations of negligence but not admitting the allegations of injury, loss and damage. The action proceeded towards trial of the single issue of damages. The parties joined in several applications to the Court to expedite the hearing. Then, on 29 May 1986, an order was made by Master Brett giving the Commonwealth leave to amend the defence. By the amended defence, the plaintiff's allegations of negligence were denied and two specific grounds of defence were pleaded: first, by par.4, that the naval personnel participating in and/or directing the "combat exercises" in which H.M.A.S. **Voyager** and H.M.A.S. Melbourne were engaged owed no duty of care to the plaintiff; second, by par.5, that the plaintiff's action was barred by s.5 of the Limitation of Actions Act 1958 (Vict.) ("the Limitation Act"). The plaintiff delivered a reply raising waiver and estoppel against the specific pleas in the Commonwealth's amended defence. Particulars were furnished setting out, inter alia, the contents of a letter dated 27 November 1985 from the Minister Assisting the Minister for Defence to the plaintiff stating "... the Commonwealth has admitted negligence and is not pressing the statutory limitation period as a defence. ... I can assure you that all reasonable steps are being taken to expedite these matters ..." Moreover, conversations between the respective solicitors allegedly expressed an agreement to waive the defence under the Limitation Act. By his reply, the plaintiff pleaded that, in reliance on the defendant's agreement to waive and its waiver of the defence under the Limitation Act, he "issued and continued proceedings in this matter and has been otherwise disadvantaged." He furnished particulars of the allegation that he was "otherwise disadvantaged" as follows:

> "The Plaintiff has lost rights pursuant to Section 23A of the Limitation of Actions Act 1958. The Plaintiff has issued and continued proceedings in the Supreme Court of Victoria. The Plaintiff has incurred expense by reason of costs associated with this action. The Plaintiff suffers from increased stress as a result of continued protraction of these proceedings leading to an aggravation of his psychiatric state of health."

3. When the matter came for trial before O'Bryan J., his Honour decided, over the plaintiff's objection, to hear argument on certain questions of law raised by the pleadings, taking the view that the facts relevant to these questions "were not in issue or would not be seriously disputed at trial." His Honour first considered whether on the facts relating to the collision - which had been set out in a notice to admit and which the plaintiff was taken to have admitted - any duty of care was owed by the defendant. On the facts thus admitted, his Honour found:

> "that Melbourne and **Voyager** and their officers and crew were engaged in a naval training exercise at sea, during peace-time, whereby conditions of a nature which might be experienced during war-time against an enemy were simulated."

However, his Honour held that the defence pleaded in par.4 of the amended defence was not sound in law.

4. Next, his Honour held that s.5(6) of the Limitation Act applied to the plaintiff's claim. That provision read as follows:

" No action for damages for negligence ..., where the
damages claimed by the plaintiff consist of or include
damages in respect of personal injuries to any person,
shall be brought after the expiration of three years after
the cause of action accrued."
Then his Honour proceeded to consider whether the defendant had waived or was estopped from relying on the defence under s.5(6) of the Limitation Act. It was and is common ground that the Commonwealth had adopted a clear policy of admitting liability and not raising any applicable Limitation Act in any case in which a seaman injured in the collision between H.M.A.S. Melbourne and H.M.A.S. **Voyager** sued for damages. Then the policy changed and the Commonwealth decided to contest liability and rely on statutes of limitation in these cases. The question was and is whether this midstream change of policy came too late to relieve the Commonwealth from the liability which had theretofore been admitted in the plaintiff's case. The conduct of the defendant on which the plaintiff relied to raise waiver and estoppel was not in dispute. The relevant correspondence was produced. His Honour said:
"As there is no factual issue for a jury to determine, it is
proper and convenient that the Court now determine the
questions of law at issue."
It is by no means clear that the relevant facts as to detriment were agreed. In the course of argument before his Honour, counsel for the plaintiff had said that the plaintiff "undertook loan commitments for the purpose of carrying on his action". Counsel had also alleged that the amending of the defence (which "take(s) away the carrot, so to speak") would have "severe consequences upon the (plaintiff's) ill-health produced by the defendant's negligence." Having reserved consideration of the questions of waiver and estoppel, his Honour found:
" One may assume that the defendant by its authorised
agents expressly or impliedly offered or promised the
prospective plaintiff, shortly before the Writ was issued,
that it would not rely upon a limitation defence. The
problems for the plaintiff are that the offer or promise
was not made by the defendant when the parties stood in a
relevant legal relationship and that the offer or promise
was unsupported by any form of consideration known to the
law. Further, the plaintiff did not alter his position
detrimentally in reliance upon the promise otherwise than
by incurring legal costs."
And further -
"if the offer or promise relied upon was given as to future
conduct, the necessary contractual relationship was absent,
but if the promise was given as to the present, detriment
was absent.
...
... as a consequence of the promise the plaintiff was
not materially disadvantaged because the legal costs he
incurred will be recoverable by an appropriate costs
order."
His Honour's finding that legal costs were the only material detriment did not accord with the assertion that the plaintiff had suffered exacerbation of his ill-health and that that was a material detriment. His Honour rejected estoppel as an answer to the plea based on the Limitation Act as the plaintiff had suffered no detriment other than costs; he rejected waiver on the ground advanced in Kerrison v. Martin and Heyward [1975] VicRp 40; (1975) VR 401, where the Full Court had said (at p 405):
" However it is, we think, clear that any such unilateral
waiver without consideration can be terminated at any time.
Upon the waiver terminating, the other party would we think
have a reasonable time in which to do the act which that
other party had omitted to perform."
His Honour held:
" In the present case the waiver relied upon is, in my
opinion, unilateral and voluntary and the defendant was
entitled to withdraw the offer or promise when it did by
giving notice of an application to amend the defence."

Rejecting both waiver and estoppel, his Honour upheld the defence under s.5(6) of the Limitation Act and ordered that judgment be entered for the defendant. On appeal by the plaintiff to the Full Court the majority (Kaye and Marks JJ.) allowed the appeal with costs, ordered the judgment for the defendant to be set aside and remitted the matter for trial by jury on the issues of negligence and damages. Their Honours dismissed the defendant's cross-appeal. King J. would have ordered an inquiry into the out-of-pocket costs and expenses suffered by the plaintiff by reason of the Commonwealth's change of mind and would have ordered the Commonwealth to pay any sum found to be due by the inquiry but, subject to that, he would have dismissed the appeal.

5. The present appeal is not an appeal against Master Brett's order allowing the Commonwealth to amend its defence. The amendment stands and the questions raised on the appeal are whether the Commonwealth is precluded from relying on pars 4 and 5 of its amended defence by reason of estoppel or waiver.

6. Election, estoppel and waiver are cognate concepts: each relates to the sterilization of a legal right otherwise than by contract. A "right" may include a liberty or an immunity, according to the circumstances. In Sargent v. A.S.L. Developments Ltd. [1974] HCA 40; (1974) 131 CLR 634, Mason J. said (at p 655):

" Any discussion of the principles governing the circumstances in which a party's words or conduct may preclude him from exercising a legal right which he possesses is beset with difficulties. They have their origin in the differences to be found in the various doctrines (election, waiver and estoppel) which may come into operation and in the differing concepts which each doctrine has at times been thought to embrace."

Election consists in a choice between rights which the person making the election knows he possesses and which are alternative and inconsistent rights: Evans v. Bartlam (1937) 2 All ER 646, at pp 652,653; Tropical Traders Ltd. v. Goonan [1964] HCA 20; (1964) 111 CLR 41 at p 55; Kammins Co. v. Zenith Investments (1971) AC 850 at p 883. A doctrine closely related to election, and sometimes treated as a species of election, is the doctrine of approbation and reprobation. This doctrine precludes a person who has exercised a right from exercising another right which is alternative to and inconsistent with the right he exercised as, for example, where a person "having accepted a benefit given him by a judgment, cannot allege the invalidity of the judgment which conferred the benefit": Evans v. Bartlam, per Lord Russell of Killowen at p 652. An election is binding on the party who makes it once it is made overtly - or, at all events, not later than on the communication of the election to the party or parties affected thereby: Newbon v. City Mutual Life Assurance Society Ltd. [1935] HCA 33; (1935) 52 CLR 723 at p 733; Scarf v. Jardine (1882) 7 App Cas 345 at pp 360-361. It is binding whether or not others who are affected by the election have acted in reliance on it. In this respect, election is to be distinguished from estoppel: Khoury v. Government Insurance Office (N.S.W.) [1984] HCA 55; (1984) 165 CLR 622 at p 633.

7. Estoppel by representation of a fact (estoppel in pais) precludes a party who, by his representation, has induced another party to adopt or accept the fact and thereby to act to the other party's detriment from asserting a right inconsistent with the fact on which the other party acted: Thompson v. Palmer [1933] HCA 61; (1933) 49 CLR 507; Grundt v. Great Boulder Pty. Gold Mines Ltd. [1937] HCA 58; (1937) 59 CLR 641. Equitable estoppel or, as I prefer to call it, an equity arising by estoppel precludes a person who, by a promise, has induced another party to rely on the promise and thereby to act to his detriment from resiling from the promise without avoiding the detriment: Waltons Stores (Interstate) Ltd. v. Maher [1988] HCA 7; (1988) 164 CLR 387 at p 427. An equity of this kind, by imposing a liability either to avoid detriment to the other party or to honour the promise, trenches upon the liberties or immunities of the person who is bound. An estoppel, whether in pais or arising in equity, is binding so soon as it is acted on to the detriment of the other party.

8. Waiver is a term of shifting meaning. Lord Wright in Smyth and Co. v. Bailey and Co. (1940) 3 All ER 60 said (at p 70):

" The word 'waiver' is a vague term used in many senses. (Stroud's Judicial Dictionary lists at least 13.) It is always necessary to ascertain in what sense and with what restrictions it is used in any particular case. It is sometimes used in the sense of election as where a person decides between two mutually exclusive rights. Thus, in the old phrase, he claims in assumpsit and waives the tort. It is also used where a party expressly or impliedly gives up a right to enforce a condition or rely on a right to rescind a contract, or prevents performance, or announces that he will refuse performance, or loses an equitable right by laches."

To identify the relevant legal doctrine, it is necessary to identify the sense in which we intend to use the term "waiver". In this case, there is no contract to admit liability (a proposition considered in Newton, Bellamy and Wolfe v. S.G.I.O. (1986) 1 Qd R 431) and we can put aside until we consider estoppel the kind of waiver which depends on the suffering of detriment by a person who relies on the waiver. We are concerned here with a unilateral release or abandonment of a right. In Banning v. Wright (1972) 1 WLR 972 at pp 978-979; (1972) 2 All ER 987 at p 998, Lord Hailsham of St Marylebone L.C. pointed out that "waiver" is derived from the same root as the word "waif" - a thing, or person, abandoned. Lord Hailsham, after citing the speech of Lord Wright (supra), continued:

"In my view, the primary meaning of the word 'waiver' in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted."

In accord, see Halsbury's Laws of England, 4th ed. (1976), vol.16, par 1471. His Lordship must not be taken to be saying that waiver necessarily occurs before pleadings are closed. Clearly enough, rights are frequently waived during a trial. What his Lordship is saying is that a right which is susceptible of waiver can be "confessed" by a party against whom it might prima facie be exercisable but that party's liability can be "avoided" by showing that the right has been abandoned. In other words, upon waiver, the party waiving the right ceases to be able thereafter to assert it effectively. When a right has been waived in the sense defined by Lord Hailsham (and it is in this sense that it is used in this judgment), it is unnecessary to consider whether any other party has acted in reliance on the release or abandonment: the right is abandoned once and for all.

9. These distinct doctrines serve different purposes: election (in either species) ensures that there is no inconsistency in the enforcement of a person's rights; estoppel or equitable estoppel ensures that a party who acts in reliance on what another has represented or promised suffers no unjust detriment thereby; waiver recognizes the unilateral divestiture of certain rights. True it is that the divisions in nature and purpose between one of these doctrines and another have not always been expressed in the way in which I have stated them and there have been occasions when the sterilization of a right has been dubiously attributed to one doctrine rather than to another. Indeed, Lord Diplock in Kammins Co. (at p 883) regarded waiver which debars a person from raising a particular ground of defence as an instance of the operation of the law of contract or of the doctrine of estoppel, and in The "Kanchenjunga" (1990) 1 Lloyd's Rep 391 Lord Goff of Chieveley was concerned with "waiver" arising by "election". Yet it is clear that the doctrine of waiver has long been applied to grounds of defence without reference to estoppel and, shortly after Kammins Co., Banning v. Wright defined waiver as a doctrine distinct from estoppel. In Craine v. Colonial Mutual Fire Insurance Co. Ltd. [1920] HCA 64; (1920) 28 CLR 305 Isaacs J. (at p 327) distinguished waiver from estoppel, although he appeared to regard waiver as synonymous with election and the doctrine of approbating and reprobating: see p 326. The sterilizing of a right might, in some circumstances, be attributable to either a waiver or an election, but the doctrines are distinct, for a right may be waived though there is no alternative right inconsistent with it. As it is erroneous to treat waiver in the sense relevant to this case as synonymous with, or as a species of, estoppel, it is convenient to examine these doctrines separately. There is a difference in their respective applicability to the pleas in pars 4 and 5 of the amended defence.

Waiver

10. The general principle was stated by Alderson B. in Graham v. Ingleby [1848] EngR 92; (1848) 1 Ex 651 at p 657 [1848] EngR 92; (154 ER 277 at p 279):

"it is evident that a party who has a benefit given him by statute, may waive it if he thinks fit. There are many cases in which no action can be commenced except after certain notice of action. That is a requirement by statute; but if a plaintiff went to trial, and the defendant did not then object to the want of notice, could he afterwards set aside the whole proceedings because no notice was given? It is clear that he could not."

11. In Wilson v. McIntosh (1894) AC 129, a caveat had been lodged against an application to bring land under the Real Property Act 1862 (N.S.W.) (26 Vict. No.9) and, the time limited for the caveator to take proceedings to establish her title having passed, the caveat lapsed and the applicant was entitled to have the caveat removed. But the applicant proceeded to state his case and secured an order that the caveator should state her case, which she did. The applicant, having neglected to take any steps to set the matter down for hearing, applied to have the caveat removed on the ground that it had expired. The Privy Council ordered that the motion for removal be refused. Lord Justice Davey said (at p 133):

"Their Lordships are of opinion that the maxim 'Quilibet potest renunciare juri pro se introducto' applies to this case, that it was competent for the applicant to waive the limit of the three months and the lapse of the caveat by sect.23, and that the respondent did waive it by stating a case and applying for and obtaining an order upon the appellant to state her case, both which steps assumed and proceeded on the assumption of the continued existence of the caveat."

The maxim quoted by Lord Justice Davey is translated in Broom's Legal Maxims, 10th ed. (1939), p 477, as follows:

"Any one may, at his pleasure, renounce the benefit of a stipulation or other right introduced entirely in his own favour."

(See Bonner v. Wilkinson (1822) 5 B and Ald 682 at p 686 (106 ER 1340 at p 1341).) The learned author comments:

" According to the well-known principle expressed in this maxim, a defendant may, as a rule, decline to avail himself of a defence which would be at law a valid and sufficient answer to the plaintiff's demand, and waive his right to insist upon that defence."

12. As it is a characteristic of a right susceptible of waiver that it is introduced solely for the benefit of one party, a condition precedent to the jurisdiction of a court to grant relief cannot be waived: Park Gate Iron Co. v. Coates (1870) LR 5 CP 634. It follows that, if the jurisdiction of a court to entertain proceedings is conditioned on the commencement of the proceedings within a specified time, a defendant cannot waive the time requirement and thereby confer jurisdiction on the court. Conversely, where a case is fought on the issue whether a time limitation in a particular statute is or is not a condition precedent to jurisdiction, an argument that another statute overrides the time limitation can be raised on appeal though conceded in the court below: Adams v. Chas. S. Watson Pty. Ltd. (1938) [1938] HCA 37; 60 CLR 545 at pp 547,548. However, a defence under s.5(6) of the Limitation Act does not create a condition precedent to jurisdiction. It is merely a right conferred on a defendant to defeat a claim brought outside the time limited by the Limitation Act. In Australian Iron and Steel Ltd. v. Hoogland [1962] HCA 13; (1962) 108 CLR 471 at pp 488-489, Windeyer J. said:

"It seems that, under the common law system of pleading, when a limitation is annexed by a particular statute to a right it creates, the plaintiff should allege in his declaration that the action was brought within time. On the other hand it is for the defendant to plead the Statute of Limitations as a defence to an action on a common law cause of action, as if he does not it is assumed that he

intends to waive it: see Chapple v. Durston ((1830) 1 C and J 1 at p 9 [1830] EngR 40; (148 ER 1311 at p 1314)). However, when issue is joined on a plea of the Statute, the burden of proving that the action is within time is on the plaintiff: see cases referred to by Dixon J., as he then was, in Cohen v. Cohen [1929] HCA 15; ((1929) 42 CLR 91 at p 97). And, even when a time limit is imposed by the statute that creates a new cause of action or right, it may be so expressed that it is regarded as having a purely procedural character, as a condition of the remedy rather than an element in the right; and in such cases it can, it seems, be waived, either expressly or in some cases by estoppel: Wright v. John Bagnall and Sons Ltd. ((1900) 2 QB 240); Lubovsky v. Snelling ((1944) KB 44)."

In Chapple v. Durston (1830) 1 C and J 1 at p 9 [1830] EngR 40; (148 ER 1311 at p 1314) Vaughan B., noting that the Statute of Limitations bars the remedy not the right (as does s.5(6) of the Limitation Act), said:

"If he intends to insist upon it, he should plead it to prevent surprise, and if he does not, it should be presumed he intends to waive it."

As the right created by s.5(6) is introduced solely for the benefit of a defendant, who must plead the right before it is effective, the right is capable of waiver by a defendant.

13. However, waiver does not apply to an element in a plaintiff's cause of action. An element in a cause of action simply does not answer the description of a right which has been introduced solely for the benefit of a defendant. It follows that the defence of s.5(6) of the Limitation Act is amenable to waiver but the issue of negligence is not.

14. The next question is whether the defence of s.5(6) was waived, that is to say, abandoned so that it was beyond the capacity of the Commonwealth thereafter to defeat the plaintiff's claim by invoking s.5(6). A failure to plead the Statute of Limitations does not, without more, establish a waiver of the statute. Subject to the Rules of Court, a pleading is always capable of amendment, at least until judgment is pronounced. It is no more than a party's definition of the issues which that party intends to litigate: see Laws v. Australian Broadcasting Tribunal [1990] HCA 31; (1990) 64 ALJR 412 at pp 418-419; 93 ALR 435 at pp 446,447. In the present case, however, there was much more than a failure to plead the Limitation Act. By the clearest communication and by its conduct, the Commonwealth declared its intention to abandon the defence. But does a clear and unequivocal declaration by a defendant that it will not raise a defence under s.5(6) of the Limitation Act amount to a waiver?

15. As the "right" (that is, the defence) conferred by s.5(6) is introduced solely for the benefit of a defendant and as a plaintiff can plead the abandonment of the right "by way of confession and avoidance if the right is thereafter asserted", there must be a time after which the defence can no longer be exercised. At what time must the defence be either raised or waived?

16. The time when waiver of a right occurs depends on the relationship between a party possessed of such a right and the party whose interests may be affected by exercise of the right. When the party possessed of the right knows that a new legal relationship is to be constituted between him and the party whose interests are liable to affection by exercise of the right and that the right, if exercised, might affect that new relationship, the party possessing the right must enforce the right before the new relationship is constituted or he will be held to have waived the right. The new relationship is typically created by the pronouncing of a judgment in which the existing rights of the parties are merged or by the making of an order, but it may be created in other ways. However created, it is on or before the constitution of the new relationship that the right must be exercised: the right is not waived until the last moment at which its exercise is capable of affecting the new relationship: see Ward v. Raw (1872) LR 15 Eq 83 at p 85. Once the new relationship is constituted without exercise of the right, it is immaterial that the relationship would not have been differently constituted had the right been exercised.

17. As a right is waived only when the time comes for its exercise and the party for whose sole benefit it has been introduced knowingly abstains from exercising it, a mere intention not to exercise a right is not immediately effective to divest or sterilize it. Vaughan B. in Chapple v. Durston was precise in speaking of a defendant's failure to plead a time bar not as a waiver but as the foundation for a presumption that the defendant "intends to waive it". Waiver of a time limitation which bars a remedy occurs only when the time for granting the remedy arrives, that is, the moment before judgment. Until that time arrives, the time limitation is not waived. If a party is to be held to an intention to waive the limitation, it can be only by contract or estoppel or, where the intention to waive appears from a failure to plead the limitation, by refusal of leave to amend the pleading (if leave be necessary and refusal of leave be justified).

18. In the present case, leave to amend was granted to the Commonwealth to plead s.5(6) of the Limitation Act; there was no prior contract binding on the Commonwealth not to plead it. The time for waiving the defence had not arrived. If the Commonwealth is to be held to its original intention not to waive the defence conferred by s.5(6) of the Limitation Act, it must be by reason of an equity arising from estoppel.

19. Waiver has no application to the general denial of negligence and to the specific denial in par.4 of the amended defence. Those paragraphs of the defence relate to the essential element in the plaintiff's cause of action, not to a right introduced for the benefit of a defendant. Again, if the Commonwealth is to be held to its original intention to admit liability for negligence, it must be by reason of an equity arising from estoppel.
Equitable estoppel

20. The Commonwealth made no misrepresentation of fact. Until the Commonwealth changed its policy, its intention was as it had represented its intention to be: to admit liability, not to rely on s.5(6) of the Limitation Act and to seek an assessment of damages. The Commonwealth's representations of fact were true when they were made, but the promises made by the Commonwealth - promises made gratuitously - were not to withdraw its admission of negligence and not to rely on s.5(6) of the Limitation Act and thus to submit to judgment for the plaintiff at the trial. Although waiver, in the sense earlier discussed, does not bind a party to fulfil such promises, there is at least a theoretical possibility that an equity arising from estoppel could be invoked to debar a defendant from resiling from a promise not to contest an issue at the trial or not to raise a defence. Sometimes an equity arising from estoppel has been described as a waiver. That was the type of "waiver" referred to by Neill J. in The "Athos" (1981) 2 Lloyd's Rep 74 at p 88, in a passage cited by Hirst J. in The "Uhenbels" (1986) 2 Lloyd's Rep 294 at p 297:

" The second type of waiver debars a person from raising a defence to a claim against him which would otherwise be available to him. This type of waiver arises when that person either agrees with the claimant not to raise that particular defence, or so conducts himself as to be estopped from raising it. The ordinary principles of estoppel apply to it. The statement or conduct which is said to found the estoppel must be clear and unequivocal and the other party must either have acted to his detriment or otherwise have conducted his affairs in reliance on that statement and conduct." (Emphasis added.)

The ordinary principles of equitable estoppel which might apply to a promise of this kind were discussed in Waltons Stores v. Maher.

21. The judgments of a majority of the Court in Waltons Stores v. Maher held that equitable estoppel yields a remedy in order to prevent unconscionable conduct on the part of the party who, having made a promise to another who acts on it to his detriment, seeks to resile from the promise: see pp 404,405,419. The remedy is to effect what Scarman LJ. called "the minimum equity to do justice" in Crabb v. Arun District Council [1975] EWCA Civ 7; (1976) Ch 179 at p 198: see Waltons Stores v. Maher, per Mason C.J. and Wilson J. at pp 404-405; per Brennan J. at pp 419,423,427. The remedy is not designed to enforce the promise although, in some situations (of which Waltons Stores v. Maher

affords an example), the minimum equity will not be satisfied by anything short of enforcing the promise.

22. If this were a case where justice could not be done unless the Commonwealth were held to its promises, the equity would have to be satisfied by entry of an interlocutory judgment for the plaintiff and an order for the assessment of his damages. But that is not the minimum equity needed to avoid the relevant detriment. The relevant detriment in a case of equitable estoppel is detriment occasioned by reliance on a promise, that is, detriment occasioned by acting or abstaining from acting on the faith of a promise that is not fulfilled. The relevant detriment does not consist in a loss attributable merely to non-fulfilment of the promise. The principle is analogous to the principle of estoppel in pais: see Thompson v. Palmer, at pp 520,547. In the present case, it may be (as counsel for the plaintiff alleged) that the plaintiff's ill-health was exacerbated by the defendant's amendment of its defence. That allegation was not considered by the learned trial judge who found that the only detriment suffered consisted in the incurring of costs. But it was not suggested that any exacerbation of the plaintiff's ill-health flowed from some act done or omission made by him in reliance on the defendant's promise to admit or earlier admission of liability. Nor is the loss of the plaintiff's chance of success a detriment occasioned by any act done or omission made by the plaintiff in reliance on the defendant's promise to admit or earlier admission of liability. Those "detriments" flowed from the defendant's failure to fulfil its promise, but not from any act done or omission made by the plaintiff in reliance on the making of the promise. They are not relevant detriments.

23. The only relevant detriment which the plaintiff suffered, according to his pleadings and the argument of his counsel, was financial loss in continuing with the action until the defence was amended to deny negligence and to raise s.5(6) of the Limitation Act. In these circumstances, to hold the Commonwealth to its promise to admit liability in negligence would be to go beyond the minimum equity. It may be that the relevant financial detriment exceeded in amount the costs which were awarded to the plaintiff by the Master by the order giving leave to amend the defence. This question of fact was not investigated by O'Bryan J. nor by the majority of the Full Court who noted the plaintiff's counsel's concession before that Court that he had not wished to call evidence before the trial judge on the questions of waiver and estoppel and who concluded that the facts relating to waiver and estoppel were not in dispute before O'Bryan J. As I read their Honours' reasons for judgment, however, the facts relating to detriment were not regarded as critical provided only that some detriment was established. King J., however, was concerned by the absence of agreed facts as to detriment. He said [1989] VicRp 63; ((1989) VR 712 at p 735):

" In Waltons' Case justice was satisfied only by awarding damages in lieu of enforcing Waltons' promise; in the present case it may be that it can be given by ordering that the respondent pay the difference between the appellant's costs thrown away on a solicitor-and-client basis and the party-party basis which I understand was ordered by the master."

His Honour would have ordered an inquiry into the plaintiff's out-of-pocket costs and expenses thrown away by the defendant's change of plea. The procedure adopted in the Courts below was not effective to determine the extent of the relevant detriment suffered by the plaintiff.

24. In strict theory, a party who is entitled to equitable relief to make good some detriment suffered in reliance on a promise has a cause of action rather than an answer to a plea raised by a defendant-promisor in proceedings to enforce another cause of action. But when an equity by way of estoppel is raised as an answer to a plea in a defence which a defendant-promisor seeks to raise contrary to his promise, it may be appropriate to give effect to the defence on terms that the defendant-promisor satisfy the plaintiff's equity. It would be an appropriate order in this case, where (if my view were to prevail) the plaintiff would ultimately be liable to fail on the ground pleaded in par.5 of the amended defence, that is, s.5(6) of the Limitation Act. As the extent of the plaintiff's detriment was not determined, the appropriate order would follow the order proposed by King J. However, mine is a minority view. The majority would hold that, by appropriate amendment of the reply, the Commonwealth can be made to fulfil its promises to admit negligence and not to raise the defence of s.5(6) of the Limitation Act.

25. On either view, no consideration need be given to the question whether there was any duty of care owed to the plaintiff by the naval personnel participating in and/or directing the "combat exercises" in which the collision occurred. I am thus relieved from determining whether or not the simulation of wartime conditions in training exercises, which necessarily entails personal hazards, precludes the existence of a duty of care - a question that was not necessary to decide in Groves v. The Commonwealth [1982] HCA 21; (1982) 150 CLR 113: see pp 119,134,136.

26. I would allow the appeal, set aside the order of the Full Court and in lieu thereof order:

1. that the matter be remitted to the trial judge to ascertain
what detriment was suffered by the plaintiff in continuing with
the action until the defence was amended and what amount would
be fair compensation for that detriment; and
2. that, upon payment by the defendant to the plaintiff of the
amount so ascertained, the action stand dismissed.
The plaintiff should pay the costs of the proceedings after amendment of the defence, and the parties should have leave to submit appropriate minutes of order setting off the amounts due between them.

DEANE J. The resolution of this case lies, in my view, in the application of the general doctrine of estoppel by conduct. In what follows, I explain in some detail why that is so. Subject to that, I am in general agreement with the analysis of the law and the facts contained in the judgment of Dawson J. and agree with his Honour's conclusion that the appeal should be dismissed.
THE RELATIONSHIP BETWEEN PROMISSORY ESTOPPEL AND ESTOPPEL BY CONDUCT

2. In Waltons Stores (Interstate) Ltd. v. Maher [1988] HCA 7; (1988) 164 CLR 387 at pp 447-453, and Foran v. Wight [1989] HCA 51; (1989) 64 ALJR 1 at pp 22-23; [1989] HCA 51; 88 ALR 413 at pp 448-449, I attempted to explain the reasons which induced me to conclude that promissory estoppel should be seen not as a separate and distinct doctrine which operates only in equity but as an emanation of the general doctrine of estoppel by conduct which had been explained by Dixon J. in Thompson v. Palmer [1933] HCA 61; (1933) 49 CLR 507 at p 547, and Grundt v. Great Boulder Pty. Gold Mines Ltd. [1937] HCA 58; (1937) 59 CLR 641 at pp 674-677. I do not regard myself as constrained to depart from that conclusion by what was said in other judgments in those two cases. The support to be found in some of those other judgments for insistence upon a difference in nature between promissory estoppel and estoppel by conduct has, however, caused me to reconsider the question of the relationship between the two. That reconsideration has not caused me to abandon the view that promissory estoppel is but one aspect of a general doctrine of estoppel by conduct which should, under a modern Judicature Act system with merged availability of remedies, be seen as operating indifferently in both law and equity. It has, however, made me more conscious of the force of contrary views. It has also made me conscious of the inadequacy of what I wrote in earlier judgments.

3. The principle of promissory estoppel can be traced, particularly through the judgment of Denning J. in Central London Property Trust Ltd. v. High Trees House Ltd. (1947) KB 130 at pp 133-135, and, in this country, through the majority judgments in Legione v. Hateley [1983] HCA 11; (1983) 152 CLR 406 to Hughes v. Metropolitan Railway Co. (1877) 2 App Cas 439 and Birmingham and District Land Company v. London and North Western Railway Co. (1888) 40 Ch D 268. Lord Cairns LC. in Hughes (at p 448) and Bowen LJ. in Birmingham (at p 286) referred to the relevant principle in terms appropriate to a doctrine of estoppel: a party who has induced another party to act on the assumption that contractual rights will not be enforced "will not be allowed to enforce" those rights "where it would be inequitable having regard to the dealings which have thus taken place between the parties" (per Lord Cairns L.C.) or "without at all events placing the parties in the same position as they were before" (per Bowen L.J.). In the High Trees Case (at p 134), Denning J., no doubt influenced by statements of high authority to the effect that the general doctrine of estoppel by conduct did not extend to assumptions of future fact or conduct (see, in particular, Chadwick v. Manning (1896) AC 231 at p 238), was at pains to distance the principle which he recognized from that general doctrine. He referred to four cases in which it had been held that the circumstances gave rise to an estoppel (see Fenner v. Blake (1900) 1 QB 426 at pp 428-429; In re Wickham (1917) 34 TLR 158 at p 159; Re William Porter and Co. Ltd. (1937) 2 All ER 361 at pp 363-364; Buttery v. Pickard (1946) WN 25 at p 26) and insisted that they were "not cases of estoppel in the strict sense" but "promises - promises intended to be binding, intended to be acted on, and in fact acted on". However, his Lordship went on to identify the

operation of the principle in terms which acknowledged its essential similarity to the operation of the doctrine of estoppel by conduct: "The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. It is in that sense, and that sense only, that such a promise gives rise to an estoppel." In Combe v. Combe (1951) 2 KB 215 at p 219, Denning L.J. took a firm step towards the assimilation of "the principle stated in the High Trees case" with the general doctrine of estoppel by conduct. In what could pass as a succinct statement of the operation of that general doctrine, he pointed out that the "principle does not create new causes of action" but "only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties" (emphasis added).

4. A number of obstacles lay in the path of the acceptance of promissory estoppel as an emanation of estoppel by conduct. For one thing, there was, as has been indicated, strong authority for the proposition that the doctrine of estoppel by conduct did not extend to a representation about future facts or conduct. For another, the ancestry of old equity cases encouraged the perception that the principle of promissory estoppel was an exclusively equitable one, notwithstanding that investigation of the sentences immediately following the oft-quoted passage from Bowen L.J.'s judgment in Birmingham discloses that his Lordship expressly disavowed (at p 286) any suggestion that the principle enunciated by Lord Cairns L.C. in Hughes' Case was not "a principle that was recognised by Courts of Law as well as of Equity" (cf. Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd. [1955] UKHL 5; (1955) 1 WLR 761 at p 766; [1955] UKHL 5; (1955) 2 All ER 657 at p 662).

5. In so far as promissory estoppel relates to an assumption about future fact or conduct, it can, of course, be distinguished from other instances of estoppel, including equitable estoppel, based upon assumptions about existing facts or legal entitlement. That distinction no doubt explains the tendency in cases immediately following the High Trees Case to treat promissory estoppel as somehow different in principle from other instances of estoppel. It does not, however, of itself necessarily indicate any difference in nature or principle between promissory estoppel, other aspects of equitable estoppel and the general doctrine of estoppel by conduct. In that regard it is relevant to recall that Dixon J.'s classic expositions of the doctrine of estoppel by conduct in Thompson v. Palmer (an equity suit in pre-Judicature Act New South Wales) and Grundt (a claim in the Western Australian Warden's Court involving, inter alia, questions of trespass and conversion) would seem to have been predicated upon the assumption that the doctrine operated consistently at law and in equity and were worded in terms which, with the possible exception of one reference to "assumption of fact" (in Grundt, at p 674), are appropriate to encompass an assumption about future facts or conduct.

6. Obviously, the operation in equity of any doctrine of estoppel may be described in words which would be inappropriate to describe its operation at law. In particular, it is commonplace to speak of promissory estoppel as of itself giving rise to "an equity". Precisely the same comment could, however, be made about the operation of any form of estoppel by conduct (including representation and acquiescence) in equity. I turn to explain why that is so.

7. The phrase "an equity" can be used in the narrow sense of referring to an immediate right to positive equitable relief. The word "equity" was used in that sense in the standard pre-Judicature Act submission (as if it were a plea or demurrer) in equity in New South Wales to the effect that the plaintiff had "no equity" entitling him or her to invoke equitable jurisdiction (see, e.g., Miller and Horsell, Equity Forms and Precedents (New South Wales), (1934), p 132). Used in that sense, the phrase does not encompass the entitlement of a "promisee" under a promissory estoppel. A promissory estoppel does not, of itself, give rise to any right to traditional equitable relief at all, let alone a right to claim compensation under the statutes which conferred power upon equity courts to award compensatory damages. As has been seen, Denning L.J., in Combe v. Combe, stressed that promissory estoppel "does not create new causes of action where none existed before" but simply "prevents a party from insisting upon his strict legal rights". Subsequently in his judgment (at p 220), his Lordship pointed out that "(s)eeing that the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action" (emphasis added). His Lordship's statements in that regard accord with earlier and subsequent authority (see, e.g., Taylors Fashions Ltd. v. Liverpool Trustees Co. (1982) 1 QB 133, at pp 151-155; Ajayi v. R.T. Briscoe (Nig.) Ltd. (1964) 1 WLR 1326, at p 1330; (1964) 3 All ER 556, at p 559; Amalgamated Property Co. v. Texas Bank (1982) 1 QB 84, at p 105; Beesly v. Hallwood Estates Ltd.

(1960) 1 WLR 549, at pp 560-561; (1960) 2 All ER 314, at p 324; Seton v. Lafone (1887) 19 QBD 68, at p 70).

8. The phrase "an equity" can, however, be used in a broader and less precise sense to refer to any entitlement or obligation ("the equities") of which a court of equity will take cognizance. In that sense, the phrase can be used to refer to a "defensive equity" such as "laches, acquiescence or delay" or a mere set-off or to an interest or entitlement which does not of itself found equitable relief. It is in that broader and less precise sense that it is permissible to speak of the operation of estoppel in equity as giving rise to "an equity". This use of the phrase "an equity" in relation to the operation of promissory estoppel can be illustrated by reference to cases in the Supreme Court of New South Wales where, until 1972 when a Judicature Act system was first introduced, old phraseology was preserved and the distinction between "an equity" which of itself founded a claim for relief and "an equity" which did not remained of critical importance in some circumstances.

9. In Perpetual Trustee Co. v. Pacific Coal Co. Pty. Ltd. (1953) 55 SR (NSW) 495, the plaintiff demurred to a number of pleas filed on behalf of the defendant in a common law action for rent and royalties allegedly due under a lease of a coal mine. One of the pleas was a plea of promissory estoppel which alleged that the plaintiff had induced the defendant to act to its detriment on the basis that the plaintiff would accept reduced rent and royalty payments during a particular past period of the lease. The Full Court of the Supreme Court approached the question of the validity of the plea on the basis that promissory estoppel was an exclusively equitable principle. On that basis, the plea was bad in proceedings at law unless it could be justified under then operative statutory provisions which allowed a plea on equitable grounds in some circumstances where the facts pleaded would found equitable relief against enforcement of a common law judgment. The plea was held to be bad for the reason that the equity to which promissory estoppel gave rise did not of itself entitle the promisee to any form of equitable relief. After referring to the judgment of Long Innes J. in Greater Sydney Development Association Ltd. v. Rivett (1929) 29 SR(NSW) 356, Herron J. said (at p 519):

"Even in light of the more modern decisions in England, including the High Trees Case, the correct view is, as Long Innes J. indicated, that a promissory representation not to enforce a legal right may be relied upon as a defensive equity to an attempt by the representor to obtain equitable relief in a court of equity in respect of such legal right. In other words it may constitute a defensive equity to a claim for equitable relief. Beyond this it cannot go."

Owen J. (at p 508) indicated that, in that regard, the High Trees principle of promissory estoppel operated in the same way in equity as did the ordinary doctrine of estoppel by conduct: "an estoppel, whether a promissory estoppel or a true estoppel, can never be used to found a cause of action whether in equity or at common law". The decision of the Full Court in the Pacific Coal Case was unaffected on this point by the subsequent appeals to this Court [1954] HCA 37; ((1954) 91 CLR 486) and the Privy Council ((1956) AC 165). In N.S.W. Rutile Mining v. Eagle Metal (1960) SR (NSW) 495, the Full Court of the Supreme Court affirmed and applied its decision that promissory estoppel could not of itself give rise to anything more than a defensive equity.

10. The judgments of the members of the Full Court of the Supreme Court of New South Wales in the abovementioned cases need to be qualified or amended in the light of subsequent recognition of the extent to which estoppel generally, and promissory estoppel in particular, can establish an ingredient of an action, whether at law or in equity, for relief framed on the basis of the assumed state of affairs (see, generally, Waltons Stores, at pp 400, 444-445; Texas Bank, at pp 105, 131-132). However, the New South Wales judgments correctly identify the only basis upon which it can properly be said that promissory estoppel of itself gives rise to "an equity". That equity is, as the cases on promissory estoppel seem to me to make plain, an entitlement in equity proceedings to preclude departure by the other party from the assumed state of affairs if departure would, in all the circumstances, be unconscionable. The content of the estoppel will, of course, vary according to the nature of the assumption. In particular, the assumption may extend only to observance of the assumed state of affairs until after the expiry of reasonable notice of intended departure. Alternatively, the circumstances may be such that insistence upon strict adherence to the assumed state of affairs would go beyond, and even conflict with, what the requirements of good conscience would demand. In such a case, equitable relief

may be available only on a more restricted basis (see below). Nonetheless, the point remains that promissory estoppel does not of itself give rise to any entitlement to relief in equity. In that regard, promissory estoppel conforms with "the true proposition of law, that, while a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed" (per Brandon L.J., Texas Bank, at pp 131-132). The proposition may be further clarified by example.

11. Let it be assumed that the circumstances are such as to give rise to an ordinary proprietary estoppel precluding A from denying B's beneficial ownership of Blackacre (or B's beneficial ownership of rights of easement over Blackacre: cf. Crabb v. Arun District Council [1975] EWCA Civ 7; (1976) Ch 179). Let it also be assumed that other circumstances are such as to give rise to a promissory estoppel precluding A from departing from a promissory representation that A would transfer the legal and beneficial ownership of Whiteacre to B at a specified future time which has now been reached. If A is otherwise the legal and beneficial owner of Blackacre and Whiteacre, B can use the relevant estoppel to establish, as between himself and A, beneficial ownership of each property (or of rights of easement over Blackacre) in proceedings against A for equitable relief: e.g. for a declaration of trust and order for transfer (or grant of a legal easement) in the event that A denies, or deals or threatens to deal with the properties in a manner that is inconsistent with, B's assumed beneficial interest in them. In neither case would B be asserting that the estoppel of itself gave rise to a cause of action such as an action for injunction to prevent, or for compensatory damages for, departure from (or breach of) the assumed state of affairs. The cause of action in each case would be the ordinary one of a beneficiary against a trustee for actual or threatened breach of trust in which the estoppel was relied upon to establish the factual ingredient of B's beneficial ownership of the alleged trust property. If, on the other hand, A had no interest whatsoever in Blackacre or Whiteacre at any relevant time, the estoppel would, in the absence of other circumstances such as a dealing between A and B on the conventional basis of B's beneficial ownership, be irrelevant to any proceedings by B against A. The reason why that is so is that the estoppel of itself gives rise to no cause of action and the assumed facts which it would establish would not provide an ingredient of a cause of action against A. Indeed, the assumed state of affairs would, if established, be likely to be destructive of any action (e.g. for fraud or negligence) founded upon the conduct giving rise to the estoppel.

12. In Woodhouse Ltd. v. Nigerian Produce Ltd. (1972) AC 741, at p 758, Lord Hailsham of St. Marylebone L.C. expressed the view that "the time may soon come when the whole sequence of cases based on promissory estoppel since the war ... may need to be reviewed and reduced to a coherent body of doctrine by the courts". Lord Denning M.R. took up the challenge in Moorgate Ltd. v. Twitchings (1976) QB 225. In a passage which invoked the authority of Dixon C.J., his Lordship said (at pp 241-242):

"Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity. It comes to this: when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so. Dixon J. put it in these words:
'The principle upon which estoppel in pais is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations.'
Sir Owen said so in 1937 in Grundt v. Great Boulder Proprietary Gold Mines Ltd.
In 1947 after the High Trees case (Central London Property Trust Ltd. v. High Trees House Ltd.), I had some correspondence with Sir Owen about it: and I think I may say that he would not limit the principle to an assumption of fact, but would extend it, as I would, to include an assumption of fact or law, present or future."

13. In extending Dixon J.'s words to expressly include an assumption about future fact, that is to say promissory estoppel, Lord Denning was, in my view, propounding the preferable view of the relationship of the principle of promissory estoppel and the general doctrine of estoppel by conduct. To the extent that there was conflict between that approach and what had been said and decided in earlier cases, it was, for reasons explained in Legione v. Hateley (at pp 434- 435), plainly preferable to recognize that the earlier cases were inconsistent with subsequent developments in the law. I have some difficulty, though, with one sentence in what followed the above extract from Lord Denning's judgment in Moorgate. His Lordship referred to some cases in which estoppel by conduct had operated at common law to preclude an assertion of ownership and added (at p 242):

"Those cases have their parallel in equity when the owner of land, by his conduct, leads another to believe that he is not the owner, or, at any rate, that the other can safely spend money on it. It is held that he cannot afterwards assert his ownership so as to deprive the other of the benefit of that expenditure: see Ramsden v. Dyson (1866) LR 1 HL 129. The Court of Equity will look to the circumstances to see in what way the equity can be satisfied: see Inwards v. Baker (1965) 2 QB 29."

14. I would prefer to read Lord Denning's statement that a court of equity will look to the circumstances "to see in what way the equity can be satisfied" (and to similar statements by his Lordship and others in other cases) as referring to the need to identify the minimum content of the assumed state of affairs from which the doctrine of estoppel precludes departure and the appropriate relief to which the relevant party is entitled pursuant to ordinary equitable principles operating on that assumed state of affairs. That construction of his Lordship's comment would make it consistent with his emphasis, in the High Trees and other cases, upon the proposition that promissory estoppel does not give rise to any cause of action. If, contrary to that reading of his Lordship's comment, Lord Denning was suggesting (as his and Scarman L.J.'s judgments in Crabb v. Arun District Council, at pp 187-190, 193, would seem to indicate) that estoppel by conduct of itself operates in equity to give rise to an equity in the form of some imprecise cause of action for whatever relief might seem fair in the circumstances, I am respectfully unable to accept that as an accurate statement of the operation of the doctrine. That is not, of course, to deny either the flexibility of equitable remedies when equitable principle entitles a party to relief framed on the basis of the assumed state of affairs or the need in an appropriate case to modify relief where the circumstances are such that it would represent a denial rather than a vindication of equity to preclude any departure at all from the assumed state of affairs. It is simply to recognize the basic proposition that estoppel does not of itself provide a cause of action either in law or in equity. A fortiori, estoppel does not of itself provide an independent cause of action in equity for non-traditional equitable relief in the form of compensatory damages, under Lord Cairns' Act or subsequent statutory provisions, for the detriment caused by a departure from an otherwise unenforceable promise as to future conduct. If it did, promissory estoppel could no longer be said to provide a basis upon which ordinary principles of law, including the doctrine of consideration, would operate (see Combe v. Combe, at p 220). To the contrary, it would directly confound the doctrine of consideration and, in a case of promissory estoppel where consideration had moved from the promisee but compensatory damages for detriment sustained exceeded damages for loss of bargain, simply override the law of contract.

15. Once it is accepted that the general doctrine of estoppel by conduct extends to representations about future facts (including conduct) and that the operation of promissory estoppel in equity conforms with the operation of estoppel by conduct in law and equity, there is no reason in principle for refusing to accept promissory estoppel as but an emanation of the general doctrine of estoppel by conduct. In pre-Judicature Act times when, to the "discredit (of) our jurisprudence", cases could arise in which courts of law and equity applied "different rules of right and wrong to the same subject matter" (see the Report of the Common Law Commissioners, etc., quoted in N.S.W. Rutile Mining, at p 505), the confinement of a developing doctrine to one or other of law and equity may well have been unavoidable. It is not so, however, in a modern system where the law represents the fusion and interaction of both disciplines and is administered by courts of both law and equity. Oliver J. in Taylors Fashions and Robert Goff J. (at first instance) in the Texas Bank Case have convincingly explained why it is undesirable to seek to restrict equitable estoppel to certain defined categories such as promissory estoppel, proprietary estoppel and estoppel by acquiescence. For the reasons which I

indicated in Waltons Stores (pp 447-453) when read in the context of what I have written above, it appears to me that the courts of this country should recognize a general doctrine of estoppel by conduct which encompasses the various categories of "equitable estoppel" and which operates throughout a fused system of law and equity.

UNCONSCIENTIOUS CONDUCT

16. The doctrine of estoppel by conduct is founded upon good conscience. Its rationale is not that it is right and expedient to save persons from the consequences of their own mistake. It is that it is right and expedient to save them from being victimized by other people (cf. Allcard v. Skinner (1887) 36 ChD 145, at p 182). The notion of unconscionability is better described than defined (see per Mahoney J.A., Antonovic v. Volker (1986) 7 NSWLR 151, at p 165; Taylors Fashions, at pp 151-152; and, generally, per Cooke P., Nichols v. Jessup (1986) 1 NZLR 226, at pp 227-229). As Lord Scarman pointed out in National Westminster Bank Plc. v. Morgan [1985] UKHL 2; (1985) AC 686, at p 709, definition "is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends upon the particular facts of the case". The 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 (see Story, Commentaries on Equity Jurisprudence, 2nd Eng. ed. (1892), par.1219; Thompson v. Palmer, at p 537). In this as in other areas of equity-related doctrine, conduct which is "unconscionable" will commonly involve the use of or insistence upon legal entitlement to take advantage of another's special vulnerability or misadventure (cf. Stern v. McArthur [1988] HCA 51; (1988) 165 CLR 489, at pp 526-527) in a way that is unreasonable and oppressive to an extent that affronts ordinary minimum standards of fair dealing. That being so, the question whether conduct is or is not unconscionable in the circumstances of a particular case involves a "real process of consideration and judgment" (cf. Harry v. Kreutziger (1978) 95 DLR (3d) 231, at p 240) in which the ordinary processes of legal reasoning by induction and deduction from settled rules and decided cases are applicable but are likely to be inadequate to exclude an element of value judgment in a borderline case such as the present.

RELIEF IN A CASE OF ESTOPPEL BY CONDUCT

17. There could be circumstances in which the potential damage to an allegedly estopped party was disproportionately greater than any detriment which would be sustained by the other party to an extent that good conscience could not reasonably be seen as precluding a departure from the assumed state of affairs if adequate compensation were made or offered by the allegedly estopped party for any detriment sustained by the other party. An obvious example would be provided by a case in which the party claiming the benefit of an estoppel precluding a denial of his ownership of a million dollar block of land owned by the allegedly estopped party would sustain no detriment beyond the loss of one hundred dollars spent on the erection of a shed if a departure from the assumed state of affairs were allowed (cf., e.g., Ramsden v. Dyson (1866) LR 1 HL 129, at pp 140-141; Sheridan v. Barrett (1879) 4 LR Ir 223, at pp 229-230). In such a case, the payment of, or a binding undertaking to pay, adequate compensation would preclude a finding of estoppel by conduct. In other cases, particularly cases involving an assumption about a future state of affairs, the circumstances may be such that any significant detriment would be avoided altogether if the party affected were given reasonable notice of the intended departure. In such a case, the estoppel may only preclude departure from the assumed state of affairs otherwise than after such reasonable notice has been given (cf., e.g., Ajayi v. R.T. Briscoe (Nig.) Ltd., at p 1330; p 559 of All ER). Even in a case where an estoppel by conduct is established and would prima facie operate to preclude departure from the assumed state of affairs, the circumstances may be such that to grant unqualified relief on that basis would exceed any requirements of good conscience and be unduly oppressive of the other party. "Of all doctrines, equitable estoppel" - and, I would add, equitable relief based on the assumed state of affairs - "is surely one of the most flexible" (see Texas Bank, at p 103; Taylors Fashions, at p 153).

18. There is clear support in the cases and learned writings for the view that, in this as in other fields, equitable relief must be moulded to do justice between the parties and to prevent a doctrine based on good conscience from being made an instrument of injustice or oppression. That being so, it should be accepted that the prima facie entitlement to relief based on the assumed state of affairs must, under a doctrine which is of general application in a system where equity prevails, be qualified if it appears that that relief would exceed what could be justified by the requirements of conscientious conduct and would be unjust to the estopped party. In some such cases, an appropriate qualification may be a requirement that the party relying upon the estoppel do equity (see, e.g., Texas Bank, at pp 108-109). In other cases, the relief to which the party relying upon the estoppel would be entitled upon the

assumed state of affairs will merely represent the outer limits within which the jurisdiction of a modern court to mould its relief to suit the circumstances of a particular case should be exercised in a manner which will do true justice between the parties (cf. Hamilton v. Geraghty (1901) 1 SR(NSW) Eq. 81, at pp 87-88). In some such cases the appropriate order may be one which places the party entitled to the benefit of the estoppel "in the same position as (he or she was) before" (cf. Birmingham, at p 286). In others, the appropriate order may be an order for compensatory damages.

19. To acknowledge the fact that the relief appropriate to a case of estoppel by conduct may vary according to the circumstances is not to suggest that relief is to be framed on an unprincipled basis. Prima facie, the operation of an estoppel by conduct is to preclude departure from the assumed state of affairs. It is only where relief framed on the basis of that assumed state of affairs would be inequitably harsh, that some lesser form of relief should be awarded. Moreover, while the relief awarded should be appropriate to the circumstances of the particular case, the courts should not adopt an arbitrary or idiosyncratic approach to the determination of what is in fact appropriate. In particular, it is permissible to recognize prima facie categories of cases in which it will not be inequitable to award relief framed on the basis of the assumed state of affairs. It is arguable that one such category should consist of cases in which an employer deliberately and with full knowledge of relevant circumstances induces an employee injured by the negligence of the employer or a co-employee to act to his or her detriment by pursuing an action for compensatory damages on the basis that the employer will not take advantage of unmeritorious technical defences to resist liability. It is not, however, necessary to pursue that question for the purposes of the present case.

THE CONTENT AND OPERATION OF THE GENERAL DOCTRINE OF ESTOPPEL BY CONDUCT

20. It is undesirable to seek to define exhaustively and in the abstract the content or operation of any general legal doctrine. Inevitably, there will be unforeseen and exceptional cases. Ordinarily, there will be borderline areas in which the interaction of the doctrine with other doctrines will be uncertain. Most important, it is part of the genius of the common law that development on a case-by-case basis enables its adaptation to meet changing circumstances and demands.

21. On the other hand, the conceptual foundations of a legal doctrine constitute an essential basis of judicial decision in a borderline case such as the present. Those conceptual foundations can only be identified by reference to the essential content and operation of the doctrine. It is, for that reason, desirable that I identify in a general way what I see as the conceptual foundation and essential operation of the doctrine of estoppel by conduct which has, during this century, emerged as a coherent body of substantive and consistent principle. To a significant extent, I do so in words taken (without specific acknowledgment) from the judgments of others in earlier cases (see, in particular, Thompson v. Palmer, at p 547; Grundt at pp 674-677, Moorgate, at pp 241-242; Taylors Fashions, at pp 144-157; Texas Bank, at pp 101-107; Waltons Stores, at pp 404, 458). For ease of subsequent reference (in this judgment) I shall use numbered paragraphs.

1. While the ordinary operation of estoppel by conduct is between parties to litigation, it is a doctrine of substantive law the factual ingredients of which fall to be pleaded and resolved like other factual issues in a case. The persons who may be bound by or who may take the benefit of such an estoppel extend beyond the immediate parties to it, to their privies, whether by blood, by estate or by contract. That being so, an estoppel by conduct can be the origin of primary rights of property and of contract.

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

3. Since an estoppel will not arise unless the party claiming the benefit of it has adopted the assumption as the basis of action or inaction and thereby placed himself in a position of significant disadvantage if departure from the assumption be permitted, the resolution of an issue of estoppel by conduct will involve an examination of the relevant belief, actions and position of that party.

4. The question whether such a departure would be unconscionable relates to the conduct of the allegedly estopped party in all the circumstances. That party must have played such a part in the adoption of, or persistence in, the assumption that he would be guilty of unjust and oppressive conduct if he were now to depart from it. The cases indicate four main, but not exhaustive, categories in which an affirmative answer to that question may be justified, namely, where that party:

(a) has induced the assumption by express or implied representation;
(b) has entered into contractual or other material relations with the other party on the conventional basis of the assumption;
(c) has exercised against the other party rights which would exist only if the assumption were correct;
(d) knew that the other party laboured under the assumption and refrained from correcting him when it was his duty in conscience to do so.

Ultimately, however, the question whether departure from the assumption would be unconscionable must be resolved not by reference to some preconceived formula framed to serve as a universal yardstick but by reference to all the circumstances of the case, including the reasonableness of the conduct of the other party in acting upon the assumption and the nature and extent of the detriment which he would sustain by acting upon the assumption if departure from the assumed state of affairs were permitted. In cases falling within category (a), a critical consideration will commonly be that the allegedly estopped party knew or intended or clearly ought to have known that the other party would be induced by his conduct to adopt, and act on the basis of, the assumption. Particularly in cases falling within category (b), actual belief in the correctness of the fact or state of affairs assumed may not be necessary. Obviously, the facts of a particular case may be such that it falls within more than one of the above categories.

5. The assumption may be of fact or law, present or future. That is to say it may be about the present or future existence of a fact or state of affairs (including the state of the law or the existence of a legal right, interest or relationship or the content of future conduct).

6. The doctrine should be seen as a unified one which operates consistently in both law and equity. In that regard, "equitable estoppel" should not be seen as a separate or distinct doctrine which operates only in equity or as restricted to certain defined categories (e.g. acquiescence, encouragement, promissory estoppel or proprietary estoppel).

7. Estoppel by conduct does not of itself constitute an independent cause of action. The assumed fact or state of affairs (which one party is estopped from denying) may be relied upon defensively or it may be used aggressively as the factual foundation of an action arising under ordinary principles with the entitlement to ultimate relief being determined on the basis of the existence of that fact or state of affairs. In some cases, the estoppel may operate to fashion an assumed state of affairs which will found relief (under ordinary principles) which gives effect to the assumption itself (e.g. where the defendant in an action for a declaration of trust is estopped from denying the existence of the trust).

8. The recognition of estoppel by conduct as a doctrine operating consistently in law and equity and the prevalence of equity in a Judicature Act system combine to give the whole doctrine a degree of flexibility which it might lack if it were an exclusively common law doctrine. In particular, the prima facie entitlement to relief based upon the assumed state of affairs will be qualified in a case where such relief would exceed what could be justified by the requirements of good conscience and would be unjust to the estopped party. In such a case, relief framed on the basis of the assumed state of affairs represents the outer limits within which the relief appropriate to do justice between the parties should be framed.

22. The propositions contained in the second and third sentences of par.1 are framed in words taken from Pomeroy's Equity Jurisprudence, 5th ed. (1941), par.801, pp 177, 179 (see also, e.g., Spence, The Equitable Jurisdiction of the Court of Chancery, (1846), vol.1, p 550; Pickard v. Sears (1837) 6 Ad and E 469, at p 474 [1837] EngR 195; (112 ER 179, at p 181); Loffus v. Maw [1862] EngR 645; (1862) 3 Giff 592, at pp 603-605 (66 ER 544, at pp 548-549); Plimmer v. Mayor, etc., of Wellington (1884) 9 App Cas 699, at p 714; Brikom Investments v. Carr (1979) QB 467, at pp 484-485; In re Sharpe (1980) 1 WLR 219, at p 223; (1980) 1 All ER 198, at pp 201-202). As I have indicated in par. 2, I prefer the word "unconscientious" to "unconscionable" in this and other areas where equity has traditionally intervened to vindicate the requirements of good conscience. In deference to the generally accepted usage of "unconscionable" and "unconscionability" in this area by judges and writers however, I have thought it preferable to use those words in this judgment. The quotation in par.6 is from Lord Cranworth L.C.'s judgment in Jorden v. Money (1854) 5 HLC 185, at p 210 (10 ER 868 at p 880).

THE APPLICATION OF THE DOCTRINE OF ESTOPPEL BY CONDUCT TO THE FACTS OF THE PRESENT CASE

23. Dawson J.'s analysis of the facts of the present case, which falls within category (a) (and arguably (b) and (d) also) of par. 4 (above), leads, in my view, to the conclusion that, subject to any necessary

amendments to the pleadings being allowed and made (as to which see the judgments of Dawson and Gaudron JJ.), the Commonwealth is estopped from disputing its liability to Mr. Verwayen for damages for the injuries he sustained while in its service. In so far as the above numbered paragraphs embody requirements on the path to that conclusion, the requirements of all but pars. 4 and 8 are clearly satisfied. The steps leading to that conclusion which are open to real dispute involve the answers to two related questions: (i) whether, in circumstances where Mr. Verwayen has obtained the benefit of a limited order as to costs, the Commonwealth would be acting unconscionably if it disputed its liability at this late stage (par.4); and, (ii) whether, in those circumstances, the unqualified operation of the doctrine of estoppel to preclude the Commonwealth from denying liability would be disproportionately burdensome to the Commonwealth and accordingly unjust (par.8). I add to Dawson J.'s analysis of the facts some supplementary comments of my own to make plain why I consider that those two questions should be respectively answered in the affirmative and in the negative, that is to say, favourably to Mr. Verwayen.

24. As I followed the argument, it is common ground that Mr. Verwayen's injuries were sustained by reason of the negligence of a person or persons in the service of the Commonwealth. He was, himself, also in that service. Indeed, it is the fact that he was a serving member of the Royal Australian Navy which the Commonwealth now seeks to invoke as a ground for denying that it owed him any duty of care. The other defence which the Commonwealth seeks to invoke is that Mr. Verwayen's action is statute-barred. It is not suggested that the Commonwealth was other than fully conscious of these possible defences when it induced Mr. Verwayen to assume that his action for damages for negligence would proceed against the Commonwealth and be determined on the basis that liability was admitted. With the encouragement of the Commonwealth, there was established between the Commonwealth and Mr. Verwayen the relationship of admitted wrongdoer (the Commonwealth) and wronged (Mr. Verwayen) for the express common purpose of enabling the expeditious assessment of the amount of compensation which the wrongdoer should pay. On the basis of that assumption and relationship, Mr. Verwayen proceeded with the preparation and prosecution of his action. He expended both time and money thereon. Far more important, he subjected himself to the stress, anxiety and inconvenience which were inevitably involved in the pursuit of the proceedings. It was only when the actual hearing was all but due to commence that the Commonwealth sought to depart from the induced assumption and to destroy the whole material relationship between the respondent and itself and the entitlement to just compensation which would result from it.

25. In the ordinary case where a party to litigation amends a pleading to raise a new defence or to assert a new claim, questions of estoppel do not arise. The effect of earlier pleadings will be merely to reflect the particular party's then intentions in relation to the conduct of the action and the other party will not be justified in assuming that subsequent amendment will not be made. Nor, in such a case, will amendment of the pleadings and subsequent conduct of the proceedings on the basis of the amendment give rise to any suggestion of unconscionable conduct on the part of the amending party. It will involve no more than the exercise of the right to seek to raise additional matters of claim or defence in accordance with the procedures laid down for that purpose. The present case is, however, far removed from the ordinary one. The claimed estoppel does not arise merely from the Commonwealth's failure to deny liability in the pleadings. It arises from the fact that other actions of the Commonwealth constituted an unambiguous representation to Mr. Verwayen that liability would not be contested, that is to say, that a limitations defence would not be relied on and that breach of a duty of care would not be denied. The assumption upon which Mr. Verwayen acted was knowingly and deliberately induced and the resulting material relationship of wrongdoer and wronged was deliberately established so that the action could proceed expeditiously to the assessment of damages. The evidence discloses that the Commonwealth had, to the knowledge of Mr. Verwayen, admitted its liability to pay damages to at least one other injured serviceman in comparable circumstances. The confinement of the dispute to the assessment of damages had, no doubt, the advantage, from the Commonwealth's point of view, that it avoided the public impression of a mean-spirited and technical approach to those injured in the performance of their duties as members of their country's defence forces.

26. Equity has never adopted the approach that relief should be framed on the basis that the only relevant detriment or injury is that which is compensable by an award of monetary damages. To the contrary, a major part of equity was founded upon a denial of that approach (see, e.g., Pomeroy's Equity Jurisprudence, par.116; Dougan v. Ley [1946] HCA 3; (1946) 71 CLR 142, at p 150, per Dixon J.; Aristoc Industries Pty. Ltd. v. Wenham Pty. Ltd. (1965) NSWR 581, at pp 587-588; Doulton Potteries Ltd. v. Bronotte (1971) 1 NSWLR 591, at p 597). If the Commonwealth were now allowed to

depart from the assumed state of affairs, the detriment which Mr. Verwayen would sustain could not be measured in terms merely of wasted legal costs. The past stress, anxiety, inconvenience and effort which were involved in the pursuit of the proceedings would be rendered futile. More important, Mr. Verwayen would be subjected to the potentially devastating effects of a last-minute denial of an expectation of just compensation for his injuries in circumstances where those injuries were sustained in the course of the service of the Commonwealth by reason of the negligence of another or others in that service and where that expectation of just compensation had been deliberately induced by the Commonwealth. In that regard, the learned primary judge was expressly informed, without objection or dissent, that the relevant detriment included "increased ill health" and that part of Mr. Verwayen's "problems are of a psychiatric nature and medical evidence is that this" - i.e. the Commonwealth's inducement of the assumption and attempt to depart from it ("take away the carrot") - "has had and will continue to have ... severe consequences upon the ill health produced by the defendant's negligence" (i.e. the original accident). It is true that the extent of the detriment which, in the absence of an estoppel, Mr. Verwayen would sustain by reason of the induced assumption has not been established or quantified with the precision which might be thought necessary to discharge an onus of proof in an action for pecuniary compensation for that detriment. That is not surprising however, since the issue of estoppel was resolved against Mr. Verwayen before he had an opportunity of leading detailed evidence. More important, the absence of such detailed evidence is not really to the point in circumstances where the relevant detriment to Mr. Verwayen would obviously extend far beyond any question of legal costs and be of such a nature and extent that it cannot properly be said that it exceeds the requirements of good conscience or is unjust to the Commonwealth to hold it to the assumed state of affairs upon the basis of which it deliberately induced Mr. Verwayen to act.

27. There are three further matters which I would mention. The first is, to some extent, a matter of semantics. It is that I do not see the case as one of "waiver". In Foran v. Wight (at p 22; p 447 of ALR), I expressed the view that the somewhat arbitrary doctrine of waiver is being increasingly absorbed and rationalized by the more flexible doctrine of estoppel by conduct and that, "in cases ... where the focus is upon action by one party 'upon' what was conveyed to that party by the other party, the applicable primary doctrine should be seen in a modern context as that of estoppel". Upon reflection, I should have omitted the qualification "primary" from that statement. In the context of the development of the general doctrine of estoppel by conduct in recent years, it seems to me to be preferable to confine the rubric of "waiver" within the area of the law in which, notwithstanding the absence of consideration, the act of the alleged waivor is of itself directly operative to "waive" a right or entitlement without there being any need to establish that the other party has acted upon the basis that the right or entitlement in question was no longer asserted. The principal examples of cases falling within that area are cases of true election (see, generally, the discussion in the judgment of Lord Goff of Chieveley in The "Kanchenjunga" (1990) 1 Lloyd's Rep 391 at pp 397-400). Where a case is said to fall within that area, estoppel by conduct may, if the claim of waiver fails, operate either directly to preclude enforcement of the right allegedly waived or indirectly to preclude departure from a representation that the right had been or would be waived. Even if I had (like Gaudron J.) seen the present case as falling within a category where, in the context of a change of relationship, detriment could be assumed, it would not, in my view, be one in which any particular act or acts of the Commonwealth of themselves operated as a waiver of the relevant defences. That being so, I have identified the applicable doctrine solely in terms of estoppel by conduct. The second further matter is that, as I followed the argument, the Commonwealth adopted the position that, if it fails (as I think it does) in its argument in this Court on the question of estoppel on the basis of the material at present in evidence, that question should be finally determined against it. The final matter which I would mention is that, if I had been of the view that the material presently in evidence was inadequate to found a conclusion that Mr. Verwayen's relevant detriment extended beyond his liability in respect of legal costs and outgoings, I would have considered that he should, in all the circumstances of the case, be given an opportunity to apply for an order that would enable him to lead further evidence in relation to that matter. As I have indicated, perusal of the transcript of argument before the learned primary judge discloses that the proceedings at first instance were conducted on the basis that, for the purposes of a consideration of the question of estoppel as a preliminary point, it was unnecessary that Mr. Verwayen lead evidence to establish the allegation (made in further and better particulars) that the relevant detriment extended beyond liability for costs and included "increased stress as a result of continued protraction of these proceedings leading to an aggravation of his psychiatric state of health". It also discloses that determination of the question of estoppel as a preliminary point was contrary to the wishes of Mr. Verwayen and that a somewhat informal approach was taken to the identification of what was and was not in evidence before his Honour for the purposes of that determination. In these circumstances, it appears to me that,

if the material in evidence had proved inadequate to establish detriment beyond liability for legal costs, the interests of justice would have required that Mr. Verwayen be afforded an opportunity of applying for an order that would have allowed him to supplement that evidence either on further hearing of the preliminary point before the trial judge or, as the Full Court would seem to have thought appropriate in an earlier appeal from an interlocutory order made in the case, before the jury on the trial.

DAWSON J. The circumstances of this appeal are sufficiently set out elsewhere. The respondent (the plaintiff in the action) pleaded in reply that the Commonwealth has waived, or is estopped from relying upon, a defence under s.5 of the Limitation of Actions Act 1958 (Vict.) raised by it by amendment of its defence. The respondent also pleaded in reply that the Commonwealth has waived a defence raised by it by amendment that, because the respondent was injured, if at all, whilst participating in combat exercises as a serving member of the Royal Australian Navy, the Commonwealth owed him no duty of care.

2. In argument, the respondent did not draw any clear distinction between waiver and estoppel. Indeed, authority favours the view that, in the present context, no such distinction can in principle be drawn. "Waiver" is an imprecise term and is used to describe what is done in a variety of circumstances rather than to assert any particular legal process. However, where it is not used in the sense of election between mutually exclusive alternatives, if it has any identifiable legal consequence, it is generally indistinguishable from estoppel. Isaacs J. made this point in a well-known passage in Craine v. Colonial Mutual Fire Insurance Co. Ltd. [1920] HCA 64; (1920) 28 CLR 305, at p 326, where, in delivering the judgment of the Court, he used the word "waiver" in the sense of waiver by election and said that waiver requires a distinct act done with knowledge and intention in order to see whether there has been an election. Waiver looks "chiefly to the conduct and position of the person who is said to have waived, in order to see whether he has 'approbated' so as to prevent him from 'reprobating' - in English terms, whether he has elected to get some advantage to which he would not otherwise have been entitled, so as to deny to him a later election to the contrary".

3. Isaacs J. contrasted election with the doctrine of estoppel by conduct which, he said (at p 327), "looks chiefly at the situation of the person relying on the estoppel" with the consequence that "the knowledge of the person sought to be estopped is immaterial". He concluded (at p 328) that "estoppel may be established where waiver cannot, and conversely waiver may be found where estoppel does not exist".

4. The passage from the judgment of Isaacs J. to which I have referred is cited in Spencer Bower and Turner, The Law Relating to Estoppel by Representation, 3rd ed. (1977), pp 318-319. The authors comment, at pp 319-320, that:

"The truth is, perhaps, that whereas a fairly successful attempt may be made to state with precision what is meant by 'estoppel' and by 'election', the term 'waiver' when used in a similar connotation is not capable of exact definition in the light of the authorities."

The authors here refer to Ewart, Waiver Distributed, (1917) where, at p 5, it is said of waiver: "No one has been able to give it satisfactory definition, or to assign to it explanatory principles. The word is used indefinitely as a cover for vague, uncertain thought." Spencer Bower and Turner continue, at p 320:

"Possibly it may be regarded as usefully describing an end-result; but its application to the process by which that result is brought about is almost invariably attended with ambiguity as to the essential nature of that process. The term when so employed is used sometimes in one significance and sometimes in another, and the result is that its use has dangers which may be avoided only by foregoing it as a useful term when considering either estoppel or election. When it does appear in the authorities, however, it is submitted that it will more probably be found to connote 'election' than 'estoppel' - and for the reasons which have so well been expressed by Isaacs J."

5. In Kammins Co. v. Zenith Investments (1971) AC 850, at p 883, Lord Diplock also distinguished waiver amounting to an election from waiver amounting to an estoppel. The former, he said, occurs where "a person is entitled to alternative rights inconsistent with one another" and "acts in a manner which is consistent only with his having chosen to rely on one of them". The latter "debars a person from raising a particular defence to a claim against him" and "arises when he either agrees with the claimant not to raise that particular defence or so conducts himself as to be estopped from raising it". In referring to waiver amounting to estoppel, Lord Diplock was speaking not only of estoppel by conduct which is based upon a representation or an assumption with respect to an existing state of affairs. He was also speaking of promissory or equitable estoppel which is based upon an assumption with regard to future conduct. The assumption may arise from a representation or from conduct - that is to say, it may be the result of an express or implied promise. See also The "Kanchenjunga" (1990) 1 Lloyd's Rep 391.

6. Of course, when Isaacs J. spoke about estoppel in Craine v. Colonial Mutual Fire Insurance Co. Ltd., he was confining his observations to estoppel by conduct. As he said in Ferrier v. Stewart [1912] HCA 47; (1912) 15 CLR 32, at p 44, "estoppel has reference to an existing fact, and not to a promise de futuro, which must rest, if at all, on contract". But the law has developed considerably since Isaacs J. made his observations and promissory estoppel within its proper confines is no longer seen as a threat to the doctrine of consideration. A limited form of promissory estoppel had never entirely disappeared from the law of equity and, therefore, the development has taken place in that area. But, as was recognized in Waltons Stores (Interstate) Ltd. v. Maher [1988] HCA 7; (1988) 164 CLR 387, the basic considerations underlying both common law estoppel and equitable estoppel have always been the same. The only thing standing in the way of their parallel development has been the persistence of the view at common law that to succumb to a doctrine of promissory estoppel would be to undermine the foundations of the law of contract. Yet the description of estoppel by conduct given by Dixon J. in Thompson v. Palmer [1933] HCA 61; (1933) 49 CLR 507 and Grundt v. Great Boulder Pty. Gold Mines Ltd. [1937] HCA 58; (1937) 59 CLR 641 is equally applicable to common law estoppel and equitable estoppel. The description appearing in Thompson v. Palmer, at p 547, is as follows:

> "The object of estoppel in pais is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment. Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party."

The "unjust departure ... from an assumption" of which Dixon J. speaks is equally applicable to an assumption with respect to future conduct as an assumption with respect to an existing state of affairs and the requirement that the departure must be unjust may be taken as a reference to the unconscionable conduct required to found an equitable or promissory estoppel. It is the requirement of unconscionable conduct which is now seen as the protection against undue intrusion upon the law of contract, for a voluntary promise of itself will not give rise to an estoppel. 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.

7. How exactly the estoppel will operate to take account of that equity is another question. The result of an estoppel at common law was, viewed as a separate and distinct doctrine from equitable estoppel, to preclude the party estopped from denying the assumption upon which the other party acted to his detriment. It followed that the party who acted to his detriment was, in effect, given the benefit of the assumption. It was all or nothing. By contrast, the view is expressed by Mason C.J. and Wilson J. and by Brennan J. in Waltons Stores (Interstate) Ltd. v. Maher, at pp 404-405 and p 423 respectively, that an estoppel in equity may not entitle the party raising it to the full benefit of the assumption upon which he relied. The equity is said "not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or to abstain from acting thereon": per Brennan J. at p 423. To avoid the detriment may, however, require that the party estopped make good the assumption: see Crabb v. Arun District Council [1975] EWCA Civ 7; (1976) Ch 179, at pp 190, 192, 199; Ramsden v. Dyson (1866) LR 1 HL 129, per Lord Kingsdown at p 170; Jones (AE) v. Jones (FW)

(1977) 1 WLR 438, at p 443; Riches v. Hogben (1985) 2 Qd R 292, at p 302. But, depending upon the circumstances of the case, the relief required may be considerably less.

8. If this view is right, estoppel at common law and in equity may have had common origins, but there the similarity stops. While the role of estoppel at common law was largely as a rule of evidence, its role has been vastly expanded in equity to raise questions of substance. At the same time, the discretionary nature of the relief in equity marks a further reason why the fear of the common law that promissory estoppel would undermine the doctrine of consideration is unwarranted. In this case, in view of the conclusion which I have reached as to the relief to which the respondent is entitled, it is not necessary to carry this aspect of the matter any further.

9. Nevertheless, the development of the equitable doctrine has been cautious. In Legione v. Hateley [1983] HCA 11; (1983) 152 CLR 406, this Court held that promissory estoppel should be accepted in Australia as applicable to parties in a pre-existing contractual relationship. That is to say, it was held that it should be accepted that a person who has a contractual right may be estopped from enforcing it if he has made representations or has so conducted himself as to lead to an assumption by the other party that he does not intend to enforce it. He may be estopped from departing from the assumption if the departure would amount to unconscionable conduct and would operate to the detriment of the other party by reason of his having conducted himself in reliance upon the assumption. In Legione v. Hateley, since the parties were in a pre-existing contractual relationship, it was unnecessary to consider whether the doctrine of promissory estoppel should be accepted as a general doctrine applicable regardless of that relationship. That consideration arose in Waltons Stores (Interstate) Ltd. v. Maher and the further step was taken. A pre-existing contractual relationship was held not to be a prerequisite to the application of the doctrine of promissory estoppel. As I have said, the protection of the law of contract was seen to lie in the requirement of unconscionable conduct and the discretionary nature of the relief.

10. But it is, I think, unnecessary to go beyond Legione v. Hateley for the purposes of this case. For the parties here, whilst not in a contractual relationship, were in a legal relationship which began at least with the commencement of the action by the respondent against the appellant. It may well be that legal relations arose between the parties at an earlier stage upon the commission of the tort alleged by the respondent, but it is unnecessary to go back any further than the commencement of the action. Whilst the cases speak of pre-existing contractual relations, there is no reason why the doctrine of promissory estoppel, even in the restricted form recognized in Legione v. Hateley, should be confined to cases where the pre-existing legal relationship arose from contract. That was the view taken by Donaldson J. in Durham Fancy Goods Ltd. v. Michael Jackson (Fancy Goods) Ltd. (1968) 2 QB 839, at p 847, and it appears to me to be plainly correct. See also Waltons Stores (Interstate) Ltd. v. Maher, per Mason C.J. and Wilson J. at p 399; The "Henrik Sif" (1982) 1 Lloyd's Rep 456, at p 466. In this case, the parties were in a relationship which gave rise to legal rights and duties with regard to one another; it was a legal relationship. One of the appellant's rights was the statutory right to bar the respondent's action by insistence upon the statute of limitations. If by its conduct the appellant caused the respondent to assume that it would not exercise that right, and departure by the appellant from that assumption would be unconscionable and would operate to the detriment of the respondent by reason of his having acted or omitted to act upon the basis of the assumption, there is no reason why the appellant should not be estopped from insisting upon the statute.

11. It is commonly said that a person may waive a statutory right in the sense of not relying upon it. In order to waive a statutory right in this way, it must be a personal or private right and must not rest upon public policy or expediency: see Brown v. The Queen [1986] HCA 11; (1986) 160 CLR 171, at p 208. Provided that it bars a remedy rather than extinguishes a cause of action, a statute of limitations gives rise to a right of that kind and it must be pleaded if it is to be invoked: Re Burge; Gillard v. Lawrenson (1887) 57 LT 364. If it is not pleaded, it is said to be waived, but the use of the term "waiver" in this way exemplifies its imprecision. A waiver of this kind does not amount to an election and does not necessarily give rise to an estoppel.

12. A defendant who fails to plead a period of limitation may apply for leave to amend his defence to enable him to do so. The appellant did that in this case and was granted leave. The considerations which govern a decision to grant or refuse leave to amend are of a different kind from those which go to establish an estoppel. The rules of court have always provided that leave to amend pleadings may be

given for the purpose of determining the real question in controversy between the parties (see now O.36, r.1 of the Supreme Court Rules (Vict.)) and an amendment should ordinarily be allowed if any harm arising from so doing can be compensated for by the imposition of terms upon the party asking for the amendment: see Shannon v. Lee Chun [1912] HCA 52; (1912) 15 CLR 257; Tildesley v. Harper (1878) 10 ChD 393, at pp 396-397; Cropper v. Smith (1884) 26 ChD 700, at p 710. The usual terms which are imposed are an order for costs or an adjournment. In granting leave to amend, a court is concerned with the raising of issues and not with their merits. Of course, an amendment which is futile because it is obviously bad in law will not be allowed. But it is no ground for refusing an amendment that it raises a claim or defence which ought not to succeed. That will be an issue upon trial. An amendment may, however, be refused because it is made at such a late stage that neither costs nor an adjournment can compensate the other side for the failure to raise the issue at an earlier stage. In Ketteman v. Hansel Properties (1987) AC 189 the House of Lords considered an application for amendment which had been made at the stage of final addresses. It was an application to amend in order to raise a defence under a statute of limitations. Lord Griffiths observed, at p 219:

"I have never in my experience at the Bar or on the Bench heard of an application to amend to plead a limitation defence during the course of the final speeches. Such an application would, in my view, inevitably have been rejected as far too late. A defence of limitation permits a defendant to raise a procedural bar which prevents the plaintiff from pursuing the action against him. It has nothing to do with the merits of the claim which may all lie with the plaintiff; but as a matter of public policy Parliament has provided that a defendant should have the opportunity to avoid meeting a stale claim. The choice lies with the defendant and if he wishes to avail himself of the statutory defence it must be pleaded. A defendant does not invariably wish to rely on a defence of limitation and may prefer to contest the issue on the merits. If, therefore, no plea of limitation is raised in the defence the plaintiff is entitled to assume that the defendant does not wish to rely upon a time bar but prefers the court to adjudicate on the issues raised in the dispute between the parties. If both parties on this assumption prepare their cases to contest the factual and legal issues arising in the dispute and they are litigated to the point of judgment, the issues will by this time have been fully investigated and a plea of limitation no longer serves its purpose as a procedural bar."

13. In this case, the appellant having amended its defence to plead the statute of limitations and the respondent having pleaded waiver or estoppel, an issue was raised for trial. But the issue raised was one of estoppel rather than of waiver in some other sense. When the term "waiver" is not being used to describe election or estoppel it may be used loosely to indicate non-insistence upon a right either by choice or by default. The use of the term in that sense raises a different question, namely, whether a party, having failed to insist upon his right at an appropriate time, should later be allowed to do so. In this case, that question was determined when the appellant was given leave to amend its defence. In a case such as Ketteman v. Hansel Properties that was the question for determination. Sometimes the questions of estoppel and of waiver in this loose sense are not kept distinct. Wilson v. McIntosh (1894) AC 129 is an example. In that case an applicant to bring lands under the New South Wales Real Property Act 1862 (26 Vict. No.9) filed a case in the Supreme Court more than three months after a caveat had been lodged. He thereafter obtained an order that the caveator should file her case. The Privy Council held that the applicant had thereby waived his right to have the caveat set aside as lapsed for non-activity on the part of the caveator during the period of three months. In so holding it relied upon a passage from the judgment of Darley C.J. in a similar case, Phillips v. Martin (1890) 11 NSWLR 153 at p 158, where he said:

"Here there is abundant evidence of waiver, and it is quite clear that a man may by his conduct waive a provision of an Act of Parliament intended for his benefit. The caveator

was not brought into Court in any way until the caveat had lapsed. And now the applicant, after all these proceedings have been taken by him, after, doubtless, much expense has been incurred on the part of the caveator, and after lying by and hoping to get a judgment of the Court in his favour - asks the Court to do that which but for some reasons known to himself he might have asked the Court to do before any other step in the proceedings had been taken. I think he is altogether too late. It is to my mind a clear principle of equity, and I have no doubt there are abundant authorities on the point, that equity will interfere to prevent the machinery of an Act of Parliament being used by a person to defeat equities which he has himself raised, and to get rid of a waiver created by his own acts."

14. Clearly the question in both Wilson v. McIntosh and Phillips v. Martin was whether the applicant should be allowed to raise the issue of the lapse of the caveat, rather than whether that issue, if raised, should be determined in favour of one or other of the parties. They were not, therefore, cases in which the issue of lapse was raised and met by a plea of estoppel. Perhaps if the issue had been raised such a plea may have been successful, but that was not the question. Nevertheless, the terms "waiver" and "estoppel" were used interchangeably. Thus in Phillips v. Martin, at p 159, Innes J. expressed the view that it was rightly admitted by counsel for the applicant "that if anyone could be estopped from taking advantage of this Act that his client should be estopped in this particular case" and Foster J. said, at p 159, that "the applicant is estopped from taking that point at this stage of the case".

15. But the distinction between being allowed to raise an issue and the determination of an issue once raised is important because the two things are governed by different considerations. The distinction is more easily observed in the context of pleadings but is by no means confined to that situation. Quite commonly a point which is not a pleading point is not taken by a party to litigation when it arises and he is said to have waived it with the consequence that it cannot be raised at a later stage. A recent example is to be found in Vakauta v. Kelly [1989] HCA 44; (1989) 167 CLR 568, which held that a party's right to object to the participation of a judge in the proceedings on the ground of ostensible bias had been waived as it had not been raised at the appropriate time.

16. In this case, by pleading waiver the respondent was not asserting that the appellant had lost the opportunity to plead the statute of limitations. Obviously, having been given leave to amend, it had not. Rather, the respondent was seeking to have the issue which was raised by the amended pleadings determined; he was seeking to have the appellant estopped from relying on the statute.

17. Although it was the respondent, the plaintiff in the action, who was seeking to have the appellant estopped, he was not doing so in a manner which was inconsistent with its defensive character. In Foran v. Wight [1989] HCA 51; (1989) 64 ALJR 1 at p 29; [1989] HCA 51; 88 ALR 413 at p 459, there is an observation that, even upon the traditional view:

"a plaintiff may rely upon an estoppel if he has an independent cause of action and the estoppel upon which he relies is in answer to a defence raised by the defendant rather than part of the cause of action itself: see Waltons Stores (Interstate) Ltd. v. Maher, at 400."

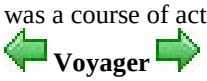
And in Waltons Stores (Interstate) Ltd. v. Maher, Deane J. at pp 444-445, said:

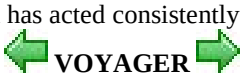
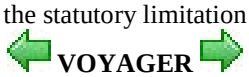
"It has often been said that estoppel can be used only as a shield and not as a sword. In so far as estoppel by conduct is concerned, that statement is generally true only in the very limited sense that such an estoppel operates negatively to preclude the denial of, or a departure from, the assumed or promised state of affairs and does not of itself constitute an independent cause of action. The authoritative expositions of the doctrine of estoppel by conduct ... to be found in judgments in this Court have been

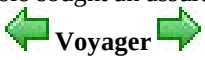
consistently framed in general terms and lend no support for a constriction of the doctrine in a way which would preclude a plaintiff from relying upon the assumed or represented mistaken state of affairs (which a defendant is estopped from denying) as the factual foundation of a cause of action arising under ordinary principles of the law ..."

18. What Deane J. is saying in that passage, as I understand it, is that a plaintiff may rely upon an estoppel, even in the formulation of his claim, if his cause of action is not one in which estoppel is an ingredient, however much estoppel may assist him in an evidentiary way in establishing his cause of action. Indeed, this case is a good illustration of the point. The respondent was in no position to rely upon an estoppel at the time he formulated his claim. The estoppel arose at a later stage and was pleaded in reply. A reply is obviously of a defensive character. Yet if the estoppel had arisen before the respondent commenced his action, he may have relied upon it as part of his claim, although his cause of action would still have been negligence, of which estoppel forms no part.

19. There can be no doubt that the appellant's conduct resulted in the adoption of an assumption on the part of the respondent. The respondent was plainly led to assume that the appellant would not raise a defence of limitation. Nor, to my mind, is there any doubt that the departure from that assumption by the appellant was unconscionable. It was not a case in which the adoption of the assumption by the respondent was occasioned merely by the initial absence of any plea raising the defence or by a mere promise not to raise it.

20. It was the result of a deliberate course of action on the part of the appellant pursued consistently over a considerable period of time. See The "Henrik Sif", at p 464. Moreover, it is significant that it was a course of action not confined to the respondent but extending to survivors of the  collision in general. As the Minister for Defence stated in a letter in August 1985:

"the Commonwealth has acted consistently with its past practice in regard to  claimants in admitting negligence (in the legal sense) and ... the Commonwealth has never relied upon the absolute defence open to it by reason of the expiration of the statutory limitation periods in regard to claims by  survivors."

The solicitors who acted for the respondent also acted for many other survivors of the  collision. Before commencing this action on behalf of the respondent, they had been engaged in correspondence with the solicitors acting for the Commonwealth and with the Minister for Defence himself in relation to an action brought on behalf of another  survivor. In that action, they had requested that the Commonwealth not rely on the limitation defence. Both the solicitors acting for the Commonwealth and the Minister for Defence gave written assurances that the Commonwealth would not insist on its rights under the Limitation of Actions Act. In addition, from November 1983 conversations took place, usually on a weekly basis and usually by telephone, between the solicitors for the plaintiff in that action and the Commonwealth's legal representatives to the effect that the Commonwealth had agreed not to plead the statute. Before the respondent issued his writ in November 1984 his solicitors sought an assurance during September on behalf of the respondent and four other survivors of the  collision that, in the light of the Commonwealth's treatment of the plaintiff in the previous action, "you treat these men the same and waive the Statute to allow us to proceed on their behalf". Although the formal assurance was not received until after the respondent's writ had been issued, it is a fair inference that he would not have commenced his action had he not expected, in the light of the treatment afforded his fellow serviceman, to receive the assurance he sought.

21. His expectation was met with an assurance that the statute would be waived. The respondent's delay in commencing the action was explicable upon reasonable grounds and the appellant's decision not to insist upon the period of limitation and to contest the case on its merits could readily be seen as prompted by a humane attitude befitting the Commonwealth towards a former member of its armed

services. The appellant continued to encourage the respondent in his belief that there would be no insistence upon the statute by joining in applications for an expedited hearing and, a year after the commencement of the action, by reiterating that it would "not (be) pressing the statutory limitation period as a defence". The subsequent abrupt change in policy on the part of the appellant, unexplained as it was, constituted the breach of a firm assurance deliberately given on more than one occasion over a considerable period of time. The absence of any attempt by the appellant to justify the amendment to its defence, other than upon the basis that it was entitled to take the course which it did, leads inevitably to the conclusion that in conscience it was unable to do so, having stood by for so long whilst the respondent pursued his claim upon the basis that he was assured of success, subject only to the proof of damage.

22. There can be no question that the respondent acted upon the assumption that the appellant would not exercise its right to claim that the action was statute barred. No doubt the respondent was, or could be, compensated by an award of costs for any actual expense incurred as a result of the appellant's failure to plead the statute of limitations at the beginning. But the real detriment to the respondent was that he was induced by the assumption that the appellant would not insist upon the statute to allow the litigation to proceed for more than a year without taking any steps to bring it to a conclusion by way of settlement or, if necessary, withdrawal. Furthermore, as Lord Griffiths observed in Ketteman v. Hansel Properties, at p 220, "justice cannot always be measured in terms of money" and the strain of litigation, particularly where that litigation is between a natural person and a defendant with the resources of the Commonwealth, is not to be underestimated. 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 in an action in which the damages claimed were for, amongst other things, a high level of anxiety and depression. I would hold that the appellant was estopped from insisting upon the statute of limitations, and would observe that the equity raised by the appellant's conduct was such, in my view, that it could only be accounted for by the fulfilment of the assumption upon which the respondent's actions were based; cf. Robertson v. Minister of Pensions (1949) 1 KB 227.

23. The other defence raised by amendment which is said in reply to have been waived is that which alleges that the appellant owed the respondent no duty of care because he was injured, if at all, whilst participating in combat exercises as a serving member of the Royal Australian Navy. In fact, the appellant also amended its defence to deny negligence altogether in addition to denying the existence of a duty of care. It is difficult to understand why the respondent restricted his allegation of waiver to the more limited denial of liability, but in the absence of any amendment of the reply, that is the basis upon which we must deal with the matter. In my view, the appellant was estopped from denying any duty of care for the same reasons as it was estopped from insisting upon the statute of limitations. The two matters were clearly linked in causing the respondent to act or refrain from acting as he did. There was no more justification in the circumstances for the appellant's ultimate denial of liability than there was for its insistence upon the statute. The fact that the litigation was allowed to continue for as long as it did was no doubt due as much to the admission of liability as to the absence of any insistence upon the statute.

24. Furthermore, any estoppel raised here is also raised defensively rather than as part of the cause of action. Obviously, the cause of action as pleaded by the respondent in his statement of claim involved no estoppel. When the appellant made an admission of liability in its defence, the respondent was relieved, subject to proof of damage, of any obligation to prove negligence. It was by way of defence against the change brought about by the appellant's amendment of its pleading that the respondent raised the question of waiver in reply. The waiver, or estoppel, was not pleaded as part of the cause of action but to preclude the appellant from departing from the assumption which it had induced. I would hold that the appellant was also estopped from denying liability by claiming that it owed no duty of care to the respondent and, for that reason, it is unnecessary to consider further that particular defence.

25. I would dismiss the appeal. That is the order favoured by a majority of the Court. Its effect will be that the order made by the Full Court of the Supreme Court will stand and that the proceedings will be remitted for trial by jury on the issues of negligence and damages. Having had the advantage of reading the reasons for judgment of Deane, Toohey and Gaudron JJ., that is the appropriate result on the present state of the pleadings, notwithstanding that Toohey and Gaudron JJ. reach their conclusion upon the basis of waiver and Deane J. and I reach our conclusion upon the basis of estoppel. Of course,

if (as one would expect) the respondent seeks, and is granted, leave to amend his reply to raise estoppel and waiver in relation to the denial of liability by the appellant (and not just the denial of a duty of care as at present), then, upon the basis of the views expressed by the majority (for whom I am able to speak on this point), the trial will proceed as an assessment of damages only.

TOOHEY J. The circumstances giving rise to this appeal appear in the judgments of other members of the Court.

2. A convenient starting point is the application by the Commonwealth on 22 May 1986 to amend its defence. At that time Mr Verwayen's action had been on foot since 2 November 1984; it was commenced well out of time. The Commonwealth's advisers had told Mr Verwayen's advisers on 25 January 1985 that the Commonwealth proposed to admit liability for his claim and to waive the Statute of Limitations. The relevant legislative provision was s.5(6) of the Limitation of Actions Act 1958 (Vic.) ("the Limitation Act"). Consistent with that advice, on 14 March 1985 the Commonwealth had filed its defence to the action, admitting all the allegations in the statement of claim, save those relating to injuries, loss and damage. It contained no plea that the action was statute barred. It was therefore the not uncommon situation of a defendant admitting liability for the plaintiff's claim but putting in issue the damages to which the plaintiff is entitled.

3. Thereafter, during 1985, the Australian Government Solicitor had joined on five occasions in applications made on behalf of Mr Verwayen for an expedited hearing of the only issue arising on the pleadings, namely, the assessment of damages, and had signed a Certificate of Readiness for assessment of damages only. As late as 27 November 1985, the Minister Assisting the Minister for Defence had written to Mr Verwayen, repeating that "the Commonwealth has admitted negligence and is not pressing the statutory limitation period as a defence". At the same time the Minister expressed regret at "any delay in the finalization of claims". Six months later and only a short time before the assessment of damages was due to take place, the Commonwealth applied for leave to amend its defence.

4. Against opposition from Mr Verwayen's counsel, leave was granted to amend the defence so as to deny negligence and to plead, not only s.5 of the Limitation Act, but also that by reason of the fact that the **Voyager** and the Melbourne were, at the relevant time, engaged in combat exercises, no duty of care was owed to Mr Verwayen. I propose to deal first with the limitations issue. Now, it is true that different considerations apply in deciding whether a party should have leave to amend a pleading and in determining the issue raised by the amended pleading, if leave be given. Leave to amend is ordinarily given, even at a late stage, so long as this can be done "without injustice to the other party", to use the words of Bowen L.J. in Cropper v. Smith (1884) 26 ChD 700, at p 710. See also Shannon v. Lee Chun [1912] HCA 52; (1912) 15 CLR 257, at p 261; Clough v. Frog (1974) 48 ALJR 481; 4 ALR 615; Atkinson v. Fitzwalter (1987) 1 WLR 201, at pp 204-205; (1987) 1 All ER 483, at pp 485-486. Nevertheless, it is appropriate to refuse leave to amend, if to grant leave may bring about an injustice to the other party which cannot be compensated by an adjournment or by an order for costs. This is not something that can always be determined by reference to the merits of the matter sought to be raised by the proposed amendment: Strauss v. Douglas Aircraft Co. [1968] USCA2 658; (1968) 404 F 2d 1152, at p 1155. There may be cases, and a plea of limitations is a good example, where the amendment proposed has every prospect of success but comes at such a late stage that, if it be granted and the point raised succeeds, an award of costs in favour of the other party is no adequate compensation. It may be, for instance, that it is then too late for the plaintiff to bring action against anyone else: see Joint Coal Board v. Adelaide S.S. Co. Ltd. (1964) NSWR 1126. It should not be lightly assumed that the "healing medicine" (the words are those of Bowen L.J. in Cropper v. Smith, at p 711) of costs is always a sufficient cure for the disadvantage to the other side. Lord Griffiths made the point in Ketteman v. Hansel Properties (1987) AC 189, when he said at p 220:

" Whether an amendment should be granted is a matter for
the discretion of the trial judge and he should be guided
in the exercise of the discretion by his assessment of
where justice lies. Many and diverse factors will bear
upon the exercise of this discretion. I do not think it
possible to enumerate them all or wise to attempt to do so.
But justice cannot always be measured in terms of money and

in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other."

5. Therefore, while it is true that to grant the amendment sought by the Commonwealth would not preclude Mr Verwayen, by some such plea as waiver or estoppel, from meeting the matters raised by the amendment, the delay in seeking to plead limitations, particularly in the context of the many assurances given to Mr Verwayen by the Commonwealth that no such plea would be raised against his claim and that liability would be admitted, provided compelling reasons for refusing leave to amend. However, there was no appeal from the order giving the Commonwealth leave to amend its defence and the matter must be approached on the basis that the amended defence has been properly entered. To that defence Mr Verwayen pleaded by way of reply that the Commonwealth "agreed to and did waive any such defence". That plea went to the defence that no duty of care was, in the circumstances, owed to Mr Verwayen and also to the defence based on s.5 of the Limitation Act. In addition, the reply asserted that the Commonwealth was "estopped" from relying upon either defence. However, the reply did not advert to the general denial of negligence, a matter that is referred to again at the end of these reasons.

6. Putting to one side for a moment the terminology of waiver or estoppel, it is necessary to ask - what is Mr Verwayen's complaint by reason of the introduction of the new matters into the Commonwealth's defence? One thing is clear, he cannot complain that, by reason of anything done or not done by the Commonwealth, he was induced to delay bringing his action until after the relevant limitation period had expired. As already mentioned, the limitation period had expired well before there was any communication between Mr Verwayen or his advisers on the one hand and the Commonwealth or its advisers on the other. Nor can he complain that he was induced to bring proceedings when he did because of any assurance given by the Commonwealth. It is true that two months earlier his solicitors had written to the Department of Defence on his behalf and on behalf of four other survivors from the **Voyager**, noting that in the case of another survivor the Commonwealth had "waived the Statute of Limitations" and had "admitted liability". But, by 2 November 1984, no reply had been received to that letter, other than an acknowledgement of receipt and a statement that the request to "treat these men the same" had been referred to the Australian Government Solicitor in Victoria, who would advise the solicitors of the Commonwealth's position.

7. On the other hand, it is equally clear that the conduct of the Commonwealth, beginning with its advice of 25 January 1985 and continuing until the letter of 27 November 1985, written by the Minister Assisting the Minister for Defence, and thereafter, induced Mr Verwayen to continue with his action in the belief that liability for his claim was admitted and ultimately to prepare for an assessment of damages, expected to be held during the Wangaratta sittings of the Supreme Court of Victoria to begin on 3 June 1986. When Mr Verwayen brought his action, it was open to the Commonwealth to include in its defence those matters which it later included, pursuant to the order of 29 May 1986, made on the application of 22 May 1986. It did not do so. Neverthless it might, at any time before May 1986, have sought leave to amend its defence to raise those matters. It did not do so. Furthermore, it engaged in correspondence with Mr Verwayen's solicitors that left in no doubt that it did not propose to rely upon any defence of limitations or indeed upon any defence at all, other than to put Mr Verwayen to proof of damage.

8. It is against that background that it is necessary to characterize the conduct of the Commonwealth. And this is no mere matter of semantics, for the consequences for the parties may depend very much upon the character to be attributed to that conduct.

9. The Commonwealth conceded that there had been a promise on its part not to rely upon the Limitation Act. But, it was argued, that could not give rise to a promissory estoppel because the object of promissory estoppel is to avoid detriment, not to secure performance of the promise made. The only possible detriment acknowledged by the Commonwealth to have been suffered by Mr

Verwayen was that involved in preparing the action for trial; such detriment, it was said, could be met by an appropriate order for costs. I return to this aspect later in these reasons.

10. Any discussion of waiver or estoppel often begins with Craine v. Colonial Mutual Fire Insurance Co. Ltd. [1920] HCA 64; (1920) 28 CLR 305, in which Isaacs J. delivered the judgment of the Court. At p 326, Isaacs J. identified waiver as "an intentional act with knowledge", borrowing the language of Lord Chelmsford L.C. in Earl of Darnley v. Proprietors, andc. of London, Chatham, and Dover Railway (1867) LR 2 HL 43 at p 57. Waiver, said his Honour at p 326:

"looks, however, chiefly to the conduct and position of the person who is said to have waived, in order to see whether he has 'approbated' so as to prevent him from 'reprobating' - in English terms, whether he has elected to get some advantage to which he would not otherwise have been entitled, so as to deny to him a later election to the contrary".

His Honour then contrasted the notion of estoppel by conduct, saying, at p 327:

"First of all, the law of estoppel looks chiefly at the situation of the person relying on the estoppel; next, as a consequence of the first, the knowledge of the person sought to be estopped is immaterial; thirdly, as a further consequence, it is not essential that the person sought to be estopped should have acted with any intention to deceive; fourthly, conduct, short of positive acts, is sufficient."

11. However, the terms are not used consistently and Lord Wright commented in Smyth and Co. v. Bailey and Co. (1940) 3 All ER 60, at p 70: "The word 'waiver' is a vague term used in many senses." See also The "Kanchenjunga" (1990) 1 Lloyd's Rep 391, per Lord Goff of Chieveley at pp 397-398. 'Estoppel' is likewise susceptible of several meanings. Indeed, in his foreword to Ewart, Waiver Distributed, (1917), Roscoe Pound observed, at p vi:

" Having previously looked into the case of that much-enduring word 'estoppel' Mr. Ewart now takes up another slippery word worn smooth with overuse and shows us 'waiver' as a pseudo-conception."

Nevertheless, usage has sanctioned waiver as apt to signify "the legal grounds on which a person is precluded from asserting one legal right when he is entitled to alternative rights inconsistent with each other" and "the legal grounds on which a person is precluded from raising a particular defence to a claim against him": Mason J. in Sargent v. A.S.L. Developments Ltd. [1974] HCA 40; (1974) 131 CLR 634, at p 655. While it has been said that the loss of a right in the circumstances postulated is "better categorised as 'election' rather than as 'waiver'" (Lord Diplock in Kammins Co. v. Zenith Investments (1971) AC 850, at p 883), waiver is an appropriate term to describe the loss of a defence otherwise available to a defendant. In that sense it has been said to arise when a defendant "either agrees with the claimant not to raise that particular defence or so conducts himself as to be estopped from raising it" (Lord Diplock, at p 883) though, again, the terminology is blurred.

12. Waiver, as a notion applicable both to the loss of a right and the loss of a defence, has a respectable lineage. The maxim Quilibet potest renunciare juri pro se introducto (a person may renounce a right introduced for his benefit), referred to in Wilson v. McIntosh (1894) AC 129, at p 133, is mentioned by Coke in Beawfage's Case [1572] EngR 33; 10 Co Rep 99b, at p 101a, as "the old rule" (77 ER 1076, at p 1080). In Bovill v. Wood (1813) 2 M and S 23, at p 25 [1813] EngR 565; (105 ER 291, at p 292) Bayley J. said, in relation to an argument that all contracting parties to an attorney's bill should have been joined in an action for assumpsit, notwithstanding that one had been made bankrupt:

" There is no doubt but that the action ought to be brought against Dodgson jointly with the other defendants; he was not discharged absolutely, but only in such way as the Legislature has prescribed; and he was not bound to

take the benefit of it, quivis renunciare potest juri pro
se introducto."
Again, in Bonner v. Wilkinson (1822) 5 B and Ald 682 at p 686 (106 ER 1340 at p 1341) Abbott C.J. observed:
" It is certainly true that a party cannot, by his own
private instrument, defeat the object of an Act of
Parliament, but he may thereby waive a provision intended
for his own benefit."

13. There is another maxim Omnes licentiam habere his quae pro se indulta sunt renunciare (everyone has liberty to renounce those things which are granted for his benefit) which is also of considerable age: see Rumsey v. The North-Eastern Rly. Co. [1863] EngR 681; (1863) 14 CB (NS) 641 at p 649 [1863] EngR 681; (143 ER 596 at p 600). Like most Latin maxims, these two, which are discussed in Broom's Legal Maxims, 10th ed. (1939), pp 477-478, assert rather than explain. The observation of Windeyer J. in Smith v. Jenkins [1970] HCA 2; (1970) 119 CLR 397 at p 410, (though in a different context) holds good:

"The intrusion of this Latin maxim into learned commentary,
and also into judgments, has caused a confusion which would
not have occurred if the writers had condescended to
translation and had not taken the maxim into territory
where it does not belong."
The point of referring to the maxims and to the early decisions is to illustrate the means by which the courts have grappled with the notion to which the label of waiver has been attached and to show that a combination of the two maxims is reflected in the general proposition that a person may waive both a substantive right and an available defence, in the sense that he may agree or choose not to rely upon the one or the other. The maxims embody concepts and that is their value. They are not definitions and, of course, they involve translations. There are translations of the maxims in Jowitt's Dictionary of English Law, 2nd ed. (1977), pp 1283, 1488. Broom's translation of the second maxim reads: "every man may renounce a benefit or waive a privilege which the law has conferred upon him": at p 478. Nothing in the maxims limits the terms "introduced", "granted" or "conferred" to a benefit arising in some formal way, for example by statute.

14. The idea that waiver involves a renunciation of a right or benefit comes through in the judgment of the Earl of Selborne L.C. in Great Eastern Railway Co. v. Goldsmid (1884) 9 App Cas 927. Speaking of a benefit granted to the City of London by a charter of 1st Edward III, his Lordship said, at pp 936-937:

"It (the benefit) is a jus introductum for the particular
benefit of the city of London, and it falls within the
general principle of law, 'Unusquisque potest renunciare
juri pro se introducto;' a principle not only of ancient
but also of modern application, applicable even where Acts
of Parliament have been passed of a much more public
character. In such cases, when the rights given have been
only private rights, unless there has been also in the Act
of Parliament a clause excluding a power of contract, it
has been held that by contract or by voluntary renunciation
such rights, as far as they are personal rights, may be
parted with and renounced."

15. At times other expressions have crept into judgments. Thus, in Wright v. John Bagnall and Sons Limited (1900) 2 QB 240, where agreement had been reached between employer and worker that there was a statutory liability on the former to pay compensation for an accident to the latter, the headnote speaks of evidence upon which a judge or arbitrator "may properly find that the employer is estopped from setting up the defence that the request for arbitration was not filed within six months of the accident". Yet the judgment of Collins L.J., with whom the other members of the Court of Appeal agreed, speaks, at p 244, of the respondent being "debarred" from raising the point that the statutory

limitation applied. No member of the Court of Appeal uses the expression "estopped" or indeed "waived". See also Lubovsky v. Snelling (1944) KB 44.

16. The question is not merely one of terminology; however the law has to work with words. It is important, though, that labels are used with clarity and consistency. It may well be, as suggested in Spencer Bower and Turner, The Law Relating to Estoppel by Representation, 3rd ed. (1977), at p 318:

" Most of the cases which use the term 'waiver' (using the term in a sense bringing it within the ambit of this chapter) use it in the sense of 'election' as it is used here, and as different on ultimate analysis from estoppel proper."

On one view, that is merely to replace one legal label with another. But waiver, seen as a form of election, does have characteristics that distinguish it from estoppel, though there may be occasions when the distinction is not an easy one to draw. The distinction needs further consideration in these reasons. What it is necessary to do is to give to waiver, in any sense relevant for the disposition of this appeal, the aspect that it should properly bear.

17. Much of the confusion is due to the fact that, as Edward L. Rubin, in a learned article entitled "Toward a General Theory of Waiver", (1981) 28 UCLA Law Review 478, observes: "Waivers appear in almost every area of law and in connection with almost every type of legal right": at p 478. Rubin comments at p 479:

"Precisely the same term with precisely the same effect is used in both criminal and civil law, yet no theory of waiver bridges these two areas."

Equally, it may be said, the term is applied to events which occur within the adjudicative process and events which occur prior thereto. In seeking for a definition of waiver, the author points to the difficulties arising from the emphasis in the familiar definition of waiver on "an intentional relinquishment ... of a known right or privilege": Johnson v. Zerbst [1938] USSC 145; (1938) 304 US 458, at p 464. The same emphasis is to be found in Craine, at p 327. But it has not seemed possible, whether in this country or elsewhere in the common law world, to reconcile the requirement of intention with the notion that waiver may be inferred from conduct. It may be noted that in Craine, at p 326, Isaacs J. spoke of "intentional" as "such as either expressly or by imputation of law indicates intention ...". See also Gresson P in Auckland Harbour Board v. Kaihe (1962) NZLR 68, at p 88. Because of the difficulty in effecting that reconciliation, it is preferable to speak of waiver in the broad way in which it was referred to by Mason J. in Sargent, though it is still necessary to identify the "legal grounds" on which a person is precluded from asserting a right or from raising a particular defence.

18. Necessarily, questions have to be answered. In what circumstances does waiver operate? In particular, when is a defendant precluded from relying upon a defence such as a plea of limitations? To attempt an answer to the general question first. A defendant may be precluded from asserting a right or from raising a defence, as a matter of contract. In Tropical Traders Ltd. v. Goonan [1964] HCA 20; (1964) 111 CLR 41, where this Court was considering the consequences of repeated acquiescence by one party to a contract in non-observances by the other party of stipulations as to time, Kitto J. commented, at p 52, that "it may not matter whether the result is described as a promissory estoppel or a waiver or a variation of the contract by mutual, though tacit, consent". Yet, variation of contract does stand in a category of its own since, as the law presently stands, consideration is necessary to support the altered bargain. In many cases where waiver is sought to be argued, consideration is not present; the situation may be an entirely non-contractual one, as in Vakauta v. Kelly [1989] HCA 44; (1989) 167 CLR 568, where the question was whether a party to litigation, with knowledge of the right to take objection on the ground of bias on the part of the trial judge, lost that right through failure to take objection at the appropriate time.

19. There may be much to be said for the suggestion made by Wootten J. in Wilson v. Kingsgate Mining Industries Pty. Ltd. (1973) 2 NSWLR 713, at p 730, and noted in Cheshire and Fifoot's Law of Contract, 5th Aust. ed. (1988), pp 628-629, "that the time is at hand when these various approaches to the same or similar problems should be rationalized under one subsuming principle". The learned authors offer, as a subsuming principle, the statement by Dixon J. in Thompson v. Palmer [1933] HCA

61; (1933) 49 CLR 507, at p 547 (though said in regard to estoppel in pais), that the law will not allow "an unjust departure by one person from an assumption adopted by another ... which ... would operate to that other's detriment".

20. Whether or not the time is ripe for a subsuming principle, the shape that this case has taken since its inception makes the formulation here of such a principle inappropriate. More importantly, such a formulation has sweeping implications, not only for waiver and estoppel, but for other areas of the law as well, not least the doctrine of consideration. In the circumstances of the present case, the efficacy of the Commonwealth's limitations defence must fall to be determined within the language of waiver or estoppel.

21. In my view, waiver, by that name, has a role to play. And it is a role which involves no confusion with variation of contract or promissory estoppel. It may be seen as a form of election between inconsistent rights, in the former of the categories mentioned by Mason J. in Sargent, at p 655. Election implies that a choice must be made between two rights which are mutually exclusive. "Obviously there can be no election, choosing one course to the exclusion of another, when in fact there is only one course to take, or where the two courses are such that the adoption of one of them does not necessarily indicate a final intention to abandon the other": Spencer Bower and Turner, at p 342. But, in the second of those categories, "the legal grounds on which a person is precluded from raising a particular defence ...", an election is involved, only in the sense that a defendant may choose to take a jurisdictional point, rely upon an irregularity in the proceedings, plead a particular defence, or take some other step in the adjudicative process, or he may choose not to do so. But he may not take up "two inconsistent positions", the language used in Craine, at p 326. It may be, therefore, that "election" is best reserved for the former of Mason J.'s categories and "waiver" for the latter. The distinction is noted by Lord Wright in Smyth and Co. v. Bailey and Co., at p 70.

22. Halsbury's Laws of England, 4th ed. (1976), vol.16, par.1471, part of which reflects the judgment of Lord Hailsham of St Marylebone L.C. in Banning v. Wright (1972) 1 WLR 972, at p 979; (1972) 2 All ER 987, at p 998, offers the following definition which comes close to this notion; nevertheless, it is open to the objection that it tends to blur different concepts:

" Waiver is the abandonment of a right in such a way
that the other party is entitled to plead the abandonment
by way of confession and avoidance if the right is
thereafter asserted, and is either express or implied from
conduct. It may sometimes resemble a form of election, and
sometimes be based on ordinary principles of estoppel,
although, unlike estoppel, waiver must always be an
intentional act with knowledge."

23. In this appeal we are concerned with waiver as it exists within the adjudicative process. It is commonplace to speak of a person "waiving" a right, for instance, by submitting to the jurisdiction of a court which otherwise has no jurisdiction over him, by not insisting upon arbitration, where an agreement so provides, by not taking advantage of some irregularity in proceedings or by not pressing a particular argument that is available at trial: see, by way of example, Graham v. Ingleby [1848] EngR 92; (1848) 1 Ex 651 (154 ER 277); Park Gate Iron Co. v. Coates (1870) LR 5 CP 634; Ward v. Raw (1872) LR 15 Eq. 83; Fry v. Moore (1889) 23 QBD 395; Shrager v. Basil Dighton Ltd. (1924) 1 KB 274; Water Board v. Moustakas [1988] HCA 12; (1988) 62 ALJR 209; 77 ALR 193.

24. Waiver, in the sense used for the purposes of this appeal, may be found in the deliberate act of a defendant not to rely upon a defence available to him. That is not to say that there must be an intention to bring about the consequences of waiver; rather, the conduct from which waiver may be inferred, must be deliberate. Detriment is not an essential attribute of waiver, though it will often be found as a consequence. Within the adjudicative process at any rate, it is enough that the defendant "renounces" a defence which is available to him and which is there for his benefit.

25. A defence available to a defendant, whether it be on the facts or on the law, is not waived merely because the defendant does not initially plead that defence. It is commonplace for pleadings to change as an action progresses, whether by way of expansion or contraction (though usually the former). But

what happened in the present case is more fundamental than a pleading point. The situation is not simply that the Commonwealth had filed a defence to the action and later sought to add a plea of limitation to that defence. The Commonwealth sought to adopt a position which had been open to it at the outset but which it deliberately chose not to make a part of the issues for adjudication. The stance of the Commonwealth from the beginning, consistent with its communications to Mr Verwayen's advisers, was that it was not relying upon the Limitation Act, indeed that it was not defending the action, save as to the amount of damages to be awarded to Mr Verwayen. It was on that footing that the plaintiff pursued his action for damages right through to the listing of the action for the assessment of damages. To uphold a limitations plea in those circumstances would be to permit the Commonwealth to rely upon a defence which it had unequivocally renounced.

26. Section 5(6) of the Limitation Act provides that no action for damages for negligence in respect of personal injuries "shall be brought after the expiration of three years after the cause of action accrued". Such a provision has been long held to go, not to the jurisdiction of a court to entertain a claim, but to the remedy available and hence to the defences which may be pleaded. Absent a plea of limitations, in those circumstances the matter does not arise for the consideration of the court: see Ronex Properties v. John Laing (1983) QB 398 and the authorities there cited. Equally, it is well established that a provision such as s.5(6) is procedural in nature: Ketteman v. Hansel Properties, at p 219; see also Admiralty Commissioners v. Valverda (Owners) (1938) AC 173, at p 185. Such a right is capable of being waived if it is for the benefit of the party concerned: Phillips v. Martin (1890) 11 NSWLR 153; Wilson v. McIntosh; Brown v. The Queen [1986] HCA 11; (1986) 160 CLR 171, at p 178. The Commonwealth renounced and thereby waived its right to rely upon the defence of limitations, a defence which was otherwise available to it and which was for its benefit.

27. The passage from Halsbury, referred to earlier in these reasons, concludes:

"The waiver may be terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him."

28. Waiver, in the sense relevant for the purposes of this appeal, is not capable of being withdrawn. It is of the essence of waiver in this sense that the defendant has unequivocally renounced his right to rely upon the particular defence; once the defence has been so renounced (and this will be hard to establish except in a case as clear as this one), the defendant should not be permitted to rely upon it. In this context, to say that waiver may be terminated unless the other party cannot resume his position is, once again, to move into the area of estoppel. This is made evident by the authority cited by Halsbury in support of the proposition - Ajayi v. R.T. Briscoe (Nig.) Ltd. (1964) 1 WLR 1326; (1964) 3 All ER 556 speaks expressly of promissory estoppel. As to the causing of injustice to the other party, the authority cited is W.J. Alan and Co. v. El Nasr Export (1972) 2 QB 189. That case concerned contracts for the sale of coffee and a question as to the currency in which payment should be made. Lord Denning M.R. spoke of waiver, but in relation to the enforcement of rights under a contract, adding, at p 213:

"It may be too late to withdraw: or it cannot be done without injustice to the other party. In that event he is bound by his waiver. He will not be allowed to revert to his strict legal rights."

This is waiver in the first of the two senses mentioned by Mason J. in Sargent. It is the second of those senses with which this appeal is concerned. It follows that I disagree with the view expressed in Kerrison v. Martin and Heyward [1975] VicRp 40; (1975) VR 401, at p 405, that "any such unilateral waiver without consideration can be terminated at any time", at least if it is thought to apply to waiver as I have sought to identify it in the present case. Because waiver, in this sense, involves unequivocal renunciation or abandonment of a defence, it may occur at any stage of the adjudicative process. In the ordinary course, proof that there has been such a renunciation or abandonment will be the harder to establish, the earlier the stage reached in that process. But that is an evidentiary problem; it does not mean that a particular stage in the adjudication process must be reached before waiver of a defence may occur.

29. What I have said regarding the limitations plea applies equally to the defence that the Commonwealth was engaged in combat exercises. There is no statutory provision involved but, in the sense in which waiver is used in these reasons, the Commonwealth had available to it, by way of answer to Mr Verwayen's claim, a contention that it owed no duty of care to him in the circumstances. The distinction drawn by Windeyer J. in Australian Iron and Steel Ltd. v. Hoogland [1962] HCA 13; (1962) 108 CLR 471, at pp 488-489, between "a condition of the remedy rather than an element in the right" was drawn in the context of a limitations defence and is not necessarily apposite in all situations in which waiver arises. For the reasons already given, the Commonwealth must be taken to have renounced its right to rely upon a defence that, in the circumstances of this case, it owed no duty of care to Mr Verwayen. There is no operative difference between this defence and the limitations plea. In one case the Commonwealth said to Mr Verwayen: "There is available to us an argument that, in the circumstances prevailing at the time you were injured, we owed you no duty of care. But we abandon any such argument." In the other case the Commonwealth said: "There is available to us an argument that any claim you might otherwise have is statute barred. But we abandon any such argument." To abandon the combat exercise defence offended no statutory provision, whether for the benefit of the public or otherwise, and no rule of public policy. In all the circumstances the Commonwealth must be held to have renounced that particular answer to Mr Verwayen's claim.

30. The conclusions I have reached make it unnecessary to deal with the argument based on estoppel. But on the present state of the authorities, the consequence of any promissory estoppel is that the court should enforce the promise only as a means of avoiding detriment and to the extent necessary to achieve that end: see Waltons Stores (Interstate) Ltd. v. Maher [1988] HCA 7; (1988) 164 CLR 387, at pp 404-405, 423-427. In Mr Verwayen's case, that end may be achieved by compensating him for what he has lost by way of costs in pursuing the action. If there are other factors to be taken into account (and before O'Bryan J. counsel for the respondent contended that there were such factors), they have not been established in the proceedings that have taken place. Whether Mr Verwayen should now be given the opportunity to supplement the material relevant to detriment is a matter I need not pursue for he has succeeded in making good his claim of waiver.

31. Something must be said, however, about the consequences of these conclusions for this appeal, having regard to the present state of the pleadings. By its amended defence the Commonwealth denied negligence and pleaded s.5(6) of the Limitation Act and that, by reason of combat exercises in which the **Voyager** and the Melbourne were engaged at the relevant time, no duty of care was owed to Mr Verwayen. The reply to that defence asserted, inter alia, that the Commonwealth had waived or was estopped from raising the limitations defence and the combat exercise defence. The reply did not assert that the Commonwealth had waived or was estopped from raising its general denial of negligence. Those pleadings stand though possible consequences were raised by this Court during the hearing of the appeal. A conclusion that the Commonwealth waived the limitations defence and the combat exercise defence does not directly touch the general denial of negligence.

32. Having regard to the issues raised by the appeal, it is appropriate that the appeal be dismissed. It may well be that the Commonwealth will agree to the action proceeding to trial for the assessment of damages only, since the combat exercise defence was the only basis upon which the absence of a duty of care was sought to be raised and, once that issue has been removed from the action, negligence may no longer be contested. But that is a matter to which Mr Verwayen's advisers must direct their attention and, if necessary, seek an amendment to the reply to assert that the Commonwealth is precluded from denying negligence. In all the circumstances, it is hard to see any basis on which such an application may be refused. Although the denial of negligence presently remains in the defence, the effect of this judgment is that the Commonwealth is held to its admission of liability. The only matter on which the Commonwealth should now be heard is as to the amount of damages to which Mr Verwayen is entitled.

33. The appeal should be dismissed.

GAUDRON J. In February 1964 there was a collision at sea between two ships of the Royal Australian Navy, HMAS **Voyager** and HMAS Melbourne. Many of the crew of the **Voyager** were injured, some fatally. Mr Verwayen was on board the **Voyager** and claims to have suffered injuries in the collision.

2. It seems that for a number of years it was generally assumed that there was no liability in negligence on the part of the Commonwealth of Australia, its officers, servants or agents in respect of the collision. However, following the decision of this Court in Groves v. The Commonwealth [1982] HCA 21; (1982) 150 CLR 113, the services of Messrs Vaccaro and Taylor, Barristers and Solicitors of Myrtleford, Victoria, were retained by some of the survivors from the **Voyager** to investigate the possibility of their recovering damages from the Commonwealth. In November 1983 Messrs Vaccaro and Taylor secured agreement from the Commonwealth that it would "not rely on the Statute of Limitations" in an action arising out of the collision commenced by Mr Robert Palmer. In February 1984 the Commonwealth admitted liability in that action. Damages were to be assessed.

3. In September 1984 Messrs Vaccaro and Taylor wrote to the Secretary, Department of Defence, noting that in the case of Mr Robert Palmer the Commonwealth had "waived the Statute of Limitations" and had "admitted liability". A request was made on behalf of Mr Verwayen and four other persons that "you treat these men the same and waive the Statute to allow us to proceed on their behalf". A reply was received from the Minister Assisting the Minister for Defence stating that the request had been referred to the Australian Government Solicitor (Victoria) who would advise of the Commonwealth's position.

4. On 2 November 1984, Mr Verwayen commenced proceedings against the Commonwealth in the Supreme Court of Victoria claiming damages for negligence. On 25 January 1985, the Australian Government Solicitor advised that the Commonwealth proposed to admit liability and to waive the Statute of Limitations in that action. Thereafter, on 14 March 1985, the Australian Government Solicitor delivered a defence which, in terms, admitted negligence as pleaded in Mr Verwayen's statement of claim. There was no plea that the action was statute barred. As the pleadings then stood, the only issue was as to Mr Verwayen's injuries, loss and damages. Thereafter, during 1985, the Australian Government Solicitor joined in five applications made by or on behalf of Mr Verwayen for an expedited hearing of that issue. In November 1985, the Minister Assisting the Minister for Defence wrote to Mr Verwayen stating, inter alia, that "the Commonwealth has admitted negligence and is not pressing the statutory limitation period as a defence". In that letter there was an expression of regret as to "any delay in the finalization of claims" and an assurance that "all reasonable steps are being taken to expedite these matters, consistent with normal legal requirements".

5. Mr Verwayen's action was prepared for trial. It seems that it was expected that the trial would be held during the Wangaratta sittings commencing on 3 June 1986. However, on 22 May 1986, application was made for leave to amend the Commonwealth's defence. The application was opposed. Leave was granted. An amended defence was filed on 29 May 1986. By that amended defence the Commonwealth denied negligence and asserted that the **Voyager** and the Melbourne were, at the relevant time, warships engaged in combat exercises and that, by reason thereof, no duty of care was owed to Mr Verwayen. For the sake of convenience the matter thus pleaded will be referred to as "the combat exercise defence". Additionally, it was pleaded that the action was barred by s.5 of the Limitation of Actions Act 1958 (Vic.).

6. A reply to the amended defence was filed. Issue was joined on the denial of negligence. Additionally, the reply -

(a) denied that the **Voyager** and the Melbourne were engaged in combat exercises;

(b) asserted that the claim that the **Voyager** and the Melbourne were warships engaged in combat exercises did not amount, in law, to a defence to the plaintiff's claim;

(c) asserted that "the Limitation Act does not apply to (the Commonwealth)";

(d) alternatively, asserted that the Commonwealth had waived or was estopped from raising "the combat exercise defence" and the defence that the action was statute barred.

7. The question raised by the plea that "the Limitation Act does not apply to (the Commonwealth)" has been decided against Mr Verwayen and that decision has not been challenged. It is convenient to note two other matters relating to the amended defence and the reply. First, the reply did not assert that the Commonwealth had waived any right to raise or was estopped from raising a general denial of negligence. This may have resulted from an assumption, which seemed to underlie the argument put to this Court, that the only basis on which negligence is denied by the Commonwealth is that comprehended in "the combat exercise defence". Secondly, the questions of waiver and estoppel raised on behalf of Mr Verwayen go to both "the combat exercise defence" and the defence that the action is statute barred.

8. The issues raised by the amended defence and the reply were determined as preliminary issues by O'Bryan J., his Honour taking the view that none of these issues involved any factual issue for a jury to determine. So far as is presently relevant, his Honour held -

(i) that "the combat exercise defence" did not amount, in law, to a defence to the plaintiff's action; and
(ii) that the Commonwealth was not precluded (whether by waiver or estoppel) from relying on a defence that the action was statute barred.

In the result, judgment was entered for the Commonwealth, but, by reason of the course which the action had taken, the Commonwealth was ordered to pay Mr Verwayen's costs of and incidental to the hearing before O'Bryan J.

9. Mr Verwayen appealed and the Commonwealth cross-appealed to the Full Court of the Supreme Court of Victoria. It was held by majority (Kaye and Marks JJ., King J. dissenting) that the Commonwealth was estopped, by virtue of a promissory estoppel, from relying on its defence that the action was statute barred. It was further held by the majority (King J. not finding it necessary to decide the issue raised by "the combat exercise defence") that the facts did not disclose that "at the time of collision **Voyager** was engaged in a military manoeuvre as such or otherwise doing anything which could remotely be described as training for battle". Accordingly, the appeal was allowed and the cross-appeal was dismissed. It was ordered that the judgment entered at first instance be set aside and that the proceedings be remitted for trial on the issues of negligence and damages. The order remitting the issue of negligence flowed from the denial of negligence by the Commonwealth in its amended defence, which denial was not the subject of any claim of waiver or estoppel in the reply. The Commonwealth now appeals to this Court.

10. In this Court two distinct issues were argued on behalf of the Commonwealth. First, it was argued that the Commonwealth was not precluded from raising the defence that the action was statute barred (Appeal Ground 4). Secondly, it was argued that "(t)he Full Court erred ... in failing to find ... that (Mr Verwayen) was owed no duty of care by (the Commonwealth) or by any member of the armed forces engaged in the operations of either or both of HMAS Melbourne and HMAS **Voyager**" (Appeal Ground 5).

11. It is not now in issue that, if the Commonwealth is entitled to rely on its defence that Mr Verwayen's action is statute barred, it is a complete answer to his claim. Accordingly, if the Commonwealth is correct in its first argument, it is unnecessary to consider its second argument. And, because the questions of waiver and estoppel go equally to "the combat exercise defence" and the defence that the action is statute barred, then, unless there is some difference arising from the nature of the two defences, if the Commonwealth is not successful on its first argument, the question posed by "the combat exercise defence" does not arise.

12. The starting point of the argument made on behalf of the Commonwealth is that waiver, unless constituted by Deed or by an agreement supported by consideration, does not exist independently of estoppel. There was neither a Deed nor agreement supported by consideration in the present case. The Commonwealth acknowledges that there was a promise, knowingly and intentionally made, which gave rise to a promissory estoppel. But, it was argued, the object of promissory estoppel is to avoid detriment, not to secure performance of the promise made. The only detriment suffered by Mr Verwayen, it was said, was that involved in preparing his action for hearing. And, according to the

argument, that detriment was fully and appropriately avoided by cost orders fashioned to the particular circumstances of the case.

13. In Craine v. Colonial Mutual Fire Insurance Co. Ltd. [1920] HCA 64; (1920) 28 CLR 305 this Court, in a judgment delivered by Isaacs J., sought to distinguish (at pp 326-328) between waiver and estoppel by conduct; it was said (at p 328) that "estoppel may be established where waiver cannot, and conversely waiver may be found where estoppel does not exist". The distinction made was between "an intentional act with knowledge" (Earl of Darnley v. Proprietors, etc. of London, Chatham, and Dover Railway (1867) LR 2 HL 43, at p 57) and conduct which, even if done unintentionally, without knowledge and not amounting to a positive act, is such that "it would be unjust ... to throw the consequences on the person who believed his statement and acted on it": Sarat Chunder Dey v. Gopal Chunder Laha (1892) LR 19 Ind App 203, at p 216.

14. Contemporary understanding of the nature of the conduct which will ground an estoppel allows that the conduct which was identified in Craine as a waiver is conduct which may ground an estoppel. See, for example, Thompson v. Palmer [1933] HCA 61; (1933) 49 CLR 507, per Dixon J. at p 547, and Grundt v. Great Boulder Pty. Gold Mines Ltd. [1937] HCA 58; (1937) 59 CLR 641, per Dixon J. at p 675. And that the same conduct might be characterized either as waiver or as founding an estoppel was recognized by Isaacs J. in Sandringham Corporation v. Rayment [1928] HCA 13; (1928) 40 CLR 510, at pp 528-529.

15. Given that the same conduct may constitute what was characterized as waiver in Craine and provide the foundation for an estoppel, there has been a tendency, in recent times, to question whether and, if so, in what circumstances waiver exists independently of the general law of estoppel. And this question has led to the further question whether the word "waiver" is not productive of confusion. Thus in Kammins Co. v. Zenith Investments (1971) AC 850, Lord Diplock (at p 882) observed that the word "waiver" was "sometimes used loosely to describe a number of different legal grounds on which a person may be debarred from asserting a substantive right ... or from raising a particular defence". His Lordship went on to say that the first type was "better categorised as 'election' rather than as 'waiver'" and that "(t)he ordinary principles of estoppel apply to (the second category of waiver)". In the same case Viscount Dilhorne (at pp 872-873) quoted the statement in Spencer Bower and Turner, The Law Relating to Estoppel by Representation, 2nd ed. (1966), at pp 291-292, that the word "waiver" has "dangers which may be avoided only by forgoing it as a useful term when considering either estoppel or election" and that its use in the authorities is more probably to "be found to connote 'election' than 'estoppel'". (See now 3rd ed. (1977), at pp 319-320.)

16. In Craine, Isaacs J. (at p 326) referred to waiver as "a doctrine of some arbitrariness introduced by the law to prevent a (person) in certain circumstances from taking up two inconsistent positions". The expression "taking up two inconsistent positions" is wider than the expression "asserting two inconsistent rights". It is the assertion of inconsistent rights that is generally understood to be at the heart of what is called "election". See Sargent v. A.S.L. Developments Ltd. [1974] HCA 40; (1974) 131 CLR 634, per Stephen J. at p 641; Lissenden v. C.A.V. Bosch Ltd. (1940) AC 412, per Lord Wright at pp 435-436. For present purposes the question whether there is a doctrine, be it called "waiver" or anything else, which operates by reference to the taking of inconsistent positions rather than the assertion of inconsistent rights can be confined to the situation where, in the course of litigation, a person asserts a right to take a position which is inconsistent with one earlier taken in the same litigation.

17. If, in the course of litigation, a person fails to plead a matter, take an available objection or pursue a particular point of law, the matter proceeds on the basis that the point which might have been taken is not in issue. Were it otherwise the conduct of litigation would be unmanageable. Of course, leave may be granted for the point to be raised notwithstanding the failure to take the point at the appropriate time. Generally, leave is granted if the point can be raised without injustice to the other party. That question may depend upon whether disadvantage to the other party can be avoided by adjournment or an appropriate costs order. But other issues may be taken into account. In Ketteman v. Hansel Properties (1987) AC 189 Lord Griffiths (at p 220) said "justice cannot always be measured in terms of money". His Lordship then observed that there was to be weighed in the balance "the strain the litigation imposes on litigants ..., the anxieties occasioned by facing new issues, the raising of false

hopes". Additionally, his Lordship noted the necessity to take into account "the pressure on the courts" and the public interest in "legal business (being) conducted efficiently".

18. When a party to litigation deliberately chooses not to take a point or fails to take a point when it comes to notice, the courts may adopt a more stringent attitude, treating the point as having been irrevocably abandoned. Usually the party who has thus failed to take the point is said to have "waived" it.

19. In Wilson v. McIntosh (1894) AC 129 a question arose as to the consequence to be attached when a party to litigation had stated his case and required the other party to file her case in an application for the removal of a caveat under the Real Property Act 1862 (N.S.W.) (26 Vict. No.9) notwithstanding that the caveat had by then lapsed. In that case the Privy Council approved a statement of Sir Frederick Darley C.J. in Phillips v. Martin (1890) 11 NSWLR 153, at p 158, where it was said:

"(I)t is quite clear that a man may by his conduct waive a provision of an Act of Parliament intended for his benefit. The caveator was not brought into Court in any way until the caveat had lapsed. And now the applicant, after all these proceedings have been taken by him, after, doubtless, much expense has been incurred on the part of the caveator, and after lying by and hoping to get a judgment of the Court in his favour - asks the Court to do that which but for some reasons known to himself he might have asked the Court to do before any other step in the proceedings had been taken. I think he is altogether too late. It is to my mind a clear principle of equity, and I have no doubt there are abundant authorities on the point, that equity will interfere to prevent the machinery of an Act of Parliament being used by a person to defeat equities which he has himself raised, and to get rid of a waiver created by his own acts."

The same principle is to be found in Graham v. Ingleby [1848] EngR 92; (1848) 1 Ex 651 (154 ER 277); Park Gate Iron Co. v. Coates (1870) LR 5 CP 634; St. Victor v. Devereux (1845) 14 LJ Ch 244.

20. There are two matters of significance in the statement approved in Wilson v. McIntosh that serve to indicate that what was considered in that case and in the case of Phillips v. Martin was neither election nor estoppel as those doctrines are presently understood. First, the situation there considered concerned the taking of inconsistent positions rather than the assertion of inconsistent rights in the strict sense. Secondly, to the extent that the incurring of expense might equate with detriment for the purposes of the law of estoppel, that detriment was presumed rather than established. One other matter may also be noted by reference to Wilson v. McIntosh. If the incurring of expense were the only consideration, it is difficult to see that it could not have been dealt with by an order for costs. But it was not the only or, indeed, the relevant consideration. The relevant consideration was that there were "equities which he (had) himself raised". What those equities were was not made explicit.

21. To some extent the equity which underlies the doctrine approved and applied in Wilson v. McIntosh can be distilled from the situations in which the doctrine has been applied or, if not applied in terms, like considerations have resulted in a party to litigation being precluded from taking a point previously open.

22. A party to litigation who has failed to object that a condition attaching to the exercise of jurisdiction has not been satisfied or that the proceedings were irregularly instituted may, by reason of his subsequent participation in the proceedings, be precluded from later raising the defect. See, for example, Broad v. Perkins (1888) 21 QBD 533; In re Jones v. James (1850) 19 LJ QB 257; Moore v. Gamgee (1890) 25 QBD 244. So too, a litigant may be precluded from raising a matter going to the disqualification of the person constituting the court if, with knowledge of the disqualification, he participates in the proceedings without objection. See Vakauta v. Kelly [1989] HCA 44; (1989) 167 CLR 568. See also Corrigal v. The London and Blackwall Railway Company (1843) 5 Man and G 219 [1843] EngR 153; (134 ER 545); Shrager v. Basil Dighton Ltd. (1924) 1 KB 274, a case concerning jurisdiction of Official Referees appointed under the Rules of the Supreme Court (U.K.).

23. Once a matter has passed into judgment similar considerations may operate to limit the matters which may be raised on appeal. A party to an appeal may be precluded from taking a point not argued at trial, even if the matter was pleaded and particularized: Water Board v. Moustakas [1988] HCA 12; (1988) 62 ALJR 209; 77 ALR 193. See also Suttor v. Gundowda Pty. Ltd. [1950] HCA 35; (1950) 81 CLR 418; Maloney v. Commissioner for Railways (N.S.W.) (1978) 52 ALJR 292; 18 ALR 147. So too, a party to an appeal may be precluded from relying on the pleadings if some different basis was chosen by the parties for the determination of the matter at trial. See Browne v. Dunn (1893) 6 R. 67, at pp 75-76, cited with approval in Rowe v. Australian United Steam Navigation Co. Ltd. [1909] HCA 25; (1909) 9 CLR 1, at pp 24-25; Gould and Birbeck and Bacon v. Mount Oxide Mines Ltd. (In Liquidation) [1916] HCA 81; (1916) 22 CLR 490, per Isaacs and Rich JJ. at p 517.

24. There is a common aspect to the situations above discussed. The relationship of the parties has changed. In cases involving questions relating to jurisdictional defect or irregularity attending the institution of the proceedings the parties have become or are treated as having become parties to a proceeding. In the case of failure to raise a matter of personal disqualification, the parties have entered a new relationship, namely parties to a proceeding which is in the course of adjudication. Again, once a matter has passed into judgment, the relationship of the parties is according to the judgment, subject only to such powers as may be exercised by an appellate court if an appeal is instituted. And, it is significant that a respondent to an appeal who fails to object that the appeal has not been properly instituted may be precluded from later raising that issue. See Park Gate Iron Co.; Ward v. Raw (1872) LR 15 Eq 83. Again, in that situation the parties are or are deemed to be in a new relationship, namely, that of appellant and respondent.

25. Perhaps there is a principle of wider application, but it is clear that a party to litigation will be held to a position previously taken (that position having been intentionally taken with knowledge) if, as a result of that earlier position, the relationship of the parties has changed. The changed relationship, in the terms used in Phillips v. Martin and approved in Wilson v. McIntosh, constitutes an "equit(y) which (the other) has ... raised".

26. Given that the position deliberately adopted by one party has brought about a change in the relationship of the litigants, a doctrine which holds the parties to that relationship may be seen as resting either on general policy considerations or on principles analogous to those of estoppel. Such a doctrine, by ensuring fair dealing in the conduct of litigation and by promoting the finality of litigation, aids the efficient administration of justice. By analogy with the general law of estoppel, one may treat the doctrine as operating by reference to an assumption that a particular relationship has been constituted, which assumption has been occasioned by the deliberate failure to take an available point when it comes to notice. But the doctrine does not require proof that detriment will be suffered. Rather, to continue the analogy, it presumes that putting the parties back in some earlier relationship is, itself, a detriment. And, in a sense, so it is, for there could be no certainty that the parties would thereafter secure the rights against each other that marked the relationship brought about by the failure to take an available point. For example, if proceedings had to be started afresh because of some procedural defect attending their institution, there could be no certainty that service would again be effected or that it would be effected before the expiry of some limitation period. Although the doctrine is analogous to general principles of estoppel, it operates because there is no injustice in holding a party to a changed relationship where that relationship is referable to a deliberate failure to take an available point. Conversely, if the failure is not deliberate, there is no injustice (whether viewed from the perspective of estoppel or otherwise) in allowing that point to be later taken if disadvantage to the other side can be avoided by adjournment or an order as to costs. It matters not whether the doctrine is called "waiver" or anything else. For ease of expression I shall continue to use the word "waiver", using it in the present context to signify deliberate action or inaction which has resulted in a changed relationship to which the parties will be held whether or not detriment is actually established.

27. Ordinarily the failure to raise a particular defence will not effect a change in the relationship of parties to litigation. If, for example, liability is in contest, the relationship is not altered by expanding the grounds of that contest. Thus, ordinarily and subject to those considerations relevant to the grant of leave, the pleadings may be amended to enable all matters relevant to that issue to be raised. See, for example, Cropper v. Smith (1884) 26 ChD 700. However, in the present case, the relationship of the parties was altered by the defence originally delivered by the Commonwealth. As earlier mentioned that defence, in terms, admitted negligence. That admission having been made and it not having been

pleaded that the action was statute barred, the relationship between Mr Verwayen and the Commonwealth changed to one in which Mr Verwayen became entitled to a verdict in his favour, subject only to damages being established and assessed. This new entitlement was recognized by the Commonwealth when, on five occasions, it joined in applications for an expedited hearing on the issue of damages. The new relationship was the direct result of the Commonwealth's original defence. And, it is not in issue that the Commonwealth intentionally and with knowledge of the defences available to it delivered a defence admitting liability and raising neither "the combat exercise defence" nor a defence that the action was statute barred. Unless something renders "the combat exercise defence" or the defence that the action was statute barred insusceptible of abandonment, Mr Verwayen is entitled to have his claim determined without intrusion of the issues thereby raised.

28. The starting point of any consideration of whether the defences are insusceptible of abandonment must be s.64 of the Judiciary Act 1903 (Cth) which relevantly provides:

"In any suit to which the Commonwealth ... is a party,
the rights of parties shall as nearly as possible be the
same ... as in a suit between subject and subject."
It was not contended that anything requires that the present matter be determined on any different basis from that applicable in proceedings between subject and subject.

29. The general principle is that a "an individual cannot waive a matter in which the public have an interest": Graham v. Ingleby, per Alderson B. at p 657 (p 279 of ER) referring to Reg. v. Bloxham [1844] EngR 973; (1844) 6 QB 528 (115 ER 197). See also Ross v. Australian Postal Commission (1982) 69 FLR 376, at p 382; Phillips v. Martin, at p 158. Conversely, a person may waive a right that is for his or her own benefit: Great Eastern Railway Co. v. Goldsmid (1884) 9 App Cas 927, at pp 936-937; Toronto Corporation v. Russell (1908) AC 493, at p 500. Where a right is conferred by statute a question may arise whether the statute confers a personal or a public right. See, for example, Ross, at pp 382-383; Park Gate Iron Co., at pp 638-639. A statutory right to plead that an action is statute barred, such as that conferred by s.5 of the Limitation of Actions Act, which bars the remedy rather than the right or the right to invoke a court's jurisdiction, is a personal right. See Kammins, per Lord Diplock at p 881. Cf. Adams v. Chas. S. Watson Pty. Ltd. [1938] HCA 37; (1938) 60 CLR 545, where the issue under consideration was whether a time limitation ousted jurisdiction.

30. From one perspective "the combat exercise defence" asserts a defence deriving from what may be described as an inherently governmental function. However, on proper analysis, the matter thus pleaded does no more than assert that, in the particular circumstances, no duty of care was owed to Mr Verwayen. The right to answer a claim of negligence by the denial of a duty of care is a personal right. Accordingly, both "the combat exercise defence" and the defence that Mr Verwayen's action was statute barred were susceptible of waiver. And being so susceptible, for the reasons earlier given, the Commonwealth is precluded from relying on them.

31. It follows from what has been said that, had Mr Verwayen's reply asserted that the Commonwealth was precluded from denying negligence, Mr Verwayen would be entitled to have his claim determined in a hearing limited to the issue of damages. It may be that an application will be made for leave to amend the reply. Unless such application is made and granted, Mr Verwayen's claim must proceed to a hearing on the issues of negligence and damages as ordered by the Full Court.

32. Although it is not necessary for me to deal with the argument that the object of an estoppel is to avoid detriment and not to make good the assumption on which it is founded, it is convenient that I note my 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. Even so, it may be that an assumption should be made good unless it is clear that no detriment will be suffered other than that which can be compensated by some other remedy. Where the nature or likely extent of the detriment cannot be accurately or adequately predicted it may be necessary in the interests of justice that the assumption be made good to avoid the possibility of detriment even though the detriment cannot be said to be inevitable or more probable than not. On that basis and were the present matter to be determined by reference to the substantive doctrine of estoppel, the mere possibility of increased stress and anxiety to Mr Verwayen would tend in favour of making good the assumption that liability would not be put in issue by the Commonwealth. As that aspect was not fully explored in

argument it is undesirable that I express a concluded view on the matter. However, that aspect aside, the present matter was determined, on the application of the Commonwealth and contrary to the argument made on behalf of Mr Verwayen, on the basis that the issues raised by the pleadings involved no issue of fact for a jury to determine. Were the resolution of this case to depend on whether or not Mr Verwayen could establish detriment over and above that which is appropriately dealt with by an order for costs it would be necessary, at the very least, that he be given an opportunity of making that case.

33. The appeal should be dismissed.

McHUGH J. The Commonwealth of Australia appeals against an order that an action brought against it by Bernard Leonardus Verwayen ("the plaintiff") be remitted for trial by jury on the issues of negligence and damages. The order, made by the Full Court of the Supreme Court of Victoria (Kaye and Marks JJ., King J. dissenting), set aside a judgment made by O'Bryan J. in favour of the Commonwealth. His Honour had entered judgment for the Commonwealth upon the ground that the plaintiff's action was barred by s.5 of the Limitation of Actions Act 1958 (Vict.) ("the Limitation Act"). The issue in the appeal is whether the Commonwealth waived its right to rely on the Limitation Act and its right to rely on a defence that it owed no duty of care to the plaintiff or, alternatively, whether it is estopped from relying on those two defences.
The history of the proceedings

2. In his action the plaintiff claimed damages for personal injury suffered as a result of a collision at sea on 10 February 1964 between H.M.A.S. Melbourne and H.M.A.S. **Voyager**. The action was commenced on 2 November 1984 - over twenty years after the collision. On 14 March 1985, the Commonwealth filed its defence and admitted all the allegations in the statement of claim except the allegation that the plaintiff was injured and had suffered loss and damage. It did not plead that the action was barred by the effluxion of time, as it might have done relying on the Limitation Act. However, by an order made by the Master on 29 May 1986, the Commonwealth was given leave to file an amended defence. The amended defence denied that the collision between the Melbourne and **Voyager** was caused by the negligence of the officers or crew of those ships or by any other officer or servant of the Commonwealth of Australia. Indeed, par.4 alleged that any injury suffered by the plaintiff occurred during the currency of or as a consequence of combat exercises and that consequently the naval personnel participating in the exercise owed no duty of care to the plaintiff. The amended defence also alleged that the plaintiff's action was barred by s.5 of the Limitation Act.

3. On 5 June 1986 the plaintiff delivered his reply which joined issue, denied that par.4 of the amended defence disclosed any defence to the action, and asserted that, if the defence of no duty of care or s.5 of the Limitation Act was otherwise a defence to the action, the Commonwealth "agreed to and did waive any such defence".

4. Before empanelling a jury, O'Bryan J. determined the questions of law raised by the defence of no duty of care and the allegation of waiver upon the basis that the facts relied on in respect of these matters were not in issue or would not be seriously disputed at the trial. His Honour held that the defence of no duty of care was not made out and that neither the doctrine of waiver nor the doctrine of estoppel provided the plaintiff with an answer to the defence based on s.5 of the Limitation Act. Consequently, he entered judgment in the action for the Commonwealth without empanelling a jury.

5. At the trial, counsel for the plaintiff identified three matters upon which he relied to constitute waiver and estoppel. They were:
(1) A letter dated 6 September 1984 from the plaintiff's solicitors

to the Secretary, Department of Defence, together with copies of other letters. The letter of 6 September stated that the plaintiff's solicitors acted on behalf of five named ex-naval personnel including Mr Verwayen. It went on to say:
"These men are in the same position as their shipmate Mr. Robert Palmer of whom we wrote to you on the 4th of July, 1983. You graciously waived the Statute of Limitations as regards Mr. Palmer and also admitted

liability.
...
We request you treat these men the same and waive
the Statute to allow us to proceed on their behalf."
The copy letters enclosed with the letter of 6 September related to another person in respect of whom the solicitor for the Commonwealth had advised the plaintiff's solicitors on 21 November 1983 "that the Commonwealth will not rely on the Statute of Limitations in this action".
(2) A conversation on 25 January 1985, between an employee of the Australian Government Solicitor and the plaintiff's solicitors, in which the employee advised that the Commonwealth proposed to admit liability and waive the Limitation Act in the plaintiff's action.
(3) The delivery of the defence on 14 March 1985 in which liability was admitted and the Limitation Act was not pleaded.

6. Two other matters, which do not seem to have been relied on at the trial, should be mentioned. First, on five occasions, the Australian Government Solicitor joined with the plaintiff's solicitors in applications for an expedited hearing of the claim on the ground that liability was not an issue. Secondly, on 27 November 1985 the Minister Assisting the Minister for Defence wrote to the plaintiff stating, inter alia:

"As you have pointed out, the Commonwealth has admitted
negligence and is not pressing the statutory limitation
period as a defence. Nevertheless, it still expects
claimants to show that they have suffered injury as a result
of the collision between HMAS **Voyager** and HMAS Melbourne,
and to prove the extent of their injuries and resultant
loss, in order to justify an award of damages."
The reasoning of the trial judge and the Full Court

7. The learned trial judge held that waiver "not supported by consideration and not in respect of a valid and subsisting claim is unilateral and revocable at any time". He thought that the waiver relied upon in the present case was unilateral and voluntary and that the Commonwealth was entitled to withdraw the promise not to plead the defences. His Honour, who gave his decision before this Court's decision in Waltons Stores (Interstate) Ltd. v. Maher [1988] HCA 7; (1988) 164 CLR 387 also rejected the claim of estoppel. He did so on the ground, inter alia, that promissory estoppel operates only in the course of an existing contractual relationship.

8. In the Full Court, Kaye and Marks JJ. said that "(t)he law has not recognised nor come to recognise 'waiver' as a concept independent of 'forbearance', waiver agreements, election, estoppel and promissory estoppel". Accordingly, their Honours held that, if the plaintiff was to succeed, he had to rely on estoppel or promissory estoppel. They held that the Commonwealth had led the plaintiff to understand that his claim would be met, that the Limitation Act would not be pleaded and that, to the knowledge of the Commonwealth, the plaintiff had relied on that promise. Their Honours said that "the application of the principles affirmed by the High Court in Waltons Stores to the facts of the present case lead to the conclusion that the respondent is not to be allowed to resile from its promise not to plead the statute". King J. held that there was no procedure whereby a right can be irrevocably abandoned "in the absence of consideration or the presence of estoppel" and that the claim of waiver failed. On the issue of estoppel, his Honour thought that the injustice to the plaintiff arising from the Commonwealth's change of position would be satisfied by "an inquiry into the out-of-pocket costs and expenses" suffered by the plaintiff as the result of that change. Subject to the payment of these sums, he held that the Commonwealth was not estopped.
Waiver

9. In this Court counsel for the plaintiff approached the matter differently from the way in which the majority of the Full Court approached the matter. He contended that there had been a true waiver or abandonment by the Commonwealth of the right to plead the Limitation Act and "that (had) been the

forefront of (his) case all along". He relied on estoppel only as an alternative answer to the defences of the Commonwealth.

10. Most cases which purport to apply the doctrine of waiver are really cases of contract, estoppel or election: cf. Ewart, Waiver Distributed, (1917), at p 4. Thus, for example, in Matthews v. Smallwood (1910) 1 Ch 777, where a lessee had breached the condition in the lease, the question for decision was whether the lessor had abandoned his right of re-entry. Parker J. applied what he called the law of waiver and said (at p 786):

"I think that the law on the subject of waiver is reasonably clear. ... Waiver of a right of re-entry can only occur where the lessor, with knowledge of the facts upon which his right to re-enter arises, does some unequivocal act recognizing the continued existence of the lease."

In Sargent v. AS.L Developments Ltd. [1974] HCA 40; (1974) 131 CLR 634, Stephen J. (at p 646), correctly in my opinion, treated this case as one of election. See also Kammins Co. v. Zenith Investments (1971) AC 850.

11. Nevertheless, there are a number of cases in England and Australia which appear to hold that a party may waive a statutory condition conferred for his or her benefit. At least, some of them cannot accurately be categorised as cases of contract, estoppel or election. An early illustration is Graham v. Ingleby [1848] EngR 92; (1848) 1 Ex 651 (154 ER 277) where it was held that the plaintiff had waived the benefit of a statutory provision requiring a plea of abatement to be verified by affidavit. The defendant's affidavit in support of his plea of abatement was defective. However, by his replication the plaintiff traversed the plea, joined issue and delivered a notice of trial. The defendant then struck out the joinder of issue and delivered a demurrer to the replication. The plaintiff, after an unsuccessful application to set aside the demurrer, obtained two separate summonses for time to join issue on the demurrer. But before the time granted expired, he signed judgment in the action for want of a plea. The Court of Exchequer held that he had waived his right to treat the defendant's plea as a nullity. Parke B. said (at p 656 (p 279 of ER)):

"It follows, that although an affidavit is so defective as to amount to no affidavit, a plaintiff may, if he choose, waive the benefit of his right, and join issue on the plea and go to trial; and if he does so, he cannot afterwards avail himself of the provisions of the statute. So, if he should demur to the plea, he would, in like manner, waive the benefit of the statute. If it were otherwise, the inconvenience would be great ..."

12. Graham v. Ingleby was followed in Park Gate Iron Co. v. Coates (1870) LR 5 CP 634 which involved a statute obliging an appellant to give written notice of appeal and security for costs within ten days. Although the respondent in the case was aware that the appellant had not complied with the statute, he proceeded to settle a special case in concert with the appellant. The Court of Common Pleas held that the respondent had waived his right to rely on the statutory requirement as to notice and the giving of security within ten days. Bovill C.J. said (at p 637):

"The provisions of s.14, that there shall be notice of appeal and security, seem to me more in the nature of procedure and practice, and to have been intended for the benefit of the respondent. It is not a matter with which the public are concerned. If this be so, it falls within the rule that either party may waive provisions which are for his own benefit ... where the provisions of the Act are entirely for the benefit of the respondent, we may hold him able to dispense with their fulfilment."

Brett J. said (at p 639):

"If they are conditions precedent to the jurisdiction of the Court to hear the appeal, it is clear that they cannot be

waived; but if they are mere matters of procedure, and enacted entirely for the benefit of the respondent, this being a civil matter, they might be waived."

13. In Ward v. Raw (1872) LR 15 Eq 83, the defendant appealed against an order made against him but failed to give notice of his appeal within the time required. The parties appeared before a judge to settle a case for the appeal. On appeal, the plaintiff raised a preliminary objection as to the competency of the appeal. Sir Richard Malins V.C. said (at p 85):

"Nothing is more clear to my mind than that the parties, by consenting to have the case settled and signed, have waived the objection as to time."

14. In Ex parte Moore; In re Stokoe (1876) 2 Ch D 802, pursuant to s.24 of the Bankruptcy Act 1869 (U.K.), lessors gave a trustee in liquidation a notice calling on him to disclaim a lease held by the debtor "within the usual time" (that is, 28 days). On the day before the 28 days expired, the lessors wrote to the trustee and asked for a reply to their letter "at (his) earliest convenience". After the 28 days had expired, the trustee applied to the Court for leave to disclaim the lease. The Court of Appeal held that, by asking for a reply "at (his) earliest convenience", the lessors had waived their right to insist on an answer within 28 days. Leave to disclaim was given. However, the case is really one of estoppel as the trustee obviously relied on the statement of the lessors in not answering within 28 days.

15. In Phillips v. Martin (1890) 11 NSWLR 153, the Full Court of the Supreme Court of New South Wales held that a party may waive a statutory right conferred for his benefit. Phillips lodged an application to bring lands under the Real Property Act 1862 (N.S.W.). Within the proper time, Martin lodged a caveat to this application. Consequently, it became the duty of Phillips to state a case for the opinion and direction of the Supreme Court. Martin also had a duty to apply to the Court within three months for an order to restrain the Registrar-General from proceeding until the further order of the Court. Phillips stated his case, but Martin did not obtain an order against the Registrar-General within the specified period. After the expiration of the three-month period Phillips could have called on Martin to show cause why the caveat should not be removed. Instead, Phillips asked that Martin state a case in support of her caveat. In the case, Martin alleged that the two deeds on which Phillips relied were forgeries. These issues were tried before a jury which found the deeds were forgeries. Phillips then applied to the Full Court and subsequently to the Privy Council for a new trial but his applications failed. He then brought a summons for an order that the caveat be removed on the ground that Martin had failed to take action against the Registrar-General as required by the Act. Darley C.J. said (at p 158):

"Here there is abundant evidence of waiver, and it is quite clear that a man may by his conduct waive a provision of an Act of Parliament intended for his benefit. The caveator was not brought into Court in any way until the caveat had lapsed. And now the applicant, after all these proceedings have been taken by him, after, doubtless, much expense has been incurred on the part of the caveator, and after lying by and hoping to get a judgment of the Court in his favour - asks the Court to do that which but for some reasons known to himself he might have asked the Court to do before any other step in the proceedings had been taken. I think he is altogether too late. It is to my mind a clear principle of equity, and I have no doubt there are abundant authorities on the point, that equity will interfere to prevent the machinery of an Act of Parliament being used by a person to defeat equities which he has himself raised, and to get rid of a waiver created by his own acts."

The judgment of the Chief Justice seems to be based on some form of equitable estoppel. His Honour said (at p 157) "we are now sitting as a Court of equity". Innes J. and Foster J. in their judgments referred to Phillips as being "estopped" from taking the point.

16. Phillips v. Martin was approved by the Judicial Committee in Wilson v. McIntosh (1894) AC 129 upon which counsel for the plaintiff in the present case placed much reliance. There the appellant had lodged a caveat against land being brought under the provisions of the Real Property Act 1862 (N.S.W.). More than three months after the lodging of the caveat, the respondent stated and filed a case for the opinion and direction of the Supreme Court. Later, the respondent applied for and obtained an order directing the appellant to state and file a case on her behalf. The appellant did so. No steps were taken by the respondent to obtain the decision of the Court on the questions raised between the parties. Over two years later, however, the respondent sought to have the appellant's caveat removed on the basis that she had failed to take any proceedings within three months of filing of the caveat as required by the Act and that the caveat had consequently lapsed. The Judicial Committee held that, by requiring the appellant to state her case, the respondent had waived his right to rely on the three-month limitation period. After citing the observations of Darley C.J. in Phillips v. Martin, the Judicial Committee said that they agreed with them and thought they applied to the instant case. Their Lordships went on to say (at pp 134-135):

"The respondent in the present case invoked the jurisdiction of the Court to compel the appellant to state her case, and the appellant did so, and no doubt incurred costs in doing so, and all the risk involved in shewing her title. If it be once admitted that an applicant may waive the lapse, it is a question of fact on the circumstances of each case whether there has been a waiver or not."

17. In Toronto Corporation v. Russell (1908) AC 493, a plot of land owned by the plaintiff, an alderman of the Toronto Council, was advertised by the Council for sale for arrears of taxes. After an adjournment of the sale, the land was bought by the Council. The Council, during the adjournment, had advertised its intention to purchase the land if the amount bid was less than the arrears due but it omitted to give the plaintiff a notice in writing to this effect as required by legislation. Some years later, the plaintiff brought an action to set aside the sale on the ground, among others, that he had not received the notice. However, on the day before the land had been advertised for sale, the plaintiff, in his capacity as an alderman, had attended a meeting of the Council in which it was decided that, if the land was not sold for the arrears owing, it would be purchased by the Council at a later sale. The Judicial Committee said (at p 501):

"There is no evidence to shew that the plaintiff, up to a short time before bringing this action, ever complained that he had not received the notice which his counsel now insist was a condition precedent to a valid sale, or that the sale was invalid for any reason. On the contrary, he treated the sale as valid, but mistook the effect of it on his right to redeem. Their Lordships think that, in the absence of all explanation by the plaintiff other than that given in his evidence on discovery, the legitimate inference to be drawn is that he consented to dispense with this notice - that is, he waived it."

The basis of this decision seems to be that, at the meeting when it was decided that the Council would purchase the land if necessary, the plaintiff "had himself joined in" in conferring the power on the Council (at p 499). Accordingly, he waived his right to prior notice of the sale.

18. In Evans Pty. Ltd. v. Hawthorn [1967] VicRp 24; (1967) VR 212, the Full Court of the Supreme Court of Victoria held that a municipality had waived its right to object that a notice of intention to appeal, given by an aggrieved ratepayer, was not in accordance with a section of the Local Government Act 1958 (Vict.). The Full Court said (at p 218) that the requirement of notice was intended to ensure that the municipality should not be taken by surprise. It was open to the municipality, however, to elect to proceed without the information which the notice must give.

19. In Bock v. Don-Rex Furniture (Qld) (1981) Qd R 326, relying on Wilson, Sheahan J. held that the Workers' Compensation Board had waived its right to insist on strict compliance by the plaintiff with a section of the Workers' Compensation Act 1916 (Q.). However, his Honour expressly found that the

plaintiff suffered detriment which was a finding unnecessary to support a claim of waiver but essential to support a claim of estoppel.

20. The principle that statutory conditions enacted solely for the benefit of individuals and not for the public can be waived has also been recognised in this Court on a number of occasions: see Sandringham Corporation v. Rayment [1928] HCA 13; (1928) 40 CLR 510, at pp 527, 537; Davies v. Davies [1919] HCA 17; (1919) 26 CLR 348, at p 365; Brown v. The Queen [1986] HCA 11; (1986) 160 CLR 171, at pp 178, 208. In each of those cases, however, the defence of waiver failed on the facts or because the right was one enacted for the benefit of the public and not for the benefit of individuals.

21. In my opinion, the cases to which I have referred do not establish any principle which supports the claim of waiver in the present case. Ex parte Moore and Bock, and perhaps Phillips v. Martin and Wilson v. McIntosh, are really cases of estoppel. Indeed, in Kammins Co. v. Zenith Investments Lord Diplock thought that all cases of the type to which I have referred were better categorised as estoppel cases. His Lordship said (at pp 882-883):

"'Waiver' is a word which is sometimes used loosely to describe a number of different legal grounds on which a person may be debarred from asserting a substantive right which he once possessed or from raising a particular defence to a claim against him which would otherwise be available to him. We are not concerned in the instant appeal with the first type of waiver. This arises in a situation where a person is entitled to alternative rights inconsistent with one another. If he has knowledge of the facts which give rise in law to these alternative rights and acts in a manner which is consistent only with his having chosen to rely on one of them, the law holds him to his choice even though he was unaware that this would be the legal consequence of what he did. He is sometimes said to have 'waived' the alternative right, as for instance a right to forfeit a lease or to rescind a contract of sale for wrongful repudiation or breach of condition; but this is better categorised as 'election' rather than as 'waiver'. It was this type of 'waiver' that Parker J. was discussing in Matthews v. Smallwood (1910) 1 Ch 777.
The second type of waiver which debars a person from raising a particular defence to a claim against him, arises when he either agrees with the claimant not to raise that particular defence or so conducts himself as to be estopped from raising it. This is the type of waiver which constitutes the exception to a prohibition such as that imposed by section 29(3) of the Landlord and Tenant Act, 1954, and other statutes of limitation. The ordinary principles of estoppel apply to it."

22. Some of the cases which debar "a person from raising a particular defence to a claim against him", however, stand outside the categories of election, contract and estoppel. They are sui generis. They are cases where a statute has conferred a right on A, subject to the fulfilment of a condition for the benefit of B, and B has waived the condition by taking the next step in the course of procedure without insisting on A fulfilling the condition. In my opinion, the true basis of the decisions in these cases is that, where the existence of a statutory right depends upon the fulfilment of a condition precedent, a person entitled to insist on the fulfilment of that condition may dispense with its compliance unless it is enacted for the benefit of the public, and that person will be held to have waived compliance with the condition if he or she knowingly takes or acquiesces in the taking of a subsequent step in the course of procedure laid down by the statute after the time for the other person to fulfil the condition has passed. These cases are also, to a certain extent, anomalous. They should be strictly confined so as not to conflict with the more established doctrines of election, contract and estoppel.

23. The present case, however, is far removed in nature and principle from the various cases which have given effect to the principle of waiving a statutory condition. Section 5 is not a condition precedent to the obtaining or maintaining of a statutory right by the plaintiff. Nor is the common law right of the plaintiff to sue the Commonwealth subject to the statutory condition that he commence his action within the period set by s.5 of the Limitation Act. There is, of course, a fundamental difference between a true statute of limitation, such as s.5, which bars stale claims and a limitation period annexed by a statute to a right which it creates. In the latter class of case, the limitation period will generally be of the essence of the right: see Australian Iron and Steel Ltd. v. Hoogland [1962] HCA 13; (1962) 108 CLR 471 at pp 488-489. It is not a condition precedent to the right but part of it. However, neither is a true statute of limitation a condition precedent to the right which it bars. It is a plea in confession and avoidance of that right and not a condition precedent to its exercise. Accordingly, the plaintiff's common law right to bring the present action was not subject to any condition precedent that it be exercised within the period specified by s.5 of the Limitation Act.

24. The deliberate act of the Commonwealth in not raising the Limitation Act or, if it matters, renouncing the defence based on that Act is not enough to attract the principle of waiver enshrined in the cases to which I have referred. That principle has nothing to say about a case where a party has done no more than consciously refuse to plead a defence or a cause of action. If, having decided not to plead a cause of action or defence, a party then seeks to amend his or her pleading before verdict, the right to amend will be governed by the principles expounded in such cases as Leotta v. Public Transport Commission (N.S.W.) (1976) 50 ALJR 666; 9 ALR 437 and Ketteman v. Hansel Properties (1987) AC 189. If the party seeks to raise the defence or cause of action after verdict, the right to amend will be governed by the principles expounded in cases such as Suttor v. Gundowda Pty. Ltd. [1950] HCA 35; (1950) 81 CLR 418 and Coulton v. Holcombe [1986] HCA 33; (1986) 162 CLR 1. In neither case, however, will the deliberate decision not to raise the point by itself be a fatal bar to the grant of a subsequent amendment or the right to raise the defence or cause of action, and this will be so even if the party seeking to amend had previously announced his or her intention not to raise the point. In Adams v. Chas. S. Watson Pty. Ltd. [1938] HCA 37; (1938) 60 CLR 545, this Court allowed a party to an appeal to raise a point which he had expressly conceded in the court below. Latham C.J. said, at p 548:

"The court is of the opinion that the objection should be overruled. It is entirely a question of law. I refer to George Hudson Ltd. v. Australian Timber Workers' Union [1923] HCA 38; ((1923) 32 CLR 413, at p 426), per Isaacs J., where he says: 'In Ex parte Markham ((1869) 34 JP 150) the Court of Queen's Bench (Cockburn, C.J. and Blackburn, Mellor and Lush JJ.) held that a fatal objection in law may be taken in the appellate court, though not noticed before the justices, the condition being that it could not be cured by further evidence.' The principles there expressed by Isaacs J. appear to apply completely to this case. As Mr Ashkanasy has said, it is a matter which may be taken into account in considering the question of costs, but that will depend upon the view which the court takes of the whole matter."

25. In Lang v. Australian Consolidated Press Ltd. (1970) 2 NSWR 408, the Court of Appeal of New South Wales held that a trial judge erred in leaving a defamatory imputation to the jury even though counsel for the defendant had conceded at the trial that the imputation was open to the jury to find. This Court refused special leave to appeal against the order of the Court of Appeal: (1970) 124 CLR 681.

26. Adams and Lang decide, therefore, that after verdict a party may raise a point that he has conceded in the court below. They deal with the conscious decision of counsel not to raise a point of law. It is difficult to see how they can be reconciled with the claim of "waiver" in the present case.

27. In the present case, the Supreme Court allowed the Commonwealth to amend its defence to plead the Limitation Act defence notwithstanding previous statements made on its behalf to the effect that the defence would not be pleaded. The facts relied on by the plaintiff in his reply of "waiver" provided no

answer in point of law to that defence once it was raised. Consequently, the Supreme Court was correct in holding that the reply of "waiver" was no answer to the defence based on s.5 of the Limitation Act.

28. It necessarily follows from these reasons that the reply of "waiver" was also no answer to the defence based on "no duty of care".

Estoppel

29. The alternative ground upon which the plaintiff relied was that of estoppel. His counsel contended that common law and equitable estoppel are now unified. Reliance was placed on what was said by Mason C.J. in Foran v. Wight [1989] HCA 51; (1989) 64 ALJR 1 at p 12; [1989] HCA 51; 88 ALR 413 at p 430. See also Deane J. in Waltons, at pp 451-452. However, it is unnecessary to decide that point in this case: I do not think that the doctrine of common law estoppel advances the plaintiff's case any further than does the doctrine of equitable estoppel. Both common law and equity applied the principle of estoppel in pais. They both held that, if a person made a false representation to another about a past or present fact and the representee acted upon it, the representor was not allowed to assert the untruth of that representation: Jorden v. Money (1854) 5 HLC 185 at p 210 (10 ER 868 at p 880); Waltons, at pp 447-448. Accordingly, so far as any representation by the Commonwealth as to present or past facts is concerned, the common law doctrine of estoppel does not advance the plaintiff's case any further than the equitable doctrine does. But more importantly, in the present state of authority, the common law doctrine of estoppel does not, but the equitable doctrine of promissory estoppel does, extend to representations or assumptions concerning the future: Legione v. Hateley [1983] HCA 11; (1983) 152 CLR 406 at pp 432-435; Waltons at pp 398-399, 459. Hence any representations or assumptions concerning the future can be dealt with, and on the traditional view can be dealt with only, by equitable estoppel. Even if "there is no acceptable reason why the doctrine of promissory estoppel should be seen, in a fused system, as exclusively equitable", as Deane J. asserted in Waltons (at p 448), the equitable rules must prevail over the common law rules "concerning the same matter": Supreme Court Act 1986 (Vict.), s.29.

30. 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 common law will not permit "an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations": Grundt v. Great Boulder Pty. Gold Mines Ltd. [1937] HCA 58; (1937) 59 CLR 641 at p 674. In so far as the assumed fact gives rise to a cause of action or alters the legal relationship between the parties, it does so because of the operation of the general law on the assumed fact either alone or in conjunction with other facts. Equity, like the common law, also will not permit an unjust departure from an assumption of fact which one person has caused another to adopt or accept for the purpose of their legal relations: Thompson v. Palmer [1933] HCA 61; (1933) 49 CLR 507 at p 547. But 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. It will be unconscionable for a party to insist on his or her strict legal rights if that party has induced the other party to assume that a different legal relationship exists or will exist between them, if he or she knew that the other party would act or refrain from acting on that assumption and if, as a result, the other party will suffer detriment unless the assumption is maintained. Hence, to avoid detriment to the party who has been induced to act or refrain from acting on that assumption, equity will require the parties to act on the basis of the relationship assumed by the innocent party until the detriment is removed or the innocent party otherwise compensated. The equitable right of the innocent party will take precedence over the strict legal rights of the party estopped. And because the doctrines of promissory and proprietary estoppel create equitable rights, they operate differently from the common law doctrine of estoppel in pais. The purpose of both the common law and equitable doctrines is "to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting": Grundt at p 674. But because the common law doctrine of estoppel in pais is a rule of evidence, it operates to preclude the party estopped from denying the assumption of fact whenever it is necessary to do so for the purpose of determining the rights of the parties. On the other hand, because the equitable doctrines create rights, they preclude the party estopped from denying the assumption of fact (or law) only as long as the equitable right exists. Once the detriment has ceased or been paid for, there is nothing unconscionable

in a party insisting on reverting to his or her former relationship with the other party and enforcing his or her strict legal rights.

31. What will be required to satisfy the equity which arises against the party estopped depends on the circumstances: Waltons, per Mason C.J. and Wilson J. at p 404. Often the only way to prevent the promisee suffering detriment will be to enforce the promise. But the enforcement of promises is not the object of the doctrine of equitable estoppel. The enforcement of promises is the province of contract. Equitable estoppel is aimed at preventing unconscionable conduct and seeks to prevent detriment to the promisee. As Brennan J. pointed out in Waltons, "in moulding its decree, the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct": at p 419. Consequently, a court of equity will only require the promise or assumption to be fulfilled if that is the only way in which the equity can be fulfilled: per Brennan J. at p 416. In Silovi Pty Ltd v. Barbaro (1988) 13 NSWLR 466 at p 472, Priestley J.A, writing for an unanimous Court of Appeal, said: "The remedy granted to satisfy the equity ... will be what is necessary to prevent detriment resulting from the unconscionable conduct."
The claim of estoppel fails

32. Despite the argument for the plaintiff to the contrary, I do not think that the present case involved any representation as to present or past facts. The Commonwealth did not represent that it had no right to plead the Limitation Act. At its highest what it did on 25 January 1985 and later was to represent that it would not plead the statute as a defence or take any steps in the future to amend its defence. If the plaintiff is to rely on estoppel, he must rely on promissory estoppel. In Waltons, Brennan J. set out (at pp 428-429) the matters which he thought a party must establish to prove a case of promissory estoppel. His Honour said:

"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 would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant's property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs."

33. For the purposes of the present case, I am content to adopt his Honour's analysis of the elements of equitable estoppel and I shall assume in favour of the plaintiff that the facts of this case establish the first requirement specified by his Honour. But even when that assumption is made in favour of the plaintiff, I do not think that he has made out a case of equitable estoppel.
(i) The "no duty" point

34. I do not think that it is possible to infer that the plaintiff was induced to continue his action and incur unnecessary costs or that he will otherwise suffer detriment by reason of the promise that the Commonwealth would admit liability. The terms of the statement of claim, which was issued before any assurance by the Commonwealth, and the course of events since the Commonwealth changed its mind suggest that the plaintiff would have commenced and continued his action even if the liability of the Commonwealth had been put in issue from the beginning. Moreover, there is no suggestion that the plaintiff has been prejudiced in the conduct of his case by the change of position on the part of Commonwealth. The claim of estoppel in respect of the defence of "no duty of care" must fail.
(ii) The Limitation Act point

35. In my opinion, the claim of estoppel in respect of the Limitation Act must also fail. Ordinarily, a statement that a party does not intend to rely on a particular defence will not give rise to an estoppel. One reason is that it is difficult for a party to rely on a voluntary and unilateral promise as giving rise to an estoppel "because the promisee may reasonably be expected to appreciate that he cannot safely rely upon it": Waltons, per Mason C.J. and Wilson J. at p 406. Another reason is that, if the representation is confined to the party's present intention, it cannot found a promissory estoppel unless the representation, expressly or implicitly, also makes it clear that that party does not intend to change his or her mind in the future: cf. Waltons, per Deane J. at p 450. A statement by a party that he or she does not intend to rely upon a particular cause of action or defence cannot be regarded as anything more than a statement of present intention. Pleadings may be amended, with the leave of the court, right up to verdict. Hence, ordinarily a party cannot reasonably rely on a statement that his or her opponent will not be relying on a particular defence or cause of action to found an estoppel. Still less can the filing of statement of claim or statement of defence which omits to raise a particular cause of action or ground of defence give rise to an estoppel. The present case, however, is exceptional. First, the statement was made against the background that, in the action brought by Mr Palmer, the Commonwealth had admitted liability and not sought to rely on the Limitation Act defence. Secondly, the statement of the Commonwealth on 25 January 1985 was made in answer to a request to "waive the Statute". The request was made before the plaintiff commenced his action. Thirdly, the Commonwealth confirmed the statement of 25 January by not pleading the Limitation Act and by not denying negligence. Fourthly, the Commonwealth joined in a number of applications for an expedited hearing of the issues after the defences were not raised. Finally, the Minister Assisting the Minister for Defence wrote to the plaintiff on 27 November 1985 pointing out that the Commonwealth "has admitted negligence and is not pressing the statutory limitation period as a defence". In these circumstances, the inevitable conclusion to be drawn is that, by 27 November 1985 at the latest, the Commonwealth was representing that it had no intention then or in the future of filing defences denying negligence or pleading the Limitation Act.

36. Accordingly, it is proper to infer that the plaintiff assumed from at least 27 November 1985 that his relationship with the Commonwealth as plaintiff and defendant was one in which no issue arose between them concerning the Limitation Act. I think that it is also proper to infer that the plaintiff continued his action, and incurred a liability for legal costs which he would not otherwise have incurred, because of the assurance which the Commonwealth gave concerning the Limitation Act, and that the Commonwealth knew of these matters. It follows, therefore, that, if the Commonwealth can rely on the Limitation Act to defeat the plaintiff's action, he will suffer detriment.

37. The plaintiff led no evidence of any particular detriment that he has suffered or will suffer by reason of being induced to alter his position as the result of the conduct of the Commonwealth. The only detriment that one can infer is that of unnecessarily incurring legal costs between the date of the assurance by the Commonwealth that it would not plead the statute and the date when the Commonwealth changed its policy. That detriment to the plaintiff can be avoided by an order for costs. It is possible that the plaintiff has suffered more worry and stress as the result of the assurance of the Commonwealth than he would otherwise have suffered if the Commonwealth had not given the assurance which it did. But the plaintiff led no evidence to this effect, and I do not think that it can be inferred. In any event, even if the plaintiff had sought to make out a case along these lines, his equity would be satisfied by an award of compensation for that additional worry and stress and would not require that the Commonwealth be estopped from relying on the Limitation Act. However, counsel for the plaintiff did not seek to make out any case for compensation on this basis. Nor did he seek an inquiry as to out-of-pocket costs and expenses as suggested by King J. He relied on estoppel as absolutely precluding the Commonwealth from relying on the Limitation Act. But, for the reasons I have given, such a claim cannot succeed. Any equity in favour of the plaintiff arising from the conduct

of the Commonwealth can be satisfied by means less drastic than an order precluding the Commonwealth from relying on the Limitation Act.
Order

38. The appeal should be allowed, the order of the Full Court set aside and the order of O'Bryan J. restored.

ORDER

Appeal dismissed with costs.
