

Equitable Estoppel and the Censure of Unconscionable Conduct: Can this principle be extended to hold politicians accountable for their unfulfilled political promises?

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*That this nation under God shall experience a new freedom.
That Government of the people, by the people and for the
people shall not perish from the earth.*

Abraham Lincoln: Gettysburg Address

Introduction

Arguments for legal rules holding people to undertakings made outside contractual or other formal legal relationships have until recently been rejected by the courts for fear of establishing dangerous precedents that could have a number of unintended consequences. However, in *Waltons Stores (Interstate) Ltd v Maher*¹ (*Waltons*) and subsequent decisions, the courts have recognised that judicial intervention may be appropriate to censure unconscionable conduct. This article analyses the *Waltons* principle and subsequent developments. It then applies the principle to political promises made by election candidates to people living in remote parts of Papua New Guinea who act to their detriment in reliance on those promises. Some explanation of the cultural and political background of Papua New Guinea is provided to enable an appreciation of the context within which these promises are made. With regard to the legal context and the appropriateness of the application of the principle, it is argued that while the principles of common law and equity developed since Papua and New Guinea's independence in 1975 no longer automatically form part of her legal system and are therefore not binding, they can still have persuasive force. The persuasive value of the *Waltons* principle arises through its ability to censure unconscionable conduct

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¹ *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

towards people who for different reasons find themselves in positions of vulnerability. This means that the *Waltons* principle can be a valuable tool in promoting the goals of equality and participation that are central to Papua New Guinea's *Constitution*.

Equitable Estoppel and Promises

Promises or undertakings made by one person to another person form an essential part of many human relationships. An important criterion in determining the integrity of a person is to consider whether or not he/she will fulfil their promise or be faithful to their undertaking. There is a moral obligation to fulfil a promise or undertaking. But is a promise or undertaking legally binding? The answer is usually 'no' if the promise or undertaking has not been accompanied by consideration. This means that if a person promises/undertakes to perform a task for another, the person cannot be held to that promise/undertaking unless he/she has been given something in cash or in kind for performing that task. In other words, there must be a price paid for the fulfilment of the promise/undertaking to make it legally binding. This is the doctrine of consideration in its simplest form. Consideration is central to the law of contract, and it is one of the key hallmarks for determining whether or not an agreement is legally binding.

The requirement that a promise be accompanied by consideration for it to be legally binding is well illustrated by the 19th century case of *Foakes v Beer*² (*Foakes*). In *Foakes*, the defendant owed the plaintiff £2,050, a large sum of money in those days. Foakes was unable to pay the full amount immediately and put a proposal to Beer, the plaintiff, that he would pay her £500 immediately and £150 every six months until the amount had been repaid in full. Beer agreed to this proposal and promised that if the proposed schedule of payments was adhered to, she would not initiate any legal action against him. The money owing was paid in accordance with the agreed schedule. However, Beer then demanded interest on the loan and commenced an action to enforce this demand. Foakes' defence was that he had relied upon the promise Beer had made not to initiate any action against him. The House of Lords held that the promise could not be legally recognised, as it had not been accompanied by the common law requirement of

² *Foakes v Beer* (1884) 9 App Cas 605.

consideration. Lord Blackburn expressed his dismay at not being able to give legal recognition to Beer's promise. This decision has been criticised ever since.³

The decision in *Foakes* demonstrated how the common law's rigid commitment to the requirement of consideration to make a promise enforceable could cause an injustice in situations where a person had in good faith relied upon a promise unaccompanied by consideration. In response to this unsatisfactory state of affairs, the equity courts developed the principle of promissory/equitable estoppel.

The principle of promissory/equitable estoppel, although having its origins in *Hughes v Metropolitan Rly Co*,⁴ was formally established by Denning J (as he then was) in *Central London Property Trust Ltd v High Trees House Ltd*⁵ (*High Trees*). The issue in *High Trees* concerned the lease of a block of flats in London. The lease was for a 99-year period at a rental of £2,500 per year. However, during World War II, especially during the Battle of Britain, many people left London and so it was not possible to achieve full occupation of the block of flats. As a response to this, in 1940, the landlord halved the rental. The reduced rental continued until the end of the war in 1945, when the flats became fully occupied again. The landlord then gave notice that the full amount of the rental would be reimposed.

The issue before Denning J was whether the full rental could be reimposed. He held that the undertaking to reduce the rental was binding in equity. However, that undertaking was effective only while the conditions giving rise to the reduced occupancy and the reduced rental remained in existence.⁶ Once wartime conditions ceased and the flats became fully occupied again, the full rental could be reimposed.⁷ However, the landlord could not claim arrears for the period when the rental had been halved. The lessee having acted in reliance on the

3 Note especially the comments of Denning LJ in *D and C Builders Ltd v Rees* [1966] 2 QB 617 (Court of Appeal).

4 *Hughes v Metropolitan Rly Co* (1877) 2 App Cas 439.

5 *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 (Denning J).

6 *High Trees*, note 5, at 135.

7 *High Trees*, note 5, at 135.

landlord's promise to reduce the rental for that period, the promise was legally binding.

In Denning J's view, if one party to a contract made a promise to the other party that the strict conditions of the contract would not be imposed, and the other party acted in reliance on that promise, then the promise should be enforced despite the fact it was unaccompanied by consideration. This was an appropriate way for common law and equity to complement each other. Not to uphold such a promise would result in the relying party suffering an injustice. This would offend against equity, which focuses upon upholding fairness and justice. This was Denning J's basic explanation of the principle of promissory/equitable estoppel.

In the cases following *High Trees* the courts, to ensure that the central principles of contract law were not undermined, placed a number of qualifications on this principle. Five qualifications were seen to be of importance. Three of the qualifications were set out in *Ajayi v R T Briscoe (Nigeria) Ltd*.⁸ First, for the promisor to be held to her/his promise it is essential that the promisee has altered her/his position in reliance on the promise.⁹ Secondly, the promisor can retract the promise provided that reasonable notice is given of the retraction.¹⁰ Thirdly, the promise not to impose the strict terms of the contract becomes absolute if the promisee cannot resume fulfilling the strict terms and conditions of the contract. The third qualification complements the second: that is, while the promise may be retracted in certain circumstances, it may not be retracted if it would be unreasonable to do so.¹¹ The fourth qualification was established in *Combe v Combe*.¹² Lord Denning held that, within the contractual situation, promissory estoppel could not establish a separate cause of action: it could only be used to hold a party to its promise. The final qualification was set out in *D and C Builders Ltd v Rees*.¹³ This case, another decision of the Court of Appeal, held that for a promise not to

⁸ *Ajayi v R T Briscoe (Nigeria) Ltd* [1964] 3 All ER 556 (Privy Council).

⁹ *Ajayi v R T Briscoe (Nigeria) Ltd*, note 8, at 559.

¹⁰ *Ajayi v R T Briscoe (Nigeria) Ltd*, note 8, at 559.

¹¹ This qualification was discussed in *W J Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189 (Court of Appeal). Its full implications remain to be considered.

¹² *Combe v Combe* [1951] 2 KB 215 (Court of Appeal).

¹³ *D and C Builders Ltd v Rees*, note 3.

impose the strict terms and conditions of a contract to be legally recognised it must be given freely and not under any duress.

The extension of the principle

As discussed, the courts have imposed certain restrictions on the application of the principle of promissory/equitable estoppel. This reflects the desire of the courts to ensure that the application of the principle does not undermine the law of contract, in particular the doctrine of consideration. However, these restrictions meant there were still a number of fact situations that were left without a just solution. This was contrary to equity which will not allow a person to suffer a wrong without a remedy. The realisation of this led the courts to cautiously extend the principle to undertakings or representations made outside the contractual situation. Some of the cases dealt with proprietary estoppel and some with promissory estoppel. This discussion adopts the position of Deane J in *Commonwealth v Verwayen*¹⁴ (*Verwayen*) that the different titles given to the application of estoppel in various situations all contain the same core principle: “to preclude departure by the [promisor] from the assumed state of affairs if the departure would, in all the circumstances, be unconscionable.”¹⁵ The principle was first extended to the field of representations relating to interests in property. There are a number of cases where this has occurred, but the extension of the principle is perhaps best illustrated by *Inwards v Baker*.¹⁶ In this case, a father purchased a bungalow for his son, assuring him that he could remain living there for as long as he desired. The title to the property remained with the father. Subsequent to the death of his first wife, the father married a woman by the name of Inwards who bore him two children. When the father died, his second wife, now the executrix of his estate, attempted to evict the son from the bungalow. Legal proceedings ensued. The Court of Appeal, presided over by Lord Denning, held that the father’s undertaking to his son created an equity in the son’s

¹⁴ *Commonwealth v Verwayen* (1990) 170 CLR 394.

¹⁵ *Verwayen*, note 14, at 440.

¹⁶ *Inwards v Baker* [1965] 2 QB 29 (Court of Appeal).

favour.¹⁷ Thus, the principles of justice and fairness were sympathetic to the son's situation. It was further noted that, in reliance on his father's promise, the son had spent a considerable amount of money improving the property. This strengthened the equity in favour of the son. Once the equity had been established, it was then necessary to determine how it could be satisfied. The court held that the best way to satisfy this equity was to allow the son to remain living in the house for as long as he wished.¹⁸

In *Inwards v Baker* there had been no contractual agreement between the father and son, only an informal promise between two close relatives. Yet the Court of Appeal was prepared to uphold this promise to ensure a just outcome.

Another significant case in the gradual extension of promissory estoppel to non-contractual situations was *Crabb v Arun District Council*¹⁹ (*Crabb*). Crabb owned a block of land. For the purposes of access, he required a right of way through a front section of land owned by the Arun District Council (the Council). Crabb met with a representative of the Council and was given an assurance (at least by implication) that the right of way would be granted. Subsequent to this meeting, the Council erected a fence with gates at the boundary of its section and Crabb's section. This action clearly provided Crabb with a right of way. However, some time later the Council removed the gates and erected a fence. The Council then informed Crabb he would be granted a right of way at a cost of £3,000. Crabb refused to pay and commenced an action against the Council attempting to hold them to their undertaking to grant him a right of way.

The court was again considering an undertaking made outside any contractual agreement. Further, Crabb was attempting to use estoppel to establish a cause of action. When the matter came before the Court of Appeal, Denning LJ questioned this but then proceeded to say:

[T]here are estoppels and estoppels. Some do give rise to a cause of action and some do not. In the species of estoppel

¹⁷ Creating "an equity" means the basic principles of equity require some intervention to rectify an injustice.

¹⁸ *Jones v Jones* [1976] 1 WLR 438 and *Pascoe v Turner* [1979] 1 WLR 431 had similar fact situations and similar outcomes.

¹⁹ *Crabb v Arun District Council* [1975] 3 All ER 865 (Court of Appeal).

called proprietary estoppel, it does give rise to cause of action.²⁰

This signified a departure from Denning LJ's original approach as stated in *Combe v Combe*.²¹ But again, it reflects the flexibility of equity. Had the plaintiff, Crabb, not been permitted to initiate proceedings, there would have been no opportunity for judicial consideration and intervention. The Court of Appeal was prepared to hold that Crabb and the Council's representative came away from their meeting with the understanding that a right way would be granted to Crabb. That understanding was reinforced by the Council erecting a fence with gates at the boundary of its section and Crabb's section. There had been an indirect undertaking which had been justifiably relied upon. Lord Denning was prepared to extend the application of estoppel to situations where:

[S]hort of an actual promise, if a party, by his words and conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights, knowing or intending that the other party will act on that belief and does so act, that again will raise an equity in favour of the other party, and it is for the court to say in what way the equity will be satisfied.²²

The words exchanged at the meeting, and the subsequent conduct of erecting a fence with gates, led the plaintiff to believe that he would be granted a right of way without requiring registration. The Council's infidelity to this assurance, which was relied upon by Crabb, created an equity in his favour. As Scarman LJ noted, the equity arose through the unconscionable conduct of the Council. Failure to censure such unconscionable conduct would result in an injustice to Crabb. Further, once an equity has been established, it is necessary to determine the extent of the equity and how the equity can best be satisfied.²³ The considerable extent of the equity in this case was apparent from the

²⁰ *Crabb*, note 19, at 871.

²¹ *Combe v Combe*, note 12.

²² *Crabb*, note 19, at 877.

²³ *Crabb*, note 19, at 880.

fact that the Council's action in closing off access to Crabb's block of land had rendered what was supposedly a commercial section of land inactive for a considerable period of time. This had resulted in financial loss to Crabb.²⁴ The court held that the best way to satisfy the equity was to grant Crabb the right of way without requiring him to pay any fee to the Council.

Crabb extended the principle of estoppel to a situation where one party indirectly leads another party to believe that it will not enforce its legal rights. In Papua New Guinea, in *PNG Ready Mixed Concrete Pty Ltd v The State, Utula Samana and Samson Kiamba*,²⁵ this principle was used to establish the rights of people living in squatter settlements. Basically, the court accepted the argument that if people move onto government or customary land and establish houses and other facilities on them without any objection being raised by the owners, this creates an equity in favour of the settlers. This equity increases with the passage of time, provided the owners continue to raise no objection, and the settlers continue to spend money, time and energy in developing their living quarters.

In the cases discussed thus far, it can be seen that the courts thought it appropriate to enforce promises made to and relied upon by other parties in situations where it was unconscionable for the promisor to renege from the promise. Unconscionability, and the need to be faithful to promises/undertakings made to and relied upon by others, are the two common themes connecting all the situations in which promissory/equitable estoppel has been applied. *Crabb* laid the foundations, enabling the courts to extend the application of estoppel to voluntary promises in certain situations. This extension was further realised in *Waltons*.²⁶

Waltons Stores (Interstate) Ltd v Maher

Waltons concerned an agreement between Maher, a businessman, and *Waltons Stores (Interstate) Ltd* (*Waltons*), a major retail business. The agreement was that Maher would lease land to *Waltons*. Before

²⁴ *Crabb*, note 19, at 880.

²⁵ *PNG Ready Mixed Concrete Pty Ltd v The State, Utula Samana and Samson Kiamba* [1981] PNGLR 396.

²⁶ *Waltons Stores (Interstate) Ltd v Maher*, note 1.

executing the lease agreement, Waltons required that the existing building on the land be demolished and replaced by a 14,000 square feet building that would become a major retail outlet. Waltons required an input into the design of the new building.²⁷

The parties and their legal representatives held detailed discussions, and various recommendations were made. However, a formal lease had yet to be finalised and signed. In November 1983, believing the finalisation and signing of the lease were a mere formality, Maher demolished the existing building and commenced the construction of a new building which Waltons had participated in designing.

On 19 January 1984, when the new building was 40 per cent completed, Waltons informed Maher that it no longer intended to proceed with the lease agreement.²⁸ Waltons believed that as it had not formally signed a lease it could withdraw from the agreement without being legally liable for any contractual breaches. It appeared that Waltons had been having second thoughts about the project for some time. Despite this, it had remained silent while Maher undertook major construction work on the new building.

Maher commenced legal proceedings against Waltons. Ultimately, the proceedings came before the High Court of Australia. The court had to give the matter careful consideration as it was being asked to extend the principle of equitable estoppel still further. Maher submitted that the statement by Waltons' lawyers that, subject to certain minor amendments to the lease agreement everything was in order, coupled with allowing Maher to proceed with the erection of the new building, amounted to an assurance that the lease agreement would be formally signed. Maher had acted upon that assurance to his detriment. The decision not to proceed amounted to unconscionable conduct on the part of Waltons, and judicial intervention was justified. As Mason CJ and Wilson J stated in their joint judgment:

But [Maher] ask[s] us to drive promissory estoppel one step further by enforcing directly in the absence of a pre-existing

²⁷ *Waltons Stores (Interstate) Ltd v Maher*, note 1, at 393.

²⁸ *Waltons Stores (Interstate) Ltd v Maher*, note 1, at 395.

relationship of any kind a non-contractual promise on which the representee has relied to his detriment.²⁹

The High Court accepted this submission. The following quote from the joint judgment of Mason CJ and Wilson J summarises the court's reasons for doing so:

[Waltons'] inaction, in all the circumstances, constituted clear encouragement or inducement to [Maher] to continue to act on the basis of the assumption which [he] had made. It was unconscionable for [Waltons], knowing that [Maher] was exposing [himself] to detriment by acting on the basis of a false assumption, to adopt a course of inaction which encouraged [Maher] in the course [he] had adopted. To express the point in the language of promissory estoppel [Waltons] is estopped in all the circumstances from retreating from its implied promise to complete the contract.³⁰

It is important to consider the High Court's reasons for further extending the principle.

In determining whether or not promissory/equitable estoppel should be further extended, the court referred to judicial statements in two important cases on estoppel. First, Denning J in *High Trees* said that estoppel should be treated as a wide-ranging doctrine operating outside the pre-existing contractual relationship.³¹ Secondly, in *Amalgamated Property Co v Texas Bank*, Robert Goff J commented: "Of all doctrines, equitable estoppel is surely one of the most flexible."³² Thus, as a principle of equity law, estoppel was able to mitigate the rigors of the common law.

Chief Justice Mason, and Wilson and Brennan JJ, formed the view that the doctrine of equitable estoppel could be extended to the

²⁹ *Waltons Stores (Interstate) Ltd v Maher*, note 1, at 400.

³⁰ *Waltons Stores (Interstate) Ltd v Maher*, note 1, at 407-408.

³¹ *High Trees*, note 5, at 134-135.

³² *Amalgamated Property Co v Texas Bank* [1982] QB 84 (Robert Goff J) at 103.

enforcement of voluntary promises in certain circumstances.³³ Namely, where one party makes a promise to another party that something will either happen or not happen, the other party acts in reliance on that promise, the promise is not kept, and the relying party is negatively affected. However, in their view, two more elements are required to justify judicial intervention. First, the party making the promise must intend the other party to rely upon it, and the promise must be intended to affect the legal relations between the parties. Secondly, the party making the promise must be aware that the relying party will be negatively affected if the promise is not kept. Making a promise to a person that something will happen or not happen, knowing that the person will act in reliance on the promise, and then failing to be faithful to that promise, is unconscionable conduct. This unconscionable conduct justifies the intervention of the courts. As Mason CJ and Wilson J stated in their joint judgment:

Equity comes to the relief of such a plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption.³⁴

Justice Brennan put it in this way:

The object of the equity is not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or to abstain from acting thereon.³⁵

Unconscionability justifies judicial intervention as it enables the courts to uphold justice by censuring unconscionable conduct. However, this does not apply to every type of voluntary promise. The promise must be intended to affect the legal relations between the parties.³⁶

33 *Waltons Stores (Interstate) Ltd v Maher*, note 1, at 406 per Mason CJ and Wilson J, at 423-424 per Brennan J.

34 *Waltons Stores (Interstate) Ltd v Maher*, note 1, at 404.

35 *Waltons Stores (Interstate) Ltd v Maher*, note 1, at 423.

36 *Waltons Stores (Interstate) Ltd v Maher*, note 1, at 421 per Brennan J.

In their joint judgment, Mason CJ and Wilson J went a step further by referring to the influential judgment of Oliver J in *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd*³⁷ (*Taylor Fashions*) in which he “remarked that what gave rise to the need for the court to intervene was the defendant’s unconscionable attempt to go back on the assumptions which were the foundation of their dealings.”³⁸ Thus, not only must the promise affect the legal relations between the parties, but also it must be about something that is very significant to them, especially to the party relying upon the assumption. On the facts of *Waltons*, the assumption was certainly very significant to Maher.

The courts have not defined exactly what is meant by “unconscionable conduct”. However, it can be said that an “unconscionable act” occurs when one party makes a promise to another party intending and knowing that the other party will act in reliance on it, the promise is deliberately unfulfilled, and the party responsible is aware that the relying party will suffer a material disadvantage.³⁹ Justice Deane in *Verwayen*⁴⁰ took this a step further when he said that the departure from the promise involves taking advantage of another’s special vulnerability or misadventure in a manner that is unreasonable and oppressive, hence making it an affront to the ordinary standards of fair dealing.⁴¹

How then does one determine whether or not the person making the promise intended the other party to rely on it? Lord Scarman in *Crabb* saw it as necessary to consider the conduct and relationship of the parties.⁴² This observation can be built upon through the use of Denning LJ’s intelligent bystander test: Would the hypothetical intelligent bystander observing the interaction (conduct and relationship) of the parties form the opinion that the promisor intended the promise/representation to be relied upon by the other party?⁴³

³⁷ *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 (Oliver J).

³⁸ *Waltons Stores (Interstate) Ltd v Maher*, note 1, at 403-404.

³⁹ “Material disadvantage” means some tangible disadvantage assessable by a court.

⁴⁰ *Verwayen*, note 14.

⁴¹ *Verwayen*, note 14, at 441.

⁴² *Crabb*, note 19, at 880.

⁴³ *Oscar Chess Ltd v Williams* [1957] 1 All ER 325 (Court of Appeal).

Once judicial intervention is justified then adopting Scarman LJ's position in *Crabb*, it is necessary to determine how the plaintiff can be awarded justice through the censuring of the unconscionable conduct. It may be by making good the promise or representation, or it may not. The courts must tailor the remedy to fit the circumstances of the particular case. However, as Brennan J observed in *Waltons*, in moulding a remedy the court must go no further than is necessary for the prevention of the detriment flowing from the unconscionable conduct.⁴⁴ Similarly, Mason CJ held in *Verwayen* that there must be a proportionality between the remedy and the detriment that the remedy seeks to avoid.⁴⁵ This is only reasonable as it is the unconscionable conduct that justifies the judicial intervention.

The extension of the doctrine of promissory/equitable estoppel in *Waltons* has been applied by the courts in other non-contractual situations. In *Verwayen* the plaintiff, a member of the Royal Australian Navy, was injured in 1964 when two warships were engaged in combat exercises.⁴⁶ In 1984, the plaintiff commenced proceedings against the Commonwealth Government claiming damages for negligence. The government made it clear to the plaintiff that it would not plead a *Statute of Limitations* defence, and would not contest liability.⁴⁷ In 1986, when the assessment of the plaintiff's damages was about to be determined, owing to a change in policy the government sought leave to amend its defence to rely on the limitation period, and to contest liability.

The High Court by a majority held that the government, by giving its undertakings not to plead the limitation period and not to contest liability, had created an assumption in the mind of the plaintiff that this was its position. The purpose of the undertakings was to enable the expeditious assessment of the amount of compensation the government should pay.⁴⁸ The plaintiff, acting in reliance on this assumption, had proceeded to prepare his case, and had expended time, money and energy in the process. Part of the expenditure of energy

44 *Waltons Stores (Interstate) Ltd v Maher*, note 1, at 426.

45 *Verwayen*, note 14, at 395.

46 *Verwayen*, note 14.

47 Nearly 20 years having elapsed before the plaintiff commenced the civil proceedings, the limitation period was an important issue.

48 *Verwayen*, note 14, at 448.

included the stress, anxiety and inconvenience that are an inevitable part of any litigation. Experiencing this, and then having to deal with the added stress of the government's last-minute change of position, had a detrimental effect on the plaintiff, including on his health.⁴⁹ To allow the government to depart from the assumption it had intentionally created in the mind of the plaintiff, who had then acted in reliance on it, would be to condone unconscionable conduct.

In *W v G*,⁵⁰ Hodgson J in the Equity Division of the Supreme Court of New South Wales had to consider a dispute between two women who had lived together in a relationship. The relationship was volatile and there had been a number of separations. During one of their periods of cohabitation the couple had agreed to have children by artificial insemination, and this process produced two children. The man who provided the sperm did so on the basis that he would have no responsibility for the children. After both children were born the couple finally separated. The plaintiff initiated proceedings claiming that the defendant, who had subsequently inherited a large amount of money from her father's estate, had given a clear undertaking that she would participate in the children's upbringing as a parent and would contribute to the financial provisions for them. Justice Hodgson accepted the plaintiff's claim. One of the causes of action advanced by counsel for the plaintiff was that of equitable estoppel as established in *Waltons*. Counsel submitted that the plaintiff had acted in reliance on the undertaking given by the defendant that she would share in the parenting and financial support of the children.⁵¹ Further, the defendant had intended the plaintiff to so act in reliance. As a result of the defendant's failure to honour her undertaking, the plaintiff had suffered a detriment, namely, she now faced the onerous task of raising and providing for the two children by herself. In Hodgson J's view, it would be unconscionable for the defendant to be allowed to maintain her position that she had no responsibility for the children's upbringing.⁵²

These two decisions clearly illustrate that the principle established in *Waltons* can be applied to different situations. The crucial aspect of the *Waltons* principle is the detrimental effect that the failure to be

⁴⁹ *Verwayen*, note 14, at 449.

⁵⁰ *W v G*, (1996) 20 Fam LR 49.

⁵¹ *W v G*, note 50.

⁵² *W v G*, note 50.

faithful to the promise/undertaking has upon the party who acts in reliance on it. Once this principle is established, it can be appreciated that there are a number of situations in which it could be applied.

It is possible to strengthen the justification for judicial intervention to censure unconscionable conduct in certain circumstances. In the situations under consideration, the party making the representation is in a position of power while the party relying upon the representation is in a position of vulnerability.⁵³ This, it can be argued, places a fiduciary obligation upon the party in a position of power to act in the best interests of the vulnerable party by making good the representation. This issue was discussed in *Mabo v Queensland (No 2)*⁵⁴ (*Mabo*). The judgment of Toohey J in *Mabo* focused upon the fiduciary obligation. He noted that a fiduciary obligation can arise in a variety of circumstances as a result of a particular relationship,⁵⁵ and supported this argument by quoting Mason J in *Hospital Products Ltd v United States Surgical Corporation*:

The critical feature of [fiduciary] relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a practical or legal sense. The relationship between the parties is therefore one which gives the fiduciary special opportunity to exercise the power or discretion to the detriment of that person who is accordingly vulnerable to abuse by the fiduciary in his position.⁵⁶

Justice Toohey, in acknowledging what Mason J said, noted it is the power to affect the interests of a person adversely that gives rise to the duty to act in the interests of that person.⁵⁷ Applying this principle to the relationship between the government and the Aboriginal people, the government is in a position of power and the Aboriginal people are in

⁵³ See the observation of Deane J in *Verwayen*, note 14.

⁵⁴ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

⁵⁵ *Mabo*, note 54, at 200 per Toohey J.

⁵⁶ *Hospital Products Ltd v United States Surgical Corporation* (1984) CLR 41 at 68 and 96-97.

⁵⁷ *Mabo*, note 54, at 203.

a position of vulnerability. The government can act in a manner that either advances the interests of the Aboriginal people or undermines them. Equity requires the Crown to act in the best interests of the Aboriginal people.⁵⁸ It needs to be noted that *Mabo* focused on the interests of the Meriam people in their customary land. It could be said, therefore, that the obligation arose out of a proprietary interest and thus was linked to traditional fiduciary obligations. However, Toohey J made the point that since a fiduciary obligation concerns one party's ability to affect the legal position of another, the general presumption that the Crown will respect the rights of Indigenous peoples occupying colonised territory indicates that the government will take care when making decisions potentially detrimental to Aboriginal rights.⁵⁹ This approach indicates a general obligation to Aboriginal people extending beyond their customary title to land.

Support for this approach can be found in the New Zealand case of *New Zealand Maori Council v Attorney-General*,⁶⁰ which concerned the relationship between the Crown and the Maori people resulting from the Treaty of Waitangi. The Court of Appeal observed that the relationship between the Crown and the Maori people created responsibilities analogous to fiduciary duties. Again, this arose because of the power of one party (the Crown) to affect the vulnerable position of another party (the Maori people). The manner whereby the obligation to act in the best interests of the Indigenous people is exercised depends upon the policy or decision under consideration. The flexibility of equity would provide clear guidance as to how this obligation should be exercised.

The *Waltons* principle justifies judicial intervention to censure unconscionable conduct. The fiduciary obligation requires a party in a position of power to act in the best interests of a vulnerable party over whom the powerful party has influence.

It will be argued that these legal principles and obligations can be applied to a particular and significant relationship in Papua New Guinea, namely, the relationship between a Member of Parliament and her/his constituents. The focus of this argument will be the political

⁵⁸ *Mabo*, note 54, at 203.

⁵⁹ *Mabo*, note 54, at 201.

⁶⁰ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (Court of Appeal) at 664.

promises a candidate makes to electors prior to an election. It will then be argued that it is appropriate to apply the *Waltons* principle within the Papua New Guinea jurisdiction.

The extension of the principle of estoppel to certain unfulfilled political promises in Papua New Guinea

Papua New Guinea gained independence on 16 September 1975. One of the challenges it faced was to bring together in one nation a diversity of cultures, evidenced by over 800 languages in a single nation. The aim was to achieve unity in diversity.

To guide the nation on its journey to unity and development, the Papua New Guinea Parliament adopted a very detailed *Constitution*. One of the key underlying themes extending throughout the *Constitution* is that of equality. As Kearney DCJ observed in *Supreme Court Reference No 2 of 1982*:

The Constitution is permeated by an underlying principle of free and equal participation by its citizens.⁶¹

The importance of equality and participation is emphasised strongly in the National Goals and Directive Principles placed at the beginning of the *Constitution*. These set out the basic goals and directions which should be given priority. While not being directly justiciable, the National Goals and Directive Principles are intended to guide the government in formulating its different policies.⁶² In Goldring's view, they represent a political statement.⁶³ There are five National Goals

⁶¹ *SCR No 2 of 1982* [1982] PNGLR 214.

⁶² The whole issue of justiciability is an interesting one. While s 25(1) states that the National Goals and Directive Principles are not directly justiciable, s 25(2) requires government officials to give effect to them as far as they can within their respective powers. Further, s 25(3) states that the National Goals and Directive Principles should be used to interpret legislation. Section 55 of the *Constitution* gives all citizens the right to equality, but provides no definition of equality. The definition is in the National Goals and Directive Principles.

⁶³ Goldring J, *The Constitution of Papua New Guinea*, The Law Book Company, 1978, p 33.

and Directive Principles: integral human development; equality and participation; national sovereignty and self reliance; conservation of natural resources and the environment; and the use of Papua New Guinean forms of social, political and economic organisation. The goal of particular importance for this discussion is the second goal: equality and participation. This states, among other matters, that equal access to an equal quality of services should be accorded to all members of Papua New Guinean society. Further, people should be encouraged to participate freely and creatively in all aspects of society, and no person should be deprived of this opportunity through the unconscionable actions of people in positions of power and authority.

Active participation requires the attainment of a certain level of education, certain financial resources, and access to the use of a basic infrastructure enabling effective transport and communication with certain sectors and groups. Education enables people to undertake reading and research to gain an understanding of what is happening in their society, and to critically assess events and the positions taken by different leaders. Economic resources enable active participation in the economy, and economic participation also requires an adequate infrastructure and communications network.

These are all important matters when one considers the role of leadership in Papua New Guinean society. Leadership in Papua New Guinea, as in other Melanesian societies, is achieved rather than ascribed.⁶⁴ Remembering that in Melanesian society the emphasis is on the group rather than the individual, traditionally people gained a leadership position through the accumulation of wealth and resources, and being able to share these among people in their village or clan.⁶⁵ This in return created obligations between those people and the leader. One of the most important obligations was loyalty. In traditional Papua New Guinean village society people were governed by custom, and life followed a regular pattern: people knew what to expect. To a considerable extent social change has undermined that traditional element of certainty. The majority of Papua New Guineans live a semi-subsistence life style within their village and clan networks. Some

⁶⁴ ‘Ascribed’ leadership basically refers to hereditary leadership.

⁶⁵ “[T]he emphasis is on the group rather than the individual” implies that the focus of people is on an interwoven set of relationships, and maintaining balance and harmony within those relationships.

villages are close to the main centres and have access to infrastructures of varying quality. Others are situated in remote areas that have no road network, and whose schools and health centres are inadequately managed, have difficulty attracting staff, and have inadequate facilities. People from these remote areas have had sufficient contact with modern society to realise that they are being ignored by their government.⁶⁶ People who have achieved a certain level of education usually leave these remote areas to find employment in the urban areas. This results in a lack of leadership in the remote areas to assist people to progress effectively to achieving a balance between a traditional and 'modern' lifestyle.

People living in these remote areas, not having had the opportunity to gain an adequate education or to participate actively in the economy, are placed in a very vulnerable situation. They are unable to objectively access discussions and negotiations they may have with business people, government officials, and politicians or intending politicians. They can easily be exploited.⁶⁷

Elections in Papua New Guinea occur every five years. As noted, people living in remote areas usually receive little or no attention and assistance from government officials. Then, during the election campaign, the various candidates travel to different areas and make extravagant but convincing promises to the people. For example, a candidate says: "I promise to build a road if you vote for me." Often the candidates arrive by helicopter. They have some affiliation with or blood ties to the people in the area. Because the candidates exhibit material wealth, and present themselves in an effective and convincing manner, these neglected people see some hope arising out of the

⁶⁶ For example, in 1988 the author visited Laguni in the Highland Province of Enga. Laguni was a twelve hours walk from the nearest government station, which in turn was a four hours drive from the Provincial Capital. The author was accompanied by officers from the prison service. People in Laguni observed that this was the first time they had been visited by government officials since independence in 1975.

⁶⁷ One of the most common areas in which this occurs is in logging activities. National and transnational corporations mill timber on customary land, and the customary landowners are paid inadequate compensation. By virtue of the *Forestry Act 1991*, the government is very much a part of this exploitation, because through the Forestry Department it negotiates the logging agreements with the transnational corporations.

political promises. The people are prepared to accept the candidates' leadership, and their promises.

This encourages villages to block vote for a particular candidate. Because so many candidates stand for one electorate, obtaining the block vote from one or two villages may be sufficient to enable a candidate to be successful.⁶⁸ However, once the candidate is elected to parliament, little or no thought is given to the promise made to the people in the remote regions of the electorate. The promises are not fulfilled. People have voted for a named candidate in reliance on the fact that a particular event, the building of a road, will occur in the future. The event does not occur: the road is not built. However, people often act to their detriment in reliance on the building of the road. For example, they might have relocated their house or business. Can the principle developed in *Waltons*, and extended in later decisions, be applied to political promises made by successful candidates in the Papua New Guinea elections?

The following are examples of unfulfilled election promises made during the 1997 election campaign in Papua New Guinea.

Example One

In an island part of a particular electorate the candidate for election, who was the sitting member, visited the people on the island during the election campaign. The island was in need of an airstrip. In fact, there seemed to be a consensus amongst the inhabitants that this was the island's greatest need at that time. The airstrip was needed to gain easy access to the mainland, and to transport people urgently requiring medical care to hospital. The candidate/member, being aware of this need, promised that an airstrip would be built on a specific location on the island.

This encouraged many people to vote for the candidate/member, and he was re-elected. In reliance on his undertaking that the airstrip would be built at a particular location, the people cleared coconut and coffee plantations in that area. The clearing of the land involved a great deal of work, and also meant sacrificing a significant amount of income owing to loss of the sale of coconuts and coffee. However, some months afterwards, the people were told

⁶⁸ Sometimes more than 30 candidates stand for one seat.

that the airstrip would not proceed because there were no funds available for such a project.

Example Two

In a particular area of another electorate, owing to the fact that a large river flows through it, flooding can occur during heavy rains. Over the river was a bridge linking about 50 villages and several hundred thousand people to the outside world. During heavy flooding in February 1996, the bridge was washed away. As a result, vehicles could not enter this area, and the people were unable to take their produce to town for marketing. Medical supplies could not be transported to aid posts, and the owners of trade stores could not obtain new goods for their stores. In short, many people depended on the bridge as their link to the outside world: following its destruction they were in a very difficult situation.

One of the candidates in the 1997 election, being aware of the significance of the bridge to these people, promised that if he was elected a new bridge would be built within three months. In reliance on his promise all of the people in one particular village voted for him, and a large number of people in other villages also voted for him. He was elected.

Following his election, and in reliance on the fulfilling of his promise, the people in his electorate did the following:

- (1) A number of people planted vanilla gardens that would be ready for harvesting in four years time. (The erection of the bridge meant they would be able to transport the produce to the market.)
- (2) Three public servants, thinking they would make more money producing vanilla than working as public servants, left their jobs and focused on their vanilla gardens.
- (3) People planted gardens to grow vegetables and other produce that could be transported to the main markets.
- (4) An Aid Post Orderly declined a promotion to a hospital to remain in the area and revive one of the Aid Posts after the new bridge was built.

In short, people acted in various ways in reliance on the promise. However, the new bridge was not built and the people were left with a major problem relating to access. Many people had acted in reliance on the promise to their detriment.

Example Three

In another electorate, the road linking a significant number of people to the nearest district centre was in a deplorable state. Its condition was so bad that the drivers of Public Motor Vehicles refused to use it.⁶⁹ Also, culverts and bridges needed replacing.

One of the candidates in the election promised that if he was elected the road would be rebuilt, and it would follow a more appropriate route. In response, the people in the area agreed to support him, and he was successful. People then acted in reliance on his promise to rebuild the road. Two people relocated their trade stores to the proposed new route, and two market houses were also relocated along the proposed new route for the road. Also, anticipating that the relocated road would make market access easy, people prepared larger food gardens. However, the road was neither repaired nor relocated. Once again, people had acted to their detriment in reliance on the promise of the candidate turned member.

Example Four

Another area had a very low annual rainfall. Consequently, people living in a village at the mouth of a river had limited access to fresh water. On the many occasions when their drinking water was exhausted, they had to travel long distances up river to collect fresh supplies. One of the candidates, aware of the plight of the people in this village, promised that if he was elected he would install water tanks for the houses in this village. The villagers, spurred on by this promise, voted for the candidate, and after he was elected they erected platforms on which to install the water tanks. However, they never arrived.

⁶⁹ Public Motor Vehicles are privately owned vehicles that are the equivalent of buses in Australia and New Zealand.

These are four examples of unfulfilled political promises made during the 1997 election campaign. Many people acted to their detriment in reliance on these promises. As discussed previously, the nature of Papua New Guinean society and leadership lends itself to people, especially those in remote areas, being susceptible to political promises. People in remote areas receive little, if any, attention from the authorities: government representatives rarely visit these areas. The one exception is at election time. Then, a candidate in the election visits these neglected people. The candidate often arrives in a helicopter: the people are impressed: they regard the candidate as a leader. The candidate shows interest in the peoples' plight: the candidate makes a promise: the promise is made with emotion and conviction. No one else has shown any interest in the people. Therefore, they are prepared to vote for the candidate in return for the candidate's promise. After the candidate is elected, the people act in reliance on the promise.

The result of this type of behaviour from candidates has been that people in remote areas have been exploited by the election process. The vulnerable (the voters) have been exploited by the powerful (the candidates). By being unfaithful to their political promises, the candidates turned members have detrimentally affected the lives of these people.

The question is: Can the *Waltons* principle, amalgamated with the concept of fiduciary obligation, be applied to assist these people?

Summary of the *Waltons* principle

The *Waltons* principle, with its subsequent developments, may be summarised as follows:

- A party in a position of power made a promise/undertaking to another party in a vulnerable position.
- The promise/undertaking concerned something significant to the party to whom it was made.
- The promise/undertaking concerned the legal relations between the parties.
- The party who made the promise/undertaking intended the other party to rely upon it.

- The party who made the promise/undertaking failed to honour it.
- The party to whom the promise/undertaking was made acted in reliance on the promise/undertaking to its detriment.

If these conditions are met then judicial intervention is justified to censure the unconscionable conduct of the party who made the promise/undertaking, and to grant the party to whom the promise/undertaking was made an appropriate remedy.

Application of the *Waltons* principle to the examples of unfulfilled political promises

In the examples of unfulfilled political promises made during the 1997 election campaign, the candidates made the promises intending the people to whom they were made to rely on them. The promises were clearly made to improve the candidates' chances of election success. The promises were also made to affect the legal relationship between the candidates and the people. The candidates wished to become Members of Parliament, and the people would then be their constituents. Indeed, it could be argued that the candidates' promises constituted the foundation of the dealings between the parties, thus satisfying Oliver J's criterion in *Taylor Fashions*. But for those promises, the people would not have voted for the candidates.

In all of the examples, the promises made concerned something significant in the lives of people to whom they were made. In the airstrip example, the people sorely needed an airstrip to improve their links with the mainland. In the bridge example, the bridge was vital to connect a large number of people to the outside world. Again, in the road example, many people's access to the outside world was being restricted by the deplorable state of the road. In the water tank example, during the frequent dry spells in that area people had to travel long distances to obtain fresh drinking water.

When considering whether the *Waltons* principle can apply to these examples, perhaps the most crucial issue to determine is whether the parties to whom the promises were made *acted to their detriment in reliance on the promises*. In the airstrip example, the people cleared coconut and coffee plantations to make way for the building of the airstrip. They acted to their detriment in reliance on the candidate's

promise that if he was elected an airstrip would be built on a specific location on the island. In the bridge example, people planted vanilla gardens and vegetable crops, three public servants left their employment to focus on their vanilla crops, and an Aid Post Orderly declined a promotion in order to restore the standard of the Aid Post once medicines could be transported in again. These people acted to their detriment in reliance on the candidate's promise that if he was elected a new bridge would be built within three months. In the road example, trade stores and market houses were relocated, and many people prepared larger food gardens. They acted to their detriment in reliance on the candidate's promise that if he was elected the road would be rebuilt, and it would follow a more appropriate route. In the water tank example, the villagers erected platforms on which to install the water tanks. The villagers acted to their detriment in reliance on the candidate's promise that if he was elected he would install water tanks for the houses in the village.

Also relevant to each of these four examples is the fiduciary obligation owed by the candidates to the people to whom the promises/undertakings were made. Both Mason and Toohey JJ have made the point that a fiduciary obligation arises when one party is able to exercise its power or discretion to the detriment of another party who is vulnerable to abuse by the party in the stronger position.⁷⁰ Clearly, the candidate turned member is in a position to negatively affect the interests of the people. The candidates made promises/undertakings to these people, and in exchange the people gave the candidates their vote. Believing that, once elected, the candidates would fulfil their promises/undertakings, the people acted accordingly. The promises/undertakings were not fulfilled. The candidates turned members used their power and discretion to abuse the interests of the people who had placed their faith in them. This is unconscionable conduct for a leader and representative: it needs to be censured. Cases following *Waltons* have held that the principle can be applied to a party unreasonably changing its position in civil proceedings,⁷¹ and in a matter relating to parental responsibility.⁷² These decisions lend further support to the argument that the *Waltons* principle can be applied to hold politicians

⁷⁰ *Mabo*, note 54, at 201-203 per Toohey J.

⁷¹ *Verwayen*, note 14.

⁷² *W v G*, note 50.

to promises/undertakings made to constituents in the situations outlined. Arguably, judicial intervention is appropriate in such situations.

What type of judicial intervention is most appropriate?

In *Crabb* Scarman LJ stated that, when determining whether any form of judicial intervention was appropriate in situations concerning unfulfilled promises/undertakings, it was necessary to consider the conduct and relationship between the parties in question.⁷³ Did the conduct of one party towards another party raise an equity in favour of the other party? Did the unjust or unconscionable action of one party to another party in a particular relationship raise a concern in the mind of the court that the other party had been treated unjustly? Once an equity was established, it was necessary to determine its extent, and then to decide the appropriate relief to satisfy the equity.⁷⁴ In other words, how extensive is the injustice to the other party, and how can the court best act to remedy the injustice?⁷⁵ At this point, the observation of Mason CJ that there must be proportionality between the remedy granted and the detriment suffered is clearly relevant.⁷⁶

In *Inwards v Baker*, the son was permitted to remain in the house for as long as he wished. In *Crabb*, the plaintiff was granted the right of way without having to incur any fees. Does this mean that in the examples of unfulfilled political promises the appropriate relief is to hold the candidates turned members to their political promises? In some cases such an order by a court might be appropriate, while in others it might not. The appropriate relief would depend upon the particular circumstances of each case. Section 155(4) of the *Constitution* gives the National and Supreme Courts wide powers to make orders that are appropriate to do justice in the particular case.⁷⁷

⁷³ *Crabb*, note 19, at 990 per Scarman LJ.

⁷⁴ *Crabb*, note 19, at 990 per Scarman LJ.

⁷⁵ *Crabb*, note 19, at 990 per Scarman LJ.

⁷⁶ *Verwayen*, note 14, at 395.

⁷⁷ In *Aundak Kupil v The State; Kauke Kensi v The State* [1983] PNGLR 350 at 383, Bredmeyer J interpreted s 155(4) as granting jurisdiction to the court to tailor its

Equitable Estoppel and the Censure of Unconscionable Conduct:
Can this principle be extended to hold politicians accountable
for their unfulfilled political promises?

In relation to the bridge and the water tanks, the appropriate orders would be that the bridge be built and the water tanks be installed. However, regarding the airstrip and the road, it could well be that there were no funds available to fulfil the promises. Or, if funds could be found, they may have to be diverted from an essential project for another group of people. To make an order assisting one group of innocent people to the detriment of another such group would offend against equity and good conscience. Therefore, the remedy has to be carefully considered and tailored appropriately. With the road, an appropriate order may be that the member be responsible for relocating and re-establishing the trade stores and market houses. Also, it would be appropriate to order that a grader should regularly perform maintenance work on the road, and that the potholes and culverts be repaired. With the airstrip, the member would need to ensure that the coconut and coffee plantations were replanted and, perhaps, a better boat service provided for the island. As Brennan J stated in *Waltons*, the order of the court should do no more than provide redress for the detrimental reliance.

It is also necessary to consider the wider implications of such decisions. The purpose of the judicial intervention is twofold. First, the intervention seeks to give appropriate relief to people in vulnerable situations who have been detrimentally affected through their reliance on the promises/undertakings. Secondly, it is to make candidates consider the importance and significance of the promises/undertakings they make to people who have already suffered much deprivation. Such promises/undertakings should only be made if candidates intend to fulfil them, and only if, after being elected, they will be able to fulfil them. In this way, political candidates will gradually learn to appreciate the importance of being faithful to the promises/undertakings they make, and that they must not use such promises/undertakings to manipulate people to advance their own interests. They will learn to appreciate that such conduct is unconscionable and, in the best interests of the country, will be censured.

It needs to be emphasised that the author is not advocating that this development of estoppel to hold political candidates to their promises/undertakings can be applied in all circumstances. Rather, in

remedies to fit the circumstances of a particular case, thereby ensuring that the deserving party received its full rights under the law.

the examples given, because of their special circumstances the people were in a vulnerable position. Their vulnerability resulted from not having received the government assistance and services they are entitled to under Papua New Guinea's *Constitution*. Their vulnerability was exploited by people in positions of power. Judicial intervention would serve to censure this exploitation.

Is the *Waltons* principle appropriate and applicable law in Papua New Guinea?

Principles of common law and equity developed prior to 16 September 1975 became part of the underlying law of Papua New Guinea. This is provided by the Second Schedule of the *Constitution*, and the *Underlying Law Act 2000*. The principles that laid the foundation for *Waltons* were all established prior to 1975 in cases such as *Inwards v Baker* and *Crabb*. In *PNG Ready Mixed Concrete Pty Ltd v The State, Utula Samana and Samson Kiamba*, Miles J held the principles established in *Crabb* were part of the underlying law of Papua New Guinea.⁷⁸

Principles developed in post-1975 cases such as *Waltons* do not automatically form part of the underlying law. However, if subsequent cases develop legal principles established prior to 1975 in a manner appropriate to the circumstances of Papua New Guinea, it is only proper that some regard be given to them and their possible application. They can be said to have persuasive force.

The persuasive value of the *Waltons* principle can be strengthened by emphasising that it focuses on the need to censure unconscionable conduct in order to protect the vulnerable party in a relationship. This is fully in accord with the basic principles underlying the *Constitution*. The Second National Goal and Directive Principle emphasises not only the importance of equality, but also the importance of all people actively participating in all aspects of Papua New Guinean society. In particular, subsection 8 of the Second National Goal and Directive Principle states that people should be able to pursue their own interests in a manner consistent with the common good, and no one should be denied this opportunity because of the predominant position of

⁷⁸ *PNG Ready Mixed Concrete Pty Ltd v The State, Utula Samana and Samson Kiamba*, note 25.

another person.⁷⁹ Section 55 of the *Constitution* guarantees equality, and s 55(2) provides for special laws and provisions to be enacted and developed to protect people in vulnerable positions in society.⁸⁰ Finally, s 158(2) requires the courts to give paramount consideration to the dispensation of justice when interpreting the law. The *Waltons* principle seeks to prevent people in dominant and powerful positions from undermining the position of those who rely on their promises/undertakings. Hence, the principle is fully in accord with the Second National Goal and Directive Principle: it protects the vulnerable. Finally, by allowing courts to censure unconscionable conduct, the *Waltons* principle encourages the courts to give paramount consideration to the dispensation of justice.

The *Waltons* principle builds in a logical manner on principles of equity that were developed prior to 16 September 1975. Further, the *Waltons* principle is not only totally consistent with the important principles of the *Constitution*, but also it provides a tool to give effect to those principles. It is submitted that the application of this principle in Papua New Guinea will assist in realising some of the goals set out in the *Constitution*.

Conclusion

Conduct whereby a party in a dominant position exploits the weaker position of another party is unconscionable and should be censured. This type of conduct occurs in many different situations in Papua New Guinea. It occurs in various commercial transactions. It occurs when groups and organisations use their power to promote decisions that ignore the detrimental effect they will have on vulnerable people and groups. It occurs when political candidates exploit the vulnerability of

⁷⁹ The Second National Goal and Directive Principle states at (8):
[We accordingly call for] means to be provided to ensure that any citizen can exercise his personal creativity and enterprise in pursuit of fulfilment that is consistent with the common good, and for no citizen to be deprived of this opportunity because of the predominant position of another.

⁸⁰ Section 55(2) of the *Constitution* states:
Subsection (1) does not prevent the making of laws for the special benefit, welfare, protection or advancement of females, children and young persons, members of underprivileged or less advanced groups or residents of less advanced areas.

elements of the voting population by making extravagant promises to them in exchange for their votes: promises that the candidates have neither the intention nor the means of fulfilling. People who act in reliance on these promises are affected in a negative manner when the promises are not fulfilled. In the interests of justice, this unconscionable conduct on the part of candidates turned politicians needs to be censured. The principle developed in *Waltons*, and the extension of the fiduciary obligation as set out in *Mabo*, can be amalgamated to enable judicial intervention to censure such unconscionable conduct. Equity is stretching out its hands in an appropriate manner to give relief to the vulnerable.