CIRCUMSCRIBING ELECTION: REFLECTIONS ON THE TAXONOMIZATION AND MENTAL COMPONENTRY OF AFFIRMATION OF A CONTRACT BY ELECTION

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I INTRODUCTION AND PROSPECTUS

It not frequently occurs in legal contractual settings that one contracting party is confronted with a choice between holding the other contracting party to a valid and subsisting contractual relationship *inter se* ('affirming' the contract), and exercising an inconsistent legal power permitting that relationship to be put to an end ('disaffirming'[1] the contract).[2] When that happens, the other party becomes vulnerable to having his or her existing legal position altered (indeed abolished) by the unilateral decision of the party so confronted and empowered. The existence of such vulnerability thus necessitates that a choice, one way or the other, eventually, and permanently, be made; for it is undoubtedly unfair and inconvenient that the other party should be 'faced with the dilemma of uncertainty'[3] as to where she or he stands vis-à-vis the first party,[4] especially in commercial affairs, and that she or he should thereby be exposed to procrastination or,

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1 Unless context dictates otherwise, I shall use 'disaffirm', or any of its derivations ('disaffirmation', 'disaffirmatory', 'disaffirmance', etc), as a neutral umbrella term to refer to whatever is the opposite of 'affirm' ('affirmation', 'affirmatory', 'affirmance', etc). This is simply to avoid possible confusion over the sometimes distinct concepts of 'termination', 'cancellation', 'discharge' and 'rescission'.

2 Generally it matters not what triggered the necessity of such a choice between maintaining the contractual relationship and ending it (eg, repudiation, serious breach, misrepresentation, non-fulfilment of a contingent condition, act of duress, undue influence or unconscionable dealing); compare *Peyman v Lanjani* [1985] 1 Ch 457, 494 (per May LJ). All that matters is that the party confronted with the choice cannot insist on the continued performance of the contract while at the same time asserting an uninterrupted power to determine the contract; see *Public Trustee v Pearlberg* [1940] 2 KB 1, 9 (per Slesser LJ), quoting *Gray v Fowler* (1873) LR 2 Ex 249, 272 (per Kelly CB).

3 *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch 12, 30 (per Robert Walker LJ).

4 See *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 656 (per Mason J): 'No doubt this rule [that an election, once it is communicated, cannot be recalled] has been adopted in the interests of certainty and because it has been thought to be fair as between the parties that the person affected is entitled to know where he stands and that the person electing should not have the opportunity of changing his election and subjecting his adversary to different obligations'.

worse, opportunism at the hands of the party empowered to choose.[5] Contract law's long-standing aversion to one-sided promises generally explains why the power-holding party should be disqualified from an ability to speculate protractedly or indefinitely on the future progress of the contract at the other party's risk or possible disadvantage.[6]

One way in which the common law regulates this power–vulnerability relationship is through its election doctrine.[7] That doctrine works first by 'requiring'[8] that a choice ('election') be made between the jural alternatives confronting the party entitled to elect,[9] and second, in the case of affirmatory elections at least,[10] by providing that once the choice is made, and unambiguously communicated to the non-electing party, it results, by operation of law, in the *permanent* loss of the right to pursue the alternative that was *not*

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5 This obtains even for non-electing parties who have been guilty of fraud, breach of fiduciary duty, duress or cynical repudiation, as they too are entitled to act with confidence as to where they stand after notification of a firm choice by the electing party. Compare John Skirving Ewart, *Waiver Distributed among the Departments Election, Estoppel, Contract, Release* (1917) 108: 'for, admitting that the defrauder is not entitled to much sympathy, yet his conduct affords little reason for saying that the other party can retain an indefinite option between approbating and reprobating the transaction', and E Allan Farnsworth, *Changing Your Mind: The Law of Regretted Decisions* (1998) 188: 'Even the victim of fraud is expected to deal fairly in this way with the one who has perpetuated the fraud'. The law will no doubt be slower, in cases where the relevant disaffirmation entitlement has been generated by serious wrongdoing on the part of the non-electing party, to find or deem an election to affirm in the circumstances. It might do this, for example, by requiring 'more convincing' proof of affirmation in such cases. However, no separate principle need be seen to be involved here, as tribunals of fact can simply apply the well-known forensic maxim that, in applying the standard of proof, all evidence is to be weighed in the light of the gravity of the issue to be decided (eg, *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, 266 (per Morris LJ)).

6 See *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1, [364] (per Finn J), accepting the views of Farnsworth, ibid 184–185.

7 I shall assume throughout that the relevant disaffirmation power, whatever its source (statute, contract, the general law), is not qualified by any special requirement (under the relevant statutory provision or contract) relating to its exercise. Hence, the generic common-law rules will govern by default. See, generally, John W Carter, *Carter's Breach of Contract* (2011) [10-11].

8 Such mandatory language regularly features in the judgments and commentaries on the law relating to election between inconsistent substantive rights, with courts and commentators often switching within a very short space between describing a party as having a 'right' to elect and she or he being 'required' to elect. See, eg, *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26, 41 (per Deane, Toohey, Gaudron and McHugh JJ); *Commonwealth v Verwayen* (1990) 170 CLR 394, 408 and 409 (per Mason CJ). But care must be taken, at least in the present context of the choice between affirming and disaffirming a contract, for it is obvious that election here is merely a legal power and not a duty. One party cannot compel the other party to make an election. Lord Goff of Chieveley emphasized this in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India ('The Kanchenjunga')* [1990] 1 Lloyd's Rep 391, 398: 'In all cases, he has in the end to make his election, *not as a matter of obligation*, but in the sense that, if he does not do so, the time may come when the law takes the decision out of his hands, either by holding him to have elected not to exercise the right which has become available to him or sometimes by holding him to have elected to exercise it' (emphasis supplied).

9 A choice must of course be made because the two options are, in legal contemplation, 'inconsistent' and hence 'alternative': neither can be enjoyed without the extinction of the other.

10 As Stephen J pointed out in *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 642, when a disaffirmatory election is made, in contrast to an affirmatory one, it is not strictly speaking the election doctrine that destroys the right unilaterally to revive and enforce the contract, but rather the act of effective termination itself.

communicated – here, disaffirmance. The doctrine thus functions as a 'preclusionary rule':[11] the elector is automatically precluded, by his or her simple act of election, from reversing the communicated decision and backtracking after the event, in particular by seeking to reinstate a disaffirmation power that would otherwise have existed in the absence of the legal reason for preclusion. The elector's unequivocal indication of a decision counter to disaffirmance thus completes the election and amounts to 'affirmation' of the contract, thereby destroying the inconsistency that necessitated the exercise of choice in the first place. The inconsistency, once it is destroyed by the elective act, cannot be reinstated without the approval of the non-electing party. The affirmance is thus rendered permanent, so that it becomes in a sense 'binding' upon the elector, and binding, notice, without any additional requirement that the resultant loss of power – the preclusion – be supported by form, consideration or proof of detrimental reliance on the other side.[12]

That much about the common-law election doctrine is uncontroversial (more or less). What continue to remain highly contentious, however, are some of the legal application criteria pertaining to the doctrine's scope and operation. Particularly notable in this connection are the necessary mental componentry of an effective, hence irreversible, election to affirm. Although election clearly involves a performative act communicated (or otherwise 'made known') to the other party, it is also conventionally understood to be an act that is accompanied by a particular mental state on the part of the one said to have elected.[13] What, then, are the necessary mental elements of an elective act? In what sense, if at all, must an election be 'intended' by the electing party? And, to the extent that intention is indeed an integrant of the election doctrine, in what sense, and to what extent, must an election to affirm a contract also be an 'informed' act? Can any convincing rationale exist, in legal precedent, legal principle or legal policy, for a rule that deems an election to have been made when '[i]t is quite clear that [the allegedly electing party] never dreamt of electing, never knew anything about electing, and never knew that he had the rights between which he is deemed and adjudged to have elected?'[14]

In this paper I want to address those (as well as related) questions about the common-law election doctrine. So far, to my knowledge, none of the above questions have been definitively answered by the High Court of Australia (not to mention other senior Anglo-Commonwealth courts). Although, as we shall see, Australian courts have embraced a distinction between 'actual election' and so-called 'imputed election', the latter concept signifying (at least) that a party may be treated as having exercised an election to affirm a contract irrespective of an actual intention to do so, the precise boundaries of imputed election, and the nature and object of party-intention in the election inquiry, nevertheless remain poorly defined. As to the nature and extent of the

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11 Although the language of 'preclusion' is perhaps most commonly encountered in the modern United States jurisprudence on the subject (see, eg, American Law Institute, *Restatement of the Law of Contracts* (2nd ed, 1981) ch 16, Topic 5; Farnsworth, *Changing Your Mind*, above n 5, chs 17–20), it is also to be found in some of the earlier English authorities: eg, *Clough v London and North Western Railway Co* (1871) LR 7 Exch 26, 35 (per Mellor J) (though the judgment was written by Blackburn J); *Ives and Barker v Williams* [1984] 2 Ch 478, 483 (per Lindley LJ).

12 *Clough v London and North Western Railway Co* (1871) LR 7 Exch 26, 34; *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 , 646–647 (per Stephen J, McTiernan ACJ agreeing); *Peyman v Lanjani* [1985] 1 Ch 457, 494D (per May LJ), 500D–E (per Slade LJ); *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India ('The Kanchenjunga')* [1990] 1 Lloyd's Rep 391, 398–399 (per Lord Goff of Chieveley).

13 Ewart, see above n 5, 88, declared that election is 'in itself a mental state'.

14 *In re Collie, ex parte Adamson* (1878) 8 Ch D 807, 817 (per James and Baggallay LJJ).

knowledge required for an effective election to affirm, the High Court[15] has expressly abstained from determining whether, in addition to knowledge of the facts upon which the power to disaffirm depended,[16] the electing party, when she performed acts that appeared to recognize the continued existence of the contract in question, must also have understood that, as a legal consequence of those facts, she had available to her the inconsistent legal alternative of disaffirming that contract. To date, such abstention has rested primarily on the discriminant that the relevant disaffirmation power was one conferred under and by reason of the parties' own contractual instrument (of which more below) or, where the power arose entirely dehors the contract, by operation of the general law, on the familiar escapist ground that it was ultimately unnecessary to resolve the matter at hand.[17]

As to the argumental structure of this paper, I intend eventually, in Part VI, to present a restatement of the law relating to affirmation of a contract by election, which restatement is essentially a refinement and reformulation of the current taxonomy of preclusionary reasons in the field. My restatement, it will be seen, respects and absorbs the prevailing law on 'actual election', and also tolerates a limited conception of 'imputed election', but it is a narrower intellection of affirmatory election than some of the modern alternative accounts of the subject purport to offer or allow. According to my limited conception, an election to affirm a contract may be imputed to a party without proof of an actual intention to elect, but never without knowledge, real or constructive, of the available legal alternatives between which the party is claimed to have elected. But that limited conception is further circumscribed by a parsimonious comprehension of the circumstances under which 'constructive knowledge' of a disaffirmation entitlement can fairly be ascribed, counterfactually, to the power-holding party. Cases falling outside of such a restrictive conception of imputed election must be administered according to some other legal preclusionary principle than election, such as estoppel or laches.

In order to lay the foundation for my proffered restatement, I shall first introduce the currently endorsed distinction between 'actual election' and 'imputed election' (Part II). Implicit in that distinction is the phenomenon of what I shall call the 'taxonomization' of election, which is essentially a formal ordering of legal preclusionary categories in the field (for example, 'election' versus other legal preclusionary rules such as 'estoppel'). The taxonomy of legal preclusionary reasons from *Coastal Estates Pty Ltd v Melevende*[18] is then introduced (Part III), before being evaluated in the light of the existing Australian jurisprudence in the field (Part IV). The paper then turns, in Part V, to consider in detail the necessary mental componentry of an effective election to affirm: 'intention' and 'knowledge'. This includes discussion of the very thorny question of whether, particularly from the standpoint of legal principle and legal policy, there ought to be a knowledge-of-rights requirement within the common-law election doctrine, at least for Australia. It is concluded, in Part IV.D, that there should be such a requirement, but that a reworking of the *Coastal Estates* taxonomy presented in Part II is nonetheless desirable, if not imperative (Part VI).

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15 In *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 645 (per Stephen J, McTiernan ACJ agreeing).

16 That is, knowledge of the serious breach, repudiation, misrepresentation, non-fulfilment of contingent condition, or whatever.

17 Although *Khoury v Government Insurance Office of New South Wales* (1984) 165 CLR 622 involved election in respect of a common-law (as opposed to an express contractual) disaffirmation entitlement, the Court ultimately decided against affirmation because the insurer did not know of the *fact* of the insured's material non-disclosures. Compare also *Re Hoffman, Ex parte Worrall v Schilling* (1989) 85 ALR 145, 152 (per Pincus J).

18 [1965] VR 433.

II 'ACTUAL' VERSUS 'IMPUTED' ELECTION

Australasian courts have consistently endorsed a distinction between 'actual election' and so-called 'imputed election'.[19] Basically, actual election is a *real* election, found as a matter of fact on the balance of probabilities, whether directly (for example, via express affirmation) or else by way of proper inference drawn from all the evidence before the court. It is said to involve 'a deliberate and conscious act by the electing party'.[20] 'Imputed election', in contrast, does not involve a genuine finding that the party empowered to disaffirm the contract has elected against exercising that particular power on the occasion in question. It occurs when 'the law attributes the character of an election to the conduct of the other party',[21] thereby 'treating the electing party as having exercised an election irrespective of actual intention'.[22] It entails, in other words, a *deeming* that an election has occurred notwithstanding that the elector may have had no actual intention to elect or indeed, on the strongest articulations of the concept, even knowledge of the legal alternatives between which he or she is treated as having elected. Affirmation of a contract via imputed election is thus a *legally imposed result*, notwithstanding the absence of an exercise of genuine choice. It is an election that is admitted to be fictional only.

Perhaps the clearest articulation in Australia of the distinction between 'actual' and 'imputed' election is to be found in the following passage from *Champtaloup v Thomas*,[23] where Mahoney JA described the 'two-fold nature' of an election in the context of contractual rights or powers thus:[24]

> [I]t is important to bear in mind that the right to elect, whether to affirm or rescind a contract according to its contractual terms, may be found to have been exercised in two ways. First, it may be exercised by a conscious act of election. The party having the right may actually determine on his election and … communicate it to the other party, and the election is thereby made. A party may make his election in this way *in [express] terms*, or he may do such acts as satisfy the court that it should be *inferred as a fact* that he has made it … But the question in such a case is as to his actual election, not as to whether an election should be imputed to him. And, once the actual election is found to have been made, the election is complete, although there has been no exercise of any contractual right and no act done or detriment produced under the contract.
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> Secondly, the party may do some act which is of such a nature that, irrespective of his actual intention or determination, the law treats him as having exercised his election. *This imputation of an election may occur even though the party does not subjectively know that he has the right to elect, or even when he does not intend to elect* …

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19 *Champtaloup v Thomas* [1976] 2 NSWLR 264, 274–275 (per Mahoney JA); *Zucker v Straightlace Pty Ltd* (1986) 11 NSWLR 87, 93 (per Young J); *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 656 (per Mason J); *Coastal Estates Pty Ltd v Melevende* [1965] VR 433; *Khoury v Government Insurance Office of New South Wales* (1984) 165 CLR 622, 633–634 (per Mason, Brennan, Deane and Dawson JJ). See also Christopher J Rossiter, 'The Doctrine of Election and Contracts for the Sale of Land' (1986) 60 *Australian Law Journal* 563, 565ff. In New Zealand the distinction was confirmed by Randerson J in *Jansen v Whangamata Homes Ltd* (HC Hamilton CIV-2003-419-1511, 29 November 2004) [26]. Randerson J's account of the law was in turn accepted by the New Zealand Court of Appeal in *Jansen v Whangamata Homes Ltd* [2006] 2 NZLR 300.

20 *Jansen v Whangamata Homes Ltd* (HC Hamilton CIV-2003-419-1511, 29 November 2004) [26] (per Randerson J).

21 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 656 (per Mason J).

22 *Jansen v Whangamata Homes Ltd* (HC Hamilton CIV-2003-419-1511, 29 November 2004) [26] (per Randerson J).

23 [1976] 2 NSWLR 264.

24 Ibid 274–275 (emphasis supplied).

> In cases of [this second] kind, the problem is to determine what is the nature of the acts which will result in the imputation of an election, and, in particular, to determine whether a finding that a right under the contract had been exercised without more, requires an imputation.

In my view, the distinction between actual election and imputed election is a useful, though potentially problematic, one. It is useful because it creates a pathway to important taxonomical discriminations that are perceived to operate in the present context, thereby assisting courts and lawyers to disambiguate the relationship between election and other legal preclusionary departments, such as 'waiver' and 'estoppel'. In that respect, too, the distinction provides a convenient intellectual platform for dissection of the precise mental requisites for an effective affirmation of a contract by way of election, which is largely the focal inquiry of this paper. But the distinction can also prove problematic, because the nature and limits of 'imputed election' are not entirely clear and stable in the modern jurisprudence, thereby undermining the aforementioned potential benefits of the distinction itself. For example, it is not unknown for judges[25] and commentators[26] to elide 'inferred' (or 'implied'[27]) election and 'imputed' election, when these are not necessarily identical concepts or legal operations.[28] They ought not to be conflated. But more than that, the preconditions for imputation of a binding affirmatory election simply remain under-determined in the case law on the subject. Although Mahoney JA in *Champtaloup v Thomas* stated that 'imputation of an election may occur even though the party does not subjectively know that he has the right to elect', it is not presently possible to locate consensus among courts and commentators on that particular issue. That an affirmation may be curially imposed upon a party who was innocently unaware that she or he had any choice in the matter immediately prompts the question of whether the law's distinction between 'actual' and 'imputed' election might better be seen to lie not in differentiating between different types of *election* as such, but rather in distinguishing between what ought to be viewed as a genuine (or at least plausible and tolerable)

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25 *Peyman v Lanjani* [1985] 1 Ch 457, 488D (per Stephenson LJ). In *Zucker v Straightlace Pty Ltd* (1986) 11 NSWLR 87, 93E–F, Young J also confuses 'imputed' election and 'inferred' election: 'The present case is of the second kind [referred to by Mahoney JA in *Champtaloup v Thoma*s [1976] 2 NSWLR 264] and the question is whether the acts done by the purchaser are such that the court should *infer* that he has exercised his election' (emphasis supplied).

26 See, eg, John W Carter, Elisabeth Peden and Greg J Tolhurst, *Contract Law in Australia* (5th ed, 2007) 394, [18-47].

27 Sometimes 'inferred' election is referred to as 'implied' election; see, eg, *Yukong Line Ltd of Korea v Rendsburg Investment Corporation of Liberia* [1996] 2 Lloyd's Rep 604, 607 (per Moore-Bick J): 'Election can be express or implied and will be implied where the injured party acts in a way which is consistent only with a decision to keep the contract alive or where he exercises rights which would only be available to him if the contract had been affirmed'. The concepts of implication and inference, however, are not interchangeable. Something 'implied' is something that is suggested or indicated, though not expressed; something 'inferred' is something that is deduced from the available evidence.

28 To be sure, 'inferred election' involves a *finding* (not deeming) of *actual* election, in cases other than those involving affirmation in the manner of an 'express communication' from the party entitled to disaffirm that she or he has elected not to disaffirm the contract. That is to say, in the language of Adam J in *Coastal Estates*, it is affirmation where, although there is no express election *inter se*, there is nevertheless conduct on the part of the allegedly affirming party 'in relation to the contract or its subject-matter from which the proper inference is that he has so elected' (*Coastal Estates* [1965] VR 433, 452). An inference may of course involve an imputation (as the inference may in fact be untrue), but imputation can occur without an inference, for example where a rule of law is involved.

application of the common-law election doctrine on the one hand, and what is really the outcome of an estoppel (or some other more appropriate set of principles) on the other.

This, of course, is just to return to the taxonomical crux of the distinction between actual and imputed election. In that connection, there is perhaps no better starting point for discussion than the separate judgments of Sholl J and Adam J in *Coastal Estates Pty Ltd v Melevende*,[29] a decision to which I now turn.

III TAXONOMIZING AFFIRMATORY ELECTION (I): *COASTAL ESTATES PTY LTD V MELEVENDE*

In addressing the nature of the acts that will result in the imputation of an election to affirm, Mahoney JA in *Champtaloup v Thomas* drew inspiration from the earlier decision of the Full Court of the Supreme Court of Victoria in *Coastal Estates Pty Ltd v Melevende* ('*Coastal Estates*').[30] There, a purchaser had been induced by the vendor's agent's fraudulent misrepresentations to enter into an instalment contract for the sale and purchase of land. After discovering that he had been defrauded, but without knowledge of the legal entitlement to rescind the contract for that reason, the purchaser continued to pay instalments under the contract and rates on the land. He also endeavoured to sell the land and, when that failed, to renegotiate with the appellant vendor. Only when his solicitor subsequently informed him of his entitlement to rescind the contract for fraud did the purchaser promptly commence an action for the recovery of money paid under the contract, the consideration for which had wholly failed. The Court held that the purchaser had not yet lost the power to rescind because of subsequent affirmation, even though he had performed acts that appeared to recognize the continued existence of the contract. Neither the payments made by the purchaser nor his unsuccessful attempts to sell the land or renegotiate with the vendor signalled an unequivocal decision against disaffirmance of the contractual relationship. The purchaser could not be found to have made an *actual* election to affirm the contract when he was in fact unaware of his inconsistent alternative right to rescind it. Nor could any question of estoppel arise, as there was no evidence that the vendor had prejudicially altered its position on the strength of any affirmatory representation made by the purchaser or arising out of his conduct. A distinction between two quite separate mechanisms of affirmance of a contract was elaborated in the several judgments of the Court. In particular, Adam J said:[31]

> [T]he ultimate question to be answered in cases where affirmation is relied upon as a defence to a rescission is whether the representee has after discovery of the falsity of the relevant misrepresentations, in truth elected to affirm the contract and thereby elected not to avoid it. Because the making of an election necessarily presupposes a knowledge that a choice between alternative courses is open, in general, no question of affirmation can arise in the absence of such knowledge. There appears, however, to be one important qualification upon this. If a representee, after discovery of the facts which entitle him to avoid a contract, exercises, in an unequivocal manner, rights under the contract adversely to the other party he will in general be deemed to have elected to affirm it, although not aware of his right to elect. In the case of a representee unaware of his right of election there is, I consider, a distinction to be drawn between acts done by him in exercise of rights under the contract adversely to the other party which, were the contract not on foot, could not be justified, and acts which do no more than show that the representee recognised the contract as still subsisting, but are not prejudicial or adverse to the other party. Such a distinction may be explained as an application of the doctrine of estoppel, or of the rule against approbating and reprobating, or perhaps more broadly on general

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29 [1965] VR 433.

30 Ibid.

31 Ibid 453 (emphasis supplied).

> considerations of justice. Strictly speaking I would think that the so-called affirmation without knowledge of any right to elect should be regarded as an example of the loss of a right to rescind *apart from the principle of election*, and that it tends only to confusion to treat it as of the same species as a true election to affirm.

Judging by the emphasized words, it is clear that Adam J viewed 'election' in the strict sense as *actual* or *true* election. When an affirmatory election is sought to be imputed or 'deemed', however, he considered that that ought to occur on the basis of some other legal preclusionary basis than election, such as estoppel, intervention of third-party rights, impossibility of *restitutio in integrum* or delay, whereby 'general considerations of justice' demanded that an election be imposed upon the power-holding party contrary to the truth. Sholl J, in the same case, stated that the loss of a disaffirmation entitlement where the power-holding party possessed no knowledge of his or her right to disaffirm, but who had nevertheless performed acts that were referable only to a decision to affirm the contract, was 'a form of estoppel, for the other party has in such a case acted to his prejudice upon a representation, made by [the allegedly affirming party's conduct], that the latter is going on with the contract'.[32] It is clear, then, that both judges considered it rationally superior, whether for linguistic, conceptual or taxonomical purposes, to treat some (if not all) cases of 'imputed election' not as a species of election, but rather as a manifestation of some other legal preclusionary category, such as estoppel (or 'what is in effect an estoppel'[33]). As Sholl J in particular opined:[34]

> I think the better view is that there must be either an election (which involves knowledge of legal rights though the proofs advanced to establish knowledge may include or consist of inferences of fact), or an estoppel.

Accepting, at least for the moment, the correctness of the above taxonomy of preclusionary reasons, its significance for this paper is that the essential distinction between 'actual election' and 'imputed election' must be seen to lie both in the state of mind involved on the part of the allegedly electing party, and in the nature of the performative acts that would cause that party to lose his or her erstwhile disaffirmation power even in the absence of the requisite mental condition for genuine election. For according to the Full Court in *Coastal Estates*,[35] true affirmatory election involves an unequivocal communication of a *conscious* decision on the part of the affirming party. Affirmation in this sense thus requires both knowledge of the *facts* giving rise to the legal right to disaffirm – in *Coastal Estates*, knowledge of the vendor's agent's fraudulent misrepresentations – and knowledge of one's *legal rights* in relation to those facts, meaning sufficient awareness of the inconsistent disaffirmation power itself. Once such dual knowledge exists, affirmation can occur (be shown) either by (1) express

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32 Ibid 443.

33 Ibid 444 (per Sholl J).

34 Ibid. Other senior Australia judges have appeared to share this view. In *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298, for example, Priestley JA (at 305D) suggested that where there is no knowledge of the alternative options available, the case must turn on estoppel principles rather than on election: '[T]he type of situation where an estoppel may operate even although the doctrine of election does not is where the latter doctrine does not apply because the party with the right of election did not know his legal rights regarding election but nevertheless acted in such a way as to represent to the other party that the contract was being affirmed and that the other party then acted to that party's detriment on the basis of the representation'.

35 Only Herring CJ mentions the exception of the right being in the contract itself; see *Coastal Estates* [1965] VR 433, 433. This point is discussed in the text accompanying notes 135–140 below.

communication of the fact that the power-holding party has decided against ending the contractual relationship in question, or else by (2) indicative words or conduct by or on behalf of that party in relation to the contract or its subject matter from which an inference of the same can properly be drawn in the circumstances.[36]

Where no express election to affirm has been communicated, and the tribunal of fact is instead being invited to draw an inference of affirmation from conduct and circumstances, the question for determination is simply this: 'Objectively, did the party entitled to disaffirm the contract, after discovery of the facts and consequent disaffirmation power, perform any acts that unambiguously recognized the continued existence of the contract?' This may include 'neutral acts': acts that, in Adam J's words above, 'do no more than show that the representee recognised the contract as still subsisting, but are not prejudicial or adverse to the other party'. However, as Sholl J made clear in the same case, non-prejudicial or neutral acts are merely 'some but not conclusive evidence of a binding election made with knowledge of his rights. They may be enough to pass to him the shifting onus of proof so that he has to show non-knowledge of his rights at the time, but they do not of themselves involve an estoppel'.[37] In other words, acts that are not, in the relevant sense, 'adverse to' the non-electing party will be insufficient to found an estoppel, but they will be capable of affording *some* evidence of an election, *where the electing party possesses knowledge of his or her legal alternatives*, from which evidence the trier of fact must draw the proper inferences on the balance of probabilities. The words 'where the electing party possesses knowledge of his or her legal alternatives' are italicized to stress again the connection between the mental condition that accompanies an actual election (of which more below) and the inferences that might legitimately be drawn about that mental condition through the conduct of the allegedly electing party in the context of the contractual relationship and dealings at hand. Merely exercising rights under the contract in a neutral manner – that is, doing no more than showing that you recognize the continued existence of the contract without prejudice to the other party – cannot suffice to support an *inference* (as opposed to an 'imputation') of election in the absence of adequate knowledge, on the part of the would-be elector, of his or her power to choose between the available legal alternatives. As Adam J observed in *Coastal Estates*:[38]

> In such a case [where P knows the facts that in law give him the power to disaffirm the contract but is in fact unaware that he has that power] it would seem on principle that no question can arise of his having made an election. In the nature of things how can one elect between alternative courses, unless one is aware that alternative courses are open?

'Imputed' election, by contrast, which assumes the existence of knowledge of the underlying facts but does not further require knowledge of the legal position resulting from those facts (the resultant disaffirmation power), involves the court asking whether the party sought to be precluded from disaffirming the contract exercised rights under the contract 'adversely to the other party' or 'without justification': Did he or she exercise rights that, unless the contract were still on foot, could not be *justified* by the exerciser of the rights? This tends to encompass acts that the allegedly electing party would not be *entitled* to do unless the contract subsisted, or that would lead the non-electing party to do

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36 *Coastal Estates*, ibid 452 (per Adam J).

37 Ibid 443 (point 3). He continues, however (ibid): 'They may, however, form part of the foundation for an estoppel, eg, if the opposite party, misled by such an act into supposing that the other is proceeding with the contract, refuses a more advantageous offer for the property the subject of the contract, or otherwise acts to his prejudice'.

38 Ibid 452.

or abstain from doing something on the footing that the contract was still alive.[39] Examples might include such unreserved conduct as: acceptance of rent from a tenant after the landlord has become entitled to re-enter and determine the lease;[40] acceptance of an unearned premium from an insured party after the insurer has become entitled to avoid the policy;[41] going into or taking possession of property exchanged under the contract; insistence on the continued performance of the contract according to its terms;[42] receiving payments or other performance benefits under the contract;[43] or calling on the other party to answer questions and requisitions,[44] or to pay rates or other charges to third parties.[45] Although the distinction between a 'neutral' and an 'adverse' exercise of rights will no doubt be difficult to apply in some instances, it has nevertheless been judicially accredited with a 'functional' basis:[46]

> In such cases, the question is whether, by reason of what has been done, an election should be imputed, although it is common ground that none has actually or subjectively been made. I do not think that an election should be imputed merely on schematic grounds. If the thing done, though it assumes the existence of a contract, is neutral as far as concerns the other party, the fact that what is done in pursuance of a contractual right is, of itself, no sufficient reason to impute an election. But it is otherwise if that which is done is adverse to or, a fortiori, detrimental to, the other party.

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39 Compare *Larratt v Bankers and Traders Insurance Co Ltd* (1941) 41 SR 215, 227 (per Jordan CJ).

40 See, eg, *Matthews v Smallwood* [1910] 1 Ch 777; *Owendale Pty Ltd v Anthony* (1967) 117 CLR 539, 557 (per Windeyer J). Where a landlord receives rent after notice of a tenant's breach, she or he is generally precluded from taking advantage of an earlier forfeiture, on the basis that it is 'a contradiction in terms to treat a man as a tenant, and then treat him as a trespasser': *Finch v Underwood* (1876) 2 Ch D 310, 316 (per Mellish LJ).

41 See, eg, *Back v National Insurance Co of New Zealand* [1996] 3 NZLR 363, 375 (per Hammond J).

42 See, eg, *Turner v Labafox International Pty Ltd* (1974) 131 CLR 660, 663, 668 and 669 (per Rich ACJ, Dixon and McTiernan JJ). Calling on the performance of secondary obligations under a contractual provision (eg, invoking an arbitration clause) does not necessarily amount to affirmation; see *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1, [360] (per Finn J). The mere fact that the allegedly electing party has called upon the other party to change his or her mind and perform the contract will not generally, of itself, constitute affirmation, as '[t]he law does not require an injured party to snatch at a repudiation and he does not automatically lose his right to treat the contract as discharged merely by calling on the other to reconsider his position and recognize his obligations': *Yukong Line Ltd of Korea v Rendsburg Investment Corporation of Liberia* [1996] 2 Lloyd's Rep 604, 608 (per Moore-Bick J). His Lordship added that, in his view, courts should generally be 'slow' to find that a party has committed itself irrevocably to persisting with the contract. Rather, they should leave it to 'the doctrine of estoppel' to remedy any potential injustice that may arise where one party has relied upon a representation by the other party indicating that the contract has been affirmed.

43 See, eg, *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 659 (per Mason J); *Jansen v Whangamata Homes Ltd* (HC Hamilton CIV-2003-419-1511, 29 November 2004) (defendant had demanded, received and accepted payments under the contract).

44 See, eg, *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305.

45 See, eg, *Coastal Estates* [1965] VR 433, 443 (per Sholl J); *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 659 (per Mason J).

46 *Champtaloup v Thomas* [1976] 2 NSWLR 264, 278 (per Mahoney JA).

IV METHODOLOGICALLY, HOW PLAUSIBLE IS THE *COASTAL ESTATES* TAXONOMY WITHIN THE AUSTRALIAN JURISPRUDENCE IN THE FIELD?

Bracketing for the moment the question of the normative or prospective desirability of the *Coastal Estates* taxonomy of preclusionary reasons in this field, it is important first to consider the simple interpretative (legal methodological) merits of Adam J's and Sholl J's judgments within the wider Australian jurisprudence on the subject. Although those judgments have strongly influenced the English Court of Appeal's formulation of the common-law election doctrine in relation to contractual affirmation,[47] in advancing their taxonomy in *Coastal Estates* both Adam J and Sholl J purported to apply, as well as to clarify, the High Court's earlier decision involving the election doctrine in *Elder's Trustee and Executor Co Ltd v Commonwealth Homes and Investment Co Ltd* ('*Elder's*').[48] There, a shareholder of a company was entitled to rescind his contract of membership for breach of the minimum subscription requirement. Although he was aware (or at least had reason to be aware) of the facts that rendered his allotment of shares voidable, the plaintiff shareholder, who over a long period of time failed to repudiate the shares, remained ignorant throughout of his statutory right to rescind. The Court therefore held that, without knowledge of that statutory right, there could be no inference that the plaintiff had made an *actual* election to affirm the contract, that is, simply by acting as if he were a shareholder and failing to disclaim that character.[49]

As members of an inferior court, Adam J and Sholl J were of course bound to apply *Elder's*. However, even as a purported exercise in 'clarifying' an authority that was indisputably binding on their Honours' court, a close reading of the High Court's judgment in *Elder's* exposes potential cracks in the legal precedential foundation for the *Coastal Estates* taxonomy. Although much of *Elder's* is consistent with what was said in *Coastal Estates* about the election concept and doctrine – actual election requires knowledge both of the facts giving rise to the disaffirmation power and of the legal disaffirmation power itself – it is, beyond that, less than certain that the *Elder's* decision

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47 In *Peyman v Lanjani* [1985] 1 Ch 457, Stephenson LJ, who delivered the leading judgment in the case, stated that the judgments in *Coastal Estates* were 'particularly helpful' and that he 'gratefully follow[ed]' them (ibid 486 and 489). His Lordship held that 'knowledge of the facts which give rise to the right to rescind is not enough to prevent the plaintiff from exercising that right, but he must also know that the law gives him that right yet choose with that knowledge not to exercise it' (ibid 487). That view was subsequently reaffirmed by a differently constituted English Court of Appeal in *HB Property Developments Ltd v Secretary of State for the Environment* (1998) 78 P & CR 108: 'The law gives the right, and knowledge of that right itself, involving knowledge of the right of choice, are necessary' (ibid 118 (per Henry LJ)).

48 (1941) 65 CLR 603. In *Coastal Estates* [1965] VR 433, for example, Adam J stated (at 453) that his views on affirmation 'appear to derive support from certain observations of the High Court in [*Elder's*]', and that none of his conclusions were 'inconsistent with any of the authorities binding on [his] Court' (ibid 454).

49 *Elder's*, ibid 617 and 618 (per Rich ACJ, Dixon and McTiernan JJ).

would have permitted the two judges[50] in *Coastal Estates* to reassign all non-actual ('imputed') election cases effectively to the realm of estoppel (or other plausible preclusionary category). That is because the thrust of the discussion in *Elder's* seems to be that the extent of the power-holder's knowledge of his or her legal alternatives in the present context relates not to the involvement of, or need for, some other principle than election to effectuate preclusion when the power-holder acts without knowledge of his or her rights, but rather merely to matters of proof, in particular the *inferential worth* of the power-holder's acts that were performed either with or without knowledge of the election alternatives, as the case may be. That is to say, the High Court saw the extent of the would-be elector's knowledge of his or her legal alternatives as relating merely to the *unequivocality* (or otherwise) of the conduct alleged to be elective, and elective conduct, the case law consistently affirms, must always be 'unequivocal'.[51] Their Honours implied that conduct that merely evidences the existence of a contract, and which is not of itself necessarily inconsistent with disaffirmance, would not sustain a defence of elective affirmation in the absence of proof of knowledge of rights.[52] However, where the party's conduct is 'unequivocal in its effect', for example because it involves an exercise of rights 'adversely to the other party', the Court said that 'it *may well be* that the party exercising them loses the right to determine the … contract … unless he is able to show not merely that he was unaware of the existence of his right but [also] of the facts [giving rise to the right to disaffirm]'.[53] On this (rather inconclusive) view, an election to affirm a contract simply involves knowledge of the facts giving rise to the disaffirmation power, together with an unequivocal performative act inconsistent with disaffirmance. Neutral acts, however, cannot be regarded as unequivocally affirmatory unless they were performed by the electing party with knowledge of his or her inconsistent legal alternatives (as well as of the facts that generated them), whereas adverse acts, being 'unequivocal in their effect', need not be done with knowledge by the electing party of his or her rights consequent upon the facts. Put slightly differently, conduct that might properly be advanced as proof that the power-holding party had resolved not to disaffirm

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50 The third judge in *Coastal Estates* was Herring CJ. Unlike Adam J and Sholl J, who argued that if there is no actual election an alternative ground must be found if loss of a disaffirmation power is to occur, the Chief Justice's judgment is consistent with the High Court's decision in *Elder's*. Herring CJ, however, found that the plaintiff had made no actual election to affirm because he did not have knowledge of his rights when his acts were done. His Honour then proceeded to ask whether 'the plaintiff having made no actual election, [his] conduct is of such a character as to preclude the plaintiff on [sic] the circumstances of the case from asserting that he has not affirmed the contract before he issued his summons' (*Coastal Estates* [1965] VR 433, 436). He concluded that it did not because the plaintiff's acts were neutral and hence he (the plaintiff) had done nothing inconsistent with disaffirmance. Affirmation where there was merely neutral conduct would require knowledge of rights, but the plaintiff's conduct had to be judged on the basis that he had no such knowledge. Unlike Sholl J and Adam J, Herring CJ did not see this as involving an estoppel, because after concluding on the affirmation issue, he then went on to say: 'No question of estoppel can arise here' (ibid 437).

51 See *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 30 (per Lord Atkin). Affirmatory conduct must be 'unequivocal' in the sense of being open to one construction only (see *Champtaloup v Thomas* [1976] 2 NSWLR 264, 269 (per Glass JA)), or being 'referable only to a decision to adhere to the contract – that is which he has a right to do, as against the opposite party, or is obliged to do, only if the contract stands' (see *Coastal Estates* [1965] VR 433, 443 (per Sholl J)), or being 'justifiable only if an election had been made one way or the other' (*Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 656 (per Mason J)), that is, 'consistent only with the exercise of one of the two sets of rights and inconsistent with the exercise of the other' (ibid 646 (per Stephen J)).

52 (1941) 65 CLR 603, 618 (per Rich ACJ, Dixon and McTiernan JJ).

53 Ibid (emphasis supplied).

the contract if that party knew that he or she had a right of election would have to be looked upon differently if that party did not possess such legal knowledge. Conduct that might be considered 'unequivocally affirmatory' in the first situation may not achieve that character in the second.

Notice that nowhere in *Elder's* does the Court explicitly declare that when a party loses an unknown disaffirmation power because she or he exercised contractual rights adversely to the other party, such a loss of power was the jural consequence of affirmation of the contract *by way of election*. However, their Honours did clearly state that 'it could not be *inferred* that [that party] made an *actual* election'.[54] It was, therefore, strictly open to two of the three members of the *Coastal Estates* bench to interpret the High Court's approach as not approving and adopting the view, expressed perhaps most notably by Jordan CJ in *O'Connor v SP Bray Ltd*[55] and John Skirving Ewart in his *Waiver Distributed*,[56] that knowledge of rights is not necessary for a binding election to affirm a contract. However, subsequent courts, including the High Court of Australia itself, have treated *Elder's* as making a distinction that is 'really only a practical or evidentiary one'.[57] From this it follows that we cannot assume, as Adam J and Sholl J each did in *Coastal Estates*, that the judicial reference to 'adverse acts' in connection with contractual affirmation necessarily involves or implies 'what is in effect an estoppel' rather than election. Hence, in *Sargent v ASL Developments Ltd*,[58] for example, Stephen J (McTiernan ACJ agreeing) opined that in *Elder's* the High Court expressed a 'clear preference' for Jordan CJ's and Ewart's repudiation of the need for knowledge of rights 'in those cases in which the conduct of the elector is unequivocal'.[59] His Honour then stated:[60]

> Only where the conduct is not so unequivocal, amounting to no more than some evidence of election to affirm, will knowledge of the right of election be relevant *and then only because*, viewed in its light, his conduct may, as a matter of 'natural inference', be regarded as constituting an affirmation of the contract.

Notice also that, on a meticulous reading, *Elder's* does not necessarily imply that unequivocal affirmatory acts performed without knowledge of the inconsistent power to disaffirm the contract must perforce result in a loss of that power through the election doctrine, rather than via some other legal preclusionary channel. Still, because nothing was overtly said on the matter in their Honours' reasoning, it has remained open for subsequent courts and writers to interpret the High Court as treating 'knowledge of rights' as merely evidential, rather than criterial, in the election inquiry, that is, for all cases falling short of 'actual election'. However, the Court's view that knowledge of rights is unnecessary, qua preclusion by way of the common-law election doctrine, if the power-holder's conduct is nonetheless unequivocal follows immediately from a reference made in its joint judgment to Ewart's denial, in his *Waiver Distributed*, of any requirement in contract law that the elector must know of his or her election entitlement

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54 Ibid (emphasis supplied).
55 (1936) 36 SR (NSW) 248, 263.
56 Ewart, see above n 5, 72.
57 See, eg, *Ellison v Lutre Pty Ltd* (1999) 88 FCR 116, [51] (per von Doussa, Mansfield and Goldberg JJ).
58 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634.
59 Ibid 644.
60 Ibid (emphasis supplied). Later in his judgment, when describing the sort of conduct that may suffice to constitute an election, his Honour stated (ibid 646): 'less unequivocal conduct, only providing some evidence of election, may suffice if coupled with actual knowledge of the right of election'.

before an apparent affirmation is effective and binding.[61] But the Court's transition to a discussion of the *evidential* function of such knowledge – namely, that 'neutral' acts are not capable of being viewed as unequivocally elective unless they were performed with knowledge of rights, whereas 'adverse' acts are 'unequivocal in their effect' and therefore need not to have been done with knowledge of rights – is somewhat baffling. For Ewart's argument was not that knowledge relates to the unequivocality (or otherwise) of an elective act, but rather that it is simply not criteriological in contract affirmation situations at all. But that is because Ewart was basically concerned with cases where the relevant[62] disaffirmation entitlement was expressly contained in and conferred by the instrument that created the contractual relationship in question, and he viewed the power and consequences of election as deriving from the terms of the contract itself.[63] Although that may obtain for many cases involving an election to disaffirm a contract, it does not hold true for all disaffirmation entitlements that contracting parties may enjoy (*Coastal Estates* being a case in point), and very rarely, if ever, does it rule for *affirmatory* elections in particular. Ewart, it must be emphasized, believed that affirmation results simply from the fact that a contract automatically continues if it has not been terminated,[64] but he could not then adequately explain why the loss of the termination right should be treated in law as permanent for that reason alone.[65] That is possibly what Sholl J had in mind when, in *Coastal Estates*, he spoke of the High Court's references in *Elder's* to Ewart's views in this connection as 'elliptical'.[66] In his Honour's view, the 'better interpretation' of those references was that the *Elder's* Court 'did not approve and adopt [the view that knowledge of the legal right is not necessary for a binding election to affirm], save where what is in effect an estoppel has operated'.[67]

Still, an additional problem remains with Sholl J's and Adam J's interpretation and purported clarification of *Elder's* in *Coastal Estates*. It concerns in particular their Honours' reading that the High Court's views in *Elder's* are not inconsistent with the proposition that all cases of non-actual (imputed) election necessarily involve the separate preclusionary principle of estoppel (or something akin to it). The problem is that both judges treat the High Court's references to an 'adverse' exercise of contractual rights as tantamount to conduct that is 'prejudicial' or 'detrimental' to the non-electing party, sufficient to found 'what is in effect an estoppel'.[68] But in the relevant passage of

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61 Ewart, see above n 5, 72.

62 Of course, the contract in question may contain two or more independent disaffirmation entitlements. Affirmation of the contract in relation to one power will not preclude subsequent disaffirmation in relation to another, independent, power with which the power-holding party was not confronted at the time of his or her earlier affirmation; see *Koutsopoulos v Pintusen (No 2)* [2011] NSWCA 122.

63 In other words, Ewart's view that knowledge of the existence of the right to elect is not required for an effective election is premised on the view that 'the right of election in the law of contracts is created by the agreement of the parties; the elector has the power given to him by the agreement; and the relationships between the parties can be affected only in the manner, and to the extent, provided for in the agreement' (Ewart, see above n 5, 75). That assumption is self-evidently false and does not draw the distinction, which is recognised in later authorities (of which more below), between contractually created election rights and equivalent rights that are conferred by general law, dehors the contract.

64 See Ewart, ibid 90–93.

65 See Rick Bigwood, 'Fine-Tuning Affirmation of a Contract by Election: Part 1' [2010] *New Zealand Law Review* 37, 87–88.

66 *Coastal Estates* [1965] VR 433, 444.

67 Ibid. Interestingly, in *Larratt v Bankers and Traders Insurance Co Ltd* (1941) 41 SR (NSW) 215, 227, Jordan CJ was clearly of the view that cases of imputed election (or an 'unintended waiver', as he put it) must basically involve an estoppel.

68 Ibid 443 (per Sholl J) and 453 (per Adam J).

the *Elder's* judgment where the concept of an 'adverse exercise of rights' is introduced[69] the Court implies nothing about the need for temporally prejudicial conduct on the part of the one subsequently claimed to have lost his or her erstwhile disaffirmation entitlement. In saying that the plaintiff in *Elder's* did not exercise any rights 'adversely to' the company (but rather acted merely neutrally, by proceeding as if he were a shareholder and not disclaiming that character), the High Court simply observed that '[h]e did nothing inconsistent with renunciation or disaffirmance'.[70] Their Honours seem to have perceived the concept of an 'adverse exercise of rights' just in terms of the relevant rights having been 'exercised, either in virtue of an estate or interest in property, or by virtue of a contract, which would not exist unless the estate, interest or contract endured or remained in force'.[71]

Successive courts have also appeared to draw a distinction between 'detriment' or 'unfair prejudice' and conduct that is 'adverse to' the other party. In *Champtaloup v Thomas*,[72] for example, Mahoney JA noted how Stephen J in *Sargent v ASL Developments Ltd*[73] had observed that because detriment was not an ingredient of actual election, it could not be said to be elemental to imputed election either.[74] And later in his judgment, after noting that if something is done in pursuance of a contractual right (which, while assuming the existence of a contract, is nevertheless neutral vis-à-vis the other party), the fact that it was done is not, of itself, a sufficient reason to impute an election, Mahoney JA went on to state that 'it is otherwise if that which is done is adverse to or, *a fortiori, detrimental to*, the other party'.[75] Also, in *Turner v Labafox International Pty Ltd*,[76] a purchaser was held to have affirmed a contract even though his solicitor's affirmatory conduct[77] and his (the purchaser's) subsequent invalid attempt to disaffirm the contract occurred on the same day, and the vendor had not materially altered its position on the strength of the solicitor's earlier affirmatory conduct. Mason J stated that '[w]hat [the purchaser's solicitor] did was adverse to the respondent and was justifiable only on the footing that the contract was subsisting'.[78] That is clearly inconsistent with the view, propounded by Sholl J and Adam J in *Coastal Estates*, that all cases of non-actual election must be seen to involve a different principle than that of election, especially estoppel.

I shall in Part VI of this paper return to the *Coastal Estates* taxonomy of preclusionary reasons, essentially as a platform for presenting an alternative, restated taxonomization of the law in the field. Before doing that, however, it is necessary first to consider, in some detail, the precise mental componentry of an effective election to affirm, including the as-yet-unsettled and rather difficult question of whether there ought to be a knowledge-of-rights requirement inside the common-law election doctrine.

V THE NECESSARY MENTAL COMPONENTRY OF AN EFFECTIVE ELECTION TO AFFIRM

As mentioned in the introduction and prospectus to this paper, election involves indicative conduct accompanied by a particular mind state on the part of the one said to

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69 (1941) 65 CLR 603, 618 (per Rich ACJ, Dixon and McTiernan JJ).
70 Ibid.
71 Ibid.
72 [1976] 2 NSWLR 264.
73 (1974) 131 CLR 634, 647.
74 [1976] 2 NSWLR 264, 275F.
75 Ibid 278E (emphasis supplied).
76 (1974) 131 CLR 660 .
77 Namely, insisting on performance of the contract and furnishing the particulars of title as required by the contract.
78 (1974) 131 CLR 660, 670.

have elected. The jurisprudence in the field generally confirms at least two mental components to an effective election to affirm: 'intention' and 'knowledge'.[79] Moreover, those constituent elements are 'nested' in the sense that the former, intention, is built, hence proven, conceptually upon the foundation of the latter, knowledge. Election is thus conventionally understood to comprise an intentional or deliberate act done with requisite knowledge.

Beyond those basic propositions, though, the cases and literature in the field disclose significant confusion, disagreement, ambivalence and imprecision in connection with the essential mental componentry of an effective election to affirm. Major questions remain unanswered (or under-answered) both as to the nature and object of the intention or deliberation involved in such an election, and as to the nature and extent of the knowledge required for the purpose. For example, must the allegedly affirming party actually have 'intended' to choose between the available alternatives, in favour of affirmation (or against disaffirmance), with requisite knowledge of the legally inconsistent alternative of disaffirmation? If so, must that party have intended not only to continue with the contract, but also to permanently forsake thereby the alternative of disaffirming? In other words, must one intend to make the choice communicated *and* to suffer the legal consequences of having so chosen? How 'objective' is the intention required? Provided that a party's acts suffice to support a reasonable belief in the other party that a choice against disaffirmation has in fact been exercised, need the former party actually know that an election was vested in him or her by reason of the event that, as a matter of law, entitled disaffirmance of the contract? In other words, despite *the appearance* of an affirmation, can a party rely on genuine ignorance of his legal position so as to prevent a judgment of affirmation by way of election against him?

To date, the highest courts of Anglo-Commonwealth legal systems, including Australia, have not fully and unambiguously answered those questions. Some of them have even expressly been left open. However, a stable and just conception of affirmation of a contract by election must hinge at least on a proper understanding of the mental componentry of the mechanism by which a party is found, or deemed, to have affirmed his or her contract, and consequently to have lost his or her erstwhile disaffirmation entitlement. Toward the achievement of such an understanding, I turn now to consider the elements of 'intention' and 'knowledge' in greater depth. Although they are discussed sequentially below, it pays to bear in mind that they are nested in the manner aforementioned.

A *Intention: In What Sense, If At All, Must an Election to Affirm Be 'Intentional' or 'Deliberate'?*

No shortage of apparent confirmation exists in both the early and the recent authorities and commentaries in the field that 'election must be an intentional act'.[80] Indeed, it seems hardly open to question that an element of intentionality must inhere in the common-law election concept and doctrine, at least when the election concerned is of the 'true' or 'actual' variety, as distinct from its 'imputed' counterpart. However, the fact that the law recognizes a distinction between actual election and imputed election (above), and calls them both 'election', instantly implies that the presence of a specific intention, say to abandon the relevant disaffirmation power, is not necessary for a binding

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[79] I shall assume voluntariness on the part of the electing party, in the sense that the relevant act of choosing was within the electing party's control.

[80] *Earl of Darnley v Proprietors of London, Chatham and Dover Railway* (1867) LR 2 HL 43, 57 (per Lord Chelmsford LC). See, generally, Piers Feltham, Daniel Hochberg and Tom Leech (eds), *Spencer Bower, The Law Relating to Estoppel by Representation* (4th ed, 2004) 359, 419–421 ('*Spencer Bower*').

affirmation by way of election (although it may of course be sufficient). It is, therefore, hardly surprising that one routinely encounters statements in the leading authorities that appear to deny that intention is, in any real sense at least, integral to the common-law election concept. Consider, for example, the following judicial assertions:

> [Acceptance of rent] … 'affirmeth the lease to have a continuance' … [and consequently] the right of entry is waived or barred, and his intention and desire not to waive it is immaterial …[81]

> An election to affirm does not depend on an actual intention to do so …[82]

> Not that election is about intention. [An affirmation] is an effect which the law annexes to conduct which would be justifiable only if an election had been made …[83]

> [A]nd whether he intended it or not if he has done an unequivocal act – I mean an act which would be justifiable if he had elected one way and would not be justifiable if he elected the other way – the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election.[84]

> It is … clear that a person may have affirmed a contract and waived his right to rescind even though he had no intention of doing so.[85]

> There need be no expressed intention to elect, nor will an express disclaimer of such an intention be of any avail in preserving one right if in fact there be an exercise of another inconsistent right ... For an election there need be no actual, subjective intention to elect ... [A]n election is the effect which the law attributes to conduct justifiable only if such an election had been made ...[86]

> It is not necessary for election that there be a consciously 'choosing' mind.[87]

Statements such as these are open to diverse interpretations, not least because the judges who authored them did not always adequately explain the purport of their words in the present connection. Some of the statements seem to imply no more than that, to the extent that intention is elemental to election at all, it must be gauged objectively rather than subjectively.[88] That, of course, is entirely consistent with contract law's general

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81 *Croft v Lumley* (1858) 10 ER 1459, 1478 (per Martin B).

82 *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41, 55 (per Kitto J, Taylor and Menzies JJ agreeing). Compare *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1, [359] (per Finn J).

83 *Tropical Traders Ltd v Goonan*, ibid.

84 *Scarf v Jardine* (1882) 7 App Cas 345, 361 (per Lord Blackburn).

85 *Zucker v Straightlace Pty Ltd* (1986) 11 NSWLR 87, 93D (per Young J). But he is referring to 'imputed' election here, even though he later confuses it with 'inferred' election.

86 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 646 (per Stephen J, McTiernan ACJ agreeing) (citations omitted).

87 *Wallace-Smith v Thiess Infraco (Swanston) Pty Ltd* (2005) 218 ALR 1, [96] (per French J, citing Stephen J in *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 648–649). But see Kirby J in *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, [143], point (6): a legally effective election involves 'a conscious choice between inconsistent rights'.

88 Judges often make this point explicitly. See, eg, *Peyman v Lanjani* [1985] 1 Ch 457, 488D (per Stephenson LJ): 'Waiver or election is always a question of intention to be decided on the evidence as a question of fact (unless determined by a statute like the Sale of Goods Act 1979). In fact and in law men's intentions must be judged by their actions, and a man's acts may convey to any reasonable person standing in the shoes of the other party to a contract, as clearly as any words, an intention to repudiate or to affirm the contract'.

approach to ascertaining intention in other areas where it is relevant, such as in relation to establishing contract formation,[89] the proper construction of a contract[90] and repudiation.[91] However, it is also clear that, in the context of election, intention is not serving the same function as it does in those other areas, most notably contract formation, because whereas the fifth quotation above explains that 'an express disclaimer of such an intention [will not] be of any avail in preserving one right if in fact there be an exercise of another inconsistent right', express disclaimers of an intention to accept an offer are, if communicated timeously to the offeror, generally effective to prevent the formation (or subsequent alteration) of a contract.[92] The objective approach to contract formation cannot prevail when the admissible evidence discloses that the parties did not in fact achieve a consensus.[93] This implies that intention in the election field is directed at a different *object* than it is in other contract-law contexts, of which more below.

Another, less modest, interpretation of the above statements produces the conclusion that intention, whether actual or objective, is not integral to election at all. Election is simply an 'effect which the law attributes to conduct', and any affirmatory intention that happened to accompany a party's contract-recognizing conduct at the relevant time is in point of fact superfluous to the legal preclusionary consequences that follow upon that party's so acting. Certain formulations of the 'imputed election' concept would seem to entail such a conclusion – namely, that a party can be held to have affirmed a contract even though she or he was innocently unaware of the alternative disaffirmation entitlement, hence providing no foundation for the formation of any 'elective intention' whatsoever, actual or objective – although we may well question whether such cases could then sensibly be regarded as involving 'election' at all. An election doctrine that eliminated the need for any meaningful conception of agency-responsible 'choice' would be a doctrine marked by patent contradiction. It would also be a doctrine that rendered it either impossible or futile to differentiate election from other legal preclusionary categories that are similarly concerned to regulate inconsistent human behaviour in the present context, most notably estoppel.

A third, and in my view the most preferable, interpretation of the above statements is that election does involve intention, objectively determined,[94] but it is a specific *and narrow* form of intention built upon a foundation of initial knowledge of both (1) the facts giving rise to a choice between affirming and disaffirming the relevant contractual relationship, and (2) the resultant legal entitlement to choose between those inconsistent jural alternatives. It will be necessary to elaborate on those knowledge criteria shortly;[95]

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89 *Smith v Hughes* (1871) LR 6 QB 597; *Tamplin v James* (1880) 15 Ch D 215; *Taylor v Johnson* (1983) 151 CLR 422.

90 Generally, see David W McLauchlan, 'Contract Interpretation: What Is It About?' (2009) 31 *Sydney Law Review* 5. See also *Byrnes v Kendle* [2011] HCA 26, [98]–[101] (per Heydon and Crennan JJ).

91 *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423; *Koomphatoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115, [44] (per Gleeson CJ, Gummow, Heydon and Crennan JJ).

92 *Airways Corporation of New Zealand Ltd v Geyserland Airways Ltd* [1996] 1 NZLR 116; *Magnum Photo Supplies Ltd v Viko New Zealand Ltd* [1999] 1 NZLR 395, 400–401; *Butler Machine Tool Co Ltd v Ex-Cell-O Corp Ltd* [1979] 1 WLR 401, 406H (per Lawton LJ).

93 See, generally, David W McLauchlan, 'Objectivity in Contract' (2005) 24 *University of Queensland Law Journal* 479.

94 Note that, as with objectivity in relation to the determination of *consensus ad idem* in contract formation, the objective approach in the present context does not necessarily entail that an actual intention to elect is unnecessary; it merely precludes the party who 'objectively elects' from denying its absence. Compare Ewart, above n 5, 87. Ewart, however, thought that 'the courts will sometimes be unable to declare that intention to elect really existed. And for such cases, application of the principles of estoppel may be necessary' (ibid).

95 See Part V.B, below.

for now, though, I shall focus on avoiding confusion as to what, exactly, an electing party must 'objectively intend' as part of his or her affirmation of a contract by way of election.

It is occasionally suggested that, in order for there to be a binding election to affirm, the electing party must intend not only to make and communicate an unequivocal choice to proceed with the contractual relationship rather than ending it, but also to bear the *legal consequence* of having so chosen, which is permanent preclusion from reasserting the choice that was not communicated (here, disaffirmance).[96] Needless to say, these are very different objects of possible intention in the present context. The first refers merely to an intention in relation to the doing of the acts that, with sufficient knowledge of the underlying facts and consequent legal options, would unambiguously indicate, to any reasonable person in the shoes of the non-electing party, a decision not to end the contractual relationship. The second object of intention subsumes the first but extends to include as well an intention in relation to the *legal definitional consequences* of the acts that objectively indicated the first form of intention on the elector's part.

The truth, however, is that only the first form of intention is necessary for the election doctrine to operate in its full rigour, not the second (although the second form of intention might coincidentally, albeit redundantly, be present as well).[97] That is because once a party communicates objectively an unambiguous choice against disaffirmance of the contract, that party also being sufficiently aware of the facts and of his or her legal options in relation to those facts, the original power to disaffirm is automatically destroyed by operation of law. In order to achieve the desired ends of the doctrine (the promotion of certainty and protection against unauthorized speculation at the non-electing party's risk), such a consequence is *imposed upon* the electing party regardless of his or her actual, or indeed even apparent, intention.[98] As the late Professor Allan Farnsworth nicely explained, the surrender or loss of rights by way of election operates qua 'preclusion' rather than qua 'relinquishment', the latter term denoting intentional surrender or abandonment. He encapsulated the distinction between 'preclusions' and 'relinquishments' thus:[99]

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[96] See, eg, in *Spencer Bower*, above n 80, 359; *Jansen v Whangamata Homes Ltd* (HC Hamilton CIV-2003-419-1511, 29 November 2004) [27] (per Randerson J). See also *Maritime Life Assurance Co v Saskatchewan River Bungalows Ltd* [1994] 2 SCR 490, 500 (per Major J): 'Waiver [meaning "election"] will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) *an unequivocal and conscious intention to abandon them*' (emphasis supplied). Major J's reference to 'conscious intention' was accepted by Kirby J in relation to election in *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, [147].

[97] That an intention to surrender is immaterial to the question of whether an affirmance has occurred can also be seen from the converse case: 'If a party who erroneously supposes that an election were available had actually intended to surrender a right and assert a supposed alternative which did not exist, that right would not be lost, in the absence of circumstances of promissory estoppel' (Richard A Lord (ed), *Williston on Contracts* (4th ed, 2000) vol 13, §39:33).

[98] As Stephenson LJ points out in *Peyman v Lanjani* [1985] 1 Ch 457, 486G: 'it has never been the law that the elector must know … that if he chooses one way the law may judge his choice irrevocable'. But his Lordship then immediately goes on to ask (ibid 486H): 'will an intention to waive a right be presumed from the conduct of a party who has not in fact known of his right or intended to waive it?' This is a curious question to ask, because intention to 'waive' a right is not a requirement of election at all, although 'knowledge of the right' is something different from one's intention to 'waive', and of course from one's knowledge of the legal consequences in the absence of such intention. See also Tipping J (for the Court) in *McDrury v Luporini* [2000] 1 NZLR 652, a case concerning 'waiver of forfeiture' (ie, election) in tenancy law: 'There does not have to be … be any intention to waive' (ibid [11]).

[99] Farnsworth, *Changing Your Mind*, see above n 5, 121–122.

> What of the distinction between relinquishments and preclusions? Often when you surrender something you intend to do exactly that – to surrender it. When you *give* a collection of manuscripts to the university, *declare* that you hold a painting in trust for a friend, or *cancel* a debtor's $10,000 note, you intend to surrender something. In such cases your expression of intention is not unlike your expression when, by promising, you make an expression of commitment. You take a first step by making an initial decision to surrender something, you take the second step to carry out your decision, and then you change your mind – you regret having taken the second step of surrendering. I use the term 'relinquishment' to refer to such situations in which surrender is not only voluntary, in the sense that the second step was within your control, but intentional, in the sense that surrender was what you intended when you took the second step.
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> But this is not always so. Sometimes you surrender something without intending to do so. When you *ratify* a contract made as a teenager, *represent* that a companion is the owner of your emerald ring, or *refrain* from protesting a neighbor's use of your land, you may have no intention of surrendering anything – your initial decision relates to something quite different. But after taking the second step to carry out your decision, you change your mind – and then you regret having taken your second step because of a legal rule under which your second step – ratifying, representing, or refraining – results in surrender of something that you do not want to surrender. I use the term 'preclusion' to refer to situations in which surrender is voluntary, in the sense that the second step was within your control, but not intentional, in the sense that surrender was not what you intended when you took the second step.

Thus, 'preclusions', such as estoppels[100] and elections, are 'voluntary but not intentional'. No proof is demanded of a specific intention – actual or objective – to surrender the right, power or advantage in question.[101] This is in contrast to 'relinquishments', such as pure waivers and releases by way of accord and satisfaction, which are based precisely on such an intention (and, for accord and satisfaction, on form or consideration as well). 'While relinquishment results in a surrender that you once intended, preclusion results in a surrender that you never intended',[102] or at least *regardless of* what you specifically intended. Although the power-holding party must 'intend' to do the acts that objectively constitute affirmation (in the sense of performing those acts 'knowingly' and 'voluntarily' with a view to recognizing, at least conditionally, the continued existence of his or her contractual obligations),[103] the resulting loss of the disaffirmation power is, definitionally, *unintentional* because of a *legal rule* under which one's act of signifying assent to the continuance of the contractual relationship results in the loss of something that one did not, or might not, wish or intend to lose. Accordingly, surrender of a legal power may not necessarily be what the affirming party intended when she, with requisite knowledge, took the step of (say)

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[100] Preclusion by way of estoppel, of course, is the same, and, unlike relinquishment, works by operation of law rather than party-intention. However, in estoppel cases the apparent choice might not have been real because it was unwitting and not fully informed, and the other party will not be protected from a reversal of the apparent choice, whether temporarily or indefinitely, unless there was detrimental reliance. Thus, like election, preclusion by estoppel does not rest on intention; however, unlike election, it is based on the reliance principle.

[101] But compare Toohey J in *Commonwealth v Verwayen* (1990) 170 CLR 394, 473, who seemed to come close to capturing the intention element in election (although he was actually talking about pure 'waiver'): 'Waiver … 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'.

[102] Farnsworth, see above n 5, 164.

[103] Ewart, see above n 5, 84: 'Study of the cases … induces a distinction between intention to choose, and intention to do the act or say the word, which the courts hold to be a choice'.

demanding that the other party complete the contract, or performed acts that otherwise recognized the continued existence of the contract. That the loss of a right (legal power, etc) is a consequence imposed by the law regardless of any specific intention to relinquish the right is also reflected in the courts' repeated endorsement of the proposition, quoted earlier, that 'an express disclaimer of such an intention [is] of [no] avail in preserving one right if in fact there be an exercise of another inconsistent right'.[104] Although an express reservation or denial of an intention to affirm may serve to postpone an election for a time if that is reasonable and harmless in the circumstances,[105] it cannot ultimately deprive an unequivocal act of its elective character:[106] 'the legal consequences of such an act must follow, however much [the party entitled to elect] might desire to repudiate them'.[107]

Via the election doctrine, then, preclusion is automatically achieved. The loss of right is not something that the electing party necessarily chose. It is simply the jural consequence of that party having objectively signalled an intention not to end the contractual relationship in question. There is, or ought to be, no additional doctrinal prerequisite of a specific accompanying intention to abandon that particular legal option.[108] In contrast to contract formation, modification or release situations, there is no equivalent requirement here of an 'intention to be bound'. No curial search is undertaken as to whether there was a 'promise' or a 'commitment' not to go back on the communicated decision. The unambiguous intimation of a known inconsistent jural alternative is all that matters and is required. The affirming party must intend to do the acts that would indicate, objectively and unequivocally, a non-disaffirmatory choice made, accompanied by sufficient knowledge of the legal alternatives available, but there is no additional requirement of a specific intention to bring about the very loss of the inconsistent disaffirmation power, which is effectuated by operation of law. That, quite simply, would be a superfluous requirement.

B *Knowledge: In What Sense, and To What Extent, Must an Election to Affirm Be an 'Informed' Act?*

Although affirmation need not be 'intentional' in the sense that loss of the relevant disaffirmation power was something that the electing party specifically intended when performing, deliberately and voluntarily, acts that objectively demonstrated an unequivocal decision against disaffirmance of the contract, the authorities are nevertheless unanimous that that objective decision must, to some extent at least, be an 'informed' one:[109]

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[104] *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 646 (per Stephen J, McTiernan ACJ agreeing). See also *Matthews v Smallwood* [1910] 1 Ch 777, 786–787 (per Parker J); *Summer Hill Business Estate Pty Ltd v Equititrust Ltd* [2011] NSWCA 149, [26].

[105] See, eg, *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41.

[106] See, eg, *Haynes v Hirst* (1927) 27 SR 480, where a party unsuccessfully sought to 'protect himself against the legal consequences of his acts by stating that he [did] them without prejudice' (at 489). See also *Summer Hill Business Estate Pty Ltd v Equititrust Ltd* [2011] NSWCA 149, [26]: 'If there has not been any outright exercise of one of the rights, reservations by a party of its rights may assist in depriving its conduct of the necessary unequivocal character'.

[107] *Croft v Lumley* (1858) 10 ER 1459, 1480 (per Williams J).

[108] Ongoing suggestions that the loss of the disaffirmation entitlement is something that the electing party has chosen or intended probably owe their existence, and error, to the enduring power of the misleading language of 'waiver' in the field. Generally, see Bigwood, above n 65, 62–72.

[109] *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 30 (per Lord Atkin) (emphasis supplied), adopted in *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 642 (per Stephen J, McTiernan ACJ agreeing).

> [I]f a man is entitled to one of two inconsistent rights it is fitting that when *with full knowledge* he has done an unequivocal act showing that he has chosen the one he cannot pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose.

Although Lord Atkin in the above passage used the phrase 'full knowledge', even a cursory survey of the case law and secondary literature on the subject reveals remarkable indeterminacy as to the target and extent of the knowledge required before a would-be elector will be found, or more likely deemed, to have affirmed a contract by way of election. Needless to say, it is beyond question that the elector must at least know the *facts* upon which the alternative and inconsistent disaffirmation power depended (knowledge of the serious breach, repudiation, misrepresentation, non-fulfilment of contingent condition, or whatever);[110] all the controversy and uncertainty pertains to the further question of whether the allegedly electing party must also have understood that, as a legal consequence of those known facts, she had available to her the inconsistent

[110] *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 656–658; *Khoury v Government Insurance Office of New South Wales* (1984) 165 CLR 622, 635. As to the extent of knowledge of the relevant facts required for the election doctrine to apply, that has been described as 'full knowledge of the material facts': *Bennett v L & W Whitehead Ltd* [1926] 2 KB 380, 410, as quoted by Stephen J in *Sargent v ASL Developments Ltd*, ibid 642. It is unlikely that 'full knowledge' here requires the electing party to know all of the details of the event upon which his or her disaffirmation entitlement depends, provided that he or she has 'knowledge of circumstances such as will provide information from which the decisive fact giving rise to the legal right is "a clear if not a necessary inference"' (*Sargent v ASL Developments Ltd*, ibid, citing *Elder's* (1941) 65 CLR 603, 617). See also *Spencer Bower*, above n 80, 429–430. In *Coastal Estates* [1965] VR 433, 443 (per Sholl J) suggested that the defrauded party must either fully know the facts, or else have 'positively and correctly [assumed] the falsity of the representation which induced the contract'. In the same case, Adam J, ibid 451, said: 'On principle I would think it sufficient that the representee had an informed belief in the falsity of the representation sufficient in all the circumstances to induce any reasonable man aware that he had a right to avoid the contract for misrepresentation and anxious to rid himself of it, to avoid it'.

jural alternative option of disaffirming the contract. Must she, in other words, know of 'the legal position resulting from the facts'?[111]

Now, the discordance and reservations on this issue in the jurisprudence are plenteous indeed.[112] Some courts simply omit discussion of the nature of the knowledge required,[113] while others speak only of knowledge of the facts that triggered the disaffirmation entitlement.[114] Still others expressly deny that knowledge of consequent legal rights is required in addition to mere knowledge of the facts giving rise to them,[115] while others again have insisted upon actual knowledge of the legal entitlement to elect.[116] It should come as little surprise, then, that judges have felt compelled at times to

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[111] The phrase is Lord Pearson's, in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, 890. Note also that, even if, as a precondition to an effective election, the law further requires knowledge of 'the legal position resulting from the facts', it does not follow that it should also require knowledge of the *legal consequences* of the electing party's selecting one alternative over the other. Although this is mentioned as a possible criterion of election in some cases (see, eg, *Otis Elevator Co Pty Ltd v Guide Rails Pty Ltd* (2004) 49 ACSR 531, [52] (per Palmer J)), and occasionally is argued for in the secondary literature on the subject (see, eg, James E Redmond, 'The Logical Basis of the Doctrine of Election in Contract' (1963) 3 *Alberta Law Review* 77, 87–88), awareness of the ultimate legal preclusionary effect of one's decisions and actions is not necessary for a binding election to affirm. As Stephenson LJ pointed out in *Peyman v Lanjani* [1985] 1 Ch 457, 486G, the law has never required that the elector must know of the legal effect resulting from his apparent exercise of choice, that is, that if he elects one way the law will adjudge his choice to be irrevocable. (See also *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd*, ibid 883A–B (per Lord Diplock)). This must follow because, as discussed above, election operates as a preclusionary rule rather than by way of 'relinquishment'; hence, the legal consequences of an unequivocally communicated election to affirm – automatic and permanent loss of the inconsistent disaffirmation power – is not an object of the electing party's 'intention' here at all. If intention as to the legal consequences of one's elective conduct is irrelevant to a binding affirmation, so too must be party-knowledge of them. Moreover, this stance is consistent with the modern general approach to contract formation and construction: that it is generally irrelevant whether a contracting party is conscious of the construction that a court will place upon his or her (deliberate and voluntary) words and conduct if called upon to adjudicate the issue. A party is generally bound to his or her apparent agreement, or in this context to his or her apparent affirmation, regardless of whether he or she realised, ex ante, that the court would interpret his or her agreement or conduct in that particular way.

[112] See the comments of Stephen J in *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 643.

[113] See, eg, *Scarf v Jardine* (1882) 7 App Cas 345, 361 (per Lord Blackburn); *Abram Steamship Co Ltd v Westville Shipping Co Ltd* [1923] AC 773; *Brown v Smitt* [1924] VLR 333; *Watson v Burton* [1957] 1 WLR 19; *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41, 55 (per Kitto J).

[114] See, eg, *Matthews v Smallwood* [1910] 1 Ch 777, 786–787; *Owendale Pty Ltd v Anthony* (1967) 117 CLR 539, 556 (per Windeyer J), 601 (per Owen J).

[115] See, eg, *O'Connor v SP Bray Ltd* (1936) 36 SR (NSW) 248, 261–262 (per Jordan CJ); *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41, 55 (per Kitto J); *Re Hoffman, Ex parte Worrall v Schilling* (1989) 85 ALR 145, 151–152 (per Pincus J); *Ellison v Lutre Pty Ltd* (1999) 88 FCR 116, [58] (per von Doussa, Mansfield and Goldberg JJ); *McDrury v Luporini* [2000] 1 NZLR 652, [11] (per Tipping J).

[116] *Kendall v Hamilton* (1879) 4 App Cas 504, 542 (per Lord Blackburn); *Young v Bristol Aeroplane Co Ltd* [1946] AC 163 (election between remedies by an injured worker); *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62, 78 (per Latham CJ), 94 (per Dixon J); *Peyman v Lanjani* [1985] 1 Ch 457; *Coastal Estates* [1965] VR 433; *Crump v Wala* [1994] 2 NZLR 331, 337 (per Hammond J) (noting, too, that the proposition was 'contentious').

admit that the various opinions expressed on the subject are 'impossible to reconcile'.[117] Although some authors have contended that, upon minute textual analysis, the existing body of case law satisfactorily answers the issue posed,[118] I remain unconvinced that microscopic dissection of prior judicial passages and decisions is alone capable of resolving, even by accident, this particular aspect of the modern election doctrine. To adapt a point made by Kirby J in *Agricultural and Rural Finance Pty Ltd v Gardiner*,[119] the matter 'cannot be resolved solely by citing old cases'.[120] Why not? First, it is unrealistic to believe that the judges who decided the older cases necessarily had the 'bigger picture' in mind when enunciating the doctrine, or that they were intending to be definitive *sub silentio*. Typically they enunciated the doctrine in a way and to the extent necessary to decide the particular, and often narrow, case before them. The distinction between estoppel and election, for example, only emerged, or assumed prominence, in the comparatively recent cases. Second, there is no escaping the fact that the High Court of Australia,[121] not to mention other senior Commonwealth courts,[122] have expressly

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[117] *Hughes v Huppert* [1991] 1 NZLR 474, 478 (per Gallen J); *Coastal Estates* [1965] VR 433, 444 (per Sholl J).

[118] See especially The Hon KR Handley, 'Exploring Election' (2006) 122 *Law Quarterly Review* 82. Contrast Sheppard, who analyses the same cases and comes to the opposite view: Aleka Mandaraka Sheppard, 'Demystifying the Right of Election in Contract Law' [2007] *Journal of Business Law* 442. Carter, Peden and Tolhurst, see above n 26, 726–727, suggest that '[g]iven that [*Khoury v Government Insurance Office of New South Wales* (1984) 165 CLR 622] involved election in respect of a common law right', it is arguable that that case has settled the position for Australia, namely, against a requirement of knowledge of rights. Although *Khoury* indeed involved election in respect of a common-law (as opposed to express contractual) right, what was said there in relation to knowledge of rights is clearly obiter (the case was decided against affirmation because the insurer did not know of the fact of the insured's material non-disclosures), and the discussion on knowledge of rights (see *Khoury*, ibid 633–634) is simply a nod in favour of what was said in *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, where the point was expressly left open.

[119] (2008) 238 CLR 570.

[120] Ibid [120]. Kirby J made this point specifically in connection with the so-called law of 'waiver'. His Honour went on to remark (ibid [130]): 'Against this background it is clear that examination of judicial authority alone will not clarify the law of "waiver" in the context of contractual breaches. A final court such as this must examine, as well, any relevant considerations of legal principle or legal policy'. See also ibid [137]. I consider these points equally valid for the law relating to affirmation of a contract by election.

[121] As earlier mentioned, the High Court expressly left the question open in *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 645 (per Stephen J, McTiernan ACJ agreeing).

[122] The House of Lords expressly left the question open in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India ('The Kanchenjunga')* [1990] 1 Lloyd's Rep 391, 398 (per Lord Goff of Chieveley). There are contradictory and inconclusive opinions on the point in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, 873B–D (per Viscount Dilhorne), 878E–879D (per Lord Pearson, Lord Reid agreeing, 860H), 883F–885E (per Lord Diplock). In *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 657 (per Mason J), after noting the conflicting opinions among their Lordships, commented that *Kammins* 'was not so much a case of election as a suggested case of waiver of a [statutory] defence'. See also *Spencer Bower*, above n 80, 431–432. For New Zealand, Henry J (for the Court) in *Matamata Metal Supplies Ltd v Waipa District Council* [1996] 3 NZLR 190, 195, observed that the question remains an open one. As for Canada, see *Maritime Life Assurance Co v Saskatchewan River Bungalows Ltd* [1994] 2 SCR 490, 499–500 (per Major J): 'Waiver [meaning "election"] will only be found where the evidence demonstrates that the party waiving had (1) a full knowledge of rights …'. For the United States, knowledge of rights resulting from the facts appears to be immaterial, at least judging by §84 (comment (b)) and §93 of the *Restatement of the Law of Contracts* (Second, 1981). See also the remarks of Stephen J in *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 644, regarding the 'United States authorities'.

abstained from pronouncing authoritatively and conclusively on a general knowledge-of-rights requirement within the common-law election doctrine. It follows that for Australia, the United Kingdom and New Zealand, at least, the question truly remains an open one. To my mind, and consistent with the official responsibility of such senior courts, the matter must now be settled by reference to logic, legal principle and legal policy, in addition to the decided cases.

Before turning to matters of logic, principle and policy, however, it is useful first to survey the current legal position in Australia on the subject. Although, as mentioned, the jurisprudence is not conclusive as to whether knowledge of rights is a precondition to a binding election to affirm, the case law and commentary in the field nevertheless afford a lens through which relevant matters of legal principle and legal policy can be brought into focus.

C *The Current Legal Position in Australia on a Knowledge-of-Rights Requirement for Affirmatory Election*

In *Borda v Burgess*,[123] Young CJ in Equity, referring in particular to election between alternative rights not expressly provided by the parties' own contract, observed:[124]

> [F]airness dictates that people should not too easily lose important rights by unwitting conduct unless that conduct has been acted upon by another to his or her detriment. Losing a right by conduct which is undertaken in ignorance of its legal consequences should be confined to estoppel. The law should preserve the distinction between election, where no detriment to the other side is required, and estoppel where detriment is required.[125]

In his Honour's view, authorities counter to that viewpoint[126] fell on 'the less orthodox side of the line'.[127]

However, despite modern dicta by individual members of the High Court indicating that '[e]lection consists in a choice between rights *which the person making the election knows he possesses* and which are alternative and inconsistent rights',[128] and that a legally effective election involves 'a *conscious choice* between inconsistent rights',[129] a neutral examination of the leading authorities in this area can only reveal that Australia's most senior court has yet to commit itself unambiguously as to the direction it will ultimately move on this issue.[130] If anything, and contrary (with respect) to Young CJ's understanding of the 'orthodox side of the line', the High Court has in past cases seemed

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123 [2003] NSWSC 1171.

124 Ibid [70]. This passage was respectfully adopted by Palmer J in *Otis Elevator Co Pty Ltd v Guide Rails Pty Ltd* (2004) 49 ACSR 531, [58].

125 I should point out a slight looseness of language here. Although Young CJ refers to '[l]osing a right by conduct which is undertaken *in ignorance of its legal consequences*' (emphasis supplied), it is clear from the surrounding discussion in the case that he is really talking about the electing party merely understanding that he or she has the right to disaffirm the relevant contract.

126 In particular *Re Hoffman, Ex parte Worrall v Schilling* (1989) 85 ALR 145, 151–152 (per Pincus J).

127 [2003] NSWSC 1171, [75].

128 *Commonwealth v Verwayen* (1990) 170 CLR 394, 421 (per Brennan J) (emphasis supplied).

129 *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, [143] (point (6)) (per Kirby J) (emphasis supplied).

130 Mention has already been made that the High Court of Australia expressly left the question open in *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 645 (per Stephen J, McTiernan ACJ agreeing).

to signal a clear preference *against* treating knowledge of the legal alternatives resulting from the facts as a precondition to a binding election to affirm.[131] Although, as we have seen, two members of the Full Court of the Supreme Court of Victoria in *Coastal Estates* managed to interpret the High Court's earlier decision in *Elder's* to the contrary,[132] there can be no escaping the more plausible reading of that case, namely, that the *Elder's* Court was in fact far from clear as to whether, outside of cases of actual election, knowledge of rights was elemental to 'non-actual' election as opposed to merely forensic. Indeed, it will be recalled that in *Sargent v ASL Developments Ltd*, Stephen J (with whom McTiernan ACJ agreed) reported the *Elder's* Court as expressing 'a clear preference' for the view that knowledge of the facts giving rise to the choice is all that is necessary where 'the conduct of the elector is unequivocal'.[133] However, where the elector's conduct was 'less unequivocal', providing merely 'some' evidence of affirmation, it may suffice as elective conduct if coupled with actual knowledge of the legal power to disaffirm, but 'then only because, viewed in its light, his conduct may, as a matter of "natural inference", be regarded as constituting an affirmation of the contract'.[134]

Ultimately, though, Stephen J was relieved of having to decide the point, because the case at hand involved a disaffirmation power that was bestowed by a term of the contract between the parties rather than through the independent operation of the general law. His Honour accepted as 'well founded' a distinction drawn by Herring CJ in *Coastal Estates v Melevende*,[135] that knowledge of rights is not necessary where the disaffirmation power in question is one conferred[136] under and by reason of the parties' own contract. By dint of the principle in *L'Estrange v F Graucob Ltd*,[137] contracting parties are deemed to know the terms of their contract, and therefore of any entitlements conferred thereunder, or, at any rate, they are precluded from taking advantage of their ignorance of those terms and entitlements.[138] Since *Sargent v ASL Developments Ltd* itself involved a contractually conferred right of rescission, Stephen J held that it was unnecessary for him to decide in general on the requisite knowledge for a binding affirmatory election, as the vendors' knowledge of the facts giving rise to the inconsistent

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131 Compare also the conclusion of Handley, see above n 118, 93.

132 Recall that Sholl J and Adam J in *Coastal Estates* [1965] VR 433, 443 and 453, respectively, opined that knowledge of the alternative right was essential to the making of a binding election in the absence of conduct and circumstances amounting to an estoppel.

133 (1974) 131 CLR 634, 644. To similar effect, see *Khoury v Government Insurance Office of New South Wales* (1984) 165 CLR 622, 633–634 (per Mason, Brennan, Deane and Dawson JJ): 'It would seem however, that, at least where the alternative rights arise under the terms of the one contract, a party may be held to have elected to affirm it notwithstanding that he was unaware of the actual right to avoid it'.

134 *Sargent v ASL Developments Ltd*, ibid. See also *Khoury v Government Insurance Office of New South Wales*, ibid 646.

135 [1965] VR 433, 433, himself drawing on the views of Ewart, see above n 5.

136 The conferment is usually express, but disaffirmatory rights that accompany terms implied into a contract by statute or regulation, thereby becoming 'contractual' in nature, must also be treated in the same way as any other term of the contract permitting disaffirmance: *Zucker v Straightlace Pty Ltd* (1986) 11 NSWLR 87, 93A (per Young J).

137 [1934] 2 KB 394, 403 (per Scrutton LJ), 406 (per Maugham LJ). The principle from *L'Estrange* has been consistently, and emphatically, confirmed by the High Court in recent years. See *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; *Equuscorp Pty Ltd v Glengallan Investments* (2004] 218 CLR 471, [33].

138 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 644–645. The distinction has become well accepted in Australia. See also *Zucker v Straightlace Pty Ltd* (1986) 11 NSWLR 87, 92G–93A (per Young J); *Khoury v Government Insurance Office of New South Wales* (1984) 165 CLR 622, 633–634 (per Mason, Brennan, Deane and Dawson JJ); *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26, 30 (per Brennan J), 40 (per Deane, Toohey, Gaudron and McHugh JJ).

legal alternatives sufficed for the election doctrine to apply in the case before the bench. However, in endorsing Herring CJ's distinction, Stephen J also said that he was 'not to be taken as concluding that where contractually conferred rights are not in issue there can be no binding election without knowledge of the right to elect'.[139] He intended no more than to suggest that the distinction between contractually conferred disaffirmation rights and those arising entirely dehors the contract provided a measure of reconciliation of the conflicting authorities on the subject.[140] In relation to cases of *contractually conferred disaffirmation entitlements*, however, the principle upon which Stephen J decided the case is unambiguously expressed in his judgment:[141]

> Election between inconsistent contractual rights does not call for any conscious choice as between two sets of rights, it being enough that there should be intentional and unequivocal conduct together with knowledge of the facts giving rise to the legal rights. There need not, therefore, be a consciously 'choosing mind' …

Turning to Mason J's judgment in the same case, we see an acknowledgement of the controversy in the jurisprudence on the subject. Nonetheless, a clear preference is expressed for Jordan CJ's view in *O'Connor v SP Bray Ltd*,[142] that 'it is the general rule that a person may be held to have elected with knowledge of the facts giving rise to the existence of the alternative right, though unaware of the existence of that right'.[143] The crucial passage in Mason J's judgment is this one:[144]

> If a party to a contract, aware of a breach going to the root of the contract, or of other circumstances entitling him to terminate the contract, though unaware of the existence of the right to terminate the contract, exercises rights under the contract, he must be held to have made a binding election to affirm. Such conduct is justifiable only on the footing that an election has been made to affirm the contract; the conduct is adverse to the other party and may therefore be considered unequivocal in its effect. *The justification for imputing to the affirming party a binding election in these circumstances, though he be unaware of his alternative right, is that, having a knowledge of the facts sufficient to alert him to the possibility of the existence of his alternative right, he has acted adversely to the other party and that, by so doing, he has induced the other party to believe that performance of the contract is insisted upon.* It is with these considerations in mind that the law attributes to the party the making of a choice, though he be ignorant of his alternative rights.

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139 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 645.
140 Ibid.
141 Ibid 648–649.
142 (1936) 36 SR (NSW) 248, 262–263.
143 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 657.
144 Ibid 658 (emphasis supplied).

The emphasized words, it seems, have proven influential with Australia's lower courts, particularly the Federal Court.[145] That is notwithstanding the fact that, as Stephen J pointed out in *Sargent v ASL Developments Ltd*,[146] Jordan CJ's stance in *O'Connor v SP Bray Ltd* is supported only by reference to cases of contractually conferred rights,[147] *Sargent* also being a case of that nature.[148] However, Mason J's 'justification' for attributing, counterfactually, the character of an election to the conduct of the affirming party is, with respect, not entirely convincing. Although it is of course vital to the operation of both the election and estoppel doctrines that there be 'unequivocal' words or conduct by one party causing the other party reasonably to believe that the former was pursuing one jural alternative rather than the other,[149] and that 'exercising rights under the contract adversely to the other party' is *ipso facto* 'unequivocally affirmatory conduct', his Honour's additional reference to the electing party 'having a knowledge of the facts sufficient to alert him to the possibility of the existence of his alternative right' is both puzzling and problematic. It seems to incorporate a form of constructive knowledge (as to personal rights) into the rationale for imputing an election against an ignorant party, which mode of knowledge follows simply upon that party's possessing actual knowledge of the facts upon which the personal rights legally depend. Yet the commanding source of this element of Mason J's justification remains obscure. It is discernible neither from his Honour's judgment nor from the previous leading authorities in the election field.

Granted, it is easy to defend a standard of constructive knowledge being applied for the purpose of imputing election in cases where the relevant disaffirmation entitlement is

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[145] See *Re Hoffman, Ex parte Worrall v Schilling* (1989) 85 ALR 145, 151–152 (per Pincus J); *Ellison v Lutre Pty Ltd* (1999) 88 FCR 116, for example at [58] (disaffirmation rights conferred by statute); *Tiplady v Gold Coast Carlton* (1984) 8 FCR 438. In the latter two cases especially, *Coastal Estates* is distinguished on the basis that it is a fraud case, and that fraud cases are by their nature different from non-fraud cases. In *Ellison*, the Full Court relies on Stephen J in *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, in support of such a distinction, but nowhere in that case did his Honour draw that particular distinction. He merely said (ibid 645) that *Coastal Estates* involved 'the right conferred by law to rescind ab initio for fraudulent misrepresentation', and he was contrasting that situation with contractually conferred disaffirmation rights. (Sholl J's suggestion in *Coastal Estates* [1965] VR 433, 444, that society should not complain if a stricter test were to apply in order to show affirmation in the case of fraud is not definitive either, as his Honour immediately went on to refer to knowledge of rights being insisted on in other contexts as well, such as workers' compensation.) The *Ellison* Court also refers to *Tiplady*, which distinguishes *Coastal Estates* on the same basis (ie, that it was a fraud case), but *Tiplady* involved a contractually conferred rescission right, and the purchasers in that case were found to have been aware of their disaffirmation entitlement anyway.

[146] (1974) 131 CLR 634, 645.

[147] Also, I am not sure that Jordan CJ's views in *O'Connor v SP Bray Ltd* (1936) 36 SR (NSW) 248 align with what he later said in *Larratt v Bankers and Traders Insurance Co Ltd* (1941) 41 SR (NSW) 215, 227 – namely, that 'unintended waiver' (ie, imputed election) must basically satisfy the requirements of estoppel.

[148] For other criticisms of Jordan CJ's conclusion on the knowledge point, see Rossiter, above n 19, 569.

[149] See, eg, *Peyman v Lanjani* [1985] 1 Ch 457, 501G (per Slade LJ); *Glencore Grain Ltd v Flacker Shipping Ltd (The 'Happy Day')* [2002] 2 Lloyd's Rep 487, [67] (per Potter LJ).

conferred under and by reason of a term of the contract in question.[150] There might also exist a handful of well-recognized disaffirmation rights arising exclusively dehors the contractual instrument, with knowledge of which the parties may nevertheless fairly be charged (for example because of common experience, notoriety or judicial notice).[151] Beyond such cases, though, it is hard to accept that such a deeming of knowledge is, or ought to be, generalized outward to cover all disaffirmation entitlements conferred independently upon a party by operation of the general law, whether it be via the common law, statute or equity. Although it is possible to find eminent judges asserting that 'generally when the facts are known ... the right is presumed to be known',[152] others have been unwilling 'to accept the view that there is in law any presumption that anyone, even a judge, knows all the rules and orders of the Supreme Court':[153]

> The fact is that there is not and never has been a presumption that everyone knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application.

Also, in *Coastal Estates*, Sholl J opined:[154]

> A good many of the earlier cases, especially those relating to the subscribing for shares in companies, appear to have dealt with the question of affirmation as if there were at least a presumption of fact that anyone induced by fraud to enter into a contract knows that on discovery of the fraud he has a right to avoid the contract ab initio, provided that is still

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[150] The principle from *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 surely commands consistency here. It is sometimes said that even where the relevant disaffirmation power is contained in the contract, 'it may be however appropriate to consider the situation as one where the onus of proof has shifted rather than one to be determined on the basis that a different principle applies': *Hughes v Huppert* [1991] 1 NZLR 474, 478 (per Gallen J). However, although there are a few (very limited) exceptions to the *L'Estrange* principle, and the principle basically involves factual inferences that a reasonable bystander could draw as to the signatory's assent to a contractual document, in practice the principle tends to function effectively as an irrebuttable rule, as a matter of necessary legal policy. Certainly a person cannot in law disclaim knowledge of the contents of their contract simply by showing that they did not actually know or understand the terms of their contract; rather, they must be able to bring themselves within the narrow exceptions to the normal signature rule. I am inclined, therefore, to view 'imputed election' in cases of contractually conferred disaffirmation rights, where there is actually ignorance of those rights, as involving a *separate* principle (the *L'Estrange* signature rule), but one that is absorbed into the criteria of the election doctrine, hence not appearing to be separate at all.

[151] A termination right existing in virtue of an estate in property, such as the landlord's right to forfeit a lease for non-payment of rent, seems to be the most obvious example. Such cases are sometimes observed to involve an exception to the normal requirement of knowledge of rights as well as the facts in the election context (see, eg, *Coastal Estates* [1965] VR 433, 435 (per Herring CJ)). Attenuation of the knowledge requirement in the landlord–tenant context may be explicable by historical circumstances; see *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch 12, 30D–G (per Robert Walker LJ). Of course, a landlord's right of fortfeiture for non-payment of rent tends almost invariably to be expressly conferred under the terms of the lease, hence falling within the more readily acceptable exception to the requirement for actual knowledge of rights for the purpose of election.

[152] *Hourigan v Trustees Executors and Agency Co Ltd* (1934) 51 CLR 619, 651 (per Dixon J), quoting Knight Bruce LJ in *Stafford v Stafford* (1857) 1 De G & J 193, 202.

[153] *Evans v Bartlam* [1937] AC 473, 479 (per Lord Atkin), quoted with approval by Stephenson LJ in *Peyman v Lanjani* [1985] 1 Ch 457, 483–484. See also *Crump v Wala* [1994] 2 NZLR 331, 337 (per Hammond J). It is possible that 'in the ordinary way a solicitor should be presumed to know the law': *Stevens and Cutting Ltd v Anderson* [1990] 1 EGLR 95, 97D–E (per Stuart-Smith LJ).

[154] [1965] VR 433, 444.

> possible. But I think the better view is that there must be either an election (which involves knowledge of legal rights though the proofs advanced to establish knowledge may include or consist of inferences of fact), or an estoppel. …

That, in my respectful opinion, is the better, more defensible, view. The idea that there is, or ought to be, a general 'presumption of fact' that knowledge of rights follows upon one's knowing the underlying facts, so as to generate a 'permissible inference' of the former upon proof of the latter, strikes me as rather untenable, all things considered.[155] Because factual presumptions typically rest on quantifiable 'human experience or tendency', the one presently alleged would have to be plausibly based on a strong practical likelihood or high probability that if the basic fact is shown (here, that the event giving rise to the inconsistent legal alternatives is known), the presumed (inferred) fact also exists (namely, that the rights consequent upon that event are known as well).[156] Yet both professional experience and empirical research tend to confirm that lay people do not in general know their juridical rights, at least in any practically utilizable way.[157] Given the modern complexities of law (and, of course, countless appellate court decisions divulge that even judges are capable of making errors of law from time to time), that is hardly a surprising revelation. It must surely follow, then, that if a presumption as to legal knowledge were to legitimately operate in this field, it would have to be seen to function as a genuine *legal*, rather than factual, presumption, having *mandatory* effect.[158] In other words, it must be viewed as a *policy-based* presumption in the sense of resulting not simply from human experience or tendency (as a matter of probability),[159] but rather from a 'societal predilection toward the existence of the presumed fact':[160] if the facts generating the rights are known, those rights *ought to*, as a matter of sound legal policy, be deemed to be known as well. Yet as Lord Atkin pointed out in *Evans v Bartlam*,[161] nowhere in the law is there a presumption that everyone knows the law. Even the weaker proposition, that everyone could and should know the law, has been lambasted as 'notoriously and ridiculously false'.[162]

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[155] I draw here on Linda J Cohen, 'Presumptions According to Purpose: A Functional Approach' (1980–1981) 45 *Alberta Law Review* 1079, 1092–1093, who argues that presumptions can be classified into three major types, according to the purpose for which each was created: 'procedural presumption', 'probability presumption' and 'policy presumption'. Needless to say, not many presumptions fall neatly within one class, for many are founded, at least in part, on all three bases: efficiency or expedience, quantifiable human experience or tendencies, and social predilections or values.

[156] *Res ipsa loquitur* is an example of such a factual presumption; see, eg, *Fitzpatrick v Walter E Cooper Pty Ltd* (1935) 54 CLR 200, 219 (per Dixon J); *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121, [22] (per Gleeson CJ and McHugh J). It is merely the application of inferential reasoning and does not, like a true legal presumption, have mandatory effect.

[157] See Alexy Buck, Pascoe Pleasence and Nigel J Balmer, 'Do Citizens Know How to Deal with Legal Issues? Some Empirical Insights' (2008) 38 *Journal of Social Policy* 661.

[158] That is to say, successful proof of the basic facts (here that facts giving rise to legal rights are known) *compels* the operation of the presumption (that the rights are actually known) as a matter of law. The presumption does not cease to control as a makeweight in the assessment of the evidence unless the court accepts the veracity of the opposing evidence to the appropriate standard.

[159] As Cohen points out (see above n 155, 1093), policy presumptions 'differ from probability presumptions because the relationship between the basic and presumed facts cannot be quantified'.

[160] Ibid.

[161] [1937] AC 473, 479.

[162] John Austin, *Lectures on Jurisprudence* (1879) vol 1, Lecture 25, 497, as quoted by Robert E Goodin, 'An Epistemic Case for Legal Moralism' (2010) 30 *Oxford Journal of Legal Studies* 615, 620, fn 18.

But what of the narrower, though unquestionably related,[163] principle captured by the legal maxim '*ignorantia juris non excusat*' (ignorance of the law is no excuse)? That, of course, is a principle that rests squarely on a legal policy. Indeed, an Australian judge, writing extra-curially, has invoked the maxim in support of a principle-based argument that knowledge of the right to elect should not be a precondition to a binding election to affirm: 'Ignorance of the law is generally a misfortune, not an advantage'.[164] There is, no doubt, substantial truth in that statement, but even the author rightly qualifies it through use of the adjective 'generally'. Whether, and if so to what extent, ignorance can serve as an 'advantage' in law is likely to depend on a weighing and balancing of a range of countervailing interests and considerations, most of which are significantly 'contextual' in nature. For example, *ignorantia juris non excusat* is, as one would expect, most pragmatically justifiable and rigidly applied in connection with the criminal law, as a basic imperative to the maintenance of social order and the tenets of legality.[165] Hence it has featured in virtually every criminal code since Roman times.[166] When one turns to the modern private law, however, where much less is potentially at stake, the maxim is, as it ought to be, correspondingly relaxed. There, ignorance of (or mistakes as to) one's civil obligations can indeed serve as 'an advantage': for example, to support a compromise of a bona fide (but nonetheless legally unmeritorious) claim,[167] to reverse a mistaken payment on restitutionary grounds,[168] or, by logical extension of the previous example and curial developments in the estoppel field, to empower a court to grant relief in respect of a contract induced by a mistake.[169] In other words, although policy clearly demands that the maxim be rigorously applied to those charged with wrongdoing or breach of duty, whether it be criminal or civil, that policy simply does not apply (or, if it does, with much less force) in the present context, where the allegedly electing party is not seeking to escape a legal duty or shelter from the consequences of his or her own

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[163] Historically, in relation to the criminal law at least, the maxim was connected to a deeming that everyone 'is bound and presumed to know' the law; see William Blackstone, *Commentaries on the Laws of England* (1769) vol 4, ch 2, sec 6, 27, quoted by Goodin, ibid 619, fn 14.

[164] Handley, see above n 118, 97.

[165] As Selden proclaimed in his *Table Talk*: 'Ignorance of the Law excuses no Man; not that all Men know the Law, but because 'tis an excuse everyman will plead, and no Man can tell how to confute him'. (John Selden, 'Table Talk' in James Thornton (ed), *Table Talk from Ben Johnson to Leigh Hunt* (1934) ch 77, sec 2, 60, as quoted in Goodin, see above n 162, 617, fn 5.) Routinely allowing accused persons to avail themselves of the excuse would create a perverse incentive for people to remain ignorant of the criminal law, which is generally duty-imposing, and duty-imposing for a public, collective purpose. Moreover, courts would be impossibly burdened in every case to decide upon the plea, 'render[ing] the administration of justice next to impracticable' (Austin, above n 162, 498, quoted in Goodin, ibid 617, fn 6). See also Laurence D Houlgate, '*Ignorantia Juris*: A Plea for Justice' (1967) 78 *Ethics* 32, 37.

[166] See, eg, Goodin, above n 162, 616, fn 4, citing Blackstone, see above n 163, Edwin R Keedy, 'Ignorance and Mistake in Criminal Law' (1908) 22 *Harvard Law Review* 75, and Glanville Williams, *Criminal Law* (2nd ed, 1961) ch 8. In Queensland, for example, the *ignorantia juris non excusat* principle is enshrined in s 22(1) of the *Queensland Criminal Code Act 1899* (Qld): 'Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence'. Sections 22(2) and (3) contain limited exceptions, namely colour of right and non-publication (or non-discoverability) of the law, respectively.

[167] See *Miles v New Zealand Alford Estate Co* (1886) 32 Ch D 266, 291 (per Bowen LJ); *Wigan v Edwards* (1973) 1 ALR 497.

[168] See, eg, *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349.

[169] See Nicholas C Seddon and Manfred P Ellinghaus, *Cheshire and Fifoot's Law of Contract* (9th Australian ed, 2008) [12.8].

wrongdoing.[170] Moreover, it might well be asked why the non-electing party requires the protection of a maxim that exists primarily for those other purposes, particularly when she or he potentially enjoys the protection of estoppel-based principles should the other, apparently affirming, party happen to be innocently unaware of his or her legal disaffirmation entitlements at general law.

Accordingly, in my view, whether genuine ignorance of one's legal position can serve as an advantage – here to preserve a disaffirmation power despite overtly affirmatory conduct – should be seen to depend on a range of circumstantial considerations.[171] For that reason it is best left to a factual inquiry in each case, at least where the disaffirmation power in question exists entirely independently of the parties' own contractual instrument. Given that the onus of proving a prior inconsistent election rests on the party asserting it,[172] it has been argued, against allowing an ignorance defence in this connection, that legal professional privilege would make it difficult for the non-electing party to prove that the elector was aware of his or her legal disaffirmation entitlement at the earlier time.[173] It is, however, easy to exaggerate the gravity of the practical difficulties in this area, as the court always remains free to draw inferences from the surrounding facts. As Slade LJ observed in *Peyman v Lanjani*:[174]

> I would like to make a few observations as to the practical consequences of this court's decision on this point [that is, the decision that a person (such as the plaintiff in the present case) cannot be held to have made the irrevocable choice between rescission and affirmation unless he had knowledge of his legal right to choose and actually chose with that knowledge] ... If A wishes to allege that B, having had a right of rescission, has elected to affirm a contract, he should in his pleadings … expressly allege B's knowledge of the relevant right to rescind, since such knowledge will be an essential fact upon which he relies. The court may, and no doubt often will, be asked to order A to give further and better particulars of the allegation … In many cases the best particulars that A will be able to give will be to invite the court to infer knowledge from all the circumstances. However strong that prima facie inference may be, it will still be open to the court at the trial, after hearing evidence as to B's state of mind, to hold on the balance of probabilities that he did not in fact have the requisite knowledge. In the latter event A's plea that B has elected will fail. Yet it should not be thought that injustice to A will necessarily follow. For if A has acted to his detriment in reliance on an apparent election by B, he will in most cases be able to plead and rely on an estoppel by conduct in the alternative. If on the other hand A has not acted to his detriment in reliance on any such apparent election, justice would not seem to preclude B from sheltering behind his ignorance of his rights.

Thus, the fact that legal professional privilege will place a difficult burden on the non-electing party does not prevent a court, after all the evidence has been heard, from nevertheless inferring, on the balance of probabilities, that the electing party in fact possessed the requisite knowledge as to his or her legal options, despite all assertions to the contrary. Although, of course, no adverse inference can be drawn simply from the allegedly electing party's failure to waive privilege in his or her solicitor's file,[175] the mere fact that that party had received advice from a competent solicitor in relation to the

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170 Indeed, very often it is the other party whose wrongdoing triggered the disaffirmation power!

171 Compare also *Holder v Holder* [1968] Ch 353, 369–370 (per Cross J).

172 *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, 878, 878–888 (per Lord Pearson) (waiver); *Coastal Estates* [1965] VR 433, 444–445 (per Sholl J).

173 *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd*, ibid 878C–D (per Lord Pearson) ('unreasonable burden of proof'); Handley, see above n 118, 97; *Nectar Ltd v SPHC Operations (NZ) Ltd* (HC Auckland CL20/02, 7 May 2003) [118] (per Harrison J).

174 [1985] 1 Ch 457, 500H–501C.

175 See *WC Wentworth v JC Lloyd* (1864) 10 HLC 589, 590–591 (per Lord Chelmsford); *Oxford Gene Technology Ltd v Affymetrix Inc (No 2)* [2001] RPC 18, [21] (per Aldous LJ), [53] and [56] (per Brooke LJ) (Sedley LJ agreeing with both).

matter might contribute to a permissible inference that his or her legal position was actually known at the time of the alleged affirmatory conduct. As Stephenson LJ acknowledged in *Peyman v Lanjani*: 'When a party has legal advice, he will be more easily presumed to know the law and evidence or special circumstances may be required to rebut the presumption'.[176]

It is likewise easy to exaggerate the gravity of other objections in this area that, while of a similarly practical nature, are also policy-inspired. Handley, for example, has complained that '[a] rule that knowledge of the right had to be proved would encourage perjury and reward those who do not seek advice'.[177] Carter, Peden and Tolhurst[178] also object that such a rule would result in the legally represented party being treated differently than those who are not so represented, owing to the legal adviser's knowledge of the law.[179] Yet it is difficult to see why this should be of material concern to vulnerable non-electing parties who, if they rely on an apparent affirmation, potentially enjoy the protection of estoppel-based principles in any event, and who otherwise invariably stand to gain, without consideration, reliance or form, the advantage of securing their contractual relationship at the expense of the other party's erstwhile disaffirmation power. A constant challenge for the law is to make credible demands of those subject to its dictates, and it is not always practicable for people to obtain timely legal advice, or realistic to assume that everyone enjoys 'equal access to justice' (so to speak).[180] The common law of contract must serve the business needs and justice interests of both well-advised corporate legal entities and such belated receivers of legal advice who might, like the plaintiff in *Coastal Estates*, exhibit 'the despairing attitude of a person without legal knowledge, who believe[s] himself defrauded, who [cannot] afford to go on with the contract, and who [does] not know how to escape from the position in which he [finds] himself'.[181]

In my view, it is far better that a party's reasons for not pursuing timely legal advice in relation to his or her contractual position, after discovery of facts giving rise to a disaffirmation power, be adjudged on a case-by-case basis rather than being governed by an unnuanced legal rule or blanket presumption. Moreover, the objection relating to assisting perjury and rewarding the tardy should be seen to carry as much persuasive force as most other rhetorical fears ('slippery slopes', 'floodgates of litigation', and the

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176 [1985] 1 Ch 457, 487D. See also *Spencer Bower*, above n 80, 435, [XIII.3.24]. Just to be clear here, although it is sometimes suggested that a solicitor's knowledge of the law must be attributed ('imputed') to the client in certain circumstances (see, eg, *Borda v Burgess* [2003] NSWSC 1171, [73] (per Young CJ in Equity)), the better view is that no legal rule of imputed knowledge applies in the present connection, that is, apart from the normal operation of an evidential presumption; see *Spencer Bower*, ibid 433–434, [XIII.3.23]. The extent to which a solicitor's knowledge of his or her client's rights could genuinely be imputed to the client will of course depend on the nature of the transaction and the scope of the solicitor's agency in relation to that transaction.

177 Handley, see above n 118, 97. Compare also *Nectar Ltd v SPHC Operations (NZ) Ltd* (HC Auckland CL20/02, 7 May 2003) [118] (per Harrison J): 'A cynical defendant could deliberately act without legal advice, knowingly that it would not be bound by its conduct if events did not work out as planned or expected. Similarly it could knowingly defer exercising its rights to legal advice for the same purpose'.

178 Carter, Peden and Tolhurst, see above n 26, 396, [18-48].

179 This seems to concern the situation of a solicitor's knowledge being imputed to his or her client, which will of course depend on the scope of the agency and ordinary agency principles. Cases such as *Coastal Estates* and *Peyman v Lanjani*, however, do not raise any issue of imputed (in contrast to constructive) knowledge.

180 Of course, no aspersions were, or plausibly could have been, cast upon the late receiver of legal advice in each of *Coastal Estates* [1965] VR 433 and *Peyman v Lanjani* [1985] 1 Ch 457.

181 *Coastal Estates*, ibid 442 (per Sholl J).

like).[182] A tribunal of fact should be competent to ascertain the bona fides (or otherwise) of a party's assertion of legal ignorance, which state of mind can only realistically fall for individuated discovery in the particular case. Deliberately acting without seeking legal advice or knowingly abstaining from taking such advice, purely for self-serving strategic reasons, smacks of speculation at the other party's expense – the very species of opportunism that the common-law election doctrine aims to suppress in the present context. If such opportunism were apparent on the evidence, it would be easy for the court to apply the standard of Nelsonian (shut-eye) knowledge, whereby it could not lie in the mouth of the 'wilfully blind' or 'recklessly indifferent' elector to assert that he or she in fact lacked knowledge of his or her legal position after discovery of the facts.[183] Despite the evidence not showing directly that the elector knew of his or her legal position, it would nevertheless in those circumstances again support an inference that he or she was in fact so aware, despite protestations of ignorance.[184]

Finally, the above fears seem even more overstated in the light of the practical reality that the risk of electing parties successfully invoking legal ignorance so as to avoid the imputation of an affirmatory election is likely to affect a very small class of potential case indeed. Judging by the case law in the field, the vast majority of affirmation disputes involve contractually conferred rights, deemed knowledge of which can virtually never be disavowed. It follows that an ignorance defence will very quickly be blocked in most commercial and conveyancing disputes. The defence, therefore, is likely to be restricted to the vast minority of litigated matters involving disaffirmation entitlements arising entirely dehors the contract. The argument is much weaker, both empirically and in policy, for presuming knowledge of rights in those very few remaining cases. Again, it is best left to the relevant tribunal of fact to determine the existence and extent of the allegedly affirming party's legal knowledge on an individuated, case-by-case basis.

Turning briefly to academic viewpoints in Australia, opinion in the major textbooks seems divided. Carter, Peden and Tolhurst, for example, mentioned above, believe that 'knowledge' in connection with the election doctrine means no more than 'knowledge of the facts'. They 'have great difficulty in seeing the basis or logic for' the *Coastal Estates* Court's requirement of 'knowledge of rights', even when those rights are generated entirely dehors the contract.[185] In addition to their objection based on the differential treatment of legally advised and non-legally advised parties, the authors state: 'What seems to us the appropriate rationale for saying that the distinction between implied rights and those expressly conferred is erroneous is that the principles of election are concerned with consistency of conduct'.[186] Although it is true that the election principles

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[182] In my experience, 'slippery slope'- and 'floodgates'-type arguments are often an asylum for those unwilling (or unable) to engage on the substance of an issue. See, generally, Toby J Stern, 'Federal Judges and Fearing the "Floodgates of Litigation"' (2003–2004) 6 *University of Pennsylvania Journal of Constitutional Law* 377.

[183] See, eg, *Allcard v Skinner* (1887) 36 Ch D 145, 188 (per Lindley LJ), 192 (per Bowen LJ): victim of undue influence precluded from rescinding because she deliberately chose not to inquire into her equitable rights.

[184] Compare also *Insurance Corporation of the Channel Islands, Royal Insurance (UK) Ltd v Royal Hotel Ltd* [1998] Lloyd's Rep IR 151, 161 (per Mance J): 'A person who deliberately and for tactical reasons decides not to acquire definite knowledge of a matter which he believes it likely that he could confirm must be treated as having knowledge of that matter. This is not to introduce any conception of constructive knowledge into the present situation'. Mance J held that election requires actual knowledge as to the electing party's rights; constructive knowledge is insufficient.

[185] Carter, Peden and Tolhurst, see above n 26, 396, [18-48]. See also Carter, above n 7, [11-14].

[186] Carter, Peden and Tolhurst, ibid.

are motivated by a legal precept against inconsistent conduct, it does not follow that such a precept must be enforced against all parties at all costs, including those who happen innocently to stumble into the 'legal trap' of losing their erstwhile disaffirmation rights without the support of form, reciprocity or, on the other party's side, unfair prejudice. Moreover, the authors' comment is equally true for the estoppel principles, by which a much fairer and nuanced balance can be struck between the competing interests of the parties. Their rationale simply drops the element of 'choice' – as well as considerations concerning the lack of any requirement for supporting form, reciprocal benefit or detrimental reliance – completely out of the picture, ultimately leaving no room (or indeed need) for distinguishing election from estoppel. They concede, however, that in the absence of knowledge of the legal right to disaffirm, and particularly in the case of fraud, conduct may need to be 'more convincing', for example 'by showing the exercise of proprietary rights or contractual rights adverse to the other party or to his or her detriment'.[187] But if rights can be shown to have been exercised 'to [the other party's] detriment', why is estoppel not the more appropriate preclusionary category to invoke?

In contrast, at one point[188] in the Australian edition of *Cheshire and Fifoot's Law of Contract* the authors propose a possible reconciliation of the competing authorities in this area by requiring full knowledge of the facts and consequent legal rights for a binding election to affirm, but by stating also that this principle may have to 'give way in certain circumstances where the courts will impute an election. This will happen when the representee has apparently (though not consciously) affirmed the contract by conduct that is "adverse" to the other party. In such a case an estoppel arises against the representee'.[189] The problem with this qualification, however, is that it seems to assume that all cases of imputed election must perforce involve an estoppel (hence stand conceptually apart from the election principles), which is an assumption that is compelled by neither authority nor intellectual necessity in this field. It is unnecessary to resort to estoppel principles where, for example, by dint of the *L'Estrange v Graucob* principle, a party is effectively charged with constructive knowledge of any expressed contractual disaffirmation power in his or her favour. An election can therefore be imputed on that basis even in the absence of conduct 'adverse to' the non-electing party, that is, if there is unambiguously indicative behaviour leading the non-electing party to believe that a decision against disaffirmance of the contract has finally been made.

D *Should There Be A Knowledge-of-Rights Requirement Within the Australian Election Doctrine? Arguments from Logic, Legal Principle and Legal Policy*

As will be clear from the discussion in the previous section, Australian law is not yet settled as to the place, if any, for a knowledge-of-rights requirement in the law relating to affirmation of a contract by election. Although the senior judicial inclination appears to be against formal recognition of such a criterion, the fact remains that the High

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[187] Ibid.

[188] To be sure, the point is made in relation to the discussion of rescission for misrepresentation. Later in the work, in relation to termination for breach, the point is made, unqualifiedly, that '[a] party may by conduct affirm a contract though unaware of his or her right to terminate, so long as there is knowledge of the facts which give rise to that right' (Seddon and Ellinghaus, see above n 169, 1043). The authors cite *Sargent* in support of the proposition, although that was of course a case concerning a contractually conferred disaffirmation power.

[189] Seddon and Ellinghaus, ibid 528. Because the point is made in connection with rescission of a contract for misrepresentation, that probably explains why the authors were not mindful of the 'exception' relating to contractually conferred rights. It is not common for a contract to confer an express disaffirmation power in relation to pre-contractual misrepresentation (as opposed, say, to breaches or unfulfilled contingent conditions).

Court has to date expressly renounced speaking authoritatively and definitely on the matter, and it certainly cannot be claimed that Australia's intermediate appellate courts have spoken with a united voice on the subject. It is likely that the question can now only be resolved by reference to logic, legal principle and legal policy, in addition to whatever positive law currently exists in the field. This will doubtless necessitate a balancing of an assortment of countervailing considerations in the mix.

First, from the standpoint of logic and ordinary semantics, one might be excused for wondering why so much discordance exists among courts and commentators over a knowledge-of-rights requirement in the present context.[190] For how could an 'election' ever be said to have occurred when the would-be 'elector' was in fact unaware that she or he had any choice in the matter? Indeed, as Adam J rhetorically pondered in *Coastal Estates*: 'In the nature of things how can one elect between alternative courses, unless one is aware that alternative courses are open?'[191] It might thus be considered that knowledge of one's legal alternatives is demanded because it goes to the very heart of what it means to *elect* between them, just as knowledge sometimes goes to what it means to 'accept' a contractual offer[192] or to 'assent to' displayed or delivered terms that are sought to be incorporated into an unsigned contract.[193] Moreover, if it is correct that 'at the heart of election is the idea of confrontation which in turn produces the necessity of making a choice',[194] it is difficult to comprehend how a contracting party could sensibly be said to have been *confronted* with the *necessity* of making a choice if that party was in fact ignorant of the imperative of choice, or at least of the choice-alternatives themselves.[195] Deeming an election despite an actual lack of knowledge as to the jural alternatives involved can only come at the cost of fictionalizing what is really going on; and although legal fictions are often, perhaps, harmless necessities in the law,[196] why would the common law create an obfuscating fiction when it is unnecessary given that some other preclusionary rule – such as estoppel – could readily achieve a just balance between the parties' respective interests *without* resort to a fiction?

Turning to the reasons in legal principle and legal policy for a knowledge-of-rights requirement within Australia's common-law election doctrine, it is first notable that some judges and legal commentators have argued that no such principle or policy exists in favour of requiring anything more than mere knowledge of the underlying facts as a precondition to an effective election to affirm. Carter, for instance, has asserted that '[t]here is no reason in principle why waiver between inconsistent rights should attract a requirement of knowledge of the right'.[197] But this is, with respect, an arresting assertion; for it cannot literally be true that *no* such reason in principle exists. Even courts on occasion have introduced considerations of legal principle and policy in support of a legal-knowledge requirement in this area. In *Borda v Burgess*,[198] for instance, we saw

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190 Compare also *Spencer Bower*, above n 80, 428 ('inescapable as a matter of logic') and 430.

191 [1965] VR 433, 452.

192 *R v Clarke* (1927) 40 CLR 227 (one cannot accept an offer of which one is in fact ignorant).

193 The leading case is, of course, *Parker v South Eastern Railway Co* (1877) 2 CPD 416: one must at least know, or have constructive knowledge of, the contractual nature of the proffered terms, if not knowledge of the actual terms themselves. This is true of incorporation by signature as well: *L'Estrange v F Graucob Ltd* [1934] 2 KB 394.

194 *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26, 42 (per Deane, Toohey, Gaudron and McHugh JJ).

195 Also, to the extent that the irreversibility rule is explicable by an anti-speculation rationale, it seems that some level of knowledge of the alternatives is required, otherwise the one with the power to disaffirm could not be said to be 'speculating' at the other party's risk at all.

196 As to which, generally, see Lon L Fuller, *Legal Fictions* (1967).

197 John W Carter, 'Waiver (of Contractual Rights) Distributed' (1991) 4 *Journal of Contract Law* 59, 63.

198 [2003] NSWSC 1171.

how Young CJ in Equity reasoned that '*fairness* dictates that people should not too easily lose important rights by unwitting conduct unless that conduct has been acted upon by another to his or her detriment'.[199] And in *Coastal Estates*, as well as two subsequent English Court of Appeal decisions that purport to follow the reasoning in that case,[200] essentially identical arguments were made from the standpoint of 'justice', namely that, owing to its irreversibility, affirmation by way of election should not be permitted to function as a 'legal trap into which the public can fall';[201] 'the law protects persons making the choice from stumbling into it'.[202] In essence, because the doctrine operates irrespective of prejudicial reliance on the other side, it 'must be confined within strict limits'.[203] Of course, one assumes that Carter did not mean that there are literally no reasons of legal principle or legal policy in this connection, merely that whatever reasons do exist are not sufficiently cogent to outweigh what he doubtless regards as countervailing authority and justification.[204]

In a relatively recent article,[205] the Hon Justice KR Handley devotes a number of pages of close-textured analysis to demonstrating that, as a matter of precedent and black-letter common-law methodology, the English Court of Appeal (in *Peyman v Lanjani*[206]) was wrong in its interpretation of the earlier authorities, and in particular that it was wrong to hold that knowledge of rights is a precondition to an effective election to affirm. However, only two brief paragraphs at the end address matters of principle and policy:[207]

> Are there reasons, in principle, why knowledge of the right to elect should not be required? The common law favours objective standards. In the criminal law a mistake of fact may excuse, but not a mistake of law. Ignorance of the law is generally treated as a misfortune, not an advantage. In *Hourigan v Trustees Executors & Agency Co Ltd*[208] Dixon J. quoted Knight Bruce L.J. saying in 1857 'generally when the facts are known … the right is presumed to be known'.[209]
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> Disputes about an election normally arise because the other party relies on an earlier election to defeat a later attempt to elect the other way. Legal professional privilege would make it difficult for that party to prove that the elector was aware of his right at the earlier time. … A rule that knowledge of the right had to be proved would encourage perjury and reward those who do not seek advice. The preference of the common law for objective standards is reflected in the tests for contract formation, repudiation, and estoppel by representation, and in the imputation of an agent's knowledge to his principal. It would not be surprising if it did not allow a person who knows the facts to have his cake and eat it.

Most of Handley's objections in the above passage have been dealt with in the previous section of this paper. They are, in my respectful view, overstated, unpersuasive and unsuited to a sophisticated (nuanced) system of contractual justice. Problems of legal

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199 Ibid [70] (emphasis supplied).
200 See above n 47.
201 *HB Property Developments Ltd v Secretary of State for the Environment* (1998) 78 P & CR 108, 117 (per Aldous LJ).
202 Ibid 118 (per Henry LJ).
203 Ibid.
204 In his recent monograph on breach of contract (see Carter, above n 7), he advances (ibid [11-14]) a number of arguments *against* a knowledge-of-rights requirement in the present context.
205 Handley, see above n 118. Contrast Sheppard, see above n 118.
206 [1985] 1 Ch 457.
207 Handley, ibid 96–97.
208 (1934) 51 CLR 619, 651.
209 *Stafford v Stafford* (1857) 1 De G & J 193, 202 (per Knight Bruce LJ).

professional privilege, encouraging perjury and rewarding careless ignorance doubtless exist, but they are not beyond the procedural and forensic competence of the courts to manage without excessive cost, burden or delay to the routine administration of justice.[210] The remark that the common law prefers objective standards, especially in contract, is also accurate, but it is a sweeping and overly simplistic assertion for present purposes. As is well known, objectivity in contract is essentially 'a rational and necessary response to practical constraints, by which a balance of convenience has been struck';[211] it is not an end in itself.[212] Although strongly weighted – nowhere more so than in Australia, it seems[213] – objectivity is never applied to the exclusion of every other countervailing consideration or desideratum that may bear upon a just and efficient system of contract law. An objectively formed contract may, for example, be set aside if it can be shown to be unjust despite appearances, say because it was entered into as a result of mistake, misrepresentation, duress, undue influence, unconscionable dealing, or the like. In all such cases the law is called upon to balance wider 'justice' considerations with the virtues that attend the law's preference for objective criteria and standards (expedience, certainty, simplicity, security, predictability, and the like). Similarly, in the present connection, it is not necessarily 'just' that a party who is innocently unaware of his or her disaffirmation rights (or who at least is unchallenged in respect of his or her ignorance of them) should permanently lose those (potentially very important) rights just because the other party holds a belief that the contract has been affirmed, when that belief ***is*** founded merely on conduct and appearances, and particularly when that other party has not yet

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[210] See text accompanying notes 173–184 above.

[211] See Brian Coote, 'Reflections on Intention in the Law of Contract' [2006] *New Zealand Law Review* 183, 183. Professor Coote argues, however, that what the law selects to treat as intention may in many cases come closer to the real intention of the parties than some might at first suppose. It is to be borne in mind, too, that when objectivity applies to bind someone to an unintended agreement, in contrast to an unintended election, the party so bound at least receives the benefit of the consideration requirement, such that the unintended consequence is not a legally unrewarded one.

[212] Also, when it is said that contract law takes an 'objective' approach, this is typically in relation to matters of *intention*, when intention is said to be required (eg, 'intention' to make or accept an offer, or 'intention' to repudiate one's contractual obligations), and not necessarily in relation to the knowledge upon which the (objective) intention is built. In other words, that the common law prefers 'objective standards' does not necessarily answer the question of what the appropriate test for knowledge, as the foundation of the relevant intention, should be. Brennan J seems to hint at this point in *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26, 38: 'This appeal does not turn simply on whether the conduct of Immer, viewed objectively, constituted an election not to exercise its contractual right of rescission. Rather, the question as argued is whether, in the light of Immer's knowledge or lack of knowledge of relevant circumstances, it can be held to have so elected'.

[213] Recent High Court of Australia decisions seem to promote the value of objectivity in contract in circumstances where other Anglo-Commonwealth jurisdictions would tolerate a different solution, consistent with their own conception of what objectivity demands. Consider, for example, *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165: no 'surprise term' exception to contract law's signature rule; but compare, in Ontario, *Tilden-Rent-A-Car v Clendenning* (1978) 83 DLR 3d 400; *Equuscorp Pty Ltd v Glengallan Investments* (2004) 218 CLR 471, [33]–[35]: no partially integrated contract allowed where the oral terms conflict with the written; but compare, in England, *Couchman v Hill* [1947] KB 554. Also, in *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 *NSWLR* 603, [6] (per Allsop P), stated that resort to subsequent conduct in aid of the interpretation of a contract 'is difficult to reconcile with the objective paradigm'. Contrast, however, the very different viewpoint of the Supreme Court of New Zealand in *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2008] 1 NZLR 277.

altered his or her position, or forsaken opportunities, based on the belief.[214] Where there has been prejudicial reliance upon the belief, that consideration may well trump any concern we may hold for the first party losing his or her rights unwittingly. However, that, I suggest, is a reckoning best left to estoppel (or similar) principles and not election.

Of course, Justice Handley might object to the notion that an allegedly electing party could ever be 'innocently unaware' of his or her disaffirmation rights, since his Honour is clearly in favour of the legal proposition that people generally should be treated as knowing their rights when they know the antecedent facts, or at least that their legal ignorance should generally count as a 'misfortune' rather than an 'advantage'. But, as previously discussed, the principle that ignorance is no excuse (or advantage) is weaker in private law than it is, say, under the criminal law (or otherwise is inapplicable when the legally ignorant party is not seeking to use ignorance to escape a legal duty or the consequences of his or her own wrongdoing); and the idea that people could in general know all their legal rights is, to borrow Austin's words again, 'notoriously and ridiculously false'.[215] To close, as his Honour does, with the statement that '[i]t would not be surprising if [the common law] did not allow a person who knows the facts to have his cake and eat it', is, of course, to do no more than beg the question at hand; for it is simply to presuppose the persuasive force of all the reasons preceding the ultimate assertion and to ignore (or at least not engage with) the counter-arguments that have been explicitly relied on in a number of the modern leading authorities themselves. In the present context, the party who risks losing his or her contractual relationship with another whose ignorance of a disaffirmation entitlement is either innocent or unchallenged always enjoys the potential protection of estoppel or laches in any event, that is, if the facts support preclusion in the name of those other departments of the law.

VI TAXONOMIZING AFFIRMATORY ELECTION (II): A SUGGESTED RESTATEMENT OF LEGAL PRECLUSION BY WAY OF ELECTION

In Part III of this paper, the taxonomy of legal preclusionary reasons from *Coastal Estates Pty Ltd v Melevende*[216] was presented. According to that taxonomy, election may either be 'actual' (found as a fact, expressly or by way or inference) or 'imputed' (deemed to have occurred contrary to fact). 'Actual election' requires knowledge both of the facts giving rise to the power to disaffirm the contract in question and of the disaffirmation power itself, together with performative acts that unambiguously indicate that a decision against disaffirmance of the contract has finally been made. 'Imputed election' requires merely knowledge of the facts, together with an 'adverse' exercise of rights under the contract, or an exercise of rights that could not be justified unless the relevant contractual relationship remained intact. For Sholl J and Adam J in *Coastal Estates*, cases of 'imputed' election are not really instantiations of 'election' at all, but rather are better seen to involve the application of some other legal preclusionary principle, such as estoppel.

Bracketing the normative or intellectual desirability of the *Coastal Estates* taxonomy, we also saw in Part IV that that taxonomization of election might not actually present an accurate, or even plausible, encapsulation of the law and operative

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[214] It is interesting that Handley lists 'estoppel by representation' as an example of the common law's preference for objective standards, yet, *ex hypothesi*, there is more going on in relation to founding an estoppel by representation than simply a belief founded objectively on the representation. That is to say, it is not just 'objectivity' here that is precluding the inconsistent behaviour after the objective representation.

[215] Austin, see above n 162, 497.

[216] [1965] VR 433.

discriminations in this field. A fair reading of the leading Australian authorities on affirmation of a contract by election – especially *Elder's Trustee and Executor Co Ltd v Commonwealth Homes and Investment Co Ltd*[217] and *Sargent v ASL Developments Ltd*[218] – tends to buttress the view that the extent of an electing party's knowledge as to his or her legal options relates merely to the inferential worth, or 'unequivocality' (or otherwise), of conduct that is alleged to be 'affirmatory'. *Pace* Sholl J and Adam J in *Coastal Estates*, it does not relate to the involvement of or necessity for some other doctrine than election to effectuate preclusion when the party entitled to disaffirm the contract has acted without knowledge of that entitlement. Moreover, and again contrary to the views of Sholl J and Adam J in *Coastal Estates*, there is evidence in the subsequent case law that the notion of an 'adverse' exercise of contractual rights in the election context is not necessarily coextensive with the concepts of 'reliance', 'detriment' and 'unfair prejudice' that motivate and characterize the law relating to estoppel.

What I want to do in this Part of the paper is, necessarily briefly, refine and reformulate the *Coastal Estates* taxonomy of preclusionary reasons, essentially with a view to offering a restatement of the law in this field. The main desiderata that I have sought to satisfy in composing my own taxonomization of legal preclusion by way of election are that the common-law election doctrine must be principled, workable and just, and that its criteria and applications must, as far as possible, be conformable with other features and operations of modern contract law. I also take it as axiomatic that a judicially created and administered election doctrine that was directed at achieving those desiderata would be doctrine that sought in general to (1) preserve the greatest freedom for the party entitled to disaffirm, (2) for the longest possible time, while (3) protecting the non-electing party from reliance injury or unfair speculation at that party's risk or disadvantage. It would also be a doctrine that both avoided the perpetuation of unnecessary fictions and enjoyed clear delineation from other legal preclusionary categories, such as 'waiver' and 'estoppel'.

Nothing in my suggested restatement of the election doctrine is intended to affect the existing law relating to affirmation of a contract in its purest form: affirmation by way of 'actual', 'true', 'real' or 'genuine' election. Actual affirmation involves the communication, either expressly or via unambiguous indicative conduct, of a free, deliberate and informed decision, by or on behalf of the one entitled to disaffirm, against disaffirmance of the contract. The decision is made with actual knowledge of the legal alternative of disaffirmation, though it need not be accompanied by a specific intention, on the part of the electing party, to relinquish that particular disaffirmation power. Such an intention is superfluous to the operation of the common-law election doctrine, as preclusion results by operation of the law rather than in virtue of intentional surrender or abandonment. In that vital respect, 'election' must be distinguished from so-called 'waiver'.

Where my restatement differs from the *Coastal Estates* taxonomy is entirely in relation to the nature and scope of so-called 'imputed' affirmatory elections: affirmations that are deemed to have occurred between the parties contrary to (or at least irrespective of) fact because there has been unequivocal conduct by the power-holding party that led the other party reasonably to believe that a decision against disaffirmance had in fact been made. Whereas Sholl J and Adam J in *Coastal Estates* preferred that all such cases be administered outside of the common-law election doctrine, *stricto sensu*, my own taxonomy would, in a principled way, tolerate an affirmatory election being 'imputed' counterfactually to the party entitled to disaffirm, but only where that party is, pursuant to some *supplementary* principle or policy, fairly affixed with constructive knowledge of his or her disaffirmation entitlement(s). In that respect my limited conception of imputed

[217] (1941) 65 CLR 603.
[218] (1974) 131 CLR 634.

election adds a layer of complexity to the *Coastal Estates* taxonomy, as well as differing from those accounts of the subject that deny altogether a formal knowledge-of-rights criterion inside the common-law election doctrine.

Needless to say, my conception of imputed election encompasses the most benign manifestation of counterfactual affirmation, which is where an affirmatory election is imputed despite the nonattendance of any subjective intention, in the mind of the party entitled to choose, to elect against disaffirmance, when that party is aware both of the event giving rise to the legal disaffirmation power and of the legal disaffirmation power itself. Such an election is 'fictional' only in the relatively trivial sense that, because the relevant intention is being gauged objectively rather than subjectively, there is always a chance that the 'election' may indeed be contrary to fact. Appearances (that the contract has been affirmed) may belie an uncommunicated actual state of mind (that the party in question has not yet decided against disaffirmance of the contract). However, because such an intention is being ascertained where there is also knowledge, by the allegedly electing party, of the inconsistent jural alternatives involved, 'imputed' election in this situation is better conceived of simply as 'inferred' election, hence falling comfortably on the 'actual election' side of the taxonomy. If the power-holding party's conduct led the other party reasonably to believe that an election against disaffirmance has finally been made, then that other party is entitled to *infer* that it has in fact been made, even if that should transpire to be contrary to subjective reality. That is how objectivity works in other areas of contract law where intention must be ascertained, and there is no reason it ought to operate differently here. The fiction must be tolerated for the same reason it is tolerated in those other areas of contract: an objective approach to party-intention represents 'a rational and necessary response to practical constraints, by which a balance of convenience has been struck'.[219]

More problematic are those authorities where it is suggested that an affirmatory election can be imputed to a party when that party lacks not only the intention to exercise a choice, but also knowledge of the inconsistent jural alternatives between which he or she is alleged to have chosen. Although we might accept that an election can quite readily be imputed where there is no actual intention to elect, it does not follow that one can, or should, be imputed in the face of an absence of the basic legal knowledge upon which even an 'apparent' intention to elect can be formed. Not least of all, such an imputation would involve a *serious* legal fiction. However, whether it is a fiction that can plausibly be defended (or at least tolerated) in the present context, that is, without the need to resort to some other legal preclusionary category than election, depends entirely on whether a supplementary legal principle or legal policy, conformable with contractual orthodoxy, can be found to support it.

As suggested, on my restatement of the election doctrine, imputation of an election to affirm when there is, innocently, no actual knowledge by the allegedly affirming party (or his or her agent) of the inconsistent legal entitlement to disaffirm must be limited to those situations where that party can fairly be affixed with *constructive knowledge* of such a legal entitlement despite not actually knowing it. Such situations are, in my view, to be parsimoniously construed, so as to result in a circumscribed conception of imputed election – certainly narrower than some of the modern authorities and commentators would permit or acknowledge. No controversy ought to be seen to infect the vast majority of cases where a party is, by virtue of the principle in *L'Estrange v F Graucob Ltd*,[220] effectively charged with constructive knowledge of a disaffirmation entitlement that is conferred under and by reason of the parties' own contractual instrument. Whether a party should be charged with constructive knowledge of a disaffirmation entitlement that arises entirely dehors the formal contract, however, is a much thornier question; still,

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[219] Coote, see above n 211, 183.

[220] [1934] 2 KB 394, 403 (per Scrutton LJ), 406 (per Maugham LJ).

no compelling reasons exist in legal principle or in legal policy to support the conclusion that, in general, he or she should be so charged (or, if not, then at least prevented from relying on his or her unchallenged ignorance thereof). I do not deny that certain legally common situations may well exist where, for the purposes of the election inquiry, constructive knowledge of a general-law disaffirmation power might fairly be ascribed to the power-holding party. However, given that the non-electing party is potentially protected by other legal preclusionary devices in the event of unwitting affirmatory conduct, such situations ought also to be parsimoniously acknowledged and construed. They should, in my view, be limited to disaffirmation rights that have acquired 'notoriety' within a particular trade, industry or class of contractual undertaking or dealing to which the parties' actual contractual relationship belongs.[221] To charge a party with constructive knowledge outside of those limited situations, for the purpose of then imputing counterfactually to him or her an election to affirm, is to pile one fiction upon another fiction in an unnecessary, artificial and unwarranted manner. Other legal preclusionary categories, especially estoppel, are quite capable of achieving a just balance between the parties' respective rights and interests in those (in practice very few) cases that do not fall within the limited conception of imputed election described in my proffered restatement.

So, to summarize, my refinement and reformulation of the *Coastal Estates* taxonomy of preclusionary reasons can be encapsulated in the following six propositions:

1. An election to affirm a contract may be either 'actual' (express or inferred/implied) or 'imputed'.
2. Actual election and imputed election overlap to the extent that 'elective intention' is always adjudged objectively, hence potentially counterfactually, rather than subjectively.
3. Potentially, an affirmatory election is imputed whenever the party entitled to elect engages in unequivocal conduct that leads the other party reasonably to believe that an election against disaffirmance has in fact been made.
4. Such a belief can only be held when that other party is also justified in believing that the electing party was acting with awareness of the jural choice options that followed upon the (also known) event permitting disaffirmance.[222] In other words, the allegedly electing party's conduct in the circumstances must be such that an inference of knowledge, by that party of his or her legal disaffirmation rights, is also justified, which knowledge may be actual or constructive.

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[221] I have in mind here 'notoriety' in the same sense, *mutatis mutandis*, as it is used in the area of terms implied by custom or usage. See *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1985) 160 CLR 226, 236; *Woods v NJ Ellingham & Co Ltd* [1977] 1 NZLR 218, 220 (per Henry J), quoting *Halsbury's Laws of England* (4th ed, 1975) vol 12, Custom and Usage, [451]: '"Notoriety" does not mean the usage must be known to everyone or even by the person against whom it is asserted, but must be well known at the place to which it applies and readily ascertainable by a person who proposes to enter into a contract of which such usage would form part'.

[222] Compare Mance J (as he then was) in *Insurance Corporation of the Channel Islands, Royal Insurance (UK) Ltd v Royal Hotel Ltd* [1998] Lloyd's Rep IR 151, 162: 'Is it sufficient for affirmation that there is knowledge and a communication (by words or conduct) which, assuming such knowledge, demonstrates an unequivocal choice? Or must the communication itself or the surrounding circumstances demonstrate such knowledge to the other party? In principle, it seems to me that the latter approach is correct in the context of affirmation. The communication itself or the circumstances must demonstrate objectively or unequivocally that the party is making an informed choice'.

5. An inference of constructive knowledge in connection with proposition 4 is only warranted where the relevant disaffirmation power is provided by the parties' own contractual instrument or otherwise is 'reasonable and notorious' *inter se*. While imputation of an intention to affirm can occur without proof of an actual intention to so elect, there can be no such imputation in the absence of knowledge, actual or constructive, of the available legal alternatives between which the party is alleged to have elected.
6. In the very few remaining cases where the circumstances do not support a fair ascription of constructive knowledge as to personal legal rights, such as *Coastal Estates* and *Peyman v Lanjani*, loss of the relevant disaffirmation power (that is, legal preclusion) must occur 'on some other recognisable ground based on justice or equity but which has nothing to do with election as such'.[223]

Nothing in this restatement/taxonomization of affirmation of a contract by way of election is intended to controvert the inevitable legal reality that all preclusions from disaffirmance of a contract, whether based on genuine elective behaviour or otherwise, are heavily fact-dependent. Under no circumstances can a court or other tribunal of fact avoid making its determinations in the context of the totality of the relations, dealings and circumstances of the case at hand.

VII CONCLUSION

When affirmation of a contract, hence legal preclusion, occurs as a result of *election*, it is because the party who was confronted with the necessity of choosing between ending a contractual relationship and persevering with that relationship communicated to the other party an unambiguous decision *not* to end the relationship. Although the communicated decision need not be 'intentional' in the sense that the party whose indicative behaviour was unambiguously inconsistent with disaffirmance specifically intended 'affirmation' to follow as a legal consequence of that behaviour, it must nevertheless in general be 'actual and conscious'. That is to say, the allegedly electing party must have intended to perform the acts that objectively signalled perseverance with the contractual relationship in question, while sufficiently knowing not only of the facts that generated the relevant disaffirmation power but also of the relevant disaffirmation power itself.

There is room in this account of the common-law election doctrine for a limited conception of 'imputed election'. That allows an election to be imposed fictitiously upon a party without proof not only of an intention actually to exercise an affirmatory election, but also of legal knowledge in relation to his or her jural election options themselves. However, this conception of imputed election requires at least constructive knowledge of the relevant disaffirmation power, which further limits the conception, because this paper has also argued for a parsimonious comprehension of the circumstances under which 'constructive knowledge' of a disaffirmation power can fairly be ascribed to the power-holding party, especially dehors the parties' own contractual instrument. Legal preclusion in cases falling outside of such a limited conception of imputed election must be achieved via some other doctrinal channel than election – for example, estoppel or laches. In this writer's view, no convincing rationale can exist for a general rule that deems an election to have been made when '[i]t is quite clear that [the allegedly electing party] never

[223] *Coastal Estates* [1965] VR 433, 454 (per Adam J).

dreamt of electing, never knew anything about electing, and never knew that he had the rights between which he is deemed and adjudged to have elected':[224]

> To say that such a man had elected is to say the thing that is not, and it is no more open to a Court or a Judge to say the thing which is not than it is to other men; and the question, then, really is, not whether he had elected, but whether he is estopped from asserting one of two rights, which he says he had, by reason of his having successfully asserted the other of them.[225]

[224] *In re Collie, ex parte Adamson* (1878) 8 Ch D 807, 817 (per James and Baggallay LJJ) (re-election to prove in bankruptcy against joint or separate estates).

[225] Ibid.