RESTITUTION OF INVALID TAXES—PRINCIPLES AND POLICIES

MARGARET BROCK*

If the tax has been held illegal, unconstitutional, which is how it is being interpreted, shouldn't we be refunded in some shape or form?[1]

I INTRODUCTION

On 5 August 1997 the High Court decided in *Ha v New South Wales*[2] that the New South Wales State Government 'licence fees' were really an excise duty and consequently were in breach of s 90 of the Commonwealth Constitution. On 19 September 1997 a Commonwealth legislative package[3] received Royal Assent to circumvent this decision and protect the States from claims such as that suggested by Mr Libertino above.[4]

Mr Libertino's response is characterised in restitutionary law as an ultra vires right of recovery. Professor Peter Birks has claimed that 'Australian law teeters on the brink of recognising [this] right to restitution.'[5] Such a form of restitution has been the subject of much academic debate,[6] was accepted in England[7] in 1992 and has

---

*Articled Clerk, Maddens Lawyers, Warnambool, Victoria. This paper, in slighly revised form, was awarded the Law School prize for Honour's Papers, Deakin University, School of Law, 1998. Thanks to Sharon Erbacher for all her help and encouragement; of course, all errors are mine alone.

[1] Joseph Libertino, 'Retailer', *The Australian* (Sydney), 7 August 1997, 4.
[2] (1997) 71 ALJR 1080 ('*Ha*').
[3] Consisting of the *Franchise Fees Windfall Tax (Collection) Act 1997*, the *Franchise Fees Windfall Tax (Imposition) Act 1997*, the *Franchise Fees Windfall Tax (Consequential Amendments) Act 1997*, the *Sales Tax (Customs) (Alcoholic Beverages) Act 1997*, the *Sales Tax (Excise) (Alcoholic Beverages) Act 1997*, the *Sales Tax (General) (Alcoholic Beverages) Act 1997* and the *Sales Tax Assessment Amendment Act 1997*.
[4] Note *Roxborough v Rothmans of Pall Mall Ltd* [1999] 161 ALR 253 regarding a claim directly resulting from the decision in *Ha* for, inter alia, restitution of moneys paid by retailers to wholesalers.
[5] Peter Birks, *Restitution—The Future* (1992) 81.
[6] See, eg, Clifford Pannam, 'The Recovery of Unconstitutional Taxes in Australia and the United States' (1964) 42 *Texas Law Review* 777; Peter Birks, 'Restitution from the Executive: A Tercentenary Footnote

been raised in some Australian courts.[8] The *Ha* decision and the Federal Government's legislative response, provide an excellent vehicle through which to examine the Australian adoption of such a restitutionary right of recovery and any limitations on that right.

A tax can be invalid in both an administrative law and constitutional law sense. This article will examine taxes that are invalid for contravening the Constitution,[9] as occurred in *Ha*. Part II examines current avenues for recovery of unconstitutional taxes and judicial discussion of such a new possible ground. It will be seen there is no comprehensive right of restitution for payment of invalid tax and there is much divergence regarding the basis upon which to found a distinct ground. There will also be examination of issues specific to Australia that may affect the scope, ramifications and possibly even adoption of such ground.

Part III examines the ability of the State and Federal legislatures to limit such a restitutionary right of recovery through analysis of specific attempts at such limitation. It will become apparent that such ability is restricted, but some avenues do remain open depending on drafting formulation or cause of the invalidity. Such limitations have a direct bearing on ultimate recovery. It will be suggested that guidance may be gained from the limitations regarding the possible foundation of such ground in Australia regarding unconstitutional taxes so that ability for actual recovery complements the cause of action instead of being irrelevant to it.

II RESTITUTION FOR PAYMENT OF INVALID TAXES

In *Ha* two actions were combined. In the first, the plaintiffs were retailers of tobacco products in New South Wales but did not hold the licence required under the *Business Franchise Licences (Tobacco) Act 1987* (NSW). The plaintiffs in the second action,[10] who were wholesalers of tobacco products in New South Wales, held the required licence but had not paid the correct amount for it. Under the Act, selling tobacco without a licence was prohibited under penalty.[11] The delegate of the Commissioner demanded tax with the penalty amount in lieu of fees for the licence that should have been paid from the plaintiff in the first action and demanded an

---

to the Bill of Rights' in Paul D Finn (ed), *Essays on Restitution* (1990) 164; W R Cornish, '"Colour of Office": Restitutionary Redress Against Public Authority' (1987) 14 *Journal of Malaysian and Comparative Law* 41; John D McCamus, 'Restitutionary Recovery of Moneys Paid to a Public Authority Under a Mistake of Law: *Ignoratia Juris* in the Supreme Court of Canada' (1983) 17 *University of British Columbia Law Review* 233; Graham Virgo, 'The Law of Taxation is not an Island—Overpaid Taxes and the Law of Restitution' (1993) *British Tax Review* 442; and Ronald D Collins, 'Restitution from Government Officials' (1984) 29 *McGill Law Journal* 407.

[7] *Woolwich Building Society v Inland Revenue Commissioners* [1992] 3 All ER 737.

[8] *Esso Australia Resources Ltd v Gas and Fuel Corporation of Victoria* [1993] 2 VR 99; *State Bank of New South Wales Ltd v Federal Commissioner of Taxation* (1995) 132 ALR 653.

[9] *Commonwealth of Australia Constitution Act 1900* (UK) ('Constitution').

[10] *Walter Hammond & Associates Pty Ltd v New South Wales* (1997) 71 ALJR 1080.

[11] *Business Franchise Licences (Tobacco) Act 1987* (NSW), s 29 (wholesale), s 30 (retail).

increased amount with penalty from the second plaintiff.[12] Both plaintiffs refused and asserted the fees were a duty of excise.

The High Court by 4:3 majority declared the provisions of the Act imposing licence fees or fees in lieu of licence fees were invalid as being excise duty contrary to s 90 of the Constitution. The majority of Brennan CJ, McHugh, Gummow and Kirby JJ held that the fee went beyond regulatory control and was really a revenue-raising tax on the sale of tobacco.[13]

It would appear that the first plaintiff had not made any payment (although the licences were renewable monthly and so an earlier fee may have been paid) whilst the second plaintiff had paid, albeit allegedly insufficiently. After the High Court's finding of invalidity the second plaintiff, or anyone else who had paid such licence fee to the State Government, may have been able to claim restitution for such payment. As this article is concerned with the restitutionary consequences of the *Ha* decision rather than the decision itself, discussion will be premised on one party claiming restitution from the State for payment of invalid taxes.

A *The Current Position*

A survey of the current state of the law in relation to recovery of invalid taxes from revenue reveals there is no comprehensive restitutionary right based on the invalid nature of the tax but rather several grounds of recovery mainly based on private law notions. Recovery varies according to the circumstances of the individual case, thus leaving 'gaps'. There are some statutory recovery provisions, but they, however, are dependant on legislative will and do not provide a prima facie right. Common law grounds under which such right of recovery are found (compulsion, *colore officii* and mistake) will be examined in turn and applied to the *Ha* situation to explore such gaps.

1 *Compulsion*

Under this category, actual compulsion, that is lack of voluntariness, must be proven. The taxpayer must have an honest and reasonable belief that the threat will be carried out.[14] A protest at the time of payment may be evidence of such lack of voluntariness but is not conclusive.[15] As summarised by the Supreme Court of Canada: '[T]here must be some natural or threatened exercise of power possessed by the party receiving it over the person or property of the taxpayer for which he has no immediate relief than to make the payment'.[16]

It is subject to a very narrow test of what is legally considered duress. The threat must be in some way illegitimate and so threat of legal action, even criminal sanc-

[12] Ibid ss 46, 47.
[13] *Ha* (1997) 71 ALJR 1080, 1092.
[14] See *Air India v Commonwealth* [1977] 1 NSWLR 449.
[15] See *Mason v New South Wales* (1952) 102 CLR 108.
[16] *Air Canada v British Columbia* (1989) 59 DLR (4th) 161, 199 (La Forest J).

tion, is not sufficient.[17] This is in essence a private law action as emphasis is placed on the plaintiff's state of mind and is based on the assumption that a demand by the State is equivalent to a demand by a private citizen.

In *Mason v New South Wales*[18] restitution was claimed for payments made for permits to enable the Masons to undertake their inter-state transportation business. The payments were made between the period the High Court confirmed the validity of the legislation under which the fees for the permits were demanded[19] and the decision of the Privy Council on this matter. Thus at the time there was much speculation on the permit's validity; the payments were made under protest. The Privy Council subsequently declared the legislation invalid.[20] In *Mason*, the majority found the Masons had a reasonable apprehension the seizure provisions would be enforced against their vehicle if payment were not made and so they satisfied the duress requirement. Kitto J found that the seizure provisions in the Act were in themselves sufficient to raise the presumption of compulsion which gave some recognition to the public aspects of demands by public bodies. Birks has argued that Menzies J's judgment extends further than that of Kitto J's, as his view of compulsion was a presumption drawn from the character of the agency making the demand.[21] However, Menzies J also found that the Masons believed the Act would be enforced against them and that payment was not voluntary.[22]

Although the plaintiffs in *Ha* were exposed to criminal prosecution if they did not pay, they would not have succeeded in a restitutionary action under compulsion because, as seen, threat of legal action is not sufficient for a finding of duress.

2 Colore Officii

Under the *colore officii* doctrine, restitutionary recovery is allowed where 'a public officer demands and is paid money he is not entitled to, or more than he is entitled to, for the performance of his public duty.'[23]

It is based on the rationale that the circumstances are such that compulsion is assumed because

> the position occupied by the defendant creates virtual compulsion, where it conveys to the person paying the knowledge or belief that he has no means of escape from payment strictly so called if he wishes to avert injury to or deprivation of some right to which he is entitled without such payment.[24]

---

[17] *Mason v New South Wales* (1952) 102 CLR 108, 119 (McTiernan J).
[18] (1952) 102 CLR 108 ('*Mason*').
[19] See *Hughes and Vale Pty Ltd v State of New South Wales* (1953) 87 CLR 49. The legislation was the *State Transport (Co-ordination) Act 1931-1952* (NSW).
[20] *Hughes and Vale Pty Ltd v State of New South Wales* (1954) 93 CLR 1.
[21] See Birks, above n 6, 189.
[22] *Mason* (1959) 102 CLR 108, 132, 135-6.
[23] Ibid 140 (Windeyer J).
[24] *Sargood Brothers v Commonwealth* (1910) 11 CLR 258, 301 (Isaacs J).

It is the inequality of the parties that underpins the presumption and so to a certain extent there is acknowledgement of the difference between citizen to citizen interaction and that with an agent of the State.

The difference between this unjust factor and compulsion is well illustrated by comparing *Bell Brothers Pty Ltd v Serpentine-Jarrahdale Shire*[25] with *Mason*. In *Bell Bros* the applicant was required to obtain and pay fees for a licence under Council by-laws before undertaking excavation work. It did so but subsequently the by-law requiring payment was declared invalid, although the requirement to obtain a licence remained valid. Bell Brothers had not protested at the time of payment, but the Court found that it had no real alternative but to pay the fee as it required the licence to undertake its excavation business.

McTiernan J drew the distinction between the two cases in the following way:

> The respondent shire in this case [Bell Brothers] was validly empowered to license persons wishing to quarry. It was only the payments by-law which was invalid.
>
> In *Mason's* case, however, both the licensing and the payments enactments were held to be invalid as contrary to s 92 of the Constitution. A person could therefore legally disregard both enactments.[26]

The basis of the difference is the presence of an 'entitlement threat' in *Bell Bros* and not in *Mason*. In *Bell Bros* the applicant had an entitlement to the licence which was necessary so he could conduct his business. In *Mason*, as there was no power to require the licence, Mason could operate without it and so had no entitlement to something that did not exist—thus there was no entitlement threat and consequently no presumption of duress. This resultant anomaly was revealed by Birks, who noted that the 'hope of restitution diminishes as the illegality established against the agency becomes more radical.'[27]

If the licence imposed in *Ha* were held to be invalid as well as the payment for it, the plaintiffs could not succeed in a restitutionary claim either under compulsion or *colore officii*. If just the payment for the fee were declared invalid and the licence itself were valid a claim under *colore officii* may succeed. However, in *Mason*, Windeyer J in obiter suggested that an element of *colore officii* was that the payer be mistaken and pay in ignorance of the invalidity[28] and as a corollary of that, pay without protest. As the plaintiffs in *Ha* asserted the invalidity of the impost they could not be considered mistaken nor had they paid under protest. Thus if Windeyer J's position were adopted they still may not satisfy the elements of *colore officii*.

This illustrates how a slight variation in facts can dramatically affect a restitutionary claim and the gaps present in these grounds of recovery.

---

[25] (1969) 121 CLR 137 ('*Bell Bros*').
[26] *Bell Bros* (1969) 121 CLR 137, 142.
[27] Peter Birks, 'Restitution from Public Authorities' (1980) 33 *Current Legal Problems* 191, 196-7.
[28] *Mason* (1959) 102 CLR 108, 140-1 (Windeyer J).

3 *Mistake*

Recovery is available when payment is made as a result of a mistake either of fact and of law as both are accepted as restitutionary unjust factors in Australia.[29] In the context of invalid taxes a claim of mistake of law such as to the law's validity, scope or application would be the most likely ground claimed and it significantly fills the gaps between compulsion and *colore officii.* However, gaps remain as illustrated by *Ha* where the plaintiffs could not claim to be mistaken because they correctly asserted the invalidity of the impost. This could lead to the anomalous position of recovery being granted for payment by a plaintiff who merely presumed the law was valid but not to a plaintiff who had correctly asserted its invalidity and is supported in such an assertion by a court.

Although the rationale underpinning recovery is different and thus may affect defences and limitations, mistake of law attracts many of the same issues as an ultra vires ground, particularly the possibility of fiscal chaos. Brennan J acknowledged this in *David Securities Pty Ltd v Commonwealth Bank of Australia*[30] when he drew the distinction between mistake of fact which tends to only affect individual transactions, with mistake of law which may affect many transactions and thus have greater implications for revenue.[31] His suggested limitation by the defence of honest belief in entitlement to retain the payment was rejected as too wide in *Kleinwort Benson Ltd v Lincoln City Council*[32] and does not appear compatible with the recent Canadian decision in *Air Canada v Ontario (Liquor Control Board)*[33] where it was held that bad faith by government was not a requirement for recovery and that it was the government's responsibility to ensure the law is legal and applicable.

B *Ultra Vires as an Unjust Factor in Australia*

1 *The Position in the UK*

In *Woolwich Building Society v Inland Revenue Commissioners*[34] the House of Lords by majority accepted ultra vires as an unjust factor in restitution by subtraction. In 1996 a long standing arrangement whereby Building Societies paid the income tax due on the interest and dividends earned by members to the Inland Revenue Commissioners (IRC) was formalised by Regulation.[35] As a result the IRC

---

[29] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51. It does not have to be a mistake as to liability—see *Barclays Bank Ltd v Simms* [1980] QB 677.

[30] (1992) 175 CLR 353, 394 ('*David Securities*').

[31] See also *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513, 538 (Lord Goff) for a similar distinction regarding scope of affected transactions between mistake of law and ultra vires claims.

[32] *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513, 540-1 (Lord Goff), 565 (Lord Hope). See also, UK Law Commission, *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments*, Report No.227 (1994) 37-8.

[33] (1997) 148 DLR (4th) 192.

[34] [1992] 3 All ER 737 ('*Woolwich*').

[35] *Income Tax (Building Societies) Regulations* 1996.

demanded tax due for the period 30 September 1985 to 1 March 1986. Woolwich asserted this resulted in double taxation for the period and argued the retrospective operation of the regulations should be declared void. To avoid damage to its business reputation by adverse publicity, Woolwich paid the tax under protest and applied for judicial review of the regulations and later a writ to recover the amount paid with interest. The regulation was declared void by Nolan J[36] and was subsequently confirmed by the House of Lords.[37] The IRC repaid the tax and interest from the date of Nolan J's order.

Woolwich, however, claimed interest from the date of the original payment. Under s 35A of the *Supreme Court Act 1981* (UK) a court can award interest on the judgment debt from the date the cause of action arises. Thus Woolwich argued the cause of action arose on the date of original payment on the grounds of a general restitutionary principle that there is a prima facie right of recovery for payment of an unlawful demand by a public authority or that it had paid under duress. No court found duress established. Nevertheless the House of Lords found such a general restitutionary right by a 3:2 majority. Although Lord Browne-Wilkinson and Lord Slynn said they agreed with the reasons given by Lord Goff, an analysis of each judgment shows there was not uniformity as to the rationale of ultra vires as an unjust factor.

In the leading judgment in which he claimed to 'reformulate'[38] the law and not rely on precedent from which many academics have claimed support, Lord Goff made a strong appeal to the justice of Woolwich's claim.[39] He rejected Andrew Burrows' approach to expand private law unjust factors of compulsion and mistake, because of their inapplicability to the facts before him and the demands of 'logic'.[40]

Despite such an appeal to justice, he did not rely on it as the foundation for his decision.[41] He supported Birks' conclusion that restitution was required to give effect to the fundamental constitutional principle in the Bill of Rights[42] that taxes should not be levied without the authority of Parliament.[43] Goff LJ did not solely rely on the ultra vires nature of the demand to justify his decision, however, but also relied on the special position of the State, as 'when the Revenue makes a demand for tax, that demand is implicitly backed by the coercive powers of the state and may well entail ... unpleasant economic and social consequences'.[44]

---

[36] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1989] 1 WLR 137.
[37] *Inland Revenue Commissioners; Ex parte Woolwich Equitable Building Society* [1990] 1 WLR 1400.
[38] *Woolwich* [1992] 3 All ER 737, 756.
[39] Ibid 759, 761, 763.
[40] Ibid 760.
[41] Cf Brian Fitzgerald, 'Ultra Vires as an Unjust Factor in the Law of Unjust Enrichment' (1993) 2 *Griffith Law Review* 1, 11.
[42] (1689) 1 Wm and Mary, c 36, art 4. This has been held to be reflected in State and Federal Constitutions in Australia—see *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, 572 (Mason CJ, Deane, Toohey and Gaudron JJ), 580-1 (Brennan J), 597-9 (McHugh J).
[43] *Woolwich* [1992] 3 All ER 737, 759-60.
[44] Ibid.

He also found the contrast in a prima facie right to restitution between a government that has made an unauthorised payment from consolidated revenue and the citizen who has made the payment, 'most unattractive'.[45] Finally he claimed European Community Law in support and pointed to the disparity if a claim could be made under it but not under domestic law.

Lord Browne-Wilkinson agreed that the law should be established as Lord Goff proposed, as he believed it was 'in accordance with both principle and justice'.[46] He went on to discuss his finding in which he made no reference to the ultra vires nature of the claim. His conclusion was based on two grounds: want of consideration and payment under implied compulsion. He argued there was want of consideration because it was paid as a result of a legal demand, and as the demand was not legal (and so a nullity), the reason for payment did not exist.[47] Payment under implied compulsion was drawn from the 'unequal footing'[48] of the parties and in that respect his view is similar to Goff LJ's.

Slynn LJ placed greater emphasis on the ultra vires nature of the claim and also called upon justice when claiming it was 'unacceptable in principle that the common law should have no remedy'.[49] His analysis, however, seems to largely depend upon finding a common element of pressure which shades into duress or *colore officii*.[50] Although this could be interpreted as an extension of those private law bases alternatively it could be seen as giving regard to the public nature of one of the parties.

Goff LJ and Slynn LJ both expressly left open whether the ultra vires ground could encompass misconstruing otherwise valid statutes or regulations.[51]

2 *Could* Woolwich *be Applied in Australia?*

There have been some indications in Australia of preparedness to accept a restitutionary right for payment of invalid taxes. In *The Melbourne Tramway and Omnibus Company Ltd v The Mayor of Melbourne*[52] the Full Court of the Victorian Supreme Court granted recovery to the plaintiff for payment of a licence fee when it was found it was under no obligation either to obtain a licence nor under liability for running tramcars without a licence. The plaintiff had paid under protest after threat of litigation thus neither compulsion nor *colore officii* could be satisfied on these facts. Recovery was based on the inequality of the position of the parties. Earlier in *Payne v The Queen*,[53] Madden CJ had asserted that payment under a

[45] Ibid 763.
[46] Ibid 782.
[47] See Fitzgerald, above n 41, 15 for a persuasive rejection of this argument.
[48] *Woolwich* [1992] 3 All ER 737, 781.
[49] Ibid 787.
[50] Ibid.
[51] Ibid 764, 787.
[52] [1903] 28 VLR 647.
[53] [1901] 26 VLR 705.

demand 'not warranted by law' was exempt from the bar then present on recovery for mistake of law.

Support for an ultra vires ground in Australia has been claimed from dicta of both O'Connor J in *Sargood Brothers v Commonwealth*, where he suggested that a government demand for payment that was not legally payable should be recoverable irrespective of the presence or absence of a protest, and Dixon CJ in *Mason* where he expressed doubt that cases should be decided on private law principles when they involved a demand for invalid taxes, but who then went on to decide that case on such private law principles.

In *Esso Australia Resources Ltd v Gas and Fuel Corporation of Victoria*,[54] Gobbo J avoided examining if there were a prima facie right of restitution based on the invalidity of the tax paid. In that case Esso claimed restitution of money paid to transport natural gas along the Gas and Fuel's pipelines. The charge reflected a levy the Gas and Fuel were required to pay the Victorian State Government under the *Pipeline (Fees) Act 1981*. Esso paid under protest and challenged its validity. The High Court declared the State levy invalid and Esso then made its restitutionary claim. Gobbo J distinguished *Woolwich* by saying that here it was not a public law impost but payment made on the basis of a commercial agreement.[55]

In *State Bank of New South Wales Ltd v Federal Commissioner of Taxation*,[56] the Bank had previously successfully challenged the validity of its liability for sales tax as contrary to s 114 of the Constitution.[57] The tax had been paid to a neutral party pending the outcome of the dispute. Upon declaration of its invalidity the Commissioner had repaid the amount but refused to pay interest. The action concerned payment of such interest. Wilcox J said:

> I see no reason why the reformulation of the law effected in *Woolwich* should not be adopted in Australia. It does no more than recognise the realities of the position in which taxpayers may find themselves.[58]

However, he held that the interest payment in *Woolwich* was based on s 35A of the *Supreme Court Act 1981* (UK), not the restitutionary principle therein established. He found, independently of *Woolwich*, that a court has the power to include an amount representing interest if necessary to do justice to the parties and thus ordered the Commissioner to pay such interest.[59]

---

[54] [1993] 2 VR 99.

[55] See Fergus Farrow, 'Back Where it Belongs: Novel Approaches to Issues of Restitution' (1995) *Law Institute Journal* 794 for an argument that the Gas and Fuel was a statutory agent of the Government for collection of the tax. See also *Roxborough v Rothmans of Pall Mall Australia Ltd* [1999] 161 ALR 253.

[56] (1995) 132 ALR 653 ('*State Bank of NSW*').

[57] See *DCT v State Bank of New South Wales* (1992) 174 CLR 219.

[58] *State Bank of NSW* (1995) 132 ALR 653, 658.

[59] Ibid 660. See also *Commonwealth v SCI Operations Pty Ltd* (1998) 152 ALR 625, 644 where McHugh and Gummow JJ, in obiter, argue authority does not support 'a "free-standing" right to the recovery of interest where the defendant has had the use of the plaitiff's money in circumstances which indicate an unjust enrichment at the expense of the plaintiff.' But Kirby J, at 25, appears to implicitly support the

It is possible to infer from Wilcox J's brief interpretation of the *Woolwich* decision that he saw *Woolwich* as based on inequality of the parties or recognition of the public aspects such as the implicit coercive powers of the State, rather than the ultra vires nature of the demand. Although the payment was made not as a tax, but to a neutral party pending resolution of the dispute, Wilcox J distinguished *Esso* and said the payments were not made under a 'normal commercial agreement'[60] but were made under a special agreement. In his eyes,

> It would be unrealistic to overlook the pressure placed on a commercial organisation by a demand for payment of tax and unfair to attach critical importance to the fact that, by agreement, the taxpayer made payments to a fund, rather than directly to the Commissioner.[61]

This again shows the importance to Wilcox J of the pressure exerted by a government demand.

In *Commissioner of State Revenue (Vic.) v Royal Insurance Australia Ltd*,[62] Mason CJ said in dicta 'it is perhaps possible that the absence of any legitimate basis for retention of the money by the Commissioner might itself ground a claim for unjust enrichment'.[63] This appears to be based more on the ultra vires nature of the demand than the public law aspects of inequality of the parties or implicit coercion by the State.[64]

3 *Differences in the Australian Context*

(a) Is Woolwich *Really Applicable?*

Apart from lacking a unified basis for an ultra vires ground, *Woolwich* is of limited assistance to Australia. It did not address unconstitutional taxes at all, nor could it. In *Woolwich* a new regulation with a short period of retrospectivity and no prior judicial pronouncement was at issue, not a primary taxation Act subject to constitutional restrictions that had existed for many decades and had previously received judicial sanction by the High Court, as in *Ha*.[65] These are fundamental differences and as will be seen, implications for recovery and risk of fiscal chaos are far greater in the latter.

---

restitutionary analysis in *State Bank of NSW* when distinguishing application of principle in that situation from the one under consideration.

[60] *State Bank of NSW* (1995) 132 ALR 653, 662.

[61] Ibid.

[62] (1993) 182 CLR 51 ('*Royal Insurance*').

[63] Ibid 67.

[64] See Mitchell McInnes' criticism of Mason CJ's statement arguing that he misconstrued Wilson J in *Air Canada* and as threatening the tripartite analysis required in restitution—Mitchell McInnes, 'Bases for Restitution: A Call for Clarity with Unjust Factors' (1996) 10 *Journal of Contract Law* 73, 77-9.

[65] Which raises difficult questions relating to reliance. See Keith Mason, 'Money Claims By and Against the State' in Paul Finn (ed), *Essays on Law and Government* (1995) vol 1, 116.

(b) A Written Constitution

Although some benefit may be gained from examination of English decisions and academic analyses of the ultra vires ground, the fundamental difference in constitutional form between the United Kingdom and Australia must be acknowledged. Dicey's writings on the constitutional structure of the United Kingdom, particularly Parliamentary sovereignty, despite extensive criticism, are generally accepted to be an expression of the absolute legislative supremacy of Parliament which is still applicable today.[66] The Parliament is subject to no *legal* limitations on its power and thus is sovereign.[67] Australia, of course, is quite different. It has a written constitution which limits and distributes power between two levels of government by establishing a federal system. Its Parliaments (Federal and State) have legislative supremacy, a relative, not absolute concept as in England, in that they have a superior claim to other bodies regarding legislative competence subject to the allocation of such competence in the written constitution. They can never be seen as sovereign. The Commonwealth Parliament's heads of power are exhaustively enumerated and are also subject to certain procedural limitations. State Constitutions hold plenary power[68] subject to the allocation in the Commonwealth Constitution and inconsistency with a Commonwealth law.[69] Thus State Constitutions are mainly limited by the Federal construct set out in the Commonwealth Constitution rather than by their own Constitutions.[70]

In one respect such a limitation of legislative power would support the adoption of a restitutionary action based on the ultra vires nature of the tax. It would enforce the limitations of power by providing a remedy when governments taxed beyond their powers.

Australia has a tradition of judicial scrutiny of legislative competence to ensure compliance with the Constitution.[71] In England there can only be judicial interpretation and scrutiny of secondary legislation as occurred in *Woolwich*. Primary legislation, subject to receiving assent from the three estates and compliance with manner and form requirements, can never be beyond power because the Parliament is sovereign. Such sovereignty enables the Parliament of the United Kingdom to prevent or limit a restitutionary right of recovery or to cure any defect in the secondary legislation, including retrospectively, whereas in Australia this is questionable.

---

[66] See David Kinley, 'Constitutional Brokerage in Australia: Constitutions and the Doctrines of Parliamentary Supremacy and the Rule of Law' (1994) 22 *Federal Law Review* 194. As Kinley notes, this is subject to the inhibitions of prevailing social and political mores (at 196). For a critique of Dicey, see, eg, A Bradney, 'Parliamentary Sovereignity—A Question of Status' (1985) 36 *Northern Ireland Legal Quarterly* 2.

[67] Except, of course, those resulting from membership of the European Union, which, however, imposes a very different form of federal structure on the United Kingdom Parliament than that of the Constitution in Australia.

[68] The High Court in *Union Steamship Co Of Australia Pty Ltd v King* (1988) 82 ALR 43 held that the wording in the *Constitution Act 1902* (NSW), s 5, which is similar to that in other State Constitutions, 'are not words of limitation'.

[69] Constitution, s 109.

[70] See, eg, *Tasmania v Commonwealth* (1983) 158 CLR 1 and *Mabo v Queensland* (1988) 83 ALR 14.

[71] Under s 76(i) of the Constitution.

Thus, exposure of the United Kingdom's revenue to restitutionary claims, is significantly reduced compared to Australia. It is arguable such assumptions about the possibility of fiscal disruption that could be caused by acceptance of this ground of recovery may underpin the analyses of the English judiciary[72] and academic commentators and their support for the principle. Birks acknowledges this, noting that 'the danger of general invalidations is much less in a system in which primary legislation cannot be struck down. The pressure against the development of a common law basis for restitution is thus much less here than, for instance, Australia.'[73]

(c) Retrospective Overruling

The potential for fiscal chaos is further exacerbated by the traditional approach of judicial decisions operating retrospectively. That is, when a statute is declared invalid, it is void *ab initio*. This is based on the declaratory theory that judges declare the law rather than make it and so they are only stating what has always been the case.[74] This theory is generally seen to have been abandoned.[75] There have been an increasing number of calls for Australia to selectively use the method of prospective overruling particularly in situations such as this to avoid fiscal chaos resulting from the potential of large numbers of restitutionary claims from any person who had ever paid the tax now declared invalid.[76] It is argued prospective overruling would engender respect for the rule of law without such disruption.[77] There had been a few indications in the High Court, in non-constitutional cases, that it may consider this option.[78] In *Ha,* however, the Court unanimously rejected prospective overruling as inconsistent with judicial power.[79] Thus in Australia the potential for fiscal chaos remains high if the ultra vires ground is adopted.

---

[72] See, eg, Lord Goff in *Woolwich* who said it may be necessary to have recourse to special statutory defences: *Woolwich* [1992] 3 All ER 737, 761.

[73] Birks, above n 27, 205.

[74] See, eg, *South Australia v Commonwealth* (1942) 65 CLR 381, 408 (Latham CJ).

[75] *Giannarelli v Wraith* (1988) 165 CLR 543, 543-6; *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 532-3. See also *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513, 518 (Lord Browne-Wilkinson), 548 (Lord Lloyd), 563 (Lord Hope). Note, however, discussion by Lord Goff at 535-6 in which he does not reject it but recommends 'reinterpretation' of the theory.

[76] See, eg, Mason, above n 65, 125-7; Keith Mason, 'Prospective Overruling' (1989) 63 *Australian Law Journal* 526; Pannam, above n 6, 801-3; Brian Fitzgerald, 'When Should Unconstitutionality Mean "Void ab Initio"?' (1994) 1 *Canberra Law Review* 205.

[77] Mason, above n 65, 126.

[78] See, eg, *McKinney v The Queen* (1991) 171 CLR 468; *Oceanic Sun Line Special Shipping Co v Fay* (1988) 62 ALJR 389, 419 (Deane J); *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1, 15 (Mason CJ); *John v Commissioner of Taxation* (1989) 63 ALJR 166, 179 (Brennan J); *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 171 (Toohey J). It has also been embraced in the US—see *American Trucking Association v Smith* 496 US 169 (1990); in India—see *Synthetics and Chemicals Ltd v State of UPAIR* (1990) SC 1927; and in a hybrid form in Ireland—see *Murphy v Attorney-General* [1982] IR 241.

[79] *Ha* (1997) 71 ALR 1080, 1093 (Brennan CJ, McHugh, Gummow, and Kirby JJ). Dawson, Toohey and Gaudron JJ agreed at 1100. In *Kleinwort* Lords Goff and Browne-Wilkinson rejected it as having 'no place in our legal system': see *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513, 534-6 (Lord Goff), 518 (Lord Browne-Wilkinson).

(d) Rejection Because of Fiscal Chaos?

Fiscal chaos has been described as a 'situation where idealism and realism clash'.[80] Thus even if there were theoretical support for an ultra vires ground the threat of fiscal chaos may be so high and its potential for harm so great that the ground should be rejected because of it, as Isaacs J inferred in *Sargood Bros v Commonwealth.*

Like Australia, Canada also has a limited Constitution and the concern with fiscal chaos was a strong factor in the rejection of recovery under mistake of law of ultra vires levies in *Air Canada v British Columbia.*[81] In the leading judgment La Forest J (with whom Lamer and L'Heureux-Dubé JJ concurred) said that there are solid public policy grounds for not according a general right of recovery in situations like these.[82]

The public policy grounds were inefficiency in having to impose a new replacement tax and having a new generation pay for the tax and fiscal chaos.[83] His rule against recovery would not apply to misapplication of an otherwise valid law because in such a case it is more likely to have limited application and not pose such a threat to the treasury.[84] In contrast, Wilson J, in dissent, did not see her task as balancing policy issues:

> What is the policy that requires such a dramatic reversal of principle? Why should the individual taxpayer, as opposed to taxpayers as a whole, bear the burden of government's mistake? I would respectfully suggest that it is grossly unfair that X ... should absorb the costs of government's unconstitutional act.
>
> The 'sin' in this case (if it can be so described) is that of government and only government and government has means available to it to protect against the consequences of it. ... It should not ... be done by the courts and certainly not at the expense of individual taxpayers.[85]

Wilson J's repudiation of the fiscal chaos argument has received much academic and judicial support in England,[86] and Mason CJ in *Royal Insurance* found it compelling.

---

[80] Virgo, above n 6, 444.

[81] (1989) 59 DLR (4th) 161 ('*Air Canada*'). Although La Forest J held the retroactive tax valid and so did not need to decide the issue, he said 'I find it better to also base my decision on considerations raised in relation to "mistake of law"' (at 187) in which fiscal chaos was raised.

[82] Ibid 194.

[83] Ibid 195, 197.

[84] This is criticised as an highly artificial distinction in Peter Hogg, *Liability of the Crown* (1989) 183-4. It could also create the anomaly discussed by Birks in that the greater the government error, the less likely the taxpayer will recover.

[85] *Air Canada* (1989) 59 DLR (4th) 161, 169.

[86] See, eg, Andrew Burrows, *The Law of Restitution* (1993), 360; *Woolwich* [1992] 3 All ER 737, 763 (Lord Goff).

Cornish also rejects the fiscal chaos argument as government is not subject to insolvency like the private sector and has the ability to raise revenue from alternative sources or 'make retrospective statutory exceptions.'[87] Initially Birks constrained the right of restitution because of such concern regarding fiscal chaos[88] but later rejected that approach and gave priority to the rule of law saying it was for the legislature to address, not the courts to thereby compromise principle.[89]

When mistake of law (which, as seen, similarly raises the potential of fiscal chaos) was accepted in Australia in *David Securities*, the revenue was not a party and the issue was not raised although, as seen, Brennan J alluded to it.[90] In *Royal Insurance*, where the High Court once again applied the mistake of law doctrine, the revenue was involved but fiscal chaos was rejected as a defence and was not even considered as a barrier to recognition of the cause of action. As Mason CJ declared:

> The remedy for any disruption of public finances occasioned by the recovery of money in conformity with the law of restitution lies in the hands of the legislature. It can determine who is to bear the burden of making up any shortfall in public funds.[91]

Both Mason CJ's and Wilson J's comments raise the issue of intrusion of policy into the principle of a right of restitution of invalid taxes. It would appear to entail a balancing of the interests of one group (even one individual) against another (perhaps the greater society) which is usually seen as more properly the role of government.[92] But in Australia the legislatures may be confined in their ability to so limit recovery and thus the full force of fiscal chaos may be felt.

III COULD SUCH RIGHT BE LIMITED BY THE LEGISLATURE?

If a prima facie right of restitution for payment of invalid taxes were accepted in Australia, could it be legislatively limited?[93] Possible restrictions on both State and Commonwealth legislatures to limit such right will be examined by application both of statutory provisions already existing and those directly enacted as a result of the *Ha* decision.

---

[87] Cornish, above n 6, 52.
[88] Birks, above n 6, 206.
[89] Birks, above n 5, 72.
[90] See above n 29-33 and accompanying text.
[91] *Royal Insurance* (1994) 182 CLR 51, 68.
[92] See *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 37 (Brennan J).
[93] See comment by McHugh and Gummow JJ in *Commonwealth v SCI Operations Pty Ltd* (1998) 152 ALR 625, 645 quoting with approval *National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd* (unreported, New South Wales Court of Appeal, Mason P, 23 April 1997) 12, that restitutionary considerations cannot purport to override statute by claiming a superior sense of injustice to Parliament's. Note, however, that that was in the context of establishing the cause of action, not constitutional considerations regarding the legislative ability to limit such action.

A *Restrictions by State Legislature*

In 1993 as part of a package to limit restitutionary claims against the Government the *Limitations of Actions Act 1958* (Vic) was amended[94] by the addition of s 20A. Of particular relevance in this context is s 20A(2) which states

> Despite anything to the contrary in any other Act, if money paid by way of tax or purported tax is recoverable because of the invalidity of an Act or provision of an Act, a proceeding for the recovery of that money must (whether the payment was made voluntarily or under compulsion) be commenced within 12 months after the date of payment.

Under s 20A(5) 'tax' is defined as including a fee, charge or other impost. It would appear that licence fees such as those used in *Ha* may fall within this provision if a right of restitution for invalid taxes were accepted.[95] Under s 6 of the *Limitation of Actions (Amendment) Act 1993* (Vic), transitional arrangements were made so that the new section 20A of the Act applied to payments made before, on or after the section's commencement, except for payments in respect of which proceedings had already been brought.

The section is thereby given retrospective effect. It thus limits the right of recovery to payments made within the previous twelve months, whereas the restitutionary right may have covered payments made over many previous decades. The High Court decision in *Barton v Commissioner for Motor Transport*,[96] however, may impact upon the validity of such a limitation.

In *Barton* the Court was concerned with the original enactment of s 27 of the *Transport (Division of Functions) Act 1932* (NSW) and a later addition to the section (the 1956 amendment).[97] The original provision limited actions against the Commissioners for certain acts or omissions to be commenced within one year of arising. The amendment made a similar limitation for actions to recover money paid under the Act and s 27 was deemed to have always extended such limitation to such actions, thus giving it retrospective effect. The amendment was enacted as a consequence of the Privy Council decision rendering such fees unconstitutional[98] and the subsequent decision of *Anthill Ranger & Co Pty Ltd v Commissioner for Motor Transport*,[99] in which total extinguishment of a cause of action to recover such payments was rejected.

Barton, an inter-state transport operator, claimed repayment of money paid between 4 October 1951 and 12 June 1954 for permits issued under the *State Transport (Co-*

---

[94] See the *Limitations of Actions (Amendment) Act 1993* (Vic). See also *State Taxation (Further Amendment) Act 1993* (Vic).

[95] Note the assumption that payment so made could be recoverable on the grounds of the invalidity of the tax.

[96] (1957) 97 CLR 633 ('*Barton*').

[97] See *Motor Traffic and Transport (Further Amendment) Act 1956* (NSW) s 5.

[98] *Hughes and Vale Pty Ltd v New South Wales* (1954) 93 CLR 1.

[99] (1955) 93 CLR 83 ('*Anthill*'). Decision endorsed by the Privy Council in *Commissioner for Motor Transport v Anthill Ranger & Co Pty Ltd* (1956) 94 CLR 177.

ordination) Act 1931 to enable operation of a public motor vehicle within New South Wales. The Supreme Court of New South Wales referred to the High Court the question that if such a permit was invalid as contrary to s 92 of the Constitution and if recovery were thereby permitted, would s 27 bar recovery or would it also be invalid as contrary to s 92? The Court held by majority that recovery was not barred by s 27 but the ratio was complicated by the dual nature of the section under review and the widely varying reasons for decision.

1 Barton: *The Retrospective Effect of the Limitation*

The majority held that the original part of s 27 did not apply to the particular facts of the case. They divided, however, over the validity of the 1956 amendment and in particular its retrospective effect.

Dixon CJ, (with whom McTiernan J agreed) argued that for causes of action existing outside the twelve month limitation, the amendment

> spells an attempt to bar such claims retrospectively, an attempt which is distinguishable only in form from [the legislation impugned in *Anthill*]. The substance is the same. It attempts to bar absolutely the legal remedy to recover money already exacted in violation of the freedom assured by s 92. It follows that in relation to a case like the present the second part of s 27 ... can have no operation, for the reasons given in *Anthill*.[100]

Kitto J agreed saying that 'no sensible distinction can be drawn between an absolute prohibition and the imposition of a time limit after the stated time has expired.'[101] Fullagar and Taylor JJ did not discuss the validity of the 1956 amendment due to their view of the original part of s 27. It would thus appear that a majority struck down the retrospective effect as also repugnant to s 92 for effectively being an absolute prohibition on recovery.

The *Limitation Act* also was given retrospective effect under the transitional provision as it applied the amendment to payments made before the commencement of the section. Thus, payments made before 23 November 1992 were barred by the twelve month limitation period thereby also creating an absolute prohibition for that period similar to that struck down by the majority in *Barton*.

Webb J, however, in obiter,[102] dissented on this point. He argued that what the States can do prospectively they should also be able to do retrospectively.[103] He distinguished *Anthill* by saying that the legislation impugned in that case was beyond State's powers because its only object was to exclude from the scope of s 92 an exaction which that same section had rendered unlawful and that it was an unquali-

---

[100] *Barton* (1957) 97 CLR 633, 641.
[101] Ibid 662.
[102] It is dicta because at 651 he agreed with Dixon CJ's reasons that s 27 with or without amendment had no application to the case before him.
[103] *Barton* (1957) 97 CLR 633, 650.

fied bar, not just a time limit.[104] Although conceding that the effect of the amended s 27 was an absolute bar he said

> it does so validly as regard claims not resting on s 92, and there is no exemption of s 92 claims stated or recognised by the law as a matter of policy or for any other reason. It is no answer to say that s 27 in its retrospective operation does just that thing that the legislation declared invalid by the Privy Council had failed to do. The effect of s 27 is not to be judged in the light of the Privy Council's decision on the other legislation, which was expressly directed at inter-State trade and nothing else.[105]

Similarly, the limitation imposed under the *Limitation Act* is applicable to all claims for recovery of money based on invalidity of an Act, thus not specifically addressed to an unconstitutional provision. It is to be noted, however, that Webb J's argument was in dissent on this point and that as will be seen later, *Anthill* has subsequently been seen as extending beyond s 92 and applying to certain other constitutional provisions. To some extent, therefore, this weakens Webb J's argument.

2 Barton: *The Prospective Effect of the Limitation*

Fullagar and Taylor JJ in dissent in *Barton*, found the original s 27 was applicable and thus examined whether the prospective operation of a twelve month time limit was also unconstitutional. As will be seen, a main reason for decision in *Anthill* was that the legislation denied any form of remedy. This was not the case in *Barton*. Indeed, Fullagar J[106] found that

> Section 27 is...quite general in application. It has been in force since 1940—long before the decision of the Privy Council ... which first cast doubt on the validity of the earlier transport cases. It is simply a statute of limitation of a very ordinary and familiar kind, which substitutes ... a shorter period than that which is generally applicable ... The period cannot be said to be unreasonable. The position might have been different if the period fixed had been extremely short. If the period had been a day or a week, *it might have been suggested that the practical and substantial effect of the section was to take away causes of action.* ... I think it impossible to maintain that the period of one year is otherwise than reasonable.[107] (emphasis added).

Fullagar J appears to be placing a refinement on the *Anthill* decision to make it clear that there is no absolute bar on the legislature's ability to protect itself from restitutionary claims but merely a restriction so that any limitation must be reasonable and

---

[104] Ibid.
[105] Ibid.
[106] With whom Taylor J agreed at 666.
[107] *Barton* (1957) 97 CLR 633, 659-60.

not have the effect of depriving a plaintiff of '*practically effective redress*'.[108] (emphasis added).

Returning to the Victorian *Limitation Act*, the prospective application of the Act would appear to satisfy most of Fullagar J's requirements in that it is an ordinary and familiar Statute of Limitation of general application for a period of one year. However, one proviso Fullagar J made was that it had been in force for a long period, long before the first decision that cast doubt on the transport cases. The Victorian amendment received Royal Assent on 23 November 1993. On 7 December 1993 the High Court handed down the decision of *Capital Duplicators Pty Ltd v Australian Capital Territory [No. 2]*[109] in which Australian Capital Territory taxes on x-rated videos were held to be an excise duty and thus contrary to s 90. Although the joint majority judgment expressly declined to reopen earlier High Court decisions which had upheld State taxes in the form of franchise fees, a clear warning was issued that their validity depended upon the magnitude of the fee and whether it was 'simply regulatory' or had 'a very substantial revenue purpose.'[110] These were the grounds on which the licence fees in *Ha* were later struck down as unconstitutional. In the debate accompanying the *Limitations of Actions (Amendment) Bill* it was suggested that the amendment was a reaction to *Capital Duplicators* which was before the High Court at the time.[111] This was denied[112] but nevertheless reveals the issue was known at the time.[113] It is arguable that the amendment to the Victorian Act does not meet that proviso of Fullagar J.

B *Inconsistency with the Commonwealth*

A further possible problem with the *Limitations Act* is that by technical argument, it may possibly be struck down under s 109 as inconsistent with a law of the Commonwealth.[114] It could be argued that it attracts federal jurisdiction under s 76(i) of the Constitution by the challenge to its constitutional validity or as an action following finding the licence fee unconstitutional as repugnant to s 90. Then, as it would involve civil action against the State, the *Judiciary Act 1903* (Cth) s 64 would apply[115]and in combination with ss 79, 80 and 80A of the *Judiciary Act 1903* (Cth), would require the liabilities be determined by the substantive and procedural

---

[108] Ibid 660.
[109] (1993) 178 CLR 561 ('*Capital Duplicators*').
[110] Ibid 596.
[111] See Commonwealth, *Parliamentary Debates*, House of Representatives, 28 October 1993, 1450 (Mr Baker).
[112] Ibid 1452 (Mr Stockdale), who said it was to close a loophole revealed in *Royal Insurance*.
[113] See also Commonwealth, *Parliamentary Debates*, House of Representatives, 2 September 1997, 7560 (Mr Kelvin Thompson); G Rumble and I Cunliffe, 'Some Issues Unresolved: High Court Decision on Excises' (1994) *Direction in Government* 24 where comment was made on the High Court's warning and the future of excise fees.
[114] See Enid Campbell, 'Unconstitutionality and its Consequences' in G Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 90, 119-20. See also *Anthill* (1955) 93 CLR 83, 103.
[115] As authorised under s 78 of the Constitution.

laws of Victoria.[116] The Victorian Act may then be considered contrary to s 64 which deems that the rights of parties shall as nearly as possible be the same as in a suit between subject and subject. The *Limitation Act* does not do this but gives special protection to the State.[117]

It would appear that the prospective operation of the Victorian Act may be valid in limiting claims resulting from *Ha* if it could be severed from the retrospective operation, which is unlikely to be declared valid given the *Barton* principle.

If the legislation did not survive such challenge and a claim could be made against the State government for restitution of money paid for the licence fee, a claimant may still not effectively obtain such a remedy if the Commonwealth limitations imposed are valid.

C Restrictions by Commonwealth Legislature

In the legislative package enacted in response to *Ha* was the imposition of a 'Windfall Tax' on a taxpayer 'to whom the State was liable to repay the taxable amount'.[118] The taxable amount is an amount that

> (a) a State is liable to repay...[the taxpayer] because a State franchise law is wholly or partly invalid because of section 90 of the Constitution;
>
> (b) the amount is by way of repayment of an amount paid under the State franchise law before 5 August 1997 in respect of a licensing period commencing before 5 August 1997; or
>
> (c) the amount is claimed by the taxpayer from the State, or a court orders the State to pay the amount to the taxpayer.

In a complex collection arrangement the State is prevented from repaying the taxable amount until it has first deducted the Windfall Tax which is 100% of the taxable amount.[119] When the deduction is made the State must remit it to the Commissioner and is only liable to pay or account for it to the Commissioner.[120] The taxpayer is credited with the equivalent of the amount deducted as a debt due to them by the Commissioner which may then be applied by the Commissioner against the taxpayer's liability for Windfall tax and refund the amount not so applied.[121]

The 100% tax has the effect of rendering any restitutionary remedy nugatory as ultimately the State will retain the exact amount it unconstitutionally exacted and a plaintiff seeking restitution of such unconstitutional taxes will never actually re-

---

[116] *Commonwealth v Evans Deakin Industries Ltd* (1986) 66 ALR 412.
[117] See discussion about consideration of the special position of the Crown in *DTR Securities v DCT* (1987) 72 ALR 513, 524-6 (McHugh JA).
[118] *Franchise Fees Windfall Tax (Imposition) Act 1997* (Cth) s 8.
[119] Ibid s 4.
[120] Ibid s 9(3).
[121] Ibid s 10(4). Note thereby implicitly recognising a right of restitution for the amount.

ceive the money due. It will be withheld by the State to satisfy the Commonwealth tax liability which only arises upon gaining the right to restitution.

The Explanatory Memorandum said the purpose of the legislation is 'to protect revenue collected prior to 5 August 1997 by the States and Territories, which may be lost as a result of the High Court's decision in *Ha.*'[122] During the second reading speech the Parliament was advised that

> State and Territory leaders unanimously requested the Commonwealth to utilise Commonwealth tax bases to collect the revenue that was formerly raised by the business franchise fees and to *remit that money to the States and Territories.* The Commonwealth has agreed to do so.[123] (emphasis added)

The legislation was thus specifically directed to render ineffective restitutionary claims against the States resulting from the *Ha* decision. Clearly the complex collection procedure is designed not only to eliminate duplication of payments but also to sever the relationship between the State and the claimant creating in its place a debtor relationship with the Commonwealth in order to overcome restrictions on the States' ability to extinguish such claims. This raises questions as to the extent of the Commonwealth's ability to effectively bar the remedy of such claims against the States and whether the Windfall Tax could be struck down as contrary to the Constitution.

1 *Total Extinguishment*

The *Anthill* decision previously referred to is directly relevant here. In that case the plaintiff, Anthill Ranger, sought to recover money paid under protest to the defendant for charges demanded under the *State Transport (Co-ordination) Act 1931* (NSW). The demands under the Act were held to be invalid by the Privy Council.[124] After the plaintiff had commenced his action for recovery, the *State Transport Co-ordination (Barring of Claims and Remedies) Act 1954* (NSW) came into operation. Section 3(a) of that Act purported to extinguish every claim by any person for the recovery of any of the sums in s 2. Section 4 purported to bar any action for recovery of sums referred to in s 3(a). As the plaintiff's case fell within its provisions the Act purported to extinguish the plaintiff's cause of action and bar the remedy. The plaintiff therefore brought a demurrer to the Commissioner's plea of defence under the new Act. The High Court held unanimously that the judgment in demurrer should be given for the plaintiff because ss 3 and 4 of the Act were invalid as contrary to s 92 of the Constitution. The Privy Council endorsed the High Court's decision and reasons.[125]

---

[122] *The Parliament of the Commonwealth of Australia House of Representatives Franchise Fees Windfall Tax (Imposition) Act* 1997 (Cth) *Explanatory Memorandum*, 1. See also Commonwealth, *Parliamentary Debates Second Reading Speech*, House of Representatives, 28 August 1997, 7255 (Mr Miles).

[123] Commonwealth, *Parliamentary Debates*, House of Representatives, 2 September 1997, 7558 (Mr Kelvin Thomson); see also ibid, Senate, 4 September 1997, 6413 (Senator Sherry).

[124] *Hughes and Vale Pty Ltd v New South Wales* (1954) 93 CLR 1.

[125] *Commissioner for Motor Transport v Anthill Ranger & Co Pty Ltd* (1956) 94 CLR 177.

Total extinguishment of any remedy for contravention of s 92 was an important factor in the High Court's decision. The majority stated

> The statute now in question does not give him some other remedy by which he may regain the money or obtain reparation. It does not impose a limitation of time or require affirmative proof of the justice of the claim. It simply extinguishes the liability altogether.[126]

Fullagar J, in dicta which, as seen, was further developed in *Barton*,[127] expressed perhaps more forthrightly what the majority implied:

> If the Act did no more than limit the remedy, while leaving *practically effective redress open* to the plaintiff, I am disposed to think that it would not be inconsistent with the Constitution. ... But s 4 simply takes away all remedies against anybody, and no severance or reading down seems to me to be possible.[128] (emphasis added)

The Court agreed that the effect of this was to leave the plaintiff in the same position as if the Act were valid.[129] As the Privy Council stated, s 92 was, in the same measure, defeated.[130]

In the Canadian decision *Amax Potash Ltd v Government of Saskatchewan*,[131] the Supreme Court applied the *Anthill* decision. In that case the appellant, Amax Potash produced potash by mining in Saskatchewan. The Saskatchewan Parliament enacted to impose a potash tax on all miners of potash.[132] The appellants challenged the law as being inter alia contrary to the Canadian Constitution and thus beyond the powers of Saskatchewan and claimed repayment of all monies paid regarding the tax. In defence, Saskatchewan claimed the law was intra vires and that there was no cause of action because s 5(7) of the *Proceedings Against the Crown Act* purported to limit the Crown's liability for acts under an ultra vires enactment. The case before the Court was Amax's challenge of that provision as itself ultra vires of the powers of Saskatchewan conferred under the Canadian Constitution. The claim as to the taxing legislation was pending at the time of the decision. The Court held that the provision was ultra vires in so far as it purported to bar the recovery of such taxes.

Dickson J for the Court said:

> Since it is manifest that if either the federal Parliament or a provincial legislature can tax beyond the limit of its powers, and by prior or *ex post facto* legislation give itself immunity from such illegal act, *it could readily place itself in the same position as if the act had been done within proper constitu-*

---

[126] *Anthill* (1955) 93 CLR 83, 99.
[127] See above at Part III.A.2.
[128] *Anthill* (1955) 93 CLR 83, 103.
[129] Ibid 99 (Dixon CJ, McTiernan, Williams, Webb, Kitto, and Taylor JJ), 101 (Fullagar J).
[130] *Commissioner for Motor Transport v Anthill Ranger & Co Pty Ltd* (1956) 94 CLR 177, 180 (Viscount Simonds).
[131] (1976) 71 DLR (3d) 1 ('*Amax*').
[132] *Mineral Taxation Act*, RSS 1965 c 64, ss 25A, 28A.

> *tional limits*. To allow moneys collected under compulsion, pursuant to an *ultra vires* statute, to be retained would be *tantamount to allowing the provincial Legislature to do indirectly what it could not do directly,* and by covert means to impose illegal burdens.[133] (emphasis added)

Thus, indirect effect of the legislation was an important consideration.

In *Barton* as seen, the Court also looked at the practical effect of the limitation and held it was 'distinguishable only in form'[134] from *Anthill*, and thus applied *Anthill*'s reasoning to the case. The indirect effect of the Windfall Tax is to bar a restitutionary remedy for the licence fees. No practically effective redress is left open and so in this regard the legislation is analogous to that struck down in *Anthill.*

2 *Cause of Invalidity of the Tax*

In *Anthill* emphasis was placed, particularly by the majority of the High Court, on the special nature of s 92. They claimed s 92 was a 'constitutional guarantee of freedom'[135] and that it is not 'a question of exceeding the limits of some affirmative power defined according to subject matter. It is a question of infringing upon a constitutional immunity.'[136]

Lord Simonds for the Privy Council also noted that immunities granted under s 92 cannot be illusory.[137]

The *Ha* decision struck down the licence fees as contrary to s 90 of the Constitution. Under that provision the Commonwealth is granted exclusive power to impose duties of customs and excise. It may be said that as an affirmative power[138] it can be distinguished from the constitutional immunity granted by s 92 and thus should be accorded different treatment. In *Anthill*, Fullagar J appeared to support a wider restriction and be more concerned with indirectly contravening the Constitution. His view was that the States cannot make lawful, either prospectively or retrospectively, that which the Constitution says is unlawful.[139] The Privy Council also appeared to find contravention of the Constitution as important in itself.[140]

The High Court revealed more precisely the ambit of the *Anthill* restriction in *Mutual Pools and Staff Pty Ltd v Commonwealth of Australia.*[141] In an earlier decision, the High Court had held a sales tax imposed was invalid as contravening s 55 of the Constitution.[142] Section 55 is procedural in nature and requires laws imposing excise

---

[133] *Amax* (1976) 71 DLR (3d) 1, 10.
[134] *Barton* (1957) 97 CLR 633, 641 (Dixon CJ).
[135] *Anthill* (1955) 93 CLR 83, 99.
[136] Ibid 100.
[137] *Commissioner for Motor Transport v Anthill Ranger & Co Pty Ltd* (1956) 94 CLR 177, 180.
[138] It is arguable that as an exclusive power it has a stronger argument for special treatment than other concurrent affirmative powers.
[139] See *Anthill* (1955) 93 CLR 83, 103.
[140] *Commissioner for Motor Transport v Anthill Ranger & Co Pty Ltd* (1956) 94 CLR 177, 180.
[141] (1993) 179 CLR 155 ('*Mutual Pools*').
[142] *Mutual Pools v Federal Commissioner of Taxation* (1992) 173 CLR 450.

duty to only impose excise duty. The impugned taxation Act was found to impose an excise duty on pools manufactured at the factory and land tax on those built *in situ*. *Mutual Pools* was concerned with a refund Act[143] which regulated refunds of payments made pursuant to the invalid tax Act. In obiter,[144] the Court discussed the impact of the cause of invalidity on the power to extinguish claims. The Court did not believe the difference between a taxing statute invalid for procedural reasons (as in *Mutual Pools*) and misapplication of a valid statute was material to the power to enact laws that extinguished refunds. But as Mason CJ stated: 'The difference would be material in a case where the invalidity of the taxing statute had its origin in some want of legislative power or irremediable contravention of a constitutional prohibition.'[145]

In so saying, Mason CJ claimed authority from *Anthill*. McHugh J similarly saw the principles enunciated in *Anthill* and *Barton* as going beyond constitutional guarantees to encompass legislation outside the scope of the granted powers.[146] Clearly the High Court does not see *Anthill* as restricted to constitutional guarantees but extending to allocation of power such as that in s 90. This distinction, however, indicates that restitutionary claims for some mistakes of law, such as misapplication, as well as some forms of unconstitutionality, may be legislatively limited.

3 *Federal Construct*

In both *Anthill* and *Amax* it was a non-federal Act that was contrary to the Constitution and that also prohibited recovery. With *Ha* it was a State Act that contravened s 90 and a Commonwealth Act that rendered nugatory a resultant restitutionary claim. In Australia, the Commonwealth has the power both to impose excise duty and taxation.[147] Therefore, such legislation, it could be argued, actually upholds the Constitutional allocation of legislative power.

In *Air Canada,* the majority declared valid a new taxation provision[148] that was retroactive and 'confiscated' money earlier raised under an invalid tax. La Forest J (with whom Beetz, McIntyre, Lamer and L'Heureux-Dubé JJ agreed) placed great emphasis on the tax being validly imposed and collected and merely put it down to 'good fortune' that the invalid amount previously collected 'matched precisely' the new amount.[149] He argued the confiscation provision was simply collection machinery and distinguished *Amax* and *Anthill* where the legislatures sought to give themselves immunity and so indirectly gave effect to invalid statutes. Wilson J, in dissent, looked at the substance of the retroactive tax and the confiscation provision. To her,

---

[143] *Swimming Pools Tax Refund Act 1992* (Cth).
[144] It was found there was contractual agreement to repay in the event of invalidity.
[145] *Mutual Pools* (1993) 179 CLR 155, 167 (Mason CJ), 183 (Deane and Gaudron JJ).
[146] Ibid 214.
[147] Sections 90 and 51(ii) of the Constitution, respectively.
[148] *Finance Statutes Amendment Act*, SBC, 1981, c 5, s 20.
[149] *Air Canada* (1989) 59 DLR (4th) 161, 187.

> [t]he imposition of the retroactive tax in the exact amount of the payments made under the *ultra vires* legislation combined with the act of confiscation lead ... to the inescapable conclusion that the intent of the province was to defeat any claim for return of the moneys paid pursuant to the *ultra vires* legislation so as to achieve indirectly what it could not achieve directly, namely, the imposition of an *ultra vires* tax. This, in my view, is a clear violation of the principle in *Amax*.[150]

Wilson J's view is to be preferred, as the basis of *Amax* and *Anthill* was that constitutional restrictions cannot be evaded in substance by retaining that which is unconstitutionally obtained. Here retention was achieved by the confiscation method just as if it was by extinguishing the claim. Similarly with the Windfall Tax, it is clear from the purpose of the imposition of the tax, the correlation of the amounts and the triggering of the tax liability, that in substance the tax bars restitutionary recovery and achieves retention of the invalid tax.

The decision in *Air Canada* can be distinguished from *Ha* because in *Air Canada* it was not want of power but only a technical error,[151] which, as seen in *Mutual Pools*, can be limited by legislation. More importantly, however, *Ha* can be distinguished because the Windfall Tax stands alone as its only purpose is to effectively bar the remedy for the restitutionary claim against the States, whereas in *Air Canada*, the confiscation provision was only a part of a new ongoing taxing scheme. La Forest J, for the majority, found this distinction important, noting that if the provision stood alone it could be successfully argued that it violates the *Amax* principle.[152]

It could also be argued the confiscation in *Air Canada* was just the chosen method to give the new tax its retroactive effect, whereas there was no retroactivity with the Windfall Tax. In addition, the Windfall Tax Act states that the collecting State has no further liability to anyone for the amount collected other than the Commissioner of Taxation. Clearly, unlike *Air Canada*, the Windfall Tax's sole purpose is to avoid restitutionary recovery (as was also revealed in the Explanatory Memorandum) and circumvent the *Amax* and *Anthill* principle. As the Privy Council made clear in *Anthill*, excluding from the Constitution's scope an enactment whose only object is to validate an exaction which the section renders unlawful would be a mockery of the spirit of the Constitution.[153]

4 *Acquisition of Property*

If the legislation were found to be valid, thereby effectively extinguishing the claim, the Commonwealth may have contravened s 51(xxxi) of the Constitution which empowers the Commonwealth to acquire property but only on just terms.

---

[150] Ibid 167.
[151] The original legislation which was cured by redrafting to make it 'direct' taxation.
[152] *Air Canada* (1989) 59 DLR (4th) 161, 186.
[153] *Commissioner for Motor Transport v Anthill Ranger & Co Pty Ltd* (1956) 94 CLR 177, 181.

In *Georgiadis v Australian and Overseas Telecommunications Corporation*,[154] Mason CJ distinguished Dixon J's conclusion in *Werrin v Commonwealth*[155] that there was no constitutional principle preventing Parliament extinguishing a cause of action, by saying that Dixon J may have assumed without deciding that the cause of action in that case was not property because it was not assignable. Since *Werrin* it had been established that a chose in action (such as a right to restitution) is considered 'property' for the purpose of s 51(xxxi).[156] In *Georgiadis* the majority said '"acquisition" directs attention to whether something is or will be received. If there is a receipt, there is no reason why it should correspond precisely with what was taken.'[157]

In that case it was held 4:3 that legislation that effectively barred Mr Georgiadis' cause of action against Telecom for personal injuries sustained at the workplace was invalid as contrary to s 51(xxxi) of the Constitution in that it effected an acquisition of property (his chose in action) on other than just terms. The majority held that acquisition extends to the extinguishment of a vested cause of action, at least where the extinguishment results in a benefit.[158]

In applying this to the Windfall Tax it could be argued that this is effectively what the tax achieves. The tax is levied at 100% of the 'taxable amount' that is the State's liability to restitution of the prior payments of the invalid tax, and is required to be collected by the State *prior* to it making payment in satisfaction of its liability. In so doing, the State is discharged from any liability other than that against the Commissioner.

Thus as well as technically making the State liable to hand over the Windfall Tax to the Commonwealth, it also effectively cancels the State's restitutionary liability because it discharges it from liability to anyone else regarding the withheld amount. It is a technical device to bar the restitutionary remedy. As the States are then required to pass that amount to the Commonwealth within 21 days after the end of that month,[159] the Commonwealth receives a direct financial benefit from such extinguishment of the general law cause of action (which according to the Parliamentary debates the Commonwealth intends to then give to the States, although it would be Commonwealth property up to that point). It could therefore be said that the legislation creates an 'acquisition' according to *Georgiadis* that falls within s 51(xxxi). As seen such acquisition does not need to correspond precisely. Extinguishment is not 'just terms' and so there is contravention of the constitutional provision.

The acquisition is achieved through the taxation power and in *Mutual Pools*, Deane and Gaudron JJ said that the operation of s 51(xxxi) is subject to an express or

---

[154] (1993) 179 CLR 297 ('*Georgiadis*').
[155] (1938) 59 CLR 150 ('*Werrin*').
[156] See *Minister for the Army v Dalziel* (1944) 68 CLR 261, 270 (Starke J).
[157] *Georgiadis* (1993) 179 CLR 297, 304.
[158] Ibid 305.
[159] *Franchise Fees Windfall Tax (Imposition) Act 1997* (Cth) s 9(3).

necessarily implied contrary intention of other grants of power such as taxation, which necessarily encompasses acquisition of property.[160] The Court found that the taxation in *Mutual Pools* was directed to achieve a resolution of the competing claims as they related to the refund of moneys.[161] Mason CJ noted that there was nothing in the *Swimming Pools Tax Refund Act* which would allow the Court to find that it was, in addition to a law regarding taxation, also a law for the acquisition of property.[162]

This suggests that if there is dual characterisation of the legislation, one form of which could truly be said to be acquisition of property, it may overcome the prima facie exclusion of the operation of s 51(xxxi) from the scope of taxation. In characterising the law, Brennan J said it was necessary to see if acquisition of property was the sole or dominant character of the provision or such acquisition was a necessary feature of the means selected to achieve the objective within power and was appropriate and adapted to that end.[163] In the case of the Windfall Tax, as seen, the dominant purpose of the legislation was to effectively neutralise the restitutionary chose in action and because of restrictions on its ability to extinguish the action the necessary means to achieve this was arguably acquisition of property by imposition of a Commonwealth taxation liability.

In *Australian Tape Manufacturers Association Ltd v Commonwealth*[164] the Court held that where obligations to pay are imposed as genuine taxation provisions, there is little likelihood that there will be any acquisition of property within s 51(xxxi) of the Constitution. Given the form and stated purpose of the Windfall Tax it could be argued it is not genuine taxation and so the taxation limitation on the scope of s 51(xxxi) may not apply, thereby meaning that just terms are required for such acquisition.

Thus acquisition of property on other than just terms is a possible ground to impugn Commonwealth limitation on restitutionary recovery, although it perhaps is not as strong as the grounds previously mentioned.

5 *Substance Over Form*

In Australia the High Court has expressed support for a substance over form approach to constitutional interpretation. In *Georgiadis* the majority stated

> It is often said in relation to constitutional guarantees and prohibitions that "you cannot do indirectly what you are forbidden to do directly". That maxim

[160] *Mutual Pools* (1993) 179 CLR 155, 187. See also Mason CJ, 171.
[161] Ibid 175 (Mason CJ).
[162] Ibid.
[163] Ibid 179-80 (Brennan J).
[164] (1993) 176 CLR 510.

> is, in fact, an important guide to construction, indicating that guarantees and prohibitions are concerned with substance not form.[165]

In *Ha* itself, the High Court restated its support for such an approach[166] and quoted with approval Isaacs J's statement in *Commonwealth and Commonwealth Oil Refineries Ltd v South Australia*[167]:

> The prohibitions of ss 90 and 92 of the Constitution may be transgressed ... also by a statute—whatever its ultimate purpose may be, and however its provisions are disguised by verbiage or characterization, or by numerous and varied operations lengthening the connective chain ... if it operates in the end by its own force so as to do substantially the same thing as a direct contravention would do, either in attaining a forbidden result or in using forbidden means. ... *It is no justification ... for securing forbidden results that lawful means are employed.*[168] (emphasis added).

As seen, the practical operation of the legislative scheme and stated intention of the Government post-*Ha* is to bar any remedy and thereby protect the States' revenue by allowing them to retain the taxes raised contrary to s 90. There has been use of the federal division of powers as a device to overcome limitations on the legislatures' ability to limit or prohibit exposure to restitutionary claims as accepted in *Anthill*.

Ultimately, if it has achieved in substance what the Constitution forbids, the States will be able to retain the excise duties raised, contrary to s 90. By extension, the Windfall Tax, too, may contravene s 90 of the Constitution.

IV WHY IS THERE A DISTINCTION IN LEGISLATIVE ABILITY TO LIMIT CLAIMS?

So far I have examined *what* was said in the *Anthill* line of cases but not *why* it was said. Why is there a distinction between constitutional procedural provisions and those relating to positive grants of power or prohibitions? In *Mutual Pools* Brennan J explained the distinction as between whether the legislature had the power to impose the tax or not. Mason CJ said if there were power to impose the tax then there was power to legislate to retain it or not be liable to refund it. Perhaps then the cause of action is based on lack of affirmative grounds for retention, as suggested

---

[165] *Georgiadis* (1993) 179 CLR 297, 305, quoting from *Wragg v New South Wales* (1953) 88 CLR 353, 387-8 (citation excluded). See also, *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349-50; *Attorney-General (Commonwealth) v Schmidt* (1961) 105 CLR 371; *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55; *Caltex Oil (Australia) Pty Ltd v Best* (1990) 170 CLR 516.
[166] *Ha* (1997) 71 ALJR 1080, 1090.
[167] (1926) 38 CLR 408.
[168] Ibid 423.

by JD Merralls.[169] Alternatively, the distinction could lie in the remedial character of procedural errors which would also accord with a restitutionary analysis as there would not be an unjust enrichment if the government could still require the payment.

The distinction may, however, lie on another level. Professor John McCamus suggests that the reasoning in *Amax* may have been an appeal to basic democratic values for striking down legislation when it acts beyond the scope of its democratic mandate.[170] Professor Paul Finn has argued that democracy in the Australian context is shaped by notions of sovereignty of the Australian people and public trust by which government is limited by existing to serve the interests of the people.[171] These, he says

> are best seen as *expressions of intrinsic qualities of our democracy*. In this, they properly can be described as "constitutional principles"... [in that they] provide fundamental assumptions of our system of government.
>
> [T]heir function would seem to be no more than... to provide a more explicit *basis for explaining, appraising and developing particular doctrines of common law*...Much more important...is the impact they should have as constitutional principles on the *structuring and practice of government* under our constitutions.[172] (emphasis added)

If this is what informs the High Court regarding the status of legislative contraventions of the Constitution which results in the selective ability to limit restitutionary liability, perhaps it could also provide guidance regarding the foundation of the restitutionary ground of recovery for unconstitutional taxes in Australia. Similar notions have been used as the foundation of this restitutionary ground by some academic commentators.

Both Peter Birks and WR Cornish have noted that a fundamental supposition of our democratic society is that government is to act lawfully.[173] Cornish has argued that the tension inherent in democratic government is such that the only precise way to ensure government for the whole of society prevails over that favouring sectional interests is the requirement of legality.[174] Restitution of invalid tax is not important for giving effect to the imprimatur of no taxation without consent of Parliament in itself but because in so doing it acts as a bulwark and disciple of democratic government. Ronald Collins sees the restitutionary right as embodying the duty of

---

[169] J D Merralls, 'Restitutionary Recovery of Taxes After the Royal Insurance Case' in Mitchell McInnes (ed), *Restitution: Developments in Unjust Enrichment* (1996) 117, 123. See also *Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285, 324ff (Kirby J).

[170] McCamus, above n 6, 256.

[171] Paul Finn, 'A Sovereign People, A Public Trust' in Paul Finn (ed), *Essays on Law and Government* (1995) vol 1, 1 says it was enunciated by the High Court in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 72 (Deane and Toohey JJ); *Australian Capital Television Pty Ltd v Commonwealth [No 2]* (1992) 177 CLR 106, 136 (Mason CJ).

[172] Finn, ibid, 15.

[173] Birks, above n 5, 61; Cornish, above n 6, 50.

[174] Cornish, above n 6, 51.

government to exercise the power given to it by the citizens fairly and only in accordance with the law.[175]

One could question whether the cause of action is a manifestation of Finn's constitutional principles shaping the practice of government. If the basis of the action were to be found in a transactional inequality and the coercive nature of a State, these factors would be present whether the invalidity were caused by technical breaches or a more fundamental constitutional breach, and the chance of recovery would have little to do with the cause of action. If the action were founded on fundamental precepts of government and the democratic mandate, then recovery complements such basis.

V CONCLUSION

The *Ha* decision and the resultant legislation indicates that restitution of unconstitutional taxes is a live issue in Australia that must soon be addressed. Current causes of action do not provide comprehensive or logical coverage of restitutionary recovery in this area. As yet the courts have not enunciated a united juristic basis for a new cause of action to close the remaining gaps. Caution must be shown in not unthinkingly adopting the English approach expressed in *Woolwich* given the diverse justifications for the ultra vires ground in the decision and, in many ways, its inapplicability in the Australian context. Australia's constitutional form and continued support for retrospective overruling means it has great potential for numerous and large claims against the revenue. Ability to limit such claims in the context of unconstitutional taxes is severely limited, thus creating a real spectre of fiscal chaos. There cannot be extinguishment, either in form or substance, prospectively or retrospectively, where the invalidity is caused by want of constitutional power or irremedial contravention of a constitutional prohibition. Extinguishment may be possible, however, where the cause of the invalidity is a procedural error or misapplication of the law. Limitation of the action or remedy is also possible, irrespective of the cause of invalidity, but only where the restriction is reasonable as determined by examination of both form and practical effect.

Appreciation of these issues and a clearly enunciated foundation for such action is vital if Australia decides to adopt such a restitutionary ground of recovery. In establishing such a foundation, guidance may be provided by the limitations themselves, and their theoretical basis, so that ability to recover and the cause of action are complementary rather than incongruous. By examining and resolving these issues a principled development of the action's form, scope and limitations may be achieved, thereby avoiding 'well-meaning sloppiness of thought'.[176]

---

[175] Collins, above n 6, 409-10.
[176] See *Holt v Markham* [1923] 1 KB 504, 513 (Scrutton LJ).