RESTITUTIONARY PRINCIPLES GOVERNING THE RECOVERY OF OVERPAID STAMP DUTY

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I. INTRODUCTION

> It is to be hoped that the growing understanding and awareness of restitutionary principles will lead to an increased judicial reluctance to tolerate a public authority's unjust enrichment.[1]

The recent decision of the High Court in *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Limited*,[2] illustrates the importance of restitutionary principles in preventing a revenue authority's unjust enrichment, which, in the *Royal Insurance* case, arose from a series of mistaken payments by the taxpayer to the Victorian Commissioner of State Revenue.

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The writer wishes to acknowledge the invaluable assistance of Dr John Carter, Professor of Law, University of Sydney, and Mr Keith Mason QC, Solicitor-General for New South Wales, in the review of this paper.

1 A Burrows, "Public Authorities, Ultra Vires and Restitution" in Burrows (ed), *Essays on the Law of Restitution*, Clarendon Press; Oxford University Press (1991) p 69.

2 (1994) 182 CLR 51.

Since the landmark decision in *Pavey & Matthews Pty Limited v Paul*,[3] the High Court of Australia has embraced the unjust enrichment principle as a means of reversing benefits unjustly derived by a defendant at the expense of a plaintiff. The *Royal Insurance* case is an important illustration of the High Court's recent innovation and development of the law of restitution in Australia.[4]

As the title suggests, this essay is concerned with the restitutionary principles governing the recovery of overpayments of stamp duty from the Revenue as a result of mistake (both of fact and law). Although the Revenue may be unjustly enriched at the expense of a taxpayer in a number of different ways, each of which might justify recovery, the focus of this paper, in the context of stamp duty, is to discuss the principles governing the recovery of mistaken payments. The discussion is equally applicable, however, to other State and Federal taxes.

The traditional approach in recovering overpaid taxes from the Revenue has been somewhat diverse.[5] Any payments of taxes or other charges levied ultra vires (ie pursuant to an invalid demand by the Revenue) could be recovered on the same basis as any payments made to another but not lawfully due. The payer would, therefore, be able to recover if they could show a ground for restitution, such as mistake of fact[6] (in Australia this now also includes mistake of law)[7] or duress.[8]Recovery was also permitted in Australia where a public official demanded a payment to which they were not entitled or which was in excess of the entitlement for the performance of a public duty.[9] The payer would also be able to recover if they could show that the payment was made pursuant to an agreement that the sum would be repaid if it were found not in fact to be due.[10] In the context of ultra vires demands, the decision of the majority of the House of Lords in *Woolwich Equitable Building Society v Inland Revenue Commissioners*,[11] has recognised a general right to restitution where payments is made in response to ultra vires demands by government or public authorities.[12]

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3 (1987) 162 CLR 221.

4 Other recent examples of restitution based on unjust enrichment include *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 and *Baltic Shipping Co v Dillon (The Mikhail Lermontov)* (1993) 176 CLR 344.

5 See generally K Mason and JW Carter, *Restitution Law in Australia*, Butterworths (1995), Chapter 20. See also the Law Commission Report No 227 (UK), *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments*, 1994.

6 *Meadows v Grand Junction Waterworks Co* (1905) 21 TLR 538.

7 *David Securities*, note 4 *supra*.

8 *Maskell v Horner* [1915] 3 KB 106; *Mason v New South Wales* (1959) CLR 108.

9 See *Mason v New South Wales* (1959) 102 CLR 108; *Steele v Williams* (1853) 8 Ex 624, 155 ER 1502; *Campbell v Hall* (1774) 1 Cowp 204, 98 ER 1045; *Dew v Parsons* (1819) 2 B & Ald 562, 106 ER 471 and *Hooper v Mayor of Corporation of Exeter* (1887) 56 LJQB 457. On one view of the matter, these so-called "public duty" cases could be considered as a species of duress - see R Goff and G Jones, *The Law of Restitution*, Sweet and Maxwell (4th ed, 1993) at pp 245-50.

10 *Sebel Products Ltd v Commissioners of Customs and Excise* [1949] 1 Ch 409; *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70.

11 *Ibid.*

12 For a more detailed discussion of the *Woolwich* decision refer to Mason and Carter, note 5 *supra*, Chapter 20; Goff and Jones, note 9 *supra*, Chapter 24; A Burrows, *The Law of Restitution*, Butterworths (1993), Chapter 12; and J Beatson, "Restitution of Taxes, Levies and Other Imposts: Defining The Extent of the Woolwich Principle" (1993) 109 *Law Quarterly Review* 401.

A mistake can take many forms, the legal analysis of which may vary. Generally speaking, an overpayment of stamp duty can arise in one of the following ways:

(a) where stamp duty is payable but more than what is due is paid under mistake;

(b) where no stamp duty is payable, with the consequence that the entirety of that which has been paid under mistake, is an overpayment;[13] and

(c) where the statute provides that the stamp duty paid should be refunded where certain criteria are satisfied. This might occur, for example, where the agreement on which ad valorem ("according to the value") stamp duty has been paid is afterwards rescinded or annulled or where the stamped instrument has failed in its intended operation and has become useless.[14]

Whilst recognising that stamp duty overpayments may arise in a variety of contexts, this paper is generally concerned with the categories of mistaken overpayments described at (a) and (b) above.

II. DISCUSSION OF ROYAL INSURANCE

A. Facts of *Royal Insurance*

Royal Insurance Australia Limited ("Royal") issued policies of insurance against liability for workers compensation. It remitted to the Comptroller of Stamps amounts which it believed were due under the *Stamps* Act 1958 (Vic) (the "Act") as duty on premiums received in respect of those policies.

Between 1 July 1985 and 21 August 1989 Royal paid to the Comptroller $1,907,908.10 more than the amount it was ultimately liable to pay under the Act, as it was unaware of two amendments made to the Act. The overpayments were made in respect of premiums paid on two classes of policy - "wages" policies and "cost plus" policies. The first exempted from charge premiums paid for certain policies.

The second amendment exempted from duty premiums on other policies received after 30 June 1985 in respect of liabilities incurred before 1 October 1985. This second amendment was deemed to have come into operation on 30 June 1985.

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13 This may extend to instruments which have no legal effect and which, therefore, do not require to be stamped - see *Re Rushcutters Court Pty Ltd (No 1)* (1978) 78 ATC 4411 (contract purporting to dispose assets of company following a winding-up); *Kern Konstruction (Townsville) Pty Ltd v Commissioner of Stamp Duties* (1981) 81 ATC 4147 (instrument not in proper form for registration under the *Real Property Act* 1877 (Qld)); *Bell Resources Holdings Pty Ltd v Commissioner for ACT Revenue Collections* (1990) 90 ATC 4327 (ineffective share transfer). See also the *Stamp Act* 1894 (Qld), which allows the refund of stamp duty (less 5 per cent) in certain specified circumstances, including, for example, cases "where an instrument is not capable of legal effect, and was void from inception": s 75(5)(d).

14 See s 15 of the *Stamp Duties Act* 1920 (NSW). See also s 75 of the *Stamp Act* 1894 (Qld) (summarised in Table A) and generally refund provisions set out in Table A. In New South Wales, claims to recover refunds under specific provisions of the *Stamp Duties Act* (other than the general refund provisions) might arise on surrenders of leases (s 78B); options not proceeded with(s 40C); certain family law instruments (s 74CD); failed instruments (s 15(1)) and certificates of registration of stolen motor vehicles (s 84GA).

The overpayments by Royal were thus made up as follows:

(a) $138,179.21 in respect of premiums exempted under the first amendment (known as "post-1985 wages payments");

(b) $1,674,301.94 in respect of premiums exempted under the second amendment. Of this, $1,373,938.10 was paid in respect of premiums received before the second amendment commenced (known as "pre-1987 cost plus payments") and $300,363.84 which was paid in respect of premiums received after the second amendment commenced ("post-1987 cost plus payments"); and

(c) $95,426.95 in respect of over estimates of premiums on certain policies received before 1 July 1985 in respect of liabilities incurred before 1 October 1985 ("overestimated payments").

Royal sought a refund under s 111(1) of the Act which provided as follows:

> Where the [Commissioner] finds in any case that duty has been overpaid, whether before or after the commencement of the *Stamps Act* 1978 he may refund to the company, person or firm of persons which or who paid the duty the amount of duty found to be overpaid.

B. The Decision of the High Court

The High Court held in favour of Royal as follows:

(a) The Comptroller was obliged to refund the entire amount of $1,907,908.10 overpaid by Royal.

Although the three substantive judgments differed slightly in their analysis as to the precise basis for recovery, the outcome under each of the judgments was that Royal was entitled to a refund of the full amount of $1,907,908.10 overpaid.

Justice Brennan (with whom Toohey and McHugh JJ concurred), held in favour of Royal on the ground that it was *unjust* for the Comptroller to retain the post-1985 wages payments and the post-1987 costs plus payments. These payments were liable to be refunded because Royal was *mistaken* in making them. The relevant mistake was firstly, as to the existence of a statutory liability to pay and secondly, as to the quantum of premiums actually received.[15] Accordingly, it was held that it would be "unjust" for the Comptroller to retain these amounts and Royal could recover them under the general law of restitution.[16]

However, the overestimated payments were made on the understanding that the amount would be adjusted when the quantum of the premium become known, so that the Comptroller was bound to refund the amount of the overpayment when ascertained. There was no "mistake" affecting the payment of this amount. The retrospective effect of the 1987 amending legislation created, however, a duty to refund as the Comptroller was "retrospectively disentitled to retain what was paid as stamp duty under the

15 Note 2 *supra* at 89.

16 *Ibid.*

Act as it had stood before the 1987 amendment commenced".[17] The Comptroller's liability to refund this amount was seen as arising under the statute and there was no occasion to invoke common law restitution in order to discover a cause of action for Royal.[18]

Chief Justice Mason, on the other hand, treated all of the payments made by Royal as having been made "in the mistaken belief that in law it was bound to do so".[19] His Honour accepted without question that the principle established by *David Securities* could be invoked by Royal. Accordingly, "payment in the circumstances opens the gateway to recovery where the payment results in the *enrichment of the defendant at the expense of the plaintiff*"[20] (emphasis added). This meant that the entire amount of the overpayment was recoverable by Royal on the basis of mistake and under the general law of restitution.

Dawson J held in favour of Royal on the ground that the word "may" in s 111(1) of the Act merely conferred authority on the Comptroller to refund any overpayments. Relying on previous High Court authority in *Finance Facilities Pty Limited v Federal Commissioner of Taxation*,[21] he held that when the condition for the exercise of that authority was fulfilled, the finding of overpayment meant that there was a duty upon the Comptroller to refund the overpaid amounts.[22]

(b) Section 111(1) of the Act conferred a discretionary power on the Comptroller to refund money overpaid, but created no duty to make a refund - per Mason CJ, Brennan, Toohey and McHugh JJ (Dawson J dissenting on this point). However, the Comptroller had no residual discretion to refrain from making a refund under s 111(1) once a finding of overpayment had been made and there was a legal liability to refund (per Brennan, Toohey and McHugh JJ). Mason CJ also indicated that the discretion under s 111 was to be exercised in accordance with the principles of the law of restitution.[23]

(c) If Royal had "passed on" to its policy holders the burden of the payments made to the Comptroller that fact did not provide a defence to Royal's restitutionary claim. Put simply:

> the fact that Royal had passed on to its policy holders the burden of the payments made to the Commissioner does not mean that Royal did not pay its own money to the Commissioner. The passing on of the burden of the payments made does not affect the situation that, as between the Commissioner and Royal, the former was enriched at the expense of the latter. [24]

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17 *Ibid.*

18 *Ibid* at 89-90. Brennan J was of the opinion that *Royal Insurance* was quite different, in principle, from *Air Canada v British Columbia* [1989] 1 SCR 1161; (1989) 59 DLR (4th) 161 and *Woolwich* (see notes 10 and 12 *supra*), where payments had been made under statutory provisions that were held to be invalid.

19 *Ibid* at 67.

20 *Ibid* at 68.

21 (1971) 127 CLR 106.

22 Note 2 *supra* at 90, per Brennan J.

23 *Ibid* at 66.

24 *Ibid* at 90, per Brennan J.

(d) Section 20A of the *Limitation of Actions Act* 1958 (Vic) (the "Limitation Act"), which imposed a twelve month limitation on actions to recover moneys paid as taxes, fees, charges or other imposts under the authority or purported authority of any Act, did not apply to Royal's claim.
Justice Brennan (with whom Toohey and McHugh JJ concurred), held that the *Limitation Act* was not a bar to recovery on the ground that the post-1985 wages payments, the post-1987 cost plus payments and the pre-1987 cost plus payments were not made under a provision of any Act which imposed or purported to impose a duty to pay the amount so paid. Accordingly, the usual six-year limitation was applicable.[25] However, an action to recover the overestimated payments was, according to Brennan J, an action for recovery of an amount paid under the authority of the Act, for it was due and owing under the Act at the time when it was paid. On that basis, an action to recover this amount prima facie fell within s 20A of the *Limitation Act*. Notwithstanding this, s 20A was impliedly excluded from operation by the retrospective effect of the 1987 amendment. The relevant limitation provision was s 5(1)(d) of the *Limitation Act* which applies to "actions to recover any sum recoverable by virtue of an enactment"[26] and imposes a six-year limitation period.[27]
Mason CJ and Dawson J held that s 20A of the *Limitation Act* was not a bar on the ground that none of the payments made by Royal were made under the authority or purported authority of the Act, for the simple reason that the duty was not payable under the Act.[28]

C. Relief

The Appeal Division of the Victorian Supreme Court[29] granted relief in the nature of mandamus by directing the Commissioner to refund the amount claimed. The Commissioner, on appeal to the High Court, submitted that mandamus would not result in an order for payment of that amount. The High Court rejected this argument by holding that there can be no objection to the grant of relief by mandamus directed to a statutory officer, requiring that officer to pay money, if there is a public legal duty so to act.[30]

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25 The liability of the Commissioner was not statute-barred at the time when the proceedings commenced.

26 Note 2 *supra* at 90.

27 *Ibid.* Refer to Part E of Section VI for a discussion of limitation periods generally. See also Mason and Carter, note 5 *supra* at [2035]; [2714]-[2718].

28 Following the decision in *Royal Insurance*, the *Recovery of Imposts Act* 1963 (NSW) was promptly amended. On 21 December 1995, assent was given to the *State Revenue Legislation Further Amendment Act* 1995 which amended s 2(1) to apply to proceedings to recover "the amount or any part of the amount paid by way of tax or purported tax and recoverable on restitutionary grounds (including but not limited to mistake of law or fact)". Section 7(1) was also amended to provide that the Act applies *"whether or not the payment was made under the authority or purported of any Act"*. (Emphasis added.)

29 *Royal Insurance Australia Ltd v Comptroller of Stamps (Vic)* (1992) 23 ATR 528; 92 ATC 4399.

30 Note 2 *supra* at 81. Interestingly, the term "proceedings" (in the context of proceedings to claim refunds by a taxpayer in Victoria) was inserted into the *Stamps Act* 1958 (Vic) by the *State Taxation (Further Amendment) Act* 1993 (Vic) and is defined to include, amongst other things, seeking the grant of any relief or remedy in the nature of mandamus: *Stamps Act* 1958 (Vic), s 32AA(8).

III. UNJUST ENRICHMENT ANALYSIS

A. General

In *Pavey & Matthews Pty Limited v Paul*,[31] Deane J recognised the concept of unjust enrichment as a "unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff".[32]

This is subject to any available defences or countervailing factors which might deny restitution to the plaintiff.[33]

In a recent article, Fitzgerald[34] has commented that if unjust enrichment is to be a workable concept it must be capable of being constrained in its application by the judiciary; it must be definable so as to prevent it from becoming an unruly concept exercisable in any shape or form.[35] This was recognised by Deane J in *Pavey & Matthews*:

> [T]o identify the basis of such actions as restitution ... is not to assert a judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate.[36]

Restitution is not concerned with palm tree justice and recovery will not be permitted merely because a court on the day might consider it "just and fair".

A definition of unjust enrichment constructed by academics[37] indicates that the concept embodies those cases which have been judicially recognised as justifying the recovery of certain gains subtracted from the plaintiff's wealth. In Australia, the majority of the High Court in *David Securities*, have at least gone as far as recognising vitiated and qualified transfer as two broad categories of factors which permit recovery:[38]

> [I]t is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair or unconscionable. Instead, recovery depends upon the existence of a *qualifying or vitiating factor such as mistake, duress or illegality.*[39] (Emphasis added.)

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31 Note 3 *supra.*

32 *Ibid* at 256-7.

33 Goff and Jones, note 9 *supra*, take the view that a defendant is enriched if the benefit is conferred by the plaintiff in a non-voluntary way. This might occur, for example, if the benefit was conferred by mistake or under compulsion, duress, undue influence or out of necessity. P Birks, *An Introduction to the Law of Restitution*, Oxford (1985) argues that a vitiated or qualified transfer would mean that the transfer is involuntary and on that basis, the law should respond to reverse the unjust enrichment. In Birks' view, benefits conferred under mistake are conferred involuntarily (and are recoverable in the absence of defences) because the mistake vitiates the plaintiff's intention to enrich the defendant. Thus, it is the *mistake* which is the "unjust" factor.

34 B Fitzgerald, "Tracing at Law, The Exchange Product Theory and Ignorance as an Unjust Factor in the Law of Unjust Enrichment" (1994) 13 *University of Tasmania Law Review* 116.

35 *Ibid* at 119-120.

36 Note 3 *supra* at 257.

37 P Birks, note 33 *supra*; P Birks, *Restitution - The Future*, Federation Press (1992); A Burrows, note 12 *supra*; Goff and Jones, note 9 *supra;* Mason and Carter, note 5 *supra.*

38 Note 4 *supra.* This approach is very similar to the subtractive unjust enrichment analysis, based on *vitiated* and *qualified* transfers, propounded by Birks (see note 33 *supra*).

39 Note 4 *supra* at 379.

A plaintiff must prove the following elements to succeed in a restitutionary claim:

(a) enrichment (or benefit) of the defendant;
(b) at the expense of the plaintiff;
(c) injustice.[40]

This establishes a prima facie right to restitution, unless the defendant can point to a common law or statutory defence.[41]

IV. BENEFIT AND "AT THE EXPENSE OF THE PLAINTIFF" ELEMENTS

A. Benefit

The element of enrichment in the unjust enrichment formula is generally uncontroversial. Money is an incontrovertible benefit[42] but two brief comments should be made:

(a) Generally speaking, successful plaintiff will be entitled to claim interest on the payment recovered. Interest is also a "benefit", although it is not the original benefit paid to the defendant. Part VII below discusses this in more detail.

(b) A plaintiff who successfully seeks restitution for mistake obtains a money judgment against the defendant, ie a personal claim against the defendant. However, in *Chase Manhattan Bank NA v Israel - British Bank (London) Limited*,[43] Goulding J held that a person who paid money to another under a factual mistake could, in certain situations, retain an equitable interest (or property) in it such that the payee in conscience was subject to a fiduciary duty to respect the proprietary right. This case is highly controversial.[44] In *Australia and New Zealand Banking Group Limited v Westpac Banking Corporation*,[45] the High Court recognised that the common law personal right of action may arise in certain circumstances which also gives rise to a resulting trust of specific property or funds.[46]

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40 See for example the judgments of Deane J in *Pavey and Matthews*, note 3 *supra*, and Mason CJ in *Royal Insurance*, note 2 *supra*. See also Mason and Carter, note 5 *supra* at [203] and Chapter 2.

41 In the majority judgment of *David Securities*, note 4 *supra*, the High Court recognised (at 379) that a defendant may in defence any matter or circumstance which shows that the receipt or retention of the payment is not unjust. This sentence needs a verb "defend" in stead of "in defence"

42 For a discussion of "incontrovertible benefit", ie, a benefit which no reasonable person could deny, see Mason and Carter, note 5 *supra* at [213]-[215].

43 [1981] Ch 105.

44 See the discussion in Mason and Carter, note 5 *supra* at [445]; Burrows, note 12 *supra* pp 36-41 and pp 69-70. This case is also discussed by P Butler, "Mistaken Payments, Change of Position and Estoppel" in PD Finn (ed) *Essays on the Law of Restitution*, Law Book Co (1990) and in (1981) 12 *University of Queensland Law Journal* 99. See also RH Mandsley, "Proprietary Remedies for the Recovery of Money" (1959) 75 *Law Quarterly Review* 234; CEF Rickett, "Banks and the Recovery of Mistaken Payments" (1994) 16 *New Zealand University Law Review* 105.

45 (1988) 164 CLR 662.

46 *Ibid* at 673.

However, that case did not call for any application of those principles. Although the recovery of money mistakenly paid is commonly (and often loosely) said to be based on the common count of money had and received,[47] the statement of Lord Goff in *Lipkin Gorman v Karpnale Limited*[48] states the correct position, namely that "the claim for money had and received is a *personal claim and not a proprietary claim*".[49] (Emphasis added.)

B. At the Expense of the Plaintiff

The plaintiff must show the defendant's enrichment was "at the expense of" the plaintiff. As Goulding J said in *Chase Manhatten,* the words "unjust enrichment" fail on their own to identify any plaintiff.[50]

In *Royal Insurance*, this issue was crucial, particularly since Royal had "passed on" the cost of the overpaid duty to its customers. The Commissioner argued the enrichment was not at the expense of Royal but at the expense of its policy holders. The High Court dismissed this argument as follows:

> Restitutionary relief, as it has developed to this point in our law, does not seek to provide compensation for loss. Instead, it operates to restore to the plaintiff what has been transferred from the plaintiff to the defendant whereby the defendant has been unjustly enriched. As in the action for money had and received, the defendant comes under an obligation to account to the plaintiff for money which the defendant has received for the use of the plaintiff. *The subtraction from the plaintiff enables one to say that the defendant's unjust enrichment has been "at the expense of the plaintiff", notwithstanding that the plaintiff may recoup the outgoing by means of transactions with third parties".*[51] (Emphasis added.)

Justice Brennan stated that "the fact that Royal had passed on to its policy holders the burden of the payments made to the Commissioner does not mean that Royal did not pay its own money to the Commissioner".[52] It would thus appear that the High Court has entirely rejected the defence of "passing on" as part of the common law of restitution. A more detailed discussion of this issue is set out in Part D of Section VI below.

V. THE UNJUST FACTOR: MISTAKE

A. Mistake as the Unjust Factor

When a defendant receives a payment which it has no right to receive and which the plaintiff has paid by mistake, the defendant, having no right to receive the payment, is unjustly enriched by its receipt.[53] Mistake is clearly recognised as an

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47 See Mason and Carter, note 5 *supra*, at [442]-[445].
48 [1991] 2 AC 548.
49 *Ibid* at 572.
50 [1981] Ch 105 at 109.
51 Note 2 *supra* at 75, per Mason CJ.
52 *Ibid* at 90.
53 *David Securities,* note 4 *supra* at 393.

"unjust factor" which vitiates the intent to transfer the money (or other benefit) to the defendant.[54] As Parke B said in *Kelly v Solari*:

> I think that where money is paid to another under the influence of a mistake ... an action will lie to recover it back, and *it is against conscience to retain it.*[55] (Emphasis added.)

In *David Securities*, the bank submitted that the appellants must prove "unjustness" over and above the mistake. The majority of the High Court rejected this submission on the basis that "the fact that the payment has been caused by a mistake is sufficient to give rise to the prima facie obligation on the part of the respondent to make restitution."[56]

As noted earlier, not all of the members of the High Court in *Royal Insurance* regarded all the overpayments as arising under mistake. Mason CJ treated a payment made under a statutory obligation that was subsequently repealed (with retrospective effect) as made under a mistake of law. The majority held otherwise. It is submitted that the majority were correct on this issue.[57] As Brennan J stated in *Royal Insurance*: "by force of the [retrospective] operation attributed to the 1987 amendment, the Commissioner is retrospectively disentitled to retain what was paid as stamp duty".[58] The Commissioner's liability in such a case arises under the statute and not as a result of the plaintiff's mistake. In other words, the obligation to make restitution is not based on common law principles.

B. The Impact of *David Securities*

Before the abolition of the distinction between mistakes of law and fact in *David Securities*, the general rule that money paid under a mistake of law could not be recovered was subject to much criticism.[59]

Academic writers, law reformers and jurists were calling for the abolition of the rule for at least two decades prior to the decision. Although some legislatures responded, including Western Australia and New Zealand,[60] it was widely believed that judicial reform was also required. In a short and sudden period of three years,

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54 See Mason and Carter, note 5 *supra* at [228] and Chapter 4; Burrows, note 12 *supra*, Chapter 3 and *David Securities*, *ibid* at 379, per Mason CJ, Deane, Toohey, Ggaudron and McHugh JJ.

55 (1841) 9 M&W 54 at 8. Alternatively, the law might be seen as permitting recovery of unjust enrichments (in various recognised circumstances) in order to "prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep": *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 61, per Lord Wright.

56 Note 4 *supra* at 379.

57 See Mason and Carter, note 5 *supra* at [416]. The authors distinguish between the effect of a judicial overruling and the repeal with retrospective effect of a statute. The Supreme Court of Canada has previously held that recovery is possible if the provision entitling the taxpayer to recover is retrospective: *Kew Property Planning and Management Limited v Town of Burlington* (1980) 110 DLR (3d) 263.

58 Note 2 *supra* at 89.

59 See the discussion of this issue in *David Securities*, note 4 *supra* and also refer to the report by the UK Law Commission, note 5 *supra*. See also JD 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.

60 *Property Law Act* 1969 (WA), ss 124 and 125; *Judicature Act* 1908 (NZ), ss 94A and 94B.

the divide between fact and law was rejected by the highest courts in Canada,[61] South Africa[62] and Australia, and strongly questioned in the United Kingdom.[63]

With the greatest respect, it is perhaps regretful that the decision of the High Court in *David Securities* retained the language of "voluntariness". The majority (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ), in a joint judgment, explained the earlier mistake of law authorities as obiter dicta or as instances where the payment had been made voluntarily. As Watts has recognised:

> voluntariness amounts to indifference on the part of the payer as to where the truth lies in respect of the relevant question of fact or law or to a failure to contest the point in the face of a clear contrary assertion by the payee. In such cases the payer cannot be said to be mistaken at all.[64]

Birks has suggested that the word "voluntarily" is too unstable to be useful and can easily degenerate into a synonym for "non-recoverable".[65] It is submitted that these criticisms are justified.

Although the High Court in *Royal Insurance* did not attempt to clarify the mystifying language of "voluntariness" in the context of payments made under a mistake of law, one expects, or at least hopes, that the High Court will do so at the next available opportunity.

One point remains here. The relevant mistake in *Royal Insurance* occurred between 1985 and 1989, ie before the change of law, in relation to mistaken payments, effected by *David Securities* (decided in 1992). Despite this, the High Court applied *David Securities*, finding a mistake (of law) on the basis that "the Comptroller must be taken to have known at all material times that the statutory liability had been repealed and that she had no entitlement to retain these amounts".[66] It is submitted that the approach of the High Court on this issue was correct.[67]

C. What Amounts to "Mistake"

Australian courts have established the following principles in relation to "mistake":

(a) "Mistake of law" is intended to cover circumstances where a plaintiff pays moneys to a recipient who is not legally entitled to receive them.[68] It

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61 *Air Canada v British Columbia*, note 18 *supra* (in particular at 191).

62 *Willis Faber Enthonven Pty Ltd v Receiver of Revenue* 1992 (4) 202 (A).

63 *Woolwich Equitable Building Society v Inland Revenue Commissioners*, note 10 *supra* at 164, 169.

64 P Watts, "Mistaken Payments and the Law of Restitution" [1993] *Lloyd's Maritime and Commercial Law Quarterly* 145.

65 P Birks, "Modernising the Law of Restitution" (1993) 109 *Law Quarterly Review* 164 at 167. Birks cleverly argues (at 167) that "the large question whether the plaintiff did or did not want to make the transfer is insufficiently refined to solve many restitutionary problems; nor does the crude contrast between wanted and unwanted correspond at all exactly to the line between recoverable and irrecoverable enrichments".

66 Note 2 *supra* at 89, per Brennan J.

67 Notwithstanding the writer's view, a recent judgment of the Federal Court has indicated that overpayments of tax made under a mistake of law are refundable only from the date of the change in the law effected by the decision in *David Securities*: *Torrens Aloha Pty Limited v Citibank NA* (1996) 96 ATC 4214 at 4222, per Hill J.

68 *David Securities*, note 4 *supra* at 376.

would not, for example, extend to a case where the moneys were paid under a mistaken belief that they were due under one clause of a contract when in fact they were due under another clause of the same contract. By the same token, a taxpayer who believes that stamp duty is payable under one provision of the Stamps legislation, whereas in fact it is payable under another, cannot recover the stamp duty paid on the basis of a mistake (as to the *particular* section of the Act under which the stamp duty liability is imposed).

(b) The mistake does not have to be a "fundamental" mistake in any sense other than it causes the payment or transfer.[69]

(c) There is no requirement to prove "unjustness" over and above the mistake of the taxpayer.[70]

(d) If a defendant has a right to receive a payment, whether under a statute, in discharge of a liability owing to it or pursuant to a contract, a mistake by the plaintiff in making the payment does not convert the receipt into an unjust enrichment. But, if the defendant receives more than is due, the defendant may be unjustly enriched to the extent of the excess and restitution may be ordered *pro tanto* ("so far as it will go").[71]

(e) Mistake not only signifies a positive belief in the existence of somethinig which does not exist but may also include sheer ignorance of something relevant to the transaction in hand.[72]

It is apparent from the above that the scope of mistake in the law of restitution is open-ended.

Some commentators, regard ignorance as stronger than mistake, for in cases of mistake the plaintiff's decision is impaired, but in cases of ignorance there is no decision at all to transfer the benefit to the defendant.[73]

Royal Insurance can theoretically be analysed either as a mistake case or as an ignorance case. In terms of the latter, it is certainly accurate to say that Royal never actually turned their mind to whether a specific exemption from duty existed. On the other hand, Royal was "mistaken" in the sense that it had a conscious, but mistaken, belief that the Act required payment. Notwithstanding the possible characterisation of the payments made, it is submitted, in view of the finding in *David Securities* that mistake can include cases of sheer ignorance, that

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69 *Ibid* at 378. Causation is discussed in more detail at the end of Part C of Section V.

70 *Ibid* at 379.

71 *Ibid* at 392-3, per Brennan J

72 *Ibid* at 369; approving Winfield, "Mistake of Law" (1943) 59 *Law Quarterly Review* 327, in relation to "ignorance" point.

73 In particular see P Birks, note 33 *supra* at pp 140-7; P Birks, "Misdirected Funds: Restitution from the Recipient" [1989] *Lloyd's Maritime and Commercial Law Quarterly* 296. See also Burrows, note 12 supra, Chapter 4. In a recent unpublished work, I have argued that the Courts have not recognised ignorance as an *unjust* factor. This is despite the calls of commentators such as Birks and Burrows that this should be the case and that decisions such as *Lipkin Gorman*, note 48 *supra*, should be explained on the basis that ignorance was the unjust factor giving rise to recovery.

the payment made by Royal was correctly treated as a mistaken payment by the High Court.

Although the general approach has been to seek recovery of the moneys overpaid on the basis of mistake,[74] alternative approaches have been suggested. In *Royal Insurance* itself, Mason CJ suggested obiter that "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 without the need to show any causative mistake on the part of Royal".[75] Compulsion may be another way to analyse the so-called mistake cases. As some commentators have acknowledged there are inherent elements of compulsion in every government demand for money.[76] One judge stated:

> No normal person pays a tax or a licence fee that he is not compelled to pay.[77]

On this basis, it could be argued where the law does not compel payment (either because there is no charging provision, a specific exemption exists or the taxpayer has paid more than was required under the statute), a taxpayer who pays duty is entitled to recover because of the Revenue's unjustifiable compulsion to pay what is not due. However, while compulsion is theoretically a possibility for the taxpayer, it is submitted that short of improper pressure from the Revenue, these types of cases should be construed as payments made under mistake. Finally, some might find attraction in the argument that an overpayment of stamp duty is a "payment without consideration" and recoverable on the principle recently approved by the English Court of Appeal in the *Westdeutsche* decision.[78]

As noted in Part I, overpayment of duty can arise in three ways: where there is some liability to duty, but the taxpayer mistakenly pays more than is due; where there is no liability to duty at all; and where the statute provides for refunds in defined circumstances. The first two categories clearly fall within the principles relating to mistake, but in the writer's view the third category should not be strictly so regarded. General provisions exist in the stamp duties legislation throughout Australia dealing with the recovery of payments were:

- there is a mistake of fact;
- duty paid is in excess of the amount chargeable under the Act;
- assessment of the duty is in error, or
- assessment of the duty is modified.[79]

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74 Section I above.

75 Note 2 *supra* at 67. Reference was also made to the judgment of the Supreme Court of Canada in *Air Canada v British Columbia,* note 18 *supra.*

76 RD Collins, "Restitution from Government Officers" (1984) 29 *McGill Law Journal* 407 at 429.

77 *George (Porky) Jacobs Enterprise Limited v City of Regina* (1963) 37 DLR (2d) 757 at 760.

78 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 1 WLR 938. The greatest difficulty in adopting this approach is the meaning to be attributed to "consideration". This issue is left unresolved by the English Court of Appeal, although the trial judge indicated that "any payments made under a contract which is void ab initio, in the way that an ultra vires contract is void, are not contractual payments at all ... neither mistake nor the contractual principle of total failure of consideration are the basis for the right of recovery": (1993) 91 LGR 323 at 367.

79 A summary of these provisions, together with commentary, is set out in Table A. The discussion in Part E of Section VI is also relevant in this context.

A right to recover in such circumstances should simply be seen as a right conferred by statute.

To conclude this part of the discussion, two final matters should be emphasised:

(a) The causative approach to mistake means that a plaintiff will not be entitled to recover moneys paid under a mistake unless it can demonstrate that the mistake *caused* the payment or transfer. Authority supports the "but for" test as the test of causation.[80] It is important to note that the "but for" test does not mean that the mistake was the major or the only cause for the payment; it simply establishes that the mistake was *a* cause.

(b) The framing of a definition of operative mistake by the High Court in *David Securities*, together with the abolition of the mistake of law/fact distinction, now means that the prima facie right to recover a mistaken payment in restitution is very broad. This can be countered by a wide range of defences which can adequately protect the position of the transferee by either limiting or excluding recovery altogether. It may also be necessary to recognise special defences which should only be available to the Revenue. These matters are dealt with in more detail in Section VI below.

VI. COUNTERVAILING FACTORS AND DEFENCES

A. General

In *David Securities*, the High Court indicated that "the recipient of a payment, which is sought to be recovered on the grounds of unjust enrichment, is entitled to raise by way of answer any matter or circumstance which shows that his or her receipt (or retention) of the payment is not unjust".[81]

It is necessary to allow both defences which operate to negate one of the elements of unjust enrichment and those that operate even where those elements are made out. Some of these defences, such as change of position, apply only to restitutionary claims, whereas others, such as estoppel, are general defences available in the law of civil obligations - where restitution now has a place alongside tort and contract.

Recognising that the right to recover moneys paid to the Revenue under a mistake is potentially very broad, an important question which arises is whether it is sensible to allow unrestricted and widespread restitution from the Revenue.

One body of authority argues that it would be unacceptable to permit widespread restitution from the Revenue as this would "unexpectedly require the return of enormous sums of money and quite disorganise the public treasury".[82] According to McCamus, "in an extreme case, the granting of recovery could have

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80 *Barton v Armstrong* [1976] AC 104; *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1990) 19 NSWLR 40; and Burrows, note 1 *supra* at pp 47-50.

81 Note 4 *supra* at 379.

82 *Sargood Bros v Commonwealth* (1911) 11 CLR 258 at 303, per Isaacs J (dissenting). See also *Air Canada v British Columbia*, note 18 *supra* at 195.

a seriously disruptive effect on public finances".[83] McCamus also argues that if the mistake of law bar is abandoned in Canada then a special defence of "extreme disruption of public finances" should be recognised, along with the careful tailoring of normal defences like change of position and laches.[84]

On the other hand, commentators including Birks,[85] Collins,[86] Cornish[87] and Burrows[88] generally do not support the notion of allowing a special defence of "extreme disruption of public finances" but they all acknowledge the importance of defences in the context of claims against the Revenue. Burrows concludes that "there is no convincing counter-argument to the powerful logic and fairness" of Justice Wilson's words [in *Air Canada v British Columbia*] and that "a defence of 'extreme disruption of public funds' would be hopelessly vague and arbitrary".[89]

Mason and Carter[90] recognise that the possibility of substantial disruption to treasuries has special significance in the Australian constitutional context.

In *Royal Insurance*, however, the Commissioner did not pursue this defence. After discussing the *Air Canada* decision, Mason CJ concluded, obiter, that "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".[91]

It is submitted that this approach is correct. A general defence of "extreme disruption of public funds" would undermine the position of innocent taxpayers who might otherwise have a legitimate claim against the Revenue. Only the legislature can determine who is to bear the burden of making up the shortfall, if any, in public funds. The position of the Revenue, it is submitted, can be adequately protected by short limitation periods and provisions disentitling recovery if the tax has been "passed on".

A number of possible defences available to the Revenue are discussed below.[92]

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83 Note 59 *supra* at 273.

84 *Ibid.*

85 P Birks, "Restitution from Public Authorities" (1980) 33 *Current Legal Problems* 191 and "Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights" in Finn, note 44 *supra*, p 164.

86 RD Collins, "Restitution from Government Officers" (1984) 29 *McGill Law Journal* 407. Collins argues that a special standard should be adopted in *colore officii* situations, given the transactional inequality between the subject and the Revenue. This special standard could be described as a rebuttable presumption that the payment was involuntary.

87 WR Cornish, "'Colour of Office': Restitutionary Redress Against Public Authority" (1987) *Journal of Malaysian and Comparative Law* 41.

88 A Burrows, note 1 *supra*.

89 *Ibid* p 58.

90 Note 5 *supra* at [2033].

91 Note 2 *supra* at 68.

92 The discussion of defences in this Section is not exhaustive. Space does not permit a detailed coverage of other defences, which include: (a) value received by the taxpayer - in the writer's opinion, it seems that instances where the revenue can successfully invoke the "value to the taxpayer" defence will be rare since, there is little, if any, value *to the taxpayer* in (over)paying a tax; nonetheless, the defence may be available in limited circumstances; (b) moneys due anyway; (c) moneys paid to compromise honest claims; (d) where payment would frustrate the policy of a statutory or common law rule: *Pavey & Matthews Pty Limited v Paul*, note 3 *supra*, per Deane J.

B. Change of Position

As a general restitutionary defence, the defence of change of position[93] should be available to the Revenue. In *Royal Insurance*, Mason CJ appeared to contemplate that the defence was capable of operating in favour of the State in relation to unauthorised receipts.[94] However, the difficulty for the Revenue is the near impossibility of establishing the defence. A defendant that asserts that it is not liable to repay moneys because it has significantly changed its position in consequence of its receipt of the moneys must show *extraordinary* expenditure, such as taking an expensive holiday, gambling the money away or donating the money to charity. The Revenue would have to establish some new (and arguably extraordinary) initiative which would not have been undertaken if the payment had not been made.

Whilst the "change of position" defence remains open to the Revenue as a theoretical possibility, it would appear that in practice the defence is likely to have very limited application (if any).

C. Estoppel

In *David Securities*, the High Court referred to the restitutionary defences of change of position and good consideration without making any mention of estoppel. In light of the recent wealth of authority on that issue and the decision of the same Court in *Waltons Stores (Interstate) Limited v Maher*[95] this was somewhat unusual. The absence of any discussion of estoppel in *David Securities* (and in *Royal Insurance* for that matter) might indicate that the High Court regards change of position and estoppel as quite discrete defences. Estoppel is well established as a defence to a restitutionary claim. Its relationship to change of position is, however, elusive. Lord Goff in *Lipkin Gorman v Karpnale Ltd*[96] distinguished estoppel from change of position in two respects:

(a) estoppel normally depends upon the existence of a representation by one party, in reliance upon which the representee has so changed their position that it is inequitable for the representor to go back upon their representation[97] - in cases of restitution, no representation is necessary; and

(b) estoppel cannot operate *pro tanto*, whereas change of position can. That is, the change of position defence is available only to the extent to which the defendant has changed their position.[98]

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93 The defence has recently been recognised in the following cases: *David Securities*, note 4 *supra; Royal Insurance*, note 2 *supra* at 65, per Mason CJ; *Lipkin Gorman*, note 48 *supra*, per Lord Goff; *ANZ Banking Group Ltd v Westpac Banking Corp*, note 45 *supra*; *Royal Municipality of Storthoaks v Mobil Oil Canada Ltd* (1975) 55 DLR (3d) 1.

94 Note 2 *supra* at 65.

95 (1988) 164 CLR 387.

96 Note 48 *supra*.

97 *Ibid* at 579.

98 *Ibid*.

The above two distinctions may not necessarily have any relevance to estoppel under Australian law as it has developed since *Waltons Stores (Interstate) Limited v Maher.*[99] In any event, it would seem difficult, if not impossible, for the Revenue to establish estoppel as a defence against the taxpayer.[100] Nevertheless, as a matter of law estoppel is a defence available to the Revenue.

D. Passing On

An important question is whether it is a defence for the Revenue to claim that the taxpayer has "passed on" the tax.

"Passing on" refers to the taxpayer passing the burden of the tax onto the consumer by adding the cost of the tax (or part of it) to the price of goods or services it provides. This was probably the most interesting and yet the most difficult aspect of *Royal Insurance.*

The defence of "passing on" was accepted by the majority in *Air Canada v British Columbia*[101] but was rejected in Justice Wilson's dissenting judgment. It was also rejected by Windeyer J in *Mason v New South Wales.*[102] And in *Royal Insurance*, four Justices excluded the defence. Justice Brennan (with whom Toohey and McHugh JJ concurred) stated that:

> The fact that Royal had passed on to its policy holders the burden of the payments made to the Commissioner does not mean that Royal did not pay its own money to the Commissioner. The passing on of the burden of the payments does not affect the situation that, as between the Commissioner and Royal, the former was enriched at the expense of the latter ... [No] defence of "passing on" is available to defeat a claim for moneys paid by A acting on his behalf to B where B has been unjustly enriched by the payment and the moneys paid had been A's moneys.[103]

Mason CJ indicated that the defence should be considered at two levels:

(a) *Public law* - that is, on the basis that no tax can be levied by the executive government without parliamentary authority:

> [I]t would be subversive of an important constitutional value if this Court were to endorse a principle of law which authorised the retention by the Executive of payments which it lacked authority to receive and which were paid as a result of causative mistake.[104]

(b) *Restitution* - there is recognition in some of the authorities that the defendant's enrichment is not at the expense of the plaintiff if the defendant has passed on the burden of the tax to its customers. Reference was made to the *Air Canada* decision, although Mason CJ distinguished

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99 Note 95 *supra.*

100 For the Revenue to succeed on the basis of estoppel, serious representations must be made by the taxpayer. If anything, estoppel would generally be invoked by the taxpayer against the Revenue.

101 Note 18 *supra.* In *Mutual Pools & Staff Pty Limited v Commonwealth* (1994) 179 CLR 155 Brennan, Deane and Gaudron JJ suggested, without actually deciding, that a taxpayer who gets a refund of an "invalidly" imposed tax in circumstances where the burden had already been passed on to another party could be bound in restitution to refund to that other party the amount received or the amount recouped, whichever is the less (at 177, 191).

102 (1959) 102 CLR 108 at 146.

103 Note 2 *supra* at 90-1.

104 *Ibid* at 69.

> that case on the basis that it involved the imposition of an illegal burden (by means of an unconstitutional tax) which was not the case in *Royal Insurance*.[105]

According to Mason CJ, the argument that a plaintiff who passes on a tax or charge will receive a windfall or will unjustly be enriched, if recovery from the Revenue is permitted, rests upon the economic view that the plaintiff should not recover if the burden of the imposition of the tax or charge has been shifted to third parties. In the context of the law of restitution, this economic view encounters a number of difficulties.[106]

The High Court in *Royal Insurance* concluded that if the passing on defence operates to disentitle the plaintiff "it is because, in the particular circumstances, the defendant's *enrichment has not been at the expense of the plaintiff*".[107] (Emphasis added.)

By adopting this reasoning the High Court has rejected the defence as part of the common law of restitution and it now appears that it can only operate if provided for by legislation.

Although the precise nature of the passing on defence is unclear, it is respectfully submitted that the reasoning of the High Court was incorrect insofar as it suggested that the defence negated the requirement that the enrichment be "at the expense of the plaintiff". Rather, it should be rejected because an enriched party should not be permitted to refuse to return moneys which it was not in law entitled to collect and which it received unjustly. Whether or not the taxpayer has "passed on" the burden of the mistaken payment is irrelevant. If a benefit has been *derived*[108] unjustly at the expense of the plaintiff it is prima facie recoverable and no amount of "passing on" by the taxpayer or plaintiff can change that conclusion, unless of course another defence is available to the defendant, such as change of position.

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105 *Ibid* at 69-70.

106 To deny recovery when the plaintiff shifts the burden of the imposition of the tax to third parties will leave a plaintiff (who suffers loss) without a remedy. This may then direct the focus of the inquiry from restitution to compensation for damage or loss. Finally, the determination of the plaintiff's damage (or loss) is likely to be a complex undertaking.

107 Note 2 *supra* at 75, per Mason CJ. His Honour also stated (at 73) that "the defence should not succeed unless it is established that the defendant's enrichment is not at the expense of the plaintiff but at the expense of some other person or persons". This view was based on the commentary of Birks, note 33 *supra*, pp 23-4. Although not entirely clear from the judgment of Brennan J (with whom Toohey and McHugh JJ concurred), it would appear that the "passing on" defence was rejected on the basis that it negated the "at the expense of the plaintiff" element in the unjust enrichment equation (at 90-1).

108 In *Pavey v Matthews*, note 3 *supra*, Deane J indicated that the concept of unjust enrichment is a unifying legal concept which explains why the law in certain cases will recognise "an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff". Based on this it is submitted that the true role of unjust enrichment is the reversal of a benefit received (or sometimes retained) by a defendant. This entails looking at benefit from the defendant's viewpoint and not the plaintiff's. To conclude otherwise would defeat a number of successful restitutionary claims where the plaintiff is able to mitigate their loss in some way (and this could even be accidental or unrelated to the transaction at hand), and the view is then taken that, looking at the matter objectively, the plaintiff is no worse off because the net subtraction from its resources is nil. However, this has never been the general approach of the law of restitution as it has developed thus far.

Clearly, an enrichment is "at the expense of the plaintiff" if the plaintiff's moneys are paid to the defendant. Therefore, if passing on operates to disentitle the plaintiff, theoretically it should not be on the basis that the defendant's enrichment has not been at the expense of the plaintiff. If after the mistaken payment events or circumstances occur which might entitle the Revenue to a defence, then this is a separate matter.

It would seem that if a passing on defence can be made out, such defence may be seen as abating the total "enrichment" derived by the Revenue. As pointed out by Mason and Carter,[109] where *change of position* is made out, enrichment is ultimately absent. Similar reasoning can be applied to passing on, on the basis that if the defence is made out, enrichment at the plaintiff's expense is arguably also absent. This reasoning is supported by a number of United States authorities.[110] However, in the writer's respectful opinion, this approach is not correct and passing on by a taxpayer of an overpayment of tax should not entitle the Revenue to abate an enrichment (or benefit) which it has derived unjustly at the expense of a taxpayer. Put simply, if the Revenue was not entitled to the moneys in the first place, in the absence of other recognised defences, it should refund the moneys overpaid. The proposition that passing on reduces the defendant's enrichment looks at enrichment objectively. As far as the writer is aware this has never been the strict restitutionary position. Accordingly, to adopt the language of Lord Goff in *Lipkin Gorman*, it would not "be inequitable in all the circumstances to require [the defendant] to make restitution..."[111] nor would such recovery frustrate any policy of the common law.

If passing on is to operate at all, it could possibly do so indirectly in a separate claim for restitution against the taxpayer by the parties to whom the burden of the overpaid tax has (mistakenly) been charged. In order to succeed against the taxpayer, the third party would need to establish all of the elements of unjust enrichment (ie benefit, at the plaintiff's expense and injustice) and the taxpayer must not have a defence available to it.

It is submitted that an appropriate way of dealing with the difficult theoretical and policy issues of the "passing on" defence is by legislation. A number of the Australian legislatures have recognised the injustice of recovery by a party who has already recouped the burden of a tax (and specifically stamp duty) by passing it on. In the Australian Capital Territory, Northern Territory, New South Wales, Tasmania, Victoria and South Australia there are broadly expressed "passing on" defences which are available to the Revenue.[112]

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109 Mason and Carter, note 5 *supra* at [2038].

110 See *Standard Oil v Bollinger* 169 NE (Ill. 2, 1929); *Shannon v Hughes & Co* 109 SW 2d 1174 (1937) (CA Ky, 1937): *Bacchus Imports Ltd v Dias* 468 US 263 (1984).

111 [1991] 3 WLR 10 at 35.

112 *Taxation (Administration) Act* 1987 (ACT), ss 95C and 95D; *Taxation (Administration) Act* 1978 (NT), s 118; *Stamp Duties Act* 1920 (NSW), s 35C and *Recovery of Imposts Act* 1963 (NSW), s 4; *Limitation Act* 1974 (Tas), s 25C; *Limitation of Actions Act* 1936 (SA), s 38(3a); *Stamps Act* 1958 (Vic), s 32A. Interestingly, the SA provision does not use the term passing on and instead refers to "windfall profit".

E. Limitation Periods

In *Woolwich Equitable Building Society v Inland Revenue Commissioners,*[113] Lord Goff recognised the legislature's capacity to protect the Executive through the enactment of short time limits within which claims must be advanced. In *Royal Insurance*, Mason CJ clearly recognised that the prima facie right to restitution from the Revenue may be time barred.

Most commentators have discussed the issue of shorter limitation periods for claims against the Revenue. Burrows, for example, does not see any justification for shorter limitation periods for claims against the Revenue than against other defendants.[114] He argues that if limitation periods for restitution are considered too long, the answer is to shorten them for all restitutionary actions and not simply for those where the defendant is a public or revenue authority. Other commentators such as Collins have suggested that all restitutionary actions, including actions to recover overpaid taxes, should be subject to shorter limitation periods (of two years).[115] If such an approach is adopted, this would in effect operate as an assumption of "change of position" after a reasonable time. The difficulty, however, with such an approach is determining what a "reasonable" time should be. Given that restitution is rapidly being recognised by the courts as belonging to the law of civil obligations, alongside tort and contract, it would seem inconsistent to limit the cause of action for all restitutionary actions to two years.

In the context of tax and stamp duty, limitation periods arise in one of three ways:

(a) the stamp duties (or taxation) legislation may specify the time limitations for the recovery of refunds or overpayments;

(b) there may be special rules contained in the limitation statutes of the relevant jurisdiction which specifically deal with the time limitations applicable to the recovery of overpaid taxes;

(c) if (a) and (b) do not apply, which would seem unlikely, the general limitation period of six years would apply.

A summary of the general refund provisions and the time limitations contained in the stamp duties legislation throughout Australia, together with a brief commentary, is set out in Table A. Most of the jurisdictions have general refund provisions which allow taxpayers to claim refunds within time periods ranging from one year to three years. Some of the jurisdictions expressly preclude recovery of overpayments if the tax has been "passed on". In addition, most of the jurisdictions specifically provide for the payment of interest on any overpaid stamp duty and, in general, the majority of the jurisdictions specify the circumstances in which a refund may be made. Examples of such circumstances were listed in Part V above.

A summary of the provisions in the limitation statutes applying to taxes, fees, imposts and other charges is set out in Table B. In New South Wales, there is a

113 Note 10 *supra.*
114 Note 1 *supra* at 59.
115 Note 76 *supra* at 435.

specific statute dealing with this issue.[116] Generally speaking, the limitation periods range from six months to one year and most of the jurisdictions preserve the mode of challenging an assessment or proceedings to recover refunds (or overpayments), including the time limits, under the stamp duties or taxation legislation of the relevant jurisdiction. In some limitation statutes, "passing on" exclusions provide a bar to recovery. Finally, it should be pointed out that in some cases longer periods apply in relation to taxes paid before the 1993 amendments[117] or where specific statutory schemes for the recovery of overpaid *valid* taxes apply.

Where the general limitation period of six years applies[118] and mistake is involved, the legislation of all jurisdictions, except South Australia and Western Australia, provides for an extension of the time limit.

It is submitted that the question of the appropriate time limit for recovery of overpaid or invalid taxes, could be resolved by adopting shorter time limits (which is currently the position), but by making time run from the time the mistake is discovered or could with reasonable diligence have been discovered. [119] This would ensure that the position of a mistaken taxpayer is adequately protected, without leaving the Revenue unduly vulnerable to substantial disruption. The use of specific limitation provisions in stamp duties or taxation legislation is to be applauded, although in the writer's opinion these exceptions from the general limitation period should extend to all types of overpayments, and not only payments of invalid taxes. Finally, each jurisdiction should strive to enact, if it has not already done so, general refund provisions for the recovery of overpaid stamp duty and taxes which are simple, clear and which contain specific time limits. The Stamp Duties Rewrite (the "Rewrite"), discussed in Part VIII below, proposes to adopt such an approach and this is a welcome development.

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116 *Recovery of Imposts Act* 1963 (NSW).

117 These amendments were made in most jurisdictions in 1993 following *David Securities*, note 4 *supra*.

118 The standard limitation period for contractual claims is six years in all jurisdictions, except the Northern Territory, where it is three. The period applicable to most restitutionary claims is therefore the same. In the Australian Capital Territory, it is simply prescribed that a standard six year limitation period applies to all actions except those for which another period is provided by the Act. In the other jurisdictions, the language of the legislation is that of "quasi-contract". The limitation statutes in the Northern Territory, New South Wales and Queensland provide that "contract" includes "quasi contract". Similarly, in Tasmania, Victoria and Western Australia reference is made to contracts "implied by law". The South Australian provision refers to "implied contract".
See *Limitation Act* 1985 (ACT), s 11; *Limitation Act* 1969 (NSW), s 14(1)(a) and (b); *Limitations Act* 1981 (NT), s 12(1)(a) and (b); *Limitations of Actions Act* 1974 (Qld), s 10(1)(a); *Limitations of Actions Act* 1936 (SA), s 35(a) and (c); *Limitations Act* 1974 (Tas), s 4(1)(a); *Limitation of Actions Act* 1958 (Vic), s 5(1)(a); *Limitation Act* 1935 (WA), s 38(1)(c)(v) and (vi).

119 For example, s 27(c) of the *Limitation of Actions Act* 1958 (Vic) provides that where, in the case of any action for which a period of limitations prescribed by the Act "the action is for relief from the consequences of a mistake the period of limitation shall not begin to run until the plaintiff has discovered the... mistake... or could with reasonable diligence have discovered it...".
The legislation in the other jurisdictions is substantially similar - see *Limitation Act* 1985 (ACT), s 34(1); *Limitation Act* 1969 (NSW), s 56(1); *Limitation Act* 1981 (NT), s 43(1); *Limitation of Actions Act* 1974 (Qld), s 38; *Limitation Act* 1974 (Tas), s 32; *Limitations of Actions Act* 1958 (Vic), s 27. The provisions in the ACT, Queensland and Tasmania are phrased slightly differently.

VII. INTEREST

Interest has been awarded where payments have been made in response to unauthorised demands by the Revenue, calculated from the date of the relevant payment.[120] Interest on mistaken payments is also recoverable from the date of payment.[121] In *State Bank of New South Wales v Federal Commissioner of Taxation*,[122] the Federal Court awarded interest, with Wilcox J stating that:

> it seems to me that the decided cases suggest the existence of a general principle that, in ordering a payment of money by way of restitution, a Court has power to include something by way of interest, where this is necessary to do justice between the parties.[123]

In that case, the taxpayer had paid an amount of sales tax which it disputed was owing. Ultimately, the High Court decided in the taxpayer's favour[124] and the moneys were repaid. The taxpayer then sought interest on the moneys from the date the sums were paid into the account. Wilcox J, in approving the principle referred to above, held that:

> as a matter of general principle, subject to any special circumstances or agreement and independently of any statutory provision, interest may be awarded in a case like the present. However, both the awarding and the quantum of interest are dependent upon the circumstances of the case.[125]

He also recognised that interest could be recovered under s 51A of the *Federal Court of Australia Act* 1976.[126]

The stamp duties legislation throughout Australia, for the most part, specifically provides for interest on stamp duty refunds. A summary of these provisions is set out in Table A.[127]

VIII. POSITION UNDER THE STAMP DUTIES REWRITE

The Rewrite has proposed the enactment by each of the participating jurisdictions of a uniform Taxation Administration Act (the "Draft TAA").

Clause 44 of the Draft TAA deals with refunds of tax. That clause provides that:

> if a person is entitled to a refund of tax under a taxation law, other than this Act, an application for the refund may be made and dealt with only in accordance with this Chapter.

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120 See for example the *Woolwich* case, note 10 *supra*.

121 *State Bank of New South Wales v Federal Commissioner of Taxation* (1995) 95 ATC 4734.

122 *Ibid.*

123 *Ibid* at 4740.

124 (1992) 174 CLR 219; (1992) 92 ATC 4079.

125 Note 121 *supra* at 4741.

126 This provision deals with the Court's powers and duty concerning pre-judgment interest. The power to award interest is confined to interest on the "money".

127 For a discussion of issues relating to simple and compound interest in the context of restitutionary claims refer to Mason and Carter, note 5 *supra* at [2818]-[2826].

Clause 45 of the Draft TAA provides that a person may apply to the Commissioner for a refund of tax within three years after the tax was paid and the application must be in a form approved by the Commissioner. In addition, the application must be accompanied by all relevant information that the Commissioner may reasonably require to substantiate the application.

Significantly, the Draft TAA is proposing the introduction of a general provision which will deny refunds where the tax has been passed on to another person. The wording of the proposed "passing on" exclusion is unlike any other provision contained in the current stamp duties legislation throughout Australia. The essential elements of clause 48 are as follows:

(a) the Commissioner *may* refuse to make a refund if the relevant taxation allows the passing of the tax on to another person and the refund will not be paid to the other person within six months;

(a) the Commissioner's refusal is a *reviewable decision*;

(b) the Commissioner may recover a refund made to a person who does not, within six months after the refund is made, pass the refund on to the person to whom the tax in respect of which the refund is made was passed on.

It is apparent from the above that the Commissioner does not have an unfettered discretion to disallow a refund where the tax has been passed on to another person, ie the Commissioner may only refuse to make a refund in the specified circumstances. Another important feature of the proposed "passing on" exclusion is that the Commissioner's refusal is a reviewable decision.

The Rewrite also contains a provision which deals with the refund of any amounts paid in excess of a requirement for payment where the taxpayer's objection is allowed - clause 42. In addition to the amount refunded under clause 42, the Commissioner will be specifically required to pay interest on the amount from the date of its payment by the taxpayer until the date of the refund, at the prescribed rate - clause 43.

In the writer's opinion, the refund provisions of the Rewrite achieve the key objectives of simplicity, clarity and fairness.

IX. CONCLUSION

The decision of the High Court in *Royal Insurance* has clearly signalled that Australian Courts will be reluctant to tolerate a Revenue's unjust enrichment, within the confines of the stamp duties or taxation law. This has been possible as a consequence of the growing understanding and awareness of restitutionary principles by the Courts and by the rapidly developing cause of action in restitution based on the unifying legal concept of "unjust enrichment". All of these are positive trends which will, in the writer's opinion, provide some comfort to taxpayers fulfilling their day to day duties of paying taxes and other imposts. Naturally, the prima facie right to restitution will in appropriate circumstances be curbed by the operation of recognised defences, either common law or statutory.

TABLE A
Stamp Duty Legislation: Summary of *general* refund provisions

Note: This Table is to be read in conjunction with the attached notes. Refunds of duty in relation to spoiled or unused duty stamps are not covered.

State	General refund provisions • stamp duty overpaid • agreement or contract is rescinded or annulled	Time limit within which refund application must be made	Passing on exclusion	Refund available on amendment of assessment	Provisions specifying "mistake of law" or "mistake" circumstances entitling recovery	Interest on over paid duty
NSW[1]	Yes - ss 15, 35C, 41(7) and 124(4A)[2]	ss 15(2) and 41(7) [12 months]; s 35C(3) [2 years]	Yes - s 35C(5)[3]	Yes - s 124(4A)	s 35C(1) - refund where payment is in excess of a requirement for payment under the Act[4] s 124(4A) refund of money overpaid following modification of assessment	Yes - s 124C

State	General refund provisions • stamp duty overpaid • agreement or contract is rescinded or annulled	Time limit within which refund application must be made	Passing on exclusion	Refund available on amendment of assessment	Provisions specifying "mistake of law" or "mistake" circumstances entitling recovery	Interest on over paid duty
VIC[5]	Yes - ss 32(7) and 32AA[6]	s 32AA(2) - 3 years	Yes s 32A[7]	Yes s 32(7)	Generally see ss 32AA and 32A[8]	Not specified

QLD[9]	Yes - ss 54(3), 54(7) and 80(3)[10]	s 54(3) [6 months];
		
		s 54(7) [12 months];
		
		s 80(3) [2 years]
			No	Yes - s 80(3); 2 year time limit (mistake of fact only)	s 80(3) refers to 'mistake of fact'[11]	Yes - s 24(2A)

SA[12]	Yes - ss 5ab; 23a; 24(2); 24(7); 31(4) and 60b(1)[13]	5 years - s 23a(a)[14]	No	Yes s 23(1)(3); (5 year time limit); ss 24(2) and (7)	s 5ab (overpayments where amendments effected to Act); s 23a (mistake of fact);	Yes s 23a(5) and (6); ss 24(2), (7) and (8)

State	General refund provisions • stamp duty overpaid • agreement or contract is rescinded or annulled	Time limit within which refund application must be made	Passing on exclusion	Refund available on amendment of assessment	Provisions specifying "mistake of law" or "mistake" circumstances entitling recovery	Interest on over paid duty
					s 24(2) (excess duty paid); s 24(7) (duty in excess of the amount chargeable)	
WA[15]	Yes - ss 15A; 32(5); 33(4)[16]	Not specified[17]	No	Yes ss 32(5) and 33(4)	s 32(5) (excess duty); s 33(4) (assessment of duty is in error; excess duty)	Yes - s 33A
TAS[18]	Yes - ss 21(3); 22(3); 70(7) and 79(1)[19]	s 70(7) (12 months); no time limit specified for refunds under s 79(1)	No	Yes - ss 21(3) and 22(3)	s 22(3) (assessment erroneous); s 79(1) (where a person overpays duty; "excess" payment)	Not specified

State	General refund provisions • stamp duty overpaid • agreement or contract is rescinded or annulled	Time limit within which refund application must be made	Passing on exclusion	Refund available on amendment of assessment	Provisions specifying "mistake of law" or "mistake" circumstances entitling recovery	Interest on over paid duty
NT[20]	Yes - ss 84(5); 92(4); 97(3) and 104(3)(b)[21]	3 years - s 97(1)[22]	Yes s 118[23]	Yes ss 97(3) and 104(3)(b)	ss 92(4) and 97(3) (duty overpaid)	Not specified
ACT[24]	Yes - ss 33, 95C and 95D[25]	Not specified (specific refund provisions contain their own time limitations)[26]	Yes - s 95C[27]	Not expressly specified - however, s 23(3) of TAA (ACT) states that if, following an amendment of an assessment, tax is reduced then the amount of the tax reduced shall be taken never to have been payable	s 33 (person has overpaid an amount of tax; s 95C (money paid voluntarily or under compulsion; s 95D (overpayment of duty)	Yes - ss 34 and 35

1 *Stamp Duties Act* 1920 (NSW).

2 Section 15 deals with refunds where a stamped instrument has failed in its intended operation and has become useless. Section 35C is the general refund provision which empowers the Chief Commissioner in his or her *absolute discretion* to:

(a) reduce the amount of duty to be paid in respect of an instrument; or

(b) refund any amount which has been paid in respect of an instrument which is in excess of a requirement for payment under the Act [an application for a reduction or refund must be made within 2 years after the date of payment of the amount].

Section 41(7) deals with stamp duty paid on agreements which are afterwards rescinded or annulled. Finally, s 124(4A) provides that the Chief Commissioner must make a refund of money overpaid following the modification of an assessment.

3 No refund is available if "the person applying for the refund has passed the duty or other amount on to another person".

4 For the refund requirements specified in s 35C refer to note 2.

5 *Stamps Act* 1958 (Vic).

6 Section 32(7) deals with refunds on amendments of assessments. Section 32AA is the general refund provision (see note 8).

7 No refund is available if the applicant for the refund has charged, or recovered from, and will charge to, or recover from any other person - s 32A(1).

8 Section 32AA is the general refund provision whereas s 32A deals with, amongst other matters, the "passing on" exclusion. The main refund provision is contained in subsection 32AA(2) which contains a 3 year limitation (from the time the payment was made).

9 *Stamp Act* 1894 (Qld).

10 Section 54(3) deals with refunds of duty on the rescission of certain option agreements. Section 54(7) deals with refunds of duty on contracts or agreements (generally) which are rescinded after having been stamped. In relation to s 80(3) refer to note 11. Finally, s 75 in Queensland should be mentioned. This section allows for refunds of stamp duty (less 5 per cent) in a number of specified circumstances which include cases:

- where an instrument is found, prior to its having any legal effect, to be unfit for the purpose intended because of any error or mistake therein;
- where an instrument is not capable of legal effect, and was void from inception;
- where an instrument was voidable from inception and so rendered before the exercise of any right or fulfilment of any obligation or duty under the instrument.

An application for a refund under s 75 must be made within 12 months after the happening of the specified event.

11 Section 80(3) provides that no amendment to an assessment effecting a reduction in the amount of duty assessed on any instrument or statement shall be made except to correct an arithmetic error in the calculation of an assessment or to correct an assessment made under a "mistake of fact". The time limitation specified in the sub-section is 2 years from the date of the arithmetic error or the mistake of fact. Interestingly, s 80(3) only refers to "mistake of fact".

12 *Stamp Duties Act* 1923 (SA).

13 Section 5ab deals with refunds of stamp duty overpaid as a consequence of amendments effected to the Act. Section 31(4) deals with refunds on contracts or agreements which are afterwards rescinded or annulled. Section 23a permits the Commissioner to reassess duty in certain circumstances, which include, for example, payments made under a *mistake of fact*. Where a reassessment results in a decrease of duty a refund requires to be made - s 23a(5). Section 24, in general terms, deals with objections to and appeals against assessments, and refunds thereon - see particularly ss 24(2) and (7). Section 60b(1) deals with refunds of duty on instruments executed under a transaction which has been frustrated or avoided or has been miscarried through failure of a party to comply with a condition.

14 Section 23a(3) is the only section which provides a time limitation, namely 5 years (from the date of the original assessment). In the absence of specific time limitations in the Stamp Duties Act applying, the time limits would be governed by the *Limitation of Actions Act* 1936 (SA).

15 *Stamp Act* 1921 (WA).

16 Section 15A applies to instruments which are rescinded, annulled discharged or cancelled. Finally, s 33(4) deals with refunds of duty arising as a result of erroneous assessments - the excess duty requires to be refunded.

17 In the absence of specific time limitations in the *Stamp Act* applying, the time limits would be governed by the *Limitation Act* 1935 (WA).

18 *Stamp Duties Act* 1931 (Tas).

19 Sections 21(3) and 22(3) deal with refunds of duty on amended assessments or appeals. Section 70(7) deals with refunds of duty on contracts which are afterwards rescinded or annulled. Section 79(1) generally deals with payments of duty in "excess" of the requirement of the Stamp Duties Act in respect of a number of different heads of duty.

20 *Stamp Duty Act* 1978 (NT) ("SDA") and *Taxation (Administration) Act* 1978 (NT) ("TAA"). Unless otherwise indicated, references in the table are references to sections in the TAA.

21 Section 84(5) provides that where, by reason of an assessment of a return, a person has overpaid tax, the amount of tax overpaid shall be refunded. Section 92(4) provides that where, by reason of an assessment of an instrument in respect of which an amount has been paid as duty, a person has overpaid duty, the amount of duty overpaid shall be refunded. Section 97(3) allows for a refunds of stamp duty where a person has overpaid duty or tax. Finally, s 104(3)(b) provides for a refund of overpaid duty following the variation of an assessment on appeal.

22 In the context of amended assessments, the Commissioner is empowered, at any time within a period of 3 years after the date of an assessment of duty, to amend the assessment by making such alterations or additions to it as he or she thinks necessary - section 97(1).

23 No refund is available to a person who has recovered it from another person and has not since repaid it to that other person.

24 *Stamp Duties and Taxes Act* 1987 (ACT) ("SDTA") and *Taxation (Administration) Act* 1987 (ACT) ("TAA (ACT)"). Unless otherwise specified, references to sections are references in the TAA (ACT).

25 Section 22(3) provides that if, following an amendment of an assessment, tax is reduced then the amount of the tax reduced is taken never to have been payable. Presumably, this is then intended to entitle the taxpayer to claim a refund, even although the legislation does not expressly use the word "refund". Section 33 deals with refunds of duty on amended assessments. Sections 95C and 95D deal with the recovery of "revenue amounts" (as defined) and the recovery of "revenue amounts" following non-legislative changes in law.

26 In the absence of specific time limitations in the SDTA and the TAA (ACT) applying, the time limits would be governed by the *Limitation Act* 1985 (ACT).

27 There is no recovery of a refund if the person has charged to, or recovered from and will not charge to, or recover from, any other person an amount paid.

TABLE B
Limitation Statutes: Summary of provisions relevant to claims to recover overpaid taxes etc.

State	General limitation period (and grounds of recovery)	Overpayment exclusion[1]	Passing on exclusion	Proceedings under other Act relevant	Non-legislative change in law exclusion[2]	Provision part of substantive law	Inconsistency between Limitation provisions and other Acts
NSW[3]	12 months - s 2(1): money paid by way of tax (whether or not under the authority of purported authority of an Act); invalidity of tax (ss 2(3) and 3(3)); mistake (fact of law) or other restitutionary grounds (s 3(3))	Yes - s 2(2): if the other statute provides for the recovery of any tax paid[4]	Yes - s 4	Yes - s 2(2)	Yes - s 3	Yes - s 6	Not specified
ACT[5]	6 months - s 21A(1): invalidity of tax[6]	Yes - s 21A(2): general limitation period only applies to proceedings to recover invalid taxes[7]	No	Not specified	Yes - s 95D of TAA	Yes - s 21A(3)	Not specified

State	General limitation period (and grounds of recovery)	Overpayment exclusion[1]	Passing on exclusion	Proceedings under other Act relevant	Non-legislative change in law exclusion[2]	Provision part of substantive law	Inconsistency between Limitation provisions and other Acts
NT[8]	6 months - s 35D(1): recovery based on mistake (fact or law) or restitutionary grounds[9]	Yes - s 35D(2)[10]	No	Not specified	No	Yes - s 35D(3)	Not specified
TAS[11]	6 months - s 25D: money paid by way of tax or purported tax[12]	Yes - s 25D(3)[13]	Yes - s 25C(1)	Not specified	No	Yes s 35D(4)	Not specified
WA[14]	12 months - s 37A: money paid by way of tax or under authority or purported authority of an Act[15]	Not relevant, but see s 37A(4)	No	Yes - s 37A(4)	Yes - s 124(2) of the *Property Law Act* 1969 (WA)	Not specified	Not specified
SA[16]	6 months - s 38: invalidity of tax[17]	Yes - s 38(2): general limitation period only applies to proceedings to recover 'invalid' taxes[18]	Yes - windfall profit: s 38(3a)	Not specified	Yes - s 5ab of *Stamp Duties Act* 1923 (SA)	Yes - s 38A(1)	The other Act prevails - s 38(5)

State	General limitation period (and grounds of recovery)	Overpayment exclusion[1]	Passing on exclusion	Proceedings under other Act relevant	Non-legislative change in law exclusion[2]	Provision part of substantive law	Inconsistency between Limitation provisions and other Acts
QLD[19]	1 year - s 10A: invalidity of tax[20]	Yes - s 10A(2): general limitation period only applies to proceedings to recover 'invalid' taxes[21]	No	Not specified	No	Yes - s 10A(5)	This section prevails - s 10A(4)
VIC[22]	12 months - s 20A: recovery based on mistake (fact or law)	Yes - s 20A(3): if the other statute provides for the recovery of refund[23]	No	Yes - ss20A(1)(b) and 20A(3)	No	Not specified	Not specified

1 In the context of recovering *valid* overpaid taxes, most of the limitation statutes do not disturb the position under another Act which specifies the procedure for the claiming of refunds or for the recovery of an amount of money overpaid, within a longer period of time. The heading "Overpayment Exclusion" indicates whether or not the mode of challenging the validity of recovery of any tax actually paid, including the time limitations under the stamps legislation, are preserved.

2 Typically these provisions provide that a "mistake" made before a change in the law (other than a change in the law effected through legislative means) will not give rise to the recovery of an overpayment. An exception exists for changes effected by legislation - this is referred to as the "non-legislative change in law exclusion".

3 *Recovery of Imposts Act* 1963 (NSW).

4 The time limitations do not apply to proceedings for the recovery of money that, assuming the legislation concerned had been valid, would have represented an overpayment of a tax, if the legislation provides for the refund of the money. This provision is intended to preserve the mode of challenging an assessment (and the recovery of valid overpaid taxes) within the time frame specified in the stamp duties legislation.

5 *Limitation Act* 1985 (ACT).

6 The general limitation period appears only to apply to proceedings for the recovery of "invalid taxes" and not overpayments generally.

7 It would seem that on the basis of section 21A(2) claims to recover overpayments generally (other than invalid taxes) are governed by the stamp duties or taxation legislation concerned.

8 *Limitation Act* 1981 (NT).

9 The legislation specifically refers to an action for recovery of money paid under a "mistake of law or fact or on restitutionary grounds" - s 35D(1).

10 Proceedings to recover valid overpayments under the stamp duties or taxation legislation appear to be preserved by s 35D(2).

11 *Limitation Act* 1974 (Tas).

12 Sections 25C and 25D refer to the recovery of money "paid by way of a tax, fee, charge or other statutory impost or a purported tax, fee, charge or other statutory impost".

13 Proceedings for the recovery of valid overpayments under the stamp duties and taxation legislation appear to be preserved by s 25D(3).

14 *Limitation Act* 1935 (WA).

15 The ground of recovery refers to "the amount of any tax, fee, charge, or other impost paid under the authority or purported authority of any Act" - section 37A. Proceedings brought by a person pursuant to another Act (which provides for the mode of challenging the tax liability) are preserved by section 37A(4).

16 *Limitations of Action Act* 1936 (SA).

17 The time limits in South Australia appear only to apply to proceedings to recover overpayments arising through invalid taxes - s 38(2).

18 It would appear on the basis of s 38(2) that the general time limitation to proceedings to recover invalid taxes only.

19 *Limitations of Action Act* 1974 (Qld).

20 It would appear that the general time limits under the Queensland legislation only apply to proceedings to recover invalid taxes - s 10A.

21 See note 20.

22 *Limitations of Action Act* 1958 (Vic).

23 The general time limits do not apply if the stamp duties or taxing legislation provides for the mode of challenging an assessment or for the recovery of overpaid duty (or taxes).