HIGH COURT OF AUSTRALIA

Commissioner Of State Revenue (Victoria)

Vs.

Royal Insurance Australia Limited

(Mason C.J. Toohey J. Mchugh J. Brennan J.)

7 December 1994

MASON C.J.

This appeal arises out of proceedings brought by the respondent ("Royal") to secure a refund of $1,907,908.10 representing the amount of stamp duty overpaid by Royal to the appellant Commissioner. Royal commenced proceedings by way of originating motion in the Supreme Court of Victoria seeking:

1. an order that the Commissioner refund to Royal in accordance with s.111 of the Stamps Act 1958 (Vict.) ("the Act") the amount mentioned; or

2. alternatively, an order that the Commissioner refund such sum as may be found to have been overpaid by Royal to the Commissioner in respect of premiums for workers' compensation insurance received after 30 June 1985 in respect of liabilities incurred before 1 October 1985; or

3. alternatively, a declaration that Royal has, since 1 July 1985, overpaid the amount mentioned in respect of such premiums received after 30 June 1985 and is entitled to a refund of that amount.

2. At first instance, Beach J. dismissed the summons with costs, holding that the Commissioner was entitled as a matter of discretion under s.111 of the Act to refuse to make a refund. It was and is common ground between the parties that there was an overpayment in the amount claimed by Royal. On appeal, the Appeal Division of the Supreme Court (Brooking, Marks and Hedigan JJ.) came to a different conclusion, allowing the appeal and making an order by way of mandamus directing the Commissioner to refund the amount. Background facts and statutory provisions

3. Throughout the 1980s Royal carried on assurance and insurance business, including workers' compensation insurance. Royal was registered as a company carrying on such a business, pursuant to s.96 of the Act. Being registered as such a company, Royal was required by the provisions of Subdiv.11 of Div.3 of Pt II of the Act (ss.95-111) to lodge monthly returns of premiums, including workers' compensation premiums, received in the preceding calendar month and to pay stamp duty on the return in an amount equal to 7 per cent of the amount of all premiums chargeable with stamp duty (1 s.97(2)) , except in the case of workers' compensation premiums in respect of which duty was subsequently reduced to 3.5 per cent.

4. Prior to 1985, private insurers, of whom Royal was one, had conducted workers' compensation business as approved insurers under the Workers Compensation Act 1958 (Vict.). As approved

insurers, private insurers had insured employers against their liability to workers' compensation under that Act and in respect of employers' liability for common law claims for damages arising from breach of duty to employees. The imposition of stamp duty on the returns of insurers registered under the Act was a consequence of the regime of approved private insurers.

5. This regime was replaced by a different regime, called WorkCare, which came into operation on 1 September 1985. The Accident Compensation Act 1985 (Vict.) introduced and implemented the new scheme. By that Act, the Accident Compensation Commission was constituted as the sole insurer in respect of workers' compensation liabilities. Because the Commission, a statutory authority, was the sole insurer, it was decided to discontinue the imposition of stamp duty on workers' compensation insurance.

6. With a view to giving effect to this policy, s.99 of the Act was amended by s.276 of the Accident Compensation Act. A number of sub-sections were added to s.99, including sub-s.(3), which was in these terms:

"For the purposes of section 97, premiums for workers of policies that take effect at or after four o'clock in the afternoon on 30 June 1985 or the extension of which takes effect from that time are not chargeable with stamp duty."

At the same time the definition of "Workers compensation insurance" in s.95 was replaced by a new definition so that s.99(3), when read with the new definition, would exempt workers' compensation insurance business from the operation of Subdiv.11 of Div.3 of Pt II of the Act.

7. Section 99(4) provided for the payment of stamp duty on a pro rata basis where a premium was payable after 4 o'clock in the afternoon on 30 June 1985 for workers' compensation insurance in respect of the issue, renewal, taking out or extension of a policy for a period commencing before and expiring after that date. Sub-section (5) provided for the making of an application for a refund in such a case where the insurer had paid stamp duty at the full rate previously chargeable. Sub-section (7) went on to provide that, when an application for a refund was duly made, "the (Commissioner) ... shall make a refund to the applicant accordingly".

8. Sub-sections (5), (6) and (7) of s.99 were replaced when s.11 of the Stamps and Business Franchises (Tobacco) (Amendment) Act 1985 (Vict.) came into operation. Section 11 introduced a new sub-s.(5) and a new sub-s.(7). The new sub-s.(5) replaced the old sub-ss.(5) and (6). The new sub-s.(5) took account of the fact that stamp duty may have been paid at the rate of 7 per cent or 3.5 per cent of the premium and provided for a rebate or refund of duty accordingly, whereas the old sub-s.(5) did not take account of the fact that stamp duty may have been paid at the higher rate. The new sub-s.(7) provided:

"Where an application is made in accordance with sub-section (5) -(a) if the application is for a rebate, the amount of the rebate shall be deducted from the amount payable as stamp duty on a return lodged ... under section 97(2) or, if the amount of the rebate exceeds that amount of stamp duty, from the amount so payable on two or more returns; and

(b) if the application is for a refund, the (Commissioner of State Revenue) shall make a refund to the applicant accordingly." 9. In 1987, it was realized for the first time that the exemption granted in 1985 did not extend to the liability to pay stamp duty on a particular class of premium income, namely, premiums received by insurers after 30 June 1985 when the WorkCare scheme came into

operation in respect of "cost-plus" policies. Under a cost-plus policy, the annual premium was recalculated after the close of the relevant period of insurance so that the insurer was reimbursed for the whole of the costs of the claims made and paid during the antecedent period, those costs including the costs of handling the claims. This class of policy was to be distinguished from the ordinary policy in respect of which a premium was calculated on the basis of the employer's estimate of wages to be paid during the ensuing year with an adjustment made at the end of the year by reference to the amount of wages actually paid during the year. That latter form of policy was sanctioned by the Workers Compensation Act and Regulations; the form of it was prescribed in a schedule to that Act.

10. In order to extend the exemption to cover the cost-plus policies, s.8 of the Taxation Acts Amendment Act 1987 (Vict.) ("the 1987 Act") was enacted. That section amended s.99(3) of the Act by inserting after the words "from that time" the words "or received after that time in respect of liabilities incurred before 1 October 1985". Section 2(4) of the 1987 Act provided that s.8 should be deemed to have come into force on 30 June 1985, thereby making the operation of s.8 retrospective to that date.

11. Strange as it may seem, Royal remained unaware of the 1985 amendments for some years and of the 1987 amendments for about two years. It continued to include in its monthly returns the amounts of premiums which it received in respect of workers' compensation insurance policies issued or received after 30 June 1985 and paid stamp duty on that part of the premiums included in the returns. It seems that, as a result of advice from the Commissioner in 1989, Royal ceased to pay stamp duty on exempted premium income.

12. On 19 September 1990, Royal made a demand for repayment of the amount of stamp duty overpaid. The Commissioner did not make a refund with the result that, on 17 October 1990, Royal commenced the proceedings by way of originating motion. The proceedings related to s.111(1) of the Act. That sub-section provided:

"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."It is common ground that Royal's demand for a refund is governed by s.111(1), not by s.99(7). The Commissioner's decision13. On 19 October 1990, two days after the proceedings were commenced, the Commissioner found that duty had been overpaid in the amounts mentioned below and decided not to make a refund of any part of the amounts under s.111. The Commissioner did not give reasons for her decision. The categories of overpayment

14. According to a document prepared by the Commissioner, the overpaid duty falls into three categories. First, an amount of $1,674,301.94 which is divisible into two further categories, (a) and (b). The amount was paid as duty on premiums received by Royal after 4.00 p.m. on 30 June 1985 in respect of liabilities incurred before 1 October 1985. The amount comprised duty on premiums received by the Commissioner for the cost-plus policies. Category (a), amounting to $1,370,000 approximately, consists of duty on premiums received by Royal during the period from 30 June 1985 to 12 November 1987 being the commencement date of the 1987 Act. Category (b),

amounting to $300,000 approximately, consists of duty on premiums received by Royal from 12 November 1987 to 21 August 1989 in ignorance of the exemption from duty on premiums in respect of cost-plus policies.

15. The second main category is an amount of $95,426.95 overpaid by Royal by reason of its own over-estimates of premium income (from cost-plus policies) received by it before 1 July 1985 in respect of liabilities incurred before 1 October 1985. The third category is an amount of $138,179.21, being duty paid on premiums received by Royal for extensions after 4.00 p.m. on 30 June 1985 of policies (other than cost-plus policies) taken out before that date. The scope and purpose of the discretion conferred by s.111

16. The Commissioner contends that the presence of the word "may" in s.111(1) attracts a prima facie presumption that the word is to be understood in its natural and ordinary sense, that sense being permissive or facultative only. That submission is in accord with the principle as expressed by the judgment of this Court in Ward v. Williams (2 [1955] HCA 4; (1955) 92 CLR 496 at 505) . What is more, the legislative history supports the Commissioner's submission. Section 111, before it was amended in 1978, provided that, if the Commissioner was satisfied that overpayment of duty had been made, on application made within twelve months after such payment, the Treasurer "shall without further or other authority than this Act refund the amount" to the person by whom the overpayment was made. The change from the mandatory "shall ... refund" to the facultative "may refund" disposes of any suggestions that s.111 as amended was mandatory and not facultative. But, as the Court went on to point out in Ward v. Williams, the question whether a public officer, to whom a power is given by facultative words, is bound to exercise that power upon any particular occasion, or in any particular manner, is to be solved from the context, from the particular provisions, or from the general scope and objects of the enactment conferring the power (3 ibid) .

17. The Commissioner argues that there is nothing in the context or the scope and objects of the Act which requires or indicates that the discretion to make a refund must be exercised on any particular occasion. Indeed, the Commissioner points to the use of the word "may" again in s.111(2) and (3) and the contrasting use of the word "shall" in s.111(4) (4 "The duty paid on a return ... shall be denoted on the return by a cash register receipt imprint.) . But these provisions do no more than support the presumption that in s.111(1) the words "may refund" are facultative. They do not establish that the discretion is in any sense absolute or unfettered. Nor do they bear upon the question whether the discretion must be exercised in a particular way or upon a particular occasion.

18. In approaching that question, the first and foremost consideration is that the Act is a taxing Act and that in terms it confers no authority upon the Commissioner to levy, demand or retain any moneys otherwise than in payment of duties and charges imposed by or pursuant to the Act. In that context, there is no persuasive reason why the grant of a positive discretionary power to make a refund, once an overpayment of duty has been found by the Commissioner to have taken place, should be treated as a source of authority in the Commissioner to retain the overpayment in the absence of circumstances disentitling the payer from recovery. Nothing short of very clear words is sufficient to achieve such a remarkable result. The Court should be extremely reluctant to adopt any construction of s.111 which would enable the Commissioner by an exercise of discretionary power to defeat a taxpayer's entitlement to recover an overpayment of duty. No reason emerges for thinking that the purpose of the provisions was other than to confer legal authority upon the Commissioner to refund an overpayment found by her to have taken place.

19. In Reg. v. Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd. (5 (1988) AC 858) , the House of Lords dealt with a discretionary power to refund in particular circumstances rates paid when not payable and not recoverable otherwise than by means of an exercise of the discretionary power. Lord Bridge of Harwich expressed the principle invoked by the House of Lords in these terms (6 ibid. at 877) :

"Parliament must have intended rating authorities to act in the same high principled way expected by the court of its own officers and not to retain rates paid under a mistake of law ... unless there were, as Parliament must have contemplated there might be in some cases, special circumstances in which a particular overpayment was made such as to justify retention of the whole or part of the amount overpaid". Much the same comment may be made about s.111.

20. At the same time, I cannot accept the proposition that, once overpayment has been found to have been made, the discretion must be exercised by making a refund. Assume the State has in good faith changed its position for the worse acting in reliance on the fact that the payment was made and received for duty apparently due and payable under the Act, the regime of monthly returns and payments being one of self-assessment, it could scarcely be suggested that a refusal to make a refund in such a situation could be an erroneous exercise of discretion. In David Securities Pty. Ltd. v. Commonwealth Bank of Australia (7 (1992) 175 CLR 353 at 384-386) , it was recognized that, according to the principles of the law of restitution, such a change of position would constitute a good "defence" to an action for recovery of money paid under a mistake of fact or law. It would be surprising, to say the least of it, if the conferral of a discretion to make a refund was intended to exclude power to refuse a refund when in the circumstances the taxpayer was not entitled to recover under the general law. An action which is time barred is another illustration of circumstances in which refusal to make a refund would be justified.

21. Royal sought to answer this difficulty by submitting that under s.111 the Commissioner was under a duty to investigate whether there had been an overpayment and that, in the context of a duty to investigate, there was a duty to refund once overpayment was found to have taken place. On the assumption that the section creates a duty to investigate, I do not consider that the existence of such a duty leads to the existence of an obligation to refund once overpayment is established. No doubt there will be circumstances in which it will be a proper response, indeed the only proper response, to refund the overpayment but that will not always be the case. The primary judge's finding that a refund might result in a windfall to Royal

22. In argument, much attention was directed to the question whether the Commissioner could properly refuse to make a refund on the ground that Royal had charged the duty to its insured and that, as a consequence, the duty had been paid by the insured so that recovery by Royal would result in a windfall to Royal. Here, it seems that Royal charged the duty to its insured, believing it to be payable. Whether the duty formed the subject of a separate charge in addition to the premium does not appear from the materials. Generally, insurers charge duty separately to the insured in premium notices. The insured paid to Royal the duty as well as the premium. Royal then paid the duty to the Commissioner.

23. According to the Commissioner's counsel, one of the reasons why the Commissioner refused to make a refund was that, if the duty was refunded to Royal, in all probability it would be a windfall because difficulties Royal would face in seeking to refund the duty to its policy holders would be so great as to make it unlikely that it would seek to take that course. The primary judge did not make a finding that these difficulties existed or that it was unlikely that Royal would seek to take that

course. Instead, his Honour regarded the possibility that such a situation could arise as a reason for rejecting the proposition that there was an obligation to make a refund whenever an overpayment took place or was found by the Commissioner to have taken place. According to his Honour, the discretion could be exercised adversely to Royal by reference to the possible existence of that situation. I should mention that at no stage of the proceedings did counsel for Royal suggest that Royal was suing for the benefit of the insured who bore the burden of the tax or that it would seek to pass on a refund, if obtained, to them.

Recovery according to restitutionary principles 24. As I have already indicated, the grant of the discretionary power to refund an overpayment should not be regarded as authority to refuse a refund which a taxpayer is entitled to recover according to the principles of the general law. It is necessary then to ascertain how Royal's claim to recover stands under the law of restitution. We begin with the proposition, accepted in David Securities, that mistake of law is no bar to recovery, and in this case there is no question but that Royal made the relevant payments in the mistaken belief that in law it was bound to do so. In one respect, Royal's belief at the time of payment was not mistaken: in the case of the cost-plus policies, payments were made when there was a legal liability to pay them. Only subsequently and retrospectively was an exemption granted. But the retrospective operation of s.2(4) of the 1987 Act enables one to say that, in the light of the law as it was enacted with retrospective effect in 1987, the payments of duty were made under a mistake as to the legal liability to pay them. In David Securities it was accepted that (8 ibid. at 378) :

"the payer will be entitled prima facie to recover moneys paid under a mistake if it appears that the moneys were paid by the payer in the mistaken belief that he or she was under a legal obligation to pay the moneys or that the payee was legally entitled to payment of the moneys. Such a mistake would be causative of the payment".

And, prima facie, that is all that is required where, as here, the recipient has no legal entitlement to receive or retain the moneys. The recipient has been unjustly enriched. Indeed, 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 (9 Air Canada v. British Columbia (1989) 59 DLR (4th) 161 at 169-170 per Wilson J. (dissenting)) . But there is no occasion to pursue this aspect of the case further.

25. The belated recognition in David Securities that moneys paid away as a result of a causative mistake of law are recoverable enables us to discard some of the complications associated with the old law governing the recovery of moneys paid as and for taxes which were not due and payable because causative mistake of law was not thought to be a sufficient basis of recovery. Recovery was permitted only in cases in which money was exacted under an unlawful demand by a public authority where the payment was made under a mistake of fact or under compulsion of some kind. The relevant principles have been examined by this Court in Sargood Brothers v. The Commonwealth (10 (1910) 11 CLR 258) and Mason v. New South Wales (11 [1959] HCA 5; (1959) 102 CLR 108) , and, very recently, by the House of Lords in Woolwich Building Society v. I.R.C. (12 (1993) AC 70) In Woolwich, the House of Lords, though unwilling to acknowledge that causative mistake of law is a basis for recovery, reformulated the principles so as to recognize a prima facie right of recovery based solely on payment of money pursuant to an ultra vires demand by a public authority. With that development in the law of restitution in England we are not

presently concerned because, as I have explained, Royal made the relevant payments as a result of a causative mistake of law. In conformity with David Securities, payment in these circumstances opens the gateway to recovery where the payment results in the enrichment of the defendant at the expense of the plaintiff.

Disruption of public finances as a possible defence to a restitutionary claim

26. The Commissioner did not argue that an exception from recovery should be acknowledged in order to protect public finances from disruption and the necessity of re-imposing taxes invalidly imposed. That proposition was accepted by La Forest J. in Air Canada v. British Columbia (13 (1989) 59 DLR (4th) at 197) but it was repudiated by Wilson J. (14 ibid. at 169) , in her dissenting judgment, for reasons which, to my mind, are compelling (15 In Woolwich (1993) AC at 176, Lord Goff of Chieveley found Wilson J.'s reasons on this point "most attractive") . Those reasons centre upon the unfairness of requiring the innocent individual taxpayer, as opposed to taxpayers as a whole, to bear the burden of the government's mistake (16 (1989) 59 DLR (4th) at 169) . Wilson J.'s exposition gives emphasis to the "innocence" of the taxpayer and the "mistake" of the government, factors which were present in Air Canada. These elements are not essential to the making out of a restitutionary claim for the recovery of money paid as and for tax as a result of a causative mistake and I do not see why the absence of these elements should justify the recognition of a vague and amorphous defence based on the notion of avoiding disruption of public finances. 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.

27. That only brings us to what is a crucial question in this case: was the Commissioner unjustly enriched at the expense of Royal (17 Birks, "The English Recognition of Unjust Enrichment", (1991) Lloyds Maritime and Commercial Law Quarterly 473 at 507) ? That the Commissioner was unjustly enriched there can be no doubt. The Commissioner received payments to which the State revenue was not entitled under the Act. The question remains whether the enrichment was at the expense of Royal. And here the fact that Royal charged the duty to its insured again becomes significant. The suggestion is that the enrichment of the Commissioner has taken place not at the expense of Royal but at the expense of its policy holders. They are the persons who have suffered a detriment; Royal has suffered no detriment and, if it recovers, it will make a windfall gain (18 See Burrows, "Public Authorities, Ultra Vires and Restitution", in Burrows (ed.), Essays on the Law of Restitution, (1991) at 59-60) . Indeed, it might be said that, if Royal recovers, it will be unjustly enriched. But such an enrichment, if it be unjust, would be at the expense of the

policy holders, not at the expense of the Commissioner. The source of any windfall, if windfall there be, was in the excessive charges made by Royal to its policy holders, and the payments which they made to Royal.

Is passing on a good defence to a restitutionary claim?

28. Whether a passing on "defence" should be recognized must be considered at two levels: the levels of public law and restitutionary law. There is the fundamental principle of public law that no tax can be levied by the executive government without parliamentary authority, a principle which traces back to the Bill of Rights (19 (1688) 1 Will. and Mar., Sess.2, c.2, ("That levying Money for or to the Use of the Crowne by pretence of Prerogative without Grant of Parlyament for longer time or in other manner than the same is or shall be granted is Illegal.")) . In accordance with that principle, the Crown cannot assert an entitlement to retain money paid by way of causative mistake as and for tax that is not payable in the absence of circumstances which disentitle the payer from recovery. It would be subversive of an important constitutional value if this Court were to endorse a principle of law which, in the absence of such circumstances, authorized the retention by the executive of payments which it lacked authority to receive and which were paid as a result of causative mistake.

29. From the perspective of the law of restitution, there is some support for the view that, if the payer has passed on the burden of a tax which is found not to be payable, the payer will not be entitled to recover payments made to the public authority as and for tax. The suggestion is that, in these circumstances, the defendant's enrichment is not at the expense of the plaintiff. In Air Canada, the plaintiff airlines had passed on an unconstitutional gasoline tax in the form of fares charged to their passengers. Four justices considered the question whether the airlines could recover the payments which they had made as and for the tax. La Forest J. (with whom Lamer and L'Heureux-Dub JJ. concurred) decided that question against the airlines. La Forest J. cited (20 (1989) 59 DLR (4th) at 193) the comments of Professor Palmer in his work The Law of Restitution (21 1986 Supplement at 255) :
"There is no doubt that if the tax authority retains a payment to which it was not entitled it has been unjustly enriched. It has not been enriched at the taxpayer's expense, however, if he has shifted the economic burden of the tax to others. Unless restitution for their benefit can be worked out, it seems preferable to leave the enrichment with the tax authority instead of putting the judicial machinery in motion for the purpose of shifting the same enrichment to the taxpayer."

30. La Forest J. expressed his agreement with the comment and went

on to say (22 (1989) 59 DLR (4th) at 193-194) :

"The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss. Its function is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain the province made at the airlines' expense."

Wilson J. did not agree, concluding that to deny recovery in such a situation would be tantamount to allowing the legislature to impose illegal burdens and would be inconsistent with restitutionary principles (23 ibid. at 169-170) . The levying of an unconstitutional tax is an imposition of an illegal burden, but there was no such imposition in the present case.

31. The approach taken by La Forest J. in Air Canada accords with that adopted in the United States in Shannon v. Hughes and Co. (24 (1937) 109 SW (2d) 1174) There, the plaintiff failed to recover payments of an unconstitutional tax on its ice cream operations because it had passed on the tax to its customers and had shifted to them the burden of the imposition. The Court invoked Lord Mansfield's proposition in Moses v. Macferlan (25 [1760] EngR 713; (1760) 2 Burr 1005 at 1010 (97 ER 676 at 679)) that, in the common law action for money had and received, the defendant "may defend himself by every thing which shews that the plaintiff, ex aequo et bono, is not intitled to the whole of his demand, or to any part of it". In Shannon v. Hughes and Co. (26 (1937) 109 SW (2d) at 1175-1176) , the Court concluded that to hold otherwise would result in unjust enrichment of the plaintiff, despite the fact that the imposition of the tax and its passing on to customers caused the plaintiff's ice cream sales to drop sharply and the plaintiff's profits to collapse. By denying relief on the ground that the plaintiff would unjustly be enriched by a windfall, the Court left the plaintiff without a remedy even though it had suffered significant loss and damage.

32. The argument that a plaintiff who passes on a tax or charge will receive a windfall or will unjustly be enriched if recovery from a public authority is permitted rests at bottom 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 major difficulties. The first is that to deny recovery when the plaintiff shifts the burden of the imposition of the tax or charge to third parties will often leave a plaintiff who suffers loss or damage without a remedy. That consequence suggests that, if the economic argument is to be converted into a legal proposition, the proposition must be that the plaintiff's recovery should be limited to compensation for loss or damage sustained. The third is that an inquiry into and a

determination of the loss or damage sustained by a plaintiff who passes on a tax or charge is a very complex undertaking. And, finally, it has long been thought that, despite Lord Mansfield's statement in Moses v. Macferlan, the basis of restitutionary relief is not compensation for loss or damage sustained but restoration to the plaintiff of what has been taken or received from the plaintiff without justification (27 Mason v. New South Wales (1959) 102 CLR at 146 per Windeyer J) .

33. Shannon v. Hughes and Co. illustrates the first problem. Because passing on the tax or charge increases the price or cost of the goods or service to the customer or consumer it may have an adverse economic impact upon demand and, accordingly, upon the profitability of the plaintiff's activities. That means that passing on should not be accepted as a universal defence to a restitutionary claim unless it is related and limited to denying recovery except for loss or damage sustained. And that requires a consideration of practical and legal objections inherent in the third and fourth objections mentioned above.

34. In the United States, the Supreme Court has rejected the passing on defence in the context of treble-damages claims under anti-trust laws by plaintiffs who have passed on overpayments to their customers (28 Hanover Shoe Inc. v. United Shoe Machinery Corp. [1968] USSC 185; (1968) 392 US 481; Illinois Brick Co. v. Illinois [1977] USSC 168; (1977) 431 US 720; see also McKesson Corporation v. Division of Alcoholic Beverages and Tobacco [1990] USSC 95; (1990) 110 L Ed 2d 17 at 42-43) . Though the context is different, the reasons given for that rejection are relevant to the present case. They include the difficulty of determining the economic impact upon the plaintiff's business of passing on the overpayment (29 (1968) 392 US at 492-493) , the practical problems which availability of the defence would generate involving "massive evidence and complicated theories" (30 ibid. at 493) to demonstrate the occurrence or non-occurrence of passing on. Further, the defence would probably apply all the way down the chain of distribution to the ultimate consumer who would have little interest to sue (31 ibid. at 494) . In Illinois Brick Co. v. Illinois, the Supreme Court confirmed these grounds of objection and pointed to the problems of multiple litigation if both direct and indirect purchasers could sue for anti-trust damages. The Court also noted that economic theories rely upon assumptions that do not operate in the real world, thereby making the proof of passing on extremely difficult (32 (1977) 431 US at 741-742) .

35. A similar approach was taken in the opinion of Advocate-General Mancini in Amministrazione delle Finanze dello Stato v. San Giorgio SpA (33 (1985) 2 CMLR 658) . San Giorgio was required to pay health inspection charges under an Italian decree and regulations. They were held to be invalid. An Italian court ordered repayment to San Giorgio, notwithstanding another law which denied recovery when the charge is

presumed to have been passed on. The Advocate-General considered that the nature of a free market is such that one cannot isolate any portion of the price and link it causally to a particular cost (34 ibid. at 673) . However, the European Court concluded (35 ibid. at 688-689) :

"Community law does not prevent a national legal system from disallowing the repayment of charges which have been unduly levied where to do so would entail unjust enrichment of the recipients. There is nothing in Community law therefore to prevent courts from taking account, under their national law, of the fact that the unduly levied charges have been incorporated in the price of the goods and thus passed on to the purchasers."

The Court has also decided that it is inconsistent with Community law for a State to impose on a taxpayer the burden of establishing that unduly paid charges have not been passed on (36 Les Fils de Jules Bianco SA v. Directeur Gnral des Douanes (1989) 3 CMLR 36) . Thus, in European law it is accepted that the defence of passing on, though difficult to establish, does not infringe Community law when made available by the statute of a member State.

36. The United States and European decisions demonstrate that any acceptance of the defence of passing on is fraught with both practical and theoretical difficulties (37 See also Rudden and Bishop, "Gritz and Quellmehl: Pass it on", (1981) 6 European Law Review 243 esp. at 253-256) . Indeed, the difficulties are so great that, in my view, 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 (38 There is limited support from the textwriters for the view that passing on is not a defence: see Birks, Restitution - The Future, (1992) at 75, fn.55; Burrows, The Law of Restitution, (1993) at 475-476 (though he favours a mitigation of loss defence in some cases where it is established that the charge has been passed on); but others consider it is a defence: see Jones, Restitution in Public and Private Law, (1991) at 46; Palmer, The Law of Restitution, 1986 Supplement at 255; see also Goff and Jones, The Law of Restitution, 4th ed. (1993) at 553 where it is suggested that "(t)he burden should, in principle, be on the defendant to show that the plaintiff has suffered no loss." In Woolwich, Lord Goff of Chieveley commented: "(T)he point is not without its difficulties; and the availability of the defence may depend upon the nature of the tax": (1993) AC at 178) . In that event, the plaintiff fails, not because it has passed on the tax or charge, but because the defendant has been enriched by receiving moneys which belonged to or proceeded from someone other than the plaintiff. Take, for example, the case where there is an overpayment of a tax levied on someone other than the plaintiff who collects the tax and pays it to the public authority. In such a case, the plaintiff should not recover unless it

is established that the plaintiff will distribute the proceeds to the true taxpayers.

37. Historically, as I have already noted, the basis of restitutionary relief in English law was not compensation for loss or damage but restoration of what had been taken or received. The requirement that the defendant be unjustly enriched "at the expense of" the plaintiff can mean that the enrichment is "by doing wrong to" or "by subtraction from" the plaintiff (39 Birks, An Introduction to the Law of Restitution, (1985) at 23-24) . Hence, a plaintiff can succeed by showing that he or she was the victim of a wrong which enriched the defendant - this is not such a case - or that the defendant was enriched by receiving the plaintiff's money or property.

38. When the plaintiff succeeds in a restitutionary claim, the court awards the plaintiff the monetary equivalent of what the defendant has taken or received, except in those cases in which the plaintiff is entitled to specific proprietary relief. Because the object of restitutionary relief is to divest the defendant of what the defendant is not entitled to retain, the court does not assess the amount of its award by reference to the actual loss which the plaintiff has sustained. That is what Windeyer J. was saying in Mason v. New South Wales (40 (1959) 102 CLR at 146) when he rejected the notion that impoverishment of the plaintiff is a correlative of the defendant's unjust enrichment (41 But cf. Air Canada v. British Columbia (1989) 59 DLR (4th) at 193-194 per La Forest J. (with whom Lamer and L'Heureux-Dub JJ. concurred); Wilson J. contra. See also Beatson, "Restitution of Taxes, Levies and Other Imposts: Defining the extent of the Woolwich Principle", (1993) 109 Law Quarterly Review 401 at 427-428; The Law Commission, Restitution of Payments Made Under a Mistake of Law, (1991) Consultation Paper No.120, pars 3.83-3.85) .

39. Windeyer J. did not regard the fact that the plaintiffs had "passed on" to their customers the amounts unlawfully charged for permits as a reason for denying recovery. His Honour said (42 (1959) 102 CLR at 146; see also at 136 per Menzies J) :
"If the defendant be improperly enriched on what legal principle can it claim to retain its ill-gotten gains merely because the plaintiffs have not, it is said, been correspondingly impoverished? The concept of impoverishment as a correlative of enrichment may have some place in some fields of continental law. It is foreign to our law. Even if there were any equity in favour of third parties attaching to the fruits of any judgment the plaintiffs might recover ... this circumstance would be quite irrelevant to the present proceedings. Certainly it would not enable the defendant to refuse to return moneys which it was not in law entitled to collect and which ex hypothesi it got by extortion."

40. Windeyer J. was directing his remarks to a case in which, as in

Air Canada, the State was asserting its entitlement to payment of the charge. In the present case, there never was a demand or claim by the State or the Commissioner that tax was payable in respect of premiums received under the relevant policies. Here overpayment occurred simply because Royal made a mistake in the process of self-assessment. But I do not consider that this difference touches the question whether passing on the tax or duty is relevant to restitutionary recovery. Once it is accepted that causative mistake of law is a basis for recovery, the making of an unlawful demand for payment, though material to the making of a causative mistake, is no longer of critical importance.

41. 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's wealth enables one to say that the defendant's unjust enrichment has been "at the expense of the plaintiff" (43 Birks, (1985), op.cit. at 23-24) , notwithstanding that the plaintiff may recoup the outgoing by means of transactions with third parties.

42. On this approach, it would not matter that the plaintiff is or will be over-compensated because he or she has passed on the tax or charge to someone else. And it seems that there is no recorded instance of a court engaging in the daunting exercise of working out the actual loss sustained by the plaintiff and restricting the amount of an award to that measure.

43. Nonetheless, in the United States, relief has been denied, on equitable amongst other grounds, to a plaintiff who has passed on the tax or charge, reference being made to coming to court with unclean hands (44 Standard Oil Co. v. Bollinger (1929) 169 NE 236; see also Richardson Lubricating Co. v. Kinney (1929) 168 NE 886) . Why, as between the plaintiff and the defendant, the passing on of the tax to customers of the plaintiff results in conduct which should disentitle the plaintiff in equity from recovery is difficult to understand. The better view is that, if passing on of the tax disentitles the plaintiff, it is because, in the particular circumstances, the defendant's enrichment has not been at the expense of the plaintiff.

44. That was the way in which the problem was approached by Learned Hand J. in his dissenting opinion in 123 East Fifty-Fourth Street v. United States (45 (1946) 157 F Rep (2d) 68) . There the Court rejected the defence of passing on in circumstances where a restaurant owner, in accordance with advice received from revenue authorities that

it was liable to cabaret tax, paid amounts as and for that tax. The Court held that the tax was not payable because the restaurant was not a cabaret. The restaurant owner had charged the tax to its patrons so that items on the patrons' bills were actually part of the price paid by them and the money became that of the restaurant owner. The majority considered that this was no bar to recovery by the restaurant owner because the money, when paid to the government, belonged to and was the property of the restaurant owner. However, Learned Hand J. was prepared to infer that the owner had added the tax as a separate item to the bills and described it as a tax which it must pay and was collecting it from patrons in order to pay it to the Treasury. His Honour regarded as crucial the distinction between passing on the tax in this form and merely including in the bills the amount of the tax without saying anything about it.

45. Learned Hand J. went on to say (46 ibid. at 70; see also Wayne County Produce Co. v. Duffy-Mott Co. (1927) 155 NE 669 at 669 per Cardozo C.J. (where Duffy-Mott recovered the tax that it had paid to the federal government but, having charged the tax specifically to its customers in addition to the price of the goods sold, was held liable to account to them for the tax recovered)) :
"If it said nothing, I should agree ... that the guests had no legally recognizable interest in the money collected, which gave them any claim to it superior to the plaintiff's ... On the other hand, if the plaintiff collected the money under what the guests must have understood to be a statement that it was obliged to pay it as a tax, and that it meant to do so, the money was charged with a constructive trust certainly so long as it remained in the plaintiff's hands."

According to his Honour, the constructive trust attached to the claim for recovery of the money so that if the plaintiff recovered the payments it would hold as trustee for the patrons. That would be no answer to the claim if the plaintiff could and would distribute the recovery to the patrons. But that did not appear to be the case so that in the result, the equities being equal, the legal title should prevail.

46. In Decorative Carpets Inc. v. State Board of Equalization (47 (1962) 373 P 2d 637) , the Supreme Court of California followed the dissenting opinion of Learned Hand J. In that case, the plaintiff had overpaid sales tax with respect to transactions combining sales and installation. The plaintiff had collected for each transaction giving rise to a liability to pay sales tax a separately stated amount to cover the tax imposed on it, and had charged to its customers the amounts computed to be payable as sales tax on those transactions. The Court held that the plaintiff's mistake of law gave rise to an involuntary trust in favour of the customers and that the plaintiff could recover only if it submitted proof that the refund would be returned to the customers from whom the payments were erroneously

collected. Traynor J., with whom Gibson C.J., Peters and White JJ. concurred, said (48 ibid. at 638) :
"To allow the plaintiff a refund without requiring it to repay its customers the amounts erroneously collected from them would sanction a misuse of the sales tax by a retailer for his private gain."

47. The Court considered that, although the defendant would ordinarily, like the plaintiff, become a constructive trustee of the moneys for the plaintiff's customers, adherence to statutory procedures precluded the imposition on the defendant of an obligation to make refunds to the customers. The Court did not discuss the question whether the defendant would be unjustly enriched if the plaintiff were unable to offer proof that it could and would refund the sums to its customers.

48. On the other hand, in Javor v. State Board of Equalization (49 (1974) 527 P 2d 1153) , car purchasers sought to recover amounts of sales tax which had been passed on to them by retailers. The amount paid was excessive because of the repeal, with retrospective effect, of a federal manufacturers' excise tax which had been included in the sales tax base. The overpaid tax was in excess of $10,000,000; however, each customer was owed only a very small amount (50 For example, the plaintiff, who had purchased a Rolls Royce, was owed $65.72) . Only a retailer could apply for a refund, which was required to be paid over to the customer. Accordingly, a retailer had no particular incentive to request the refund. Sullivan J., with whom Wright C.J., Tobriner, Mosk and Burke JJ. concurred, considered that (51 (1974) 527 P 2d at 1160-1161) :
"the Board is very likely to become enriched at the expense of the customer to whom the amount of the excessive tax actually belongs.

... The integrity of the sales tax requires not only that retailers not be unjustly enriched, but also that the state not be similarly unjustly enriched."

The Court found that the customers could compel the retailers to make refund applications, and require the refunded sales tax to be paid into court.

49. I would accept so much of Learned Hand J.'s analysis in 123 East Fifth-Fourth Street as leads to the conclusion that the restaurant owner was a constructive trustee of the amount of the tax received from its patrons if the owner charged the separate amount of the tax to its patrons. The tax so received was received by the owner as a fiduciary on the footing that it would apply the money in payment of the tax. If that purpose failed or could not be effected because the tax was not payable then the owner held the moneys for the benefit of the patrons who paid the moneys. The same result would ensue if the owner recovered payments from the revenue authority made as and for tax

which was not payable. And, in my view, the patrons who paid the tax to the owner would have a right of recovery, as Learned Hand J. makes clear, against the revenue authority so long as it retained the payments which it was not entitled to retain.

50. But does all this require the further conclusion that in the circumstances predicated by Learned Hand J. - the addition of the tax as a separate item to the bills - the restaurant owner could not recover? I would answer the question in the negative on the footing that the restaurant owner had a legal title to the money immediately before it was paid to the revenue authority. In that respect, the money belonged to the plaintiff even though, if it recovered the money, it would hold as trustee for the patrons. But, in such a case, the plaintiff should be required to satisfy the court, by the giving of an undertaking or other means, that it will distribute the moneys to the patrons from whom they were collected, thereby recognizing their beneficial ownership of those moneys.

51. If, however, the plaintiff did not become the constructive trustee of the moneys by separately charging them as tax to the patrons, I do not see why the plaintiff's claim should be defeated simply because the plaintiff has recouped the outgoing from others. As between the plaintiff and the defendant, the plaintiff having paid away its money by mistake in circumstances in which the defendant has no title to retain the moneys, the plaintiff has the superior claim. The plaintiff's inability to distribute the proceeds to those who recoup the plaintiff was, in my view, an immaterial consideration, as Windeyer J. suggested it was in Mason v. New South Wales. There was in that case the additional element of an unlawful demand but the absence of that element does not mean that, in the situation under consideration, unjust enrichment was otherwise than at the plaintiff's expense.

52. In the present case, that reasoning leads me to the conclusion that the Commissioner would have no defence to a restitutionary claim by Royal to recover the mistaken payments of duty. Even if it had been established that Royal charged the tax as a separate item to its policy holders so that it was a constructive trustee of the moneys representing that separate charge when it made the payments to the Commissioner, it would have been entitled to recover from the Commissioner, provided that it satisfied the court that it will account to its policy holders. The Courts below, unlike Learned Hand J. in 123 East Fifty-Fourth Street, did not draw an inference that the tax was charged as a separate item to the policy holders. And, in any event, it has not been suggested that the Court should draw such an inference.

53. It then follows, in the light of my earlier conclusion that the discretion under s.111 is to be exercised in accordance with the

principles of the law of restitution, that the discretion was exercised erroneously. On the basis on which the case was fought in the courts below, subject to consideration of the two issues still outstanding, Royal was entitled to recover the overpayments in conformity with the law of restitution.

Limitation of Actions Act 1958 (Vict.), s.20A

54. Section 20A provided as follows (52 A new s.20A was substituted by the Limitation of Actions (Amendment) Act 1993 (Vict.)) :

> "Actions to recover moneys paid as taxes etc.
>
> (1) No action shall be brought to recover, from the Crown or the

State of Victoria or any Minister of the Crown, or from any corporation officer or person or out of any fund to whom or which it was paid, the amount or any part of the amount of any tax, fee, charge or other impost paid under the authority or purported authority of any Act, after the expiration of twelve months after the date of payment.

(2) Sub-section (1) of this section shall not apply to any action

or proceeding brought pursuant to any specific provision of any Act providing for the mode of challenging the validity, or for the recovery of the whole or any part, of any tax, fee, charge or other impost actually paid."

55. As the last payment of duty sought to be recovered was paid on 21 August 1989, if s.20A(1) applied, the time within which any action might be brought to recover duty expired no later than 21 August 1990, which was prior to the commencement of the proceedings for recovery of the duty paid.

56. The Appeal Division was of the view that s.20A had no application for three reasons. First, their Honours thought, from the speeches of the Attorney-General and others as reported in Hansard, that the section was introduced to protect the State from the obligation to repay moneys that might become payable as a consequence of successful challenges to the constitutional validity of State fiscal laws. In those speeches reference was made to Dennis Hotels Pty. Ltd. v. Victoria (53 [1961] UKPCHCA 1; (1961) 104 CLR 621) and the "windfall" that the hotel industry would have gained had its challenge to the licensing fees been successful. While apprehension of the prospect of a liability to refund imposts as a result of successful challenges to the constitutional validity of fiscal laws was the occasion and the mainspring for the introduction of s.20A, the terms of sub-s.(1) are much wider. It prohibits the bringing of an action to recover the amount of any impost "paid under the authority or purported authority

of any Act" (emphasis added).

57. The second reason was that the 1987 amendment which retrospectively declared that duty was not exigible back to 30 June 1985, covering a period of 2 years, would not have been necessary if s.20A had the effect contended for by the Commissioner. The Appeal Division therefore concluded that the 1987 amendment at least modified the operation of s.20A in relation to payments of duty properly made at the time but deemed retrospectively not to be payable. However, this reasoning overlooks the possibility that the duty to which the 1987 amendment related may have been paid within one year of the enactment of the amendment.

58. The third reason was that the imposts sought to be recovered were not "paid under the authority or purported authority of any Act". In my view, the Appeal Division was correct in so holding. The effect of the 1987 amendment was to abrogate any requirement to make a payment after 30 June 1985 of duty on premiums received on "cost-plus" policies. Hence, the payment of duty mentioned in the first category in the document prepared by the Commissioner was not "under the authority or purported authority of any Act". Likewise, the other payments of duty sought to be recovered were not made under such authority or purported authority for the simple reason that the duty was not payable; instead of imposing duty on the relevant categories of premium the Act abrogated the liability to pay duty. It is not possible to read the words "under the authority or purported authority" as denoting "under a mistaken belief as to authority".

59. It follows that s.20A has no application.

Relief

60. The Appeal Division granted relief in the nature of mandamus by directing the Commissioner to refund the amount claimed. The Commissioner submitted that mandamus would not result in an order for payment of that money.

61. Although the argument was not elaborated, it is to be understood as invoking the principle that mandamus requires the exercise of the relevant statutory discretion rather than its exercise in a particular way (54 Randall v. Northcote Corporation [1910] HCA 25; (1910) 11 CLR 100 at 105) . But that principle means no more than that the administrator to whom mandamus is directed will be required to perform the legal duty to the public which is imposed by the statute and ordinarily that duty is limited to exercising the statutory discretion according to law, there being no obligation to exercise the discretion in a particular way. However, if the administrator is required by the statute to act in a particular way and in certain circumstances, or if the exercise of a statutory discretion according to law in fact requires the

administrator to decide in a particular way, so that in neither case does the administrator in fact have any discretion to exercise, then mandamus will also issue to command the administrator to act accordingly (55 Reg. v. Anderson; Ex parte Ipec-Air Pty. Ltd. [1965] HCA 27; (1965) 113 CLR 177 at 188 per Kitto J. (dissenting but not on this point), 203, 206 per Windeyer J.; Minister for Immigration and Ethnic Affairs v. Conyngham (1986) 68 ALR 441 at 448-451) . Moreover, it has long been recognized that mandamus will issue as a remedy for certain forms of abuse of discretion upon the principle that "the improper or capricious exercise of discretion is a failure to exercise the discretion which the law has required to be exercised" (56 Reg. v. I.R.C.; Ex parte Fed. of Self-Employed [1981] UKHL 2; (1982) AC 617 at 650 per Lord Scarman; see R. v. Askew (1768) 4 Burr 2186 at 2188-2189 per Lord Mansfield C.J. [1768] EngR 8[1768] EngR 8; ; (98 ER 139 at 141); Padfield v. Minister of Agriculture,
Fisheries and Food [1968] UKHL 1 ; (1968) AC 997) .

62. At one time it seems to have been thought that mandamus would not be granted to enforce payment of money by the Crown (57 See, for example, Reg. v. Lords Commissioners of the Treasury (1872) LR 7 QB 387) . However, in principle 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 be a public legal duty to so act (58 See Reg. v. Commissioners for Special Purposes of the Income Tax (1888) 21 QBD 313 at 322 per Lindley L.J) . In the present case, the duty to exercise the discretion was a public duty (59 Reg. v. I.R.C.; Ex parte Fed. of Self-Employed (1982) AC at 651-652 per Lord Scarman) and it was a discretion which, in the circumstances of this case, could be exercised only in one way. Consequently, mandamus will issue not only to compel exercise of the discretion according to law but also to compel it to be exercised in the way in which it must be exercised.

63. The appeal must be dismissed.

BRENNAN J. The respondent, a company carrying on the business of an insurer in Victoria (hereafter "Royal"), issued policies of insurance against liability for workers' compensation and remitted to the Comptroller of Stamps amounts which Royal believed to be due to the Comptroller as stamp duty chargeable on premiums received in respect of those policies. The appellant Commissioner is the statutory successor of the Comptroller (60 Administrative Arrangements Act 1983 (Vic.), s.3(10)(a); Administrative Arrangements Order (No.106) 1992, Orders 4 and 5 and Schedule; Victorian Government Gazette G16, 29 April 1992 at 1003-1004) and the holder of the office may be referred to indifferently hereafter by either title. The Commissioner is the officer responsible for the receipt and refund of moneys paid purportedly as duty under the Stamps Act 1958 (Vic.) ("the Act"). The Act provided for registered insurers to lodge returns with the Commissioner and to pay in cash the relevant amounts of stamp duty (61

ss.96, 97) . This system of self-assessment was followed by Royal during the period between 1 July 1985 and 21 August 1989 when Royal paid to the Commissioner $1,907,908.10 more than the amounts which Royal was ultimately liable to pay as stamp duty under the Act. Royal was apparently unaware of amendments to the Act which, consequent upon the introduction of a new regime of workers' compensation by the Accident Compensation Act 1985 (Vic.), exempted from charge certain premiums for workers' compensation insurance.

2. The overpayments of stamp duty were made in respect of premiums paid on two classes of policy which were described respectively as "wages" policies and "cost plus" policies. The premium payable in respect of a wages policy was initially calculated on an estimate of wages for a year with an adjustment being made at the end of the year based on the actual wages paid for that year. The premium payable in respect of a cost plus policy was paid in arrears and was effectively a reimbursement of incurred liabilities, that is the amount paid out by the insurer in respect of claims made in the preceding period plus the cost involved in handling the claim.

3. The Accident Compensation Act 1985 (62 s.276 and Sched. Two) inserted amendments into the Act (63 amending ss.95, 97, 98 and 99) which exempted from charge those premiums which were paid for wages policies where the period of risk commenced after 4.00pm on 30 June 1985, the exemption operating proportionately in the case of premiums paid for policies where the period of risk commenced before but expired after that time (the first 1985 amendment). If a registered company had paid an amount of stamp duty and the period of risk commenced before but ended after 4.00pm on 30 June 1985, provision was made for proportionate refunds to be made by the Comptroller. The provision for refunds was itself amended later in 1985 by the Stamps and Business Franchise (Tobacco) (Amendment) Act 1985 (Vic.) (64 s.11) (the second 1985 amendment). The premiums received in respect of cost plus policies remained, by omission, chargeable to stamp duty until an amendment to the Act was introduced by a provision of the Taxation Acts Amendment Act 1987 (Vic.) (65 s.8) (the 1987 amendment). The 1987 amendment exempted from charge premiums on cost plus policies received after 30 June 1985 in respect of liabilities incurred before 1 October 1985. The 1987 amendment commenced on 12 November 1987 but, by s.2(4) of the Taxation Acts Amendment Act, it was "deemed to have come into operation on 30 June 1985".

4. The following amounts were the integers of the total amount that was overpaid before Royal realized that the premiums in respect of which it had been making payments to the Comptroller were no longer chargeable with stamp duty:

(i) $138,179.21 in respect of premiums on wages policies received for extensions after 4.00pm on 30 June 1985;

(ii) $1,674,301.94 in respect of premiums on cost plus policies
received after 4.00pm on 30 June 1985, of which approximately -
(a) $1,370,000 was paid in respect of premiums received before the
1987 amendment commenced, and

(b) $300,000 was paid in respect of premiums received after the 1987
amendment commenced;

(iii) $95,426.95 in respect of over-estimates of premiums on cost
plus policies received before 1 July 1985 in respect of liabilities
incurred before 1 October 1985.

The payments in items (i) and (ii)(b) were made by mistake of law,
Royal being unaware of the 1985 and 1987 amendments. The payments in
item (ii)(a) were due and owing when paid but, by retrospective
operation of the 1987 amendment, were deemed not to have been due and
owing. The payments in item (iii) were made provisionally and should
have been adjusted in the ordinary course of dealing between Royal and
the Comptroller when the over-estimate of premiums was ascertained.
No error of law affects this item.

5. When Royal became aware that it had made payments to the
Comptroller that it was not liable to pay or was deemed not to have
been liable to pay, it demanded a refund, but no response was received
to Royal's solicitor's letter of demand written on 19 September 1990.
On 17 October 1990, Royal commenced proceedings against the
Comptroller claiming, inter alia:

"1. An order that the defendant refund to the plaintiff in accordance
with s.111(1) of the Stamps Act 1958 ('the Act') the sum of
$1,907,908.10 being an amount of stamp duty found by the defendant to
have been overpaid by the plaintiff.

2 . Alternatively to 1, an order that the defendant as required
by s.111(1) of the Act forthwith -

(a) make a finding whether or not the plaintiff has overpaid the

sum of $1,907,908.10 or some other sum in respect of premiums for
workers' compensation insurance received after 30 June 1985 in respect
of liabilities incurred before 1 October 1985; and

(b) refund to the plaintiff any such sum found to have been

overpaid."

Royal thus sought an order in the nature of a mandamus to compel the
Comptroller to perform what was said to be her duty under s.111(1) of

the Act. That sub-section read:

" Where the Comptroller finds in any case that duty has been over-paid, 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".

6. When the proceedings were commenced the Comptroller had made no finding of overpayment for the purposes of s.111(1). However, a finding was made on 19 October 1990 as appears from a statement of facts, agreed for the purposes of the proceedings, which contains the following paragraph:

" On the 19th October 1990, the Comptroller of Stamps:

(a) found that duty had been overpaid in the amounts referred to in (an affidavit setting out the amounts appearing in items (i), (ii) and (iii), above;)

(b) decided not to make a refund of any part of that amount under s.111 of the Stamps Act 1958."

Although Royal's solicitors on 25 January 1991 requested reasons for the Comptroller's decision not to make a refund, no reasons were furnished. The proceedings were continued on the footing that the original notice of motion was sufficient to enliven the Supreme Court's jurisdiction to make an order in the nature of mandamus under s.111(1). The question in issue is whether an order should be made directing the Commissioner to refund the moneys overpaid by Royal.

Does s.111(1) create a duty to refund?

7. Although the power conferred by s.111(1) is expressed to be discretionary, Royal submits that on a true construction of the Act, the Commissioner is under a duty to refund overpaid duty once she "finds ... that duty has been over-paid". The question whether the repository of a discretionary power is under a duty to exercise the power depends upon the intention of the legislature as revealed in the language of the statute and, in ascertaining that intention, there is a prima facie presumption "that permissive or facultative expressions operate according to their ordinary natural meaning" (66 Ward v. Williams (1955) 92 CLR 496 at 505) . Therefore, if the facultative term "may" is used in the creation of a power, it does not in itself impose a duty to exercise the power but such a duty may be found in the statutory context in which the power is created. Thus, where a power is conditioned upon the existence of an event or upon the formation of a particular opinion by the repository of the power, the condition may sometimes be taken to specify the circumstances in which the power must be exercised (67 Finance Facilities Pty. Ltd. v. Federal Commissioner

of Taxation [1971] HCA 12; ; (1971) 127 CLR 106 at 134-135) . In the present case, Royal submits that the condition governing the existence of the power to refund - a finding of overpayment - specifies the circumstances in which the power must be exercised. That submission evokes a consideration of the Act as it stood when s.111(1) was introduced and the nature of the power conferred by that provision.

8. Section 111(1) was introduced into the Act by the Stamps Act 1978 (Vic.) which commenced on 1 January 1979. Prior to that time, the general refund provision was to be found in s.111 which read:

" 111. If after any duty has been paid by any company person or firm of persons under the provisions of this subdivision the Comptroller of Stamps, on application made to him within twelve months after such payment, is satisfied that such overpayment has been made shall apply to the Treasurer of Victoria for a refund to such company person or firm of persons of the duties overpaid, and the Treasurer shall without further or other authority than this Act refund the amount thereof to the company person or firm by whom the overpayment has been made or to any person acting in its his or their behalf."

This provision, by using the mandatory "shall", cast upon the Comptroller a duty to apply to the Treasurer for a refund to the party entitled once the Comptroller was satisfied that an overpayment had been made and it cast upon the Treasurer a duty to make a refund accordingly. But these duties could arise only if the party entitled applied for a refund within 12 months after the overpayment had been made. Under this provision, the Comptroller had no access to the Consolidated Fund of Victoria out of which the refund was to be paid. When the new s.111(1) was introduced, not only was the mandatory term "shall" replaced by the facultative term "may" in the creation of the power to refund but the Comptroller was given power to make the refund directly (68 Presumably s.111(1) operated as an implied appropriation for the purpose of making refunds. Subsequently, an express appropriation was provided by s.166D) . Concurrently, the time limitation was removed. If Royal's submission be correct, the new s.111(1) imposed on the Comptroller a duty to refund any overpayment, whether or not there was a legal liability to refund and irrespective of delay in discovery of the overpayment or in the making of a demand for a refund. That would be a surprising construction to place on s.111(1).

9. When the first 1985 amendment was introduced by the Accident Compensation Act, a duty to make certain refunds was imposed on the Comptroller and a time limitation for applying for those refunds was prescribed by s.99(5) and (7). Those provisions read:

" (5) Where a registered company paid an amount in respect of stamp duty in respect of a premium for workers compensation insurance in

respect of a period commencing before and ending after four o'clock in the afternoon on 30 June 1985 at a rate of 3.5 per centum of the premium, that registered company may, before 1 December 1985, apply to the Comptroller of Stamps in writing in the form approved by the Comptroller for a refund of stamp duty calculated in accordance with (a formula which apportioned premiums by reference, inter alia, to the number of days after 30 June 1985 to which the insurance relates.)

(7) Where an application is made in accordance with sub-sections

(5) and (6), the Comptroller of Stamps shall make a refund to the applicant accordingly."

10. The first 1985 amendment was itself amended by the second 1985 amendment. The latter amendment deleted the special time limitation in s.99(5), altered the formula therein contained and provided for rebates as well as refunds of stamp duty. An express duty to make refunds and rebates was retained in a new s.99(7). Evidently, it was not then the legislature's understanding that any duty had been imposed on the Comptroller by s.111(1) to make a refund once an overpayment was found to have been made. Had that been the legislature's understanding, it would not have imposed expressly a duty to refund a proportion of the stamp duty which, by reason of the 1985 amendments, had been overpaid. Rather, I would take the legislature to have intended that, while s.111(1) was the source of the power to make a refund out of the Consolidated Fund, s.99(7) should be the source of a particular duty imposed on the Comptroller to make the refund prescribed by s.99.

11. Subsequently, s.166D of the Act was introduced (69 by the Taxation Acts (Amendment) Act 1986 (Vic.) s.28, which commenced on 9 December 1986) to provide a standing appropriation for the amounts which "the Comptroller of Stamps becomes liable to pay ... in accordance with the provisions of this Act". The Commissioner's liability to pay must be the source of her duty to refund. That liability cannot arise simply from her finding that an overpayment has been made. Some overpayments might be made without the Commissioner's incurring of any liability to refund - for example, duty paid in compromise of the Commissioner's claim when it is subsequently discovered that the compromise amount was, or included, an overpayment of duty. The Commissioner's liability must arise aliunde, either under statutory provisions other than s.111(1) or under the general law.

12. In terms, s.111(1) confers a discretionary power on the Commissioner to refund moneys overpaid out of the Consolidated Fund of Victoria (in lieu of applying to the Treasurer for the money), but creates no duty to do so. In other words, once the Commissioner finds that an overpayment has occurred, there arises a power to make a refund by withdrawing from the Consolidated Fund an amount which is

limited to the amount found to have been overpaid but which, by reason of s.166D, does not exceed the amount which the Commissioner is liable to pay. But no enforceable obligation to make the refund arises merely from a finding that there has been an overpayment. It is arguable that, prior to the commencement of s.166D, the Commissioner was empowered in exercise of her discretion to refund an overpaid amount ex gratia where there was no legal liability to refund. Presumably, s.111(1) would have been construed as an implied appropriation. But the express appropriation of the Consolidated Fund by s.166D is limited to refunds in discharge of liabilities of the Commissioner. If the Commissioner is liable to make a refund she is liable "to pay amounts in accordance with the provisions of this Act", that is, she is liable to discharge her liabilities in accordance with s.111(1). But she is under no duty to make a refund unless there be an antecedent liability to do so. Unless such a liability exists, there is no duty to exercise the power conferred by s.111(1) nor any authority to do so.

Relief

13. If the Commissioner is under a liability to refund an amount which she has found to have been overpaid under s.111(1) of the Act, can she be compelled to perform her duty to do so? The power is conferred in terms that are broad enough to embrace two situations of overpayment: one, where there is no legal liability to refund the overpaid amount; the other, where there is such a liability. In the former situation, there is nothing in the Act or in the general law which would create a duty to refund the overpaid amount and s.166D precludes the Commissioner from making such a payment. In the latter situation, however, an exercise of the power conferred by s.111(1) of the Act is the means by which the Commissioner's legal liability is discharged.

14. Where the Commissioner is liable to refund an amount overpaid and has power to do so, a refusal to exercise the power can be judicially reviewed in accordance with the approach stated by Earl Cairns L.C. in Julius v. Lord Bishop of Oxford (70 (1880) 5 App Cas 214 at 222-223; see per Evatt J. in R. v. Mahony; Ex parte Johnson [1931] HCA 36; (1931) 46 CLR 131 at 145-148) :
"there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so."

The Commissioner is a public officer vested with a power to be exercised for the purpose, inter alia, of discharging her liabilities. When the power exists and the circumstances call for the fulfilment

of a purpose for which the power is conferred, but the repository of
the power declines to exercise the power, mandamus is the appropriate
remedy even though the repository has an unfettered discretion in
other circumstances to exercise or to refrain from exercising the power
(71 Padfield v. Minister of Agriculture, Fisheries and Food [1968] UKHL 1 ; (1968) AC 997 esp. at 1033-1034) . Mandamus will go where there is a duty to pay
money (72 Reg. v. Commissioners for Special Purposes of the Income Tax
(1888) 21 QBD 313 at 322; R. v. Lords Commissioners of Treasury (1835)
4 Ad and E 286 at 294-295 [1835] EngR 1004; (111 ER 794 at 797); Federal Commissioner of Taxation v. Official Receiver [1956] HCA 24; (1956) 95 CLR 300 at 311-312, 324) . In
this case, there is no residual discretion in the Commissioner to
refrain from making a refund in exercise of her powers under s.111(1)
once she finds that there has been an overpayment and there is a legal
liability to refund the amount found to have been overpaid.

Legal liability to refund

15. Some of the moneys overpaid by Royal were paid under a mistake.
The amounts in items (i) and (ii)(b) were paid under a mistake as to
the existence of a statutory liability to pay; the amount in item
(iii) was paid under a mistake as to the quantum of premiums to be
received or, alternatively, was paid provisionally pending final
determination of the quantum of the premiums actually received. In the
case of the amounts in items (i) and (ii)(b), 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 (73 David Securities Pty. Ltd. v. Commonwealth Bank of
Australia [1992] HCA 48; (1992) 175 CLR 353 at 399) . It would therefore be unjust
that the Commissioner should retain these amounts; they were
recoverable under the general law of restitution. As the amount in
item (iii) was paid on the understanding that the amount paid would be
adjusted when the quantum of the premiums on which the payments of
stamp duty had been calculated became known, the Comptroller was bound
to refund or to allow credit for the amount of the overpayment when
ascertained.

16. However, there was no mistake affecting the payment of the
amount in item (ii)(a). When paid, the Comptroller was entitled -
indeed, she was bound - to retain it. But, by force of the operation
attributed to the 1987 amendment, the Commissioner is retrospectively
disentitled to retain what was paid as stamp duty under the Act as it
had stood before the 1987 amendment commenced. What effect in law
does the 1987 amendment have? If the 1987 amendment is to be
effective retrospectively, the rights and liabilities of the
Commissioner and those who overpaid money must be so altered as to
place them in the same position as they would have been in had the Act
not imposed the stamp duty abolished by the 1987 amendment during the
period of the retrospective operation of the 1987 amendment. In other
words, the Commissioner is bound to refund the amount paid by way of

stamp duty exigible under the Act during the period of the retrospective operation of the 1987 amendment. It is only by creating a right to a refund of stamp duty already paid that retrospective effect can be given to the 1987 amendment. The Commissioner's liability thus arises directly from the provisions of the Taxation Acts Amendment Act 1987. I see no reason to treat the Commissioner's liability to refund the amount in item (ii)(a) as other than statutory. There is no occasion to invoke notions of common law restitution in order to discover a cause of action entitling a payer to a refund (74 This case is quite different in principle from Air Canada v. British Columbia (1989) 59 DLR (4th) 161 and Woolwich Building Society v. Inland Revenue Commissioners (1993) AC 70 where payments had been made under statutory provisions that were held to be invalid) .

17. It follows that, prima facie, all of the amounts claimed by Royal are recoverable. The Commissioner's liability to refund would have been enforceable by action if it were not for s.111(1) but, as that provision is clearly intended to prescribe the means by which the Commissioner's liabilities should be discharged, mandamus is the appropriate remedy to compel the Commissioner to refund overpayments which she is legally liable to refund.

18. However, as against the prima facie liability to repay the entire sum of $1,907,908.10 overpaid, the Commissioner raises two defences: (1) the windfall gain that Royal would make if the Commissioner were liable to refund all the money overpaid when Royal had already received from its policy holders premiums that covered the amounts paid; and (2) s.20A of the Limitation of Actions Act 1958 (Vic.).

The windfall gain defence

19. 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. It may be that, if Royal recovers the overpayments it made, the policy holders will be entitled themselves to claim a refund from Royal (75 Mutual Pools and Staff Pty. Ltd. v. The Commonwealth (1994) 179 CLR 155 at 177, 191) of so much of the overpayments made by Royal to the Commissioner as represents the amount paid to Royal by the policy holder (76 This was the effect of s.99(8) and (9) of the Act in relation to the particular refunds which the Comptroller was directed to make to insurers under s.99. The original sub-sections inserted by the Accident Compensation Act were amended by the Stamps and Business Franchise (Tobacco) (Amendment) Act 1985: s.11(3)(a) and (b)) . However that may be, no defence of "passing on" is available to defeat a claim for moneys paid by A acting on his own

behalf to B where B has been unjustly enriched by the payment and the moneys paid had been A's moneys (77 Mason v. New South Wales [1959] HCA 5; (1959) 102 CLR 108 at 136, 146; see also Woolwich Building Society v. Inland Revenue Commissioners (1993) AC at 177-178 and Air Canada v. British Columbia (1989) 59 DLR (4th), per Wilson J. (diss) at 169-170) .

Time limitations on claims for refunds

20. The Limitation of Actions Act contained a particular provision, inserted into that Act by the Limitation of Actions (Recovery of Imposts) Act 1961 (Vic.) (78 s.2. It commenced on 19 December 1961) , relating to recovery of money paid as taxes. Section 20A read as follows:
" (1) No action shall be brought to recover, from the Crown or the State of Victoria or any Minister of the Crown, or from any corporation officer or person or out of any fund to whom or which it was paid, the amount or any part of the amount of any tax, fee, charge or other impost paid under the authority or purported authority of any Act, after the expiration of twelve months after the date of payment.

(2) Sub-section (1) of this section shall not apply to any action

or proceeding brought pursuant to any specific provision of any Act providing for the mode of challenging the validity, or for the recovery of the whole or any part, of any tax, fee, charge or other impost actually paid."

No doubt this provision was inserted for the purpose of guarding the revenue in the event of a taxing statute being held to be ultra vires, for sub-s.(1) related to taxes paid under the "purported authority of any Act". But in terms s.20A was not limited to that purpose. It related also to taxes paid under the actual authority of an Act.
There are some situations where money paid and payable under an Act is refundable. Federal Commissioner of Taxation v. Official Receiver is an instance. However, none of the amounts claimed under items (i), (ii)(b) or (iii) was paid under a provision of the Act which imposed or purported to impose a duty to pay the amount so paid. An action to recover any of these amounts would not be barred by s.20A. There is no time limitation applicable to actions to recover these amounts except, perhaps, the limitations prescribed by s.5(1) of the Limitation of Actions Act or applied by analogy to that provision (79 In re Diplock; Diplock v. Wintle (1948) Ch 465 at 514; Re Croyden; Hincks v. Roberts (1911) 55 Sol Jo 632. It is therefore unnecessary to consider the question of the limitation period which might be applicable to a claim for refund of money paid under a mistake of law (as to which, see Ministry of Health v. Simpson (1951) AC 251 at 274)) . As the time limited by s.5(1) is six years from the accrual of the cause of action, the liability of the Commissioner was not statute barred at the time when the present proceedings commenced.

21. However, an action to recover the amount in item (ii)(a) would be 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 account, an action to recover the amount in item (ii)(a) answers the description of an action falling within s.20A. But, if s.20A had applied to the payments of stamp duty that had been made within the retrospective period prescribed by the 1987 amendment, the 1987 amendment could not have operated to entitle a party to a refund in respect of stamp duty paid as early as 1 July 1985. Impliedly, s.20A was excluded by the retrospective operation of the 1987 amendment. The limitation provision applicable to an action to recover the amount in item (ii)(a) is therefore par.(d) of s.5(1) of the Limitation of Actions Act, that is, "(a)ctions to recover any sum recoverable by virtue of an enactment". The limitation period applicable to such an action is six years from the accrual of the cause of action.

22. Of course, the application made by Royal is not an action for the recovery of money; it is for relief in the nature of mandamus. The relevance of the limitation periods is that they mark the periods during which a legal liability to refund would have been enforceable by action, if s.111(1) had not transformed the cause of action into a right to performance by the Commissioner of her duty to exercise her power to refund. In the exercise of the Court's jurisdiction to grant mandamus to compel the Commissioner to discharge her duty by making refunds under s.111(1), the Court should apply the six-year period of limitation, refusing relief when proceedings are not brought within that period. Here, the proceedings were brought within time and an order compelling the Commissioner to make the refund claimed was rightly made.

23. The appeal should be dismissed.

DAWSON J. The respondent, Royal Insurance Australia Limited ("Royal"), carried on an insurance business in Victoria. It was registered under s.96 of the Stamps Act 1958 (Vict.) and was obliged, in accordance with Pt II, Div.3, Subdiv.11 of that Act, to lodge with the Comptroller of Stamps monthly returns of premiums received by it. Under s.97 it was required to pay stamp duties upon those returns.

2. One class of business carried on by Royal was workers compensation insurance. In 1985 a new scheme, known as WorkCare, was introduced in Victoria to replace the existing workers compensation scheme (80 See Accident Compensation Act 1985 (Vict.)) . Under the new scheme the Accident Compensation Commission became the sole insurer for workers compensation liabilities and it became necessary to phase out stamp duties on workers compensation insurance. To this end a number of sub-sections were added to s.99 of the Stamps Act (81 See Accident Compensation Act 1985, s.276; Sched.2, "Stamps Act") , the

most significant of which was sub-s.(3) which was as follows:

"For the purposes of section 97, premiums for workers

compensation insurance in respect of the issue, renewal or taking out of policies that take effect at or after four o'clock in the afternoon on 30 June 1985 or the extension of which takes effect from that time are not chargeable with stamp duty."

Sub-section (4) provided for the payment of stamp duty on a pro rata basis in respect of premiums payable on policies for a period commencing before and expiring after 30 June 1985. Sub-sections (5) and (6) provided for application to be made for a refund of stamp duty previously paid in respect of premiums for workers compensation insurance for a period commencing before and ending after 30 June 1985: a situation commonly referred to as "straddle". Sub-section (7) provided:

"Where an application is made in accordance with sub-sections

(5) and (6), the Comptroller of Stamps shall make a refund to the applicant accordingly."

Sub-sections (8) and (9) provided for the insurance company to pass on to an insured person any part of the refunded stamp duty which had been paid by the insured to the insurance company.

3. Further amendments were made to s.99 of the Stamps Act by s.11 of the Stamps and Business Franchise (Tobacco) Amendment Act 1985 (Vict.). New sub-ss.(5) and (6) were inserted providing for application to be made for a rebate or refund. A substituted sub-s.(7) was as follows:

"Where an application is made in accordance with sub-section

(5)-

(a) if the application is for a rebate, the amount of the rebate

shall be deducted from the amount payable as stamp duty on a return lodged with the Comptroller of Stamps under section 97(2) or, if the amount of the rebate exceeds that amount of stamp duty, from the amount so payable on two or more returns; and

(b) if the application is for a refund, the Comptroller of Stamps shall make a refund to the applicant accordingly."

4. In 1987 it was realized that the exemption provided in 1985 did not cover stamp duty payable in respect of premiums upon a particular type of workers compensation insurance policy known as a cost plus

policy. Under a cost plus policy the annual premium was paid in arrears and was recalculated after the close of the relevant period of insurance so as to form, in effect, a reimbursement of claims made and paid during that period plus the cost of handling those claims. In order to extend the exemption from duty to premiums paid upon cost plus policies, s.99(3) was amended by s.8 of the Taxation Acts Amendment Act 1987 (Vict.) to embrace premiums received after 30 June 1985 in respect of liabilities incurred before 1 October 1985. The amendment was made retrospective to 30 June 1985 (82 Taxation Acts Amendment Act 1987, s.2(4)) . Unlike the 1985 amendment to s.99 which contained a "straddle" provision, the 1987 amendment exempted from duty all premiums received after 30 June 1985 in respect of liabilities insured before 1 October 1985, irrespective of when the liability was incurred.

5. Royal remained unaware of the 1985 amendments, or of their significance, for some years. It was also unaware of the 1987 amendments for about two years. It continued to include in its monthly returns the amounts of premiums which it received in respect of workers compensation insurance policies issued or renewed after 30 June 1985 and paid stamp duty upon those amounts.

6. It seems that the Comptroller of Stamps (now described as the Commissioner of State Revenue although it is convenient to continue describing her here as the Comptroller of Stamps (83 See Administrative Arrangements Act 1983 (Vict.), s.3(10)(a); Administrative Arrangements Order (No.106) 1992, Orders 4 and 5 and Schedule; Victorian Government Gazette, 29 April 1992 at 1003-1004)) gave advice to Royal which caused it to cease the payment of stamp duty on workers compensation insurance premiums. It then made a demand for a refund of the payments of stamp duty which it had made in ignorance of the statutory provisions and, when the demand was not met, commenced these proceedings seeking a refund of the relevant amount or, alternatively, a finding that the respondent had overpaid stamp duty and a refund of the amount found to have been overpaid. The relief sought was in the nature of mandamus by way of originating motion. Royal also sought a declaration that the amount in question had been overpaid and that it was entitled to a refund of that amount. The explanation for the alternative relief sought is to be found in s.111(1) of the Stamps Act which in its form at the relevant time was a general provision for the refund of overpaid stamp duty. Section 111(1) provided:

> "Where the Comptroller finds in any case that duty has been

over-paid, 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."

Since these proceedings commenced, s.111(1) has been amended to provide that the Comptroller "must refund the amount of the overpaid duty" upon an application made within three years of overpayment (84 Section 111(1) was amended by s.36 of the State Taxation (Amendment) Act 1992 (Vict.)) .

7. At the time these proceedings were commenced it was the respondent's belief that the Comptroller had made no finding that duty had been overpaid. Two days after the commencement of proceedings the Comptroller made a decision not to refund the overpaid duty. It was not in dispute before the trial judge or on appeal to the Full Court of the Supreme Court that an amount of stamp duty in the sum of $1,907,908.10 had been overpaid by Royal in respect of premiums for workers compensation insurance and that the Comptroller had decided not to refund any part of that amount.

8. The overpaid duty comprises three amounts. The first amount is $1,674,301.94 paid in respect of premiums received by Royal for cost plus policies. This amount may be divided into a figure of approximately $1,370,000 by way of duty paid on premiums received during the period from 30 June 1985 to the commencement date of the legislation which retrospectively removed the liability to pay duty in respect of that period and a figure of approximately $300,000 paid by way of duty on cost plus premiums subsequently received, being paid by Royal in ignorance of the 1987 repeal of duty on cost plus premiums.

9. The second amount is $95,426.95 overpaid by Royal upon overestimates of premiums for cost plus policies received by it before 1 July 1985 in respect of liabilities incurred up to 1 October 1985. These payments in respect of overestimates were never owing under the system which prevailed and would have been the subject of an adjustment when identified even if the amendments to the legislation had not taken place in 1985 and 1987.

10. The third amount is $138,179.21 paid as duty on premiums received by Royal for extensions after 4.00 pm on 30 June 1985 of policies (other than cost plus policies) taken out before that date.

11. Royal was unsuccessful before the trial judge, who reached the conclusion that the use of the word "may" in s.111(1) gave the Comptroller a discretion whether or not to refund overpaid tax. The Full Court on appeal came to a contrary conclusion, holding that the context in which the power to refund overpayment of stamp duty was given to the Comptroller called for its exercise when the requirement upon which its exercise was conditioned - a finding of overpayment by the Comptroller - was satisfied. I am of the view that the Full Court was correct in reaching that conclusion.

12. The predecessor of s.111(1) first appeared as s.34 of the Stamps

Act 1892 (Vict.) and was as follows:

"If after any duty has been paid under the provisions ...

relating to annual licences it shall be found within three months after the payment of such duty that too much duty has been paid the Collector of Imposts shall upon being satisfied that such overpayment has been made apply to the Treasurer of Victoria for a refund to such company person or firm of persons of the duties overpaid, and the Treasurer shall without further or other authority than this Act refund the amount thereof to the company person or firm by whom the over-payment has been made or to any person acting in its his or their behalf."
It is to be noted that, under this provision, once he was satisfied that an overpayment had been made, the Collector of Imposts had no discretion whether to apply to the Treasurer for a refund: he was required to do so. And the Treasurer was required to make the refund. There was, however, a time limit for making an application for a refund. This provision remained unchanged in substance in successive re-enactments of the Stamps Act, including several consolidations, until 1958 when it appeared as s.111 in the following form:

"If after any duty has been paid by any company person or firm

of persons under the provisions of this subdivision the Comptroller of Stamps, on application made to him within twelve months after such payment, is satisfied that such overpayment has been made shall apply to the Treasurer of Victoria for a refund to such company person or firm of persons of the duties overpaid, and the Treasurer shall without further or other authority than this Act refund the amount thereof to the company person or firm by whom the overpayment has been made or to any person acting in its his or their behalf."

Again, neither the Comptroller of Stamps nor the Treasurer had any discretion once the Comptroller was satisfied that an overpayment had been made: the steps resulting in a refund were required to be taken.

13. By an amendment made in 1978 the provision was recast to appear in the form which is relevant to these proceedings. That form is to be found in previous legislation, both Commonwealth and State (85 See Pay-roll Tax Assessment Act 1941 (Cth), s.24; Pay-roll Tax Act 1971 (Vict.), s.19) . There is nothing in the explanatory memorandum accompanying the 1978 legislation to suggest an intention to convert the obligation imposed by the previous provisions into a discretion to refund overpayments and if such a significant change in policy were intended, it might be expected to have received some attention. What is evident is that the new provision was intended to remove the requirement that the Comptroller of Stamps should make application to the Treasurer for the refund of overpayments and to allow the

Comptroller herself to make the refund. In that context the use of the word "may" is explicable in terms of enabling the Comptroller to do something which she was previously unable to do, rather than in terms of replacing an obligation with a discretion.

14. The word "may" is frequently merely facultative, leaving open the question whether the faculty bestowed must be exercised when the occasion prescribed for its exercise has occurred or whether its exercise is discretionary. The answer to that question is to be determined by reference to the nature of the provision and its context in the relevant legislation (86 See Ward v. Williams [1955] HCA 4; (1955) 92 CLR 496 at 505-506) . As Lord Selborne said in Julius v. Lord Bishop of Oxford (87 (1880) 5 App Cas 214 at 235) :
"The question whether a Judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved aliunde, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power."

15. In Finance Facilities Pty. Ltd. v. Federal Commissioner of Taxation (88 [1971] HCA 12; (1971) 127 CLR 106 at 134) Windeyer J. pointed out that the word "may", when used of a person having an official position, "is a word of permission, an authority to do something which otherwise he could not lawfully do". But the word "may" merely confers the authority and whether the authority must be exercised in the prescribed circumstances or whether its exercise is discretionary depends upon the nature of the authority itself (89 See Macdougall v. Paterson [1851] EngR 970[1851] EngR 970; ; (1851)
11 CB 755 (138 ER 672)) .

16. The condition prescribed for the exercise of the authority conferred by s.111(1) is a finding of overpayment and it is, in my view, not to be concluded that when such a finding is made there is a discretion conferred, rather than a duty imposed, upon the Comptroller to refund the overpayment. Section 111(1) is a remedial provision and, even without an historical explanation, it should be construed, so far as its language will allow, to the advantage of those whom it was intended to benefit (90 See Bull v. Attorney-General for New South Wales [1913] HCA 60; ; (1913) 17 CLR 370 at 384 per Isaacs J) . But when regard is had to the history of the provision, I do not think that it is possible to regard the section as replacing a previous obligation to refund overpayments with a discretion, particularly when the use of the word "may" is wholly explicable by an evident desire to confer upon the Comptroller an authority which was previously exercisable only by the Treasurer. To borrow the words of Windeyer J. in Finance Facilities Pty. Ltd. v. Federal Commissioner of Taxation (91 (1971) 127 CLR at 134) , the scope of the permission or power given to the Comptroller is circumscribed in this instance both by context and circumstances.

17. No significance can be attached to the use of the word "shall" in s.99(7) of the Stamps Act in relation to the making of a refund in both that sub-section's original and amended forms. Sub-section (7) (which does not apply in the present case) was added in 1985 after the commencement of the Interpretation of Legislation Act 1984 (Vict.). Section 45 of that Act provides that, where in an Act passed after the commencement of the Interpretation of Legislation Act the word "may" is used in conferring a power, that word shall be construed as meaning that the power so conferred may be exercised, or not, at discretion, and, where in such an Act the word "shall" is used in conferring a power, it shall be construed as meaning that the power must be exercised. Section 45 has no application to s.111(1) in its relevant form which pre-dates the Interpretation of Legislation Act, but it serves to explain the choice of the word "shall" in s.99(7).

18. The Comptroller argued that a number of considerations might justify her withholding a refund of overpaid stamp duty and submitted that the possibility of these situations arising explains why it was the intention of the legislature in s.111(1) to confer a discretion rather than impose an obligation. Chief among these considerations - indeed it was said in argument to be the relevant consideration in this case - was the impossibility of ensuring that, where the duty had been passed on to some other person, any refund should be similarly passed on. It was said in the present case that the unlikelihood of Royal's passing on any refund would result in a windfall to it because the burden of the duty had in fact been borne by its customers. But that is a situation for which the legislature might have provided had it wished to do so and its failure to do so does not indicate an intention to give to the Comptroller a discretion to retain payments of stamp duty which were not made pursuant to any legal obligation. Section 99(8) and (9) when enacted in 1985 provided for an insurance company to pass on the amount of any refund to those who actually bore the burden of the overpayment and, indeed, a provision such as s.111(1) is capable of adaptation to meet that situation. An example is provided by s.26(1) of the Sales Tax Assessment Act (No.1) 1930 (Cth) which, as amended in 1933, provided:

> "Where the Commissioner finds in any case that tax has been
> overpaid and is satisfied that the tax has not been passed on by the taxpayer to some other person, or, if passed on to some other person, has been refunded to that person by the taxpayer, the Commissioner may refund the amount of tax found to be overpaid."

The absence of any qualification of this kind in s.111(1) suggests to my mind an obligation to refund the overpaid duty rather than a discretion to withhold repayment in situations which the legislature might have specified but did not.

19. It must be borne in mind that the occasion for the exercise of the authority conferred by s.111(1) is the finding of an overpayment of stamp duty; that is to say, a finding that the Comptroller received moneys to which she had no entitlement. The sub-section must be read either as requiring her to refund the overpayment or as conferring a discretion upon her to keep the moneys notwithstanding that she had no entitlement to receive them. The principle that a statute will not be read as authorizing expropriation without compensation unless an intention to do so is clearly expressed has been described as a "firmly established rule of law" (92 See C.J. Burland Pty. Ltd. v. Metropolitan Meat Industry Board [1968] HCA 77; (1968) 120 CLR 400 at 406 per Kitto J).

It is at least an analogous proposition that clear words are

required to authorize the retention of moneys received without any entitlement and I, for my part, would not construe a statute as conferring a discretion to do so unless such an intention were made explicit.

20. Nor do I think it can be said that s.111(1) confers a discretion which must then be exercised in accordance with the law relating to restitution, for that would be to confer no discretion at all. Clearly the sub-section authorizes the making of a refund, and is not confined merely to conferring capacity upon the Comptroller should she otherwise be under a duty to do so. The occasion for the exercise of the authority is identified. The only question which arises is whether the authority must be exercised when the necessary finding of overpayment has been made or whether its exercise is discretionary. If the common law, rather than the sub-section, were to govern the Comptroller's obligation to make a refund, then no doubt a refund would now be required. That would be the result of applying the decision of this Court in David Securities Pty. Ltd. v. Commonwealth Bank of Australia (93 [1992] HCA 48; (1992) 175 CLR 353) where it was held that the principle of restitution upon the basis of unjust enrichment extends to moneys paid under a mistake of law as well as moneys paid under a mistake of fact. However, as the law stood, or at least was believed to have stood, before David Securities, moneys paid under a mistake of law were not recoverable and Royal was not entitled to recover upon the basis of a mistake of law. And, if the common law of restitution governed the Comptroller's obligation under s.111(1), that result must have been intended by the legislature, because s.111(1) came into force before the decision in David Securities and the legislature cannot be taken to have anticipated that decision.

21. Moreover, assuming that the common law was intended to govern the Comptroller's obligations under s.111(1) and even assuming that the effect of that sub-section changed following David Securities, the bulk of Royal's claim was not paid under a mistake of law or fact. Of the total amount of $1,674,301.94, some $1,370,000 was paid in respect

of premiums received for cost plus policies between 30 June 1985 and the commencement of the retrospective legislation in 1987. That amount of duty was payable according to law at the time it was paid and only became an overpayment when the legislation was retrospectively amended. It does not seem to me that the retrospective amendment converted the payments of duty making up the amount of $1,370,000 into payments made under a mistake of law, however much the amendment retrospectively removed the Comptroller's entitlement or authority to receive those payments. As Deane J. observed in University of Wollongong v. Metwally (94 [1984] HCA 74; (1984) 158 CLR 447 at 478) :

> "A parliament may legislate that, for the purposes of the law

which it controls, past facts or past laws are to be deemed and treated as having been different to what they were. It cannot, however objectively, expunge the past or 'alter the facts of history'".

It need hardly be added that the legislation in question did not deem the payments made by Royal to have been made under a mistake of fact or law.

22. No question such as that which arose in Air Canada v. British Columbia (95 (1989) 59 DLR (4th) 161) would arise in the present case. In the Canadian case a majority of the Supreme Court held that, whilst moneys paid under a mistake of law might be recovered upon the basis of unjust enrichment, that doctrine did not extend to moneys paid under unconstitutional legislation. No question of unconstitutionality arises in this case. The application of the common law would also raise the question whether the principle of unjust enrichment can be invoked when moneys paid under a mistake of fact or law constitute an expense which has been passed on to someone else, as the respondent insurer is said to have passed on the overpayments of stamp duty to its insured in this case. The better view would seem to be that it is the unjust enrichment of the payee rather than loss suffered by the payer which should govern entitlement to restitution, but, having regard to the view which I take, it is unnecessary to determine that question in these proceedings.

23. Were the Comptroller to be governed by the common law rather than s.111(1) with regard to her obligation, if any, to refund the overpaid stamp duty, the remedy available to the respondent would be of a quite different nature. The respondent would then have an action for money had and received based upon a right to restitution. On the other hand, were the Comptroller's exercise of her authority discretionary under s.111(1), the remedy available to Royal would be confined in the first place to requiring the Comptroller to exercise her discretion and then to contesting the validity of its exercise by way of judicial review. The confined grounds upon which an

administrative decision may be reviewed by a court would preclude the substitution of a decision based upon restitutionary principles. Of course, a court would require the discretion to have been exercised having regard to the scope and purpose of the relevant legislation and to be within the confines formulated in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation (96 [1947] EWCA Civ 1; (1948) 1 KB 223) with regard to reasonableness. But that is something different from an application of the common law relating to restitution. That may be seen from the decision in Reg. v. Tower Hamlets London Borough Council; Ex parte Chetnik Developments Ltd. (97 (1988) AC 858) where it was held that the purpose of legislation, which conferred a discretion upon a borough council to refund overpaid rates, extended to the repayment of rates paid under a mistake of law. The exercise by the council of its authority was, however, discretionary notwithstanding that it was to be governed by the scope and purpose of the legislation in question, as well as the principle of reasonableness as applied to administrative discretions. True it is that Lord Goff of Chieveley pointed out that the general principles of the law of restitution should be of assistance in the exercise of the discretion, but it is clear that he did not regard those principles as necessarily determining the outcome.

24. However, as I have said, I do not regard s.111(1) as conferring a discretion. Once the Comptroller found that duty had been overpaid, she was under an obligation to refund it. The necessary appropriation to enable her to do so was to be found in s.166D of the Stamps Act which provided:

"If the Comptroller of Stamps becomes liable to pay amounts in accordance with the provisions of this Act, those amounts shall be paid from the Consolidated Fund which is hereby to the necessary extent appropriated accordingly."

It may observed that, in the light of s.166D, if the Comptroller's obligation to refund overpaid tax were dependent upon the common law, there would seem to be no work for s.111(1) to do and its existence would be superfluous.

25. It is necessary then to turn to s.20A(1) of the Limitation of Actions Act 1958 (Vict.). That sub-section provides (98 A new s.20A has since been substituted into the Limitation of Actions Act 1958 (Vict.) by s.4 of the Limitation of Actions (Amendment) Act 1993 (Vict.)) : "No action shall be brought to recover, from the Crown or the State of Victoria or any Minister of the Crown, or from any corporation officer or person or out of any fund to whom or which it was paid, the amount or any part of the amount of any tax, fee, charge or other impost paid under the authority or purported authority of any Act, after the expiration of twelve months after the date of payment."

26. It was pointed out on behalf of Royal that s.20A was inserted in the Limitation of Actions Act in 1961 to afford protection to the State of Victoria against its taxing Acts being found to be unconstitutional (99 cf. Mason v. New South Wales [1959] HCA 5; (1959) 102 CLR 108).

However, even accepting that to be the reason for the legislation,

its ambit clearly extends beyond taxes paid under unconstitutional legislation and there is no occasion to read down its express words in that regard. Nevertheless, the sub-section is confined to taxes etc. paid "under the authority or purported authority of any Act" and those words are not apt to describe the overpayment of duty in this case. Accepting, as I do, that the retrospective legislation in 1987 removed any requirement to pay or authority to receive duty on premiums received in respect of cost plus policies during the period from 30 June 1985 until the commencement of the legislation, none of the duty overpaid by Royal could be described as paid "under the authority or purported authority of any Act". There simply was no Act conferring or purporting to confer authority with respect to the duty overpaid by Royal. Assuming, without deciding, that s.20A(1) was capable of applying, directly or indirectly, in proceedings by way of judicial review, that sub-section had no application in the circumstances of this case. It was not contended that any limitation period otherwise prescribed by the Limitation of Actions Act had any application in the present circumstances.

27. For these reasons, I would dismiss the appeal.

TOOHEY J. For the reasons given by Brennan J., the appeal should be dismissed.

McHUGH J. I agree that the appeal should be dismissed for the reasons given by Brennan J.

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