

# THE PUBLIC LAW OF RESTITUTION

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*Restitution is the body of law that responds to unjust enrichment. It is a private law doctrine but, like other fields of private law such as the law of torts, it intersects significantly with public law. This article examines the seminal case of Woolwich Equitable Building Society v Inland Revenue Commissioners, in which the House of Lords held that an unlawful demand for a payment of tax which was not due was an unjust factor capable of making out unjust enrichment and enabling the claimant to obtain restitution of the money paid and interest. This was a significant step forward for restitution generally but was of specific interest to public lawyers, since it links an ultra vires demand to a monetary remedy, something which is not available in judicial review. This article will look at the basis of the Woolwich factor and whether and how it might be accepted into Australian law.*

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## I INTRODUCTION

Restitution is the response to unjust enrichment.<sup>1</sup> Restitution has been available for a long time,<sup>2</sup> but, as a body of law, it has only relatively recently been acknowledged widely. In this respect, it shares considerable common ground with soft law as it exists at the domestic, rather than international, level.<sup>3</sup> The interaction of these two legal fields is a central theme of this article.

To the extent that such labels are helpful, restitution is generally seen as a private law discipline,<sup>4</sup> encompassing elements of both equity and the common law.<sup>5</sup> Private law, however, has limits. Some of the greatest challenges in legal thinking are posed by the interaction of private law with public institutions.<sup>6</sup> Although it is important that a party should be able to obtain restitution as a response to a public authority's unjust enrichment at a claimant's expense, the common law embraced that principle only relatively

<sup>1</sup> Birks' definition of restitution, albeit incomplete, was 'the response which consists in causing one person to give up to another an enrichment received at his [or her] expense or its value in money': Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, revised ed, 1989) 13 (emphasis altered); see generally at 1–16. Birks later clarified that restitution does not *only* respond to unjust enrichment, even though it *always* responds to unjust enrichment: Peter Birks, *Unjust Enrichment* (Oxford University Press, 2<sup>nd</sup> ed, 2005) 3–5.

<sup>2</sup> See, eg, *Moses v Macferlan* (1760) 2 Burr 1005; 97 ER 676.

<sup>3</sup> As long ago as 1944, Robert Megarry noted that 'administrative quasi-legislation' had invaded a legal world previously 'bounded by Acts of Parliament, Statutory Rules and Orders and judicial decisions': R E Megarry, 'Administrative Quasi-Legislation' (1944) 60 *Law Quarterly Review* 125, 125–6. Since then, the concept of domestic soft law has been discussed occasionally but has frequently seemed to 'sleep': Robin Creyke and John McMillan, 'Soft Law v Hard Law' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 377, 377.

<sup>4</sup> The Hon Paul Finn has recently noted the difficulties inherent in restitution for those less familiar with its intricacies, stating that '[e]ven the correct nomenclature has produced a battleground': Paul Finn, 'Common Law Divergences' (2013) 37 *Melbourne University Law Review* 509, 520 n 65. Finn has a better understanding of restitution than most, having edited a celebrated collection of essays on the subject: see P D Finn (ed), *Essays on Restitution* (Law Book, 1990).

<sup>5</sup> See Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3<sup>rd</sup> ed, 2011) 3, citing Robert Goff and Gareth Jones, *The Law of Restitution* (Sweet & Maxwell, 1966) ('*The Law of Restitution* (1<sup>st</sup> ed)').

<sup>6</sup> Most notably in tort law: see, eg, R P Balkin and J L R Davis, *Law of Torts* (LexisNexis Butterworths, 5<sup>th</sup> ed, 2013) 222–33 [7.31]–[7.36]; Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) ch 10. Significant issues also arise in relation to contracting: see Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 5<sup>th</sup> ed, 2013).

recently. The seminal case of *Woolwich Equitable Building Society v Inland Revenue Commissioners* ('Woolwich')<sup>7</sup> changed the law of restitution as it had developed in the United Kingdom up to that point by holding that an unlawful demand for a payment of tax which was not due was an unjust factor capable of making out unjust enrichment and enabling the claimant to obtain restitution of the money paid<sup>8</sup> and interest. The House of Lords' 'bold step' changed at a stroke the prevailing circumstance that money paid in error to government was 'surprisingly difficult to recover'.<sup>9</sup> It also created a special, government-only basis for claiming restitution.

*Woolwich* has been welcomed almost universally by judicial and academic commentators in the United Kingdom, making it somewhat surprising that it 'has had a mixed reception internationally'.<sup>10</sup> In some ways, Australia is emblematic of this reception, being in the peculiar position of still not having decided whether to accept *Woolwich* at all, although there is no reason why Australian courts ought not to apply *Woolwich* in the appropriate case.<sup>11</sup>

However, this article will seek to examine a broader point. *Woolwich* can be seen as an exception to the general taxonomy of restitution. The 'unjust factor' to which restitution is a response in the case of a *Woolwich* claim is not based on the absence of the claimant's intent to transfer money; it has some other basis.<sup>12</sup> This article will ask whether the basis for restitution first established in *Woolwich* can respond to the uniquely persuasive powers of government and public authorities in circumstances beyond overpayment of

<sup>7</sup> [1993] AC 70. The Court of Appeal and House of Lords decisions were reported together.

<sup>8</sup> In *Woolwich*, this totalled almost £57 million: *ibid* 75.

<sup>9</sup> Steven Elliott, Birke Häcker and Charles Mitchell, 'Introduction' in Steven Elliott, Birke Häcker and Charles Mitchell (eds), *Restitution of Overpaid Tax* (Hart Publishing, 2013) 3, 3. The authors also noted the significance in this regard of the House of Lords abolishing mistake of law as a bar to restitution: at 4, citing *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349.

<sup>10</sup> Elliott, Häcker and Mitchell, above n 9, 5 n 19.

<sup>11</sup> Australia's possible adoption of *Woolwich* has been considered elsewhere: see, eg, Derek Wong, 'The High Court and the *Woolwich* Principle: Adoption or Another Bullet That Cannot Be Bitten?' (2011) 85 *Australian Law Journal* 597; Simone Degeling, 'Restitution of Unlawfully Exacted Tax in Australia: The *Woolwich* Principle' in Steven Elliott, Birke Häcker and Charles Mitchell (eds), *Restitution of Overpaid Tax* (Hart Publishing, 2013) 313; Margaret Brock, 'Restitution of Invalid Taxes — Principles and Policies' (2000) 5 *Deakin Law Review* 127, 134–40.

<sup>12</sup> Webb notes, however, that there is a distinction to be drawn between an unjust factor on the one hand and a reason for restitution on the other: Charlie Webb, 'Reasons for Restitution' in Steven Elliott, Birke Häcker and Charles Mitchell (eds), *Restitution of Overpaid Tax* (Hart Publishing, 2013) 93, 94–7.

tax. It will also examine whether *Woolwich* has revealed a basis for restitution for unjust enrichment consequent on the use of soft law. More generally, this article is designed to remind public lawyers of the growing importance of restitution to a legal sphere with which it traditionally had little to do.

## II THE PURPOSE AND EFFECT OF SOFT LAW REGULATION

Soft law is a term which encompasses much and whose meaning is often contested. At the level of domestic legal regimes,<sup>13</sup> the very name ‘soft law’ sounds like an oxymoron: if law is soft, is it not therefore prevented from being law? While there may be some force to such an objection on a strictly formalist level, lawyers have understood for a long time<sup>14</sup> that some communications from public bodies are treated as though they are law, even though they lack the force of legislation or delegated legislation. Hence, representations which lack the force of law but are nonetheless treated as though they have it can be characterised as soft law. Soft law is both highly effective as a means of regulation, and inherently risky for those who are regulated by it.

Most considerations of soft law focus on the effectiveness of its role as a regulatory instrument,<sup>15</sup> a subject on which there is already a burgeoning literature.<sup>16</sup> This article will not seek to add to that literature but will instead

<sup>13</sup> Most of the academic writing about soft law is confined to its roles in international law. This has generated literally dozens of articles and book chapters but few, if any, of these have anything to say about the domestic application of soft law.

<sup>14</sup> At least since the publication of Megarry, above n 3. Professor Arthurs noted examples of ‘codified discretion’ dating back to the 19<sup>th</sup> century: H W Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press, 1985) 136.

<sup>15</sup> See, eg, Commonwealth Interdepartmental Committee on Quasi-Regulation, *Grey-Letter Law: Report* (1997); Administrative Review Council, *Administrative Accountability in Business Areas Subject to Complex and Specific Regulation*, Report No 49 (2008).

<sup>16</sup> There are many examples: see, eg, Julia Black, ‘Constitutionalising Self-Regulation’ (1996) 59 *Modern Law Review* 24; Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart Publishing, 2007); Colin Scott, ‘Standard-Setting in Regulatory Regimes’ in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 104; Karen Yeung, ‘The Regulatory State’ in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 64; Dawn Oliver, Tony Prosser and Richard Rawlings (eds), *The Regulatory State: Constitutional Implications* (Oxford University Press, 2010); Fiona Haines, *The Paradox of Regulation: What Regulation Can Achieve and What It Cannot* (Edward Elgar, 2011); Andrew Green, ‘Regulations and Rule Making: The Dilemma of Delegation’ in Colleen M Flood and Lorne Sossin (eds), *Administrative Law in Context* (Emond Montgomery Publications, 2<sup>nd</sup> ed, 2013) 125; Gail Pearson, ‘Business Self-Regulation’ (2012) 20 *Australian Journal of Administrative Law* 34.

ask whether restitution can lie as a remedy where a claimant has paid a sum of money to a public authority in reliance on a soft law instrument, unsupported by hard law regulation and therefore without legal authority. For example, this might occur where a public authority lacked a legal basis for demanding money that a claimant paid in compliance with soft law.

*Woolwich* itself was not a soft law case, since Woolwich Equitable Building Society ('Woolwich EBS') made the relevant tax payments in response to the *Income Tax (Building Societies) Regulations 1986* (UK) SI 1986/482.<sup>17</sup> However, for the purposes of this argument, let us take as an example a slightly amended version of the facts of *Woolwich*, in which the tax liabilities of building societies, in as much as they were affected by tax deductions and interest paid to members, were not covered by the applicable tax legislation but were rather the subject of non-statutory arrangements between the Inland Revenue ('Revenue') and individual building societies. The Revenue had power under legislation to change the mechanism by which it collected income tax on deposits into building societies, but that power was explicitly not to be used for the purpose of *raising* additional tax revenue. Contrary to the legislation, the Revenue issued soft law guidelines which were designed to collect more than the tax presently owed, in order to prevent taxpayers from receiving a windfall.<sup>18</sup> One building society concluded that the Revenue's proposed collection of tax would be unlawful due to the inconsistency of its guidelines with the statute,<sup>19</sup> but that it would pay anyway and attempt to recover the sum paid and interest on that sum from the Revenue later. The building society was influenced in making this choice both by the fact that no other building society was challenging the validity of the Revenue's assess-

<sup>17</sup> Woolwich EBS first challenged the regulations when they were in draft form and they could at that stage have been characterised as soft law: see *Woolwich* [1993] AC 70, 76 (Glidewell LJ), 104 (Ralph Gibson LJ). Nonetheless, the better view is that *Woolwich* was a case relating to a hard law demand.

<sup>18</sup> While the collection of monies in *Woolwich* was unlawful due to the invalidity of the regulations issued by the Revenue, Mason, Carter and Tolhurst have noted that 'Federations with controlled constitutions, like Australia, are likely to throw up problems of a completely different order' because a judicial finding of inconsistency between a statute (or regulation) and the *Australian Constitution* renders the statutory instrument void ab initio: Keith Mason, J W Carter and G J Tolhurst, *Mason and Carter's Restitution Law in Australia* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2008) 793 [2027]. A finding of unconstitutionality does not, on the other hand, result in a judicial order being rendered void ab initio: *New South Wales v Kable* (2013) 298 ALR 144, 154 [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). These difficulties do not arise on the facts under discussion.

<sup>19</sup> The inconsistency of the Revenue's tax assessment with art 4 of the *Bill of Rights 1689*, 1 Wm & M sess 2, c 2 ('*Bill of Rights 1689*') is of disputed relevance and will be discussed below: see Part V(A).

ment and by a desire to dispel any belief in the marketplace that it did not have the funds to meet the tax liability for which it had been assessed. In other words, the identity of the authority making the demand was of greater practical importance to the building society than its assessment of the legality of the demand.

This is a paradigm example of how soft law works and why it is so effective as a method of regulating behaviour. People — and indeed sophisticated businesses — are loath to act contrary to the stated requirements of public authorities, even if they have sound reasons for believing them either to be wrong or unsupported in law. In other circumstances, people have been prepared to put their faith in the opinions of a public authority given in the form of soft law, only then to fall foul of the contrary legal position.<sup>20</sup> Requests and suggestions made in soft law therefore often assume the character of demands or requirements. It is the nature of the public authority which issues the soft law that makes people treat mere guidance as though it were law.

It is clear, then, that soft law may cause people to make payments to public authorities which those authorities lack the legal authority to demand. What can be done to recover sums of money paid under the operation of soft law mechanisms by which public authorities are unjustly enriched?

### III UNJUST FACTORS CAPABLE OF LEADING TO RESTITUTION

In the United Kingdom, a claim for unjust enrichment is able to be based solely upon the unlawful act of a public authority.<sup>21</sup> This principle, and specifically the claim which was successful in *Woolwich*,<sup>22</sup> have yet to be accepted in Australia and there are significant obstacles in the path of it being so. The first of these is the characterisation of the Australian judiciary as somewhat conservative. Virgo has described the decision in *Woolwich* as an

<sup>20</sup> See, eg, *R (Davies) v Revenue and Customs Commissioners* [2011] 1 WLR 2625.

<sup>21</sup> *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] 2 AC 337, 374–5 [79] (Lord Walker JSC) (*FII Group Litigation*). The House of Lords had previously required in *Woolwich* [1993] AC 70 that there be a demand for payment. However, it was implicit in Lord Goff's reasoning that 'when the revenue makes a demand for tax, that demand is implicitly backed by the coercive powers of the state': at 172. His Lordship further stated that 'the simple fact that the tax was exacted unlawfully should prima facie be enough to require its repayment': at 173. Lord Goff appeared to use the language of the Revenue having made a demand only in order to avoid dealing with the rule barring recovery of money paid under mistake of law, which at that time remained in effect: see at 176.

<sup>22</sup> As Webb has shown, to talk of a '*Woolwich* principle' is to ignore the opacity of the reasoning employed by the majority in *Woolwich*, which does not reveal a single principle upon which future claimants might rely: Webb, above n 12, 97–100.

example of ‘the creativity of the House of Lords’.<sup>23</sup> Australian courts are now rarely described in these terms; on the contrary, they have in recent years been more likely to be criticised for their lack of creativity.<sup>24</sup> Michael Taggart noted that even when ‘Australia led the common law world in its innovation in administrative law’ it was due to ‘the work of Parliament, not “adventurous judges” in their judicial capacity’.<sup>25</sup> Having said that, it would be false to suggest that *Woolwich* was solely the result of judicial adventurism and creativity, the likes of which we cannot hope to see replicated in Australia. It is possible that the decision in *Woolwich* was driven less by creative urges than by a calculated judicial determination to seize a moment which, if lost, would ‘be gone forever’.<sup>26</sup> Understood in that light, the reasoning that emerged in *Woolwich* represents a policy choice and there is no compelling argument against Australia adopting it.

Secondly, a litigant who wished to argue for the application of *Woolwich* in Australia would first need to prove the standard requirements of unjust enrichment,<sup>27</sup> which are established by answering the following questions:

- 1 Was the defendant enriched?
- 2 Was it at the expense of the claimant?
- 3 Was it unjust?
- 4 Does the defendant have a defence?<sup>28</sup>

<sup>23</sup> Graham Virgo, ‘The Law of Unjust Enrichment in the House of Lords: Judging the Judges’ in James Lee (ed), *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart Publishing, 2011) 169, 189.

<sup>24</sup> Any generalised accusation that the High Court lacks creativity, specifically in regard to unjust enrichment, would overlook the groundbreaking role of the High Court’s decision, and particularly the judgment of Deane J, in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221.

<sup>25</sup> Michael Taggart, ‘“Australian Exceptionalism” in Judicial Review’ (2008) 36 *Federal Law Review* 1, 3.

<sup>26</sup> See *Woolwich* [1993] AC 70, 176 (Lord Goff).

<sup>27</sup> Birks, *Unjust Enrichment*, above n 1, 39. See also *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 516–17 [30] (French CJ, Crennan and Kiefel JJ); Lord Woolf et al, *De Smith’s Judicial Review* (Sweet & Maxwell, 7<sup>th</sup> ed, 2013) 1028 [19-077]; Elliott, Häcker and Mitchell, above n 9, 7.

<sup>28</sup> Birks included an additional element which asked ‘[w]hat kind of right did the claimant acquire?’. Birks, *Unjust Enrichment*, above n 1, 39. However, this was missing from the taxonomy set out by Lord Steyn in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 227. In that case, Lord Hoffmann also included an additional element, ‘whether

The first two elements will usually be easily made out where, as in *Woolwich* itself, a transfer of money has been made from one party to the other.<sup>29</sup>

What is the unjust factor that will allow restitution to be granted? Two unjust factors upon which a party might seek to rely to establish a claim, where a payment which is not due but has been made consequent on the influence of soft law, are duress and mistake.<sup>30</sup> These factors focus on the intention of the claimant to transfer wealth.<sup>31</sup> Where a public authority has exacted payments from a claimant unlawfully, it remains susceptible to 'standard unjust factors' such as duress and mistake just as any other party would.<sup>32</sup>

### A Duress

Duress is the employment of an illegitimate threat to impose pressure on a claimant which causes the claimant to confer a benefit on the defendant.<sup>33</sup> It follows that not every threat is sufficient to establish duress. For example, a threat to sue unless money is paid will almost always be regarded as legitimate.<sup>34</sup> In *Woolwich*, Lord Goff cited *William Whiteley Ltd v The King*<sup>35</sup> as authority for the proposition that

where money has been paid under pressure of actual or threatened legal proceedings for its recovery, the payer cannot say that for that reason the money has been paid under compulsion and is therefore recoverable by him. If he chooses to give way and pay, rather than obtain the decision of the court on the

there are nevertheless reasons of policy for denying a remedy': at 234. See also Virgo, above n 23, 180.

<sup>29</sup> See, eg, *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 514–15 [27] (French CJ, Crennan and Kiefel JJ). Of course, nothing is ever entirely that simple. Some of the complexities are pointed out in Elliott, Häcker and Mitchell, above n 9, 7–9.

<sup>30</sup> Elliott, Häcker and Mitchell noted that, apart from the *Woolwich* principle itself, duress, *colore officii* and mistake will usually be the relevant unjust factors where tax has been paid which is not due: Elliott, Häcker and Mitchell, above n 9, 9–10.

<sup>31</sup> Birks, *Unjust Enrichment*, above n 1, 105–6.

<sup>32</sup> Burrows, *The Law of Restitution*, above n 5, 499.

<sup>33</sup> See generally *ibid* 266–80.

<sup>34</sup> *Ibid* 281; *James v Commonwealth* (1939) 62 CLR 339, 373 (Dixon J).

<sup>35</sup> (1909) 101 LT 741.

question whether the money is due, his payment is regarded as voluntary and so is not recoverable.<sup>36</sup>

In the earlier Australian case of *James v Commonwealth*, Dixon J had said to similar effect:

I do not think that a bona-fide assertion as to the state of the law and an intention to resort to the courts made known to the third party can be considered a wrongful inducement or procurement. The situation is simply that the Executive, charged with the execution of the law, under a bona-fide mistake as to the state of the law, proposes to proceed by judicial process. ... *An intention to put the law in motion cannot be considered a wrongful procurement or inducement, simply because it turns out that the legal position maintained was ill founded.*<sup>37</sup>

Professor Burrows said that the Revenue's demands in *Woolwich* 'appeared not to have been supported by any illegitimate threats so as to constitute duress',<sup>38</sup> a view that Nolan J had taken at trial.<sup>39</sup> In the absence of *illegitimate* pressure (an 'element of impropriety'<sup>40</sup> in Dixon J's terms), the persuasive nature of *any* request made by the Revenue was irrelevant to establishing duress,<sup>41</sup> and it was on this basis that Nolan J,<sup>42</sup> Ralph Gibson LJ<sup>43</sup> (in 'a powerful dissenting judgment'<sup>44</sup> in the Court of Appeal), Lord Keith of Kinkel<sup>45</sup> and Lord Jauncey<sup>46</sup> (both dissenting in the House of Lords) found against Woolwich EBS. Importantly, however, the contrary decision of the majority in the

<sup>36</sup> *Woolwich* [1993] AC 70, 165. See also *Mason v New South Wales* (1959) 102 CLR 108, 144 (Windeyer J).

<sup>37</sup> (1939) 62 CLR 339, 373 (emphasis added).

<sup>38</sup> Burrows, *The Law of Restitution*, above n 5, 502.

<sup>39</sup> *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1989] 1 WLR 137, 144 ('*Woolwich (First Instance)*').

<sup>40</sup> *James v Commonwealth* (1939) 62 CLR 339, 373.

<sup>41</sup> See Tania Voon, 'Restitution from Government in Australia: *Woolwich* and Its Necessary Boundaries' (1998) 9 *Public Law Review* 15, 17; Burrows, *The Law of Restitution*, above n 5, 502.

<sup>42</sup> *Woolwich (First Instance)* [1989] 1 WLR 137, 144.

<sup>43</sup> *Woolwich* [1993] AC 70, 135.

<sup>44</sup> *Ibid* 163 (Lord Goff).

<sup>45</sup> *Ibid* 161–2.

<sup>46</sup> *Ibid* 192–4.

House of Lords was not intended to, and did not, displace duress as an unjust factor capable of establishing a right to restitution.<sup>47</sup>

One variety of duress which is particular to public authorities is duress through a demand made *colore officii*,<sup>48</sup> referring to pressure which is applied illegitimately under the colour of office.<sup>49</sup> It is sometimes described in terms of extortion, presumably to set it apart from other forms of duress,<sup>50</sup> although the true distinguishing feature is the power imbalance between the defendant and the claimant.<sup>51</sup> The immensity of the power of the state, which allows it to impose its will on individuals, lies at the heart of the *colore officii* doctrine, although Windeyer J pointed out in *Mason v New South Wales* that, whereas ‘all forms of extortion will ground an action for money had and received, all forms of extortion by officials are not properly described as being by colour of office’.<sup>52</sup>

The claimant in *Woolwich* was not subject to duress *colore officii* within the law as it stood because the Revenue had not insisted unlawfully on Woolwich EBS making the payment as a precondition to the Revenue performing its public duties,<sup>53</sup> although Lord Browne-Wilkinson said that he saw no reason for the authorities to have construed this point so narrowly in regard to payments consequent on unlawful demands.<sup>54</sup> However, it has been suggested subsequently that cases in which findings were made of duress *colore officii* are ‘probably of no practical importance after the *Woolwich* decision’, if it is seen

<sup>47</sup> Nelson Enonchong, ‘Restitution from Public Authorities: Any Room for Duress?’ in Steven Elliott, Birke Häcker and Charles Mitchell (eds), *Restitution of Overpaid Tax* (Hart Publishing, 2013) 71, 83.

<sup>48</sup> Professor Burrows has said that this terminology tends to cause confusion because it can also be used in other, wider senses and is therefore best avoided: Burrows, *The Law of Restitution*, above n 5, 500.

<sup>49</sup> See Peter Birks, ‘Restitution from the Executive: A Tercentenary Footnote to the *Bill of Rights*’ in P D Finn (ed), *Essays on Restitution* (Law Book, 1990) 164, 178; Mason, Carter and Tolhurst, above n 18, 781–2 [2011].

<sup>50</sup> See *Sargood Brothers v Commonwealth* (1910) 11 CLR 258, 301, 303–4 (Isaacs J); *Moses v Macferlan* (1760) 2 Burr 1005, 1012; 97 ER 676, 681 (Lord Mansfield); *Mason v New South Wales* (1959) 102 CLR 108, 139–40 (Windeyer J). See also Richard Moules, *Actions Against Public Officials: Legitimate Expectations, Misstatements and Misconduct* (Sweet & Maxwell, 2009) 300–3 [8-011]–[8-013]. Lord Keith of Kinkell referred to *Sargood Brothers v Commonwealth* (1910) 11 CLR 258 as ‘a clear case of extortion *colore officii*’: *Woolwich* [1993] AC 70, 162.

<sup>51</sup> Brock, above n 11, 131.

<sup>52</sup> (1959) 102 CLR 108, 140.

<sup>53</sup> See *ibid.* Cf P P Craig, ‘Compensation in Public Law’ (1980) 96 *Law Quarterly Review* 413, 430–1.

<sup>54</sup> *Woolwich* [1993] AC 70, 198.

as allowing restitution of any payment to government consequent on an unlawful claim.<sup>55</sup>

### B Mistake

Mistake, as it applies to the law of restitution, is 'surprisingly difficult' to categorise,<sup>56</sup> although it has at least been clear since *Deutsche Morgan Grenfell Group plc v Internal Revenue Commissioners* ('DMG')<sup>57</sup> that 'Woolwich and mistake claims are independent, have distinct requirements and, potentially ... may lead to different results'.<sup>58</sup> The problematic detail of the law regarding mistake will not be relevant since, as was accepted by every single judge who heard argument in *Woolwich*,<sup>59</sup> Woolwich EBS had always had a *correct* understanding of its legal position, in contrast to the Revenue.<sup>60</sup> Even if a claimant were to have made a mistake of law as to the legality of a public authority's demand, as happened in the trial decision in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners*,<sup>61</sup> the mistake is not relevant to a *Woolwich* claim, which does not rely on the existence of a mistake to establish the presence of an unjust factor.<sup>62</sup>

What was disputed in *Woolwich* was whether the Revenue possessed a legislative mandate to impose the tax that it had,<sup>63</sup> the fact that Woolwich EBS had understood the law accurately precluded it from relying on mistake of fact as an unjust factor. Whereas mistake of law has been an unjust factor in its own right in Australia since *David Securities Pty Ltd v Commonwealth*,<sup>64</sup> that was not yet the case in the United Kingdom when *Woolwich* was decided. In the United Kingdom, the bar on mistake of law was not lifted until *Klein-*

<sup>55</sup> Lord Woolf et al, above n 27, 1029 [19-080].

<sup>56</sup> Burrows, *The Law of Restitution*, above n 5, 201.

<sup>57</sup> [2007] 1 AC 558.

<sup>58</sup> Elise Bant, 'Restitution from the Revenue and Change of Position' [2009] 2 *Lloyd's Maritime and Commercial Law Quarterly* 166, 167. Bant was referring to the possibility that a *Woolwich* claim may be precluded by a statutory limitation, as was the case in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2009] STC 254.

<sup>59</sup> Burrows, *The Law of Restitution*, above n 5, 210 n 53.

<sup>60</sup> *Woolwich (First Instance)* [1989] 1 WLR 137, 141 (Nolan J).

<sup>61</sup> [2009] STC 254, 352 [262] (Henderson J). The appeal to the Supreme Court was reported at *FII Group Litigation* [2012] 2 AC 337.

<sup>62</sup> Bant, above n 58, 167.

<sup>63</sup> Brian Fitzgerald, 'Ultra Vires as an Unjust Factor in the Law of Unjust Enrichment' (1993) 2 *Griffith Law Review* 1, 8.

<sup>64</sup> (1992) 175 CLR 353.

wort *Benson Ltd v Lincoln City Council*.<sup>65</sup> In turn, this reform was not extended to tax payments made to public authorities under a mistake of law until the *DMG* decision.<sup>66</sup> Voon noted that the ‘difficulty in establishing the causative element of the mistake’ remained, as demonstrated in Australia by *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (‘*Royal Insurance*’).<sup>67</sup> In any event, where a public authority operates under a mistaken understanding of the law, that mistake is not an unjust factor which will assist a claimant seeking restitution because it does not have any bearing on whether the *claimant* intended to transfer wealth.<sup>68</sup>

It follows that neither mistake nor duress, the two unjust factors which would usually apply, will avail a claimant in the position of the claimant in *Woolwich*. In his trial judgment, Nolan J stated:

I may say at once that I am greatly attracted by the *Woolwich* argument that it should receive restitution in the shape of interest running from the original dates of payment to compensate it for the unjust enrichment enjoyed by the revenue at its expense. ... [I]t is clear that the money would never have been received by the revenue but for the ultra vires regulations made by them. Their ultra vires action has thus been instrumental in their obtaining from *Woolwich* the equivalent of an enormous interest free loan. The benefit of an interest free loan to the borrower, and the detriment to the lender is, of course, all the greater in times of inflation since the value of the principal sum will have fallen between the date of the loan and the date of its repayment.<sup>69</sup>

His Honour conceded, citing Professor Birks, that this did not at that time form the basis for allowing a claimant to recover a sum paid but noted that ‘different considerations apply to claims by the subject against the Crown or public authority from those which apply as between subject and subject’.<sup>70</sup> This reasoning formed the basis for the claimant’s later success in making out

<sup>65</sup> [1999] 2 AC 349.

<sup>66</sup> [2007] 1 AC 558.

<sup>67</sup> (1994) 182 CLR 51, cited in Voon, above n 41, 16.

<sup>68</sup> See Birks, *Unjust Enrichment*, above n 1, 105–6.

<sup>69</sup> *Woolwich (First Instance)* [1989] 1 WLR 137, 140. See also *Woolwich* [1993] AC 70, 107 (Ralph Gibson LJ).

<sup>70</sup> *Woolwich (First Instance)* [1989] 1 WLR 137, 144, citing Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1985) 295. His Honour referred to the doubts about the correctness of the ‘dominant modern view’ of the law expressed by Dixon CJ in *Mason v New South Wales* (1959) 102 CLR 108, 116: *Woolwich (First Instance)* [1989] 1 WLR 137, 144.

a policy-motivated unjust factor.<sup>71</sup> It also reveals the seeds of the altered perception of Diceyan orthodoxy by which the *Woolwich* majority created a government-only unjust factor.<sup>72</sup>

### C Failure of Basis

There is a further unjust factor, which was not argued in *Woolwich*, but which a claimant in a similar position might nonetheless consider using. Failure of basis requires that there be a total<sup>73</sup> failure of the basis of the arrangement between the parties under which the defendant was enriched at the expense of the claimant. Although it was not a claim against the government, *Roxborough v Rothmans of Pall Mall Australia Ltd* ('*Roxborough v Rothmans*') is nonetheless a paradigm failure of basis case, in which cigarette retailers sought restitution from the wholesalers who had sold them the cigarettes.<sup>74</sup> The price that had been charged to the retailers for the cigarettes had included a specified amount to cover the tax payable by the wholesalers to the government. In earlier proceedings, the High Court ruled that the tax was invalid due to its inconsistency with s 90 of the *Australian Constitution*.<sup>75</sup> The contracts between the wholesalers and the retailers were, however, valid and subsisting<sup>76</sup> and the wholesalers had not failed to perform any of the promises contained in those contracts. The retailers sought to recover the amount paid in respect of the invalidated tax in restitution for unjust enrichment. By majority (Kirby J dissenting), the High Court held that the retailers were able to recover the sums which had been paid to the wholesalers in regard to their tax liability under the invalid tax and, furthermore, the fact that the retailers had already recovered those sums from another source (namely, their

<sup>71</sup> The development of the law that was to come from the judgment of the House of Lords in *Woolwich* was not, of course, available to Nolan J.

<sup>72</sup> See below nn 150–7 and accompanying text.

<sup>73</sup> 'The basis of an enrichment either fails or it does not. There is no such thing as a partial failure of basis': Birks, *Unjust Enrichment*, above n 1, 121. See also Burrows, *The Law of Restitution*, above n 5, 322–6; Birks, *An Introduction to the Law of Restitution*, above n 1, 242–8.

<sup>74</sup> (2001) 208 CLR 516.

<sup>75</sup> *Ha v New South Wales* (1997) 189 CLR 465. The same issue arises even if the instrument which has been invalidated is not legislative. In tax matters, particularly, decisions based on policy statements or regulatory instruments might be disallowed or declared to be invalid because they proceed on an incorrect interpretation of the legislation, causing much the same consequences as constitutional invalidity.

<sup>76</sup> Burrows, *The Law of Restitution*, above n 5, 329.

customers) did not defeat their claim.<sup>77</sup> The valid and subsisting contracts that the retailers had with the wholesalers were not determinative because claims for restitution made in reliance on a claim of failure of basis are ‘not confined by contractual principles’.<sup>78</sup>

Burrows said that the High Court was correct to apply ‘an extended meaning of failure of consideration beyond failure of a promised return and thereby granted restitution even though the contract was valid’.<sup>79</sup> Would the unjust factor of failure of basis offer a viable path to restitution for a claimant in the same position as *Woolwich EBS*? The result in *Roxborough v Rothmans* indicates that it may, if it is considered that the basis of the Revenue’s demand, as reflected in its soft law guidelines, was unlawful and the transfer therefore failed totally because it was a condition of transfer that the regulations would be valid. The transfer would have failed even if the claimant had never thought that the guidelines were valid or that the money was lawfully due.<sup>80</sup> It may follow from this that no special, *Woolwich*-style unjust factor is required in circumstances like *Roxborough v Rothmans*. Indeed, Kirby J dissented on the basis that the ‘reasons of principle that may justify obliging the state to disgorge funds unlawfully collected by invalid taxes have no application to proceedings against a private corporation’.<sup>81</sup> As this article will demonstrate, the *Woolwich* unjust factor is nonetheless a desirable advancement of the law of unjust enrichment for other reasons.

#### IV WHAT WAS DECIDED IN *WOOLWICH*?

If a claimant were unsuccessful in arguing for the existence of an unjust factor — such as mistake, duress or failure of basis — which focuses on the intention of the claimant to transfer wealth (or, as with failure of basis in

<sup>77</sup> *Roxborough v Rothmans* (2001) 208 CLR 516, 528 [23] (Gleeson CJ, Gaudron and Hayne JJ), 542 [68]–[69] (Gummow J); cf at 576–7 [162]–[163] (Kirby J).

<sup>78</sup> *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 517 [32] (French CJ, Crennan and Kiefel JJ), citing *Roxborough v Rothmans* (2001) 208 CLR 516, 556–7 [103]–[104] (Gummow J).

<sup>79</sup> Burrows, *The Law of Restitution*, above n 5, 329. His admiration for the result in *Roxborough v Rothmans* did not extend to all of the High Court’s reasoning: Andrew Burrows, ‘The Australian Law of Restitution: Has the High Court Lost Its Way?’ in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 67, 71–6.

<sup>80</sup> Burrows argued, with reference to *Roxborough v Rothmans*, that such a result must be subject to there being no policy reason under which the defendant could plead a superior claim to the subject of the enrichment: Burrows, *The Law of Restitution*, above n 5, 90.

<sup>81</sup> *Roxborough v Rothmans* (2001) 208 CLR 516, 568 [136].

*Woolwich*, simply elects not to argue for it at all), there remains a category of policy-motivated unjust factors which may nonetheless avail it. The majority speeches in *Woolwich* developed the law such that an unlawful demand is sufficient reason for the claimant to recover as of right the item given to the defendant, leading Professor Burrows to claim that *Woolwich* ‘has subsumed the traditional duress approach’ to restitution.<sup>82</sup> This is to say that, in allowing restitution in the absence of the hitherto required unjust factors, *Woolwich* fundamentally altered the law of unjust enrichment.<sup>83</sup>

In contrast to the unjust factors considered in Part III above which are based on the claimant’s intention, there exists a separate category of unjust factors under which a claimant may obtain restitution based on policy considerations. These policy-motivated unjust factors take no account of the claimant’s subjective intention.<sup>84</sup> Rather, as the name suggests, they allow restitution for reasons of legal policy in circumstances of necessity identified by the judiciary. Although there are identified examples which are intended as a guide,<sup>85</sup> a system which allows circumvention of the dominant unjust enrichment model (which requires the establishment of a previously identified unjust factor) based upon judicial identification of a compelling policy reason may contain inherent instability.<sup>86</sup> Nonetheless, there does not seem to

<sup>82</sup> Burrows, *The Law of Restitution*, above n 5, 501.

<sup>83</sup> In doing so, Burrows argued, the House of Lords implicitly overruled several longstanding precedents: *ibid.* See also the approach of Lord Slynn, who noted in his judgment that *Woolwich* EBS’s claim did not ‘fit easily into the existing category of duress or of claims *colore officii*’, albeit it did ‘shade into them’: *Woolwich* [1993] AC 70, 204. Cf Birks, *An Introduction to the Law of Restitution*, above n 1, 297.

<sup>84</sup> Simone Degeling, ‘Understanding Policy-Motivated Unjust Factors’ in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing, 2008) 267, 274–5.

<sup>85</sup> The example of payments of money to public authorities consequent on an unlawful demand had been identified even prior to the litigation in *Woolwich*: Birks, *An Introduction to the Law of Restitution*, above n 1, 294–9.

<sup>86</sup> Degeling, ‘Understanding Policy-Motivated Unjust Factors’, above n 84, 273–82. Inviting courts to make policy choices has previously been criticised, particularly where the judicial policymaking is not openly acknowledged. In a case regarding liability for negligence, McHugh J considered at length the language of ‘commonsense’ and its various synonymous words and phrases, which his Honour considered in reality to be simply applied as ‘a limiting rule [which] is the product of a policy choice’: *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506, 531. McHugh J was suspicious of the (unacknowledged) role of policy in judicial determinations, for example in circumstances when ‘the educative effect of the expert evidence makes an appeal to commonsense notions of causation largely meaningless or produces findings concerning causation which would often not be made by an ordinary person uninstructed by the expert evidence’: at 533. His Honour accepted that in an ‘exceptional case’, like the one before the High Court, the standard legal test of causation (the ‘but for’ test)

be any academic consensus to the effect that an unlawful demand for money should not be an accepted unjust factor. Indeed, the reverse is true, with most, if not all, unjust enrichment scholars over the last two decades embracing the *Woolwich* decision. The broader concerns with policy-motivated unjust factors as a category are beyond the scope of this article.

The policy-motivated unjust factor which was developed in *Woolwich* had as its basis the finding that the unlawfulness of the Revenue's demand was sufficient to ground a claim for restitution.<sup>87</sup> As Lord Slynn put it:

I find it quite unacceptable in principle that the common law should have no remedy for a taxpayer who has paid large sums or any sum of money to the revenue when those sums have been demanded pursuant to an invalid regulation and retained free of interest pending a decision of the courts.<sup>88</sup>

Consequently, it is possible in the United Kingdom for a claimant to obtain restitution from a public authority which has been unjustly enriched,<sup>89</sup> with the claimant needing only to establish that the public authority's act was unlawful in addition to the usual elements of restitution, namely that the enrichment was at the claimant's expense and that no defence applies. To establish this unjust factor, a claimant in the position of *Woolwich* EBS would need first to obtain a declaration (in separate judicial review proceedings) that the collection of tax by the Revenue was invalid, for example on the basis that it relied on invalid soft law guidelines. It would then need to commence a separate action to recover the money.<sup>90</sup>

may prove inadequate but in general any other test, such as the proposed (and subsequently accepted) 'commonsense test', 'should be recognized as a policy-based rule concerned with remoteness of damage and not causation': at 534.

<sup>87</sup> Cf Fitzgerald, above n 63, 17.

<sup>88</sup> *Woolwich* [1993] AC 70, 204.

<sup>89</sup> See *ibid*; *FII Group Litigation* [2012] 2 AC 337.

<sup>90</sup> See *Woolwich* [1993] AC 70, 106 (Ralph Gibson LJ). In England, as a result of the ruling in *O'Reilly v Mackman* [1983] 2 AC 237, '[t]here is no power to award restitution on an application for judicial review': *Wandsworth London Borough Council v Winder* [1985] 1 AC 461, 480 (Robert Goff LJ). Until the Court of Appeal decision in *British Steel plc v Customs and Excise Commissioners* [1997] 2 All ER 366, a claimant would therefore have needed to establish the unlawfulness of the request in one set of proceedings, and to seek to obtain restitution in another. That decision ended the 'inefficiency, cost and clumsiness' of such a 'bifurcated' system: Rebecca Williams, *Unjust Enrichment and Public Law: A Comparative Study of England, France and the EU* (Hart Publishing, 2010) 49. See also Andrew Burrows, 'Public Authorities, Ultra Vires and Restitution' in Andrew Burrows (ed), *Essays on the Law of Restitution* (Clarendon Press, 1991) 39, 62–3.

Much of Lord Goff's speech in *Woolwich* was devoted to justifying the policy behind his finding that unlawful demands made by public authorities were inevitably sufficiently unjust for the purposes of a restitutionary claim. Relying on Birks, Lord Goff set out to make the case that the

stream of authority [on restitution from government developed up to the early part of the 20<sup>th</sup> century] should be the subject of reinterpretation to reveal a different line of thought pointing to the conclusion that money paid to a public authority pursuant to an ultra vires demand should be repayable, *without the necessity of establishing compulsion*, on the simple ground that there was no consideration for the payment.<sup>91</sup>

This is to say that the acceptance of a policy-based unjust factor would not, on Lord Goff's approach, require a claimant to establish any other unjust factor, such as that it made payments to a public authority as a result of duress or extortion *colore officii*, or that the payment was otherwise the result of its intention not to pay being overborne. The unjust factor of duress *colore officii* is not defunct following the decision in *Woolwich*.

#### *A The Basis of Woolwich: Common Law or Constitutional?*

The issue which follows logically is whether there is any reason why *Woolwich* should stand only for the capacity to recover payments of tax consequent on an unlawful demand or if any payment to a public authority is recoverable if made consequent on an unlawful demand. *Woolwich* is a special, government-only unjust factor which should theoretically apply to any payment made in response to an unlawful demand or instrument. However, it may be the case that the *Woolwich* unjust factor is rooted in the constitutional prohibition on levying money for the use of the Crown other than by legislative means.<sup>92</sup> Broadening the basis of the *Woolwich* unjust factor to cover any unlawful unjust enrichment would exceed this constitutional basis.

The argument that *Woolwich* is properly understood as a constitutional development is premised on the view that

<sup>91</sup> *Woolwich* [1993] AC 70, 166 (emphasis added), citing Birks, 'A Tercentenary Footnote', above n 49.

<sup>92</sup> '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': *Bill of Rights 1689* art 4. This was described as a 'fundamental principle of public law' in *Royal Insurance* (1994) 182 CLR 51, 69 (Mason CJ). See also Birks, 'A Tercentenary Footnote', above n 49, 165.

illegal demands for money are not mere breaches of public law — they offend the fundamental constitutional and legal principle of no taxation without parliamentary approval; and this is the something more which justifies the award of the monetary remedy of restitution.<sup>93</sup>

Counterintuitively, this reasoning seems to attach greater disapprobation to a demand for money made in good faith but in excess of power than it does to any other breach of public law done deliberately and with the intention of adversely affecting the private actor,<sup>94</sup> but falling short of misfeasance in public office.<sup>95</sup> There is much about founding the principle of obtaining restitution for unjust enrichment by public authorities in a constitutional prohibition on taxation without parliamentary approval which is apt to lead to injustice, simply because it ignores the fact that there are more ways that modern governments can inflict loss on their citizens than taxation without parliamentary approval.<sup>96</sup> That, however, is not the subject of this article.

<sup>93</sup> Peter Cane, 'The Constitutional Basis of Judicial Remedies in Public Law' in Peter Leyland and Terry Woods (eds), *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone Press, 1997) 242, 258.

<sup>94</sup> See the fictitious example of the red-haired school teacher dismissed because she had red hair (or 'for some equally frivolous and foolish reason') in *Short v Poole Corporation* [1926] 1 Ch 66, 91 (Warrington LJ). This somewhat unsatisfactory example has come to be associated with the 'Wednesbury unreasonableness' ground of judicial review and was indeed cited by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229.

<sup>95</sup> See generally Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1.

<sup>96</sup> Cane did note that if

more of the principles of the British constitution were contained in legal documents [such as the *Bill of Rights 1689*], the courts might be more willing to give to rights and interests protected by those principles the protection offered by orders for the payment of money, including damages.

Cane, 'The Constitutional Basis of Judicial Remedies in Public Law', above n 93, 258. As the Australian experience has shown, a written constitution does nothing to assist in this regard if it does not contain substantive protection of specific rights. The Diceyan ideal of equality between government and citizens needs to be understood in a modified form to take account of the fact that, in some respects, government is (and should be) different to citizens and that therefore more should be expected of government. Such an approach satisfies Burrows' concern: see below n 128.

### B Should Australia Adopt Woolwich?

The extent to which the *Woolwich* principle applies in Australia is yet to be resolved,<sup>97</sup> since the point has not arisen in cases decided in Australia since *Woolwich*.<sup>98</sup> There is no compelling reason, in my view, why *Woolwich* ought not to be applied in Australian courts,<sup>99</sup> especially if it is applied simply as recognising that any unlawful demand by a public authority is a policy-motivated unjust factor capable of grounding a claim for restitution.<sup>100</sup> However, some commentators have raised doubts about whether Australia is able to adopt *Woolwich* or would be wise to do so in any case. Margaret Brock raised three issues with which I propose to engage in this regard: (a) that *Woolwich* is an ill fit with a written constitution; (b) that the retrospective operation of court orders would be chaotic in many circumstances; and (c) that a doctrine under which restitution of tax revenues was possible where there had been an unlawful demand is a recipe for fiscal chaos.<sup>101</sup>

The High Court regularly points out that, in matters constitutional, Australia cannot easily be compared with England.<sup>102</sup> Put simply, Australia has a written constitution and England does not, which places explicit constraints on Australian legal developments that do not limit English courts. By contrast, the British Parliament is sovereign,<sup>103</sup> whereas Australian legislatures are subject to the operation of the *Australian Constitution*.<sup>104</sup> Furthermore, Australian courts have the capacity to test legislative competence, a power

<sup>97</sup> See Voon, above n 41; Wong, above n 11; Mason, Carter and Tolhurst, above n 18, 777 [2002]; Degeling, 'Restitution of Unlawfully Exacted Tax in Australia', above n 11. Cf the pessimism in Burrows, *The Law of Restitution*, above n 5, 35–43.

<sup>98</sup> See, eg, *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30, 35 (R J Meadows QC) (during argument), 38 (M G Sexton QC) (during argument) ('*BAT v WA*'), where *Woolwich* was cited briefly in argument. However, it appeared only in a single footnote of the joint judgment of McHugh, Gummow and Hayne JJ to refer to the fact that mistake of law was not an unjust factor allowing for restitution in the United Kingdom at the time *Woolwich* was decided: at 53 [43] n 92. See also above n 64 and accompanying text.

<sup>99</sup> Or at least Lord Goff's speech in *Woolwich*: see Fitzgerald, above n 63, 17.

<sup>100</sup> See Moules, above n 50, 300 [8–011].

<sup>101</sup> Brock, above n 11, 137–40.

<sup>102</sup> See, eg, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 92–3 [20]–[22] (Gaudron and Gummow JJ) ('*Aala*').

<sup>103</sup> This is true subject to the United Kingdom's obligations as a member of the European Union. That minor exception need not detain us here.

<sup>104</sup> See Brock, above n 11, 137–8.

enshrined in s 76(i) of the *Australian Constitution*,<sup>105</sup> but because the United Kingdom Parliament is sovereign, Brock argued that English courts do not have this power,<sup>106</sup> except in regard to delegated legislation, as in *Woolwich*. Therefore, Brock concluded, there is a natural limit on restitution under the *Woolwich* principle and additionally a capacity in the United Kingdom to legislate retrospectively to cure unlawful regulations (and stem the flow of restitution to those affected). Indeed, this happened following *Woolwich*.<sup>107</sup>

By contrast, Brock argued that it is ‘questionable’ whether delegated legislation can be amended with retrospective operation in Australia.<sup>108</sup> To the extent that she meant that the success of an attempt to amend regulations of the type seen in *Woolwich* with retrospective effect, to remove invalidity and limit restitution, is uncertain in Australia, her concern is justified on a practical level, but only where the amending legislation is subordinate, not primary.<sup>109</sup> There is no reason why a legislative instrument, let alone an Act,

<sup>105</sup> It is also implicit in the prominence given to the well-known dictum in *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (Marshall CJ) (1803) — that it ‘is emphatically the duty of the judicial department to say what the law is’ — in understanding the *Australian Constitution*. Marshall CJ’s dictum has been described in the High Court as ‘axiomatic’: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262 (Fullagar J). It continues to be treated as such: see, eg, *A-G (NSW) v Quin* (1990) 170 CLR 1, 35–6 (Brennan J); *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 152–3 [43] (Gleeson CJ, Gummow, Kirby and Hayne JJ). The greatest legacy of *Marbury v Madison* is as a rejection of the English-style sovereignty of Parliament in favour of empowering the judiciary to determine conclusively issues of law: see generally J T Gleeson and R A Yezerski, ‘The Separation of Powers and the Unity of the Common Law’ in J T Gleeson, J A Watson and R C A Higgins (eds), *Historical Foundations of Australian Law: Institutions, Concepts and Personalities* (Federation Press, 2013) vol I, 297. Groves has noted that there is arguably a contradiction in the High Court’s continued embrace of *Marbury v Madison* when it has ‘pointedly rejected the constitutional compromise later reached’ by the United States Supreme Court in *Chevron USA Inc v Natural Resources Defense Council Inc*, 467 US 837 (1984): Matthew Groves, ‘Federal Constitutional Influences on State Judicial Review’ (2011) 39 *Federal Law Review* 399, 404.

<sup>106</sup> But see Douglas Edlin, ‘Will Britain Have a *Marbury*?’ on UK Constitutional Law Association, *Blog* (7 June 2013) <<http://ukconstitutionallaw.org/2013/06/07/douglas-edlin-will-britain-have-a-marbury/>>.

<sup>107</sup> See Moules, above n 50, 333 [8-058].

<sup>108</sup> Brock, above n 11, 137. There is, at any rate, a presumption against the retrospective operation of delegated legislation but this is not determinative of the delegated legislation’s validity: Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4<sup>th</sup> ed, 2012) 470–3 [31.2]–[31.5].

<sup>109</sup> See Pearce and Argument, above n 108, 473 [31.5].

with retrospective operation ought not to be valid in principle.<sup>110</sup> Australian parliaments frequently respond to judicial decisions — particularly unwelcome ones<sup>111</sup> — with legislation designed to nullify real or potential adverse consequences, as understood by the parliament.<sup>112</sup> There is clearly some capacity to limit the effects of decisions made using the *Woolwich* ground where Australia's legislators believe it desirable to do so.<sup>113</sup>

Furthermore, concerns about retrospective operation are misplaced. There have been persuasive advocates of courts being able to make orders which have only prospective operation,<sup>114</sup> but this is, at best, an idea whose time has not yet come. It has been rejected emphatically at the highest level of the judiciary in both Australia<sup>115</sup> and England.<sup>116</sup> Even where Australian federal courts have a statutory power to make prospective orders in public law,<sup>117</sup> they

<sup>110</sup> See generally D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2011) 328–31 [10.9]–[10.12]. Nonetheless, in practice there are many institutional constraints against retrospectivity in legislation, whether primary or delegated.

<sup>111</sup> An example of legislative change consequent on a welcome judicial decision followed the decision of the Full Federal Court in *Ruddock v Vadarlis* (2001) 110 FCR 491: see *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth).

<sup>112</sup> Prominent recent examples have included *Brodie v Singleton Shire Council* (2001) 206 CLR 512; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144; *Williams v Commonwealth* (2012) 248 CLR 156. See *Civil Liability Act 2002* (NSW) s 45; *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth); *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth).

<sup>113</sup> P B H Birks, 'Restitution from Public Authorities' (1980) 33 *Current Legal Problems* 191, 205, quoted in Brock, above n 11, 138.

<sup>114</sup> Notably, Keith Mason: see Keith Mason, 'Prospective Overruling' (1989) 63 *Australian Law Journal* 526; Keith Mason, 'Money Claims by and against the State' in P D Finn (ed), *Essays on Law and Government: The Citizen and the State in the Courts* (LBC Information Services, 1995–96) vol 2, 101, 125–7.

<sup>115</sup> *Ha v New South Wales* (1997) 189 CLR 465, 503–4 (Brennan CJ, McHugh, Gummow and Kirby JJ), 515 (Dawson, Toohey and Gaudron JJ). See also *New South Wales v Kable* (2013) 298 ALR 144, 160 [61] (Gageler J).

<sup>116</sup> *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 358 (Lord Browne-Wilkinson), 379 (Lord Goff). Lord Sumption has, however, pointed out that the 'courts of the United States, India, Ireland and the European Union have all asserted the right in certain categories of case to overrule a decision only with prospective effect, a function previously regarded as the special domain of the legislature': Lord Sumption, 'The Limits of Law' (Speech delivered at the 27<sup>th</sup> Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013). See also *Re Spectrum Plus Ltd (in liq)* [2005] 2 AC 680, 699 [39]–[41] (Lord Nicholls), 709–10 [71]–[74] (Lord Hope), 736 [161] (Lord Walker), 736–7 [162] (Baroness Hale); but see at 700 [45] (Lord Steyn), 726 [125]–[126] (Lord Scott).

<sup>117</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 16(1)(a).

have been demonstrably gun-shy about exercising it.<sup>118</sup> To the extent that Brock argued that it would solve some problems if Australian courts were able to make orders that did not necessarily have retrospective effect, she is undoubtedly correct. To the extent that her argument was that *Woolwich* ought not to be adopted in Australia unless prospective overruling is first available as a judicial remedy, it is hard to accept. It is surely still, broadly, a positive outcome that public authorities are not unjustly enriched because a claimant has paid consequent to a demand that was not within the authority's power to make. Embracing such a reform might perhaps spur further reform in regard to prospective judicial orders. The argument that 'it's not the right time' to make a reform is seldom compelling on its own; this circumstance is no different.

Likewise, predictions of fiscal chaos are often heard but seldom realised.<sup>119</sup> To the extent that a finding that a certain tax regulation, for example, is unlawful and there is (justified) concern that the exposure of the revenue, and with it the government, is so great that the body politic risks suffering great harm, there is of course a persuasive basis for arguing that steps ought to be taken to prevent or limit that harm. It is worth noting that the greater the exposure to fiscal chaos, the greater, one may infer, the error on the part of government, the risk of which it is now asking those at whose expense it has been unjustly enriched to bear. This ought not to be done lightly, or simply because the words 'fiscal chaos' have been invoked.<sup>120</sup> At any rate, Australian parliaments have some capacity to deal with the prospect of fiscal chaos legislatively, for example by placing limitation periods on the capacity to recover overpaid taxes<sup>121</sup> or by stating unequivocally that 'no action shall lie for the recovery of any sum paid' to a public authority 'unless the payment is made under protest in pursuance of this section and the action is commenced

<sup>118</sup> See, eg, the decision of the Full Federal Court in *Wattmaster Alco Pty Ltd v Button* (1986) 13 FCR 253.

<sup>119</sup> The introductions of the Goods and Services Tax in 2000 and the carbon tax in 2012 are recent examples of the sky failing to fall as predicted: see *A New Tax System (Goods and Services Tax) Act 1999* (Cth); *Clean Energy Act 2011* (Cth); *Clean Energy (Charges — Customs) Act 2011* (Cth); *Clean Energy (Charges — Excise) Act 2011* (Cth); *Clean Energy (Unit Issue Charge — Auctions) Act 2011* (Cth); *Clean Energy (Unit Issue Charge — Fixed Charge) Act 2011* (Cth); *Clean Energy (Unit Shortfall Charge — General) Act 2011* (Cth).

<sup>120</sup> This was a point made by Heydon J in his powerful dissent in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 193 [551], in which he indicated that a 'crisis' is in many respects a product of '[m]odern linguistic usage' rather than objective proof that the circumstances of a crisis are present; see also at 122 [347] (Hayne and Kiefel JJ).

<sup>121</sup> Mason, Carter and Tolhurst, above n 18, 802–4 [2039]; see at 803 [2039] n 196 for the relevant legislation; see generally at 945–6 [2717] regarding limitation periods.

within ... six months after the date of the payment'.<sup>122</sup> This may leave a government with a political problem but such issues are beyond the scope of judicial reasoning. In Australia, federal courts also have the jurisdiction, absent in the United Kingdom,<sup>123</sup> to use s 75(v) of the *Australian Constitution* to check excesses of the government's constitutional executive power or of acts performed in reliance on an unconstitutional statute.<sup>124</sup> Hence, if the collection of a tax were unconstitutional, any bar to recovery of the amount paid would need to be justifiable.

As a reason why *Woolwich* ought not to become part of Australian law, the possibility of fiscal chaos is not compelling; the United Kingdom experience with group litigation considering a *Woolwich* claim has not resulted in chaos.<sup>125</sup> 'Floodgates' arguments of this nature are often overstated. Ultimately, the other reasons raised by Brock are not compelling either. It is important to remember that a *Woolwich* claim arises out of a power imbalance by which a public authority is unjustly enriched; any suggestion that restitution ought to be refused bears a heavy onus of justification. It has not been satisfied, in my view, with regard to the argument that *Woolwich* should not be part of Australian law. Australia should adopt the result of *Woolwich*, but as a matter of common law and not on a 'capital-C Constitutional' basis.

### C Limitations on Private Law Remedies and the Need for *Woolwich*

Not only are the objections to adopting *Woolwich* in Australia less than compelling, there is a strong argument that adopting *Woolwich* would serve to fill an existing and problematic lacuna in the capacity of Australians to secure remedies against public authorities. It is not possible under the current orthodoxy for a party to public law litigation to obtain a monetary remedy.<sup>126</sup> Public law remedies are restricted to compelling the performance of an unperformed public duty (*mandamus*), quashing an invalid decision (*certio-*

<sup>122</sup> See *Customs Act 1901* (Cth) s 167(4), quoted in *Thiess v Collector of Customs* (2014) 306 ALR 594, 597 [9] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

<sup>123</sup> Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5<sup>th</sup> ed, 2013) 38 [2.110].

<sup>124</sup> *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 665–6 [37] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

<sup>125</sup> See *FII Group Litigation* [2012] 2 AC 337.

<sup>126</sup> See *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 167 CLR 637, 645 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); *Aerolineas Argentinas v Federal Airports Corporation* (1995) 63 FCR 100, 112 (Beazley J); *New South Wales v Paige* (2002) 60 NSWLR 371, 400–4 [156]–[177] (Spigelman CJ).

rari), declaring the law (declaration) and preventing the commencement or continuation of an invalid or unlawful action (prohibition and injunction respectively). Therefore, the fact that a public authority's guidelines are unlawful does not lead directly to a monetary remedy. However, the fact that damages are not available for 'mere' breaches of public law is not incompatible with the availability of restitution for unjust enrichment,<sup>127</sup> giving a court the power to direct the return of money paid in the belief that it had been claimed without proper authority and therefore that the money would have to be returned.

A party which had paid a sum of money based on a soft law demand which was beyond the power of the public authority which had made it could attempt to recover the money in compensatory damages for the public authority's commission of a civil wrong. For example, an unlawful monetary demand made by a public authority may sometimes amount to misfeasance in public office,<sup>128</sup> leaving the public authority liable for compensatory damages in tort.<sup>129</sup> However, such an action would not lie where, as in *Woolwich*, the public authority *thought* its act was legal.<sup>130</sup> An action may, on the other hand, lie for unjust enrichment, allowing the affected party to obtain restitution as a remedy without needing to establish that the public authority had committed a 'wrong'.<sup>131</sup> This is much more satisfactory where what is at issue is nothing more or less than the fact that a public authority has been enriched by money to which it has no right at the expense of another party. The return of the money is pertinent; the blameworthiness of the public authority is not.

<sup>127</sup> Cane, 'The Constitutional Basis of Judicial Remedies in Public Law', above n 93, 258.

<sup>128</sup> Peter Cane, *Administrative Law* (Oxford University Press, 5<sup>th</sup> ed, 2011) 239 n 3. It is interesting to note Burrows' argument (expressed prior to *Woolwich*) that the

ultra vires theory contradicts ... the whole Diceyan tradition of English law whereby the law of obligations is basically applied equally to all defendants. Just as there is no special public law tort of causing loss by ultra vires conduct, so it would fly in the face of tradition to have a special public law right to restitution for ultra vires demands.

Burrows, 'Public Authorities, Ultra Vires and Restitution', above n 90, 62. I respectfully disagree and argue that there is a solid Diceyan argument in favour of *Woolwich*: see below n 157 and accompanying text.

<sup>129</sup> See generally Aronson, above n 95.

<sup>130</sup> As was the case in *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 165 [58]–[59] (Gummow, Hayne, Heydon and Crennan JJ).

<sup>131</sup> See Michael Tilbury et al, *Remedies: Commentary and Materials* (Thomson Reuters, 5<sup>th</sup> ed, 2011) 560 [6.50]; Moules, above n 50, ch 8.

## V A GOVERNMENT-ONLY (BUT NOT A JUDICIAL REVIEW) CLAIM

The claim for restitution based on *Woolwich* is best understood as a claim which relates only to government entities and to other entities which exercise statutory power. It does not follow that the payment which triggers a *Woolwich* claim must have been made consequent on a jurisdictional error made by the government entity in question. It is beyond doubt that tax authorities cannot decide conclusively on the validity or meaning of tax law,<sup>132</sup> or on its applicability, in Australia for constitutional reasons.<sup>133</sup>

In obiter dicta, Lord Goff's speech in *Woolwich* indicated that his Lordship inclined

to the opinion that this principle should extend to embrace cases in which the tax or other levy has been wrongly exacted by the public authority not because the demand was ultra vires but for other reasons, for example because the authority has misconstrued a relevant statute or regulation.<sup>134</sup>

The current authors of *De Smith's Judicial Review* agreed that a *Woolwich* claim should 'recognise the full effect of the collapse of the distinction between jurisdictional and non-jurisdictional error',<sup>135</sup> although they mistakenly supposed that the dicta quoted above demonstrated Lord Goff's opposition to such a principle.<sup>136</sup> What, then, of Australia, where the distinction between jurisdictional and non-jurisdictional error is not merely yet to collapse but is positively canonical?<sup>137</sup>

There is no reason to think that there must be a jurisdictional error before restitution is payable on the basis of a *Woolwich* claim in Australia. This is because the presence of a jurisdictional error in an impugned decision is the

<sup>132</sup> Brett MR did not decide in *R v Commissioners of Inland Revenue; Re Nathan* (1884) 12 QBD 461, 472, whether the Commissioners were made by statute 'the ultimate and sole judges' of whether overpaid taxes should be returned on the basis that it was not necessary to do so, but he did say that he 'should be very loth to hold that it is so'.

<sup>133</sup> Justice G T Pagone, 'Taxation by Discretion' (2011) 22 *Public Law Review* 298, 303–4; Mark Aronson, Geoffrey Kennett and Neil Williams, 'Commentary on Taxation by Discretion' (2011) 22 *Public Law Review* 311, 311, 317–18.

<sup>134</sup> *Woolwich* [1993] AC 70, 177.

<sup>135</sup> Lord Woolf et al, above n 27, 232 [4-069].

<sup>136</sup> This error has persisted over multiple editions of this leading work: see Lord Woolf, Jeffrey Jowell and Andrew Le Sueur, *De Smith's Judicial Review* (Sweet & Maxwell, 6<sup>th</sup> ed, 2007) 216 [4-083].

<sup>137</sup> See, eg, Chief Justice J J Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77; Groves, 'Federal Constitutional Influences on State Judicial Review', above n 105, 414–18.

basis for an order ‘declaring or assuming that the decision lacks any relevantly adverse legal effectiveness’.<sup>138</sup> The reasoning which supports the award of judicial review remedies, which are axiomatically procedural and aimed at reversing consequences rather than events, is not apposite to the field of restitution for unjust enrichment. The purpose of restitution is to *respond* to unjust enrichment<sup>139</sup> by *reversing* its effect,<sup>140</sup> albeit in a practical rather than a literal sense, since no event can actually be reversed, absent the capacity for time travel. Restitution is not a body of law which merely remedies consequences in the manner of judicial review which might, for example, quash a decision affected by bias, order a public officer to perform an unperformed duty, order a public authority not to breach (or continue breaching) the law, or declare conclusively that a person has been denied procedural fairness in his or her dealings with a statutory body. The consequences of jurisdictional error are addressed in this way by the court but it does not and cannot address the merits of the applicant’s involvement with the respondent public authority. By contrast to judicial review’s remedies, restitution has a substantive purpose to which the prohibition, rooted in the separation of powers,<sup>141</sup> against judicial review addressing the merits of a disputed decision has no relevance.

The retention of jurisdictional error as a basis for the availability of judicial review remedies has as its founding assumption that some public bodies, such as inferior courts,<sup>142</sup> are able to make errors within jurisdiction that would be jurisdictional errors if made by other public bodies.<sup>143</sup> While this reasoning has long since been abandoned in jurisdictions outside Australia,<sup>144</sup> it is accepted in Australia for reasons including the fact that it allows courts to avoid privative clauses which would otherwise remove acts and decisions

<sup>138</sup> Aronson and Groves, above n 123, 681 [10.10].

<sup>139</sup> Birks, *An Introduction to the Law of Restitution*, above n 1, 11–15.

<sup>140</sup> Burrows, *The Law of Restitution*, above n 5, 4. It should be noted at this point that a judicial declaration of unlawfulness, which need not amount to jurisdictional error, has the same effect in any case which does not involve a payment of money. They operate as a practical reversal of the unlawful act or decision: see Lord Woolf and Jeremy Woolf, *The Declaratory Judgment* (Sweet & Maxwell, 4<sup>th</sup> ed, 2011) 34–6 [2.59]–[2.60]. Cases involving payments are different since they require something more than mere declaratory relief in order for the applicant to recoup the unlawfully obtained payment.

<sup>141</sup> Aronson and Groves, above n 123, 19 [1.150].

<sup>142</sup> See *Craig v South Australia* (1995) 184 CLR 163, 179–80 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

<sup>143</sup> Aronson and Groves, above n 123, 697 [10.240].

<sup>144</sup> In the United Kingdom, see *R v Lord President of the Privy Council; Ex parte Page* [1993] AC 682.

from judicial supervision.<sup>145</sup> Such reasoning is irrelevant to restitution matters, which do not involve the courts in supervising public bodies for error but which assume the presence of legal error as their prerequisite. The purpose of restitution is not to hold public authorities accountable for such legal errors (in the manner of administrative law) but to reverse any consequent unjust enrichment. Given that parliament is free to exclude restitution by legislation,<sup>146</sup> there is no need to restrict *Woolwich* to jurisdictional errors in order to limit the effect of privative clauses.

Unlike the common law of negligence<sup>147</sup> and the statutory provisions which have more recently governed it,<sup>148</sup> there is no persuasive argument that public authorities deserve a level of protection which is not provided to defendants generally.<sup>149</sup> If the enrichment of a public authority is unjust, it should therefore be the subject of restitution on the normal basis. All that *Woolwich* does is make illegal acts and decisions which result in a public authority being enriched presumptively unjust as a matter of policy.

Williams has noted that the issue which arose in *Woolwich* had features which properly inhabited opposite sides of the ‘Diceyan orthodoxy’,<sup>150</sup> namely that the validity of the tax instrument was a public law question,<sup>151</sup> but the recovery of money paid to the Revenue as a result of an invalid tax was an issue for private law.<sup>152</sup> This ought not to be of undue concern. After all, as Lord Goff pointed out in *Woolwich*, ‘it is well established that, if the Crown

<sup>145</sup> See generally *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

<sup>146</sup> See above n 121 and accompanying text.

<sup>147</sup> See Balkin and Davis, above n 6, 222–33 [7.31]–[7.36].

<sup>148</sup> See, eg, *Civil Liability Act 2002* (NSW) pt 5. See also Panel of Eminent Persons, *Review of the Law of Negligence: Final Report* (2002) ch 10.

<sup>149</sup> This is contrary to the general rule that public authorities can never truly be the same as private actors: see generally Greg Weeks, ‘Private Law Litigation against the Government: Are Public Authorities and Private Actors Really “the Same?”’ (Faculty of Law Research Series Paper No 68, The University of New South Wales, 2010).

<sup>150</sup> Williams, *Unjust Enrichment and Public Law*, above n 90, 21.

<sup>151</sup> Decided ultimately in *R v Inland Revenue Commissioners; Ex parte Woolwich Equitable Building Society* [1990] 1 WLR 1400 (‘*Ex parte Woolwich*’).

<sup>152</sup> Williams, *Unjust Enrichment and Public Law*, above n 90, 16. Recovering tort damages from public authorities is commonplace, but not on the basis that the public authority has acted unlawfully in a public law sense. Invalidity is irrelevant to proving negligence — and sometimes other actions, like defamation and nuisance — and negligent actions are never interpreted as being authorised by statute (a proposition which can be traced back to *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430, 455–6 (Lord Blackburn)) but by the same token, their negligence does not make them invalid. More simply, statutory authority is never a defence to a negligence action.

pays money out of the consolidated fund without authority, such money is ipso facto recoverable if it can be traced',<sup>153</sup> under the principle established in *Auckland Harbour Board v The King* ('*Auckland Harbour*').<sup>154</sup> Harlow has long championed the view that rules which operate only for or against the government offend the Diceyan aspiration of equality before the law.<sup>155</sup> Why then should the reverse not be true, allowing individuals to recover payments made to government pursuant to unlawful demands?<sup>156</sup> To the extent that *Woolwich* is simply the reverse of *Auckland Harbour*, objections to *Woolwich* on Diceyan grounds are unsupported.<sup>157</sup>

Lord Goff was compelled to conclude that the comparison between the position of the Crown and the position of the citizen 'on the law as it stands at present is most unattractive'.<sup>158</sup> Indeed, *Woolwich* was one of several tax cases which seemed to hint at developments in public law to remedy the inequality between the Revenue and taxpayers,<sup>159</sup> prior to the concept of 'abuse of power' gaining credence in the United Kingdom following *R v North and East Devon Health Authority; Ex parte Coughlan*.<sup>160</sup> Consider again the situation where money is paid to the Revenue, which is acting bona fide, and where the payer does not believe that the money is payable but nonetheless pays it in order that others do not think it incapable of paying. This is not a situation which is caused by the Revenue's *misuse* of its power per se but by the very *fact* of that power.<sup>161</sup> As Lord Goff put it, *Woolwich* EBS was 'faced with the revenue,

<sup>153</sup> [1993] AC 70, 177.

<sup>154</sup> [1924] AC 318. See also Williams, *Unjust Enrichment and Public Law*, above n 90, 56–7, 67–9.

<sup>155</sup> Carol Harlow, "Public" and "Private" Law: Definition without Distinction' (1980) 43 *Modern Law Review* 241, 247–50.

<sup>156</sup> 'The constitutional rule against taxation without authority should be accorded the same respect as the rule against payment out without authority': Voon, above n 41, 18.

<sup>157</sup> Cf Burrows, 'Public Authorities, Ultra Vires and Restitution', above n 90, 62.

<sup>158</sup> *Woolwich* [1993] AC 70, 177. There are nonetheless plenty of situations in which the government is treated preferentially to members of the public — for example, in regard to public authorities' liability in negligence: see above n 148.

<sup>159</sup> Other notable examples include *Re Preston* [1985] 1 AC 835; *R v Inland Revenue Commissioners; Ex parte Unilever plc* [1996] STC 681. See also Matthew Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *Melbourne University Law Review* 470, 484.

<sup>160</sup> [2001] QB 213. See also Greg Weeks, 'Holding Government to Its Word: Legitimate Expectations and Estoppels in Administrative Law' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 224, 233–6.

<sup>161</sup> Lord Goff characterised the power to return overpaid tax *only* as a matter of discretion as the foremost concern of the Revenue in *Woolwich*: [1993] AC 70, 163.

armed with the coercive power of the state, including what is in practice a power to charge interest which is penal in its effect.<sup>162</sup> This disparity in power had been both accepted as fact and seen as relevant throughout the proceedings in *Woolwich*.<sup>163</sup> Put another way, the hypothetical building society is not persuaded that it must pay by the soft law guidelines themselves; it is persuaded by the identity of the authority which issued the guidelines and the concern about how the marketplace may perceive a failure to pay first and challenge the guidelines later.<sup>164</sup> Only a public authority *could* cause such a claimant to pay under those circumstances, which is why questions about whether the Revenue had *misused* its power miss the point. However, to grant relief only on the basis of the public authority's greater power would be to confuse an unjust factor, the presence of which is required to make out restitution, with a civil wrong.<sup>165</sup> Mere inequality is an insufficient basis for obtaining compensatory damages in tort but this does not affect a claim for restitution, which is not made out by establishing wrongdoing on the part of the defendant.

#### A *Woolwich as a Direct Constitutional Claim*

Given the terms in which this proposed development has been discussed, one wonders why following *Woolwich* would cause an Australian court any difficulty at all. Referring to art 4 of the *Bill of Rights 1689*, Mason CJ stated baldly that

[i]t would be subversive of an important constitutional value if this Court were to endorse a principle of law which ... authorized the retention by the executive of payments which it lacked authority to receive and which were paid as a result of causative mistake.<sup>166</sup>

<sup>162</sup> Ibid 171.

<sup>163</sup> See *Woolwich (First Instance)* [1989] 1 WLR 137, 142–3 (Nolan J). The evidence cited by Nolan J to the effect that Woolwich EBS had no practical commercial option but to pay the disputed amount per the demand of the Revenue was quoted with approval by Lord Slynn in the House of Lords proceedings: *Woolwich* [1993] AC 70, 203–4.

<sup>164</sup> At trial in *Woolwich*, Nolan J noted that 'the ability of the Crown or a public authority to apply duress to the subject may be very much greater than that of another subject': *Woolwich (First Instance)* [1989] 1 WLR 137, 144. See also *Woolwich* [1993] AC 70, 172 (Lord Goff).

<sup>165</sup> Historically, the greater power of the public party was not, per se, a circumstance which would ground an unjust factor, such as mistake (when only mistakes of fact counted) or duress.

<sup>166</sup> *Royal Insurance* (1994) 182 CLR 51, 69.

In the years preceding Mason CJ's dictum, the importance of this 'important constitutional value' had already been noted by Birks<sup>167</sup> and Burrows<sup>168</sup> in England, while, in Canada, Hogg referred to taxation imposed unlawfully as 'unconstitutional'.<sup>169</sup> Importantly, this commentary also preceded the decision of the House of Lords in *Woolwich* and doubtless influenced the thinking of Lord Goff, himself a restitution scholar of many years' standing.<sup>170</sup> It is in this context that one should read Lord Goff's statement that

the retention by the state of taxes unlawfully exacted is particularly obnoxious, because it is one of the most fundamental principles of our law — enshrined in a famous constitutional document, the *Bill of Rights 1688* — that taxes should not be levied without the authority of Parliament; and full effect can only be given to that principle if the return of taxes exacted under an unlawful demand can be enforced as a matter of right.<sup>171</sup>

Lord Goff did not put this point expressly as a constitutional argument, despite having described the *Bill of Rights 1689* in those terms. Rather, his Lordship spoke of restitution in these circumstances as no more than 'a matter of common justice' and a response to 'the simple call of justice'.<sup>172</sup> This terminology was used in the context of making the point that there existed a discrepancy between the power of the two parties: the Revenue had obtained a benefit 'implicitly backed by the coercive powers of the state' at the expense of Woolwich EBS.<sup>173</sup> Lord Browne-Wilkinson also noted the 'inequalities of the parties' respective positions' as the basis upon which he was prepared to find an unjust factor which would allow Woolwich EBS to obtain restitution

<sup>167</sup> Birks, 'A Tercentenary Footnote', above n 49, 181.

<sup>168</sup> Burrows, 'Public Authorities, Ultra Vires and Restitution', above n 90, 60–3. Voon expressed this in Diceyan rule of law terms: Voon, above n 41, 18.

<sup>169</sup> Peter W Hogg, *Liability of the Crown* (Law Book Co, 2<sup>nd</sup> ed, 1989) 184.

<sup>170</sup> Lord Goff was a co-author of the seminal English restitution text: see Goff and Jones, *The Law of Restitution* (1<sup>st</sup> ed), above n 5. His Lordship also wrote the Foreword to Andrew Burrows (ed), *Essays on the Law of Restitution* (Clarendon Press, 1991). Clearly, he was aware of both Burrows' and Birks' views on restitution from government consequent on an unlawful act: see Lord Goff and Gareth Jones, *The Law of Restitution* (Sweet & Maxwell, 4<sup>th</sup> ed, 1993) v, 549 ('*The Law of Restitution* (4<sup>th</sup> ed)'). Note that while Lord Goff appears as an author, the fourth edition of his text was written entirely by Professor Jones: at vii.

<sup>171</sup> *Woolwich* [1993] AC 70, 172.

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

from the Revenue.<sup>174</sup> The purpose of these dicta was to justify the policy-motivated unjust factor of payment subject to an unlawful demand.

However, the inequality of the parties is not determinative in regard to making out the *Woolwich* unjust factor,<sup>175</sup> notwithstanding the fact that unlawful claims made by the Revenue are merely a species of unlawful claims made by public bodies more generally, as Lord Goff and Lord Browne-Wilkinson both stated.<sup>176</sup> The latter point was not developed: Lord Goff referred to recovering money paid consequent on an unlawful demand from a ‘public authority’,<sup>177</sup> Lord Browne-Wilkinson from ‘some public officer’.<sup>178</sup> These references seem to indicate that their Lordships did not see the *Woolwich* unjust factor as being restricted to revenue authorities, and therefore that art 4 of the *Bill of Rights 1689* was not the true basis of their conclusions. Professor Jones expressed confusion as to the meaning of ‘public authority’ as it was employed in the majority speeches,<sup>179</sup> a predicament with which most public lawyers can empathise.<sup>180</sup>

It is interesting to note that, even before *Woolwich*, Burrows had identified this unsettled point as a possible obstacle to expanding the boundaries of restitution for unjust enrichment:

application of the ultra vires theory requires one to draw a sharp distinction between invalid demands for money made by big private companies (eg British Telecom plc) and those made by public authorities. Yet it can be argued that any divide between private and public bodies is not so clear as to justify a wholly different restitutionary regime. Furthermore, even if one can clearly divide public from private bodies, it is hard to see why demands made by public bodies in the course of carrying out ordinary commercial functions (eg charging rent to

<sup>174</sup> Ibid 198.

<sup>175</sup> Cf the unjust factor of duress *colore officii*.

<sup>176</sup> Jones noted that Lord Slynn referred only to restitution in regard to unlawful demands for payments of tax: Lord Goff and Jones, *The Law of Restitution* (4<sup>th</sup> ed), above n 170, 549 n 36. Cf Mason, Carter and Tolhurst, above n 18, 777 [2002].

<sup>177</sup> *Woolwich* [1993] AC 70, 177.

<sup>178</sup> Ibid 198.

<sup>179</sup> Lord Goff and Jones, *The Law of Restitution* (4<sup>th</sup> ed), above n 170, 549 n 35.

<sup>180</sup> Consider for instance the ongoing debate in Australia about how to hold accountable exercises of government power when they are made by private bodies, usually centred around the question of whether Australian law should adopt the findings in *R v Panel on Take-overs and Mergers; Ex parte Datafin plc* [1987] 1 QB 815: see, eg, Janina Boughey and Greg Weeks, “Officers of the Commonwealth” in the Private Sector: Can the High Court Review Outsourced Exercises of Power? (2013) 36 *University of New South Wales Law Journal* 316, 331–7.

tenants) should be subjected to a different restitutionary framework from where analogous demands are made by private bodies.<sup>181</sup>

Concerns about where to draw the line between exercises of private power which could attract the *Woolwich* principle by analogy and those which could not are understandable. An over-broad application of *Woolwich* might make the entire principle ungovernable and it is therefore appropriate that *Woolwich* apply only where a party has been unjustly enriched as a result of monies paid subject to an unlawful demand of a public character, whether made by a public authority or by a private entity to which public duties have been outsourced. In such circumstances, the unjust factor necessary to obtain restitution does not require an examination of the behaviour of either party but simply looks at the presence or absence of legal authority for the demand in question. Furthermore, there is little benefit to examining minutely whether the defendant meets the description of a 'public authority'. This, after all, is not truly an element of the taxonomy of unjust enrichment, even after *Woolwich*. All that *Woolwich* decided was that an unlawful demand is an unjust factor upon which a claim for restitution can be based. If the defendant has been unjustly enriched consequent upon having made an unlawful demand, restitution should be available. This is of critical importance where the demand is made through the medium of soft law.

Williams considered the implications of the various approaches to the question of whether cases like *Woolwich* should be treated as wholly public, wholly private or as a hybrid of both.<sup>182</sup> None of the existing private law unjust factors applied on the facts of *Woolwich*,<sup>183</sup> and it would therefore seem odd to conclude that there was no public law element to the House of Lords' determination of the matter. Williams also considered several candidates for the new reason for restitution developed by the majority in *Woolwich*, without

<sup>181</sup> Burrows, 'Public Authorities, Ultra Vires and Restitution' above n 90, 62. Cf Birks, 'Restitution from Public Authorities', above n 113, 205. With the benefit of another two decades' hindsight, we can see that the relevant issues in regard to obtaining restitution for unjust enrichment from, alternatively, a public body and a private body engaged in a public function share much in common with obtaining a judicial review remedy against the same parties, with the exception in English suits that restitution cannot be sought in an action commenced under *Civil Procedure Rules 1998* (UK) SI 1998/3132, pt 54: see *O'Reilly v Mackman* [1983] 2 AC 237, which refers to the preceding rules, the *Rules of the Supreme Court 1965* (UK) SI 1965/1776, O 53.

<sup>182</sup> Rebecca Williams, 'Overpaid Taxes: A Hybrid Public and Private Approach' in Steven Elliott, Birke Häcker and Charles Mitchell (eds), *Restitution of Overpaid Tax* (Hart Publishing, 2013) 23.

<sup>183</sup> Williams, *Unjust Enrichment and Public Law*, above n 90, 23–7.

any of them presenting a compelling case.<sup>184</sup> In response, she asked rhetorically:

Why should we not simply regard the ultra vires demand in *Woolwich* as an entirely public event to which the law can now respond, either with a mandatory order for restitution or ... with restitution as a response in itself?<sup>185</sup>

This approach to a 'public law of restitution'<sup>186</sup> met with the unanimous approval of the Canadian Supreme Court in *Kingstreet Investments Ltd v New Brunswick (Finance)* ('*Kingstreet Investments*'),<sup>187</sup> albeit for reasons which had nothing to do with the acceptance of *Woolwich*.<sup>188</sup> Writing for the Court, Bastarache J held that the ultra vires 'user charge' which had been imposed on the appellants' nightclubs in New Brunswick, was recoverable 'on the basis of constitutional principles rather than unjust enrichment', which was 'ill-suited to deal with the issues raised by ultra vires taxes'.<sup>189</sup> His Honour employed similar reasoning in this regard to that used by the House of Lords when it replaced estoppel against public authorities with an equivalent public law doctrine.<sup>190</sup> The principle of restitution from public authorities is constitutional in Canada in a way that it has not been recognised to be in Australia,<sup>191</sup> where art 4 of the *Bill of Rights 1689* is seen only as forming part of Australia's constitutional background (though it nonetheless remains an important part of Australian law). Bastarache J held that the principle equivalent to art 4 is embedded in s 53 of the Canadian *Constitution Act 1867* (Imp), 30 & 31 Vict, c 3 ('*Constitution Act 1867*'): 'Bills for appropriating any Part of the Public

<sup>184</sup> Ibid 28–30.

<sup>185</sup> Ibid 31.

<sup>186</sup> Robert Chambers, 'Restitution of Overpaid Tax in Canada' in Steven Elliott, Birke Häcker and Charles Mitchell (eds), *Restitution of Overpaid Tax* (Hart Publishing, 2013) 303, 303.

<sup>187</sup> [2007] 1 SCR 3.

<sup>188</sup> In Canada, the principle rests entirely on constitutional grounds and 'has nothing to do with the unjust enrichment principle': Virgo, above n 23, 190 n 110.

<sup>189</sup> *Kingstreet Investments* [2007] 1 SCR 3, 13 [12] (Bastarache J for McLachlin CJ, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ). See also Peter W Hogg, Patrick Monahan and Wade K Wright, *Liability of the Crown* (Carswell, 4<sup>th</sup> ed, 2011) 504–5.

<sup>190</sup> Lord Hoffmann commented that 'in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet': *R (Reprotech (Pebsham) Ltd) v East Sussex County Council* [2003] 1 WLR 348, 358 [35] ('*Reprotech*'). See also Greg Weeks, 'Estoppel and Public Authorities: Examining the Case for an Equitable Remedy' (2010) 4 *Journal of Equity* 247, 260–7.

<sup>191</sup> Cf *Royal Insurance* (1994) 182 CLR 51, 69 (Mason CJ).

Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons'.<sup>192</sup>

Of course, the same principle is embedded in ss 53 and 83 of the *Australian Constitution*. The difference is that, unlike the Canadian Supreme Court in *Kingstreet Investments*, the High Court of Australia has not, to this point, recognised the link between s 53 of the *Australian Constitution* and art 4 of the *Bill of Rights 1689*. Bastarache J's reasoning was that s 53 of the *Constitution Act 1867* imposed a 'governing constitutional principle'<sup>193</sup> that the Crown requires legislative authority in order to impose taxation, and that therefore it is also a constitutional principle that where the Crown obtains revenue as the consequence of having imposed an invalid tax, it is liable to make restitution of the amount of that revenue and the taxpayers to recover amounts paid under the invalid tax as 'a matter of constitutional right'.<sup>194</sup>

Hogg and his co-authors included Australia in their proposition that the law as stated in *Kingstreet Investments* 'is generally the position outside Canada', citing *Royal Insurance* in support.<sup>195</sup> However, that statement exaggerates the constitutional reasoning employed by Mason CJ in *Royal Insurance*<sup>196</sup> and misunderstands the caution which, in the Australian judiciary, continues to adhere to the notion of restitution as of right against public bodies for imposing invalid taxation. At any rate, Australian courts have not attempted to separate cases 'into wholly separate bodies of law, depending on the reason why the tax is invalid',<sup>197</sup> thereby nullifying the simplicity which the Canadian Supreme Court had intended to institutionalise when it eschewed the complexity of the unjust enrichment framework.<sup>198</sup>

The notion of an Australian court treating unlawful taxation as an entirely public event and using the writ of mandamus to order the return of monies obtained through the unlawful demand is initially startling, but not un-

<sup>192</sup> This provision was cited in *Kingstreet Investments* [2007] 1 SCR 3, 14 [14] (Bastarache J for McLachlin CJ, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ). By s 90, the *Constitution Act 1867* extends this principle to the provinces.

<sup>193</sup> Hogg, Monahan and Wright, above n 189, 353.

<sup>194</sup> *Kingstreet Investments* [2007] 1 SCR 3, 23 [34] (Bastarache J for McLachlin CJ, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ).

<sup>195</sup> Hogg, Monahan and Wright, above n 189, 353 n 61.

<sup>196</sup> But see *BAT v WA* (2003) 217 CLR 30, 68–9 [95], where Kirby J (in obiter dicta) supported a constitutional right to restitution as a response to the exaction of an 'unconstitutional tax'.

<sup>197</sup> Chambers, above n 186, 312.

<sup>198</sup> *Kingstreet Investments* [2007] 1 SCR 3, 24 [35] (Bastarache J for McLachlin CJ, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ).

known.<sup>199</sup> Mandamus retains the characteristics of the prerogative writ which allows a person with sufficient standing to obtain relief against a respondent who has failed or refused to perform a public duty<sup>200</sup> and is additionally entrenched within s 75(v) of the *Australian Constitution* as a constitutional writ.<sup>201</sup> Mandamus issued in *Royal Insurance* to command the repayment of overpaid stamp duties in circumstances where the applicable legislation merely said that the Comptroller ‘may’ return money overpaid.<sup>202</sup> A majority held that while the relevant section created a discretion rather than a duty to return overpaid stamp duties,<sup>203</sup> an antecedent liability (such as a positive finding that the revenue had no right to retain the funds) created a duty in the Comptroller to return those funds, which would in turn allow mandamus to issue.<sup>204</sup> *Royal Insurance* was essentially a matter about statutory interpretation,<sup>205</sup> albeit one informed by unjust enrichment reasoning, which indicated

<sup>199</sup> There is some significant English precedent for the contrary proposition, which does not apply under Australia’s constitutional arrangements. The Court of Appeal reversed a unanimous decision of the Divisional Court in *R v Commissioners of Inland Revenue; Re Nathan* (1884) 12 QBD 461, holding that, if overpaid taxes were able to be recovered at all, they could only be recovered by a petition of right and not by mandamus. The Attorney-General, appearing with junior counsel for the Commissioners, argued that the Crown could never direct a writ of mandamus either to itself or to its servants (the case turned on the difference between the Crown and its servants, the Commissioners): at 462–3 (Sir H James) (during argument). This proposition was not wholly adopted by Brett MR and Bowen LJ, who held simply that mandamus was an inappropriate remedy when any other action lay: at 472–3 (Brett MR), 478 (Bowen LJ). Interestingly, junior counsel to the Inland Revenue Commissioners was A V Dicey, a post he held between 1876 and 1890. Although he naturally made the argument which best suited the interests of his client, it is odd to see him having argued for such an uneven playing field between Crown and subject. However, it is worth noting that Dicey regarded the law of tort as the primary way of making public authorities comply with the rule of law: A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 8<sup>th</sup> ed, 1915) 189. Mandamus was an exceptional remedy, which he did not consider to be a core part of the law relating to the constitution.

<sup>200</sup> Aronson and Groves, above n 123, 805–6 [13.10].

<sup>201</sup> See *Aala* (2000) 204 CLR 82, 92–3 [21] (Gaudron and Gummow JJ).

<sup>202</sup> See Aronson and Groves, above n 123, 814–15 [13.110].

<sup>203</sup> See *Royal Insurance* (1994) 182 CLR 51, 64 (Mason CJ), 84 (Brennan J), 103 (Toohey J), 103 (McHugh J). See also Pearce and Geddes, above n 110, 349–50 [11.6]–[11.7].

<sup>204</sup> *Royal Insurance* (1994) 182 CLR 51, 87 (Brennan J). McHugh J and Toohey J agreed with Brennan J: at 103. Dawson J held that ‘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’: at 96.

<sup>205</sup> It is not the only example of the High Court preferring to see issues of unjust enrichment through the lens of statutory interpretation. In a subsequent case, McHugh and Gummow JJ said:

that '[a]ll discretions have boundaries'<sup>206</sup> and that there is therefore a point at which mandamus may — theoretically — issue to compel action. I say theoretically because mandamus, and the constitutional writ jurisdiction of the High Court generally, are always discretionary.<sup>207</sup> Indeed, the grounds upon which mandamus may be refused are many.<sup>208</sup> To regard an unlawful demand by a public authority as a purely public law event with a purely public law remedy is fraught with risk for this reason.<sup>209</sup>

Williams asked why, if unlawful taxation is treated as a purely public event rather than as a policy-motivated unjust factor used for the purpose of establishing unjust enrichment, restitution is the appropriate response.<sup>210</sup> The short answer, of course, is that on a traditional understanding of the public/private divide,<sup>211</sup> it is not: shorn of its private law context, the unlawful act of a public authority has always been remedied in judicial review proceedings.<sup>212</sup> Of course, in *Woolwich* the unlawful act was not being remedied, but simply formed one of the circumstances allowing the court to conclude that the Revenue had been unjustly enriched.

The question remains whether this is an appropriate response. Since an entirely private response is no more, and arguably even less, appropriate to

Legislation should not readily be construed as conferring upon the executive branch of government a discretion to retain, rather than an obligation to refund, moneys received under a statutory entitlement which from a subsequent date has been displaced by the operation of that legislation.

*Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285, 312 [63], citing *Woolwich* [1993] AC 70, 172 (Lord Goff), *Royal Insurance* (1994) 182 CLR 51, 99 (Dawson J) and *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453, 465–6 (McHugh and Gummow JJ).

<sup>206</sup> Aronson and Groves, above n 123, 815 [13.110]; see generally at 814–15 [13.110].

<sup>207</sup> *Ibid* 798–800 [12.250].

<sup>208</sup> See *ibid* 820–8 [13.200]–[13.290].

<sup>209</sup> Alder's view was that the *Woolwich* principle should be 'one sounding only in public law' precisely so it *did not* create 'an absolute right' to restitution: John Alder, 'Restitution in Public Law: Bearing the Cost of Unlawful State Action' (2002) 22 *Legal Studies* 165, 176. Cf *Kingsstreet Investments* [2007] 1 SCR 3, 14 [14] (Bastarache J for McLachlin CJ, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ) (emphasis added), in which the Court sought to 'guarantee respect for constitutional principles'. The Court's decision also allows recourse as a matter of 'right' by basing the remedy in the *Constitution Act 1867*: at 23 [34] (emphasis added). The position is different in Australia and the United Kingdom: see Williams, *Unjust Enrichment and Public Law*, above n 90, 33–4.

<sup>210</sup> Williams, *Unjust Enrichment and Public Law*, above n 90, 35.

<sup>211</sup> Which is not 'fixed immutably': Carol Harlow, *State Liability: Tort Law and Beyond* (Oxford University Press, 2004) 31. See also Harlow, 'Public and Private Law', above n 155.

<sup>212</sup> See, eg, *Ex parte Woolwich* [1990] 1 WLR 1400.

unjust enrichment caused through unlawful acts by public authorities,<sup>213</sup> Williams posited a ‘hybrid approach’ which sought to combine the two, using the test from *R v Panel on Take-overs and Mergers; Ex parte Datafin plc* (*‘Datafin’*)<sup>214</sup> to test the extent to which private bodies exercise public power.<sup>215</sup> As I have noted above, this principle has had a notoriously difficult history in Australia,<sup>216</sup> where it has never been considered by the High Court,<sup>217</sup> but Williams recognised that to press cases like *Woolwich* and *Kingstreet Investments*<sup>218</sup> into the standard private law unjust enrichment mould, with all the difficulty that entails,<sup>219</sup> risks allowing the law of unjust enrichment to become trapped within the confines of its own taxonomy.<sup>220</sup> She stated that ‘[n]either the certainty of private law nor the flexible discretionary nature of public law can prevail absolutely; a balance must be struck between them’.<sup>221</sup>

It is not clear how *Datafin* will be helpful in sorting out these issues, which is at least unsurprising in Australia, given its heavily contested status here. Would Williams’ proposed ‘hybrid approach’ mean that restitution claims against public bodies would no longer be decided subject to judicial discretion? Would a court still apply public law principles in such cases? Should the courts have discretion in any case or is that aspect of the issue better left to parliament? The answers to these questions are unclear, but one is nonetheless moved to applaud Williams’ purpose in proposing an approach which does not compel a choice between purely private and purely public approaches and

<sup>213</sup> See Williams, *Unjust Enrichment and Public Law*, above n 90, 33. Cf Alder, above n 209, 176.

<sup>214</sup> [1987] 1 QB 815, 838 (Sir John Donaldson MR), 847–8 (Lloyd LJ), 850 (Nicholls LJ).

<sup>215</sup> Williams, *Unjust Enrichment and Public Law*, above n 90, 36.

<sup>216</sup> See *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393, 410–13 [74]–[81] (Basten JA); *Khuu & Lee Pty Ltd v Corporation of the City of Adelaide* (2011) 110 SASR 235, 241–2 [25]–[30] (Vanstone J). Special leave to appeal to the High Court was refused: Transcript of Proceedings, *Khuu & Lee Pty Ltd v Corporation of the City of Adelaide* [2012] HCATrans 108 (11 May 2012).

<sup>217</sup> With the very minor exception of Kirby J’s dissent in *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, 313–14 [112]–[113] (*‘NEAT Domestic’*). Gleeson CJ’s judgment in *NEAT Domestic* contained the hallmarks of *Datafin*’s influence, but his Honour did not mention *Datafin* by name.

<sup>218</sup> Hogg and his co-authors noted that the Court in *Kingstreet Investments* [2007] 1 SCR 3 considered that it had granted a public law remedy, ‘but it assimilated the law respecting recovery of taxes to the private law of restitution’: Hogg, Monahan and Wright, above n 189, 504. This echoes *Reprotech* [2003] 1 WLR 348: see above n 190 and accompanying text.

<sup>219</sup> See Alder, above n 209, 176–9.

<sup>220</sup> Williams, *Unjust Enrichment and Public Law*, above n 90, 36–9.

<sup>221</sup> *Ibid* 37.

brings some flexibility to a taxonomy otherwise notable for its rigidity. Maintaining a firm divide between public law and private law approaches, she pointed out, inevitably results in an inaccurate description of the *Woolwich* claim.<sup>222</sup>

Thus far, the English courts have not decided to follow the ‘hybrid’ path; in *DMG*, the House of Lords (in contradistinction to the Canadian Supreme Court in *Kingstreet Investments*) opted to take a private law approach.<sup>223</sup> While a detailed treatment of these authorities is beyond the scope of this article, I respectfully endorse Williams’ argument that the fact that an unlawful event has occurred is sufficient reason for restitution (the ‘public law reason for restitution’) and that the tortuous process of making it coincide with an existing private law unjust factor is unnecessary.<sup>224</sup> Nonetheless, the constitutional arrangements in Canada and Australia do not cause me to expect that the High Court will adopt either a totally public law or a hybrid response to unlawful taxation in the near future. Waiting for the Court to consider *Woolwich* at all is enough to be going on with.

#### VI WOOLWICH AS A RESPONSE TO A BREACH OF SOFT LAW

Has *Woolwich* revealed a basis for restitution for unjust enrichment consequent on the use of soft law? The initial problem for a claimant who seeks to obtain restitution by relying on *Woolwich* is whether the defendant public authority’s soft law guidelines are sufficient to trigger the rule in *Woolwich* at all, or whether, alternatively, the guidelines are not ‘law’ and therefore unable to be described as ‘unlawful’. In Australia and England,<sup>225</sup> provided that making rules is within that administrator’s powers and does not disclose an improper purpose which takes it beyond the extent of those powers, the soft law will not be ‘illegal’. Legal remedies attach to law’s *form* rather than to its effect or substance, which is problematic for soft law, given its pervasive and

<sup>222</sup> Ibid 38.

<sup>223</sup> [2007] 1 AC 558. Williams’ analysis is excellent: see Williams, *Unjust Enrichment and Public Law*, above n 90, 75–97.

<sup>224</sup> See Williams, *Unjust Enrichment and Public Law*, above n 90, 72–4.

<sup>225</sup> But not in America, where an intention to bind brings the notice and comment procedures of the *Administrative Procedure Act*, 5 USC § 553 (2012) into force: see Robert A Anthony, ‘Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them to Bind the Public?’ (1992) 41 *Duke Law Journal* 1311, 1355–9.

persuasive nature.<sup>226</sup> After all, since soft law does not have a *legally* binding effect, how can it be quashed? An act performed in accordance with soft law cannot be characterised as ultra vires, on the basis of either the act or the instrument being invalid, when (in Professor Wade's phrase) 'it has no vires to be ultra'.<sup>227</sup> These issues are almost irrelevant to a *colore officii* argument, since all that a claimant must establish is that a public officer has demanded and was paid money he or she is not entitled to, or more than he or she is entitled to, for the performance of his or her public duty.<sup>228</sup> Such a demand can equally be made through a soft law instrument, an unlawfully made legislative instrument, or a simple demand unvarnished with the appearance of legal status. Does a *Woolwich* claim have the capacity to counter this level of flexibility?

In my view, *Woolwich* should be understood as sufficiently flexible to allow for restitution where the claimant has paid subject to a demand made in the form of a soft law instrument which threatens unlawful consequences. If the soft law contains a demand, as in *Woolwich*, for a payment to which the public authority has no legal right, it is that *demand* which is unlawful for being beyond the public authority's powers and which therefore might attract a remedy. That is consistent with the view that one of the great dangers of soft law to the unwary is how convincingly it can present itself as law.<sup>229</sup> To limit restitution using the *Woolwich* policy-based unjust factor only to hard law instruments may make no difference to the legally sophisticated, like *Woolwich* EBS, but those who do not recognise the difference between soft and hard law would be adversely affected. In *Woolwich*, the regulations which were held to be void in the judicial review proceedings were legislative instruments.<sup>230</sup> In my view, however, that was not central to the reasoning of the majority in the subsequent restitution case, in which Lord Goff said in obiter dicta that he inclined

<sup>226</sup> See Greg Weeks, *Australian Public Authorities Which Breach Their Soft Law: Remedies and Suggested Reforms* (PhD Thesis, The University of New South Wales, 2013) <<http://handle.unsw.edu.au/1959.4/53033>>.

<sup>227</sup> H W R Wade, 'Beyond the Law: A British Innovation in Judicial Review' (1991) 43 *Administrative Law Review* 559, 561.

<sup>228</sup> *Mason v New South Wales* (1959) 102 CLR 108, 140 (Windeyer J).

<sup>229</sup> See generally Greg Weeks, 'The Use and Enforcement of Soft Law by Australian Public Authorities' (2014) 42 *Federal Law Review* 181, 182–6.

<sup>230</sup> Namely the *Income Tax (Building Societies) Regulations 1986* (UK) SI 1986/482: see *Ex parte Woolwich* [1990] 1 WLR 1400.

to the opinion that [the] principle [that money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an unlawful demand by the authority is prima facie recoverable by the citizen as of right] should extend to embrace cases in which the tax or other levy has been wrongly exacted by the public authority not because the demand was ultra vires but for other reasons, for example because the authority has misconstrued a relevant statute or regulation.<sup>231</sup>

The important factor in *Woolwich* was that the Revenue had acted in a way which was legally wrong,<sup>232</sup> rather than that it had acted in excess of specifically *legislative* authority. In other words, while the soft law may not itself be capable of being unlawful, it may reflect a legal error which, when acted upon by a public authority, means that it is acting unlawfully.

Furthermore, although the unlawfulness of the regulations was important in *Woolwich*,<sup>233</sup> there was a recognition throughout that ‘the tax position of building societies ... was regulated by *extra-statutory arrangements* made between individual building societies and the revenue.’<sup>234</sup> The majority of the House of Lords accepted that Woolwich EBS had paid under a belief that it was *practically*, rather than legally, compelled to do so. Woolwich EBS, after all, had correctly ascertained that the Revenue had no legal basis to demand tax in the amount which Woolwich EBS ultimately paid. This reinforces the view that what is important for the purpose of making out a *Woolwich* claim is not the existence of an unlawful legal instrument under which payment was demanded but the fact that one was compelled to pay in practice. That describes the essence of much soft law. For example, revenue authorities in many countries issue rulings which have the status of soft law rather than that of a legislative instrument.<sup>235</sup> Given that the purpose of such rulings is to

<sup>231</sup> *Woolwich* [1993] AC 70, 177. Cf Lord Woolf et al, above n 27, 232 [4-069].

<sup>232</sup> As was the case (albeit leading to a different remedy) with relation to legally wrong soft law instruments in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319.

<sup>233</sup> Moules took the view that it was unnecessary to decide in *Woolwich*, but that the majority thought that a misconstruction of the statute or instrument by the Revenue, falling short of being ultra vires, would still have sufficed: Moules, above n 50, 314 [8-029].

<sup>234</sup> [1993] AC 70, 102 (Ralph Gibson LJ) (emphasis added).

<sup>235</sup> See Aronson and Groves, above n 123, 194–5 [4.80]; Weeks, ‘The Use and Enforcement of Soft Law’, above n 229, 205. The Australian Taxation Office (‘ATO’) also provides Law Administration Practice Statements (‘LAPS’): ATO, *Law Administration Practice Statements* (2 August 2012) <<https://www.ato.gov.au/General/Gen/Law-Administration-Practice-Statements/>>. LAPS are statements of the ATO’s ‘corporate policy framework’ and ‘provide direction and assistance to ATO staff’. However, the ATO’s longstanding policy makes clear that, unlike rulings (which are made subject to a statutory framework), LAPS

guide the behaviour of taxpayers, a purpose in which rulings overwhelmingly succeed, upon what principled basis can it be argued that they cannot attract the *Woolwich* unjust factor because they are not (hard) law? There is no reason why *Woolwich* ought not to apply to soft law instruments which threaten unlawful consequences, in the sense of being inconsistent with a legislative or constitutional requirement.<sup>236</sup>

## VII CONCLUSION

*Woolwich* was a landmark decision which has created a blizzard of commentary that has not abated over the twenty years since the House of Lords handed it down. Although Australian courts have, in that time, had scant occasion to consider *Woolwich*, this article concludes that there is no reason why it should not be accepted as part of the common law of Australia.<sup>237</sup> It need not have a capital-C Constitutional basis, as it does in Canada, nor need it be traced exclusively to the *Bill of Rights 1689* in such a way that it would only apply against revenue authorities. Rather, *Woolwich* should be seen as standing for the proposition that a public authority which is unjustly enriched at the expense of a claimant due to an unlawful act or decision on the part of the public authority must, absent a defence, make restitution to the claimant. This is a simple proposition which does no more than assume that *Woolwich* created a policy-based unjust factor to address the problem faced by a claimant whose claim fell within none of the existing unjust factors. Nothing in *Woolwich* need be read as requiring that the public authority in question had made a jurisdictional error; that doctrine exists within Australian administrative law for a completely separate purpose and does not need to be extended further.

are published and approved for taxpayers to rely on them in the same way as other publications that are not rulings. A taxpayer who relies on particular LAPS will remain liable for any tax shortfall if those LAPS are incorrect, or are misleading and the taxpayer makes a mistake as a result.

ATO, *ATO Practice Statement Law Administration*, PS LA 1998/1, 17 December 1998, [20]. The ATO does not charge such taxpayers with penalties or interest charges as a result of a shortfall 'if the particular LAPS were reasonably relied on in good faith'.

<sup>236</sup> Moules argued that 'a statute, statutory instrument or exercise of administrative discretion will be unlawful if it is contrary to EC law': Moules, above n 50, 300 [8-008]. This statement is also true of domestic law. If discretionary decisions are able to be categorised as unlawful for the purposes of a *Woolwich* claim, soft law should be in the same position.

<sup>237</sup> In fact, only the High Court could recognise the policy-based factor that was applied in *Woolwich*.

The role of soft law is an interesting factor in considering the impact of *Woolwich*. There is a strong argument to be made in favour of using *Woolwich* as the basis for remedying unjust enrichment based upon any unlawful act or demand by a public authority. That application of *Woolwich* is consistent with the majority speeches in the House of Lords. However, unless *Woolwich* is adopted more broadly in Australia than it has been in the United Kingdom, it presents a path to obtaining restitution which is limited to overpaid taxation.<sup>238</sup> For that reason, restitution is unlikely to present a practical remedial option for persons affected by the breach of a public authority's soft law in the short term, bearing in mind that *Woolwich* has not yet been applied in Australia at all. It is to be hoped that when the appropriate matter arises in an Australian court, that *Woolwich* is not only accepted but given a broad application. This would be a powerful recognition of the potency of soft law and of the relevance of restitution as a remedy where it is misused.

<sup>238</sup> See the essays in Steven Elliott, Birke Häcker and Charles Mitchell (eds), *Restitution of Overpaid Tax* (Hart Publishing, 2013).