UNJUST ENRICHMENT AND EMPLOYEE OVERPAYMENTS
IN WESTERN AUSTRALIA

CORY FOGLIANI
BCom, LLB

This thesis is presented for the degree of

Master of Laws

School of Law
Murdoch University
Western Australia

June 2017
DECLARATION

I declare that this thesis is my own account of my research and contains, as its main content, work which has not previously been submitted for a degree at any tertiary education institution.

I declare that this thesis is approximately 52,467 words (excluding footnotes and bibliography).

Cory Fogliani
ABSTRACT

Overpaid remuneration is an ordinary aspect of the employment relationship. From time to time, it happens. What is extraordinary is the lack of attention that this issue has received from the legislature, and from legal scholars. The resolution of overpayment disputes between employers and employees has been left almost entirely to the common law.

This thesis looks at how employers and employees in Western Australia can use the law to resolve an overpayment dispute. It does so through the lens of unjust enrichment law. In particular, this study examines how the truck provisions in the *Minimum Conditions of Employment Act 1993* (WA) and in the *Fair Work Act 2009* (Cth) limit an employer’s ability to unilaterally deduct an overpayment from the pay of an employee; what an employer needs to prove in order to establish a prima facie case for restitution of an overpayment; how an employee can use the restitutionary defences to rebut the employer’s prima facie case; what strategies an employee can utilise to defend against a claim by their employer for overpaid tax or superannuation; and, the remedies that are available to an employer who is successful in an unjust enrichment-type claim against an employee.

This thesis concludes that the common law is not always a practical mechanism for resolving overpayment disputes between employers and employees. This is because of the costs involved in litigating in the common law courts. This thesis recommends that the Western Australian and Commonwealth legislatures should make legislative changes in order to better facilitate the resolution of overpayment disputes that arise in an employment context. This thesis also provides some suggested wording that the legislatures could adopt to implement that recommendation.
TABLE OF CONTENTS

Chapter I  Introduction .............................................................................................................. 1

Chapter II  The truck laws ...................................................................................................... 16

Chapter III  An introduction to unjust enrichment ................................................................. 47

Chapter IV  How an employer can recover payments made to an employee because of a mistake ......................................................................................................................... 68

Chapter V  How an employer can recover payments made in advance to an employee for work that was not ultimately performed ................................................................. 77

Chapter VI  How an employer can recover payments made due to economic duress ................................................................................................................................. 85

Chapter VII  How an employer can recover payments that were caused by an employee’s improper use of its position .................................................................................... 97

Chapter VIII  The voluntary payment defence ........................................................................ 106

Chapter IX  The good consideration defence .......................................................................... 123

Chapter X  The change of position defence .............................................................................. 149

Chapter XI  The tax component of an overpayment ................................................................ 178

Chapter XII  Overpaid superannuation ............................................................................... 194

Chapter XIII  Remedies ........................................................................................................... 208

Chapter XIV  Summary, conclusions, recommendations and closing remarks .......................... 220

Bibliography ............................................................................................................................ 231

iii
ACKNOWLEDGEMENTS

This thesis would not have been possible without the support of my primary supervisor, Natalie van der Waarden. Over the last three years, Natalie has spent countless hours checking over my work. I could not have asked for a better supervisor. Natalie was a positive influence the entire way through this journey.

I would also like to thank my supplementary supervisor, Murray Brown. Murray’s wisdom was invaluable at a time where my final deadlines were looming.

I have grown a lot while undertaking this massive task. It has been a largely rewarding exercise. However, it would be amiss of me not to say that writing a thesis is a selfish and taxing endeavour. It affects your mood, sleep, health, and relationships.

This brings me to my family. My family provided me with valuable support throughout this project. I will be forever indebted to them for their patience and understanding. I want to thank my partner, Yamina, for standing by me throughout this process.
CHAPTER I
INTRODUCTION

From time to time, employers overpay their employees.¹ There could be any number of reasons why this might occur. For example, the employer may have overpaid its employee because it was under the mistaken belief that its employee was at work, when in fact the employee was not.² Or, the employee may have misused its position in order to obtain the overpayment from the employer.³ There are two perspectives in any overpayment situation. The first is that of the employer. The second is that of the employee.

An employer that overpays an employee will ordinarily have an interest in recovering that overpayment. It is not lawful for an employer to unilaterally recover an overpayment from the pay of the overpaid employee.⁴ This is because there is a suite of laws that limit employers’ ability to make deductions from their employees’ pay.⁵ Those laws will be referred to in this thesis as the truck laws.⁶ So how can an employer recover an overpayment from an employee?

² See for example: The State of Western Australia v Hartmann-Nieto [2014] WADC 70.
³ See for example: Health Services Union v Jackson (No 4) (2015) 108 ACSR 156.
⁵ Ibid.
⁶ The truck laws are a collection of legislative provisions that aim to prohibit employers from using exploitative payment systems to diminish the real value of their employees’ labour. See generally the discussion in Australian Education Union v State of Victoria (Department of Education and Early Childhood Development) (2015) 255 IR 341, [148]-[175].
The law of unjust enrichment offers one possible solution. An employer can use the causes of action that fall under the heading of unjust enrichment to lawfully recover an overpayment from an employee. The benefit to the employer that flows from this method of recovery is that the employer does not need to prove that the employee breached a contract or committed a tort.

An overpaid employee’s interests are different to that of the employer that made the overpayment. Overpayments can create significant problems for employees. Hawkins has identified that an employer who attempts to recover a significant overpayment from an employee can expose that employee to financial distress. In *Skyring v Greenwood*, Abbot CJ said:

> It is of great importance to any man … that they should not be led to suppose that their annual income is greater than it really is. Every prudent man accommodates his mode of living to what he supposes to be his income; it therefore works a great prejudice to any man, if after having had credit given him in account for certain sums, and having been allowed to draw on his agent on the faith that those sums belonged to him, he may be called upon to pay them back.

An employee that has been sued by their employer in unjust enrichment is able to ‘raise by way of answer any matter or circumstance which shows that his or her receipt (or retention) of the payment is not unjust’. Even if the employee had no legal right to receive the payment, there are restitutionary defences that can reduce the employee’s liability to pay restitution to the employer.

---

7 See for example: *The State of Western Australia v Hartmann-Nieto* [2014] WADC 70.
10 Ibid.
11 *Skyring v Greenwood* (1825) 107 ER 1064, 1067.
This thesis will look at how employers and employees in Western Australia can use the law to resolve a dispute about overpaid remuneration. This will be done through the lens of unjust enrichment law. This thesis will then look at the practical difficulties with the current state of the law, and make suggestions about how the law could be reformed to better deal with overpayment disputes that arise in an employment context.

\[\text{A Literature review}\]

1. **Scholarly work dedicated entirely to overpaid remuneration**

There is not a great deal of scholarly work that focuses solely on the issue of overpayments in an employment context.\(^{13}\) Aside from this thesis, the most significant piece to deal with the topic is Hawkins’ 2014 journal article, *Law’s Remarkable Failure to Protect Mistakenly Overpaid Employees*.\(^{14}\) Hawkins’ paper looked at several issues. First, it looked at what causes employers to overpay employees. Second, it outlined the effect of those overpayments on employees. Third, the paper set out how an employer can use the law of unjust enrichment (as it stands in the United States of America) to resolve an overpayment dispute. Fourth, Hawkins paper elaborated on the failure of the law in the United States of America to adequately protect employees who are caught up in an overpayment dispute with their employer. Fifth, it made suggestions about how the law in the United States of America could be reformed to better protect employees from the harms that flow from the unilateral


recovery of overpaid remuneration by employers. Because Hawkins’ article was written in contemplation of the circumstances as they exist in the United States of America, it is questionable whether his research is equally applicable in Western Australia. There is no scholarly research that looks solely at the issue of overpaid remuneration in the Western Australian context.

2. **Overpaid remuneration as a subtopic within a larger piece of work**

There is a multitude of scholarly work dedicated to the general topic of employment and industrial law in Australia. This section will provide a brief overview of how the most recent editions of the leading scholarly monographs on the topic of employment and industrial law in Western Australia and Australia deal with the issue of overpaid remuneration.

(a) *Western Australian Industrial Relations Law (2nd ed)*\(^{15}\)

In 1991, Brown released the second edition of her book, *Western Australian Industrial Relations Law*.\(^{16}\) Brown’s text was one of the earliest scholarly pieces to look at Western Australia’s truck laws.\(^{17}\) Brown’s discussion of the *Truck Act 1899 (WA)* was brief.\(^{18}\) This is because the application of the *Truck Act 1899 (WA)* was only incidental to the main thesis of her book. The practical utility of Brown’s discussion of the truck laws has been diminished by the fact that the *Truck Act 1899 (WA)* was repealed in 1995.\(^{19}\) Brown’s book does not address how employers and employees can use the law

---

\(^{15}\) Marcelle V Brown, *Western Australian Industrial Relations Law* (University of Western Australia Press, 2nd ed, 1991).

\(^{16}\) Ibid.

\(^{17}\) Ibid 23, 225-6.

\(^{18}\) Ibid.

\(^{19}\) *Industrial Relations Legislation Amendment and Repeal Act 1995 (WA)* s 66(1).
of unjust enrichment to resolve an overpayment dispute. And, to be fair, that is because that topic is outside the scope of Brown’s book.

(b) Outline of Employment Law (2nd ed)\(^{20}\)

In 1994, Wallace-Bruce authored the second edition of his book, *Outline of Employment Law*.\(^{21}\) Wallace-Bruce’s text discussed the effect of the *Truck Act 1899* (WA) in Western Australia.\(^{22}\) It also flagged that the law of unjust enrichment could be used to resolve an overpayment dispute.\(^{23}\) The text did not go into any detail about what an employer or employee would need to prove to make out their respective cases.

(c) Review of Western Australian Labour Relations Legislation\(^{24}\)

In 1995, Fielding published his text, *Review of Western Australian Labour Relations Legislation*.\(^{25}\) Fielding wrote his paper as a part of a submission to the then-Minister for Labour Relations in Western Australia, Graham Kierath. Fielding’s work contains perhaps the most in-depth discussion of Western Australia’s truck laws as they stood in 1995.\(^{26}\) It also provides a unique philosophical discussion about the importance of the truck laws.\(^{27}\) Unfortunately, Fielding’s review was written at a time where the *Truck Act 1899* (WA) was still in force in Western Australia. As such, his work does not contemplate or address the current truck provisions that are contained in Part 3A of the *Minimum Conditions of Employment Act 1993* (WA). The interaction between

---

\(^{20}\) Nii Lante Wallace-Bruce, *Outline of Employment Law* (Butterworths, 2nd ed, 1999).
\(^{21}\) Ibid.
\(^{22}\) Ibid 13, 78-9.
\(^{23}\) Ibid 105-6.
\(^{25}\) Ibid.
\(^{26}\) Ibid 371-81.
\(^{27}\) Ibid.
unjust enrichment law and the recovery of overpaid remuneration was outside the scope of Fielding’s report.

(d) Stewart’s Guide to Employment Law (5th ed)\(^{28}\)

Stewart’s fifth edition of his book, *Stewart’s Guide to Employment Law*,\(^ {29}\) made three contributions to the scholarly knowledge about the resolution of overpayment disputes in Australia. First, Stewart provided a brief summary of truck laws that are contained in the *Fair Work Act 2009* (Cth).\(^ {30}\) Second, Stewart identified the fact that employers can use unjust enrichment to lawfully recover an overpayment from an employee.\(^ {31}\) And third, Stewart identified that an employee may be able to rely on the change of position defence in order to resist an employer’s claim in unjust enrichment.\(^ {32}\)

Stewart has suggested that employers can choose to simply ignore the truck laws and unilaterally recover an overpayment from an employee.\(^ {33}\) It will be argued later in this thesis that Stewart’s suggestion is incorrect.

Stewart’s contribution to the scholarly knowledge about how overpayment disputes may be lawfully resolved is of limited practical utility to employers and employees. This is because it does not provide sufficient detail about what an employer and an employee need to prove to use the law of unjust enrichment to resolve an overpayment dispute.


\(^{29}\) Ibid.

\(^{30}\) Ibid 220-1.

\(^{31}\) Ibid 221.

\(^{32}\) Ibid.

\(^{33}\) Ibid.
(e) Creighton & Stewart’s Labour Law (6th ed)\textsuperscript{34}

In 2016, Stewart, Forsyth, Irving, Johnstone, and McCrystal authored the sixth edition of Creighton & Stewart’s Labour Law.\textsuperscript{35} Their book contained some discussion about the truck laws that are in the Fair Work Act 2009 (Cth).\textsuperscript{36} That discussion was recycled from what Stewart said in the fifth edition of Stewart’s Guide to Employment Law.\textsuperscript{37} Stewart, Forsyth, Irving, Johnstone, and McCrystal also briefly commented that employers and employees could use the law of unjust enrichment to resolve an overpayment dispute.\textsuperscript{38}

(f) Macken’s Law of Employment (8th ed)\textsuperscript{39}

In 2016, Sappideen, O’Grady, and Riley authored the eighth edition of Macken’s Law of Employment.\textsuperscript{40} The authors have referred to the federal truck laws in their text.\textsuperscript{41} Those references were less detailed than those made by the authors of the sixth edition of Creighton & Stewart’s Labour Law\textsuperscript{42}. This latest edition of Macken’s Law of Employment did not discuss how the law of unjust enrichment could be used to resolve an overpayment dispute between an employer and employee.

\textsuperscript{35} Ibid.
\textsuperscript{36} Ibid 446-9.
\textsuperscript{39} Carolyn Sappideen, Paul O’Grady, and Joellen Riley, Macken’s Law of Employment (Lawbook Co, 8th ed, 2016).
\textsuperscript{40} Ibid.
\textsuperscript{41} Ibid 416-7, 494.
3. **Overpaid tax in an employment context**

When an employer overpays an employee, a portion of that overpayment will usually go directly to the Commissioner of Taxation as purported tax. The author has not been able to locate any scholarly works that address whether an employer can recover the tax component of an overpayment directly from the employee in an unjust enrichment-type claim.

4. **Overpaid superannuation**

When an employer overpays an employee, the employer may also contribute too much superannuation to the employee’s superannuation fund. This type of payment does not go directly to the employee. It goes to the trustee of the employee’s superannuation fund.

There are several scholarly journal articles from the United States of America that look at the ability of employers to recover overpaid remuneration from employee pension funds. These articles are of limited application in Australia. This is because they are heavily influenced by the effects of statutory laws that are unique to the United States of America.

The author has been unable to locate any Australian scholarly works that look at how an employee can pressure the trustee of their superannuation fund not to return a purported overpayment of superannuation to an employer. Nor has the author been able to locate any scholarly works about what remedies an employee may have against

---

a trustee of their superannuation fund if that trustee inappropriately returns a purported overpayment to an employer.

B  Objects of this thesis

The overarching purpose of this thesis is to discuss how employers and employees in Western Australia can use the law to resolve an overpayment dispute. A secondary purpose of this thesis is to provide some guidance about how the law could be reformed in order to better deal with overpayment disputes that arise in an employment context. The topic of this thesis has not previously received any significant academic attention.

This thesis will:

1. set out the legislative restraints which prevent employers from unilaterally deducting money from the pay of their employees;
2. outline the concept of unjust enrichment;
3. provide employers with a guide to how they can use unjust enrichment law to recover an overpayment from an employee;
4. explain the restitutionary defences that employees might rely upon to prevent their employer from obtaining an order for restitution of an overpayment;
5. address the complicated issues surrounding the recoverability of overpaid tax and overpaid superannuation contributions in an employment context;
6. explain the remedies that are available to an employer that is successful in an unjust enrichment-type case against its employee; and
7. provide recommendations about how the law could be reformed to improve the process for resolving disputes relating to overpaid remuneration in an employment context.

C Methodology

It can be deceptively difficult to describe the methodology that lawyers and legal scholars use to create a research paper. Legal research can appear arcane and intuitive to those who are not trained in the art of the law. Yet to lawyers and legal scholars, the method of legal research is ‘so implicit and so tacit that many … consider that it is unnecessary to verbalise the process’. 45

In standard academic parlance, legal research is a type of qualitative research. Qualitative research involves discovering ‘the meanings, concepts, definitions, characteristics, metaphors, symbols and descriptions of things’. 46 In the field of law, those discoveries are made by deciphering, understanding, and linking complex concepts that are hidden away in equally complex written laws. Those written laws are usually made by parliaments (in the form of statutes) and courts (in the form of legal reasons for deciding a case a particular way). In what is an extra layer of difficulty, those written laws are constantly changing and evolving. The process of studying the law and legal concepts is sometimes referred to as doctrinal research. 47

The creation of this thesis was underpinned by doctrinal research. This thesis deciphers and analyses a large number of statutes, judicial decisions, and academic texts, and

then links the ideas and concepts that have been drawn from those sources in order to create a unique piece of legal research. The sources of law used to create this work spanned various practice areas; such as, employment and industrial law, unjust enrichment law, restitution, equity, superannuation, and tax.

D Limitations

There are three limitations to this thesis.

First, this thesis will only examine the recovery process through the lens of actions in unjust enrichment. It will not look at tort or contract. This is because tort and contract are beyond the topic of this thesis.

Second, the focus of this thesis will be on the law as it stands in Western Australia. There are two reasons for this limitation. The first reason is that the author practices in Western Australia. As such, the limitation is partly one of convenience. The second reason is that the law in Western Australia is unique. This is because Western Australia is the only state in Australia that has not referred its industrial relations powers to the Commonwealth.48

Third, this thesis will not address how underpaid employees might use the law of unjust enrichment to recover an underpayment. That is not to take away from the seriousness of the underpayment issue in Australia. That topic deserves a research paper of its own.

Chapter II: The truck laws

Chapter II of this thesis will look at the truck laws. The truck laws are the statutory provisions that prevent or limit an employer’s ability to deduct money from the pay of its employees. The truck laws aim to eradicate an old mischief, the truck system. Chapter II will define the term ‘truck system’, provide a historical account of how the truck laws have developed in Western Australia since Anglo-colonisation, and explain how the truck laws limit an employer’s otherwise unfettered ability to unilaterally recover overpaid remuneration from its employees.

Chapter III: An introduction to unjust enrichment

Chapter III of this thesis will introduce the concept of unjust enrichment. Unjust enrichment law has the tendency to cause confusion. That is evidenced by the judiciary’s repeated warning that unjust enrichment is not a concept of direct application. Chapter III will attempt to explain why that confusion exists and provide a clear explanation of what is meant by the term ‘unjust enrichment’. In doing so, this thesis will differentiate between unjust enrichment as a label, and unjust enrichment as a taxonomical framework.


50 Bristow v City Petroleum Ltd [1987] 1 WLR 529, 532 which was cited with approval in Australian Education Union v State of Victoria (Department of Education and Early Childhood Development) (2015) 255 IR 341, [154].

3. **Chapters IV, V, VI, and VII: Four overpayment scenarios**

Chapter IV will look at what an employer needs to prove in order to recover an overpayment that it has made to an employee by mistake. Chapter V will address how an employer can recover a payment it has made to an employee in advance for work that was not ultimately performed by the employee. Chapter VI will set out how an employer can recover an overpayment that it made to an employee because it was under duress. And, Chapter VII will delve into how an employer can use the law of unjust enrichment to recover an overpayment that was made to an employee because that employee misused its position.

4. **Chapters VIII, IX and X: Three restitutionary defences**

Once an employer has established its prima facie right to an order for restitution, the onus shifts to the employee to show why the court should not order restitution of the overpayment. At a high level of abstraction, the employee’s task is to satisfy the court that it would be inequitable for restitution to be awarded, either in full or in part, in favour of the employer. Chapters VIII, IX and X will set out three restitutionary defences that an employee may be able to rely upon, depending on the circumstances, to fend off the employer’s claim. Chapter VIII will look at the voluntary payment defence. Chapter IX will discuss the good consideration defence. Chapter X will cover the change of position defence.

---


Chapters XI and XII: Overpaid tax and superannuation

The issues of overpaid tax and overpaid superannuation are complex. This is because when an employer makes one of these types of overpayment, the payment is not made directly to the employee. Chapter XI will explain why it should not be possible for an employer to recover overpaid tax directly from an employee, and how an employee can defend against an employer that tries to do so. Chapter XII will address how an employer can recover overpaid superannuation from an employee’s superannuation fund, and what options an employee has to try to stop the trustee of the superannuation fund from returning an overpayment to an employer.

Chapter XIII: Remedies

Restitution is the primary remedy that the courts can order in response to an unjust enrichment claim. In addition to an order for restitution, the common law courts can award pre-judgment interest and costs. Chapter XIII will explain each of these remedies and how they fit into an overpayment dispute between an employer and employee.

Chapter XIV: Summary, conclusions, recommendations and closing remarks

Chapter XIV is the final chapter in this thesis. It will summarise the discussion from the earlier chapters, outline the key conclusions that can be drawn from that discussion,

---

and provide a recommendation about how the law could be reformed to better deal with overpayment disputes that arise in an employment context.
CHAPTER II

THE TRUCK LAWS

A Introduction

The truck system is a collection of workplace relations mechanisms that involve an employer misusing its superior position in the employment relationship in order to reduce the real value of its labour costs. The truck system is an old industrial and social mischief. The truck laws are the legislative provisions that outlaw the truck system. The truck laws are contained in Division 2 of Part 2-9 of the Fair Work Act 2009 (Cth) and Part 3A of the Minimum Conditions of Employment Act 1993 (WA).

The truck laws are a convenient starting point in any discussion on the recovery of overpayments of employee remuneration in Western Australia. This is because the truck laws restrict an employer’s ability to unilaterally recover an overpayment from an employee’s pay. If an employer unlawfully deducts money from the pay of an employee, then the employee can bring civil proceedings against their employer for the recovery of that money.


57 Minimum Conditions of Employment Act 1993 (WA) ss 7, 17C; Industrial Relations Act 1979 (WA) s 83; Fair Work Act 2009 (Cth) ss 323(1)(a), 324, 539.
This chapter will start by explaining what the truck system is and why it is outlawed. It will then set out the historical development and operation of the truck laws in Western Australia. This chapter will conclude by identifying some deficiencies in the truck laws.

B  What is the truck system and why is it outlawed?

The truck system is a somewhat difficult creature to describe. This is because the truck system can take a variety of different forms. The key feature of the truck system is that it involves an employer misusing its superior position in the employment relationship in order to reduce the real value of its labour costs. The loser in that arrangement is the employee. This is because the truck system reduces the real value at which an employee can sell its labour to its employer. Perhaps the easiest way to explain this paradigm is by way of examples.

1.  Example 1: Payment in kind rather than money

One example of the truck system involves an employer paying its employees in over-valued goods and services rather than money. For example, an employer may give an employee a $30 bottle of wine for staying back and working three hours of unpaid overtime. If the employee’s labour was worth more than $30, then the employer has


diminished the real value of that employee’s labour by using that alternate method of payment. This method of payment will normally result in the employer gaining a commercial advantage over its competitors at the expense of its employee.

2. **Example 2: Payment in tokens and vouchers**

A second example of the truck system is where an employer pays its employees in tokens or vouchers rather than money. In days gone by, some employers would set up a shop. The shop would contain a range of consumer goods. The employer would then pay their employees in tokens and vouchers. Those tokens and vouchers would only be redeemable at the employer’s shop. Thus enabling the employer to monopolise where its employees spent their pay. Often, the goods in the employer’s shop would be overpriced compared to the open market.

3. **Example 3: Making arbitrary deductions from an employee’s pay**

A third example of the truck system is where the employer makes arbitrary deductions from an employee’s pay in circumstances where the deduction is primarily for the employer’s benefit and is unreasonable in the circumstances. The facts in *Fair Work Ombudsman v Jetstar Airways Ltd*, which are set out below, provide a modern day example of this third type of truck system.

---


61 See: *Fair Work Act 2009* (Cth) ss 325(1), 326(1), 326(3).

Jetstar Airways was an Australian airline company. In November 2009, Jetstar Airways started making plans to employ a group of cadet pilots to fly in Australia. Before the cadets could work in Australia, they were required to undergo compulsory pilot training. One aspect of Jetstar Airways’ plan was that it wanted the cadets to be responsible for the cost of their own training. Jetstar Airways was aware that if it employed the cadets in Australia, then it would be responsible for covering the cadets’ training fees. This was because of the terms of an industrial award. To get around the obligations in the industrial award, Jetstar Airways planned to employ the cadets through a related company, Jetstar New Zealand, which was registered in New Zealand.

Between 6 August 2010 and 21 October 2010, Jetstar New Zealand entered into funding agreements with six cadets. Jetstar Airway used its superior bargaining position to compel the cadets to agree to this arrangement. Under the funding agreements, Jetstar New Zealand agreed to cover the upfront costs of training the cadets. In return, the cadets promised to pay those costs back to Jetstar New Zealand once the cadets started working.

Once the cadets had completed their training, they were employed by Jetstar New Zealand. Jetstar New Zealand immediately started making deductions from the cadets’ pay pursuant to the funding agreements. During their employment with Jetstar New Zealand, the cadets performed no work in New Zealand. They worked exclusively in Australia.

63 The facts referred to in this section are drawn from Fair Work Ombudsman v Jetstar Airways Ltd [2014] FCA 33, [8]-[24].
64 Fair Work Ombudsman v Jetstar Airways Ltd [2014] FCA 33, [41].
On or around 9 March 2011, the Civil Aviation Safety Authority made a decision that the cadets would need to be based in Australia. In response, Jetstar Group (the parent company of Jetstar Airways and Jetstar New Zealand) engaged the six cadets in Australia under new employment contracts. The employment contracts purported to authorise the Jetstar Group to make deductions from the cadets’ pay in order to cover their obligations under the funding agreements. Notwithstanding that point, the relevant award required Jetstar Group to cover the costs of the cadet’s training. Jetstar Group started making those deductions from the cadets’ pay. The Fair Work Ombudsman brought an action against Jetstar Airways and Jetstar Group on behalf of the cadets.

(b) Buchanan J’s findings in relation to the truck system

Buchanan J found that Jetstar Group breached the relevant award by not covering the training costs of the cadets. The conduct of Jetstar Group and Jetstar Airways, in making deductions from their cadet’s pay for costs that ought to have been covered by those entities, was a serious breach of the truck laws contained in the Fair Work Act 2009. According to Buchanan J:

The protection of employees from unauthorised deductions from their wages or salaries

is an important one. The deduction should not have been made.

To reflect the seriousness of Jetstar Airways’ conduct, Buchanan J made a pecuniary penalty order against Jetstar Airways for $25,000 for each breach of the truck laws.

65 Ibid [53].
66 Ibid [54].
67 Ibid [56].
4. **Philosophical reasons for outlawing the truck system**

The main argument against the truck system is that it allows employers to devalue their employees’ labour. The truck system is an exploitation mechanism. In *Archer v James*, Keating J described the truck system as:

> [T]he payment by masters of their men’s wages wholly or in part with goods – a system manifestly to the disadvantage of the workman, who was, practically, forced to take the goods at his master’s valuation.

In the same case, Byles J explained that the underlying justification for laws prohibiting the truck system was because individual employees are weaker than their employer, and are therefore vulnerable to oppression.

In *Hewlett v Allen & Sons*, Bowden LJ said that the clear intention of the truck laws in England was to ensure that workers were paid the entire amount of their wages in actual currency, and free from any deductions that were not authorised by statute. The laws were to ensure that workers were not compelled by their employer to spend their wages in any particular manner or at any particular shop. Quite importantly, Bowden LJ said:

> [T]he employer cannot, for the purpose of compliance with the statute be both payer and payee.

---

69 Ibid.
70 *Archer v James* (1859) 2 B & S 67.
71 Ibid 73.
72 Ibid 83.
73 *Hewlett v Allen & Sons* [1892] 2 QB 662.
74 Ibid 664.
75 Ibid.
76 Ibid 666.
This sentiment was shared by Lord Atkinson in *Williams and Others v North’s Navigation Collieries Ltd.*[77] In that case, Lord Atkinson said the following about the purpose of the legislation that outlawed the truck system:

The whole principle upon which this legislation is based is that the workman requires protection, that if not protected he may be over-reached... [The purpose of this legislation is] to prohibit the master from, as it were, substituting himself for the legal tribunal, investigating his own claim against his workman in his own office and deciding in his own favour.[78]

In *Bristow v City Petroleum Ltd*,[79] Lord Ackner described the truck system as:

[The] payment by masters of their men's wages wholly or in part with goods — a system open to various abuse — when workmen were forced to take goods at their master's valuation.[80]

As been pointed out by Hawkins, when an employer unilaterally recovers an overpayment from the pay of an employee, that employer is effectively denying the employee an opportunity to rely on a defence to the employer’s overpayment claim.[81] According to Hawkins, ‘[t]his fact creates an incredibly large imbalance of power between the parties, even more so than already exist.’[82]

An employer can cause significant harm to an employee by unilaterally recovering an overpayment from that employee’s pay.[83] According to Hawkins, an employer’s attempt to recover an overpayment from an employee can leave that employee in financial distress.[84] The effect of that distress does not just affect the employee, but

---

77 *Williams v North’s Navigation Collieries Ltd* [1906] AC 136, 146.
78 Ibid.
80 *Bristow v City Petroleum Ltd* [1987] 1 WLR 529, 532.
82 Ibid.
83 Ibid 100-3.
84 Ibid.
also third parties who rely on the employee’s remuneration.\textsuperscript{85} The extent of that financial distress obviously increases in circumstances involving significant overpayments.\textsuperscript{86} However, even a small decrease in an employee’s remuneration can have a significant impact on an employee.\textsuperscript{87} The truck laws are important because they ensure that employees are not unnecessarily exposed to the harms associated with a reduction in the real value of their labour.

\textbf{C \ The historical development of the truck laws in Western Australia}

The operation of the truck laws in Western Australia has a chequered history. Table 2.01 sets out a summary of the truck laws that have applied in Western Australia from colonisation until now.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{Period} & \textbf{Truck laws} & \textbf{Applied to} \\
\hline
< 01.01.1900 & No laws prohibiting the truck system. & \textbullet\ All employers \\
\hline
01.01.1900 to 16.01.1996 & \textit{The Truck Act 1899} (WA) & \textbullet\ All employers \\
\hline
16.01.1996 to 26.05.2009 & \textit{The Minimum Conditions of Employment Act 1993} (WA) & \textbullet\ All employers \\
\hline
01.07.2009 to Present & \textit{The Fair Work Act 2009} (Cth) & \textbullet\ The Commonwealth \\
& & \textbullet\ Trading, financial and foreign corporations \\
& \textit{The Minimum Conditions of Employment Act 1993} (WA) & \textbullet\ The State government \\
& & \textbullet\ Non-trading entities \\
& & \textbullet\ Unincorporated partnerships \\
& & \textbullet\ Sole traders. \\
\hline
\end{tabular}
\caption{History of the truck laws in Western Australia}
\end{table}

\textsuperscript{85} Ibid.  \\
\textsuperscript{86} Ibid.  \\
\textsuperscript{87} Ibid.
1. *From colonisation to 31 December 1899: The truck system in Western Australia*

The truck system is a foreign mischief. English colonists introduced it into Western Australia. The earliest record of the truck system operating in Western Australia is contained in a proclamation that was issued by Governor James Stirling on 26 March 1830. In that proclamation, Stirling set minimum quantities of food and alcohol that employers had to provide to their employees in circumstances where there was no express employment contract to the contrary. Interestingly, the proclamation is one of the earliest forms of an industrial award in Western Australia. It was made to resolve the ‘many’ disputes that existed between employers and employees at the time about hours of work and rates of pay.

Dr Simon Stevens, a Western Australian historian, has written about the havoc that the truck system caused in Western Australia between 1829 and 1899. Dr Stevens’ research has uncovered that it was not uncommon for employers to pay their employees with kind such as eggs, alcohol, and vouchers in the colonial days of Western Australia. Dr Stevens’ work cited a number of complaints that citizens had made in local newspapers about employees being dismissed from their employment because they purchased goods from a store that did not belong to their employer.

---


89 State Records Office of Western Australia, Colonial Secretary's Outward Correspondence (CSF), Accession Number (ACC) 49, Vol. 2/644.

90 Ibid.

91 Ibid.

92 Ibid 87-93.

93 Ibid 87-93.

94 Ibid.
Between 1829 and 1899, there were a number of ‘Masters and Servants’ statutes in operation in Western Australia.\(^95\) To various degrees, each of those statutes allowed servants to bring civil proceedings against their master for the non-payment of wages.\(^96\) However, none of those laws prohibited a master from making deductions from a servant’s wages. It was not until 1899 that Western Australia made its first legislative move to outlaw the truck system.

2. \textit{1 January 1900 to 16 January 1996: The Truck Act 1899 (WA)}

On 11 July 1899, Sir John Forrest introduced the \textit{Truck Bill} into the Western Australian Legislative Assembly.\(^97\) The wording of the \textit{Truck Bill} was largely adapted from legislation that was in force in England and New Zealand at the time.\(^98\) The purpose of the \textit{Truck Bill} was to prohibit the ‘payment of wages in goods, or in any other way than in money’.\(^99\) On 10 October 1899, the \textit{Truck Bill} received royal assent from the Governor of Western Australia.\(^100\)

On 1 January 1900, the \textit{Truck Act 1899 (WA)} came into operation.\(^101\) The enactment of the \textit{Truck Act 1899 (WA)} was a significant milestone in the development of statutory rights for employees in Western Australia. The \textit{Truck Act 1899 (WA)} provided several new protections to employees. First, it required employers to pay the

\(^{95}\) Masters and Servants Act 1823 (Imp) 4 Geo 4, c 34 (which was likely inherited from England, see the test for inheritance in: Quan Yick v Hinds (1905) 2 CLR 345, 356); Masters and Servants Act 1842 (Imp) 6 Vict, c 5; Masters and Servants Act 1868 (Imp) 32 Vict, c 8; Masters and Servants Act 1886 (Imp) 50 Vict, c 20.

\(^{96}\) Masters and Servants Act 1823 (Imp) 4 Geo 4, c 34, ss 2, 5; Masters and Servants Act 1842 (Imp) 6 Vict, c 5, s 4; Masters and Servants Act 1868 (Imp) 32 Vict, c 8, s 2; Masters and Servants Act 1886 (Imp) 50 Vict, c 20, s 3 (which required the 1886 statute to be read with the 1842 and 1868 statutes); Masters and Servants Act 1892 (Imp) 55 Vict, c 28, s 4.

\(^{97}\) Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 11 July 1899, 246 (Sir John Forrest, Premier).

\(^{98}\) Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 13 July 1899, 332-3 (Sir John Forrest, Premier).

\(^{99}\) Ibid 331.

\(^{100}\) Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 10 October 1899, 1594.

\(^{101}\) \textit{Truck Act 1899 (WA)} s 1.
entire amount of their employees’ wages in money.\textsuperscript{102} Any employment contract that provided otherwise was illegal.\textsuperscript{103} Second, the Truck Act 1899 (WA) made it unlawful for an employer to require their employees to spend any part of their wages in a particular way or at a particular place.\textsuperscript{104} Third, and most importantly, the Truck Act 1899 (WA) gave employees a cause of action against those employers who breached the truck laws.\textsuperscript{105}

There were nine exceptions contained within the Truck Act 1899 (WA).\textsuperscript{106} Those exceptions were broad enough to undermine the operation of the legislation. For example, the Truck Act 1899 (WA) did not apply to seamen; people employed in agricultural, fruit growing, or pastoral pursuits; or people engaged on sheep or cattle stations.\textsuperscript{107}

Frederick Vosper was a member of the Legislative Assembly at the time when the Truck Bill was passed. Vosper, during the second reading speech for the Truck Bill, made the following statement in relation to why he believed that Forrest incorporated the broad exceptions into the Truck Bill:

If I were not perfectly well aware of the sincerity of honourable Gentlemen on the opposite side of this House, I should be inclined to think that they were bringing in this Bill for the purpose of being able to go to the country at the next election with the boast that they had passed a Truck Act, knowing that the list of exemptions was so numerous that the object of the measure would be practically defeated.\textsuperscript{108}

\begin{itemize}
\item \textsuperscript{102} Ibid s 5.
\item \textsuperscript{103} Ibid s 3.
\item \textsuperscript{104} Ibid s 4.
\item \textsuperscript{105} Ibid ss 5, 6, 9.
\item \textsuperscript{106} Ibid s 19(1)-(9).
\item \textsuperscript{107} Ibid s 19(9).
\item \textsuperscript{108} Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 13 July 1899, 340.
\end{itemize}
Another feature of the original form of the *Truck Act 1899* (WA) was that it prohibited an employer from making a set-off or counter-claim against their employee during proceedings about an alleged breach of the truck laws.\(^{109}\) This aspect of the *Truck Act 1899* (WA) was short lived. It was removed by amendments to the legislation in 1904.\(^{110}\) After the 1904 amendments, the *Truck Act 1899* (WA) remained unchanged until it was repealed on 16 January 1996.\(^{111}\)

In *Conti Sheffield Real Estate v Brailey*,\(^{112}\) Sharkey P and Negus C found that one effect of the *Truck Act 1899* (WA) was that an employer was unable to deduct money from the pay of an employee for that employer’s own benefit.\(^{113}\) Similarly, their Honours found that it was against equity and good conscience for an employer to illegally deduct money from the pay of an employee.\(^{114}\)


On 2 June 1994, Graham Kierath, the then Minister for Labour Relations, announced that there was going to be an independent review into Western Australia’s industrial relations laws. The task was assigned to Commissioner Fielding of the Western Australian Industrial Relations Commission. Fielding completed his review of Western Australia’s labour relations legislation in July 1995.\(^{115}\)

During the review process, the Ministry of Justice had suggested that the truck laws should be repealed so that employers could deduct overpayments from the wages of

---

\(^{109}\) *Truck Act 1899* (WA) s 6.

\(^{110}\) See: *Truck Act Amendment Act 1904* (WA).

\(^{111}\) *Industrial Relations Legislation Amendment and Repeal Act 1995* (WA) s 66.

\(^{112}\) (1992) 48 IR 1.

\(^{113}\) *Conti Sheffield Real Estate v Brailey* (1992) 48 IR 1, 6.

\(^{114}\) Ibid 7.

their employees. In his report, Fielding rejected the Ministry of Justice’s submission. Fielding was against the idea of there being a general right for employers to unilaterally deduct debts from the wages of their employees. This was especially so in circumstances where there was a dispute between the employer and employee about the quantum of an overpayment. The Ministry of Justice’s submission was repugnant because it would put the employer ‘in the position of being a judge or an arbitrator in his own cause and is thus open to abuse by the unscrupulous’. Fielding recognised that the truck laws provided important protections to individual employees. As a part of his review of the Truck Act 1899 (WA), Fielding made the following recommendation:

That the [Truck] Act be repealed, but that provision be made in the Minimum Conditions of Employment Act 1993 to protect the payment of salary and wages in much the same way as is now the case, but to allow scope for modern remuneration packages.


---

116 Ibid 377.
117 Ibid.
118 Ibid 378.
119 Ibid.
120 Ibid 373-4.
121 Ibid 375, (Appendix 1) 47.
122 Western Australia, Parliamentary Debates, Legislative Assembly, 14 November 1995, 10552.
123 Industrial Relations Legislation Amendment and Repeal Act 1995 (WA) pg 1, s 3(1).
The IRLAR Act repealed the *Truck Act 1899* (WA).\textsuperscript{124} Consistent with the recommendations made by Fielding, Western Australia’s truck laws were transferred into Part 3A of the *Minimum Conditions of Employment Act 1993* (WA).\textsuperscript{125} The IRLAR Act did not result in any substantial changes being made to the truck prohibitions in Western Australia. Under the *Minimum Conditions of Employment Act 1993* (WA), employees are entitled to be paid their wages in full.\textsuperscript{126} Employers are prohibited from compelling their employees to accept goods or accommodation instead of money.\textsuperscript{127} And, employers are prohibited from forcing their employees to spend their wages in a particular way.\textsuperscript{128} However, in relation to the IRLAR Act, the devil was in the detail. Incorporated into Kierath’s truck laws are broad exceptions to the truck prohibitions.

Section 17D of the *Minimum Conditions of Employment Act 1993* (WA) provides for a number of scenarios where employers are entitled to deduct money from their employees’ wages. Section 17D reads as follows:

17D. Authorised deductions from pay

(1) Despite section 17C, an employer may deduct from an employee’s pay —

(a) an amount the employer is authorised, in writing, by the employee to deduct and pay on behalf of the employee; and

(b) an amount the employer is authorised to deduct and pay on behalf of the employee under the employer–employee agreement, award or contract of employment; and

(c) an amount the employer is authorised or required to deduct by order of a court or under a law of the State or the Commonwealth.

(2) The employee is entitled to have any amount so deducted paid by the employer in accordance with the employee’s instructions or in accordance with the

\textsuperscript{124} Ibid s 66(1).
\textsuperscript{125} Explanatory Memorandum, Industrial Relations Legislation Amendment and Repeal Bill 1995 (WA) 31-2; Industrial Relations Legislation Amendment and Repeal Act 1995 (WA) s 66.
\textsuperscript{126} *Minimum Conditions of Employment Act 1993* (WA) s 17C.
\textsuperscript{127} Ibid s 17B.
\textsuperscript{128} *Minimum Conditions of Employment Act 1993* (WA) s 17B.
requirements of the employer–employee agreement, award, contract of employment, court order or law of the State or the Commonwealth (as the case may be).

(3) Nothing in this section requires an employer to make deductions requested by an employee.

(4) An employee may, by giving written notice to the employer, withdraw an authorisation under subsection (1)(a).

For the most part, the exceptions described in section 17D(1) of the Minimum Conditions of Employment Act 1993 (WA) are relatively straightforward. However, the effects of the words ‘on behalf of the employee’ and ‘contract of employment’ are worth further discussion.

(a) Deductions ‘on behalf of the employee’ must be for the benefit of the employee

The use of the term ‘on behalf of the employee’ in section 17D(1)(a) and (b) of the Minimum Conditions of Employment Act 1993 (WA) is awkward. In law, what is meant by the term ‘on behalf of’ will usually depend on its context.\textsuperscript{129} The Parliament of Western Australia left no clues in Hansard or the explanatory memorandum to the IRLAR Act about what was meant by the term ‘on behalf of the employee’.

There are some clues as to what the words ‘on behalf of the employee’ may mean in section 17D(2) of the Minimum Conditions of Employment Act 1993 (WA). Section 17D(2) talks about the employee having an entitlement to have money deducted from their pay and paid in a particular manner. The use of the word ‘entitled’ in section 17D(2) suggests that the right to have money deducted from an employee’s pay, and paid off to a third person, is not a right that belongs to the employer; it is a right that belongs to the employee. Because the right belongs to the employee, it should follow

\textsuperscript{129} R v Toohey; Ex parte Attorney-General (NT) (1980) 145 CLR 374, 386; Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 2) (1987) 162 CLR 153, 165.
that any deduction from an employee’s pay should be for the primary benefit of the employee.

It is arguable that the words ‘on behalf of the employee’ in section 17D(1) of the *Minimum Conditions of Employment Act 1993* (WA) create a fiduciary relationship between the employer, who is handling the deduction on behalf of the employee, and the employee, whose money is being deducted and paid to a third party. This is because, in the circumstances authorised by section 17D(1) of the *Minimum Conditions of Employment Act 1993* (WA), the employee is in a particularly vulnerable position. Fielding arguably recognised that vulnerability when he said in his report that an employer ‘should not be able to unilaterally make deductions, for whatever reason, in favour of himself/herself from wages which have been earned by the employee’. 130 The existence of a fiduciary relationship, and in turn fiduciary duties, would protect employees from the evil that was described by Fielding. If a fiduciary relationship existed, then an employer would have a conflict of interest if it deducted money on behalf of its employee then proceeded to pay that money to itself. The only way that an employer could get around that conflict is if the employee expressly waived the conflict.

The meaning of the term ‘on behalf of the employee’ in section 17D has not been judicially considered. If the words ‘on behalf of the employee’ import a fiduciary relationship, then, for the above reasons, an employer could not likely rely on any of the circumstances in section 17D of the *Minimum Conditions of Employment Act 1993* (WA) to justify a deduction that has been made in its own favour.

(b) **Deductions authorised by a contract of employment**

In *BGC (Australia) Pty Ltd v Phippard*, the Industrial Appeal Court of Western Australia considered the scope of the words ‘contract of employment’ in section 17D of the *Minimum Conditions of Employment Act 1993* (WA). All three members of the bench found that a term of an employment contract which authorises an employer to deduct and pay money on behalf of their employee, did not need to be in writing in order to satisfy section 17D(1)(b) of the *Minimum Conditions of Employment Act 1993* (WA). This is because it is perfectly acceptable for an employer and employee to verbally agree to the terms of an employment contract.

(c) **Obiter comments in MacFarlane v Halperin Fleming & Meertens**


First, Smith C found that the provisions of the *Truck Act 1899* (WA) contained broader prohibitions on deductions than Part 3A of the *Minimum Conditions of Employment Act 1993* (WA). The Commissioner did not elaborate on this point. However, she was most likely talking about the types of deductions which are expressly authorised by section 17D of the *Minimum Conditions of Employment Act 1993* (WA).

Second, and more controversially, Smith C said the following:

> Alternatively it is my view, that s.17C and s.17D of the MCE Act are not intended to operate so as to prevent an employer from recovering from monies outstanding on one item (namely salary and accrued annual leave that is due and owing under the contract

---

133 Ibid.
135 Ibid 153.
of employment), an amount which is due and owing by an employee pursuant to the express terms of a contract of employment.\textsuperscript{136}

The Commissioner’s view is not binding due to its obiter nature. With respect, sections 17C and 17D do not give employers a carte blanche authority to recover money owed by an employee under an employment contract. Those sections do not concern themselves with money owed by an employee to an employer. They instead refer to circumstances where a deduction is expressly authorised by a particular instrument. To that extent, the Commissioner’s view is probably not good law.

5. \textit{26 May 2009 to present: state and federal regulation of truck systems}

In 2009, the Rudd-Labor federal government enacted the \textit{Fair Work Act 2009} (Cth). The \textit{Fair Work Act 2009} (Cth) represented a significant development to the truck laws in Australia. This is supported by the following passage from the explanatory memorandum to the \textit{Fair Work Bill 2009} (Cth):

\begin{quote}
This Division is about the frequency and methods of payment of amounts payable to an employee in relation to the performance of work and allowable deductions from such amounts. … Currently, these issues are dealt with primarily by State and Territory legislation. This has led to a patchwork of obligations for employers. The payment of wages provisions in this Division draw upon the protections that exist in State and Territory legislation to provide a simple, national scheme.\textsuperscript{137}
\end{quote}

The federal truck laws are contained in sections 323 to 327 of the \textit{Fair Work Act 2009} (Cth). Those provisions apply to all national system employers and national system

\textsuperscript{136} Ibid.
\textsuperscript{137} Explanatory Memorandum, Fair Work Bill 2009 (Cth) [1277]-[1278].
employees. They do not apply to employers and employees who still operate in the state systems.

In Western Australia, employers and employees who are in the state system are still covered by the truck provisions in the *Minimum Conditions of Employment Act 1993* (WA). Those laws have been addressed above. They will not be repeated in this section.

(a) *The Fair Work Act 2009 (Cth) – Section 323*

Section 323(1) of the *Fair Work Act 2009 (Cth)* is intended to remedy the mischief of the truck system. This provision requires employers to pay their employees in full, in money, and at least monthly. Section 323(1) does not create an ‘underlying legal obligation to pay’. It simply reinforces an existing obligation to pay and places additional requirements on the employer in relation to that obligation.

The protections in section 323(1) of the *Fair Work Act 2009 (Cth)* cover all wage and wage-related amounts that an employer is required to pay to its employees. This includes payments that an employer owes to their employees under the National Employment Standards, an award, an enterprise agreement, or a common law contract. Section 323 is a civil remedy provision. An employee, or its union, is able to sue an employer who does not pay that employee in full.

---

138 *Fair Work Act 2009 (Cth)* s 322.
139 *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, 633-4; *Association of Professional Engineers, Scientists and Managers, Australia v Wollongong Coal Limited* [2014] FCA 878, [28].
140 *Fair Work Act 2009 (Cth)* s 323(1).
142 Ibid.
144 *Fair Work Act 2009 (Cth)* s 323.
145 Ibid s 539.
In *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd*,\(^{146}\) the High Court of Australia found that section 323(3) of the *Fair Work Act 2009* (Cth) enabled an employer to pay an employee by a method other than money if that payment method is authorised by an enterprise agreement.\(^{147}\) Through section 323(3), an employer is most likely able to pay an employee in kind.

**(b) The Fair Work Act 2009 (Cth) – Section 324**

Section 324 of the *Fair Work Act 2009* (Cth) contains a number of circumstances under which an employer is legally entitled to make a deduction from an employee’s pay. To that extent, section 324 qualifies the obligations that are contained in section 323(1).\(^{148}\) Under section 324(1) of the *Fair Work Act 2009* (Cth), an employer is able to make a deduction from the pay of an employee if:

1. ‘the deduction is authorised in writing by the employee and is principally for the employee’s benefit’;\(^ {149}\)

2. ‘the deduction is authorised by the employee in accordance with an enterprise agreement’;\(^ {150}\)

3. ‘the deduction is authorised by or under a modern award or an FWC order’;\(^ {151}\) or

4. ‘the deduction is authorised by or under a law of the Commonwealth, a State or a Territory, or an order of a court’;\(^ {152}\)

---

\(^{146}\) (2013) 248 CLR 619.


\(^{149}\) *Fair Work Act 2009* (Cth) s 324(1)(a).

\(^{150}\) Ibid s 324(1)(b).

\(^{151}\) Ibid s 324(1)(c).

\(^{152}\) Ibid s 324(1)(d).
The words in section 324(1) of the *Fair Work Act 2009* (Cth) should be afforded their plain and ordinary meaning. Each exception is further detailed in the subsections below.

(i) *Section 324(1)(a) – The employee authorises the employer, in writing, to deduct the money*

Section 324(1)(a) of the *Fair Work Act 2009* (Cth) allows an employer to deduct money from the wages of their employee if that employee authorises the deduction in writing. Section 324(1)(a) is broad enough to capture authorisations expressly provided by the employee in a contract of employment. However, the provision is not broad enough to capture deductions that are not principally for the employee’s benefit. That is, the principal purpose of the deduction must be to provide a benefit to the employee. In order for an employer to be able to rely upon section 324(1)(a), the employee’s consent to the deduction must be genuine, and not affected by compulsion by the employer. An employee cannot retrospectively authorise a deduction for the purpose of section 324(1)(a).

It is not enough for the employer to have a ‘blanket authorisation’ from the employee to deduct any overpayments. In order for an employee’s consent to a deduction to

---

154 *Fair Work Act 2009* (Cth) s 324(1)(a).
155 See *Fair Work Act 2009* (Cth) s 324 Note 2; *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)* (2015) 255 IR 341, [181].
156 *Fair Work Act 2009* (Cth) s 324(1)(a); *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)* (2015) 255 IR 341, [181], [217].
160 *Fair Work Ombudsman v Glasshouse Mountains Tavern Pty Ltd* [2014] FCCA 1115, [121].
be valid, the employee’s authorisation must specify the amount of the deduction.\footnote{Fair Work Act 2009 (Cth) s 324(2)(a); Fair Work Ombudsman v Glasshouse Mountains Tavern Pty Ltd [2014] FCCA 1115, [118]-[121].} The employer cannot vary the amount specified in the employee’s authorisation without further written authorisation from the employee.\footnote{Fair Work Act 2009 (Cth) s 324(3).} The employee can withdraw its written authorisation at any time.\footnote{Ibid s 324(2)(b).}

It is difficult to envisage in what circumstances an employer and employee could agree in writing to allow an employer to make deductions from that employee’s pay in order to recover an overpayment that the employer made to the employee. This is because such a deduction would not be principally for the benefit of the employee. Rather, it would principally be for the benefit of the employer.

(ii) \textit{Section 324(1)(b) – The deduction is authorised by an employee in accordance with an enterprise agreement}

Section 324(1)(b) of the \textit{Fair Work Act 2009} (Cth) allows an employer to make a deduction from the pay of an employee if that deduction has been authorised by the employee in accordance with an enterprise agreement. There are two requirements embedded in section 324(1)(b).\footnote{Australian Education Union v State of Victoria (Department of Education and Early Childhood Development) (2015) 255 IR 341, [136].} The first requirement is that ‘a deduction made must be a deduction that the enterprise agreement permits an employee to authorise’.\footnote{Ibid.} Second, to the extent that an enterprise agreement ‘provides for the manner in which the authorisation by the employee is to be made, the authorisation must be made in accordance with that requirement’.\footnote{Ibid.}
Section 324(1)(b) does not allow an employer to unilaterally deduct money from an employee’s pay.\(^{167}\) Even if an enterprise agreement allows an employer to make a deduction from an employee’s pay, that deduction still needs to be authorised by the employee.\(^{168}\)

(iii) **Section 324(1)(c) – The deduction is authorised by or under a modern award or an order of the FWC**

Section 324(1)(c) of the *Fair Work Act 2009* (Cth) enables an employer to deduct money from the pay of an employee if that deduction is authorised by or under a modern award or an order of the Fair Work Commission. One caveat on section 324(1)(c) is that the Fair Work Commission cannot retrospectively authorise a deduction.\(^{169}\) An employer would need to obtain an order from the Fair Work Commission before it would be entitled to make any deduction from an employee’s pay.

(iv) **Section 324(1)(d) – The deduction is authorised by or under a law or a court order**

An employer is entitled to make a deduction from an employee’s pay if that deduction is authorised by a law of the Commonwealth, a law of a state or territory, or a court order.\(^{170}\) However, that authorisation must be in operation before the employer makes any deduction from the employee’s pay.\(^{171}\) A court is unable to make good an

\(^{167}\) *Radpoy Pty Ltd v/s Lake Imaging Re Lake Imaging Enterprise Agreement (Imaging Staff - Geelong) 2010* [2011] FWA 39, [47]-[48].

\(^{168}\) Ibid.

\(^{169}\) *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)* (2015) 255 IR 341, [260].

\(^{170}\) *Fair Work Act 2009* (Cth) s 324(1)(d).

\(^{171}\) *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)* (2015) 255 IR 341, [258]-[263].
employer’s breach of section 323(1) of the *Fair Work Act 2009* (Cth) by retrospectively authorising the employer’s deduction from the employee’s pay.\(^{172}\)

\((c)\) *The Fair Work Act 2009* (Cth) – Section 325

Section 325 of the *Fair Work Act 2009* (Cth) is a classical truck law.\(^{173}\) It provides that an ‘employer must not directly or indirectly require an employee to spend any part of an amount payable to the employee in relation to the performance of work if the requirement is unreasonable in the circumstances.’\(^{174}\) Section 325 is a supplement to section 324(1) of the *Fair Work Act 2009* (Cth).\(^{175}\)

One effect of section 325 is that it prevents an employer from instructing an employee to authorise a deduction in accordance with section 324(1) in circumstances where the deduction is unreasonable.\(^{176}\) To the extent that an employer does instruct an employee to authorise an unreasonable deduction, that instruction is unlawful.

Whether it is unreasonable for an employer to require an employee to authorise a deduction, and in turn spend their remuneration in a particular way, will depend on the circumstances of each case. The employee bears the burden of proving that the requirement to spend its remuneration in a particular way was unreasonable.\(^{177}\) In *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)* (2015) 255 IR 341, [223].

---

\(^{172}\) Ibid.

\(^{173}\) Ibid [336].

\(^{174}\) *Fair Work Act 2009* (Cth) s 325.

\(^{175}\) *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)* (2015) 255 IR 341, [223].

\(^{176}\) C.f. *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)* (2015) 255 IR 341, [340]-[341] where the court questioned whether the word ‘spend’ can include a deduction. The court did not ultimately determine that issue.

\(^{177}\) *Australian and International Pilots Association v Jetstar Airways Pty Ltd* [2014] FCA 14, [16].
the court found that it was unreasonable for an employer to require its employees to spend their pay in a particular way in circumstances where:

1. the spending required occurred in the absence of a genuine choice by the employees;
2. the rate of spending was set at an excessive rate of contribution;
3. the deductions made were not principally for the benefit of the employees; and
4. the value of the benefits actually received by the employees did not provide a countervailing justification for the deduction.179

(d) The Fair Work Act 2009 (Cth) – Section 326

Section 326 of the Fair Work Act 2009 (Cth) prevents an employer from making a deduction from an employee’s pay and paying that deduction to itself if that deduction is:

1. ‘directly or indirectly for the benefit of the employer (or a party related to the employer); and
2. unreasonable in the circumstances’.180

The onus is on the employee to satisfy the court that the deduction was ‘directly or indirectly for the benefit of the employer’ and ‘unreasonable in the circumstances’.181

As Bromberg J said in Australian Education Union v State of Victoria (Department of Education and Early Childhood Development):

180 Fair Work Act 2009 (Cth) s 326(1).
There is, therefore, an additional concern expressed by s 326(1) in relation to deductions that are directly or indirectly for the benefit of the employer. The legislation evinces a suspicion about deductions that benefit the employer. Terms that provide for deductions of that kind are of no effect, where the deduction is unreasonable in the circumstances.\textsuperscript{182}

Whether a deduction is directly or indirectly for the benefit of the employer is a question of fact. It is a relatively straightforward question.

The more complicated question is whether a deduction that is for the benefit of the employer is unreasonable in the circumstances. Bromberg J dealt with this issue in \textit{Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)}.\textsuperscript{183} His Honour said that whether a deduction is unreasonable in the circumstances will depend on the relevant surrounding circumstances, and is a question of fact and degree.\textsuperscript{184} Bromberg J then went on to identify a number of factors that he believed were likely to be relevant to such an assessment.\textsuperscript{185} Those factors are as follows:

1. The starting position is that the purpose of the truck laws is to protect employees from receiving less than they have earned and are therefore entitled to.\textsuperscript{186} A ‘central consideration’ is whether the employee has gained a benefit that is commensurate with the extent of the deduction.\textsuperscript{187}

2. A relevant consideration is the extent to which the employer has gained a benefit, and whether the employer gained that benefit at the expense of the

\textsuperscript{182} Ibid [175].
\textsuperscript{183} Ibid [148] – [183].
\textsuperscript{184} Ibid [176].
\textsuperscript{185} Ibid [177] – [182].
\textsuperscript{186} Ibid [177].
\textsuperscript{187} Ibid.
employee.\textsuperscript{188} If the employer has taken advantage of the employee by using the deduction to reduce the real value of the employee’s remuneration, then that factor suggests that the deduction was unreasonable.\textsuperscript{189}

3. If the employee has consented to the employer making the deduction, then the court needs to consider the quality of the employee’s consent.\textsuperscript{190} A deduction would be unreasonable if the employer obtained the employee’s consent through coercion or duress.\textsuperscript{191}

4. There is a strong legislative intent that an employee should be able to choose how they spend their remuneration.\textsuperscript{192} Therefore, even if the monetary value of benefit the employee received from the deduction is comparable to the value of the deduction; the deduction may still be unreasonable if the employer has pressured the employee to spend their remuneration in a particular way.\textsuperscript{193} As Bromberg J said:

Where a deduction is induced by direct or indirect employer pressure for the employee to apply his or her remuneration for a particular purpose, the genuine choice, which the provision serves to protect, will likely be negated.\textsuperscript{194}

5. If the employer is purporting to make the deduction pursuant to section 324(1)(a) of the \textit{Fair Work Act 2009} (Cth), then the employee’s written assent is not enough to render a deduction as reasonable.\textsuperscript{195} If the deduction is not

\textsuperscript{188} Ibid [178].  
\textsuperscript{189} Ibid.  
\textsuperscript{190} Ibid [179].  
\textsuperscript{191} Ibid.  
\textsuperscript{192} Ibid [180].  
\textsuperscript{193} Ibid.  
\textsuperscript{194} Ibid.  
\textsuperscript{195} Ibid [181].
‘principally for the employee’s benefit’ then it will be prima facie unreasonable.\textsuperscript{196}

6. The words ‘in the circumstances’ in section 326(1)(c)(ii) require the court to consider all of the circumstances of the case.\textsuperscript{197} The assessment of the reasonableness of any deductions can be forward looking, but can also be with the benefit of hindsight.\textsuperscript{198}

In most cases, it would be unreasonable for an employer to unilaterally deduct an overpayment from the pay of an employee. This is because the purpose of such a deduction would be to compensate the employer for its purported loss. The employee could not properly be said to be ‘gaining a benefit’ from such deduction. Similarly, such a deduction has the effect of denying the employee a choice about how they spend their remuneration.

\begin{itemize}
  \item[(i)] \textit{Regulation 2.12 – Prescribed deductions for the purpose of section 326}
  
  Subsection 326(2) of the \textit{Fair Work Act 2009} (Cth) allows for the \textit{Fair Work Regulations 2009} (Cth) to prescribe circumstances where a deduction for the purpose of section 326 is either reasonable or unreasonable. Regulation 2.12 of the \textit{Fair Work Regulations 2009} (Cth) prescribes two circumstances under which the law recognises that a deduction from an employee’s pay will be reasonable.
  
  First, the law recognises that a deduction is reasonable for the purpose of section 326(1) of the \textit{Fair Work Act 2009} (Cth) if:
  
  \begin{itemize}
    \item 1. ‘the deduction is made in respect of the provision of goods or services:
  \end{itemize}
\end{itemize}

\textsuperscript{196} Ibid.
\textsuperscript{197} Ibid [182].
\textsuperscript{198} Ibid.
a. by the employer, or a party related to the employer; and

b. to an employee; and

2. the goods or services are provided in the ordinary course of the business of the employer or related party; and

3. the goods or services are provided to members of the general public on:
   a. the same terms and conditions as those on which the goods or services were provided to the employee; or
   b. on terms and conditions that are not more favourable to the members of the general public.  

The regulations provide two examples of where the first circumstance might arise. The first example is where an employer that is a health fund makes a deduction of health insurance fees from the employees pay. The second example is where an employer that is a financial institution makes a deduction from its employee’s pay for a loan repayment that the employee owes to the employer.

Second, the law recognises that a deduction is reasonable for the purpose of section 326(1) if ‘the deduction is for the purpose of recovering costs directly incurred by the employer as a result of the voluntary private use of particular property of the employer by an employee’. The regulations list three examples where this type of deduction would be reasonable. The first example is where the employer makes a deduction from the employee’s pay to recover ‘the cost of items purchased on a corporate credit card for personal use by the employee’. The second example is where the employer

---

199 Fair Work Regulations 2009 (Cth) reg 2.12(1).
200 Ibid.
201 Ibid.
202 Ibid reg 2.12(2).
203 Ibid.
deducts money from the employee’s pay in order to recover the cost of personal calls that the employee made on a company mobile phone.\textsuperscript{204} The third example is where the employer deducts money from the employee’s pay in order to recover ‘the cost of petrol purchased for the private use of a company vehicle by the employee.’\textsuperscript{205}

\((e)\) \textit{The Fair Work Act 2009 (Cth) – Section 327}

Section 327 of the \textit{Fair Work Act 2009 (Cth)} does several things. First, if an employer tries to pay an employee in a form other than money, then the law will deem that the employee did not receive that thing.\textsuperscript{206} Second, if a modern award or enterprise agreement requires an employer to pay their employee by a specific method, and the employer pays their employee other than in accordance with that method, then the law will deem that the employee did not receive that pay.\textsuperscript{207} Third, if an employer unreasonably requires their employee to spend their pay in a particular way, then the employee is deemed as not having received from the employer the amount that the employee was required to spend.\textsuperscript{208}

D \textit{Closing remarks: deficiencies in the truck laws}

The truck laws in the \textit{Minimum Conditions of Employment Act 1993 (WA)} and the \textit{Fair Work Act 2009 (Cth)} are primarily remedial in nature. That is, they enable an employee to sue an employer to recover an unlawful deduction.

It may be arguable that the truck laws can deter employers from making deductions from their employees’ pay. Contrary to that argument, Hawkins has claimed that

\begin{itemize}
\item \textsuperscript{204} Ibid.
\item \textsuperscript{205} Ibid.
\item \textsuperscript{206} \textit{Fair Work Act 2009 (Cth)} s 327(a).
\item \textsuperscript{207} Ibid.
\item \textsuperscript{208} Ibid s 327(b).
\end{itemize}
employers often choose to help themselves to the pay of their employees rather than going through the courts to recover an overpayment. Hawkins was talking from an American perspective. A future research project would be required to investigate the extent to which the truck laws deter Australian employers from unilaterally recovering overpayments from their employees’ pay.

While the truck laws may enable an employee to recover money that has been unilaterally deducted by an employer, those laws go no further in terms of resolving an overpayment dispute. The truck laws provide no legal mechanism for the hearing and determination of an overpayment dispute. Unhelpfully and inconveniently, the State and Commonwealth Parliaments have left the resolution of overpayment disputes between employers and employees entirely to the common law. The strength of the protections currently offered by the truck laws could be enhanced if the legislature enacted a mechanism for the resolution of overpayments. Recommendations about how this might be achieved will be dealt with in Chapter XIV.

The next chapter in this thesis will introduce the concept of unjust enrichment. It is through the prism of unjust enrichment that this thesis will look at how an employer and an employee can use the common law to resolve an overpayment dispute.

---

A Introduction

The term ‘unjust enrichment’ is often misunderstood in legal circles. This is evidenced by the continuous warnings that the judiciary has given to the profession about unjust enrichment not being a principle of direct application. This chapter will introduce the concept of unjust enrichment. In the context of this thesis, this introduction is important for two reasons. First, it will be difficult to understand the underlying philosophy of the causes of action and restitutionary defences that are discussed in later chapters in this thesis without first having a basic understanding of the law of unjust enrichment. Second, the taxonomical framework of unjust enrichment, which will be outlined in this chapter, will form a key part of the recommendations in Chapter XIV.

B Defining unjust enrichment

Unjust enrichment has a taxonomical function. It has defined elements. Yet, unjust enrichment is not a cause of action. It is not something that a plaintiff can directly...
plea in an application to a court. If a plaintiff did plead unjust enrichment as a cause of action, then their pleadings are at risk of being struck out. That begs the question: so what is unjust enrichment? Unjust enrichment is a legal concept. It has two functions.

First, unjust enrichment is a label. It is a label that is used to link a group of closely related causes of action in which the law allows a person to recover a benefit that is being held by another person independent of a contract or a civil wrong. The focus of unjust enrichment law is not on the plaintiff’s loss, but on the transaction that transfers the plaintiff’s wealth to the respondent. The causes of action that fall under the heading ‘unjust enrichment’ have generally branched from the old actions in *indebitatus assumpsit*. That proposition is fettered by the use of the term ‘generally’. This is because there are some fusionists that are of the view that there are equitable actions that also fall under the label of unjust enrichment. Examples of causes of action in unjust enrichment include ‘money had and received’ and ‘economic duress’.

In its capacity as a label, unjust enrichment operates in a similar fashion as the term

---

213 Ibid.
‘tort’.\textsuperscript{221} That is, it is a general term that can be used to describe a range of causes of action.

The second function of unjust enrichment is a taxonomical one.\textsuperscript{222} It is this second function that causes confusion. Unjust enrichment provides a theoretical framework. That framework contains elements. In that regard, it can be easily mistaken as a distinct cause of action. However, the unjust enrichment framework is not a legal principle of direct application.\textsuperscript{223} That is, it is not a cause of action in its own right. The unjust enrichment framework can only be used ‘to assist in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a \textit{new or developing category of case}.\textsuperscript{224} The taxonomical framework of unjust enrichment is set out in Part C of this chapter.

\textbf{C The taxonomical framework of unjust enrichment}

Kirby J set out the taxonomical framework of unjust enrichment in a footnote in \textit{Roxborough v Rothmans of Pall Mall Australia Ltd}\textsuperscript{225} as follows:

1. the defendant has been enriched;

2. the defendant’s enrichment was gained at the plaintiff’s expense;

3. the defendant’s enrichment was caused by an unjust factor; and

\textsuperscript{221} \textit{Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd [No 3] [2014] WASC 162}, [50].
\textsuperscript{225} (2001) 208 CLR 516.
4. the defendant does not have a recognised defence.\textsuperscript{226}

Kirby J’s approach aligns closely with the decision of French CJ, Crennan and Kiefel JJ in \textit{Equuscorp Pty Ltd v Haxton}.\textsuperscript{227} Edelman J applied a similar approach in \textit{Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd [No 3]}.\textsuperscript{228} Edelman J, in his decision, merged the first and second elements. This approach of merging the first and second elements is a convenient one. It will be followed in this chapter.

The next three sections will provide some more detail about each of the elements in the unjust enrichment framework. In keeping with the overarching theme of this thesis, the focus of those three sections will be on the application of the unjust enrichment framework in an employment context.

1. \textit{The employee has been enriched at the employer’s expense}

In order for an employer to establish a prima facie right to restitution, the employer must first prove that the employee has received a benefit\textsuperscript{229} at the employer’s expense\textsuperscript{230}. This inquiry is a factual one. It involves consideration of:

1. evidence which shows that the employee received a benefit;\textsuperscript{231}

2. the nature and value of the benefit;\textsuperscript{232} and

\textsuperscript{226} Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516, 568.
\textsuperscript{227} Equuscorp Pty Ltd v Haxton (2012) 246 CLR 498, 516.
\textsuperscript{228} Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd [No 3] [2014] WASC 162, [51].
\textsuperscript{229} Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 65; Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221, 256-7.
\textsuperscript{230} Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221, 256-7; Australia and New Zealand Banking Group Ltd v Westpac Banking Corp (1988) 164 CLR 662, 673; Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd (1994) 182 CLR 51, 90-1.
\textsuperscript{231} Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 65; Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221, 256-7.
\textsuperscript{232} Australia and New Zealand Banking Group Ltd v Westpac Banking Corp (1988) 164 CLR 662, 673.
3. evidence that the employer owned the benefit before it changed hands to the employee.\(^{233}\)

In an overpayment dispute between an employer and employee, the nature of the benefit received by the employee will often be money. It is easy to determine the value of a monetary overpayment. However, a benefit does not need to be in the form of money. The term benefit is broad enough to include goods and services.\(^{234}\) If the benefit received by the employee was in the form of a good or service, then it is not the good or service that the employee needs to return to the employer, but the value of that good or service as at the time that the employee received it.\(^{235}\)

2. The employee’s enrichment was caused by an unjust factor

The employer next needs to satisfy the court that the reason why the employee received the benefit was because of the existence of an unjust factor.\(^{236}\) Or, to put it another way, the employer needs to show:

1. the presence of an ‘unjust factor’; and
2. causation.\(^{237}\)

The use of term ‘unjust factor’ in the unjust enrichment framework does not give the courts a discretionary power to engage in a subjective evaluation of what is unfair or unconscionable.\(^{238}\) An unjust factor is a factor that has been recognised, or is

\(^{233}\) Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd (1994) 182 CLR 51, 90-1.
\(^{235}\) Australia and New Zealand Banking Group Ltd v Westpac Banking Corp (1988) 164 CLR 662, 673.
\(^{236}\) Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89, 156.
\(^{238}\) Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89, 156.
recognisable by analogy; as a general rule, an unjust factor will be a factor which has either qualified or vitiated the employer’s intention at the time that they transferred the benefit to the employee. Unjust factors that are relevant to an overpayment case in an employment context, and which have been recognised at law, include mistake; duress; and failure of consideration. The list of recognised unjust factors is not closed.

Once the employer has established that their intention was qualified or vitiated by an unjust factor, they then need to show that the reason why they made the overpayment to the employee was because of that unjust factor. That is, there must be a causal link between the employer’s qualified or vitiated intention and the payment by the employer to the employee.

3. Subject to any defences

Lord Mansfield once said that the most advantageous way that a person can be sued is in an action for money had and received. The most that an employer can recover from their employee in an unjust enrichment claim is the value of the benefit, as it was

---

239 Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221, 256-7.
243 Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221, 256-7; Equuscrop Pty Ltd v Haxton (2012) 246 CLR 498, 516.
245 Ibid.
246 Moses v Macferlan (1760) 2 Burr 1005, 1010; (1760) 97 ER 676, 679.
at the time that it was received by the employee, plus pre-judgment interest.\textsuperscript{247} This is because restitution seeks to return a benefit to the employer; rather than compensate the employer for loss.\textsuperscript{248}

If the employer has established their prima facie right to restitution, then the employee can displace that prima facie by proving that an order for restitution would be unjust in the circumstances.\textsuperscript{249} The word unjust in this context is not a reference to a moral assessment of the facts.\textsuperscript{250} The unjust factor weighing against restitution must be one that is recognised by the law.\textsuperscript{251}

There are three restitutionary defences that an employee might rely on in an overpayments case. Those defences are ‘the voluntary payment defence’, ‘the good consideration defence’, and ‘the change of position defence’. That is not to say that an employee is limited to these defences, or that this is an exhaustive list of defences to an unjust enrichment claim. Indeed, the employee can rely upon any equitable defence to fend off an unjust enrichment claim.\textsuperscript{252} Each of these three defences will be addressed in more detail in later chapters in this thesis.

\textsuperscript{247} Keith Mason, J.W. Carter and G.J. Tolhurst, \textit{Mason \& Carter’s Restitution Law in Australia} (LexisNexis Butterworths, 3\textsuperscript{rd} ed, 2016) 109 [238].  
\textsuperscript{248} \textit{Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd} (1994) 182 CLR 51, 75; \textit{Roxborough v Rothmans of Pall Mall Australia Limited} (2001) 208 CLR 516, 529; Wayne Covell, Keith Lupton and Jay Forder, \textit{Principles of Remedies} (LexisNexis Butterworths, 5\textsuperscript{th} ed, 2012) 132.  
\textsuperscript{249} \textit{David Securities Pty Ltd v Commonwealth Bank of Australia} (1992) 175 CLR 353, 379.  
\textsuperscript{250} \textit{Farah Constructions Pty Ltd v Say-Dee Pty Ltd} (2007) 230 CLR 89, 156.  
\textsuperscript{251} Ibid.  
\textsuperscript{252} \textit{Sadler v Evans} (1766) 4 Burr 1884, 1886; (1766) 98 ER 34, 35.
The majority decision of Hayne, Crennan, Kiefel, Bell and Keane JJ, in *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited*,253 has injected an element of uncertainty into unjust enrichment law in Australia. It is unnecessary, at this juncture, to go into detail about the facts and reasons for the decision in that case. The case will be explored in detail in Chapter IX. However, the following passages from the majority’s reasons for decision are of importance to this chapter.

First, the majority made the following favourable comments about the concept of unjust enrichment:

More recently, *Equuscorp Pty Ltd v Haxton* confirmed that unjust enrichment does not found or reflect any “all-embracing theory of restitutionary rights and remedies”. That case identified unconscionability as relevant and as derived from general equitable notions which find expression in the action for money had and received. As this Court acknowledged in *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation*, “contemporary legal principles of restitution or unjust enrichment can be equated with seminal equitable notions of good conscience”.254 (citations omitted)

Their Honours then went on to say:

The approach argued by AFSL does not involve an inquiry as to whether it would be inequitable to require the recipient to repay. Instead, AFSL’s approach focuses upon the extent to which Hills and Bosch have been “disenriched” subsequent to the receipt. This approach seeks to give effect to an understanding of unjust enrichment as a principle of direct application, which operates by measuring the extent of enrichment or, where a defence of change of position is invoked, the extent of disenrichment

---

254 Ibid 595.
subsequent to that receipt. Such a “principle” does not govern the resolution of this case because the concept of unjust enrichment is not the basis of restitutionary relief in Australian law. The principle of disenrichment, like that of unjust enrichment, is inconsistent with the law of restitution as it has developed in Australia. Disenrichment operates as a mathematical rule whereas the inquiry undertaken in relation to restitutionary relief in Australia is directed to who should properly bear the loss and why. That inquiry is conducted by reference to equitable principles.\(^{255}\) (emphasis added)

There is a possible philosophical conflict between the above two passages. In the first passage, the majority seemingly spoke positively about the concept of unjust enrichment. Yet, in the second passage, their Honours looked as if they were jettisoning unjust enrichment as inconsistent with the law in Australia.

As Mason, Carter, and Tolhurst have explained, it appears that the majority, in the second of the above two paragraphs, was trying to do one of two things:

1. the majority was strongly reiterating that unjust enrichment is not a principle of direct application and cannot be treated as a cause of action; or

2. the majority was trying to destroy the law of unjust enrichment and replace it with some sort of new branch of equity.\(^{256}\)

\(^{255}\) *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited* (2014) 253 CLR 560, 596-7. Mason, Carter and Tolhurst have also identified the underlined aspects of this passage as being important in relation to this discussion about unjust enrichment: see Keith Mason, J W Carter, G J Tolhurst, *Mason & Carter’s Restitution Law in Australia* (LexisNexis Butterworths, 3\(^{rd}\) ed, 2016) 28.

Edelman and Bant have suggested that the first of these two options is probably what the majority was trying to do.\textsuperscript{257} There are two reasons why that suggestion has force behind it.

First, in the first of the above two passages, the majority spoke favourably about the concept of unjust enrichment.\textsuperscript{258} If their Honours had intended to jettison unjust enrichment entirely, then their acknowledgment of unjust enrichment seems out of place. The majority said nothing about discarding what had been said in previous decisions of the High Court about the law of unjust enrichment.

Second, the first explanation of the majority’s decision offered by Mason, Carter, and Tolhurst is easily reconciled with previous decisions of the High Court on the topic of unjust enrichment. That is, unjust enrichment is a concept; it is not a cause of action in its own right.

One unavoidable consequence of the final sentence of the second passage cited above is that the courts now need to consider, and be guided by, ‘equitable principles’ when determining claims in unjust enrichment.\textsuperscript{259}

\textbf{E Equitable principles}

In an unjust enrichment case, restitution cannot be awarded if it would be inequitable or unjust to do so.\textsuperscript{260} Whether it inequitable or unjust to award restitution is determined

\textsuperscript{258} \textit{Australian Financial Services and Leasing Pty Limited v Hills Industries Limited} (2014) 253 CLR 560, 595.
According to what is ‘equitable and good’ (ex aequo et bono).\(^{261}\) This is a question of conscience.\(^{262}\)

Answering a question of conscience requires the court to exercise an equitable-judicial discretion.\(^{263}\) That discretion cannot be exercised based on the decision maker’s subjective view of the ‘justice of a case’.\(^{264}\) This is because conscience, in the juristic sense, is a reference to judicial conscience and not personal conscience.\(^{265}\) The proper approach for deciding a question of conscience is for the decision maker to be instructed by the underlying rationale contained in previously decided cases.\(^{266}\) The equitable principles that courts need to consider in resolving questions of conscience are mapped out in the maxims of equity.\(^{267}\)

---


\(^{262}\) Ibid 596.

\(^{263}\) J D Heydon, M J Leeming and P G Turner, *Meagher Gummow & Lehane’s Equity Doctrines & Remedies* (LexisNexis Butterworths, 5th ed, 2015) 75. This point can also be inferred from the majority’s decision in *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited* (2014) 253 CLR 560, 596.

\(^{264}\) *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited* (2014) 253 CLR 560, 596.


The maxims of equity are not hard and fast rules. They are general guidelines. These guidelines seek to capture the essence of conscience through their embodiment of the values of society. The purpose of the equitable maxims is to entrench standards of justice, fairness and a ‘dimension of morality’ in the judicial determination of issues of conscience. Edelman has criticised the maxims of equity as operating ‘at such high levels of generality’ that they mask transparency in judicial reasoning. In contrast, Ian Spry has said the following:

… the maxims of equity are of significance, for they reflect the ethical quality of the body of principles that has tended not so much to the formation of fixed and immutable rules, as rather to a determination of the conscionability or justice of the behaviour of the parties according to recognised moral principles. This ethical quality remains, and its presence explains to a large extent the adoption by courts of equity of broad general principles that may be applied with flexibility to new situations as they arise.

There are twelve generally accepted equitable maxims in Australia. They are set out below. It is important to note that no single maxim, in isolation, will provide a definite answer to whether or not it would be inequitable to award restitution in any given case. Just like unjust enrichment, the maxims of equity are intended to guide judicial decision-making, not govern it.

---

1. **Equity will not suffer a wrong to be without a remedy**

The first maxim is that equity will not suffer a wrong to be without a remedy.\(^{275}\) It is often argued that this maxim has only historical importance.\(^{276}\) Young, Croft and Smith have argued that the first maxim ‘describes the rationale behind the development of [the] equity jurisdiction’.\(^{277}\) Edelman has gone one-step further and labelled this maxim as useless.\(^{278}\) According to Edelman, the maxim is too wide in scope and too general in nature to be of any probative use.\(^{279}\)

The above criticisms of the first maxim of equity, with respect, miss the point. The first maxim of equity cannot be looked at in isolation from the other maxims. It must be treated as a part of a larger compact of interrelated equitable principles.

2. **Equity follows the law**

The second maxim is that equity follows the law.\(^{280}\) Again, this principle is a guide. Equity is not necessarily confined by the law.\(^{281}\) As Cardozo CJ said in *Graf v Hope*...

---

\(^{275}\) Ibid 69.


\(^{277}\) Peter W Young, Clyde Croft, and Megan Louise Smith, *On Equity* (Lawbook Co, 2009) 163.


\(^{279}\) Ibid.


Building Corp,282 ‘equity follows the law, but not slavishly nor always.’283 However, the circumstances in which equity would defy the law are extremely limited.284

3. Where there is equal equity, the law shall prevail; and, where the equities are equal, the first in time shall prevail

The third maxim is that the law should prevail.285 The fourth maxim is that the first equity to come into existence should prevail.286 Where there are competing and equal equities between two parties, then the court should consider both of these maxims in determining how to exercise its discretion.

If, in an unjust enrichment case, the factors weighing in favour of restitution are equal to the factors weighing against it, then there would be a strong argument for restitution being awarded. This is because the employer’s claim to the benefit would normally be first in time.

4. He who seeks equity must do equity

The fifth maxim of equity is that he who seeks equity must do equity.287 The effect of this maxim is that a party seeking to benefit from equity must be prepared to also take

---

282 (1930) 254 NY 1.
287 Peter W Young, Clyde Croft, and Megan Louise Smith, On Equity (Lawbook Co, 2009) 175-6; J D Heydon, M J Leeming and P G Turner, Meagher Gummow & Lehane’s Equity Doctrines &
the consequences of equity. This maxim is forward looking. That is, it looks at whether the party seeking the assistance of equity is prepared to accept the consequences that flow from that assistance. A court is able to deny an employer a remedy if that employer is not prepared to do equity. For example, if a party is seeking an interlocutory injunction, then they need to make an undertaking as to damages to the court. If they are not prepared to give an undertaking as to damages, then the interlocutory injunction will not issue. This is because the party is unwilling to do equity.

5.  *He who comes into equity must come with clean hands*

The sixth maxim is that a person who comes to equity must come with clean hands. This is an important maxim. It focuses on the past conduct of the party seeking to rely on equity. If a party has engaged in some form of impropriety in a transaction, then they will not normally be entitled to equitable relief. However, as Spry has said:

---

292 Ibid 80.
293 Ibid.
294 Ibid.
The court declines to intervene only if the inequitable conduct in question is shown to have an “immediate and necessary relation” to the relief sought and the grant of that relief is accordingly unconscionable.\textsuperscript{297}

This maxim is heavily entrenched in the restitutionary defences. For example, a key plank of the change of position defence is the requirement that the employee has acted on the faith of the conferral of the benefit.\textsuperscript{298} If an employee changes their position with full knowledge of the fact that the employer only paid them because of a mistake, then the employee will not be protected by the change of position defence. This is because the employee would not have been acting on the faith of the receipt. The employee in that type of scenario would not have come to equity with clean hands.

6. \textit{Equity assists the diligent, not the tardy}

The seventh maxim is that equity assists the diligent, not the tardy.\textsuperscript{299} This is a soft principle of equity. This is because the seventh maxim should not be understood literally.\textsuperscript{300} Mere delay is not enough to stop equity from intervening in favour of a tardy party.\textsuperscript{301} As Edelman has said, the delay will need to be coupled with ‘something more’.\textsuperscript{302} For example, under the equitable doctrine of laches, there are two circumstances where the delay is against conscience. The first is where the delay is of

\textsuperscript{297} I.C.F Spry, \textit{Equitable Remedies} (Lawbook Co, 8\textsuperscript{th} ed, 2010) 409-10.
\textsuperscript{299} J D Heydon, M J Leeming and P G Turner, \textit{Meagher Gummow & Lehane’s Equity Doctrines & Remedies} (LexisNexis Butterworths, 5\textsuperscript{th} ed, 2015) 84.
such a nature that it amounts to a waiver.  

The second is if the delay has caused the other party to change their position to the extent that it would be unreasonable for equity to step in. 

7. **Equality is equity**

The eighth maxim of equity is that equity delights in equality. That is, where there is no other basis for dividing a common asset or liability, equity will make that division equally. Much like the seventh maxim, the eighth maxim cannot be interpreted literally. This is because the concept of equality is fluid. As Young, Croft, and Smith have pointed out, equality can mean either mathematical equality or proportionate equality. What equality means will always depend on the circumstances of the case.

8. **Equity looks to the intent rather than to the form**

The ninth maxim is that substance trumps form. If an insistence on form will cause the substance of an issue to be defeated, then equity will generally step in to save the substance of the issue. The maxim is not as broad as it first appears. For example, the principle cannot be used to rewrite a contract so that it aligns with the intention of

---

303 Lindsay Petroleum Company v Hurd, Farewell and Kemp (1874) LR 5 PC 221, 239-40.
304 Ibid.
308 Peter W Young, Clyde Croft, and Megan Louise Smith, On Equity (Lawbook Co, 2009) 173.
309 Ibid.
311 Parkin v Thorold (1852) 51 ER 698, 701.
312 Peter W Young, Clyde Croft, and Megan Louise Smith, On Equity (Lawbook Co, 2009) 186.
the parties. Indeed, contracts are construed the same in equity as they are under the common law. However, the maxim can be used to save the case of parties who have failed to strictly comply with court rules. According to Edelman, the maxim could be better expressed as ‘equity and common law both begin with the form but search for objective intention’.

9. **Equity looks on that as done which ought to be done**

The tenth maxim is that equity looks on that as done which ought to be done. Or to put this maxim another way, where a party is under a legal obligation to do something, equity often treats that obligation as having been done. The tenth maxim is an important one. It is wide in its application. The effect of the maxim is that a party will not be left to suffer because of another party’s failure to comply with a legal obligation that they ought to have complied with. The use of the word ‘ought’ in this maxim is fundamental. If compliance with a legal obligation is discretionary, then equity will not treat that legal obligation as having been done.

---

315 See for example: *Farm Forestry Finance Pty Ltd v English and English* [1997] WASC (Lib No: 970540) (22 October 1997) 8.
318 Peter W Young, Clyde Croft, and Megan Louise Smith, *On Equity* (Lawbook Co, 2009) 189.
321 Ibid.
322 *Howe v Earl of Dartmouth* (1802) 7 Ves 137, 141.
324 Ibid.
In some circumstances, the tenth maxim may be of relevance in defending an unjust enrichment claim. For example, if an employee could show that they were contractually entitled to all or a portion of an alleged overpayment, then it would be inequitable for the court to award restitution to the extent of the value of that entitlement.

10. \textit{Equity imputes an intention to fulfil an obligation}

The eleventh maxim of equity is that equity imputes an intention to fulfil an obligation.\footnote{J D Heydon, M J Leeming and P G Turner, \textit{Meagher Gummow & Lehane’s Equity Doctrines & Remedies} (LexisNexis Butterworths, 5th ed, 2015) 97.} If a person has a legal duty to do something, then equity presumes that the person will act with the intention of fulfilling that legal duty.\footnote{Peter W Young, Clyde Croft, and Megan Louise Smith, \textit{On Equity} (Lawbook Co, 2009) 197 citing Spencer Symons (ed), John Norton Pomeroy, \textit{A Treatise on Equity Jurisprudence} (Volume 2) (Bancroft-Whitney and Lawyers Co-operative Publishing Company, 5th ed, 1941) 182 [420].} This is the case even in circumstances where there is no evidence of such an intention or where no such intention actually exists.\footnote{James Edelman, ‘The Maxims of Equity’ in John McGhee (ed), \textit{Snell’s Equity} (Thompson Reuters (Legal) Limited, 32nd ed, 2010) 105, 126 citing Lord Neuberger in \textit{Stack v Dowden} [2007] 2 AC 432, 472.} Because of this peculiarity, the eleventh maxim is of very limited application.\footnote{Peter W Young, Clyde Croft, and Megan Louise Smith, \textit{On Equity} (Lawbook Co, 2009) 198; J D Heydon, M J Leeming and P G Turner, \textit{Meagher Gummow & Lehane’s Equity Doctrines & Remedies} (LexisNexis Butterworths, 5th ed, 2015) 97.}

11. \textit{Equity acts in personam}

rights to property in foreign jurisdictions. In contrast, the common law is not able to deal with property that is located in foreign lands. Aside from this titbit, the doctrine is of little utility.

F Closing Remarks

In Australian Financial Services and Leasing Pty Limited v Hills Industries Limited, the majority found that equitable principles need to be taken into account when deciding cases in unjust enrichment. Mason has referred to this as “unhelpful discourse”. Indeed, it is not entirely clear to what extent a judge needs to consider equitable principles in deciding an unjust enrichment case, or whether a judge would fall into error if they failed to do so. This matter may require further research as a part of a different project.

Although unjust enrichment is not a principle of direct application, its taxonomical framework is still important. This is because an understanding of the elements in the taxonomical framework helps add colour to the causes of action that fall under the label of unjust enrichment. This thesis will later rely on the taxonomical framework of unjust enrichment in recommending possible law reform.

Before getting to that matter, chapters IV, V, VI, and VII will address how an employer can make out a claim in unjust enrichment against an employee for the recovery of an overpayment. In those chapters, the reference to unjust enrichment is a reference to unjust enrichment as a label.
CHAPTER IV

HOW AN EMPLOYER CAN RECOVER PAYMENTS MADE TO AN EMPLOYEE BECAUSE OF A MISTAKE

A Introduction

It is hardly unusual that, from time to time, employers will mistakenly overpay their employees.336 If an employee refuses to voluntarily repay a mistaken overpayment to their employer, then the employer will need to take court action to recover the overpayment. The conventional method for an employer to recover a mistakenly made overpayment, in unjust enrichment, is through an action for money had and received. This chapter will set out how an employer can use an action for money had and received to recover a mistaken overpayment from an employee.

B The elements in an action for money had and received where the unjust factor is a mistake

If an employer mistakenly overpays an employee, then that employer is prima facie entitled to recover that mistaken payment through an action for money had and received.337 The action for money had and received has its roots in the decision of Lord Mansfield in Moses v Macferlan338.339 According to Lord Mansfield, the gist of

---


337 See for example: Avon County Council v Howlett [1983] 1 WLR 605; Civil Aviation Authority v Jorm (1994) 56 IR 89; The State of Western Australia v Hartmann-Nieto [2014] WADC 70.

338 (1760) 2 Burr 1005; (1760) 97 ER 676.

an action for money had and received is ‘that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money’. The terms ‘natural justice’ and ‘equity’, in this context, are not concerned with balancing competing equities between the employer and the employee. Instead, those terms require an inquiry into whether it would be inequitable in the circumstances to require the employee to return the overpayment to the employer.

In order to establish a prima facie right to restitution in an action for money had and received where the unjust factor is a mistake, the employer must satisfy the court that:

1. the employee was enriched at the expense of the employer; and

2. the reason why the employer made the overpayment to the employee was because its intention was qualified or vitiated by a mistake.

Once the employer has established its prima facie case, the onus shifts to the employee to demonstrate why it would be inequitable or unjust for the court to make an award for restitution. The defences that an employee may rely upon to achieve this are dealt with in later chapters in this thesis.

340 Moses v Macferlan (1760) 2 Burr 1005, 1012; (1760) 97 ER 676, 680-1.
342 Ibid.
C  First element: The employee was enriched at the expense of the employer

The onus is on the employer to satisfy the court that the employee was enriched at the employer’s expense.\textsuperscript{345} In \textit{Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd},\textsuperscript{346} Mason CJ said that it is ‘the subtraction from the plaintiff’s wealth [which] enables one to say that the defendant’s unjust enrichment has been ‘at the expense of the plaintiff’’.\textsuperscript{347}

The first element of the cause of action is not concerned with disgorging the gain made by the employee or compensating the employer for its loss.\textsuperscript{348} It is instead concerned with reversing the transfer of the overpayment that the employer made to the employee.\textsuperscript{349} The first element focuses on the transfer of wealth from the employer to the employee.

In practical terms, the employer needs to lead evidence that demonstrates that it made the overpayment to the employee.\textsuperscript{350} The types of evidence that should be tendered by the employer to prove this point includes payroll records, pay slips, bank transaction statements, and affidavits from the persons who made or authorised the payment.\textsuperscript{351}

D  Second element: Mistake and causation

In order to perfect its prima facie case, the employer needs to satisfy the court that the reason why it transferred the overpayment to the employee was because of a


\textsuperscript{346} (1994) 182 CLR 51.

\textsuperscript{347} \textit{Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd} (1994) 182 CLR 51, 75. Mason CJ’s statement was cited with approval by Gleeson CJ, Gaudron and Hayne JJ in \textit{Roxborough v Rothmans of Pall Mall Australia Ltd} (2001) 208 CLR 516, 529.

\textsuperscript{348} See generally: Stephen Watterson, ‘“Direct Transfers” in the Law of Unjust Enrichment’ (2011) 64(1) \textit{Current Legal Problems} 435, 435.

\textsuperscript{349} Ibid.

\textsuperscript{350} \textit{Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd} [1943] AC 32, 65.

\textsuperscript{351} See for example: \textit{The State of Western Australia v Hartmann-Nieto} [2014] WADC 70, [124]-[126].
mistake.\textsuperscript{352} It is the vitiation of the employer’s intention that enlivens the employer’s prima facie right to an order for restitution.\textsuperscript{353} There are two facets to this task. The employer needs to prove:

1. that it made a mistake; and,

2. the mistake caused the employer to make the payment to the employee.\textsuperscript{354}

1. \textit{The employer made a mistake}

The employer needs to show that it made a mistake.\textsuperscript{355} It does not matter if the mistake was one of fact or law.\textsuperscript{356} The nature of the mistake is not particularly important.\textsuperscript{357} To establish mistake, it is generally enough for the employer to show that their decision was ‘based on incorrect data’.\textsuperscript{358} For example: if the employer was mistaken about how much it was required to pay an employee under an award, that is a sufficient mistake for the purpose of an action for money had and received. The court will expect the employer to lead evidence that explains what the mistake was, who made the mistake, when the mistake was made, and how the mistake occurred.\textsuperscript{359}


\textsuperscript{358} James Edelman and Elise Bant, Unjust Enrichment (Hart Publishing, 2nd ed, 2016) 172.

\textsuperscript{359} See for example: The State of Western Australia v Hartmann-Nieto [2014] WADC 70, [29]-[115].
2. There was a causal link between the overpayment and the mistake

It is not enough for the employer to simply show that it made a mistake and that it made an overpayment to an employee. There needs to be a causal link between the mistake and the overpayment. That is, the employer needs to show that the reason why it made the overpayment to the employee was because of the mistake. This is because it is the effect that the mistake had on the employer’s intention, in making the payment to the employee, that makes it prima facie unjust for the employee to retain the overpayment.

There is a degree of controversy about the test that needs to be applied to determine causation. Edelman and Bant have suggested that there are three questions that can be asked to determine causation:

1. whether the employer would have made the payment ‘but for’ the mistake;
2. whether the mistake was a ‘significant reason’ for, or a ‘material contribution’ to, the employer’s decision to make the payment to the employee; or
3. whether the mistake was ‘a factor’ that influenced the employer’s decision to make the payment to the employee.

There are examples of the ‘but for’ test and the ‘a factor’ test being used in money had and received cases in Australia. Edelman and Bant have argued that the three tests

---

362 Ibid.
363 Ibid.
365 See for example: The State of Western Australia v Hartmann-Nieto [2014] WADC 70, [179].
366 See for example: Salib v Gakas [2010] NSWSC 505, [328].
are capable of producing different results when applied to a single set of facts.\textsuperscript{367} However, that proposition ignores that fact that it is equally plausible that two judges could make different factual findings on the issue of causation in a particular case even if those two judges applied the same test for causation. According to Edelman and Bant, the ‘a factor’ test is the correct test for causation.\textsuperscript{368} In contrast, Mason, Carter, and Tolhurst argue that the ‘but for’ test is the appropriate test.\textsuperscript{369} With respect, any attempt to break causation down into smaller parts is a straw man argument. The cold reality is that the court needs to determine whether the employer’s mistake caused the employer to make the payment to the employee. That is a question of fact that turns entirely on the quality of the evidence before the court. Answering the causation question requires the court to exercise a degree of common sense and professional judgment.

An employer should always lead subjective evidence to show that the payment was made to the employee because of the employer’s mistake. That subjective evidence will form part of the factual matrix that the court needs to consider in determining the objective issue of causation.

\textsuperscript{367} James Edelman and Elise Bant, \textit{Unjust Enrichment} (Hart Publishing, 2\textsuperscript{nd} ed, 2016) 189-94.
\textsuperscript{368} Ibid 192-4.
\textsuperscript{369} Keith Mason, J W Carter, and G J Tolhurst, \textit{Mason and Carter’s Restitution Law in Australia} (LexisNexis Butterworths, 3\textsuperscript{rd} ed, 2016) 168-9. Mason, Carter and Tolhurst put one caveat on the idea. That is that the ‘but for’ test would not apply where the payer’s mistake was inducted by misrepresentation or improper pressure by the payee.
E  Example: The State of Western Australia v Hartmann-Nieto

The State of Western Australia v Hartmann-Nieto\(^{370}\) is a good example of a mistaken overpayment case. Stevenson J, of the District Court of Western Australia, heard and determined the case.

1. The factual pattern in the State of Western Australia v Hartmann-Nieto

Dr Hartmann was employed by the State of Western Australia as a school cleaner. Dr Hartmann’s employment was based at City Beach High School. On 9 December 2005, the State permanently closed City Beach High School. Because of that closure, the State transferred Dr Hartmann’s employment to East Claremont Primary School. Due to an administrative error by the State’s payroll employees, Dr Hartmann’s change of school was not entered into the payroll system. The effect of this mistake was that Dr Hartmann continued to receive her wages from City Beach High School beyond 9 December 2005.

On 24 February 2006, Dr Hartmann stopped attending work at East Claremont Primary School. Dr Hartmann’s absence from work was not authorised by the State. Dr Hartmann did not attend work again for some three years. Because of an administrative error, Dr Hartmann was continuously paid throughout that three-year period. The State did not discover its error until 5 March 2009. The State immediately stopped paying Dr Hartmann. The State brought a claim against Dr Hartmann for money had and received. The State sought to recover the $79,290.49 (gross) that it had overpaid to Dr Hartmann while she was absent from work.

\(^{370}\) [2014] WADC 70.
2. *The decision of Stevenson J*

Stevenson J accepted that the State had mistakenly overpaid Dr Hartmann.\(^371\) His Honour’s reasons for finding in favour of the State were as follows:

The mistake was the failure of the plaintiff to amend its records to record the change of location of the place of employment of the defendant from City Beach High School to East Claremont Primary School on closure of the former school. As a result of the plaintiffs failure to amend its employment records the plaintiff’s accounting systems continued to make salary payments to the defendant even thought she was not working. But for this mistake the plaintiff would not have been paid her salary for the three-year period. Therefore, by reason of the identified mistake, there is a prima facie legal liability on the defendant to repay the monies received in error from the plaintiff.\(^372\)

F *Closing remarks*

Mistakes happen. From time to time, employers are going to mistakenly overpay their employees. Employers need to resist the temptation to take matters into their own hands by unilaterally recovering that money from their employees’ pay. Otherwise, they expose themselves to litigation risk, and potential court-imposed penalties.\(^373\)

The State and Federal Parliaments have not made the recovery of mistaken overpayments easy for employers. For the most part, they have left the resolution of this type of issue to the common law.\(^374\) As has been highlighted in this chapter, the common law is perfectly capable of resolving an overpayment dispute involving a mistaken payment. The next chapter in this thesis will set out how an employer can

\(^{371}\) *The State of Western Australia v Hartmann-Nieto* [2014] WADC 70, [179].

\(^{372}\) Ibid.

\(^{373}\) Penalties can be issued by virtue of: *Fair Work Act 2009* (Cth) ss 323(1)(a), 546(1); *Industrial Relations Act 1979* (WA) s 83(4)(a)(ii).

recover a payment that has been made in advance to an employee for work that was ultimately not performed.
CHAPTER V
HOW AN EMPLOYER CAN RECOVER PAYMENTS MADE IN ADVANCE TO AN EMPLOYEE
FOR WORK THAT WAS NOT ULTimately PERFORMED

A Introduction

It is uncommon in Australia for employers to pay their employees in advance of work being performed. Nonetheless, that type of payment method is not totally unheard of.375 If an employer pays their employee in advance for work not yet performed, and the employee does not perform the work that they were paid for, then the employer will have a prima facie right to restitution of that payment in an action for money had and received.376 The operative unjust factor in such a case is a total failure of consideration. This chapter will set out what an employer must prove in order to establish their prima facie right to restitution in an action for money had and received where there has been a failure of consideration.

B The elements in an action for money had and received where the unjust factor is a failure of consideration

If an employer has paid money to their employee for a consideration that has wholly failed, then that employer will have a prima facie right to recover that money from the employee.377 That right comes from the action for money had and received where the

375 See for example clause 38.2(a) of the Building and Construction General On-site Award 2010 which requires employers to pay annual leave in advance.
unjust factor is a failure of consideration.\textsuperscript{378} As will be discussed later in this chapter, the term ‘consideration’, in this context, is not the same as consideration in the contractual sense.\textsuperscript{379} The employer’s prima facie right to recover the overpayment does not require the existence of, or reliance on, a contract.\textsuperscript{380} It requires the employer to prove:

1. that the employer made a payment to the employee;
2. that the employer made the payment:
   a. for a particular purpose;
   b. subject to a particular condition; or
   c. on a particular basis; and
3. the purpose, condition or basis wholly failed.\textsuperscript{381}

Once the employer has established its prima facie case for restitution, the onus falls on the employee to show why it would be unjust for the court to award the employer restitution.

C First element: The employer made a payment to the employee

The first thing that the employer needs to prove is that it made the overpayment to its employee.\textsuperscript{382} That is, the employer must show that the employee was enriched at the

\textsuperscript{378} Ideas Plus Investments Ltd v National Australia Bank Ltd [2005] WASC 51, [81]; Equuscorp Pty Ltd v Haxton (2012) 246 CLR 498, 517.
\textsuperscript{380} Ibid.
\textsuperscript{381} See generally: James Edelman and Elise Bant, Unjust Enrichment (Hart Publishing, 2nd ed, 2016) 251. Also see: Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516, 525; Equuscorp Pty Ltd v Haxton (2012) 246 CLR 498, 517.
\textsuperscript{382} Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 65.
employer’s expense. This is a factual exercise. As was similarly discussed in Part C of Chapter IV, the employer should call a witness that can attest to the fact that the payment was made to the employee. The employer’s witness should produce the following types of documents to the court: payroll records, pay slips, and bank transaction statements that show the payment was made to the employee.

D Second element: The objective purpose of the employer’s payment to the employee

The term ‘consideration’ in the phrase ‘failure of consideration’ is not a reference to contractual consideration (i.e. the making of a promise). In the context of an action for money had and received for a total failure of consideration, the term ‘consideration’ means the anticipated state of affairs that qualified the intention of the plaintiff at the time that they transferred the benefit to the defendant. Or put another way, consideration is the underlying purpose of the employer’s payment to the employee.

The focus of the second element is on whether the employer’s intention, in making the payment to the employee, although unimpaired, was ‘objectively qualified by a basis,

---

383 See the minority decision of McLure P in Ideas Plus Investments Ltd v National Australia Bank Ltd [2006] WASCA 215, [96]. A similar approach was adopted by Edelman J in Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd [No 3] [2014] WASC 162, [51].

384 See for example: The State of Western Australia v Hartmann-Nieto [2014] WADC 70, [124]-126.


purpose, or condition’.\textsuperscript{388} As Steytler P said in \textit{Ideas Plus Investments Ltd v National Australia Bank Ltd}\textsuperscript{389}:

The rationale behind an award of restitution in claims based upon a failure of consideration is that it is justified essentially because the payer did not intend the defendant to have the enrichment in the circumstances which occurred.\textsuperscript{390}

The second element requires the court to determine why the employer made the payment to the employee. This is determined objectively, not subjectively.\textsuperscript{391} The employer will need to lead evidence that shows that the employer made the payment to the employee in advance:

1. because, at the time of the payment, the employer contemplated that the employee would perform the work to which the payment related to; or

2. on the condition that the employee would perform the work to which the payment related to.\textsuperscript{392}

Because the employer’s intention is determined on an objective basis, it is not enough for the employer to present a witness that merely asserts that the employer made the payment for a particular reason. That is not to say that type of subjective evidence is not important. It is. However, the employer’s evidentiary material needs to go further.

\textsuperscript{388} James Edelman and Elise Bant, \textit{Unjust Enrichment} (Hart Publishing, 2\textsuperscript{nd} ed, 2016) 251.
\textsuperscript{389} [2006] WASCA 215.
\textsuperscript{390} \textit{Ideas Plus Investments Ltd v National Australia Bank Ltd} [2006] WASCA 215, [72].
\textsuperscript{391} \textit{Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd} (2005) 63 NSWLR 203, 252 (NB: Although the decision of the Court of Appeal of New South Wales was overturned by the High Court of Australia on appeal, the High Court of Australia did not disturb the Court of Appeal’s finding that the test is an objective one); \textit{Woodgate as trustee of the Estate of the Late Mrs Marion McGuiness v Keddie} [2007] FCAFC 129, [43]-[44]; James Edelman and Elise Bant, \textit{Unjust Enrichment} (Hart Publishing, 2\textsuperscript{nd} ed, 2016) 262.
\textsuperscript{392} See generally: \textit{Roxborough v Rothmans of Pall Mall Australia Ltd} (2001) 208 CLR 516, 525.
The employer needs to show what the state of affairs was between the employer and the employee leading up to the payment.\textsuperscript{393}

If there was a written contract of employment between the employer and the employee, then that contract should be tendered to the court as evidence. Similarly, if there was an industrial instrument that regulated the employment relationship between the employer and the employee, then that industrial instrument should also form part of the employer's evidence. These documents help explain what the employee was employed to do and the nature of the relationship between the employer and the employee.

If, on previous occasions, the employer had paid the employee in advance and the employee had subsequently performed the work contemplated by those payments, then the employer should lead evidence of that past custom and practice. Again, that evidence forms part of the objective factual matrix about why the employer made the particular overpayment to the employee.

**E Third element: Total failure of consideration**

In order to perfect its prima facie right to restitution, the employer needs to show that there has been a total failure of consideration. That is, that the employee has not performed any of the work that they were paid to perform. Birks has described the term ‘failure of consideration’ as meaning:

\textsuperscript{393} See generally: *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 526, 557; *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203, 252.
Failure of the consideration for a payment … means that the state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist, has failed to sustain itself.\textsuperscript{394}

The High Court of Australia has cited Birks’ definition with approval on numerous occasions.\textsuperscript{395}

It will be relatively easy for the employer to prove the third element where, for example, the employer has paid the employee for two weeks’ salary in advance, and the employee did not show up to work at all during those two weeks. In this case, the entire basis for the employer’s payment has failed. However, the employer’s case is much more difficult if the employee showed up to work for a few days during that two-week period. This is because there is a general rule that where there has only been a partial failure of consideration, the employer will not have a right to recover a proportionate amount of the employee’s enrichment.\textsuperscript{396} The general rule is qualified by two possible exceptions.

The first exception arises when the payment can be easily divided into severable components.\textsuperscript{397} The court is able to award restitution for a severable component of a payment if the anticipated basis for the payment of that severable component has totally failed.\textsuperscript{398} The second exception is that restitution may be awarded for a partial

\textsuperscript{394} Peter Birks, \textit{An Introduction to the Law of Restitution} (Clarendon Press, revised ed, 1989) 223.


\textsuperscript{398} Ibid.
failure of consideration if the employer has no other remedy available to them (e.g. for a breach of contract). 399

F  Example: A hypothetical of where a partial failure of consideration may be recoverable

Perhaps the easiest way to explain how restitution may be awarded for a partial failure of consideration is by way of a hypothetical scenario. In our hypothetical scenario, the employer has paid $1,000 to their employee. The $1,000 is what the employer anticipates the employee will earn in the week ahead. The payment is made in advance of any work being performed by the employee.

Of that $1,000 payment, $900 is paid in anticipation that the employee will perform 40 hours of work in the week ahead. The remaining $100 is paid because the employer anticipates that the employee will be working night shift throughout the upcoming week. In this scenario, the employee is entitled to a penalty payment when they work nightshift. If the employee performs 40 hours of work but does not work any night shift, then the employee has been overpaid by $100. The question is whether the employer can recover the $100 overpayment from the employee.

The employer could not recover the money through a breach of contract claim. This is because the $100 was not a payment that was due to be paid under the contract. The employee performed their work as instructed. As such, it did not breach its employment contract. The employer must sue for restitution on the basis that there has been a failure of consideration.

In the above scenario, the $100 is arguably a severable component of the $1,000 payment. This is because the employer’s reason for paying the $100 to the employee is severable from the employer’s reason for paying the remaining $900. The employer only paid the employee the $100 because the employer anticipated that the employee would be working night shift in the week ahead. The employer should be entitled to restitution for the $100 overpayment as the anticipated state of affairs totally failed in relation to that severable component.

G Closing remarks

If an employer pays their employee in advance, and the employee does not perform any of the work that they have been paid to perform, then the employer should be able to establish a prima facie right to restitution in an action for money had and received. The unjust factor in this type of case is a total failure of consideration. The employee may be able to displace that prima facie right if it can establish one of the defences that are discussed later in this thesis.

The employer’s case is more complicated if the employee partially performs the work that they have been paid for. This is because there is a general rule that there must be a ‘total’ failure of consideration. However, the general rule may not be fatal to an employer’s case if the employer has no other means of recovering the proportional quantum of the overpayment.400

The next chapter in this thesis will continue on with the topic of employer causes of action in overpayment disputes. It will address how an employer can recover an overpayment made due to economic duress.

400 Ibid.
CHAPTER VI

HOW AN EMPLOYER CAN RECOVER PAYMENTS MADE DUE TO ECONOMIC DURESS

A Introduction

If an employee, or a third party, applies illegitimate pressure on an employer to make a payment, and the employer makes that payment to the employee because of the illegitimate pressure, then the employer will have a prima facie right to recover that payment from the employee in an action for economic duress. The focus of this chapter will be on what an employer needs to prove in order to establish a claim of economic duress. This chapter will conclude by providing a brief summary of an economic duress case where an employer successfully recovered a payment that it had made to a trade union because of illegitimate pressure.

B The elements in an action for economic duress

Economic duress is a common law cause of action. It resides under the label of unjust enrichment. Economic duress is primarily concerned with the conduct of the employee, and the effect that the employee’s conduct had on the quality of the employer’s intention. McHugh JA, in Crescendo Management Pty Ltd v Westpac Banking Corporation, said the following about economic duress:

402 Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd [2013] WASCA 36, [23]-[24], [44].
403 Ibid.
The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate? Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed. Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress. 406

It is essential, but not enough, that the employee’s conduct induced the employer to make a payment. It is not unusual for people to enter into contracts because they are under some form of pressure or because they have little choice but to enter into a contract. 407 In order to enliven the cause of action, the pressure applied by the employee must also be found to have been illegitimate.

The essential elements that an employer needs to prove in order to succeed in an action in economic duress are:

1. the employee, or a third party, applied illegitimate pressure on the employer;
2. the employer made a payment to the employee; and
3. the illegitimate pressure contributed to the employer making the payment to the employee. 408

C First element: The application of illegitimate pressure

The focus of the first element in an action in economic duress is on the employee’s conduct (or a third party’s conduct) and the legitimacy of that conduct. The employer

is required to show that the employee, or a third party, ‘applied pressure’ on the employer and that the pressure was ‘illegitimate’.

The employer needs to jump both of these hurdles in order to establish the first element. The first hurdle is a question of fact. It must be proved through evidence. The second hurdle is a question of mixed law and fact.

1. **The first hurdle: The employee, or a third party, applied pressure**

An employer’s case in economic duress will fail if it cannot prove that the employee, or a third party, applied pressure to the employer. The pressure applied to the employer may be a direct threat, or it may be a veiled one. Whether the employee’s conduct amounts to pressure is a question that looks at the substance and reality of the employee’s actions. It is not enough that there was pressure on the employer to make the payment. The employer must show that the employee, or the third party, applied that pressure.

As Isaacs J said in *Smith v William Charlick*:

Refusal to relieve from business difficulties is not the creation of those difficulties. It is not the same thing as wielding the whip or the rod.

It should be noted that Isaacs J was of the view that ‘duress created by persons or circumstances unconnected with a party to a contract is no cause for impeaching the bargain with him’. However, there is no logical reason why an employer could not

---

412 Ibid.
415 (1924) 34 CLR 38.
416 *Smith v William Charlick* (1924) 34 CLR 38, 56.
417 Ibid.
bring a claim in economic duress against an innocent employee in circumstances where the employer made the payment to the innocent employee because of illegitimate pressure that had been applied to the employer by a third party (e.g. a trade union). The causes of action in unjust enrichment are not predicated on proof of wrongdoing by the person who received the money. Instead, they are concerned with the quality of the intention of the payer.

Edelman and Bant have described applied pressure as ‘an explicit or implicit threat made to the plaintiff that undesirable consequences will follow unless the plaintiff enters a transaction that enriches the defendant or a third party’. The conduct of an employee, or a third party, will not amount to pressure if:

1. there is no ‘unwelcome consequence’ on the employer that flows from the conduct; or

2. the consequence that flows from the conduct is one that is ‘welcomed’ by the employer.

The employer should lead evidence about the employee’s (or third party’s) conduct leading up to the employer’s decision to make the overpayment to the employee. That evidence needs to explain what the employee, or the third party, did to pressure the employer to make the payment.

---

422 Ibid 203.
2. **The second hurdle: The pressure was ‘illegitimate’**

Once the employer has shown that there was applied pressure, it then needs to satisfy the court that the pressure was illegitimate.\(^{423}\) Determining whether a particular pressure was illegitimate can be a vexing task. As Kirby P said in his dissenting judgment in *Equiticorp Finance Ltd (in liq) v Bank of New Zealand*:\(^{424}\)

> What precisely the law is prepared to countenance as “legitimate” begs the question which needs to be answered in characterising particular conduct as impermissible economic duress (on the one hand) or the permissible (even necessary) operation of the market economy (on the other). There is no doubt that in some circumstances commercial pressure may constitute duress.\(^{425}\)

According to Kirby P, the danger with the doctrine of economic duress is that assessing whether pressure was illegitimate involves the courts ‘substituting their opinions about agreements for those reached by parties’.\(^{426}\) Notwithstanding this danger, illegitimacy is the accepted criterion for assessing whether pressure amounts to duress at common law.\(^{427}\)

In *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd*, McLure P, with whom Newnes JA agreed,\(^{428}\) said the following about the concept of illegitimate pressure:

---


\(^{424}\) (1993) 32 NSWLR 50.


\(^{426}\) Ibid 107.

\(^{427}\) *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40, 46; *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2013] WASCA 36, [24], [176].

\(^{428}\) *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2013] WASCA 36, [44].

89
If the pressure involves an actual or threatened unlawful act, it is prima facie illegitimate. If the pressure is lawful, it may be illegitimate if there is no reasonable or justifiable connection between the pressure being applied and the demand which that pressure supports… An actual or threatened breach of contract is unlawful conduct for the purposes of the economic duress doctrine.429 (citations omitted)

The first thing that can be drawn from the above passage is that pressure will be illegitimate if it involves an actual or threatened unlawful act. So for example, if an employee were to threaten to breach an industrial instrument in order to secure a payment from their employer, then that threat would, prima facie, amount to illegitimate pressure.430

If the pressure applied to the employer was a threat to engage in lawful conduct, then the question of whether the applied pressure was illegitimate is more difficult to answer. In those circumstances, the inquiry is whether the lawful act was nonetheless ‘wrongful’.431 McLure P and Newnes JA sought to resolve the difficulty by directing the assessment to whether there was a ‘reasonable or justifiable connection between the pressure being applied and the demand which that pressure supports’.432 The problem with that explanation is that it does not add any real clarity to what types of lawful conduct may amount to illegitimate pressure.

In assessing whether an employee’s conduct amounts to illegitimate pressure, it is not enough that the employee placed commercial pressure on the employer to make the

---

429 Ibid [25]-[26].
Indeed, even if the commercial pressure left the employer ‘with little choice but to act as he did’, that would not necessarily mean that the pressure was illegitimate. According to Sindone, there are a range of factors that need to be considered in determining whether a particular pressure amounts to illegitimate pressure. The factors described by Sindone, as adapted to the employment context, include:

1. the nature of the threat;
2. the type of demand;
3. whether the employer protested about making the payment;
4. whether the employer had adequate alternatives;
5. whether the employer sought legal advice before making the payment;
6. whether the employer failed to challenge the threat;
7. the relative strength between the employer and the employee; and
8. whether the employee provided consideration to the employer for the payment.

The employer should lead evidence that deals with each of Sindone’s eight factors. The employer should also address the relationship between that evidence and the eight factors in its submissions at trial.

---

434 Ibid.
436 Ibid.
D  Second element: The employer made the payment to the employee

The second element requires the employer to prove that it made the payment to the employee. There is nothing technical about this element. It is simply an issue of fact that must be proved by the employer.

E  Third element: There was a causal link between the first and second elements

Finally, the employer may need to satisfy the court that a reason why it made the overpayment to the employee was because of the illegitimate pressure. The illegitimate pressure does not need to be the sole reason why the employer made the payment to the employee; it just needs to be one of the reasons.

The third element is not concerned with whether the employer’s will was overborne by the illegitimate pressure. As McHugh JA said in *Crescendo Management Pty Ltd v Westpac Banking Corporation*:

> In my opinion the overbearing of the will theory of duress should be rejected. A person who is the subject of duress usually knows only too well what he is doing. But he chooses to submit to the demand or pressure rather than take an alternative course of action.

Edelman and Bant have suggested that an inference of causation will arise once the employer has established the first two elements of a claim of economic duress. In

---


support of that suggestion, they rely on the following passage of McHugh JA in

*Crescendo Management Pty Ltd v Westpac Banking Corporation*:

It is unnecessary, however, for the victim to prove that the illegitimate pressure was the sole reason for him entering into the contract. It is sufficient that the illegitimate pressure was one of the reasons for the person entering into the agreement. Once the evidence establishes that the pressure exerted on the victim was illegitimate, the onus lies on the person applying the pressure to show that it made no contribution to the victim entering into the agreement.  

( emphasis added)

That passage is authority for the idea that the employee bears the burden of proving that the employer’s intention was not affected by the illegitimate pressure. As has been highlighted by Sindone, and Edelman and Bant, this peculiarity in the law creates an inherent evidentiary difficulty for the defendant.

Even if the law does draw an inference between applied illegitimate pressure and causation, it would be prudent for an employer to, at the very least, lead evidence to show that the illegitimate pressure was one of the reasons why the employer made the payment to the employee. If the court accepts that evidence, then the onus shifts to the employee to show that the illegitimate pressure was not a reason for the employer making the payment.

**F  Example: The Universe Sentinel**

*Universe Tankships Inc of Monrovia v International Transport Workers Federation (The Universe Sentinel)* is an example of the economic duress doctrine being applied

---

in an employment context. It should be noted that this case involved an employer overpaying its employees and a trade union because of economic duress applied to the employer by that trade union. The employees involved voluntarily returned the overpayment. The trade union did not. Notwithstanding this point, the case is useful for illustrative purposes.

1. *The factual pattern in the Universe Sentinel*\(^\text{448}\)

On 17 July 1978, the Universe Sentinel, a ship, was docked at Milford Haven in Wales. The Universe Sentinel had American owners. The vessel was registered in Liberia and was using the Liberian flag as a flag of convenience.

The International Transport Workers Federation (the ITF) was a trade union that had a presence at Milford Haven. The ITF had a policy that it would boycott ships that were flying flags of convenience and which did not hold a ‘blue certificate’. The blue certificate was a certificate issued by the ITF that exempted ships from being boycotted by the ITF. Shipowners had to pay money into a welfare fund and agree to be bound by an ITF collective agreement in order to obtain a blue certificate from the ITF.

The Universe Sentinel did not have a blue certificate. As a result, the tug crews at Milford Haven refused to tow the Universe Sentinel from the port, back out to sea. The ITF informed the owners of the Universe Sentinel that the ship would only be towed if the shipowners obtained a blue certificate. The shipowners conceded to the ITF’s demand. In order to obtain the blue certificate, the shipowners agreed to:

1. apply an ITF collective agreement retrospectively to all of the crew on the Universe Sentinel; and

2. pay $US6,480 into the ITF’s welfare fund.

The consequence of the retrospective application of the ITF collective agreement was that the shipowners had to pay $US71,720 to their employees, via the ITF, for unpaid wages and entitlements, and $US8,280 to the ITF for unpaid union dues owed by the ship’s crew.

Once the owners had obtained a blue certificate, the Universe Sentinel was allowed by the ITF to sail from Milford Haven. The ITF passed the $US71,720 to the employees of the shipowners. The majority of the ship’s crew returned their portion of the $US71,720 to the owners of the Universe Sentinel. A few weeks later, the owners of the Universe Sentinel brought an action against the ITF to recover the remaining money it had paid to obtain the blue certificate. The shipowners pleaded their case in economic duress.

2. *Concessions made by the ITF in the House of Lords*

Before the Court of Appeal (UK), the shipowners were partially successful in obtaining orders for restitution of the money that they paid to the ITF due to the retrospective operation of the ITF collective agreement.449 However, they were unsuccessful in obtaining restitution of the $US6,480 paid into the ITF’s welfare fund. The shipowners appealed to the House of Lords in relation to the $US6,480.

In the proceedings before the House of Lords, the ITF conceded that the financial consequences of it boycotting the Universe Sentinel ‘were so catastrophic as to amount

---

449 Ibid 377.
to a coercion of the shipowners’ will which vitiated their consent in making the payments.\textsuperscript{450} The ITF instead tried to rely upon a liability shield contained in the \textit{Trade Union and Labour Relations Act 1974} (UK) to excuse their conduct.\textsuperscript{451} For reasons that are not relevant to this thesis, the House of Lords found that the liability shield did not protect the ITF. The House of Lords, by majority, found that the ITF was liable for economic duress in relation to the $US6,480.\textsuperscript{452}

\textbf{G \hspace{0.1cm} Closing remarks}

There are scarce examples of employers in Australia using the economic duress cause of action to recover overpayments made to employees and trade unions. This is peculiar. As was seen in \textit{The Universe Sentinel}, the cause of action can be used by an employer to recover money paid due to the duress caused by industrial action. On its face, the economic duress cause of action seems like it would be of great value to employers who are being strong-armed by militant trade unions. This is especially true given the reverse onus of proof on the issue of causation.

The next chapter in this thesis will address how an employer can use the law of unjust enrichment to recover payments made to an employee due to that employee misusing its position.

\textsuperscript{450} Ibid 383.
\textsuperscript{451} Ibid 385.
\textsuperscript{452} Ibid 390, 393, 397. But c.f. the dissenting judgments at 404 and 409.
CHAPTER VII

HOW AN EMPLOYER CAN RECOVER PAYMENTS THAT WERE CAUSED BY AN EMPLOYEE’S
IMPROPER USE OF ITS POSITION

A  Introduction

It is an unfortunate reality that, from time to time, individual employees will
improperly use their position to obtain a benefit from their employer that they would
not ordinarily, or otherwise, be entitled to. Such a possibility is contemplated by
section 182 of the Corporations Act 2001 (Cth) and section 287 of the Fair Work
(Registered Organisations) Act 2009 (Cth). Those provisions make it unlawful for an
employee to improperly use its position in order to gain a personal advantage.

The purpose of this chapter is to set out how an employer can use an action for money
had and received to recover misappropriated funds from an employee. This chapter
will start by looking at the history of misuse of position as an unjust factor. It will then
outline the essential elements that an employer needs to prove to obtain an order for
restitution in an action for money had and received where the unjust factor is an
employee’s improper use of position.

B  History of misuse of position as an unjust factor

In Moses v Macferlan, Lord Mansfield referred to ‘undue advantage taken of the
plaintiff’s situation’ as an unjust factor that can ground an action for money had and

453 See for example the Royal Commission findings into misappropriation of branch funds within the
Transport Workers Union, WA Branch: Commonwealth, Royal Commission into Trade Union
received.\(^{454}\) One of the earliest cases to deal with an employee’s misuse of position as an unjust factor was *Bristow v Eastman*\(^{455}\). In this case, the employer had employed an apprentice. A part of the apprentice’s job was to draw from the funds of the employer and use those funds to pay any customs charges that were owed by the employer. The apprentice frequently took more money from the employer’s funds than was required to pay the employer’s customs charges. The apprentice pocketed the excess. The employer sued the apprentice in an action for money had and received.\(^{456}\) The employer was successful in its claim against the apprentice.\(^{457}\)

*Health Services Union v Jackson (No 4)*\(^{458}\) is a more recent example of an employer making a claim in money had and receive to recover an overpayment that was caused by an employee’s misuse of position. This case is set out below.

1. **The relevant parts of the factual pattern in HSU v Kathy Jackson [No 4]**\(^{459}\)

*Health Services Union v Jackson (No 4)* was a case between the Health Services Union and Ms Kathy Jackson. At all material times, Ms Jackson was the branch secretary of the Victoria No 3 Branch of the Health Services Union. The case involved a number of different claims made by the Health Services Union against Ms Jackson. One of those claims was for money had and received by Ms Jackson for the Health Services Union. The money had and received claim is the only one that is relevant for the purpose of this chapter.

\(^{454}\) *Moses v Macferlan* (1760) 2 Burr 1005, 1012; (1760) 97 ER 676, 680-1.
\(^{455}\) (1820) 170 ER 160.
\(^{456}\) *Bristow v Eastman* (1820) 170 ER 160, 160.
\(^{457}\) Ibid 161.
\(^{458}\) *Health Services Union v Jackson (No 4)* (2015) 108 ACSR 156.
\(^{459}\) The facts in this section are drawn from the decision of Tracey J in *Health Services Union v Jackson (No 4)* (2015) 108 ACSR 156.
Between July 2003 and January 2008, Ms Jackson took 202 days off work. During that time, she was on personal holidays. Ms Jackson did not use her accrued annual leave entitlements while she was away. Instead, the Victoria No 3 Branch paid Ms Jackson her ordinary salary while she was on holidays. Ms Jackson was paid as if she was still at work despite not being there. Ms Jackson used her position as branch secretary to authorise that arrangement. Ms Jackson then cashed out her accrued annual leave at various points during her employment.\footnote{Ms Jackson’s annual leave pay included a leave loading component. As such it was paid at a rate that was higher than her ordinary rate. This fact is immaterial for the purpose of this chapter.}

The consequence of this unusual arrangement was that it allowed Ms Jackson to be paid twice in circumstances where she would ordinarily have only been entitled to be paid once. In relation to the action for money had and received, the Union sought an order for restitution against Ms Jackson for $67,921. That amount was the value of the salary payments that the Health Services Union had made to Ms Jackson while she was on holidays.

2. \textit{The findings made by Tracey J}

Tracey J was the single judge who presided in \textit{Health Services Union v Jackson (No 4)}. In relation to the Health Services Union’s money had and received claim, his Honour accepted that the Health Services Union had paid $67,921 to Ms Jackson while she was on holidays.\footnote{\textit{Health Services Union v Jackson (No 4)} (2015) 108 ACSR 156, [282]-[284].} Tracey J then said:

\begin{quote}
… Ms Jackson could and should have taken annual leave during the periods of her holidays. Instead she chose to receive her salary and not to claim any annual leave entitlements. As a result these entitlements accrued and she chose to make claims for payments for untaken leave.
\end{quote}
As branch secretary Ms Jackson was responsible for the oversight of branch funds and it was she who made the decisions to accept normal wage payments during periods she was absent on holidays and to accumulate annual leave entitlements and, periodically, to draw on them. In these circumstances I would also have found her to have contravened s 287 of the FWRO Act and s 182 of the Corporations Act.\(^{462}\)

In the above extract, Tracey J accepted that Ms Jackson had improperly used her position as branch secretary of the Victoria No 3 Branch in order to procure the salary payments that the Union made to her while she was on holidays. For that reason, Ms Jackson had been unjustly enriched at the expense of the Health Services Union. Tracey J ordered Ms Jackson to pay $67,921 in restitution to the Health Services Union.\(^{463}\)

\textbf{C The elements in an action for money had and received where the unjust factor is an employee’s improper use of position}

If an employee improperly uses their position in order to obtain a personal benefit from their employer then their employer will have a prima facie right to recover that payment in an action for money had and received.\(^{464}\) The unjust factor in this type of action is the employee’s improper use of its position.

In order to establish that prima facie case, the employer will need to prove that:

1. the employer has transferred a benefit to the employee; and

\begin{footnotes}
\footnotetext{462}{Ibid [283]-[284].}
\footnotetext{463}{Ibid [285].}
\footnotetext{464}{See for example: \textit{Health Services Union v Jackson (No 4)} (2015) 108 ACSR 156, [277]-[285].}
\end{footnotes}
2. the reason why the employer transferred the benefit to the employee was because the employee had improperly used its position to procure the transfer.\textsuperscript{465}

If an employee has improperly used its position to obtain a benefit from its employer, then that type of conduct will invariably involve some degree of wrongdoing. As such, it will be difficult for an employee to avoid an order for restitution once the employer has established its prima facie case. However, each case turns upon its own facts.

D First element: The employer made the payment to the employee

In an action for money had and received where the unjust factor is a misuse of position, the first thing that the employer must prove is that it made a payment to the relevant employee.\textsuperscript{466} As has been mentioned in previous chapters, this generally requires the employer to call a witness who can produce pay records and bank statements to the court.\textsuperscript{467}

E Second element: Improper use of position and causation

The employer needs to be able to satisfy the court that the reason why it made the payment to the employee was because the employee had improperly used its position in order to procure that payment. This can be broken down into two parts. First, that the employee improperly used its position. Second, that a reason for the payment was because of the employee’s improper use of its position. Before getting to the scope of

\textsuperscript{465} See the material facts relied upon by Tracey J in Health Services Union v Jackson (No 4) (2015) 108 ACSR 156, [277]-[284].

\textsuperscript{466} See for example: Health Services Union v Jackson (No 4) (2015) 108 ACSR 156, [277]-[279].

\textsuperscript{467} See for example: The State of Western Australia v Hartmann-Nieto [2014] WADC 70, [124]-[126].
those two requirements, it is important to note an assumption that has been relied upon in this chapter.

1. **The assumption relied upon in this chapter**

In *Health Services Union v Jackson (No 4)*, Tracey J suggested that the material facts that established an unjust enrichment claim against Kathy Jackson would have also established a contravention of section 182 of the *Corporations Act 2001* (Cth) and section 287 of the *Fair Work (Registered Organisations) Act 2009* (Cth).\(^{468}\) Unfortunately, Tracey J did not go into detail about that overlap.

This thesis assumes that the principles that apply to proving that there has been a misuse of position under section 182 of the *Corporations Act 2001* (Cth) and section 287 of the *Fair Work (Registered Organisations) Act 2009* (Cth) also apply to proving the same in an action for money had and received.\(^{469}\)

2. **The employee improperly used its position**

The employer does not need to show that the employee acted dishonestly.\(^{470}\) Nor does the employer need to prove that the employee was not acting in the best interests of the company.\(^{471}\) An employee can improperly use its position even when it is acting honestly and in the best interests of the company.\(^{472}\)

---

\(^{468}\) *Health Services Union v Jackson (No 4)* (2015) 108 ACSR 156, [284].

\(^{469}\) This assumption is consistent with the reasoning of Tracey J in *Health Services Union v Jackson (No 4)* (2015) 108 ACSR 156, [284].


\(^{471}\) Ibid.

\(^{472}\) Ibid.
By way of analogy, in *SBA Music Pty Ltd v Hall (No 3)*, Wigney J described what a plaintiff needs to prove to establish an improper use of position in the context of section 182(1) and 183(1) of the *Corporations Act 2009* (Cth) as follows:

The relevant “improper” conduct, also referred to as “impropriety”, in the use of a position (or information), may consist in an abuse of the power or authority which the position of director confers. Where there is such an abuse for the purpose of gaining an advantage for himself, herself or another person, or of causing detriment to the corporation, both elements of the provision are established.

The test of impropriety, in the sense of “improper use”, is objective. In *Byrnes*, the High Court held that impropriety does not depend on consciousness of impropriety, but consists in a breach of the standards of conduct that would be expected of a person in the position of the alleged offender by reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case.

Accordingly, the majority in *Byrnes* held that a fiduciary who exercises an authority or power for the personal benefit or gain of the fiduciary (or a third party) without the beneficiary’s consent, acts improperly. (citations and paragraph numbers omitted).

For an employer prosecuting an action for money had and received, whether an employee improperly used its position to obtain a payment is a mixed question of fact and law. First, the employer will need to lead evidence about what the employee did to procure the payment. What the employee did to procure the payment is a question of fact. Whether the employee’s conduct amounted to an improper use of its position is a question of law. That question needs to be answered objectively. It is an issue that needs to be addressed in the employer’s submissions to the court.

---

474 *SBA Music Pty Ltd v Hall (No 3)* [2015] FCA 1079, [32]-[34].
3. **There was a causal link between the overpayment and the employee’s improper use of position**

The final element that an employer needs to prove is that a reason why it made the payment to the employee is because the employee improperly used its position within the employer’s enterprise.\(^{476}\) Or put simply, the employer needs to prove causation. Causation is an objective question of fact. The employer should lead evidence about the reason why it made the payment to the employee. Although the court needs to determine causation on an objective basis, the employer’s subjective evidence about why it made the payment may well assist the court in making that objective determination.

\[\text{F Closing remarks}\]

1. **Closing remarks: misuse of position**

If an employee improperly uses their position to procure a payment from its employer, then that employer will have a prima facie right to recover the payment in an action for money had and received.\(^{477}\) The unjust factor in this type of action is the employee’s improper use of its position. Because of the nature of this unjust factor, it would ordinarily be difficult for an employee to mount a defence against an employer’s prima facie right to recovery. This is because these types of cases will invariably involve some form of wrongdoing by the employee. Whilst wrongdoing is

\(^{476}\) See the material facts dealt with by Tracey J in *Health Services Union v Jackson (No 4)* (2015) 108 ACSR 156, [283]-[284]. Tracey J cited the decision of Mason CJ in *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 75 as authority for the position that those material facts would create a right to restitution.

\(^{477}\) See for example: *Health Services Union v Jackson (No 4)* (2015) 108 ACSR 156, [277]-[285].
not an element that the employer needs to prove to establish its prima facie case, proof of the existence of wrongdoing will likely limit the defences available to the employee.

2. **Closing remarks: the employers’ case**

The end of this chapter also marks the end of the discussion on the causes of action in unjust enrichment that an employer may rely on to recover an overpayment from an employee. The discussion thus far highlights that the common law is perfectly capable of resolving an overpayment dispute between an employer and employee; at least from the employers’ perspective.

Chapter VIII will set out the first of the three restitutionary defences that an employee may be able to rely upon to displace an employer’s prima facie right to restitution.
CHAPTER VIII
THE VOLUNTARY PAYMENT DEFENCE

A Introduction

An employee will be able to invoke the voluntary payment defence if it can show that the employer intended for the employee to have the overpayment in all events.\(^{478}\) This chapter will start by looking at the historical foundations of the voluntary payment defence. It will then set out what an employee needs to prove to establish the defence. The chapter will conclude with a summary of the decision in *Lavert Pty Ltd v Boyd*\(^ {479}\). In that case, an employee successfully relied upon the voluntary payment defence to answer an action brought by his previous employer to recover a bonus payment.

B The historical foundations of the voluntary payment defence

The voluntary payment defence has its roots in the English decisions of *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd*,\(^ {480}\) *Kelly v Solari*,\(^ {481}\) and *Morgan v Ashcroft*.\(^ {482}\) The defence was grafted to the Australian common law through the decision of the High Court of Australia in *David Securities Pty Limited v Commonwealth Bank of Australia*.\(^ {483}\) This part will start by looking at that chain of cases. It will then go on to explain why the voluntary payment defence is a proper defence to an action for money had and received.

\(^{478}\) *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677, 695.
\(^{479}\) [2013] NSWDC 319.
\(^{481}\) (1841) 9 M&W 54; (1841) 152 ER 24.
\(^{482}\) [1938] 1 KB 49.
\(^{483}\) (1992) 175 CLR 353.
1. *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd*

A convenient starting place for a discussion on the voluntary payment defence is the decision of Goff J in *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd*. In that case, Goff J said:

(1) If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact. (2) His claim may however fail if (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend...  

Goff J referred to the underlined text in the above passage as ‘Proposition 2(a)’. Goff J then went on to explain the legal basis for his recognition of Proposition 2(a) as follows:

Proposition 2(a). This is founded upon the dictum of Parke B. in *Kelly v. Solari*. I have felt it necessary to add the words “or is deemed in law so to intend” to accommodate the decision of the Court of Appeal in *Morgan v. Ashcroft*, a case strongly relied upon by the defendants in the present case, the effect of which I shall have to consider later in this judgment...  

The reasons for decision of Parke B in *Kelly v Solari* and the reasons for decision of Greene MR and Scott LJ in *Morgan v Ashcroft* formed the basis for Goff’s Proposition 2(a). It will be necessary to look at the reasons in those two cases in order to put Proposition 2(a) into context.

---

484 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677, 695.
485 Ibid.
486 Ibid.
487 (1841) 9 M&W 54; (1841) 152 ER 24.
488 [1938] 1 KB 49.
2. **Kelly v Solari**

*Kelly v Solari* was heard and determined by the Court of Exchequer. Abinger CB and Parke, Gurney and Rolfe BB sat on the bench. Goff J, in formulating Proposition 2(a), only relied on the decision of Parke B. Parke B’s decision will be explored later in this section. The decisions of Abinger CB, and Gurney and Rolfe BB are not relevant to Goff’s Proposition 2(a). For that reason, they will not be addressed.

(a) **The factual matrix in Kelly v Solari**

Mr Angelo Solari had a life insurance policy with Argus Life Insurance Company. Mr Solari signed up to the policy in 1836. The premiums on the policy were payable quarterly by Mr Solari to Argus Life Insurance Company.

On 3 September 1840, Mr Solari failed to make a quarterly payment toward his policy. As a result, Argus Life Insurance Company cancelled Mr Solari’s insurance policy. An employee at Argus Life Insurance Company wrote the word ‘lapsed’ in pencil on the Company’s copy of Mr Solari’s policy.

On 18 October 1840, Mr Solari died. On 6 February 1841, Mr Solari’s widow and executrix proved her husband’s will. On 13 February 1841, Madame Solari made a claim to Argus Life Insurance Company in relation to Mr Solari’s death.

By 13 February 1841, the directors of Argus Life Insurance Company had forgotten that Mr Solari’s life insurance policy had lapsed due to his non-payment of the premium. They paid Madame Solari an amount that they believed was owed under Mr

---

489 (1841) 9 M&W 54; (1841) 152 ER 24.
490 The facts are drawn from the decision in *Kelly v Solari* (1841) 9 M&W 54, 54-5; (1841) 152 ER 24, 24-5.
Solari’s policy. When Argus Life Insurance Company discovered its mistake, it sued Madame Solari for restitution of the payment that it had made to her.

At first instance, Abinger CB dismissed Argus Life Insurance Company’s claim. His Honour’s view was that the directors’ forgetfulness was not a sufficient legal basis for allowing Argus Life Insurance Company’s claim to be put before a jury. On appeal, Argus Life Insurance Company was granted an order nisi to have the matter determined by a full court.

(b) The reasons for decision of Parke B

Parke B upheld the appeal on the basis that Abinger CB erred by not recognising that a payment made by mistake could be recovered at law. That was the ratio decidendi of his Honour’s decision. Parke B then made the following comments in obiter dicta:

If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact.

Parke B’s comments are curious. It is not clear whether Parke B intended to create a specific defence to a claim for money had and received, or whether his Honour was simply referring to circumstances under which a payer’s intention would not have been sufficiently qualified or vitiated to give rise to a right to restitution. A plain reading of Parke B’s comments would suggest that it was likely the latter. However, that is not

---

491 Ibid 58 (M&W), 26 (ER).
492 Ibid 59 (M&W), 26 (ER).
how Goff J treated those comments. Goff J formulated his Proposition 2(a) as a specific defence.

Parke B’s obiter comments have become part of the common law in Australia by virtue of the reasons for decision of Goff J in Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd,493 and the subsequent approval of those reasons by the High Court of Australia in David Securities Pty Ltd v Commonwealth Bank of Australia494.

3. Morgan v Ashcroft

Morgan v Ashcroft495 was a matter before the King’s Bench. The case was heard and determined by Greene MR and Scott LJ.

(a) Factual matrix in Morgan v Ashcroft496

Morgan v Ashcroft involved a dispute between a habitual gambler, Morgan, and his bookmaker, Ashcroft. The dispute was over an alleged overpayment made by Ashcroft to Morgan.

On 4 June 1936, Morgan won 24l 2s 1d in a bet that he had made with Ashcroft. Ashcroft’s clerk entered the win at the bottom of the page on Morgan’s account for 4 June 1936. Ashcroft’s clerk carried forward the 24l 2s 1d winnings from 4 June 1936 and listed that figure at the top of the page on Morgan’s account for 5 June 1936.

On 5 June 1936, Morgan made several more bets with Ashcroft. In those bets, Morgan lost 1l 6s 3d. Ashcroft’s clerk subtracted that 1l 6s 3d loss from the opening balance

495 [1938] 1 KB 49.
496 The facts are drawn from Morgan v Ashcroft [1938] 1 KB 49, 49-50.

110
of 24l 2s 1d and wrote on the bottom of Morgan’s account for 5 June 1936 that Morgan had a credit of 22l 15s 10d.

If Morgan’s winnings from 4 June 1936 had not been carried forward on the books, then the account page for 5 June 1936 would have instead shown that Morgan made a loss of 1l 6s 3d.

On 6 June 1936, Morgan went to Ashcroft to collect his winnings. Ashcroft paid 46l 17s 11d to Morgan. Ashcroft arrived at this figure by adding the 24l 2s 1d, which was at the bottom of the page for 4 June 1936, with the 22l 15s 10d which was the entry at the bottom of the page for 5 June 1936. This resulted in Morgan receiving 24l 2s 1d more than he had actually won. This was because the 4 June 1936 winnings were counted twice.

Ashcroft sued Morgan for restitution of the 24l 2s 1d overpayment. By way of a cross-claim, Morgan argued that Ashcroft actually owed him 9l 13s 4d due to a range of other bets that Morgan had made with Ashcroft. The trial judge ruled in favour of Ashcroft. The trial judge rejected Morgan’s cross-claim. Morgan appealed the decision of the trial judge.

It is important to note that, at the time, the *Gaming Act 1845* (Imp) was in effect in the United Kingdom. Section 18 of the *Gaming Act 1845* (Imp) read:

> And be it enacted, That all Contracts or Agreements, whether by Parole or in Writing, by way of gaming or wagering, shall be null and void; and that no Suit shall be brought or maintained in any Court of Law or Equity for recovering any Sum of Money or valuable Thing alleged to be won upon any Wager, or which shall have been deposited in the Hands of any Person to abide the Event on which any Wager shall have been made: Provided always, that this Enactment shall not be deemed to apply to any Subscription or Contribution, or Agreement to subscribe or contribute, for or toward
any Plate, Prize, or Sum of Money to be awarded to the Winner or Winners of any lawful Game, Sport, Pastime, or Exercise.

(b) Reasons for decision of Greene MR and Scott LJ

Greene MR and Scott LJ upheld Morgan’s appeal. Their Honours found that the trial judge should not have looked at Ashcroft’s accounts. They also found that the trial judge should have dismissed the claim and cross-claim on the basis that the parties were trying to enforce gambling contracts contrary to section 18 of the Gaming Act 1845 (Imp).

Greene MR accepted that a mistake had caused Ashcroft to make the overpayment to Morgan. Ashcroft’s mistake was that he thought that he owed a wagering debt to Morgan in circumstances where no such debt was owed. Greene MR found that Ashcroft volunteered to make the 46l 17s 11d payment to Morgan in circumstances where Ashcroft knew that he was under no legal obligation to do so. This is because the gambling debt was not an obligation that was recognised at law at the time. Greene MR found that the nature of Ashcroft’s mistake was a mistake about the type of voluntary payment he was making to Morgan. Greene MR said that if a person believes they are making one type of voluntary payment, but are actually making a different kind of voluntary payment, then that was not a mistake that was fundamental to the making of the payment. Greene MR concluded that Ashcroft was not entitled to restitution.

498 Ibid.
499 Ibid 67.
500 Ibid.
501 Ibid.
502 Ibid.
503 Ibid.
504 Ibid 66.
Scott LJ took a slightly different approach to that of Greene MR. Scott LJ found that section 18 of the *Gambling Act 1845* (Imp) created a ‘special defence’ to actions relating to gambling transactions.\(^{505}\) Under that special defence the mistaken payment made by Ashcroft, at law, was a voluntary gift from Ashcroft to Morgan.\(^{506}\)

(c) How the decision of Greene MR and Scott LJ influenced Goff J

In *Barclays Bank Ltd v WJ Simms Son & Cooke* *(Southern)* Ltd, Goff J was somewhat critical of the reasons for decision of Greene MR and Scott LJ in *Morgan v Ashcroft*.\(^{507}\) His Honour attempted to summarise the ratio from *Morgan v Ashcroft* as follows:

> It may well be found in the opinion of both judges that an overpayment of betting debts by a bookmaker is not made under a mistake of fact sufficiently fundamental to ground recovery, apparently on the basis that the payment is in any event intended to be a purely voluntary gift, because “the law prevents the plaintiff from saying that he intended anything but a present”, and the plaintiff is therefore deemed in law to intend that the payee shall be entitled to retain the money in any event.\(^{508}\)

4. *David Securities Pty Ltd v Commonwealth Bank of Australia*

In *David Securities Pty Ltd v Commonwealth Bank of Australia*, the High Court of Australia cited Goff J’s passage from *Barclays Bank Ltd v WJ Simms Son & Cooke* *(Southern)* Ltd with approval.\(^{509}\) Mason CJ and Deane, Toohey, Gaudron and McHugh JJ used the voluntary payment defence to explain the underlying rationale of a number of judicial decisions that had previously been thought to support the principle that an

\(^{505}\) Ibid 71.
\(^{506}\) Ibid 77.
\(^{508}\) Ibid 698.
action for money had and received could not be brought for a mistake of law.\textsuperscript{510} Their Honours described the confines of the voluntary payment defence as extending to circumstances where:

1. the payer believes that a particular law or contractual obligation is invalid but volunteers to pay;

2. the payer believes that a particular law or contractual obligation may be invalid but chooses to pay;

3. the payer is not concerned to query whether the payment is required at law and makes the payment;

4. the payer is prepared to assume the validity of an obligation and makes the payment; or

5. the payer is prepared to make the payment irrespective of the validity or invalidity of the obligation to make the payment.\textsuperscript{511}

Their Honours found that a payment would not be voluntary if the payer was compelled to make the payment, or was unduly influenced to make the payment.\textsuperscript{512}

5. \textit{Why the voluntary payment defence is a proper defence}

There is academic commentary that suggests that the voluntary payment defence is not a defence at all.\textsuperscript{513} The theory behind that view is that the voluntary payment defence simply negates a finding that an overpayment was made because of a

\textsuperscript{510} Ibid 372-4.

\textsuperscript{511} \textit{David Securities Pty Ltd v Commonwealth Bank of Australia} (1992) 175 CLR 353, 373-4; \textit{Hookway v Racing Victoria Limited} [2005] VSCA 310, [41].

\textsuperscript{512} \textit{David Securities Pty Ltd v Commonwealth Bank of Australia} (1992) 175 CLR 353, 374.

mistake.\textsuperscript{514} The problem with that suggestion is that, as is evident from the dicta of Greene MR in \textit{Morgan v Ashcroft},\textsuperscript{515} there will occasionally be cases where a mistake has caused a person to make a payment, but where that person would have still made the payment even if that particular mistake had not been made. This is especially true where the mistake that was made by the payer was about the type of voluntary payment that it was making to the payee.

\textbf{C. The elements of the voluntary payments defence}

In order to establish the voluntary payment defence, the employee will need to satisfy the court that:

1. the employer believed that a particular law or contractual obligation was invalid but volunteered to make the payment to the employee in any event;

2. the employer believed that a particular law or contractual obligation may have been invalid but chose to make the payment to the employee in any event;

3. the employer was not concerned to query whether the payment was required at law and made the payment anyway;

4. the employer was prepared to assume the validity of an obligation and made the payment to the employee regardless of the accuracy of that assumption; or

\textsuperscript{514} Ibid.

\textsuperscript{515} \textit{Morgan v Ashcroft} [1938] 1 KB 49, 67.
5. the employer was prepared to make the payment to the employee irrespective of the validity or invalidity of the obligation to make that payment.516

The critical inquiry in the voluntary payment defence is on ‘the mind and intention’ of the employer.517 In each of the above scenarios, the employer would have made a conscious decision to make the payment to the employee, regardless of the legal obligation.518 If there is contemporaneous evidence which shows that the employer did not intend to pay the employee any more than was legally required, and it turns out that the employer was not legally required to pay the overpayment to the employee, then the employer will be able to rebut the voluntary payment defence.519 The one caveat on the voluntary payment defence is that it will never operate where the employer has made the payment to the employee because of duress or some other form of compulsion.520

1. Compromises and the voluntary payment defence

The voluntary payment defence is an effective means of protecting compromise agreements made between employers and employees. The term ‘compromise’ has a specific legal meaning. A compromise is an agreement made between two or more parties in order to settle a dispute between them.521 Compromise agreements are often

517 See generally: Hookway v Racing Victoria Limited [2005] VSCA 310, [41].
518 Ibid.
519 See for example: TRA Global Pty Ltd v Kebakoska (2011) 209 IR 453, 460.
made without either party having to make admissions or concessions about the merits of the dispute.

If a payment is made by an employer to an employee under a compromise, then the employer cannot later come back to reclaim that money if it turns out that the employee’s claim was without merit or unable to succeed.522 It does not matter that the employer may have held a mistaken belief that it had a legal obligation to pay the employee. This is because compromise agreements are entered into voluntarily.523

Under a compromise agreement, the employer is either:

1. prepared to assume the validity of the employee’s claim; or
2. prepared to make the payment irrespective of the validity or invalidity of the employee’s claim.

D Example: Lavert Pty Ltd v Boyd

It is not uncommon for employers in Australia to reward their employees with bonuses and gifts. There is academic research that shows a correlation between employee bonuses and employee performance.524 While employee bonus schemes may be a useful productivity tool, they can also be fertile grounds for disputes between employers and employees. It is common for disputes about bonus payments to spill into courts and industrial tribunals.525 Most of those types of cases involve the

employee claiming that the employer failed to pay a bonus. Less commonly, an employer will make a claim or counterclaim against an employee in order to try to recover a bonus payment that it made to an employee.

_Lavert Pty Ltd v Boyd_ is a good example of an employer trying to recover a bonus payment from their employee. As will be discussed below, the employee in _Lavert Pty Ltd v Boyd_ was able to rely upon the voluntary payment defence to fend off their employer’s claim.

1. **Summary of the facts in Lavert Pty Ltd v Boyd**

Lavert Pty Ltd (Lavert) was owned by Mr Blazevic and Mrs Blazevic. Mr Blazevic was responsible for the day-to-day running of the business. This included controlling any payments that were made to Lavert’s employees.

On 16 February 1998, Lavert employed Mr Boyd. Mr Boyd was initially employed as a contract administrator. According to Mr Blazevic, Mr Boyd was a ‘capable, trustworthy and a valuable employee’. In January 2004, Mr Boyd was promoted to the position of construction manager.

On 23 February 2004, Mr Blazevic’s son was involved in a serious climbing accident. After the accident, Mr Blazevic took some eighteen months away from the business to be with his son. Mr Blazevic put Mr Boyd in charge of the day-to-

---

526 Ibid.
528 _Lavert Pty Ltd v Boyd_ [2013] NSWDC 319, [41].
529 Ibid [42].
530 Ibid [40].
531 Ibid.
532 Ibid [43].
533 Ibid.
534 Ibid [42].
535 Ibid [45].
day running of the company while he was away.\footnote{Ibid [44]-[46].} Notwithstanding this heightened responsibility, Mr Boyd had no involvement in the company’s accounting processes.\footnote{Ibid [47].} Mr Blazevic maintained control of the accounts of the company.\footnote{Ibid [60].}

Mr Blazevic did not make superannuation payments to Mr Boyd for long periods during Mr Boyd’s employment with Lavert.\footnote{Ibid [47].} Mr Boyd discovered this in May 2005.\footnote{Ibid [52].} The superannuation issue festered between Mr Boyd and Mr Blazevic for a number of years. Mr Blazevic ignored Mr Boyd’s numerous requests to be paid superannuation.\footnote{Ibid [131].}

In March 2007, Mr Boyd was close to resigning from Lavert due to the superannuation issue and an issue about a bonus payment.\footnote{Ibid [53].} On 9 March 2007, Mr Blazevic and Mr Boyd entered into an agreement whereby Mr Boyd was entitled to receive a share of Lavert’s profits.\footnote{Ibid.} Under that arrangement, Mr Boyd would receive 7\% of Lavert’s profits for the first $1 million in profit earned, and then 10\% of any profit earned by the company above $1 million.\footnote{Ibid [54].} Mr Boyd was also guaranteed that the bonus payment would at least be $20,000 per year.\footnote{Ibid.}

In October 2007, Lavert paid Mr Boyd $32,500 as a bonus.\footnote{Ibid [53].} Despite the agreement, Lavert did not make a further bonus payment to Mr Boyd until around September 2009.\footnote{Ibid [71].} At that point in time, Mr Boyd estimated that he was entitled to a $90,000
bonus under the arrangement. Mr Blazevic provided no explanation to Mr Boyd about why the full amount of the bonus was not paid. Mr Boyd resigned from his employment.

Mr Blazevic, after becoming aware of Mr Boyd’s resignation, demanded that Mr Boyd pays the $80,000 back to Lavert. Mr Blazevic sought to reclassify the $80,000 bonus payment as a ‘loan’. According to Mr Blazevic, he only made the ‘loan’ to Mr Boyd because he believed it would be paid back later in the year. Mr Boyd refused to repay the bonus payment.

Lavert sued Mr Boyd to recover the allegedly mistaken payment that it made to Mr Boyd (as well of a range of other money that it claimed it had overpaid Mr Boyd). Mr Boyd sought to rely upon the voluntary payment defence to avoid Lavert’s claim. Mr Boyd also cross-claimed against Lavert for unpaid superannuation, holiday leave, and long service leave.

2. The application of the voluntary payment defence in Lavert Pty Ltd v Boyd

Gibson DCJ, of the District Court of New South Wales, heard and determined Lavert Pty Ltd v Boyd. In Gibson DCJ’s reasons for decision, her Honour cited and applied David Securities Pty Ltd v Commonwealth Bank of Australia as authority for the voluntary payment defence.
Gibson DCJ rejected Mr Blazevic’s claim that the payment was a loan.\textsuperscript{557} Her Honour found that Lavert made a conscious and voluntarily decision to make the $80,000 payment to Mr Boyd as a bonus.\textsuperscript{558} Lavert made the payment knowing that it owed substantial sums of money to Mr Boyd.\textsuperscript{559} A key finding of fact made by Gibson DCJ was that Mr Blazevic ‘arranged for the payment because he believed in the validity of the obligation to pay a profit share, and consciously accepted that these entitlements had to be paid’.\textsuperscript{560} The court awarded Mr Boyd sums for outstanding holiday pay, a further $81,000 for outstanding bonus payments, and the costs of the proceedings.\textsuperscript{561}

\textbf{E Closing remarks}

The voluntary payment defence will prevent an employer from recovering a payment that it made to an employee where, at the time that the payment was made, the employer intended that the employee could keep the payment in all events.\textsuperscript{562} The defence is concerned with the mind and intention of the employer at the time that it made the payment to the employee.\textsuperscript{563} If the employer did not bother to query whether it was required to make the contested payment to the employee, then the defence may displace the employer’s prima facie right to restitution.\textsuperscript{564}

\begin{footnotesize}
\textsuperscript{557} Ibid [200].
\textsuperscript{558} Ibid [198]-[199].
\textsuperscript{559} Ibid [198].
\textsuperscript{560} Ibid [199].
\textsuperscript{561} Ibid [211]-[212], [255]-[263].
\textsuperscript{563} Hookway v Racing Victoria Limited [2005] VSCA 310, [41].
\end{footnotesize}
The next chapter in this thesis will look at the good consideration defence, and how an employee might use that defence to fend off an employer’s claim for restitution of an overpayment.
CHAPTER IX
THE GOOD CONSIDERATION DEFENCE

A Introduction

The good consideration defence is a restitutionary defence. There are two ways in which the defence can operate. First, it can operate to prevent an employer from obtaining an order for restitution in circumstances where the employer made the payment to the employee in order to clear a debt that it owed to the employee.565 Second, the defence can be used to prevent or reduce an order for restitution in circumstances where the employee has provided the employer with something of value for the payment.566

The defence has its roots in the decisions of Aiken v Short,567 Kerrison v Glyn, Mills, Currie & Co,568 and Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd569. The relevant parts of these decisions will be examined as the start of this chapter. This chapter will then look at the three occasions where the High Court of Australia has considered the good consideration defence. In order to add some practicality to the theory, this chapter will conclude by setting out what an employee will need to prove in order to establish the good consideration defence.

565 See generally: Aiken v Short (1856) 1 H & N 210; (1856) 156 ER 1180.
567 (1856) 1 H & N 210; (1856) 156 ER 1180.
568 [1912] 81 LJKB 465.
B The historical foundations of the good consideration defence

Goff J laid the foundation for the good consideration defence in his decision in *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd*\(^{570}\). His Honour embedded that foundation in the following passages from his decision:

(1) If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact. (2) His claim may however fail if … (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt….\(^{571}\)

… Proposition 2(b). This is founded upon the decision in *Aiken v. Short …*, and upon dicta in *Kerrison v. Glyn, Mills, Currie & Co…*. However, even if the payee has given consideration for the payment, for example by accepting the payment in discharge of a debt owed to him by a third party on whose behalf the payer is authorised to discharge it, that transaction may itself be set aside (and so provide no defence to the claim) if the payer’s mistake was induced by the payee, or possibly even where the payee, being aware of the payer’s mistake, did not receive the money in good faith…\(^{571}\) (emphasis added and citations omitted)

According to Goff J, the good consideration defence was a simple principle.\(^{572}\)

However, that view is not widely shared. Professor Burrows has concluded that ‘the best way of interpreting Robert Goff J’s judgment is far from obvious and that the

---

\(^{570}\) Ibid.

\(^{571}\) *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677, 695.

\(^{572}\) Ibid.
exact role of good consideration was left unclear’. The work of Edelman and Bant has similarly highlighted that Goff J’s explanation of the good consideration defence is ambiguous. The most convenient way to start grappling with Goff J’s Proposition 2(b) is to examine the decisions in Aiken v Short and Kerrison v Glyn, Mills, Currie & Co.

1. Aiken v Short

Aiken v Short was not an employment law case. It was a case involving a bank making a payment to a third party in order to discharge a debt on behalf of one of its clients. When the bank found out about the true state of its client’s affairs, it sought to recover the payment from the third party. The facts of the case are expanded upon below. Aiken v Short was heard by Pollock CB and Platt and Bramwell BB in the in the Court of Exchequer in around 1856.

(a) Factual matrix in Aiken v Short

In 1847, George Carter inherited a 1/8 share in the estate of his late brother, Edwin Carter. At the time George Carter owed £200 plus interest to the estate of Francis Short. The estate of Francis Short secured that debt by way of a bond and an equitable mortgage over George Carter’s share in Edwin Carter’s estate. George Carter also owed money to Stuckey’s Banking Company.


(1856) 1 H & N 210; (1856) 156 ER 1180.

The facts are drawn from the decision in Aiken v Short (1856) 1 H & N 210, 210-1; (1856) 156 ER 1180, 1180.
On 15 January 1855, George Carter entered into a deed with Stuckey’s Banking Company. The deed required Stuckey’s Banking Company to pay off George Carter’s debt to the estate of Francis Short. The deed also required George Carter to instruct the estate of Francis Short to give the bond and mortgage that it held over George Carter’s share in Edwin Carter’s estate to Stuckey’s Banking Company. Stuckey’s Banking Company entered into this arrangement because it believed that George Carter had good title to the 1/8 share in Edwin Carter’s estate.

In around May 1855, Stuckey’s Banking Company paid £200 plus interest to the estate of Francis Short. In return, and on instruction from George Carter, the estate of Francis Short gave their equitable charge over George Carter’s interest in Edwin Carter’s estate to Stuckey’s Banking Company.

In August 1855, the true last will of Edwin Carter was discovered. Under that more recent will, Edwin Carter instead left George Carter an annuity of £100 which would end upon George Carter making an assignment of that annuity. The effect of the discovery of Edwin Carter’s true last will was that George Carter had no title to the 1/8 share in Edwin Carter’s estate. Stuckey’s Banking Company’s mortgage became worthless. Stuckey’s Banking Company sued the estate of Francis Short in an action for money had and received in order to try to recover the money it had paid to the estate of Francis Short to discharge George Carter’s debt. Stuckey’s Banking Company argued that it had not received any consideration for the payment that it made to the estate of Francis Short.
(b) Reasons for decision of Pollock CB and Platt and Bramwell BB

Pollock CB, and Platt and Bramwell BB all agreed that it would be unjust for the court to require the estate of Francis Short to return the £200 plus interest to Stuckey’s Banking Company. There were two reasons for this.

First, and most relevantly, their Honours found that Stuckey’s Banking Company made the payment to the estate of Francis Short on behalf of George Carter (rather than on its own behalf). That is, Stuckey’s Banking Company was acting as an agent for George Carter. The purpose of the payment was to discharge the debt that George Carter owed to the estate of Francis Short. Their Honours concluded that, because the estate of Francis Short was owed the money that it received on George Carter’s behalf, the law would not require the estate of Francis Short to return that money.579

Second, Bramwell B found that Stuckey’s Banking Company voluntarily parted with its money in order to purchase a security that was worth less than what it had assumed. His Honour accepted that Stuckey’s Banking Company made a mistake about the value of the security that it had purchased. However, Bramwell B found that the type of mistake made by Stuckey’s Banking Company was not one that could justify an order for restitution.

(c) How the decision in Aiken v Short influenced Goff J in Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd

In Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd, Goff J commented that the crucial fact in Aiken v Short was that Stuckey’s Banking Company had made

577 Aiken v Short (1856) 1 H & N 210, 214-5; (1856) 156 ER 1180, 1181-2.
578 Ibid.
579 Ibid.
580 Ibid, 215 (H & N); 1182 (ER).
the payment to the estate of Francis Short as an agent for George Carter and that the estate of Francis Short had provided good consideration for that payment by discharging the debt that George Carter owed to it.\textsuperscript{581} That crucial fact appears to have inspired Goff J’s Proposition 2(b).

2. \textit{Kerrison v Glyn, Mills, Currie & Co}

\textit{Kerrison v Glyn, Mills, Currie & Co}\textsuperscript{582} was a general litigation matter before the King’s Bench Division of the House of Lords. Loreburn LC, Halsbury E and Atkinson, Mersey, and Shaw LL decided the case in 1912. The facts of the case and their Honours’ reasons for decision are set out below.

(a) \textit{Factual matrix in Kerrison v Glyn, Mills, Currie & Co}\textsuperscript{583}

Mr Kerrison was located in Ipswich, in England. He was a joint owner of the Bote Mining Co. The Bote Mining Co had a silver mine in Mexico. The Bote Mining Co held an account with Kessler & Co. Kessler & Co was a bank located in New York, in the United States of America. Kessler & Co held a bank account with Glyn, Mills, Currie & Co. Glyn, Mills, Currie & Co was a bank located in London, England.

On 30 October 1903, Kessler & Co filed for bankruptcy. It closed its operations on the same day.

On 31 October 1903, Mr Kerrison paid £500 into Kessler & Co’s bank account at Glyn, Mills Currie & Co. Mr Kerrison made the payment to Kessler & Co so that Kessler & Co could then advance the £500 to the Bote Mining Co. Mr Kerrison made

\textsuperscript{581} \textit{Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd} [1980] QB 677, 687-8.

\textsuperscript{582} [1912] 81 LJKB 465.

\textsuperscript{583} The facts are drawn from the decision in \textit{Kerrison v Glyn, Mills, Currie & Co} [1912] 81 LJKB 465, 465-470
the payment to cover a future debt of the Bote Mining Company, rather than an existing debt. At the time of the payment, Mr Kerrison was unaware that Kessler & Co had filed for bankruptcy.

Kessler & Co owed money to Glyn, Mills, Currie & Co. Glyn, Mills, Currie & Co kept the £500 that Mr Kerrison had paid into Kessler & Co’s bank account. Glyn, Mills, Currie & Co did this to recover some of the money that Kessler & Co owed to it.

Once Mr Kerrison found out that Kessler & Co had closed down due to bankruptcy, he asked Glyn, Mills, Currie & Co to return the £500. Glynn, Mills, Currie & Co refused. Glynn, Mills, Currie & Co’s position was that Mr Kerrison had paid the money to Kessler & Co to satisfy an existing debt that he owed to Kessler & Co.

Mr Kerrison sued Glyn, Mills, Currie & Co for restitution of the £500 in an action for money had and received because of a mistake of fact. Mr Kerrison contended that he only transferred the money into Kessler & Co’s account because he was of the mistaken belief that Kessler & Co was still in business. Mr Kerrison denied that the £500 payment was to extinguish an existing debt. He claimed that he made the payment to account for a future debt.

(b) Reasons for decision of the King’s Bench

The King’s Bench found that the purpose of Mr Kerrison’s payment to Kessler & Co was to account for a future debt, rather than to extinguish an existing one.\(^{584}\) Kessler & Co had no legal entitlement to receive the £500 payment from Mr Kerrison. The Court accepted that Mr Kerrison’s mistaken belief that Kessler & Co were still trading caused him to make the payment into Kessler & Co’s bank account.\(^{585}\) The Court also

---

\(^{584}\) Kerrison v Glyn, Mills, Currie & Co [1912] 81 LJKB 465, 469, 471, 472.

\(^{585}\) Ibid 469-70, 471, 472.
found that Glyn, Mills, Currie & Co held the £500 in their capacity as an agent for Kessler & Co. As such, Glyn, Mills, Currie & Co had no entitlement to keep the payment.\(^\text{586}\)

Atkinson L, with whom Loreburn LC, Halsbury E, and Shaw L agreed, said in obiter that if Mr Kerrison had made the payment to Kessler & Co to settle an existing debt, then Mr Kerrison’s mistake about the solvency of Kessler & Co would not have been a sufficient mistake to recover the £500 payment.\(^\text{587}\) This is because Kessler & Co would have provided good consideration for the payment that they received. This would also have meant that Mr Kerrison would not have been able to recover the money from Glyn, Mills, Currie & Co in their capacity as an agent for Kessler & Co.

\textit{(c) The similarities between Kerrison v Glyn, Mills, Currie & Co and Aiken v Short}

The obiter from \textit{Kerrison v Glyn, Mills, Currie & Co} is analogous the ratio from \textit{Aiken v Short}. Both decisions exemplify the idea that it would be unjust for a court to order a payee to return a mistaken payment to a payer if the payer made the payment in order to satisfy an existing debt that the payer owed to the payee.

\textbf{C The recognition of the good consideration defence in Australia}

The good consideration defence, as enunciated by Goff J in \textit{Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd}, is good law in Australia.\(^\text{588}\) This part will start by

\(^{586}\) Ibid 470, 471, 472.

\(^{587}\) Ibid 468.

exploring the leading High Court cases in Australia on the good consideration defence. It will then look at how the law surrounding the defence may expand in the future.

1. **Australia and New Zealand Banking Group Ltd v Westpac Banking Corp**

In *Australia and New Zealand Banking Group Ltd v Westpac Banking Corp*, Mason CJ, and Wilson, Deane, Toohey and Gaudron JJ commented that it would be unjust to award restitution if ‘the payment was made for good consideration such as the discharge of an existing debt’. Their Honours made this comment in passing. It was not a fundamental plank in their decision. Notwithstanding the non-binding nature of the comment, it was the first indication that the High Court of Australia was prepared to accept the good consideration defence as a part of the law of Australia.

2. **David Securities Pty Ltd v Commonwealth Bank of Australia**

*David Securities Pty Ltd v Commonwealth Bank of Australia* provided some guidance about the existence and operation of the good consideration defence. Given that the good consideration defence was a live issue before the High Court of Australia, it is worth taking a closer look at the facts of the case and the majority’s decision about the defence.

---

(a)  **Factual matrix in David Securities Pty Ltd v Commonwealth Bank of Australia**

Antoine and Therese Rahme controlled two family companies: David Securities Pty Ltd and A & T Rahme & Sons Pty Ltd. Between December 1984 and October 1985, David Securities Pty Ltd and A & T Rahme & Sons Pty Ltd entered into various foreign currency loan arrangements with the Commonwealth Bank of Australia. The money was loaned in Swiss francs. David Securities Pty Ltd and A & T Rahme & Sons Pty Ltd provided registered mortgages to the Commonwealth Bank of Australia to secure the loans. Antoine and Therese Rahme also provided unlimited personal guarantees to the Commonwealth Bank of Australia.

The *Income Tax Assessment Act 1936* (Cth) required the Commonwealth Bank of Australia to pay income tax on the interest payments that it received from David Securities Pty Ltd and A & T Rahme & Sons Pty Ltd under the loan agreements. The loan agreements contained a clause that required David Securities Pty Ltd and A & T Rahme & Sons Pty Ltd to indemnify the Commonwealth Bank of Australia in relation to that income tax liability. The Commonwealth Bank of Australia made representations to David Securities Pty Ltd and A & T Rahme & Sons Pty Ltd that they were legally obliged to indemnify the Commonwealth Bank of Australia in relation to that tax.

Unbeknown to David Securities Pty Ltd and A & T Rahme & Sons Pty Ltd, the income tax indemnity clauses in the loan agreements were unlawful and invalid by virtue of a separate provision in the *Income Tax Assessment Act 1936* (Cth). That legislative provision prevented the Commonwealth Bank of Australia from passing on its income tax liability.

---

592 The facts are drawn from the decision in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 359-362.
tax liability to the person taking the loan. For a number of years, David Securities Pty Ltd and A & T Rahme & Sons Pty Ltd paid the Commonwealth Bank of Australia’s income tax liability in accordance with the terms of the loan agreements.

Fluctuations in the exchange rates between the Australian dollar and the Swiss franc eventually led to the Rahmes, and their companies, making significant losses and defaulting on the loans. Their relationship with the Commonwealth Bank of Australia broke down.

The Rahmes and their companies sued their accountants and the Commonwealth Bank of Australia in the Federal Court. There were two parts to their claim. First, they claimed that the Commonwealth Bank of Australia had engaged in misleading conduct in breach of the *Trade Practices Act 1974* (Cth). Second, they claimed that the Commonwealth Bank of Australia breached either a contractual obligation or common law duty to advise them about the risks involved in foreign currency loans. The Commonwealth Bank of Australia cross-claimed against the Rahmes and their companies for money that was owed under the loan agreements.

The Rahmes and their companies were wholly unsuccessful at trial before a single judge. The Commonwealth Bank of Australia was successful in its cross-claim. The trial judge awarded $1,106,113.76 plus interest against David Securities Pty Ltd and $286,632.58 plus interest against A & T Rahme Pty Ltd.

The Rahmes and their companies appealed the trial judge’s decision up to the Full Court of the Federal Court. One of the grounds of appeal pursued by the Rahmes and their companies was that David Securities Pty Ltd and A & T Rahme & Sons Pty Ltd had mistakenly paid money to the Commonwealth Bank of Australia pursuant to the invalid indemnity clause in the loan agreements, and that the awards made to the
Commonwealth Bank of Australia by the trial judge should have included a set off against the value of the mistaken payments.

The Full Court of the Federal Court accepted that the indemnity clauses in the loan agreements were invalid by virtue of the *Income Tax Assessment Act 1936* (Cth). The Full Court also accepted that David Securities Pty Ltd and A & T Rahme & Sons Pty Ltd had paid money to the Commonwealth Bank of Australia because of their mistaken belief that the income tax indemnity clauses were legally enforceable. However, the Full Court found that David Securities Pty Ltd and A & T Rahme & Sons Pty Ltd had no entitlement to restitution in an action for money had and received because the mistake was a mistake of law (as opposed to a mistake of fact). The Full Court of the Federal Court dismissed the appeal.

The Rahmes and their companies appealed to the High Court of Australia. In their case before the High Court of Australia, the Rahmes and their companies challenged the finding by the Full Court of the Federal Court that an action for money had and received did not cover payments made because of a mistake of law. In response, the Commonwealth Bank of Australia relied on two defences to the Rahmes’ claim for money had and received. First, it relied on the good consideration defence. Second, it relied on the change of position defence.

In relation to the good consideration defence, the Commonwealth Bank of Australia argued that it had provided good consideration to David Securities Pty Ltd and A & T Rahme & Sons Pty Ltd for the income tax indemnity payment. That consideration was in the form of a discount on the interest rates that the Commonwealth Bank of Australia would have otherwise charged to David Securities Pty Ltd and A & T Rahme & Sons Pty Ltd under the loan agreements. The Commonwealth Bank of Australia accepted that it knew that there was a provision in the *Income Tax Assessment Act*
that prevented it from passing its income tax liability on to David Securities Pty Ltd and A & T Rahme & Sons Pty Ltd, and that it drafted the contractual provisions to avoid that legislative provision.

(b) The majority’s decision on the issue of the good consideration defence

The majority of Mason CJ and Deane, Toohey, Gaudron and McHugh JJ accepted that the good consideration defence, as set out by Goff J in *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* and recognised by the High Court of Australia in *Australia and New Zealand Banking Group Ltd v Westpac Banking Corp*, was good law in Australia. The Court also rejected the Commonwealth Bank of Australia’s argument that it was protected by the good consideration defence. Their Honours said the following about the application of the good consideration defence to the facts of the case:

However, the true situation was, of course, that the liability for payment of withholding tax fell upon the lender and that s. 261 avoided any attempt to pass this burden on to a borrower in circumstances such as the present. The appellants thus had no indebtedness in respect of withholding tax, the discharge of which could form consideration for the payments under cl. 8(b). Those payments were therefore not made for good consideration within the terms of the defence outlined in *Barclays Bank and Westpac Banking Corporation*.

Although it is not relevant to the topic of this chapter, the majority also abolished the distinction between mistakes of fact and law and provided valuable insight into the

---

594 Ibid 381.
595 Ibid.
operation of the change of position defence.\textsuperscript{596} What the majority said about the change of position defence will be dealt with in Chapter X.

3. \textit{Australian Financial Services and Leasing Pty Ltd v Hills Industries Limited}

\textit{Australian Financial Services and Leasing Pty Limited v Hills Industries Limited}\textsuperscript{597} was an appeal in the High Court of Australia. French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ heard the case in 2014. The focus of the case was on ‘the nature of the defence of change of position to a common law action for restitution for money paid under a mistake’.\textsuperscript{598} However, the majority decision of Hayne, Crennan, Kiefel, Bell and Keane JJ made some important obiter comments about the good consideration defence. Before getting to those comments, it is worth looking at the factual matrix of the case.

\textit{(a) Factual matrix in Australian Financial Services and Leasing Pty Limited v Hills Industries Limited}\textsuperscript{599}

Mr Skarzynski was the director of a number of companies. Those companies were grouped together under the name ‘the Total Concept Projects Group’ (TCP). In around August and September 2009, TCP was in a bad financial state. It owed large sums of money to two companies: Hills Industries Ltd (Hills), and Bosch Security Systems Pty Ltd (Bosch). Hills and Bosch were placing pressure on Mr Skarzynski and TCP to

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{596} Ibid 376, 385.
\item\textsuperscript{597} (2014) 253 CLR 560.
\item\textsuperscript{598} \textit{Australian Financial Services and Leasing Pty Limited v Hills Industries Limited} (2014) 253 CLR 560, 604.
\item\textsuperscript{599} The facts are drawn from the decision of Allsop P in \textit{Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd} [2012] NSWCA 380, [5]-[65].
\end{itemize}
\end{footnotesize}
pay the outstanding debts. Bosch went as far as to obtain default judgment orders against TCP and Mr Skarzynski in relation to the money that was owed.

In late 2009, Mr Skarzynski created a number of fake invoices for the purchase of commercial equipment from Hills and Bosch. Mr Skarzynski provided those fake invoices to Australian Financial Services and Leasing Pty Ltd (AFSL). Mr Skarzynski told AFSL that if it purchased the equipment listed in the fake invoices, then TCP would lease that equipment from AFSL. AFSL did not know that the invoices were fakes. AFSL agreed to the deal. AFSL paid the amounts listed in the invoices to Hills and Bosch. AFSL made the payments to Hills and Bosch under the mistaken belief that it was purchasing equipment from them.

Mr Skarzynski told Hills and Bosch that the money that they had received from AFSL was paid to partially clear TCP’s debts. Hills and Bosch, unaware of the fraud that Mr Skarzynski had committed against AFSL, used the money to clear TCP’s debts.

TCP made lease payments to AFSL for five months. AFSL then discovered the fraud that Mr Skarzynski had committed against it. AFSL sued Hills and Bosch in an action for money had and received in order to try to recover the payments that it had mistakenly made to them. Hills and Bosch defended the claims on the basis that they had provided good consideration for the money and, alternatively, they had changed their position in reliance on the payments that they had received from AFSL.

Einstein J, of the Supreme Court of New South Wales, decided the case at first instance. The case then went on to appeal to the Court of Appeal of the Supreme Court of New South Wales.
In the Court of Appeal decision, Allsop P accepted that Hills and Bosch had provided good consideration to TCP for the payment. Meagher JA did not agree with that finding. Bathurst CJ did not make any findings about the good consideration defence.

According to Meagher JA, the good consideration defence looks at the ‘circumstances of the payment sought to be recovered’. That is, the defence requires an analysis of why the payer made the payment to the payee. Meagher JA found that Hills and Bosch were unable to rely upon the good consideration defence. This was because AFSL’s payments to Hills and Bosch were not made or received in the circumstances contemplated by Goff J’s Proposition 2(b).

All three justices found that the change of position defence protected Hills and Bosch and dismissed AFSL’s appeal. AFSL appealed the decision of the Court of Appeal up to the High Court of Australia.

(b) Reasons for decision of Hayne, Crennan, Kiefel, Bell and Keane JJ

As mentioned above, Hayne, Crennan, Kiefel, Bell and Keane JJ made obiter comments in their majority decision about the scope of the good consideration defence. Their Honours started by reaffirming that Goff J’s Proposition 2(b) in *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* was a recognised

---

**Notes:**

600 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* [2012] NSWCA 380, [143]-[145].

601 Ibid [200], [209].

602 Ibid [2].

603 Ibid [184].

604 Ibid [200].

605 Ibid.

606 Ibid [1], [139], [145], [147], [148]-[166], [209], [214], [216].


defence to an action for money had and received to recover a mistaken payment.\textsuperscript{609}

The majority then said:

As Meagher JA correctly observed, in rejecting AFSL’s argument below, AFSL’s payments were not made to discharge TCP’s debts to Hills and Bosch. The payments to Hills and Bosch were not made or received in the circumstances envisaged by Goff J. To these observations, it may be added that it is doubtful whether the fraud practised on AFSL by TCP was irrelevant to whether there had been any discharge of TCP’s debts to Hills and Bosch.\textsuperscript{610}

It is easy to confuse what the majority said in the above passage. On its face, the above passage suggests that the good consideration defence is confined to circumstances where a payer, or the payer’s agent, has made a payment to the payee, or the payee’s agent, in order to clear a debt that the payer owed to the payee. Indeed, that was the formulation adopted by Meagher JA.\textsuperscript{611} However, such a reading of the majority’s obiter comments is not a plausible one. This is because to do so would confine Goff J’s Proposition 2(b) so narrowly that it could no longer be read harmoniously with Goff J’s footnote relating to Proposition 2(b).

Goff J, in his footnote, emphasised that a mistaken payment that has been made to clear a debt, and does clear a debt, is an example of a circumstance where the good consideration defence will prevent an order for restitution of such a payment.\textsuperscript{612} As will be explained in Part D of this chapter, the good consideration defence is most likely capable of applying in any circumstance where the payee has provided some

\textsuperscript{609} Australian Financial Services and Leasing Pty Limited v Hills Industries Limited (2014) 253 CLR 560, 603-4.

\textsuperscript{610} Ibid 604.

\textsuperscript{611} Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd [2012] NSWCA 380, [185]-[186].

\textsuperscript{612} Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd [1980] QB 677, 695.
consideration to the payer for the mistaken payment. Putting that issue to one side, the question arises: how then should one read the majority’s obiter comments?

The majority's comments were heavily coloured by the facts of the case that was before the court. AFSL did not make the payments to Hills and Bosch in order to discharge TCP’s debts. Nor did it make the payment as an agent for TCP. As was suggested by the majority in the above-cited passage, this much ought to have been clear from the evidence of the fraud that Mr Skarzynski practised on AFSL. The real reason why AFSL made the payments to Hills and Bosch was because it was under a mistaken belief that it was purchasing equipment from those companies. Hills and Bosch could not rely upon the good consideration defence because they could not show that consideration flowed from them to AFSL for the mistaken payment. Nor could they show that AFSL made the payments to them for TCP or as an agent of TCP.

If the facts of the case were different and AFSL had been acting as an agent for TCP when it made the payments to Hills and Bosch, or alternatively Hills and Bosch had provided the equipment to AFSL, then it is likely that Hills and Bosch would have been able to successfully rely upon the good consideration defence.

D The elements of the good consideration defence

The good consideration defence can apply in at least two different scenarios.613 What material facts the employee will need to prove in order to establish the defence will

613 C.f. James Edelman and Elise Bant, Unjust Enrichment (Hart Publishing, 2nd ed, 2016) 364-5. Edelman and Bant say that there are at least five possible principles under the heading ‘good consideration’. The second of the five principles listed by Edelman and Bant is merely the change of position defence. The third principle, the ‘payment in satisfaction of a legal claim’ principle, is not a part of the good consideration defence; but rather a part of the voluntary payment defence. The fifth principle, the ‘bona fide discharge of debt’ principle, has been rejected by the High Court of Australia in Australian Financial Services and Leasing Pty Limited v Hills Industries Limited (2014) 253 CLR 560, 603-4.
vary depending on the circumstances of the case. Both scenarios will be dealt with separately below.

1. **Scenario one: The payment was made in order to discharge a debt or obligation**

First, the good consideration defence can operate to prevent restitution of a mistaken payment where the employer owed a debt to the employee, and the mistaken payment cleared that debt.\textsuperscript{614} This is the traditional incarnation of the good consideration defence.

Virgo has suggested that good consideration ‘forms part of the wider principle that the presence of a legally effective basis for the receipt of the benefit will defeat the claim for restitution’.\textsuperscript{615} The underlying philosophy of Virgo’s suggestion is that a person could not be described as having been enriched in circumstances where that person was entitled to receive the benefit.\textsuperscript{616} However, Virgo qualified his suggestion in the following way. If the quantum of the benefit received by the person exceeds the amount that they were entitled to, then the court can order restitution for the excess amount.\textsuperscript{617} That is, good consideration defence operates on a pro tanto basis.

Taliadoros and Erbacher suggest that the good consideration defence can be enlivened when value has been provided for the payment that was made.\textsuperscript{618} In relation to the scope of the good consideration defence, there is a high degree of synergy between the ideas of Virgo, and Taliadoros and Erbacher.

\textsuperscript{614} See for example: *Aiken v Short* (1856) 1 H & N 210; (1856) 156 ER 1180.


\textsuperscript{616} Ibid 190.

\textsuperscript{617} Ibid.

\textsuperscript{618} Jason Taliadoros and Sharon Erbacher, *Restitution: The Laws of Australia* (Thomson Reuters, 1\textsuperscript{st} ed, 2014) 283.
In order to establish the defence, where the facts align with this first scenario, the employee needs to prove that:

a. the money was paid to the employee by:
   i. the employer; or
   ii. a third party for, or on behalf of, the employer; and

b. the purpose of the mistaken payment was to clear an existing debt that the employer owed to the employee; and

c. the value of the mistaken payment was equal to, or less than, the debt that the employer owed to the employee.  

(a) Element one: Was the payment made by, for, or on behalf of the employer?

If the employee received the payment directly from the employer, and it can prove that fact, then the employee will be able to make out the first element.

It may be more complicated for the employee to establish the defence where the employee received the payment from a third party (i.e. someone other than the employer). This is because if the employee received the payment from a third party, then the employee will need to prove that the third party paid the money to the employee:

1. for the employer; or
2. on behalf of the employer (i.e. as the employer’s agent).

---


620 See generally: Aiken v Short (1856) 1 H & N 210; (1856) 156 ER 1180; Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd [1980] QB 677, 695.

621 Ibid.
Determining whether a third party made the payment for, or on behalf of, the employer requires one to look at the reason why the third party made the payment to the employee.\textsuperscript{622} If the third party payer was not acting for, or on behalf of, the employer when it made the payment to the employee, then the good consideration defence will fail.\textsuperscript{623}

(b) \textit{Element two: Was the purpose of the mistaken payment to clear an existing debt?}

The employee will also need to satisfy the court that the reason why the employer, or the third party, made the payment to the employee was to clear an existing debt that the employer owed to the employee.\textsuperscript{624} The good consideration defence will not assist an employee if the employer made the payment to the employee in anticipation of a future debt, as opposed to a debt that had already accrued at the time of the payment.\textsuperscript{625} If the employee has any written, contemporaneous correspondence from the employer or the third party explaining why the payment was made, then that may assist the employee in establishing the second element.

(c) \textit{Element three: Did the payment clear the debt, or part of it?}

The good consideration defence operates on a pro tanto basis. In \textit{David Securities Pty Ltd v Commonwealth Bank of Australia},\textsuperscript{626} Brennan J said:

\begin{quote}
To the extent that a payment satisfies a defendant's right to receive it, the defendant gives good consideration and is not unjustly enriched. If the defendant receives more
\end{quote}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{622} \textit{Australian Financial Services and Leasing Pty Limited v Hills Industries Limited} (2014) 253 CLR 560, 604.
\item \textsuperscript{623} Ibid.
\item \textsuperscript{624} \textit{Kerrison v Glyn, Mills, Currie & Co} [1912] 81 LJKB 465, 468.
\item \textsuperscript{625} Ibid.
\item \textsuperscript{626} (1992) 175 CLR 353.
\end{itemize}
\end{footnotesize}
than his due, he may be unjustly enriched to the extent of the excess and restitution may be ordered pro tanto.\textsuperscript{627}

If the employee received a payment which was less than or equal to the value of the debt that the employer owed to the employee, then the good consideration defence will operate as a complete defence to the employer’s claim. However, if the value of the payment received by the employee exceeded what the employer owed to the employee, then the defence will only operate to the value of the debt owed to the employee by the employer. In those circumstances, the employee would remain liable to repay any excess amount that it received from the employer.

2. \textit{Scenario two: The payee has a counterclaim for a failure of consideration}

Second, the good consideration defence can operate in a manner akin to a counterclaim or set-off.\textsuperscript{628} The good consideration defence, under this scenario, looks at whether the employee has given something of value to the employer as consideration for the mistaken payment.\textsuperscript{629} The most convenient way to explain how the good consideration defence can operate in an employment context is by looking at \textit{National Mutual Life Association of Australasia Ltd v Walsh}\textsuperscript{630} as an example.

\textsuperscript{627} \textit{David Securities Pty Ltd v Commonwealth Bank of Australia} (1992) 175 CLR 353, 392.


\textsuperscript{630} (1987) 8 NSWLR 585.
(a) **Factual pattern in National Mutual Life Association of Australasia Ltd v Walsh**\(^{631}\)

Mr Walsh was an employee of National Mutual Life Association of Australia Ltd (NMLA). He was employed as a divisional sales manager. Mr Walsh was initially employed at NMLA’s Bondi office. He was forecast to earn $28,000 per annum in commissions while at the Bondi office. NMLA asked Mr Walsh to move to their Gosford office. Mr Walsh initially refused. NMLA offered to guarantee Mr Walsh an income of $25,000 for the first twelve months and income equivalent to the top insurance clerical award for each year of employment thereafter. NMLA also offered Mr Walsh a lucrative home loan. Mr Walsh agreed to move on those terms. Mr Walsh’s remuneration was made up of commissions and bonuses. Those commissions and bonuses were pegged to the commissions paid to the agents of NMLA that Mr Walsh was tasked to supervise and manage.

Two agents that Mr Walsh supervised were Lirapa Pty Ltd (Lirapa) and Agumba Pty Ltd (Agumba). During Mr Walsh’s employment, Lirapa and Agumba submitted fake insurance proposals to NMLA. Those fake proposals indicated that a number of clients, that Lirapa and Agumba had apparently recruited, offered to purchase insurance from NMLA. NMLA, believing the proposals were authentic, paid commissions to Lirapa and Agumba based on those proposals. Mr Walsh received a commission that was relative to the commissions paid to Lirapa and Agumba.

During his employment, Mr Walsh was working around 60 hours per week. Of that time, he spent a considerable amount of time working with Lirapa and Agumba. This is because they were proving to be productive and profitable agents. Mr Walsh did this

\(^{631}\) The facts under this heading are drawn from *National Mutual Life Association of Australasia Ltd v Walsh* (1987) 8 NSWLR 585, 587-93.
to the detriment of him focusing his attention on other agents. Mr Walsh also spent some of his own income promoting the business of NMLA. The evidence was that he would not have done this if he was not going to receive the commissions that he did. Mr Walsh also changed his lifestyle because of the commissions that he was receiving. He took out a $200,000 mortgage that he would not otherwise have taken out had he not been receiving the commissions and bonuses.

Once NMLA discovered the fraud committed by Lirapa and Agumba, it sought to recover from Mr Walsh the commissions and bonuses that it had paid to him. Mr Walsh refused to pay the money back to NMLA. NMLA sued Mr Walsh for restitution in the Supreme Court of New South Wales.

(b)  *Decision in National Mutual Life Association of Australasia Ltd v Walsh*

Clarke J accepted that NMLA had a prima facie right to restitution from Mr Walsh.632

His Honour found that NMLA made the overpayment to Mr Walsh because of its mistaken belief that Lirapa and Agumba had signed up some new clients.633 Clarke J also accepted that NMLA and Mr Walsh were deceived by Lirapa and Agumba.634

In applying the good consideration defence Clarke J said:

> Whether the criticism is justified Sir Robert Goff does recognise that the provision of consideration provides a defence. In this case I have no hesitation in concluding that consideration did move from the defendant and that the claim against him should fail. There is no dispute that he worked diligently, and for long hours, for his employer and, in that sense, provided real consideration for his remuneration. The fact that he was unwittingly servicing rogues is not to the point. Nor is it pertinent that the employer did

---

633  Ibid 593.
634  Ibid.
not receive genuine proposals. … Both believed that a large volume of new business was being written and to this end the defendant diverted his attention from other agents or potential agents whose efforts may have enabled him to earn large commissions.635

In essence, Clarke J found that an award of restitution would be inequitable because Mr Walsh had provided valuable consideration to NMLA in the form of work. One of the reasons why NMLA made the payment to Mr Walsh was because he had performed the work. At no point did that reason fail. Mr Walsh performed the work that he was paid for. The reason why Mr Walsh performed the work was to receive the payment that NMLA paid to him.

(c) Reconciling Australian Financial Services and Leasing Pty Limited v Hills Industries Limited and National Mutual Life Association of Australasia Ltd v Walsh

While the facts in Australian Financial Services and Leasing Pty Limited v Hills Industries Limited636 and National Mutual Life Association of Australasia Ltd v Walsh637 are similar in the sense that the payer in both cases made the mistake because of a fraud committed against the payer by a third party, the two cases are distinguishable. This is because, in National Mutual Life Association of Australasia Ltd v Walsh, Mr Walsh had provided a valuable benefit to NMLA in return for the mistaken payment. Whereas, in Australian Financial Services and Leasing Pty Limited v Hills Industries Limited, Hills and Bosch did not provide any consideration to AFSL for the payments that they received from AFSL. In Australian Financial Services and Leasing Pty Limited v Hills Industries Limited, the fraud was a relevant

635 Ibid 596.
factor in relation to the good consideration defence simply because it showed that AFSL was not making the payment for, or on behalf of, TCP.

E Closing remarks

Despite its apparent simplicity, the good consideration defence is a difficult defence to navigate. This is because the defence is capable of operating to cure two distinct and separate scenarios. The first scenario is where the employer has made the payment to the employee to clear a debt that the employer owed to the employee. The second is where the employee has provided something of value to the employer as consideration for the mistaken payment.

The broadness of the second incarnation of the defence means that the good consideration defence has the potential to overlap with the other restitutionary defences. That is, an employee may be able to rely on similar material facts in order to establish, for example, the change of position defence and the good consideration defence.

The next chapter in this thesis will look at history and elements of the third and final restitutionary defence, the change of position defence.
CHAPTER X
THE CHANGE OF POSITION DEFENCE

A Introduction

In an action for money had and received, the court is unable to award restitution to an employer if the court is satisfied that it would be inequitable to do so. The change of position defence is one instance in which the law recognises that it would be inequitable to award restitution. The employee will be protected by the defence if it can demonstrate that it has changed its position, and the reason why it has changed its position was because it acted on the faith of its receipt of the overpayment. The defence can operate as a full defence or on a pro tanto basis.

This chapter will begin by looking at a brief history of how the change of position defence developed in Australia. It will then set out what the employee needs to prove in order to establish the defence. This chapter will conclude by explaining how the change of position defence differs from the doctrine of estoppel.


The history of the change of position defence in Australia

The story of the change of position defence began in 1760 with the decision of Lord Mansfield in *Moses v Macferlan*. The influence of Lord Mansfield on the development of the change of position defence in Australia cannot be understated. This part will start with a brief summary of the relevant aspects of *Moses v Macferlan*. It will then go on to chart how the change of position defence has developed in Australia.

1. **1760 – *Moses v Macferlan (Imp)***

In *Moses v Macferlan*, Lord Mansfield said that a respondent could defend against an action for money had and received ‘by every thing which shews that the plaintiff, *ex aequo et bono*, is not intitled to the whole of his demand, or to any part of it’. The term *ex aequo et bono* is Latin. It means ‘according to what is equitable and good’. The legal effect of Lord Mansfield using the term *ex aequo et bono* is that a respondent in an action for money had and received is not bound by strict legal rules. Instead, the defendant is able to rely upon equitable principles to satisfy the court why the plaintiff should not be awarded restitution in full.

According to French CJ, Lord Mansfield’s statement in *Moses v Macferlan* laid ‘the seeds of the general change of position defence, although they were not to germinate

---

642 (1760) 2 Burr 1005; (1760) 97 ER 676.
643 Ibid.
644 *Moses v Macferlan* (1760) 2 Burr 1005, 1010; (1760) 97 ER 676, 679.
for more than 230 years’. There is an element of truth to what French CJ has said. However, Lord Mansfield’s contribution to the development of the change of position defence did not end with Moses v Macferlan. For example, in Buller v Harrison Lord Mansfield accepted that if an agent has, in good faith, passed off a mistaken payment to their principal (i.e. changed their position), then it would be unjust for restitution to be awarded against that agent. Returning to what French CJ said; a more accurate statement would be that following the end of Lord Mansfield’s reign on the bench, the seeds of the change of position defence sat buried in the ground for centuries. In Australia, those seeds did not begin to germinate until around 1910.

2. 1910 – Campbell v Kitchen & Sons and Brisbane Soap Company (HCA)

In 1910, Griffith CJ was one of three judges who decided the High Court case of Campbell v Kitchen & Sons Limited and Brisbane Soap Company Limited. In that case, Campbell was seeking restitution for overpayments that it claimed it had made to the two defendants over the course of seventeen years. Griffith CJ found that Campbell made the payments because of a mistaken belief that it was bound to do so under the terms of a contract.

---

648 See for example: Sadler v Evans (1766) 4 Burr 1984, 1986; (1766) 98 ER 34, 35; Dale v Sollet (1767) 4 Burr 2133, 2134; (1767) 98 ER 112, 113; Clarke v Shee and Johnson (1774) 98 ER 1041, 1042; Buller v Harrison (1777) 98 ER 1243, 1244.
649 (1777) 98 ER 1243.
650 Whilst Lord Mansfield did not expressly use the words ‘good faith’, his Honour found that if the agent has been informed that the payer made the payment by mistake and subsequently passes the payment off to their principal then the agent will not have a defence. This proposition is akin to a good faith test.
651 Buller v Harrison (1777) 98 ER 1243, 1244.
652 (1910) 12 CLR 515.
653 Campbell v Kitchen & Sons Limited and Brisbane Soap Company Limited (1910) 12 CLR 515, 524.
Campbell’s mistake was a mistake of law. At the time of the case, the common law had not openly accepted that mistakes of law could give rise to a prima facie right to restitution. While Griffith CJ did not depart from that rule, he appeared to be open to the idea that restitution could be awarded for a mistake of law if it was inequitable for the payee to retain the mistaken payment.654

In explaining why he would not depart from the rule in the case that was before him, Griffith CJ said:

In the present case, so far from thinking that it is inequitable that the defendants should retain the money which had been paid to them monthly for a period of seventeen years, and which they have no doubt taken into account in estimating and dividing their annual profits, I think that the rule of the common law [that restitution cannot be awarded for mistakes of law] is an equitable and just rule.655 (emphasis added)

According to Gummow, the above passage hinted that the law may well recognise a change of position defence.656 That rationale appears to have judicial support in the decision of Hayne, Crennan, Kiefel, Bell and Keane JJ in *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited*.657 Indeed, the essence of what Griffith CJ was saying was that it would be inequitable to award restitution against Kitchen & Sons and Brisbane Soap Company because they had, over the course of seventeen years, changed their position in reliance upon the mistaken payments they had received from Campbell. If it was Lord Mansfield who laid the seeds of the change of position defence, then it was Griffith CJ who fertilised and watered those seeds in Australia.

654 *Campbell v Kitchen & Sons Limited and Brisbane Soap Company Limited* (1910) 12 CLR 515, 524-5 citing with approval the decision of Mellish LJ in *Rogers v Ingham* [1876] 3 ChD 351, 357.
655 *Campbell v Kitchen & Sons Limited and Brisbane Soap Company Limited* (1910) 12 CLR 515, 525.
3. **1935 – Re Beard; Ex parte the Trustee (WASC)**

The next potential sign of the change of position defence in Australia came in 1935. In *Re Beard; Ex parte the Trustee*, Northmore CJ, of the Supreme Court of Western Australia, said:

> The general rule is that money paid under a mistake of fact is recoverable, but that rule is subject to certain qualifications, and it may be, I think, taken as established law that where the recipient of money paid under a mistake of fact is misled by the payment, and either acts to his own detriment, or refrains from acting to his prejudice, in those circumstances the money is not recoverable. (emphasis added)

It is somewhat unfortunate that Northshore CJ did not cite where this ‘established law’ came from. The ambiguity in the above passage means that there are two plausible ways in which it can be interpreted.

The first is that Northshore CJ was simply considering the doctrine of estoppel. This is alluded to by his Honour’s use of the words ‘is misled by the payment’. However, estoppel normally requires more than the payee being simply misled by their receipt of the payment. It requires some form of conduct by the payer in order to induce or encourage the payee to change their position.

The second plausible interpretation is that Northshore CJ was referring to an early incarnation of the change of position defence. Indeed, Northshore CJ’s reasons are strikingly similar to the modern change of position defence. That is especially true if

---

658 (1935) 37 WALR 95.
659 *Re Beard; Ex parte the Trustee* (1935) 37 WALR 95, 98.
660 *Lipkin Gorman vKarpmale Ltd* (1991) 2 AC 548, 579, which was cited with approval by the majority in *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited* (2014) 253 CLR 560, 599.
661 Ibid.
Northshore CJ’s use of the words ‘misled by the payment’ was a reference to the payee’s reliance on its receipt of the payment.

4. 1962 – Statutory recognition in Western Australia

On 6 December 1962, the Law Reform (Property, Perpetuities, and Succession) Act 1962 (WA) (the LR Act) came into effect in Western Australia.662 The LR Act abolished the rule in Bilbie v Lumley,663 which prevented restitution being awarded for mistakes of law.664 Section 23 of the LR Act created a statutory right to recover payments made because of a mistake of law. That right was strict in the sense that it did not require a plaintiff to show fault on behalf of the recipient.

Section 24 of the LR Act introduced a statutory change of position defence into the law of Western Australia. Section 24(1) of the LR Act was as follows:

Relief, whether under section twenty three of this Act or in equity or otherwise, in respect of any payment made under mistake, whether of law or fact, shall be denied wholly or in part if the person from whom relief is sought received the payment in good faith and has so altered his position in reliance on the validity of the payment that in the opinion of the Court, having regard to all possible implications in respect of the parties (other than the plaintiff or claimant) to the payment and of other persons acquiring rights or interests through them, it is inequitable to grant relief, or to grant relief in full.

In the second reading speeches in both the Legislative Council and Legislative Assembly, the Parliament of Western Australia was told that the purpose of section 24 of the LR Act was to give the courts ‘a discretion to consider which is the greater

662 See the notation under the long title in the Law Reform (Property, Perpetuities, and Succession) Act 1962 (WA).
663 (1802) East 469; (1802) 102 ER 448.
hardship between two innocent parties. Section 24(1) created a statutory, pro tanto defence to any action to recover a mistaken payment. It was the first express recognition of a change of position defence in Australia.

The Property Law Act 1969 (WA) came into operation in Western Australia on 1 August 1969. The Property Law Act 1969 (WA) repealed the LR Act. The change of position in defence contained in section 24(1) of the LR Act was transferred verbatim into section 125(1) of the Property Law Act 1969 (WA). Section 125 is still in force and unchanged as at the date of this thesis.

In Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Company Ltd, Sanderson C said that the common law defence ‘sits alongside’ section 125 of the Property Law Act 1969 (WA). According to Sanderson C, the statutory change of position defence was different to the common law change of position defence. This is because the statutory defence requires the court to consider the impact that restitution would have on third parties, whereas the common law defence does not.

On appeal, Buss JA said the following about the elements of the statutory defence:

The criteria which must be established for the defence under s 125(1) to be made out are these. First, the recipient of the payment must have received the payment in good faith. Secondly, the recipient must have altered his or her position. Thirdly, the recipient

---

665 Western Australia, Parliamentary Debates, Legislative Council, 16 August 1962, 511 (A.F. Griffith); Western Australia, Parliamentary Debates, Legislative Assembly, 18 October 1962, 1857 (Charles Court).
666 See the words ‘wholly or in part’ in section 24(1) of the Law Reform (Property, Perpetuities, and Succession) Act 1962 (WA).
667 See the words ‘whether under section twenty three of this Act or in equity or otherwise’ in section 24(1) of the Law Reform (Property, Perpetuities, and Succession) Act 1962 (WA).
670 Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Company Ltd [2006] WASC 70, [82].
671 Ibid [83].
672 Ibid.
must have made the alteration to his or her position in reliance on the validity of the payment. Fourthly, the nature or extent of the recipient’s alteration of his or her position in reliance on the validity of the payment must be such that, in the opinion of the court, having regard to all possible implications in respect of the parties (other than the plaintiff or claimant) to the payment and of other persons acquiring rights or interests through them, it is inequitable to grant relief, or to grant relief in full, to the plaintiff or claimant.673

5. 1983 - Bank of New South Wales v Murphett (VSC)

The Full Court of the Supreme Court of Victoria in the Bank of New South Wales v Murphett expressly accepted the change of position defence as a part of the common law in Australia.674 In that case, Starke and Crockett JJ cited the following passage of Goff J with approval:

(1) If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact. (2) His claim may however fail if … (c) the payee has changed his position in good faith, or is deemed in law to have done so.675 (emphasis added)

Crockett J went on to suggest that the change of position defence was equitable in nature and imports the notion of fairness.676

6. 1988 – ANZ v Westpac Banking Corp (HCA)

Acceptance of the change of position defence as a part of the law of Australia was foreshadowed by the High Court of Australia in Australia and New Zealand Banking

673 Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Company Ltd [2008] WASCA 119, [207].
The case involved three parties: Australia and New Zealand Banking Group Ltd (ANZ), Westpac Banking Corp (Westpac), and Jakes Meats Pty Ltd (Jakes Meats).

Jakes Meats was a client of Westpac. Jakes Meats held a bank account at Westpac. ANZ was instructed by one of its customers to transfer $14,158.20 to Jakes Meats’ bank account. An employee at ANZ made a clerical error and mistakenly transferred $114,158.20 to Westpac with instructions to deposit that money into Jakes Meats’ bank account. Westpac credited the funds to Jakes Meats’ account. Because of the nature of the transfer, the funds were immediately available in Jakes Meats’ account. ANZ notified Westpac of the clerical mistake three days after it had been made. By the time ANZ had notified Westpac, $82,978.32 of the $100,000 had been drawn from Jakes Meats’ account. ANZ eventually sued Westpac and Jakes Meats for restitution of the mistaken payment. By the time the matter made it to court, Jakes Meats had gone into liquidation. The case eventually made its way up to the High Court of Australia.

In the proceedings before the High Court of Australia, Westpac made a concession that it should have dishonoured all cheques that were drawn from Jakes Meats’ account once ANZ had informed it that the payment to Jakes Meats was made because of a mistake. To that extent, Westpac argued that it should only be found liable for $17,021.68 of the $100,000.

---

678 The summary of facts was drawn from Australia and New Zealand Banking Group Ltd v Westpac Banking Corp (1988) 164 CLR 662, 668-681.
Mason CJ and Wilson, Deane, Toohey and Gaudron JJ found that it was possible that it would be unjust to award restitution where ‘there has been some adverse change of position by the recipient in good faith and in reliance on the payment’.

Their Honours accepted that an agent that had received money on their principal’s behalf would have a good defence to a claim for restitution if, before becoming aware of the mistake, the agent had passed the payment to their principal. The Court’s reasoning in this regard was analogous to the reasoning of Lord Mansfield in Buller v Harrison.

The Court restrained itself from definitively labelling the defence as a change of position defence. Their Honours said:

If the matter needs to be expressed in terms of … change of position, the payment by the agent to the principal of the money which he has received on the principal’s behalf, of itself constitutes the relevant … change of position.

In relation to the facts, the Court found that Westpac has changed its position by passing the money on to Jakes Meats. The Court accepted Westpac’s argument that it should only be liable for $17,021.68.


In David Securities Pty Ltd v Commonwealth Bank of Australia, Mason CJ, and Deane, Toohey, Gaudron and McHugh JJ made strong obiter comments about the change of position defence. After abolishing the distinction between mistakes of fact...
and mistakes of law in relation to the action for money had and received, their Honours said:

If we accept the principle that payments made under a mistake of law should be prima facie recoverable, in the same way as payments made under a mistake of fact, a defence of change of position is necessary to ensure that enrichment of the recipient of the payment is prevented only in circumstances where it would be unjust. This does not mean that the concept of unjust enrichment needs to shift the primary focus of its attention from the moment of enrichment. From the point of view of the person making the payment, what happens after he or she has mistakenly paid over the money is irrelevant, for it is at that moment that the defendant is unjustly enriched. However, the defence of change of position is relevant to the enrichment of the defendant precisely because its central element is that the defendant has acted to his or her detriment on the faith of the receipt (emphasis added)

Their Honours further commented that the change of position defence would not operate where the payee has ‘simply spent the money received on ordinary living expenses’. The majority also cited Goff J’s Proposition 2(c), from Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd, with approval.

Despite the force of what their Honours said about the change of position defence, they were unable to formally accept, or provide a detailed explanation of, the defence. This was because the parties to the appeal before the Court had not adduced sufficient evidence in the proceedings below to establish the material facts necessary to make out the defence. This rendered the Court unable to decide the matter. Their

---

686 Ibid 386.
687 Ibid 380.
688 Ibid 386.
689 Ibid.
Honours remitted the matter back to the Federal Court to decide, inter alia, whether the respondent could make out the change of position defence.\textsuperscript{690}

8. \textit{2014 - Australian Financial Services and Leasing v Hills Industries (HCA)}

The High Court of Australia broached the change of position defence again in \textit{Australian Financial Services and Leasing Pty Limited v Hills Industries Limited}\textsuperscript{691}. The decision can be split into three parts. The first part is the joint-majority decision of Hayne, Crennan, Kiefel, Bell and Keane JJ. The second part is the decision of French CJ. The third part is the decision of Gageler J. The facts of the case have been set out in Section (3)(a) of Part C of Chapter IX of this thesis. They will not be repeated here.

(a) \textit{Reasons for decision of Hayne, Crennan, Kiefel, Bell and Keane JJ}

Hayne, Crennan, Kiefel, Bell and Keane JJ said that the focus of an action for money had and received was on whether it would be inequitable in all of the circumstances for the payee to retain all or some of the benefit.\textsuperscript{692} The change of position defence was simply a circumstance under which the law recognised that an order for restitution would be inequitable.\textsuperscript{693} Their Honours reaffirmed that the central element of the change of position defence was ‘that the defendant has acted to his or her detriment on the faith of the receipt’.\textsuperscript{694}

On the issue of detriment, their Honours added:

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{690} Ibid.
\item \textsuperscript{691} (2014) 253 CLR 560.
\item \textsuperscript{692} \textit{Australian Financial Services and Leasing Pty Limited v Hills Industries Limited} (2014) 253 CLR 560, 594.
\item \textsuperscript{693} Ibid 596.
\item \textsuperscript{694} Ibid 597 citing \textit{David Securities Pty Ltd v Commonwealth Bank of Australia} (1992) 175 CLR 353, 385.
\end{itemize}
\end{footnotesize}
[detriment] is concerned with the consequences that would enure to the disadvantage of a person who has been induced to change his or her position if the state of affairs so brought about were to be altered by the reversal of the assumption on which the change of position occurred.695

However, the concept of detriment should not be confused with disenrichment. The majority were at pains to point out that the change of position defence does not focus upon the extent to which the enriched party has been disenriched.696 Disenrichment is not a part of the change of position defence. This is because disenrichment merely operates as a ‘mathematical rule’.697

(b) Reasons for decision of French CJ

A significant portion of French CJ’s reasons went through the historical development of the change of position defence.698 His Honour largely agreed with the majority that the concept of detriment was not a narrow or technical one, and that detriment may be a useful criterion on which to assess the applicability of the defence in particular cases.699 However, his Honour did make some additional comments of his own about the defence.

French CJ found that ‘as a general proposition, the change of position defence should be applied in a way that is faithful to its origins in Moses v Macferlan’.700 That is, whether the defence is made out will depend on whether or not, in the circumstances of the case, it would be inequitable for restitution to be awarded in favour of the

---

697 Ibid.
698 Ibid 569-582.
699 Ibid 582.
700 Ibid 580.
p ayer.\textsuperscript{701} French CJ added that this did not invite courts to exercise an ‘arbitrary judicial discretion’.\textsuperscript{702} Instead, whether or not the defence was made out would need to be determined in a way that was analogous to the reasoning adopted in like cases.\textsuperscript{703} French CJ described this process as the development of ‘guiding criteria’ upon which others can later rely.\textsuperscript{704} These guiding criteria, according to his Honour, are ‘indispensable to judicial decision-making in the application of broad normative standards to particular classes of case’.\textsuperscript{705} Despite his guiding criteria approach, French CJ found that:

A recipient of a payment made under mistake may suffer a detriment by acting on the faith of the payment. If the detriment cannot be reversed at the time that demand is made of the recipient, the recipient can be said to have changed its position and to have a defence to a claim for repayment of the money as money had and received.\textsuperscript{706}

Unlike the majority, French CJ was open to the idea that disenrichment may be an appropriate criterion in applying the change of position defence in some circumstances.\textsuperscript{707} However, his Honour cautioned that the concept of disenrichment was of limited utility and was not ‘the central core of the defence’.\textsuperscript{708}

\textbf{(c) \quad \textit{Reasons for decision of Gageler J}}

Like the majority, Gageler J rejected the idea that the concept of disenrichment formed part of the defence.\textsuperscript{709} His Honour appeared to favour the view that the change of

\begin{itemize}
\item \textsuperscript{701} Ibid.
\item \textsuperscript{702} Ibid.
\item \textsuperscript{703} Ibid.
\item \textsuperscript{704} Ibid 580-1.
\item \textsuperscript{705} Ibid 582.
\item \textsuperscript{706} Ibid 583.
\item \textsuperscript{707} Ibid 581.
\item \textsuperscript{708} Ibid.
\item \textsuperscript{709} Ibid 621-2.
\end{itemize}
position defence was a particular application of the doctrine of estoppel. This was because both are founded upon notions of good conscience, and operate on a principled basis for determining whether it would be ‘inequitable’ or ‘unjust’ for restitution to be awarded. According to Gageler J, the convenience that flows from assimilating the two principles is that the courts would not need to try to define the change of position defence and explain how it is different to an estoppel defence. However, Gageler J left his assimilation idea undecided; labelling it as a larger question than what needed to be answered in the case before him.

His Honour found that the change of position defence would be enlivened if the defendant could prove two conditions. First, that the defendant, in good faith, acted or refrained from acting because of their assumption that they were entitled to use the benefit. Second, that ‘by reason of having so acted or refrained from acting, the defendant would be placed in a worse position if ordered to make restitution of the payment than if the defendant had not received the payment at all.’ Once these two conditions were proved, prima facie the defendant was entitled to retain the whole of the benefit. This is unless the plaintiff could show that the defendant’s retention of the whole of the benefit would ‘be disproportionate to the degree of the detriment.’ In which case, the defence would operate pro tanto.

710 Ibid 624-5.
711 Ibid.
712 Ibid 625.
713 Ibid.
714 Ibid.
715 Ibid 626.
716 Ibid.
C The elements of the change of position defence

In order for an employee to establish the change of position defence, they need to prove that they acted to their detriment on the faith of their receipt of the payment.\textsuperscript{717} Embedded in that proposition are four key elements. The employee needs to prove that:

1. they acted to their detriment;\textsuperscript{718}

2. the reason why they acted to their detriment was because of their reliance on their receipt of the overpayment;\textsuperscript{719}

3. the detriment suffered by the employee was legally or practically difficult to reverse;\textsuperscript{720} and

4. their change of position was made in good faith\textsuperscript{721}.

Before expanding upon those four elements, it is worth adding that a unique feature of the change of position defence is that it can operate on a pro tanto basis. Whilst the


pro tonto nature of the defence is not an element, it will be addressed at the end of this part.

1. **First element: The employee acted to their detriment**

In order to make out the first element of the change of position defence, the employee needs to satisfy the court that they acted to their detriment. Detriment is not a narrow or technical concept. So long as the detriment is substantial, it does not need to ‘consist of the expenditure of money or other quantifiable financial detriment’. The majority in *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited* described the concept of detriment as follows:

> The equitable doctrine concerning detriment is concerned with the consequences that would ensue to the disadvantage of a person who has been induced to change his or her position if the state of affairs so brought about were to be altered by the reversal of the assumption on which the change of position occurred. On this view, the injustice which precludes such a result lies in the disadvantage which would result to the recipient if the payer were to be permitted to recover payments as mistakenly made where they have been applied by the recipient. (citations omitted)

Whether an employee has acted to their detriment is a question of fact. It is not possible to exhaustively state the circumstances in which a court may find that an employee has acted to their detriment after receiving an overpayment from their employer.

---

724 Ibid 600.
725 Ibid 600.
However, it is possible to capture the essence of what the employee needs to prove to establish the first element. If the employee:

1. changed their position by doing something that they would not have ordinarily or otherwise done but for the overpayment;\textsuperscript{727} and

2. an award for restitution in favour of the employer would leave the employee worse off than they would have been if they had never received the overpayment;\textsuperscript{728}

then it could confidently be said that the employee has acted to their detriment.

For example, if the employee spent some or all of the overpayment by flying away on a holiday, and the employee would not have spent their money on that holiday but for their receipt of the payment, then the employee could be said to have acted to their detriment.\textsuperscript{729} In contrast, if the employee merely deposited the overpayment into their savings account, then they would suffer no detriment if they were required to return the overpayment to the employer. Similarly, if the employee used the overpayment to cover their ordinary living expenses, then they would not be protected by the defence as they did not change their position.\textsuperscript{730} What amounts to ordinary spending will depend on the individual characteristics of the employee who is resisting the claim.\textsuperscript{731}

It is important to note that an employee can act to their detriment by refraining from doing something (as opposed to performing a positive act). \textit{Palmer v Blue Circle}


\textsuperscript{728} \textit{Australian Financial Services and Leasing Pty Limited v Hills Industries Limited} (2014) 253 CLR 560, 626.


\textsuperscript{730} \textit{David Securities Pty Limited v Commonwealth Bank of Australia} (1992) 175 CLR 353, 386.

Southern Cement Ltd732 is a good illustration of this concept. In this case, the employer had mistakenly made workers’ compensation weekly payments to its employee for some 87 weeks. The employer sued the employee to recover those mistaken payments. The employee argued that if he had not received the weekly payments from the employer, then he would have applied for social security benefits.733 The employee’s case was, in essence, that he changed his position by not applying for the disability pension, and that his change of position was made in good faith in reliance on the overpayments. The court accepted this argument and found that the employee made out the change of position defence.734

2. **Second element: The reason why the employee acted to their detriment was because of their reliance on their receipt of the overpayment**

The employee’s change of position needs to be ‘on the faith of’ the payment.735 That is, the employee needs to show that they changed their position because of their reliance on their receipt of the overpayment.736 Reliance is the key aspect of the second element of the defence. As will be illustrated in the next paragraph, reliance is also the biggest limitation on the scope of the defence.

734 Ibid 325.
Reliance is different to causation. It is not enough for the employee to show that their change of position was caused by their receipt of the overpayment. Take for example a circumstance where a thief has stolen the overpayment from the employee. Under the causation approach it might be said that, but for the employee’s receipt of the overpayment from the employer, the employee would not have lost the overpayment to the thief. It could be added that the employee would be worse off if they were subsequently required to pay restitution to the employer. However, in these circumstances, it could not be said that the employee acted to their detriment because of their faith on their receipt of the overpayment. As unjust as it may seem from the perspective of the employee, the change of position defence will not shield an innocent and unlucky employee from mere hardship in repaying the overpayment.

3. Third element: The detriment is not legally or practically reversible

In order to establish the change of position defence the employee needs to satisfy the court that, at the time that the employer demanded repayment of the overpayment, the detriment suffered by the employee from their change of position was legally or practically irreversible. In Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Company Ltd, Buss JA found that, in order to establish the change of position defence, the employee needs to satisfy the court that, at the time that the employer demanded repayment of the overpayment, the detriment suffered by the employee from their change of position was legally or practically irreversible.

---

position defence, the person relying on the defence must prove that their change of position was ‘legally or practically irreversible’ or that there were ‘significant difficulties in reversing the change’.\textsuperscript{742} In \textit{Australian Financial Services and Leasing Pty Limited v Hills Industries Limited}, French CJ described the concept of ‘irreversible detriment’ as a guiding criterion in the application of the defence.\textsuperscript{743}

If the employee is arguing that the detriment was practically irreversible at the time that the employer demanded repayment, the employee does not need to prove that it was impossible for them to reverse the detriment. It is trite that practicality is a lower bar than impossibility. A detriment may be practically irreversible if undoing the employee’s change of position would affect the substance of transactions that the employee had entered into, or if it would affect the employee’s relationships with third parties.\textsuperscript{744}

4. \textit{Fourth element: The employee’s change of position was made in good faith}

The change of position defence will only be made out if the employee can show that it changed its position in good faith.\textsuperscript{745} Much like the concept of ‘irreversible detriment’, the concept of ‘good faith’ is a guiding criterion in the task of determining whether it would be inequitable to award restitution.\textsuperscript{746}

\textsuperscript{742} Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Company Ltd [2008] WASCA 119, [202].
\textsuperscript{743} Australian Financial Services and Leasing Pty Limited v Hills Industries Limited (2014) 253 CLR 560, 582.
\textsuperscript{744} See generally: Australia and New Zealand Banking Group Ltd v Westpac Banking Corp (1988) 164 CLR 662, 674.
\textsuperscript{746} For a criticism of ‘good faith’ in the context of the change of position defence see: William Gummow, ‘Moses v Macferlan 250 years on’ (2010) 84 \textit{Australian Law Journal} 756, 762.
The employee needs to explain why they thought that they were entitled to the overpayment. If the employee ‘knew or suspected’ that they were not entitled to the overpayment, but changed their position anyways, then they will not have acted in good faith. Similarly, if the employee was wilfully blind as to whether they were entitled to the overpayment then the court may well infer that the employee did not act in good faith. If, however, the employee queried their receipt of the overpayment with the employer before they changed their position, and the employer confirmed that the employee was entitled to the payment, then that will suggest that the employee was acting in good faith when they changed their position.

*Civil Aviation Authority v Jorm* is an example of a case where a finding of bad faith has prevented an employee from relying on the change of position defence. The case involved an employer who had offered voluntary redundancy to their employee. In the process of making that offer, the employer mistakenly miscalculated the employee’s redundancy entitlement by around $66,500 in favour of the employee. The employee accepted the offer and received the redundancy payment from the employer. Once the employer discovered its mistake, it sued the employee for the return of the overpayment. The employee sought to rely upon the change of position defence. The employee’s argument was that he would not have accepted the voluntary redundancy but for the calculations that the employer had provided to him about the quantum of his redundancy entitlement. The court found that it was ‘almost inescapable’ that the employee knew before the redundancy payment was made that the employer had

---


749 (1994) 56 IR 89.
miscalculated the employee’s redundancy entitlement.\textsuperscript{750} On top of that, the court found that the employee deliberately continued his dealings with the employer ‘so as not to raise the correctness of the [employer’s] calculation’.\textsuperscript{751} The court rejected the employee’s change of position defence on the basis that the employee did not change their position in good faith.\textsuperscript{752}

5. \textit{Change of position as a pro tanto defence}

Once an employee has made out the change of position defence, the court will turn its attention to whether the employee has a full defence or a partial defence to the employer’s claim for restitution. If the detriment suffered by the employee is easily quantifiable, and the value of the detriment is less than the value of the overpayment, then the change of position defence will operate pro tanto.\textsuperscript{753} That is, the employee will have to pay back the value of the overpayment minus the quantifiable value of the detriment.\textsuperscript{754}

To illustrate, let us say that the employer has overpaid their employee by $1,000. At the time of the receipt of the benefit, the employee genuinely believed that they were entitled to the $1,000. In reliance on the receipt of the benefit, the employee donated $700 to a charity. If the court were to order the employee to pay restitution of $1,000, the employee would suffer an irreversible detriment of $700. The change of position defence would operate pro tanto so that the amount the employer would be entitled to recover from the employee would be limited to $300. That is, the employer would be

\begin{flushright}
\textsuperscript{750} \textit{Civil Aviation Authority v Jorm} (1994) 56 IR 89, 98. \\
\textsuperscript{751} Ibid. \\
\textsuperscript{752} Ibid 99. \\
\textsuperscript{753} \textit{Australian Financial Services and Leasing Pty Limited v Hills Industries Limited} (2014) 253 CLR 560, 569, 583, 626. \\
\textsuperscript{754} Ibid.
\end{flushright}
entitled to restitution for the difference between the value of the benefit that was transferred to the employee and the irreversible detriment that the employee would suffer if restitution were awarded in full.

Mason, Carter and Tolhurst have said that the change of position defence ‘does not provide a complete defence unless the change of position is to the full extent of the defendant’s unjust enrichment.’\(^{755}\) That proposition is incorrect. It is true that the change of position defence will operate as a full defence when the quantum of the detriment is equal to or greater than the quantum of the overpayment. However, the change of position defence will also operate as a full defence in circumstances where it is difficult for the court to put a value on the detriment that would flow through to the employee if restitution was to be awarded.\(^{756}\) In other words, if the detriment suffered by the employee cannot be easily quantified, then the change of position defence will fully negate an order for restitution.

D *The difference between change of position and estoppel*

The change of position defence is similar, but different, to the doctrine of estoppel. There is one major difference between the two doctrines. In order to rely on an estoppel, the employee needs to prove that their change of position was caused by a representation or inducement made by the employer.\(^{757}\) The employee’s mere reliance on the receipt of the benefit is unlikely to be enough to give rise to an estoppel. In contrast, an employee that is seeking to make out the change of position defence is not burdened with the issues of representations or inducements. Instead, the employee just


needs to show that the reason why they changed their position was because of their reliance on their receipt of the payment.\textsuperscript{758} To that extent, it is easier for an employee to prove the change of position defence than it is to establish an estoppel.

There is a popular view that the doctrine of estoppel cannot operate on a pro tanto basis.\textsuperscript{759} If that popular view is true, then the effect is that an employee could rely on an estoppel as a full defence even where the detriment they would suffer from an order for restitution was easily quantifiable and valued less than the value of the overpayment.\textsuperscript{760} However, the days of that popular view may be numbered. The reasoning of Gageler J in \textit{Australian Financial Services and Leasing Pty Limited v Hills Industries Limited} has opened the door to the possibility that the doctrine of estoppel can be invoked on a pro tanto basis.\textsuperscript{761} If Gageler J’s theory received further recognition in the future, then there is no good reason for an employee to run an estoppel defence rather than the change of position defence.

\textbf{E \ Example: TRA Global Pty Ltd v Kebakoska}

\textit{TRA Global Pty Ltd v Kebakoska}\textsuperscript{762} was heard and determined by Osborn J in the Supreme Court of Victoria. The case illustrates how the change of position defence can operate in an employment context.


\textsuperscript{761} \textit{Australian Financial Services and Leasing Pty Limited v Hills Industries Limited} (2014) 253 CLR 560, 624.

\textsuperscript{762} (2011) 209 IR 453.
Ms Kebakoska worked for TRA Global Pty Ltd. TRA Global Pty Ltd made Ms Kebakoska’s job redundant. As a part of her severance package, TRA Global Pty Ltd paid 12 weeks’ salary to Ms Kebakoska as a redundancy payment. The evidence before the trial magistrate revealed that TRA Global Pty Ltd only made the redundancy payment to Ms Kebakoska because it believed it was required to by law. It turned out that TRA Global Pty Ltd’s belief was mistaken.

Ms Kebakoska was unemployed for eight months after her termination from TRA Global Pty Ltd. During that period, she applied to Centrelink for unemployment benefits. Centrelink denied Ms Kebakoska’s application because she had received the redundancy pay. As a result, Ms Kebakoska used that redundancy pay to cover her ordinary living expenses while she looked for a new job.

Ms Kebakoska sued TRA Global Pty Ltd for unpaid bonus payments. TRA Global Pty Ltd counter-claimed for restitution of the overpaid redundancy payments. In response to that counter-claim, Ms Kebakoska relied on the change of position defence and an estoppel argument. Ms Kebakoska’s defence was successful at first instance. TRA Global Pty Ltd appealed the first instance decision to the Supreme Court of Victoria.

2. **Osborn J’s reasons for decision**

Osborn J accepted that TRA Global Pty Ltd had mistakenly paid the redundancy payment to Ms Kebakoska. As a result, TRA Global Pty Ltd was prima facie entitled to recover that overpayment. However, as will be expanded upon below, Osborn J also

---

763 The facts are drawn from the decision in *TRA Global Pty Ltd v Kebakoska* (2011) 209 IR 453.

764 *TRA Global Pty Ltd v Kebakoska* (2011) 209 IR 453, [28].
accepted Ms Kebakoska’s change of position defence and estoppel argument were properly made out.

(a) The change of position defence

TRA Global Pty Ltd argued that Ms Kebakoska could not make out the change of position defence because she spent the overpayment on ordinary living expenses. Osborn J rejected that argument. Osborn J found that there were three interrelated facts that made out the defence in Ms Kebakoska’s circumstances. First, Ms Kebakoska disclosed the redundancy payments to Centrelink. Second, as a result of that disclosure, Centrelink denied Ms Kebakoska unemployment benefits. And third, Ms Kebakoska spent the redundancy payments on ordinary living expenses because she was denied unemployment benefits. The spending of the overpayment on ordinary living expenses was not the crucial fact. The crucial fact which gave rise to the defence was that Ms Kebakoska lost an opportunity to obtain unemployment benefits because of her reliance on the overpaid redundancy entitlement.

In obiter, Osborn J found that the change of position defence would have only protected Ms Kebakoska to the value of the unemployment benefits that she would have received but for the redundancy payment.

---

765 Ibid [32].
766 Ibid [31].
767 Ibid.
768 Ibid.
769 Ibid.
770 Ibid [33]-[39].
771 Ibid [40].
(b) The estoppel argument

TRA Global Pty Ltd challenged whether, as a matter of law, an employee can rely on the doctrine of estoppel in circumstances where the change of position defence is made out.\(^{772}\) Osborn J found that the trial magistrate was correct in finding that Ms Kebakoska could simultaneously rely on the change of position defence and the estoppel argument.\(^{773}\) Osborn J also found that it was open for the trial magistrate to find that Ms Kebakoska’s estoppel argument had been made out.\(^{774}\) This is because Ms Kebakoska had suffered a detriment (i.e. not being granted unemployment benefits) because she had relied on representations by TRA Global Pty Ltd that she was entitled to the redundancy payment.\(^{775}\) Osborn J accepted that the estoppel argument provided Ms Kebakoska was a full defence to TRA Global Pty Ltd’s unjust enrichment claim.\(^{776}\)

F Closing remarks

1. Closing remarks: the change of position defence

*Moses v Macferlan* was the genesis of the change of position defence. In that decision, Lord Mansfield left the door open for defendants to rely upon any equity available to them to fend off an action for money had and received.\(^{777}\) In his later decision of *Buller v Harrison*, Lord Mansfield accepted that an agent passing off an unjust enrichment to their principal gave rise to such an equity in favour of the agent.\(^{778}\) Notwithstanding

\(^{772}\) Ibid [43].
\(^{773}\) Ibid [44].
\(^{774}\) Ibid [80]-[83].
\(^{775}\) Ibid.
\(^{776}\) Ibid [79].
\(^{777}\) *Moses v Macferlan* (1760) 2 Burr 1005, 1010; (1760) 97 ER 676, 679.
\(^{778}\) *Buller v Harrison* (1777) 98 ER 1243, 1244.
the work of Lord Mansfield, it took centuries for the change of position defence to become formally recognised by the common law in Australia.

To establish the change of position defence, the employee needs to satisfy the court that they changed their position to their detriment on the faith of their receipt of the payment from their employer. Unlike with an estoppel, the employee does not need to have been motivated to change their position by a representation or inducement made by their employer. Instead, the employee needs to show that the reason why they changed their position was because of their reliance on the receipt of the benefit.

2. **Closing remarks: the employees’ case**

The ultimate question in any unjust enrichment type matter is whether it would be unjust or inequitable to award restitution, in this case, to the employer. The three restitutionary defences covered by this thesis, if proved, will make it inequitable for restitution to be awarded in favour of an employer. The effect of the defences is that the courts may allow an employee to keep an overpayment, even if the employee did not have a legal right to receive that overpayment.

The next chapter in this thesis will look at the complex issue of overpaid tax.

---

CHAPTER XI

THE TAX COMPONENT OF AN OVERPAYMENT

A Introduction

When an employer overpays an employee, it will usually follow that the employer also makes an overpayment to the Commissioner of Taxation. This is because section 12-35 of Schedule 1 of the Taxation Administration Act 1953 (Cth) requires an employer to withhold tax from the gross value of an employee’s pay. Section 16-70 of Schedule 1 of the Taxation Administration Act 1953 (Cth) requires the employer to pay that withheld amount to the Commissioner of Taxation.

The purpose of this chapter is to set out the practical limitations on an employer’s ability to recover the tax component of an overpayment from an employee. This chapter is split into two parts. The first part of this chapter will look at the time limitations on an employer’s ability to recover the tax component of a mistaken overpayment. The second part of this chapter will discuss why, in theory, it should not be possible for an employer to recover the tax component of an overpayment from an employee in an unjust enrichment type claim. This second part will also highlight why it was wrong for the court to order restitution against an employee for the tax component of a mistaken payment in the case of The State of Western Australia v Hartmann-Nieto.780

780 [2014] WADC 70.
B Pleading a time bar on the purported tax paid to the Commissioner of Taxation

In Western Australia, an employer has twelve months to commence a claim in relation to the tax component of a mistaken overpayment.781 This is because of the effect of subsection 28(1) of the Limitation Act 2005 (WA). The twelve-month time bar starts running from the date on which the employer made the mistaken payment.782 If it takes the employer more than twelve months to discover the mistaken overpayment, then subsection 28(1) will cause that employer an obvious hardship.

Subsection 28(1) of the Limitation Act 2005 (WA) is worded as follows:

An action to recover, or in relation to the recovery of, money paid by way of tax or purported tax under a mistake (either of law or fact) cannot be commenced if 12 months have elapsed since the payment. (emphasis added)

The use of the words ‘purported tax’ in section 28(1) extends the scope of the provision. This is because the words ‘purported tax’ are capable of capturing circumstances where the employer thought that it was required to pay tax, but in fact was not so required.783

If:

1. an employer has sued its employee for the purported tax component of an overpayment; and

781 Limitation Act 2005 (WA) s 28(1).
782 Ibid.
783 See by analogy: ACN 005 057 349 Pty Ltd v Commissioner of State Revenue [2015] VSCA 332, [216]-[217].
2. there was a period of more than twelve months between the date that the employer made the overpayment and the date on which the employer sued the employee;
then the employee will have a full defence to that part of the employer’s claim. However, in order for the employee to successfully rely on section 28(1), it must expressly plead the time limitation in its defence.\(^{784}\)

C Attacking the employer’s prima facie case in relation to purported tax paid to the Commissioner of Taxation

In any unjust enrichment-type claim, the employer needs to prove, amongst other things, that the employee received the overpayment.\(^{785}\) The most that the employer can achieve in this type of action is the value of the benefit that it transferred to the employee, plus interest.\(^{786}\) If the employer has overpaid purported tax to the Commissioner of Taxation, then it should follow that the employer is not able to establish a prima facie case against the employee in relation to that overpayment. This is because the employee never received the payment. The correct party for the employer to sue, in order to recover the overpaid tax, should be the Commissioner of Taxation.

In the case of *The State of Western Australia v Hartmann-Nieto*,\(^{787}\) the District Court of Western Australia awarded restitution of the gross value of a mistaken overpayment

\(^{784}\) See generally: *W D & H O Wills (Australia) Ltd v Commissioner of State Taxation* (Unreported, Supreme Court of Western Australia, Sanderson M, 13 July 1998) 10.


\(^{787}\) [2014] WADC 70.
against an employee. The court’s reasons for requiring the employee to pay ‘restitution’ of the purported tax component of the overpayment to the employer are confusing and plainly wrong. The problems with the case are addressed below.

1. **The decision in The State of Western Australia v Hartmann-Nieto**

The facts in *The State of Western Australia v Hartmann-Nieto* were set out in detail in Chapter IV. However, for ease of reference, they will be briefly summarised here.

Dr Hartmann was employed by the State of Western Australia as a school cleaner. Between 2006 and 2009, Dr Hartmann failed to attend work. Due to an administrative error, the State of Western Australia continued paying Dr Hartmann while she was absent from work. It withheld tax from Dr Hartmann’s pay for those three years and paid that tax to the Australian Taxation Office. After the State of Western Australia discovered the mistake, it sued Dr Hartmann in an action for money had and received for the gross amount of the overpayment. The State of Western Australia was successful in its claim against Dr Hartmann. Stevenson DCJ ordered Dr Hartmann to pay restitution to the State of Western Australia for the gross amount of the overpayment.

Stevenson DCJ provided the following explanation about why Dr Hartmann was liable to repay the gross amount of the overpayments to the State of Western Australia:

> The plaintiff paid the defendant the sum of $79,290.49 for the period 24 February 2006 to 19 February 2009 by mistake and, but for the administrative error, would not have paid the defendant. The end date falls within the whole pay period ending 5 March 2009.

---

788 *The State of Western Australia v Hartmann-Nieto* [2014] WADC 70, [174 (17)].
789 Ibid [7], [16], [20], [174 (16), (17)].
790 Ibid 2.
The sum of $79,290.49 includes tax paid to the Australian Taxation Office (ATO) by the plaintiff on behalf of the defendant for the financial years ending 2006, 2007 and 2008. The ATO guidelines indicate that, where tax has been paid on an overpaid salary, that tax is to be recovered from the employee, in this case the defendant. The 2009 financial year is a nett (sic) figure because no tax was paid to the ATO by the plaintiff as the error was identified in that year.

The total amount of $79,290.49 was paid by the plaintiff to the defendant each fortnight throughout the period 24 February 2006 to 19 February 2009, and retained by the defendant for her own benefit and use. The plaintiff has taken into account the defendant’s sick leave and other entitlements in its calculation of the overpayment for the period ending 24 February 2006.791 (emphasis added)

Two matters were fundamental to Stevenson DCJ’s conclusion that Dr Hartmann should be liable for restitution of the gross amount of the overpayment. The first was his Honour’s view that Dr Hartmann had received and ‘retained … for her own benefit and use’ the gross amount of the overpayment. The second was Stevenson DCJ’s reliance on an unnamed guideline that had been issued by the Australian Taxation Office. Based on the author’s review of the guidelines that had been issued by the Australian Taxation Office at the time, his Honour was most likely relying upon Tax Determination 2008/9 (TD 2008/9).

By way of a notation, TD 2008/9 was applied in a similar way by Slattery J of the District Court of South Australia in State of South Australia v Clarke792. The employer in that case sought to recover the gross amount of overpaid workers’ compensation payments that it had made to one of its employees. The employer was successful in

791 Ibid [174 (16), (17), (18)].
their claim. Slattery J relied on TD 2008/9 to justify an order for restitution for the gross amount of the overpayment.\(^\text{793}\)

2. **The first error made by Stevenson DCJ**

The first error that Stevenson DCJ made was his finding that Dr Hartmann received the gross amount of the overpayment.\(^\text{794}\) Dr Hartmann had no legal entitlement to the overpayment that was made to her by her employer.\(^\text{795}\) The value of the overpayment belonged to the State of Western Australia. Before the State of Western Australia mistakenly transferred its property to Dr Hartmann, it cut a portion out of the overpayment amount and paid that portion to the Commissioner of Taxation. Not only did Dr Hartmann have no legal interest in the overpayment that the State of Western Australia paid to the Commissioner of Taxation, Dr Hartmann did not receive that portion of the overpayment. Stevenson DCJ, by finding otherwise, created a legal fiction. That legal fiction had no doctrinal basis.

Restitution is not compensatory in nature.\(^\text{796}\) Restitution can only operate to ‘restore to the plaintiff what has been transferred from the plaintiff to the defendant’.\(^\text{797}\) Stevenson DCJ’s order went beyond requiring Dr Hartmann to return the benefit that she received back to the State of Western Australia. The practical effect of Stevenson DCJ’s order was to require Dr Hartmann to compensate her employer for its loss. In

\(^{793}\) *State of South Australia v Clarke* [2016] SADC 13, [190]-[196], [307 (8), (9)].

\(^{794}\) *The State of Western Australia v Hartmann-Nieto* [2014] WADC 70, [6], [174 (16), (17), (18)].

\(^{795}\) *Ibid* [174 (23)-(32)].

\(^{796}\) *Commissioner of State Revenue (Vic) v Royal Insurance Australia Limited* (1994) 182 CLR 51, 75; Wayne Covell, Keith Lupton and Jay Forder, *Principles of Remedies* (LexisNexis Butterworths, 5\textsuperscript{th} ed, 2012) 132.

\(^{797}\) *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 75. This was cited with approval in *Roxborough v Rothmans of Pall Mall Australia Limited* (2001) 208 CLR 516, 529.
that regard, Stevenson DCJ’s decision was inharmonious with the jurisprudence relating to the remedy of restitution.

3. The second error made by Stevenson DCJ

Stevenson DCJ’s second error was that he misapplied TD 2008/9. Before elaborating on the second error, it is necessary to take a closer look at TD 2008/9. The final discussion about the second error will occur at the end of this section.

(a) What is Tax Determination 2008/9?

The Commissioner of Taxation is able to issue public rulings under Schedule 1, Division 358 of the Tax Administration Act 1953 (Cth). Schedule 1, section 358-1 of the Tax Administration Act 1953 provides that:

A public ruling is an expression of the Commissioner’s opinion of the way in which a relevant provision applies, or would apply, to entities generally or a class of entities.

A tax determination is a type of public ruling made by the Commissioner.\(^\text{798}\) In 2008, the Commissioner issued TD 2008/9. TD 2008/9 came about because the Commissioner was asked the following question:

\[\text{[A]}\text{re amounts mistakenly paid as salary or wages to employees (or as income support payments or worker’s compensation amounts to persons), to which they are not beneficially entitled, but are obliged to repay, ‘ordinary income’ under section 6-5 of the Income Tax Assessment Act 1997?}\] \(^\text{799}\)


The Commissioner’s opinion in response to the question was that mistaken payments were not assessable income for the purpose of the *Income Tax Assessment Act 1997* (Cth). In coming to that opinion, the Commissioner relied on three cases: *The Countess of Bective v Federal Commissioner of Taxation*, *Zobory v Commissioner of Taxation*, and *Reiter v Commissioner of Taxation*.  

(b) *The Countess of Bective v Federal Commissioner of Taxation*  

*The Countess of Bective v Federal Commissioner of Taxation* was an appeal to a single judge of the High Court of Australia from a decision of the Federal Commissioner of Taxation. The case itself has no connection to employment or industrial law. However, it is important because it formed part of the foundational basis for TD 2008/9.  

In the financial year ending 30 June 1930, the Countess of Bective received £663 in income from two companies that were owned by her late husband. The Countess’ late husband had left a will. Under that will, the pair’s infant daughter was the sole beneficiary of the husband’s estate. While the daughter was under the age of fifteen, the income from the companies was to be given to the Countess for the maintenance, education, and support of the daughter. The Commissioner made a finding that the £663 received by the Countess formed part of her assessable income. The Countess disputed the Commissioner’s finding.
Dixon J found that the Countess was not beneficially entitled to the £663 she received from the two companies.\(^{806}\) The daughter was the person who was entitled to the money that was received by the Countess. The Countess was merely dispensing the income on behalf of the daughter while the daughter was too young to do so for herself.\(^{807}\) Dixon J remitted the matter back to the Commissioner to reassess the Countess’ taxable income.\(^{808}\) The key effect of the decision of Dixon J in *The Countess of Bective v Federal Commissioner of Taxation* was that the law would not treat money received by a person as income unless the person has some form of personal entitlement to that money.

\((c)\) *Zobory v Commissioner of Taxation*\(^{809}\)

The case of *Zobory v Commissioner of Taxation*\(^{810}\) involved a dispute between Mr Peter Zobory, a taxpayer, and the Commissioner of Taxation. Cannon Australia Pty Limited (*Cannon*) employed Mr Zobory as Chief Accountant. While in that position, Mr Zobory transferred $1 million from Cannon’s bank account and put it into his own bank account. Mr Zobory then transferred that money to a number of different bank accounts and term deposits. Mr Zobory mixed some of his own money into the investments that he made using Cannon’s money. Because of those investments, Mr Zobory earned large sums of interest in the financial years ended 30 June 1988 and 30 June 1989.

---

\(^{806}\) *The Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417, 425.

\(^{807}\) Ibid.

\(^{808}\) Ibid 425-6.

\(^{809}\) Unless otherwise footnoted, the facts summarised in this section are drawn from: *Zobory v Commissioner of Taxation* (1995) 64 FCR 86, 88-90.

\(^{810}\) (1995) 64 FCR 86.
In the financial year ended 30 June 1988, Mr Zobory recorded the interest on investment as his own. This was reflected in his income tax return that he submitted to the Commissioner of Taxation. Cannon discovered Mr Zobory’s fraud before 30 June 1989. In Mr Zobory’s income tax return for the financial year ended 30 June 1989, he recorded the interest earned on investment in that financial year as belonging to Cannon. On 29 August 1989, Cannon instituted proceedings in the Supreme Court of New South Wales against Mr Zobory. Mr Zobory and Cannon settled those proceedings by consenting to orders that required Mr Zobory to pay $1,400,000 to Cannon. Mr Zobory paid that money back to Cannon.811

Once Mr Zobory had paid the money back to Cannon, he made two objections to the Commissioner of Taxation about his income tax assessments for 30 June 1988 and 30 June 1989. Mr Zobory claimed that the interest earned by the investments was not his own income, but was income that he held on constructive trust for Cannon. Mr Zobory objected to the Commissioner of Taxation treating the interest earned on the investments as forming part of his personal income. The Commissioner of Taxation rejected Mr Zobory’s objections and treated the interest earned as being attributable to Mr Zobory. Mr Zobory appealed the Commissioner of Taxation’s decision to the Federal Court of Australia.

Burchett J found that it is a ‘fundamental principle’ that the term ‘income’ for the purpose of the Income Tax Assessment Act 1936 (Cth) is a reference to income that a taxpayer is beneficially entitled to.812 His Honour accepted Mr Zobory’s submission that he was not beneficially entitled to the interest earned during the financial years 30 June 1988 and 30 June 1989.

811 Zobory v Commissioner of Taxation (1995) 64 FCR 86, 94.
812 Ibid 89.
ended 30 June 1988 and 30 June 1989.\textsuperscript{813} This is because that income was held on trust by Mr Zobory for the benefit of Cannon, not the benefit of himself\textsuperscript{814}. As such, it was incorrect for the Commissioner to insist that Mr Zobory pay tax on the amount held on trust for Cannon. Burchett J remitted the matter back to the Commissioner for further hearing and determination.\textsuperscript{815}

(d) \textit{Reiter v Commissioner of Taxation}

Six years after the decision in \textit{Zobory v Commissioner of Taxation}, the Federal Court of Australia handed down its decision in \textit{Reiter v Commissioner of Taxation}\textsuperscript{816}. The presiding judge was Branson J.

(i) \textit{The facts in Reiter v Commissioner of Taxation}\textsuperscript{817}

Mr Thomas Reiter was a heavy vehicle driver. He was employed in South Australia. On 19 February 1993, Mr Reiter was injured while he was at work. The injury occurred while he was driving in Victoria. Mr Reiter made a workers’ compensation claim in relation to that injury under the South Australian workers’ compensation scheme. Under that legislative scheme, Mr Reiter received weekly payments while he was off on workers’ compensation. The WorkCover Corporation of South Australia (\textit{WorkCover}) made those payments.

While he was receiving weekly payments, Mr Reiter made a claim against his employer in the Supreme Court of Victoria in relation to his injury. On 17 December

\begin{itemize}
\item \textsuperscript{813} Ibid 90, 93.
\item \textsuperscript{814} Ibid 93.
\item \textsuperscript{815} Ibid 94.
\item \textsuperscript{816} (2001) 113 FCR 492.
\item \textsuperscript{817} The facts summarised in this section are drawn from: \textit{Reiter v Commissioner of Taxation} (2001) 113 FCR 492, 494-5.
\end{itemize}
1996, the Supreme Court of Victoria awarded common law damages in favour of Mr Reiter. However, the order required Mr Reiter to return the value of any weekly payments that he had received while on workers compensation to WorkCover.

The employer appealed the decision of the Supreme Court of Victoria. At around the same time, WorkCover brought proceedings against Mr Reiter in the Supreme Court of South Australia to recover the payments that it had made to Mr Reiter. Somewhat unusually, WorkCover continued to make weekly payments to Mr Reiter while it was suing him for the return of the payments it had already made to him.

On 17 December 1997, Mr Reiter, the employer and WorkCover settled the claims between them. Under the settlement arrangement, the employer would pay the sum awarded by the Supreme Court of Victoria to Mr Reiter, and Mr Reiter would pay back to WorkCover the weekly payments that he had received between 18 December 1996 and 16 December 1997.

Following the settlement, Mr Reiter sought to amend his tax returns for the years ending 30 June 1993 through to 30 June 1997 in order to reflect the fact that he had paid the weekly payments back to WorkCover. The Commissioner of Taxation refused Mr Reiter’s objections. Mr Reiter appealed to the Administrative Appeals Tribunal in relation to the Commissioner of Taxation’s decision to treat the weekly payments that Mr Reiter received after the Supreme Court of Victoria handed down its decision on 17 December 1996, and that he later returned to WorkCover, as income.

In the proceedings before the Administrative Appeals Tribunal, Mr Reiter argued that WorkCover had mistakenly made weekly payments to him between 17 December 1996 and 30 June 1997. Mr Reiter submitted that he received the money in trust for WorkCover and as a result, it was not assessable income. The Administrative Appeals
Tribunal disagreed with Mr Reiter. The Tribunal found that the money that Mr Reiter received from WorkCover between 17 December 1996 and 30 June 1997 was income for the purpose of the *Income tax Assessment Act 1936* (Cth). Mr Reiter appealed the decision of the Administrative Appeals Tribunal to the Federal Court of Australia.

(ii) **Decision of Branson J**

The issue before Branson J in the Federal Court of Australia was whether the money Mr Reiter received from WorkCover between 17 December 1996 and 30 June 1997 was income derived by him for the purpose of *Income Tax Assessment Act 1936* (Cth).\(^{818}\) His Honour applied the ‘fundamental principle’ approach that was adopted by Burchett J in *Zobory v Commissioner of Taxation*.\(^{819}\) Branson J found that Mr Reiter was not legally entitled to receive weekly payments once the award of the Supreme Court of Victoria came into effect.\(^{820}\) It followed that Mr Reiter was not beneficially entitled to the money that he received from WorkCover between the date on which the award of the Supreme Court of Victoria came into effect and 30 June 1997.\(^{821}\) Branson J upheld Mr Reiter’s appeal and remitted the matter to the Administrative Appeals Tribunal for further hearing and determination.

(e) **Returning to the second error in the State of Western Australia v Hartmann-Nieto**

If Stevenson DCJ relied upon TD 2008/9 to conclude that Dr Hartmann was liable for the gross amount of the overpayment, then his Honour erred in making his decision.

---

\(^{818}\) *Reiter v Commissioner of Taxation* (2001) 113 FCR 492, 496.

\(^{819}\) Ibid 499.

\(^{820}\) Ibid.

\(^{821}\) Ibid.
This is because his Honour treated TD2008/9 as some form of precedent for the idea that an employee is liable to repay the gross sum of an overpayment. This was clearly not what TD 2008/9 was about.

The Commissioner of Taxation, in making TD 2008/9, was not expressing an opinion about whether an employee should be required to repay the gross amount or the net amount of an overpayment back to their employer. None of the Australian Taxation Office’s guidelines provide any guidance about that issue. In TD 2008/9, the Commissioner of Taxation simply expressed an opinion, based on previous decisions of the Federal Court of Australia and the High Court of Australia, about whether an overpayment that had to be returned to its true owner was income for the purpose of the *Income Tax Assessment Act 1997*. To that extent, Stevenson DCJ ought to have disregarded or distinguished TD 2008/9 in his decision.

With respect, the correct approach would have been to require Dr Hartmann to repay the net amount of the overpayment to the employer. This is because the net amount of the overpayment was the only portion of the mistaken payment that Dr Hartmann received. If the employer wanted to reclaim the money it overpaid to the Commissioner of Taxation, then it should have joined the Commissioner of Taxation in as a party to the proceedings.

D Closing remarks

When an employer makes an overpayment to an employee, it will usually follow that the employer will also make an overpayment to the Commissioner of Taxation. Intermediate court authority indicates that an employee should be liable for the
overpaid tax that the employer has made to the Commissioner of Taxation. With respect, those intermediate court authorities have misapplied the law of unjust enrichment, and the law of restitution.

First, when an employer sues an employee in unjust enrichment, a material fact the employer must prove is that the employee received the overpayment. As a matter of common sense, that fact could never be established where the employer has made the payment to the Commissioner of Taxation, and the Commissioner of Taxation still has possession of the money. The correct respondent, in relation to the overpaid tax, should be the Commissioner of Taxation.

Second, the restitution remedy is about forcing the recipient of a benefit to return that benefit. Restitution is not compensatory in nature. Yet the practical effect of the intermediate court authority in relation to overpaid tax is to force the employee to compensate the employer for the loss that the employer has incurred by overpaying the Commissioner of Taxation. In State of South Australia v Clarke, the District Court of South Australia ordered the employee to compensate the employer for the overpaid tax, and told the employee that they could chase the Commissioner of Taxation for compensation of the loss that the employee had incurred as a result of the Court’s order. This was a clear misapplication of the restitution remedy.

824 Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd (1994) 182 CLR 51, 75. This was cited with approval in Roxborough v Rothmans of Pall Mall Australia Limited (2001) 208 CLR 516, 529.
826 State of South Australia v Clarke [2016] SADC 13, [191], [231]-[257].
Cases involving overpaid superannuation share similar difficulties to those involving overpaid tax. This is because overpaid superannuation, like overpaid tax, will often be paid by the employer to a third party. The issue of overpaid superannuation will be dealt with in Chapter XII of this thesis.
CHAPTER XII

OVERPAID SUPERANNUATION

A Introduction

The object of this chapter is to look at the practical complexities involved in an industrial dispute relating to overpaid, or purportedly overpaid, superannuation. Superannuation is an important aspect of the employment relationship.\textsuperscript{827} Often, an employee’s interest in their superannuation fund will be their greatest asset.\textsuperscript{828} Superannuation is not a gift; it is a part of the quid pro quo that an employer provides to an employee in exchange for the employee’s labour.\textsuperscript{829} For those reasons, an industrial dispute about overpaid superannuation should not be treated as less significant than one about overpaid wages, salary or bonuses.

This chapter will start by looking at the most common structure of a superannuation fund; a trust. It will then look at how the statutory limitations on the trustees of superannuation funds can prevent or hinder a trustee from voluntarily returning an overpayment to an employer. Embedded in that discussion will be practical suggestions about what an employee may be able to do to prevent the trustee of their superannuation fund from returning an overpayment, or purported overpayment, to an employer.

\textsuperscript{829} Ibid.
B  Back to basics: What is a superannuation fund?

A superannuation fund is an ‘indefinitely continuing fund set up to provide benefits to members on retirement or death benefits to dependants on the death of a member’. 830 These schemes can take many forms. The most common structure of superannuation scheme is a trust. 831 This is because there are significant tax benefits available to superannuation funds that, inter alia, use a trust structure. 832 The focus of this chapter will be on superannuation funds that use a trust structure.

Superannuation funds that use a trust structure will have a trust deed, a trustee, and beneficiaries. The trust deed is the document that establishes the fund. The trustee is responsible for managing any contributions that are made to the fund. 833 When an employer makes a contribution on behalf of an employee, the contribution is paid to the trustee. The members of the superannuation fund are the beneficiaries of the trust. The members do not own the trust assets. 834 Rather, they have a beneficial interest in them. 835

A beneficial interest in a superannuation fund is different in character to a beneficial interest in a non-superannuation trust. 836 Unlike an interest in a non-superannuation trust, an employee’s interest in a superannuation fund will often exist because of the direct result of their labour for an employer. 837 It is part of the work-wage bargain in

832 See for example: Income Tax Rates Act 1986 (Cth) s 27.
834 Trish Power, Superannuation for Dummies (Wiley Publishing Australia, 2nd ed, 2007) 44.
835 Ibid.
837 Ibid.
the modern employment context. As a result, there is a general public importance in trustees making sound decisions when it comes to an employee’s benefit in a superannuation fund. The High Court of Australia has gone as far as to say that the members of a superannuation fund have a legitimate expectation that the trustee(s) of the fund will make sound decisions about the members’ benefits in the fund.

The trustee of a superannuation fund is able to elect to be regulated by the Superannuation Industry (Supervision) Act 1993 (Cth) (SIS Act). Once a trustee has made such an election, the fund is a regulated superannuation fund for the purpose of the SIS Act. This election is important in several ways. First, electing to be regulated by the SIS Act means that the trustee may be able to reduce the tax payable on arm’s length income made by the fund. Second, as will be explored later in this chapter, it affords special rights and protections to the members of regulated superannuation funds.

C Overpayments can only be recovered from the trustee

The normal principles of unjust enrichment apply to the recovery of overpaid superannuation. If an employer makes an overpayment into a superannuation fund, then any demand or action for the return of that money needs to be made against the trustee of the fund. This is because it is the trustee who has control over the superannuation fund. Recovery from the employee would be impossible, as the

838 Ibid.
839 Ibid.
840 Superannuation Industry (Supervision) Act 1993 (Cth) s 19(4).
841 Ibid s 19.
842 See: Income Tax Rates Act 1986 (Cth) s 27.
843 See for example: Personalised Transport Services Pty Ltd v AMP Superannuation Ltd & Anor [2006] NSWSC 5, [13].
844 Ibid.
845 Ibid.
employee could not be said to have received the overpayment from the employer. The only exception would be in circumstances where the trustee has passed the overpayment directly to the employee. In those circumstances, the employer would need to sue the employee or the employee’s estate.

D  Limitations on trustees: Section 117 of the SIS Act and standard-employer sponsors

Section 117 of the SIS Act regulates a trustee’s ability to transfer fund money to a standard employer-sponsor of the fund. A standard-employer sponsor is an employer who contributes, or would contribute, into a superannuation fund because of an arrangement it has with the trustee of the fund. If an employer makes, or would make, contributions into the fund because of an arrangement it has with its employee(s) then it is not a standard employer-sponsor of the fund. The purpose of the SIS Act is to protect employees of superannuation funds and to ensure that those receive their superannuation entitlements from their employers.

There is a degree of controversy surrounding the application of section 117(3) of the SIS Act. According to the Australian Prudential Regulation Authority (APRA), mistaken payments made by a standard employer sponsor to the trustee of a regulated fund are not ‘contributions’ for the purpose of section 117. APRA’s view is that

---


847 See for example the obiter comments in *Personalised Transport Services Pty Ltd v AMP Superannuation Ltd & Anor* [2006] NSWSC 5, [13].

848 *Superannuation Industry (Supervision) Act 1993* (Cth) s 117(3); *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd* (2006) 15 VR 87, [23], [46].

849 *Superannuation Industry (Supervision) Act 1993* (Cth) s 16(2).

850 Ibid.

851 *IWEC Pty Ltd v Commissioner of Taxation* (2007) 65 ATR 447, [22],

section 117 would not prevent a trustee from returning a mistaken overpayment to a standard employer sponsor. The problem with APRA’s view is, for the reasons set out in the next paragraph, it is not harmonious with the wording of section 117(3).

Section 117(3) prevents the payment of ‘an amount … out of the fund’ to a standard employer sponsor. The applicability of section 117(3) will depend on the circumstances of each particular case. It is axiomatic that if the trustee has received an overpayment from a standard employer sponsor but has not yet incorporated that overpayment into the fund, then section 117(3) would not prevent the trustee from returning that overpayment to the standard employer sponsor. This is because the returned money would not be ‘an amount … out of the fund’. However, if the trustee has, through its accounting practices, incorporated the overpayment into the fund then section 117(3) would prevent the trustee from returning that overpayment to the standard employer sponsor. APRA’s circular, in this regard, should be treated with caution. This is because the circular ignores the unavoidable factual issue of whether the trustee has incorporated the overpayment into the fund.

E Limitations on trustees: Regulation 13.16 of the SIS Regulations

Once a trustee has incorporated a mistaken overpayment into the regulated superannuation fund, their ability to return that overpayment to an employer is further restricted by regulation 13.16 of the Superannuation Industry (Supervision) Regulations 1994 (Cth) (the SIS Regulations). Sub-regulation 13.16(1) prohibits a trustee from carrying out, or consenting to, an act which would adversely alter an employee’s right or claim to an accrued benefit, or the amount of an accrued benefit,

---

853 Ibid.
854 Superannuation Industry (Supervision) Act 1993 (Cth) s 117(3).
in the fund. That prohibition is subject to sub-regulation 13.16(2) of the SIS Regulations.

Sub-regulation 13.16(2) of the SIS Regulations contains seven exceptions to the prohibition in regulation 13.16(1). Only two of those exceptions are relevant to the discussion in this chapter. First, pursuant to sub-regulation 13.16(2)(a)(i), a trustee is able to return a mistaken payment to an employer if the employee consents to it. Second, sub-regulation 13.16(2)(d) allows a trustee of a regulated superannuation fund to alter an employee’s right or claim to an accrued benefit in the fund, or the amount of an accrued benefit in the fund, if:

1. the benefit accrued because of a mistake;
2. the purpose of the alteration is to rectify that mistake; and
3. the regulator has approved the alteration.855

The practical effect of regulation 13.16 of the SIS Regulations is that a trustee can only return a bona fide mistaken overpayment to an employer if either the affected employee or the relevant regulator authorises the trustee to do so. Section 34(1) of the SIS Act requires the trustees of regulated superannuation funds to comply with, inter alia, regulation 13.16 of the SIS Regulations.

F Limitations on trustees: Covenants in the trust deed

The trustee of a superannuation fund has an obligation to comply with the rules set out in the trust deed that establishes the fund.856 The content of those rules may well vary

855 Superannuation Industry (Supervision) Regulations 1994 (Cth) reg 13.16(2)(d).
between superannuation funds. Notwithstanding this, there are a number of covenants that are implied into the trust deed of every regulated superannuation fund. This occurs because of the operation of sections 52 and 52A of the SIS Act. The covenants contained in sections 52 and 52A are a codification of general law relating to trusts.\(^5\)

To avoid unnecessary repetition, the fiduciary duties that a trustee owes under the general law to a member of a superannuation fund will not be addressed in this paper. The remaining part of this section will:

1. set out the relevant statutory covenants that apply to trustees of regulated superannuation funds;
2. set out the relevant statutory covenants that apply to the directors of corporate trustees of regulated superannuation funds; and
3. discuss the effect of those covenants in the context of a mistakenly made overpayment.

1. **Relevant covenants on trustees**

Subsection 52(2) of the SIS Act contains ten covenants. Those ten covenants place obligations on the trustees of regulated superannuation funds. Four of the ten covenants have the potential to impact on a trustee’s ability to refund an overpayment to an employer. First, the trustee must act honestly in all matters concerning the fund.\(^6\) Second, the trustee must act in the best interests of the beneficiaries of the

---


\(^6\) *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(2)(a).
Third, the trustee must, in relation to all matters affecting the fund, exercise ‘the same degree of care, skill and diligence as a prudent superannuation trustee would exercise in relation to an entity of which it is trustee and on behalf of the beneficiaries of which it makes investments’. 860 The standard of care, skill, and diligence owed by the trustee of a superannuation fund is higher than that of a trustee of an ordinary trust. 861 Fourth, where there is a conflict of interest between the interests of the beneficiaries of the fund or the duties that the trustee owes to those beneficiaries, and the duties the trustee owes to any other person, then the trustee is required to prioritise the interests of the beneficiaries. 862 In a conflict situation, the trustee must also ensure that the duties it owes to the beneficiaries of the fund are met and that the interests of the beneficiaries are not adversely affected by the conflict. 863

2. Relevant covenants on the directors of corporate trustees

Subsection 52A(2) of the SIS Act contains a further six covenants. Those covenants apply to the directors of a corporate trustee of a regulated superannuation fund. First, the directors must act honestly in all matters concerning the corporate trustee. 864 Second, the directors must, in relation to all matters affecting the trustee, exercise the same degree of care, skill and diligence as a prudent superannuation trustee director would in relation to the corporate trustee. 865 Third, the directors must perform their duties and exercise their powers as directors in the best interests of the beneficiaries of the fund. 866 Fourth, where there is a conflict situation the directors must give priority

859 Ibid s 52(2)(c).
860 Ibid s 52(2)(b).
861 Preuss v Australian Prudential Regulation Authority (2005) 60 ATR 1137, [74].
862 Superannuation Industry (Supervision) Act 1993 (Cth) s 52(2)(d).
863 Ibid.
864 Ibid s 52A(2)(a).
865 Ibid s 52A(2)(b).
866 Ibid s 52A(2)(c).
to the duties to, and interests of, the beneficiaries over the duties to and interests of other persons. In addition, the directors must ensure that the duties to the beneficiaries are met despite the conflict and that the interests of the beneficiaries are not adversely affected by the conflict. Fifth, the directors are unable to do anything that would prevent the corporate trustee from, or hinder the corporate trustee in, performing or exercising its functions and powers as trustee of the superannuation fund. Sixth, the directors must exercise a reasonable degree of care and diligence to ensure that the corporate trustee meets the covenants contained in section 52 of the SIS Act.

Sections 52A and 55 of the SIS Act lift the corporate veil. The provision exposes the directors of a corporate trustee of a regulated superannuation fund to potential liability for loss suffered by a beneficiary because of the directors’ conduct.

3. *The effect of the covenants in an overpayments context*

The covenants in sections 52 and 52A place a heavy burden upon the trustees of regulated superannuation funds and, where applicable, their directors. Section 55(1) of the SIS Act prohibits a person from contravening a covenant contained in a trust deed. It is not an offence for a person to breach section 55(1). However, if a trustee of a superannuation fund has breached one of its statutory covenants in returning an overpayment to an employer, then a person who has suffered a loss because of that breach is able to bring a civil action against the trustee in order to recover that loss.

---

867 Ibid s 52A(d)(i).
868 Ibid ss 52A(d)(ii) and (iii).
869 Ibid s 52A(e)(ii).
870 Ibid s 52A(f).
871 Ibid s 55.
872 Ibid s 55(2).
873 Ibid s 55(3).
With leave of the court, the affected person can also bring an action against any
director of the trustee who has caused a loss to the affected person through a breach
of a section 52A covenant.\textsuperscript{874}

Whether a trustee, or the director of a trustee, has acted in the best interests of the
beneficiaries of a regulated superannuation fund is an objective test.\textsuperscript{875} As such, it does
not matter that the trustee, or its directors, subjectively and honestly believed that it
was acting in the best interests of the members.\textsuperscript{876} It is unlikely that a trustee could
return an overpayment to an employer without first seeking independent legal
advice.\textsuperscript{877} This is because of the high degree of care, skill, and diligence that is required
to be exercised by the trustee.

When assessing whether to voluntarily return an overpayment, the trustee would need
evidence from the employer about why the payment was made. This is so that the
trustee could reasonably satisfy itself that the employer made the overpayment
because of a bona fide mistake. Even if the payment was made because of a mistake,
the trustee would also need to be satisfied that it would not have a defence to a
restitution claim if one was made by the employer. If the trustee has an arguable
defence to evade the restitution claim, or part of it, then the trustee would need to run
that defence. This is because the trustee has an obligation to act in the best interests of

\textsuperscript{874} Ibid s 55(4A).
\textsuperscript{875} 
Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited ( Receivers and Managers appointed) (in liquidation) ( Controllers Appointed) ( No 3) [ 2013] FCA 1342, [ 485]-[ 487].

\textsuperscript{876} 
Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited ( Receivers and Managers appointed) ( in liquidation) ( Controllers appointed) ( No 3) [ 2013] FCA 1342, [ 485]-[ 487]. Also see generally: Hillsdown Holdings Plc v Pensions Ombudsman [ 1996] Pens LR 427, [ 76].

\textsuperscript{877} There is an obligation on trustees under the general law to seek professional advice about matters that they do not understand. See: Cowan v Scargill [ 1985] Ch 270, 289.
the beneficiaries. It will always be in the best interests of the beneficiaries to preserve, or to attempt to preserve, the assets of the trust.

The wording in section 55(3) of the SIS Act gives a person standing to bring a claim if they have suffered loss or damage because of a breach of a covenant. It appears to be a precondition to the cause of action that the person needs to have suffered the loss or damage before they are eligible to bring a claim. Although there are no case authorities on this point, it is questionable whether section 55(3) could be used to ground injunctive relief to prevent a future loss from occurring. If an employee wanted to prevent a trustee from returning a purported overpayment to an employer (that is, before the return of the payment occurs), then it could potentially do so through the Superannuation Complaints Tribunal. This is dealt with in the next part of this chapter.

G Complaints to the Superannuation Complaints Tribunal

If a trustee makes a decision to voluntarily return an overpayment to an employer, rather than credit that amount to the relevant employee’s account, then the aggrieved employee may be able to complain about that decision to the Superannuation Complaint Tribunal. The Superannuation Complaint Tribunal has a limited jurisdiction to rectify complaints about unfair or unreasonable decisions made by the trustees of regulated superannuation funds.

In Retail Employees Superannuation Pty Ltd v Crocker, Allsop J (as his Honour then was) outlined the limitations on the jurisdiction of the Superannuation Complaints Tribunal in determining whether a decision of a trustee is unfair or

---

879 Superannuation (Resolution of Complaints) Act 1993 (Cth) ss 14, 37.
unreasonable.\textsuperscript{881} First, if the decision is contrary to the trust deed then that decision will be unfair or unreasonable.\textsuperscript{882} Second, if the decision conforms with, and was required by, the trust deed, then the decision will be fair and reasonable.\textsuperscript{883} Third, if the decision is in conformity with the trust deed, but is not a decision that was required by the trust deed, then the Superannuation Complaints Tribunal has jurisdiction to review and supplant the decision of the trustee.\textsuperscript{884}

Any complaint brought by an employee to the Superannuation Complaints Tribunal would need to be framed as a complaint about the trustee’s decision not to credit the overpayment to the employee’s account. This is because the Superannuation Complaints Tribunal’s jurisdiction is limited to dealing with decisions that are in relation to an individual member or former member of the fund.\textsuperscript{885}

There are currently no decisions out of the Superannuation Complaint’s Tribunal that look at the interaction between the covenants inserted into trust deeds by virtue of sections 52 and 52A and the decision of a trustee to return an allegedly mistaken payment to an employer. Theoretically, if a trustee breached a section 52 covenant in returning a mistaken payment to an employer, then that conduct would be unfair and unreasonable. This is because, based on Allsop J’s paradigm, it will be unreasonable for a trustee not to comply with section 52 covenants that are implied in the trust deed.

In circumstances where a trustee has made a decision to repay a mistaken payment to an employer, the employee only has a relatively small window of time in which to make a complaint to the Superannuation Complaints Tribunal. The complaint would

\textsuperscript{881} Retail Employees Superannuation Pty Ltd v Crocker [2001] FCA 1330, [27]-[32].
\textsuperscript{882} Ibid [32].
\textsuperscript{883} Ibid.
\textsuperscript{884} Ibid.
\textsuperscript{885} Superannuation (Resolution of Complaints) Act 1993 (Cth) s 14(1).
need to be made after the trustee has made the decision, but before the repayment has been made to the employer. This is because once the trustee has returned the purported overpayment to the employer, the Superannuation Complaints Tribunal has no power under the Superannuation (Resolution of Complaints) Act 1993 (Cth) to order the employer to return the money to the trustee. If the employee does get their complaint in on time, then the Superannuation Complaints Tribunal has the power to prevent the trustee from giving the purported overpayment to the employer while the Tribunal is dealing with the employee’s complaint.\textsuperscript{886}

The Superannuation Complaints Tribunal, after reviewing the decision of a trustee, is required to make a written determination in relation to the complaint that has been made by the employee.\textsuperscript{887} In that determination, the Superannuation Complaints Tribunal can:

1. affirm the decision of the trustee;
2. send the matter back to the trustee for further consideration;
3. vary the decision of the trustee; or
4. make its own decision about the complaint.\textsuperscript{888}

\textbf{H Closing remarks}

Industrial disputes relating to purportedly overpaid superannuation are notoriously complicated. This is because these types of disputes will ordinarily involve the trustee of the employee’s superannuation fund. The trustee will be the one who received the overpayment from the employer. When faced with a demand from an employer for the

\textsuperscript{886} Ibid s 26(2).
\textsuperscript{887} Ibid s 37(3).
\textsuperscript{888} Ibid.
return of a purported overpayment, the trustee is placed in a difficult position. As was discussed in this chapter, the trustee has to act in the best interests of the employee when making the decision whether or not to voluntarily return the payment to the employer.

If the trustee does not voluntarily return the overpayment to the employer, then the employer will need to sue the trustee in an unjust enrichment type claim in order to recoup the overpayment. The unjust enrichment principles discussed in the earlier chapters of this thesis would need to be adapted to such a claim.

If the trustee decides to voluntarily return the overpayment, then the employee may be able to challenge that decision by making a complaint to the Superannuation Complaints Tribunal. The Superannuation Complaints Tribunal has the jurisdiction to review the decision of the trustee to determine whether it was unfair or unreasonable. However, the employee has a limited window of time to make that complaint. They need to make the complaint after the trustee has made its decision, but before the trustee has returned the overpayment to the employer. This is because, once the trustee has returned the overpayment to the employer, the Superannuation Complaints Tribunal has no ability to coerce the employer to return the money back to the trustee in the event that the trustee’s decision was unfair or unreasonable. Once the trustee has returned the purported overpayment to the employer, then the only course available to the employee is to sue the trustee for a breach of the trust deed, or for a breach of the SIS Act.

The next chapter in this thesis will look at the remedies that a court can award in response to an unjust enrichment claim relating to overpaid remuneration.
CHAPTER XIII
REMEDIES

A Introduction

If an employer succeeds in an unjust enrichment type claim against their employee, then they will be entitled to an order for restitution.\footnote{See generally: Peter Birks, Unjust Enrichment (Oxford University Press, 2\textsuperscript{nd} ed, 2005) 17.} The maximum value of an order for restitution will be the value of the overpayment that the employer made to the employee plus pre-judgment interest.\footnote{Keith Mason, J.W. Carter and G.J. Tolhurst, Mason & Carter’s Restitution Law in Australia (LexisNexis Butterworths, 3\textsuperscript{rd} ed, 2016) 108-9.} An order for restitution in favour of the employer may also be accompanied by an order for pre-judgment interest and an order for costs.\footnote{See generally: Supreme Court Act 1935 (WA) ss 32, 37; District Court of Western Australia Act 1969 (WA) ss 50(1), 64, 65; Magistrates Court (Civil Proceedings) Act 2004 (WA) ss 12, 25; Federal Court of Australia Act 1976 (Cth) ss 43, 51A; Federal Circuit Court of Australia Act 1999 (Cth) ss 76, 79(2).}

This chapter will start by looking at the nature of the restitution remedy. Embedded in that discussion will be a contribution to the debate about whether the restitution remedy is theoretically broad enough to allow for the disgorgement of any profits that the employee has made from its use of the overpayment. This chapter will then look at the ability of an employer to obtain an order for prejudgment interest and an order for costs if it is successful in an unjust enrichment type case against its employee.
B Restitution

Restitution is not a cause of action. It is a type of remedy. Birks has described restitution as a category of response that is available to remedy a range of causative events. That range of causative events includes but is not limited to claims in unjust enrichment. The causes of action that fall under the legal concept of unjust enrichment, if proven and absent of any defences, will always give rise to a right to restitution.

In Moses v Macferlan, Lord Mansfield said the following about the action for money had and received:

It is the most favourable way in which he can be sued: he can be liable no further than the money he has received; and against that, may go into every equitable defence, upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by every thing which shews that the plaintiff, ex aequo & bono, is not intitled to the whole of his demand, or to any part of it. (emphasis added)

Restitution is not compensatory in nature. Instead, restitution is intended to ‘restore to the plaintiff what has been transferred from the plaintiff to the defendant’.

---

893 Peter Birks, Unjust Enrichment (Oxford University Press, 2nd ed, 2005) 17.
895 Peter Birks, Unjust Enrichment (Oxford University Press, 2nd ed, 2005) 17.
896 (1760) 2 Burr 1005; (1760) 97 ER 676.
897 Moses v Macferlan (1760) 2 Burr 1005, 1010; (1760) 97 ER 676, 679.
899 Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd (1994) 182 CLR 51, 75. This was cited with approval in Roxborough v Rothmans of Pall Mall Australia Limited (2001) 208 CLR 516, 529.
overpayment case, the most an employer could achieve through an order for restitution against an overpaid employee would be the value of the overpayment that the employer made to the employee.\textsuperscript{900} The employer needs to plead, in its prayer for relief, that the type of restitution that it is seeking is the value of the overpayment that the employee obtained from the employer.\textsuperscript{901} The reason for this is explained in the next section of this part.

Unless an employee can establish the change of position defence, the fact that the employee has spent some or all of the overpayment is not a bar to a restitutionary award in favour of the employer.\textsuperscript{902} The employee’s capacity to pay the award amount is a matter that is more relevant to enforcement proceedings. The issue of enforcement is beyond the scope of this thesis.

1. \textit{Restitution and disgorgement}

A tricky issue arises where an overpaid employee has made a profit from its use of the employer’s money. For example, the employee may have had a large win at the casino by gambling the overpayment that it received from the employer. Kovacic-Fleischer has suggested that the purpose of unjust enrichment law is to disgorge the respondent’s gain.\textsuperscript{903} However, while the restitution remedy is broad enough to disgorge profits in

\textsuperscript{900} See generally: \textit{Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd} (1994) 182 CLR 51, 7; \textit{Roxborough v Rothmans of Pall Mall Australia Limited} (2001) 208 CLR 516, 529; \textit{Anderson v McPherson [No 2] [2012] WASC 19}, [226].

\textsuperscript{901} See generally: James Edelman and Elise Bant, \textit{Unjust Enrichment} (Hart Publishing, 2\textsuperscript{nd} ed, 2016) 35.


\textsuperscript{903} Candace Kovacic-Fleischer, ‘Food Stamps, Unjust Enrichment, and Minimum Wage’ (2017) 35(1) \textit{Law & Inequality} 1, 21.
certain circumstances, it cannot do so in response to an unjust enrichment type claim.904

Edelman and Bant have suggested that although some disgorging remedies have previously been referred to as restitution, they should be more correctly labelled as disgorgement.905 According to Edelman and Bant, this is because ‘restitution requires a transaction with the plaintiff, while an account of profits requires only a causal link between a defendant’s wrongful conduct and profits made.’906 They further summarised that proposition as follows:

… an award of disgorgement of profits (which follows an account of profits) strips the defendant’s profits, irrespective of their source. But a personal award of restitution for unjust enrichment is, in loose terms, ‘concerned with giving back to someone something that has been taken from them’.907 (citations omitted)

Grantham and Rickett have also advocated for the idea that there is a distinction between restitution by restoration and restitution by disgorgement.908 The authors describe restitution by restoration as ‘the giving back of wealth received by a defendant from a claimant, which must be given back or restored because it amounts to an unjust enrichment at the claimant’s expense.’909 Whereas restitution by disgorgement ‘is the giving up to a claimant of a gain made by a defendant, as a consequence of a wrongdoing committed against the claimant, but received from a third party.’910

906 Ibid.
907 Ibid 35.
909 Ibid 159.
910 Ibid.
One similarity between the theories of Edelman and Bant, and Grantham and Rickett is that they see restitution by disgorgement as only being available where the defendant has engaged in some form of wrongful activity or a breach of a duty.\textsuperscript{911} Edelman and Bant even go as far as saying that restitution by disgorgement is intended to deter defendants from engaging in wrongful activities.\textsuperscript{912} The problem with the approach taken by Edelman and Bant, and Grantham and Rickett is that disgorging remedies, such as an account of profits, are not intended to punish or deter a defendant.\textsuperscript{913} They are instead intended to prevent the defendant’s unjust enrichment.\textsuperscript{914} This obviously brings into question whether a wrongful activity or breach of duty is a necessary element to trigger the restitution by disgorgement remedy. There are at least two alternative explanations as to why restitution by disgorgement is not currently awarded in response to an unjust enrichment type claim.

First, restitution by disgorgement may not be an available remedy in an unjust enrichment type claim because it would be against good conscience for such an award to be made. This would almost undoubtedly be the case where the reason why the employee has made a profit from their receipt of the overpayment from the employer is because the employee has used their skill (or luck) to make that profit. An award for restitution by disgorgement would create a windfall for the employer at the expense of the employee and the employee’s efforts in making that profit.

Second, it may be the case that the law has simply proceeded on the basis that Lord Mansfield was correct when he said that a defendant to an action for money had and


\textsuperscript{912} James Edelman and Elise Bant, Unjust Enrichment (Hart Publishing, 2\textsuperscript{nd} ed, 2016) 34.

\textsuperscript{913} Dart Industries Inc v Décor Corp Pty Ltd (1993) 179 CLR 101, 110-1.

\textsuperscript{914} Ibid.
received could be ‘liable no further than the money he has received’.\textsuperscript{915} This idea is not so farfetched. It was not that long ago, relatively speaking, that the common law was still insisting on the existence of implied contract theory as the rationale for causes of action such as money had and received.\textsuperscript{916} It may well be that the limitation on an award for restitution by disgorgement is simply an artificial titbit of time.

In order to avoid the creation of a false dichotomy, it also important to leave open the possibility that restitution by disgorgement may well be available to remedy an unjust enrichment type claim. There may be a set of facts which, when tried in court, would justify restitution by disgorgement being awarded in response to an unjust enrichment type claim. Covell, Lupton and Forder said in their book \textit{Principles of Remedies} that the purpose of restitution is to ‘reverse the defendant’s gain’.\textsuperscript{917} If that proposition is accepted as true, then the concept of restitution by disgorgement fits neatly within the doctrinal basis for unjust enrichment type claims.

\textbf{C Pre-judgment interest}

In an unjust enrichment case for the recovery of a mistaken overpayment, the issue of pre-judgment interest can be an important consideration for employers. Pre-judgment interest is the interest payable by the employee on the principal sum for the period between when the cause of action arose and the time that judgment is handed down by a court. How the employer should frame their argument for pre-judgment interest will depend on whether or not the employee has voluntarily returned the overpayment.

\begin{footnotesize}
\textsuperscript{915} Moses v Macferlan (1760) 2 Burr 1005, 1010; (1760) 97 ER 676, 679.
\textsuperscript{917} Wayne Covell, Keith Lupton and Jay Forder, \textit{Principles of Remedies} (LexisNexis Butterworths, 5\textsuperscript{th} ed, 2012) 132.
\end{footnotesize}
1. Pre-judgment interest where the matter goes to a final determination by a court

Most of the courts that operate in Western Australia are able to award pre-judgment interest to an employer who is wholly, or partially, successful in an unjust enrichment claim against their employee. One source of that power comes from statute. The court’s power to award pre-judgment interest under statute is discretionary. However, it is only in the rarest of cases that a court will refuse to exercise that discretion.

The ability of the court to award pre-judgment interest serves two purposes. First, pre-judgment interest is awarded to compensate the successful party for having been deprived of the use of their money. Pre-judgment interest is not intended to punish the unsuccessful party. Second, the mere prospect of an award for pre-judgment interest can encourage the early resolution of litigation.

The value of the award for pre-judgment interest is a matter for the court to decide. In some cases, the court can order the payment of a lump sum of money in lieu pre-judgment interest. Where pre-judgment is awarded, the following principles will guide that award:

1. pre-judgment interest will usually be framed as a percentage of the principal award sum;
2. the rate of interest will be set by the court; and

---

919 Ibid.
920 F & G Nominees Pty Ltd v Verdell Pty Ltd [2003] WASCA 290, [27], [123].
924 See for example: Magistrates Court (Civil Proceedings) Act 2004 (WA) s 12.
3. pre-judgment interest will be payable for the period between the date on which the cause of action arose, and the date when judgment for the principal award was given by the court.\footnote{See for example: \textit{Supreme Court Act 1935} (WA) s 32.}

2. \textit{Interest where the mistaken payment has been voluntarily returned}

If an employee voluntarily returns an overpayment to their employer, but delays in doing so, then the question that arises is whether that employer could sue the employee for pre-judgment interest only. The answer to that question is not found in the statutory powers of the court to award pre-judgment interest. This is because the court’s statutory power can only be exercised in circumstances where the court has handed down judgment for restitution of the overpaid amount.\footnote{See for example: \textit{National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd} (1997) 217 ALR 365, 368.} If the employee has repaid the full amount of the overpayment, the employer cannot sue the employee for the recovery of the overpayment.\footnote{Ibid.}

Mason P alluded to the answer to the above question in \textit{National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd}.\footnote{(1997) 217 ALR 365.} In that case, Mason P said:

\ldots[W]hen A retains money owned by or owing to B over a period of time, A derives a benefit (at B’s expense) usually measurable by what A would have had to pay in the market to borrow that sum for that period. Since this benefit is derived without justification and at the expense of the person to whom the principal sum was due, we should now recognise it as an unjust enrichment. It stands independently of, but appurtenant upon the obligation to pay, the “principal” sum. The independent nature of
the restitutionary entitlement to interest is evidenced by historical recognition of a
distinct indebitatus count for interest.\textsuperscript{929}

Mason P cited the decision of Wilcox J in \textit{State Bank of New South Wales Ltd v FCT}\textsuperscript{930}
as an example of a previous case where the common law has ‘awarded interest with
respect to a discrete sum that had been ‘retained’ but repaid before proceedings were
instituted.’\textsuperscript{931} In \textit{State Bank of New South Wales Ltd v FCT}, Wilcox J had expressly
accepted that he could award restitution for interest independently of any statutory
provision.\textsuperscript{932} The above passage from Mason P’s decision was obiter dicta.\textsuperscript{933} Handley
and Sheller JJA, who were the other justices in \textit{National Australia Bank Ltd v Budget
Stationery Supplies Pty Ltd}, found that it was unnecessary for them to make any
comments about the issue of pre-judgment interest.

Around one year later, in \textit{Commonwealth of Australia v SCI Operations Pty Ltd},\textsuperscript{934}
McHugh and Gummow JJ expressed some doubt about whether there was a free-
standing right to pre-judgment interest in Australia.\textsuperscript{935} Their Honours considered and
applied \textit{National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd}, but in doing
so did not address the obiter comments of Mason P about the free standing right to
pre-judgement interest.\textsuperscript{936} The doubts raised by McHugh and Gummow JJ were obiter
dicta and were not broached by the other members of the court.

Since \textit{Commonwealth of Australia v SCI Operations Pty Ltd}, there have been a number
of decisions of intermediate courts that have accepted that there is a free-standing right

\textsuperscript{929} \textit{National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd} (1997) 217 ALR 365, 369.
\textsuperscript{931} \textit{National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd} (1997) 217 ALR 365, 370.
\textsuperscript{933} \textit{National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd} (1997) 217 ALR 365, 370.
\textsuperscript{934} (1998) 192 CLR 285.
\textsuperscript{936} Ibid 317.
to pre-judgment interest. Until and unless the High Court says otherwise, those authorities should be followed.

The pleadings for pre-judgment interest would be framed in a substantially similar way as if the employer was seeking restitution for the principal sum. That is, the employer would need to plead the facts necessary to establish their right to restitution. The only difference would be that the prayer for relief would not ask for restitution of the principal sum, but for pre-judgment interest only. The free-standing right to pre-judgment interest runs from the point at which it becomes unjust for the employee to retain the benefit until the date of judgment.

There is some remaining controversy about whether pre-judgment interest, on a restitutionary basis, ought to be awarded on a simple or compound basis. The current state of the common law is that pre-judgment interest can only be awarded as simple interest.

D Costs

The State and Commonwealth parliaments have left the resolution of overpayment disputes that arise in an employment context to the common law and the common law courts. In Western Australia, that means an employer will need to bring its claim in either the Magistrates Court of Western Australia, the District Court of Western

---

Australia, or the Supreme Court of Western Australia (depending on the value of the employer’s claim). Each of these courts has the power to award costs in civil matters.\textsuperscript{942}

When it comes to costs, the usual rule is that the unsuccessful party to the litigation has to pay some or all of the successful party’s costs to that successful party.\textsuperscript{943} If the employer is successful in obtaining an order for restitution, then the employee will ordinarily have to pay a portion of the employer’s legal costs. If the employer is unsuccessful in its unjust enrichment claim against the employee, then the employer will need to pay a portion of the employee’s legal costs.

E Closing remarks

An employer who successfully sues its employee in unjust enrichment will ordinarily be entitled to an order for restitution, pre-judgment interest, and costs. If the employer is unsuccessful in its claim, then it will normally need to pay costs to the employee.

The ability of the courts to award costs in the resolution of an overpayment dispute between an employer and employee is contrary to the long-standing philosophy in Australia that legal matters that touch upon industrial and employment law should not ordinarily be susceptible to adverse costs orders.\textsuperscript{944} For example, an employer and employee involved in a denial of contractual benefits claim before the Western Australian Industrial Relations Commission can never be liable for the costs of the other party’s legal fees, regardless of who wins or loses the case.\textsuperscript{945}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Supreme Court Act 1935 (WA) s 37; Rules of the Supreme Court 1971 (WA) O 66 r 1; District Court of Western Australia Act 1969 (WA) s 64; Magistrates Court (Civil Proceedings) Act 2004 (WA) s 25.}
\item G. E. Dal Pont, \textit{Law of Costs} (LexisNexis Butterworths, 3\textsuperscript{rd} ed, 2013) 158.
\item Explanatory Memorandum, \textit{Fair Work Bill 2009 (Cth) 2228.}
\item \textit{Industrial Relations Act 1979 (WA) s 27(1)(c).}
\end{enumerate}
\end{footnotesize}
The threat of an adverse costs order will normally weigh heavier on the shoulders of an employee than it will on an employer. This is because employees are less likely to have the financial means to pay an adverse costs order. The ordinary resource disparity between employers and employees means that employers will generally have an unfair advantage in litigation. The administration of justice would be better served if overpayment disputes between employers and employees could instead be resolved in a no-cost jurisdiction.
CHAPTER XIV

SUMMARY, CONCLUSIONS, RECOMMENDATIONS AND CLOSING REMARKS

A Summary

Overpayment disputes between employers and employees are tricky creatures. This is because existing industrial and employment laws do not regulate these types of disputes. Instead, the legislature has left the resolution of overpayment disputes to the common law. This thesis has looked at how the law in Western Australia can be used by employers and employees to resolve overpayment disputes. The problem was approached through the lens of unjust enrichment law.

This thesis began by explaining the truck system and the truck laws. The truck laws are the starting point in the mechanics of an overpayment dispute between an employer and an employee. The truck laws prevent an employer from unilaterally recovering an alleged overpayment from an employee’s pay. The practical effect is that the employer will need to sue the employee in order to lawfully recover a disputed overpayment.

Next, this thesis introduced the law of unjust enrichment. It differentiated between unjust enrichment as a label for a group of related causes of action, and unjust enrichment as a taxonomical framework. It is the causes of action that fall under the label of unjust enrichment that are of most importance to employers and employees who are involved in an overpayment dispute. However, as will be discussed later in this chapter, the taxonomical framework of unjust enrichment could be used by the legislature in order to better facilitate the resolution of overpayment disputes that arise in an employment context.
This thesis looked at the overpayment problem from the perspective of the employer and the employee. Chapters IV to VII detailed what an employer needs to prove to make out a prima facie right to restitution. And Chapters VIII to X set out the three restitutionary defences that an employee may be able to rely upon to displace an employer’s right to restitution of an alleged overpayment.

In relation to overpaid tax, there is intermediate court authority that suggests that an employee is liable for overpaid tax that an employer has paid to the Commissioner of Taxation. That intermediate authority does not fit neatly within the scope of unjust enrichment law. This is because an essential element in any unjust enrichment case is that the employee received the overpayment. Whereas, when an employer overpays money to the Commissioner of Taxation, the employee does not receive the overpaid tax; the Commissioner of Taxation does. Chapter XI questioned the correctness of that intermediate court authority.

This thesis also looked at the issue of overpaid superannuation. Overpaid superannuation is arguably one of the more complex areas of an overpayment dispute that arises in an employment context. This is because the defendant in an overpaid superannuation claim will ordinarily be the trustee of the employee’s superannuation fund, rather than the employee. As was highlighted in Chapter XII, the trustee needs to carefully consider the duties it owes to its members before it starts returning alleged overpayments to employers. Despite APRA’s view to the contrary, if the trustee has

---

948 Australian Prudential Regulation Authority, Payments to Standard Employer-Sponsors, Superannuation Circular II.B.1, October 1998, [42]-[43].
incorporated the overpayment into the fund, then it is unlikely that the trustee could voluntarily return that overpayment to the employer.\(^\text{949}\)

Finally, this thesis set out the remedies that are available to an employer that is wholly or partially successful in an unjust enrichment claim against an employee. The primary remedy available to an employer is an order for restitution of the amount by which the employee has been unjustly enriched. The secondary remedies available are pre-judgment interest and costs.

**B Conclusions**

1. **The truck laws**

   The truck laws are supposed to protect employee remuneration from unscrupulous and overreaching employers.\(^\text{950}\) The truck laws are reactive in nature. That is, they enable an employee to sue an employer after the employer has made an allegedly unlawful deduction from that employee’s pay. While this function is an important protection, the truck laws are of little use to employers and employees that are caught up in an active overpayment dispute. The truck laws could better protect employee remuneration if they contained a mechanism for the hearing and determination of overpayment disputes. Such a change would make the truck laws operate both proactively and reactively.

---

\(^{949}\) *Superannuation Industry (Supervision) Act 1993* (Cth) s 117(3).

2. **The law of unjust enrichment**

The law of unjust enrichment provides an effective means of resolving overpayment disputes that arise in an employment context. On the one hand, the causes of action in unjust enrichment allow an employer to recover money without the need to prove a contractual right to the money, or that the employee obtained the money through a tort.\(^{951}\) Indeed, the employer can establish a prima facie right to restitution even where the overpayment was the result of its own mistake. On the other hand, an employee may be able to defend against the employer’s claim to an overpayment, even where the employee was not initially entitled to receive that overpayment. The law of unjust enrichment is effective because it looks at the overpayment problem from both the perspective of the payer and of the payee.

3. **Overpaid tax and superannuation**

The common law does not handle disputes about overpayments of tax and superannuation particularly well. This is because these types of disputes generally involve a third party. In the case of overpaid tax, the third party is the Commissioner of Taxation. In the case of overpaid superannuation, the third party will usually be the trustee of the employee’s superannuation fund.

In relation to overpaid tax, the current approach of the intermediate courts is to force the employee to compensate the employer for its loss (i.e. the overpaid tax that the employer paid to the Commissioner of Taxation). With respect, that approach is based on a misapplication of the law of unjust enrichment and the scope of the restitution

remedy. This potential misapplication of the law is a good reason why the legislature should step in to regulate overpayment disputes that arise in an employment context.

In relation to overpaid superannuation, the superannuation laws do not expressly regulate the resolution of disputes about purported overpaid superannuation. Ideally, in those types of disputes, there should be a forum where the employer, employee and the trustee of the employee’s superannuation fund can go to have the issue heard and determined by an independent third party (e.g. a court or tribunal).

4. *The common law courts*

The State and Federal Parliaments have left the resolution of overpayment disputes that arise in an employment context to the common law courts. The common law courts are not the ideal place for these types of disputes to be determined. This is because the common law courts usually award costs as a matter of course.952 The fact that costs follow the event is contrary to the long-standing philosophy in Australia that costs should not be awarded in legal proceedings that touch upon industrial and employment law.953

In most cases, employees will be less likely to have the finances to wear an adverse costs order than their employers. The threat of costs means that employers have an advantage over employees in the common law courts. Shunting overpayment disputes into a no-costs jurisdiction would help level the playing field between employers and employees that are involved in an overpayment dispute.

953 Explanatory Memorandum, Fair Work Bill 2009 (Cth) 2228.
C Recommendations

The Commonwealth and State Parliaments should expand their respective truck laws to provide a statutory mechanism for resolving overpayment disputes that arise in an employment context. Federally, this would mean adding a new section to Division 2 of Part 2-9 of the Fair Work Act 2009 (Cth). In Western Australia, the amendment could be incorporated into the Industrial Relations Act 1979 (WA).

1. What the new statutory mechanism should seek to achieve

The recommended amendment to Fair Work Act 2009 (Cth) and the Industrial Relations Act 1979 (WA) should seek to achieve the following objects.

First, the amendment should expand the truck laws to prohibit employers recovering an overpayment from an employee, or an employee’s superannuation fund, unless the employee has consented to that recovery or the employer has obtained a court order authorising the recovery. Employers should not be able to be the judge, jury and sheriff of their own cause when it comes to overpayment disputes.

Second, the amendments should provide a statutory cause of action that facilitates the resolution of overpayment disputes between employers and employees. While the common law does not recognise unjust enrichment as a concept of direct application,954 there is no reason why the legislatures could not use the taxonomical framework of unjust enrichment to model the new statutory mechanism. The taxonomical framework is easy to apply, and aligns relatively neatly with the causes of action that fall under the heading of unjust enrichment.

---

Third, the new statutory mechanism should fall within the scope of the existing costs shields contained in the *Fair Work Act 2009* (Cth) and the *Industrial Relations Act 1979* (WA). This will bring the resolution of overpayment disputes in line with longstanding employment and industrial law jurisprudence.

Fourth, the mechanism should prevent employers from recovering overpayments, or purported overpayments, that the employer has made to the Commissioner of Taxation. The correct entity for the employer to sue to recover those types of overpayments is the Commissioner of Taxation. An effective means of doing this would be to limit an award of restitution to the net value of an overpayment.

Fifth, if an employer’s claim involves overpaid, or purportedly overpaid, superannuation, then both the employee and the trustee of the employee’s superannuation fund should be respondents to the claim. This ensures that all interested parties to an overpayment dispute are afforded an opportunity to be heard.

Sixth, courts and tribunals should be able to make pecuniary penalty orders against employers who unlawfully recover an overpayment from an employee or an employee’s superannuation fund. However, the court or tribunal should not be empowered to make pecuniary penalty orders in proceedings where the employer has done the right thing and brought the overpayment dispute to the court or tribunal for resolution.

2. **Potential wording of the new statutory mechanism**

The wording of the new statutory mechanism should be along the lines of the following:

(1) An employer is not to recover an overpayment or a purported overpayment from:
(a) an employee; or

(b) an employee’s superannuation fund,

without first:

(c) obtaining written consent from the employee concerned; or alternatively

(d) obtaining an order under this section.

(2) For the purpose of subsection (1)(c), the employee’s written consent must be obtained after the overpayment was made to the employee, and before the employer recovers the money from the employee, or the employee’s superannuation fund.

(3) If an employee does not consent to its employer recovering an overpayment or purported overpayment, then the employer may make an application to the court/tribunal for an order authorising the recovery of that overpayment.

(4) An employer will have a prima facie right to recover an overpayment from their employee, or the employee’s superannuation fund, if the employer satisfies the court/tribunal that:

(a) the employee has been enriched at the employer’s expense; and

(b) the employee’s enrichment was caused by an unjust factor.

(5) For the purpose of subsection (4), unjust factors include but are not limited to:

(a) mistake;

(b) failure of consideration;

(c) economic duress; or

(d) misuse of position by the employee.

(6) An employee can displace, in whole or in part, their employer’s prima facie right to recover an overpayment under subsection (4) if the employee satisfies the court/tribunal that it would be inequitable to require the employee or the
employee’s superannuation fund to return some or all of the overpayment to the employer.

(7) Subject to subsection (6), the most that an employer can recover in an action under this section is the net value of the benefit that it transferred to the employee or the employee’s superannuation fund.

(8) If a claim under this section involves overpaid or purportedly overpaid superannuation, then both the affected employee and the trustee of the employee’s superannuation fund have a right to be heard in the proceedings.

Note: This section is a civil remedy provision. However, pecuniary penalties can only be ordered in a claim under this section against an employer for a breach of subsection (1).

3. **Who should have jurisdiction to determine disputes under the new statutory mechanism**

(a) **Jurisdiction at the federal level**

At the federal level, the Commonwealth Parliament could not give the Fair Work Commission jurisdiction to hear and determine disputes about overpayments that arise in an employment context. This is because the Fair Work Commission is not a court for the purpose of the Constitution.\(^955\) The Fair Work Commission is unable to ‘entertain disputes as to the existence or enforcement of legal rights or obligations’.\(^956\) As such, the jurisdiction would need to be entrusted to the Federal Court, the Federal Circuit Court, and eligible State or Territory courts (as defined in section 12 of the *Fair Work Act 2009* (Cth)).

---

\(^955\) Ranger Uranium Mines Pty Ltd; *Ex parte FMWU* (1987) 163 CLR 656, 663-6; *Construction, Forestry, Mining and Energy Union v BHP Billiton Nickel West Pty Ltd* [2017] FWCFCB 217, [23].

\(^956\) Ranger Uranium Mines Pty Ltd; *Ex parte FMWU* (1987) 163 CLR 656, 663.
(b) Jurisdiction at the state level

The Western Australian Parliament could give the jurisdiction to resolve overpayment disputes to the Western Australian Industrial Relations Commission. The Western Australian Industrial Relations Commission is a court of record; it falls within Western Australia’s hierarchy of courts.\textsuperscript{957} The Commission has specialist industrial relations and employment law expertise, and it has the facilities to take on the new jurisdiction.

Alternatively, the State Parliament could entrust jurisdiction in the Industrial Magistrates Court of Western Australia. This approach may not be as efficient. Industrial Magistrates in the Industrial Magistrates Court of Western Australia also sit as Magistrates in the Magistrates Court of Western Australia.\textsuperscript{958} Expanding the jurisdiction of the Industrial Magistrates Court of Western Australia may place additional pressure on already limited resources of the Magistrates Court of Western Australia.

D Closing remarks of this thesis

Prior to this thesis, there has been very little scholarly research into the area of overpaid remuneration in Western Australia. The aim of this thesis has been to fill that void in the scholarly knowledge. This thesis approached the issue of overpaid remuneration from the context of the law of unjust enrichment. In doing so, it also traversed other areas of knowledge. Those other areas included the truck laws, superannuation laws, principles of tax, and legal remedies. This thesis has linked each

\textsuperscript{957} Industrial Relations Act 1979 (WA) s 12; The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia (2013) 93 WAIG 1431, 1435; The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia (2014) 94 WAIG 787, 797; The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia (2015) 95 WAIG 1593, 1595-6.

\textsuperscript{958} Industrial Relations Act 1979 (WA) s 81B.
of those areas together to, hopefully, provide interested stakeholders with some practical guidance about how to resolve an overpayment dispute that arises in an employment context.

There is scope for further research into the area of overpaid remuneration. This includes surveying the market to determine the extent of the overpayment problem in Western Australia; and researching how principles of tort and contract law might be used to resolve an overpayment dispute.

This thesis has recommended that the Federal and State parliaments amend their truck laws to better facilitate the resolution of overpayment disputes that arise in an employment context. If that recommendation is not accepted, then scholars may need to further research the topic of this thesis in order to find an alternative solution to ease the difficulty involved in resolving overpayment disputes that arise in an employment context.
BIBLIOGRAPHY

A Articles/Books/Reports


Bant, Elise, and Peter Creighton, ‘The Statutory Change of Position Defences in Western Australia’ (2003) 31(1) University of Western Australia Law Review 47


Berg, Bruce L., Qualitative Research Methods for the Social Sciences (Allyn & Bacon, 7th ed, 2009)


Birks, Peter, Unjust Enrichment (Oxford University Press, 2nd ed, 2005)


Brown, Marcelle V, Western Australian Industrial Relations Law (University of Western Australia Press, 2nd ed, 1991)


Butt, Peter, and David Hamer (eds), Concise Australian Legal Dictionary (LexisNexis, 4th ed, 2011)


Evans, Michael, *Equity & Trusts* (LexisNexis Butterworths, 2nd ed, 2009)


Hudson, Alastair, Equity & Trusts (Cavendish Publishing Limited, 2nd ed, 2001)

Hutchinson, Terry, and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17(1) Deakin Law Review 83

Klinck, Dennis R, Conscience, Equity and the Court of Chancery in Early Modern England (Ashgate, 2010)

Kovacic-Fleischer, Candace, ‘Food Stamps, Unjust Enrichment, and Minimum Wage’ (2017) 35(1) Law & Inequality 1


Martin, Jill E, Modern Equity (Thompson Reuters (Legal) Limited, 18th ed, 2008)


Power, Trish, Superannuation for Dummies (Wiley Publishing Australia, 2nd ed, 2007)

Sappideen, Carolyn, Paul O’Grady, and Joellen Riley, Macken’s Law of Employment (Lawbook Co, 8th ed, 2016)


Spry, I.C.F, Equitable Remedies (Lawbook Co, 8th ed, 2010)


Taliadoros, Jason and Sharon Erbacher, Restitution: The Laws of Australia (Thomson Reuters, 1st ed, 2014)


van der Waarden, Natalie, Employment Law – An Outline (LexisNexis Butterworths, 2004)


Wallace-Bruce, Nii Lante, Outline of Employment Law (Butterworths, 2nd ed, 1999)
Watterson, Stephen, ‘‘Direct Transfers’’ in the Law of Unjust Enrichment’ (2011) 64(1) Current Legal Problems 435

Young, Peter W, Clyde Croft, and Megan Louise Smith, On Equity (Lawbook Co, 2009)

B Cases

ABL Custodian Services Pty Ltd v Smith [2010] VSC 548
ACN 005 057 349 Pty Ltd v Commissioner of State Revenue [2015] VSCA 332
Aiken v Short (1856) 1 H & N 210; (1856) 156 ER 1180
Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Company Ltd [2008] WASCA 119
Anderson v McPherson [No 2] [2012] WASC 19
Archer v James (1859) 2 B & S 67
Association of Professional Engineers, Scientists and Managers, Australia v Wollongong Coal Limited [2014] FCA 878
Australia and New Zealand Banking Group Ltd v Westpac Banking Corp (1988) 164 CLR 662
Australian and International Pilots Association v Jetstar Airways Pty Ltd [2014] FCA 14
Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199
Australian Education Union v State of Victoria (Department of Education and Early Childhood Development) (2015) 255 IR 341
Australian Financial Services and Leasing Pty Limited v Hills Industries Limited (2014) 253 CLR 560
Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited ( Receivers and Managers appointed) (in liquidation) (Controllers Appointed) (No 3) [2013] FCA 1342

Avon County Council v Howlett [1983] 1 WLR 605

Baltic Shipping Co v Dillon (1993) 176 CLR 344

Bank of New South Wales v Murphett [1983] 1 VR 489

Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd [1980] QB 677

Barton v Armstrong [1976] AC 104

Batchelor v Burke (1981) 148 CLR 448

BGC (Australia) Pty Ltd v Phippard [2002] WASCA 191

Bilbie v Lumley (1802) East 469; (1802) 102 ER 448

Bofinger v Kingsway Group Ltd (2009) 239 CLR 269

Bristow v City Petroleum Ltd [1987] 1 WLR 529

Bristow v Eastman (1820) 170 ER 160

Buller v Harrison (1777) 98 ER 1243

Burke v LFOT Pty Ltd (2002) 209 CLR 282

Campbell v Kitchen & Sons Limited and Brisbane Soap Company Limited (1910) 12 CLR 515

Casey Grammar School v Independent Education Union of Australia (2010) 204 IR 52

Chew v The Queen (1992) 173 CLR 626

Civil Aviation Authority v Jorm (1994) 56 IR 89

Clarke (as trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (in liquidation) [2014] VSC 516

Clarke v Shee and Johnson (1774) 98 ER 1041

Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447

Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd (1994) 182 CLR 51

Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd (2013) 248 CLR 619

Construction, Forestry, Mining and Energy Union v BHP Billiton Nickel West Pty Ltd [2017] FWC FB 217

Conti Sheffield Real Estate v Brailey (1992) 48 IR 1

Corin v Patton (1990) 169 CLR 540

Cowan v Scargill [1985] Ch 270

Crescendo Management Pty Ltd v Westpac Banking Corporation (1988) 19 NSWLR 40

Cumins v Deputy Commissioner of Taxation for the Commonwealth of Australia [2007] WASCA 30

Dale v Sollet (1767) 4 Burr 2133; (1767) 98 ER 112

Dart Industries Inc v Décor Corp Pty Ltd (1993) 179 CLR 101

David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353

Delmere Holdings Pty Ltd v Green [2015] WASC 148

Draper v City of Rockingham (2013) 93 WAIG 1284

Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd [2013] WASCA 36

Equiticorp Finance Ltd (in liq) v Bank of New Zealand (1993) 32 NSWLR 50

Equiticorp Financial Services Ltd v Equiticorp Financial Services Ltd (NZ) (1992) 29 NSWLR 260

Equuscorp Pty Ltd v Haxton (2012) 246 CLR 498

F & G Nominees Pty Ltd v Verdell Pty Ltd [2003] WASCA 290

Fair Work Ombudsman v Glasshouse Mountains Tavern Pty Ltd [2014] FCCA 1115

Fair Work Ombudsman v Jetstar Airways Ltd [2014] FCA 33

Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89
Farm Forestry Finance Pty Ltd v English and English [1997] WASC (Lib No: 970540) (22 October 1997)

Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32

Finch v Telstra Super Pty Ltd (2010) 242 CLR 254

Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd (2005) 63 NSWLR 203

Friend v Brooker (2009) 239 CLR 129

Goliath Portland Cement Company Pty Ltd v McNalley Australia Pty Ltd (No 4) [1993] TASSC 1

Graf v Hope Building Corp (1930) 254 NY 1

Grincelis v House (2000) 201 CLR 321

Health Services Union v Jackson (No 4) (2015) 108 ACSR 156

Hewlett v Allen & Sons [1892] 2 QB 662

Heydon v NRMA Ltd (No 2) (2001) 53 NSWLR 600

Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd [2012] NSWCA 380

Hillsdon Holdings Plc v Pensions Ombudsman [1996] Pens LR 427

Hirschberg v Logica Pty Ltd (2003) 83 WAIG 1043

Hookway v Racing Victoria Limited [2005] VSCA 310

Howe v Earl of Dartmouth (1802) 7 Ves 137

Ideas Plus Investments Ltd v National Australia Bank Ltd [2005] WASC 51

Ideas Plus Investments Ltd v National Australia Bank Ltd [2006] WASCA 215

Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd (2006) 15 VR 87

IWEC Pty Ltd v Commissioner of Taxation (2007) 65 ATR 447

Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 2) (1987) 162 CLR 153

K.A. Albrecht v Seismic Supply International (1989) 69 WAIG 3096
Kelly v Solari (1841) 9 M&W 54; (1841) 152 ER 24
Kerrison v Glyn, Mills, Currie & Co [1912] 81 LJKB 465
Kwok v R (2007) 175 A Crim R 278
Lahoud v Lahoud [2010] NSWSC 1297
Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd [No 3] [2014] WASC 162
Lavert Pty Ltd v Boyd [2013] NSWDC 319
Lindsay Petroleum Company v Hurd, Farewell and Kemp (1874) LR 5 PC 221
Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548
Lumbers v W Cook Builders Pty Ltd (In liq) (2008) 232 CLR 635
MacFarlane v Halperin Fleming & Meertens (2002) 82 WAIG 150
MBP (SA) Pty Ltd v Gogic (1991) 171 CLR 657
Morgan v Ashcroft [1938] 1 KB 49
Morton v Mitchell Products [1996] FCA 828
Moses v Macferlan (1760) 2 Burr 1005; (1760) 97 ER 676
Muschinski v Dodds (1985) 160 CLR 583
National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd (1997) 217 ALR 365
National Mutual Life Association of Australasia Ltd v Walsh (1987) 8 NSWLR 585
Onuoha v PEP Community Services Inc (2011) 91 WAIG 1106
Orix Australia Corp Ltd v M Wright Hotel Refrigeration Pty Ltd (2000) 155 FLR 267
Palmer v Blue Circle Southern Cement Ltd (1999) 48 NSWLR 318
Parkin v Thorold (1852) 51 ER 698
Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221
Peet Limited v Richmond [2011] VSCA 343
Pemberton v Civil Service Insurance Agency Pty Ltd (2009) 89 WAIG 538
Personalised Transport Services Pty Ltd v AMP Superannuation Ltd & Anor [2006] NSWSC 5

Preuss v Australian Prudential Regulation Authority (2005) 60 ATR 1137

Quan Yick v Hinds (1905) 2 CLR 345

R v Byrnes (1995) 183 CLR 501

R v Toohey; Ex parte Attorney-General (NT) (1980) 145 CLR 374

Radploy Pty Ltd t/as Lake Imaging Re Lake Imaging Enterprise Agreement (Imaging Staff - Geelong) 2010 [2011] FWA 39

Ranger Uranium Mines Pty Ltd; Ex parte FMWU (1987) 163 CLR 656

Re Beard; Ex parte the Trustee (1935) 37 WALR 95

Re Hay’s Settlement Trusts [1982] 1 WLR 202

Reiter v Commissioner of Taxation (2001) 113 FCR 492

Retail Employees Superannuation Pty Ltd v Crocker [2001] FCA 1330

Rogers v Ingham [1876] 3 ChD 351

Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516

Sadler v Evans (1766) 4 Burr 1984; (1766) 98 ER 34

Salib v Gakas [2010] NSWSC 505

SBA Music Pty Ltd v Hall (No 3) [2015] FCA 1079

Skyring v Greenwood (1825) 107 ER 1064

Smith v William Charlick (1924) 34 CLR 38

Stack v Dowden [2007] 2 AC 432


State of South Australia v Clarke [2016] SADC 13

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia (2013) 93 WAIG 1431

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia (2014) 94 WAIG 787
The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia (2015) 95 WAIG 1593

The Countess of Bective v Federal Commissioner of Taxation (1932) 47 CLR 417

The State of Western Australia v Hartmann-Nieto [2014] WADC 70

TRA Global Pty Ltd v Kebakoska (2011) 209 IR 453

Turner v Turner [1984] Ch 100

Universe Tankships Inc of Monrovia v International Transport Workers Federation (The Universe Sentinel) [1983] 1 AC 366

VBN v Australian Prudential Regulation Authority [2006] AATA 710

W D & H O Wills (Australia) Ltd v Commissioner of State Taxation (Unreported, Supreme Court of Western Australia, Sanderson M, 13 July 1998)

Williams v North’s Navigation Collieries Ltd [1906] AC 136

Winterton Constructions Pty Limited v Hambros Australia Limited [1991] 101 ALR 363

Woodgate as trustee of the Estate of the Late Mrs Marion McGuiness v Keddie [2007] FCAFC 129

Zobory v Commissioner of Taxation (1995) 64 FCR 86

C Legislation

Commonwealth Powers (Industrial Relations) Act 1996 (Vic)

District Court of Western Australia Act 1969 (WA)

Fair Work (Commonwealth Powers) Act 2009 (SA)

Fair Work (Commonwealth Powers) and Other Provisions Act 2009 (Qld)

Fair Work Act 2009 (Cth)

Fair Work Regulations 2009 (Cth)

Federal Circuit Court of Australia Act 1999 (Cth)

Federal Court of Australia Act 1976 (Cth)
Income Tax Rates Act 1986 (Cth)

Industrial Relations (Commonwealth Powers) Act 2009 (NSW)

Industrial Relations (Commonwealth Powers) Act 2009 (Tas)

Industrial Relations Act 1979 (WA)

Industrial Relations Legislation Amendment and Repeal Act 1995 (WA)

Law Reform (Property, Perpetuities, and Succession) Act 1962 (WA)

Limitation Act 2005 (WA)

Magistrates Court (Civil Proceedings) Act 2004 (WA)

Masters and Servants Act 1823 (Imp) 4 Geo 4, c 34

Masters and Servants Act 1842 (Imp) 6 Vict, c 5

Masters and Servants Act 1868 (Imp) 32 Vict, c 8

Masters and Servants Act 1886 (Imp) 50 Vict, c 20

Masters and Servants Act 1892 (Imp) 55 Vict, c 28

Minimum Conditions of Employment Act 1993 (WA)

Property Law Act 1969 (WA)

Rules of the Supreme Court 1971 (WA)

Superannuation (Resolution of Complaints) Act 1993 (Cth)

Superannuation Industry (Supervision) Act 1993 (Cth)

Superannuation Industry (Supervision) Regulations 1994 (Cth)

Supreme Court Act 1935 (WA)

Truck Act 1899 (WA)

Truck Act Amendment Act 1904 (WA)

D  Other


*Building and Construction General On-site Award 2010*


Explanatory Memorandum, Fair Work Bill 2009 (Cth)

Explanatory Memorandum, Industrial Relations Legislation Amendment and Repeal Bill 1995 (WA)

State Records Office of Western Australia, Colonial Secretary’s Outward Correspondence (CSF), Accession Number (ACC) 49, Vol. 2/644

Superannuation Complaints Tribunal: Determination Number D06-07\129


Commissioner of Taxation: Determination Number TD 2008/9


Commissioner of Taxation: Ruling Number TR 2006/10


Troy Buswell, 'WA stands firm against full federal IR takeover' (Media Statement, 28 January 2009)


Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 July 1899

Western Australia, *Parliamentary Debates*, Legislative Assembly, 13 July 1899

Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 October 1899