HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN:

Redland City Council
Appellant

and

John Michael Kozik
First Respondent

Simon John Akero
Second Respondent

Sarah Akero
Third Respondent

Neil Robert Collier
Fourth Respondent

RESPONDENTS' SUBMISSIONS

Part I: Certification

1. This submission is in a form suitable for publication on the Internet.

Part II: Statement of issues

2. Is there in Australian law a defence of "value received" to a claim of moneys had and received for invalidly levied public imposts paid under a mistake of law? (Respondents' answer: no)

3. Should this Court recognise that invalidly levied public imposts are recoverable at common law as moneys had and received on the basis that it is *prima facie* unjust for public authorities to impose, collect and retain tax without statutory authority? (Respondents' answer: yes)

4. Are special rates or charges invalidly levied pursuant to the *Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld) (**2010 Regulation**) and the *Local Government Regulation 2012* (Qld) (**2012 Regulation**), recoverable in debt pursuant to s 32 of the 2010 Regulation and s 98 of the 2012 Regulation? (Respondents' answer: yes)

Part III: Section 78B notices

5. Notices have been given pursuant to s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Facts

6. There is no dispute as to the primary facts summarised in Part V of the Appellant's Submissions (**AS**).

Part V: Answer to Appellant's argument

Summary

7. The Appellant purported to impose special levies on the Respondents and Group Members in circumstances where it had no statutory authority to do so. The Respondents and Group Members paid the special levies under a mistake of law. The moneys were, accordingly, *prima facie* recoverable as moneys had and received, unless the Appellant could point to circumstances making an order for restitution unjust.

8. The Appellant seeks to do so on the basis that there is a defence of "value received". There is no such defence in Australian law. There is a defence of good consideration which the Appellant could not establish in the present case, because obtaining a benefit by reason of the Appellant's public works was no part of the reason why the Respondents and Group Members paid the special levies.

9. The works were carried out by the Appellant pursuant to its statutory obligations and functions. They were not performed in consideration of any payment by the Respondents and Group Members. The Appellant led no evidence that, but for the imposition of the special levies, the works would not have been carried out (it disavowed change of position). The works fall into no established category where the law recognises an entitlement to payment for a benefit which has not been requested (such as acceptance or necessity).

10. The approach the Appellant now urges upon this Court is contrary to authority and principle. It would subvert the law of restitution (both as to moneys had and received and *quantum meruit*). It would subvert public law principles in permitting a public authority to retain the benefit of taxation extracted *ultra vires* on the basis only that the money had been spent for the ostensible purpose for which it was collected. It would involve the courts in contestable assessments of whether or not particular public works confer a "benefit" on sections of the public; a matter properly the province of the

legislature and executive. It would develop the common law in an unorthodox fashion not supported by any sound analogy and without any clear boundaries. As developed in relation to the Notice of Contention, it would undermine constitutional values.

11. The Court of Appeal rightly treated the defence as a traditional defence of "good consideration" and found that good consideration had not been established. No error has been shown in the Court of Appeal's reasoning. An order for restitution was not unjust in circumstances where the Appellant had no legal right to retain the invalidly levied moneys, and had spent the moneys in performance of its statutory duties and functions thereby conferring benefits on members of the public which they did not request or accept.

The decision of the Court of Appeal

12. The Court of Appeal held that the Respondents and Group Members paid special levies imposed by the Appellant in the belief that they were legally obliged to do so, when they were not, and thus, by reason of a mistake of law.[1] No appeal has been brought from that finding, which the Appellant appears to accept (AS [23]).

13. Payments made under a mistake of law are *prima facie* recoverable as moneys had and received. The mistake itself is sufficient to give rise to a *prima facie* obligation on the part of the recipient to make restitution,[2] because "the recipient has no legal entitlement to receive or retain the moneys".[3] The recipient may displace that *prima facie* obligation by pointing to "circumstances which the law recognises would make an order for restitution unjust".[4]

14. "Value received" is not a circumstance which the law recognises would make an order for restitution unjust; there is no reference to such a defence in any reported case. Rather, the law recognises a defence of good consideration. "Consideration" here is not limited to consideration in a strict contractual sense.[5] It bears the same meaning as in the concept of a total failure of consideration, namely, "the state of affairs *contemplated* as the basis

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[1] Appeal RJ[43] CAB 51.
[2] ***David Securities*** *Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379; *Commissioner of State Revenue (Victoria) v* ***Royal Insurance*** *Australia Ltd* (1994) 182 CLR 51 at 67 per Mason CJ.
[3] *Royal Insurance* at 67 per Mason CJ.
[4] *David Securities* at 379; *Royal Insurance* at 67 per Mason CJ.
[5] *David Securities* at 382; ***Roxborough*** *v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 525 [16] per Gleeson CJ, Gaudron and Hayne JJ; at 555-557 [102]-[104] per Gummow J; ***Equuscorp*** *Pty Ltd v Haxton* (2012) 246 CLR 498 at 517 [32] per French CJ, Crennan and Kiefel JJ; at [134] per Heydon J; Appeal RJ[51] CAB 52.

or reason for the payment".[6] The contemplation referred to is that of the payer,[7] albeit that the matter is ascertained objectively.[8]

15. The Court of Appeal rejected the pleaded case[9] of good consideration.[10] It held, with respect correctly, that the "state of affairs" existing in the payers' minds as the basis or reason for the payment was that they were obliged to pay the special charges as the Appellant had levied.[11] The Court considered it immaterial that the Appellant spent the money providing services even if for the payers' benefit, because "consideration in this context means the matter considered by the payer informing the decision to pay, rather than any benefit to the payer which subsequently ensued."[12] The Court also held that the Appellant's argument was unpersuasive in light of the fact that Australian law does not recognise a general right to remuneration for work that increases the value of another's property, without a request, actual or implied, to do so.[13]

There is no defence of "value received" in Australian law

16. Confronted with the problem that it cannot show a defence of good consideration in accordance with orthodox principles, the Appellant now seeks to advance its defence as one of "value received". It seeks to cast "value received" as merely a good consideration defence under another label ("for the avoidance of confusion with contractual principles"): AS [47].

17. There is, in truth, no defence of "value received" in Australian law. The concept of "good consideration" in this context is not limited to contractual consideration. The

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[6] Birks, *An Introduction to the Law of Restitution* (1985), p. 223 (emphasis added); ***Baltic Shipping*** *Co v Dillon* (1993) 176 CLR 344 at 389 per McHugh J; *David Securities* at 382; *Roxborough* at 525 [16] per Gleeson CJ, Gaudron and Hayne JJ; at 557 [104] per Gummow J; *Equuscorp* at 517 [31] per French CJ, Kiefel and Crennan JJ.

[7] *David Securities* at 382; ***Ovidio Carrideo*** *Nominees Pty Ltd v The Dog Depot Pty Ltd* [2006] VSCA 6; (2006) VConvR 54-713 at [16], [20]-[21] (Chernov JA); at [28]-[29] (Nettle JA)

[8] *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2006) 63 NSWLR 203 at 252 [239] (Mason P, Sheller and Hodgson JJA agreeing) (issue not considered on appeal to the High Court).

[9] First Further Amended Counterclaim filed on 2 March 2020 at [23(c)] (Respondents' Book of Further Materials (**RFM**) 28), incorporated by reference into the First Further Amended Defence at [47] (RFM 13).

[10] Appeal RJ[48]-[63] CAB 52-55.

[11] Appeal RJ[60] CAB 55.

[12] Appeal RJ[61] CAB 55, referring to *David Securities* at 382. See also *Baltic Shipping* at 351 per Mason CJ; *Ovidio Carrideo* at [28] per Nettle JA

[13] Appeal RJ[62] CAB 55, referring to ***Stewart*** *v Atco Controls Pty Ltd (in liq)* (2014) 252 CLR 307 at 326 [47] per Crennan, Kiefel, Bell, Gageler and Keane JJ; *BMW Australia Ltd v* ***Brewster*** (2019) 269 CLR 574 at 646 [194] per Edelman J. See also ***Lumbers*** *v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635 at 662-663 [78]-[80] per Gummow, Hayne, Crennan and Kiefel JJ; *Friend v Brooker* (2009) 239 CLR 129 at 141 [7] per French CJ, Gummow, Hayne and Bell JJ; *Marriott Industries Pty Ltd v Mercantile Credits Ltd* (1991) 160 LSJS 288 at 297 per King CJ; ***Falcke*** *v Scottish Imperial Insurance Co* (1886) 34 Ch D 234 at 248 per Bowen LJ.

word "consideration" is nonetheless important. It has a well-understood meaning in restitution law which is not synonymous with "value" or "benefit".[14] The authorities make clear that a benefit will only constitute good consideration for a payment if it was *contemplated by the payer* as the *reason* for making the payment (see [14] above).

18. This is apparent from the two intermediate appellate authorities on which the Appellant relies at AS [45]. In *Ovidio Carrideo*, a tenant under a retail lease had made rent payments for some years, despite the landlord having failed to provide the tenant with a disclosure document. Under the relevant statute, the tenant was "not liable to pay the rent attributable to the period before the landlord gave the tenant a copy of the disclosure statement". The Victorian Court of Appeal held that this meant the rent was not payable during that period as a matter of contract.[15]

19. The tenant had made the payments under a mistake of law and was thus *prima facie* entitled to restitution for moneys had and received. However, the landlord had a defence of good consideration. That was not simply because the tenant had obtained *a* benefit (exclusive possession and use of the premises) as a result of having made the payments. It was because the tenant gained the benefit "as a *quid pro quo* for the payments in question" and thus "from its point of view", it received good consideration for its payments.[16] As Nettle JA put it: "in this case the respondent got the benefit of the use and occupation for the demised premises in return for the rent which it paid. As I see it, that is the benefit which it had in view – the benefit for which it bargained – when it agreed to pay the rent."[17]

20. The reasons of the Victorian Court of Appeal acknowledge that there was a sense in which the basis for the tenant's payments was not as it had contemplated; the tenant understood the payments to be pursuant to a contractual obligation when in truth it had no such obligation.[18] In that sense, the decision may be seen as an example of a partial but not total failure of consideration.

21. The Court of Appeal held further that an additional reason for concluding that it would not be unjust for the landlord to retain the money paid under a mistake was that the

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[14] *Contra* AS [50].
[15] *Ovidio Carrideo* at [22] per Chernov JA; at [26] per Nettle JA; Ashley AJA agreeing with both at [53].
[16] Ibid. at [21] per Chernov JA.
[17] Ibid. at [33] per Nettle JA. See also at [56] per Ashley JA.
[18] See, e.g., ibid. at [30] per Nettle JA.

landlord would have a sound claim against the tenant for use and occupation of the premises otherwise, in an amount "broadly equal to the rent reserved under the lease".[19] The tenant had occupied the premises knowing that the benefits of occupation were not intended as a gift; in the absence of an enforceable rent covenant the landlord could itself recover a reasonable fee for the tenant's occupation.[20] Viewed in this way, the "defence" of good consideration recognises (or at least operates consistently with) a counter-restitutionary claim,[21] such as was pleaded (but failed) in the present case.[22]

22. In *Adrenaline*,[23] the plaintiff entered into a contractual licence with the defendant council to hold events at Mount Panorama racing circuit. The council charged fees under the licence which it was not permitted to charge under statute. The NSW Court of Appeal held that the plaintiff had received good consideration for the licence fees it paid because it had "received precisely what it bargained for".[24] Again, the decision did not turn upon the mere receipt of value by the plaintiff, but upon the receipt of value *which formed the basis on which the payments were made*, from the plaintiff's perspective.

23. In the present case, a defence of good consideration (whether described as "value received" or otherwise) is not available. The Respondents and Group Members paid the special levies under the mistaken understanding that they were legally obliged to do so. It was not put to any of the Respondents in cross-examination that obtaining the benefit of the Appellant's works was any part of the reason why they paid the special levies. Their only reason to make the payments was the discharge of their legal liability to do so. That was the relevant "consideration" and it totally failed.[25]

24. Nor, unlike in *Ovidio Carrideo*,[26] does the Appellant have a good counter-restitutionary claim for its expenses in carrying out works. The uncontroversial facts are as follows. The Appellant carried out works upon Crown land[27] which it was both authorised *and*

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[19] Ibid. at [22] per Chernov JA; at [34]-[50] per Nettle JA.
[20] Ibid. at [41] per Nettle JA; at [22] per Chernov JA.
[21] Edelman and Bant, *Unjust Enrichment* (2nd ed. 2016), at 365.
[22] See footnote 9 above.
[23] ***Adrenaline*** *Pty Ltd v Bathurst Regional Council* (2015) 97 NSWLR 207.
[24] Ibid. at 225 [86] per Leeming JA (with whom Macfarlan and Ward JJA agreed).
[25] ***Woolwich*** *Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 at 198G per Lord Browne-Wilkinson.
[26] It would appear that in *Adrenaline* the council would also have had a good counter-restitutionary claim upon the facts, albeit that the Court did not conduct that analysis in determining the case.
[27] Primary RJ[3] CAB 8 (footnote 4).

required to carry out pursuant to its statutory functions and obligations.[28] The Appellant funded the works in part from the special levies it collected and in part from its general funds.[29] The Appellant did not plead, and led no evidence to the effect that, but for the invalid levies, it would not have undertaken the works.

25. In these circumstances, on what basis could the Appellant have sustained a counterclaim in restitution? The mere conferral of a benefit – not requested, consented to, or acquiesced in by the Respondents and Group Members, and not a benefit they were able to reject – could not possibly give rise to a liability on their part.[30] That is because, as Bowen LJ explained in *Falcke*, in a passage which remains sound in principle, "Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will."[31]

This Court should not now create a defence of "value received" in respect of invalidly levied public imposts

26. As submitted above, there is no defence of "value received" in Australian law. The Appellant's submissions must accordingly be read as inviting this Court now to create such a defence to a claim at least in the context of invalidly levied public imposts. It is unclear if the Appellant urges the more general recognition of such a defence. The Court should decline that invitation, whatever be its reach, for the following reasons.

27. *First*, the defence cannot be justified on the basis of a development of the common law by analogy in accordance with traditional judicial method. The Appellant attempts to do so by submitting that (AS [51]):

(a) consideration in the case of private agreements serves to "show correlation" between the payment and the value received; and

(b) in the context of wrongly levied imposts, such "correlation" is shown by considering the "statutorily-defined purpose of the impost; whether the charges

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[28] In respect of Aquatic Paradise and Raby Bay, the Appellant was required to undertake the works by the *Coastal Protection and Management Act 1995* (Qld), s 121; it admitted this (see Amended Rejoinder filed on 4 June 2020 at [8(a)], [9(a)], [16(a)] and [17(a)] (RFM 65, 67)). In respect of Sovereign Waters, it was obliged to undertake the works pursuant to its general government obligations under the *Local Government Act 2009* (Qld); again it admitted this (see Amended Rejoinder at [12(a)] and [13(a)] (RFM 66)).

[29] First Further Amended Counterclaim filed on 2 March 2020 at [2(b)(vi)], [5(b)(vi)], [13(b)(vi)] (RFM 14, 19-20, 23-25).

[30] See the authorities referred to at footnote 13 above.

[31] *Falcke* at 248 per Bowen LJ.

were in fact so spent; and whether, in the case of the particular claimant, they received a benefit of the nature which the statute defined".

28. The first problem with the argument is its starting point. Consideration in the case of private agreements does not serve to show "correlation" between a payment and value received; rather, in that context as in others, "consideration" as explained by the authorities is concerned with the *reason* why a payment is made, objectively assessed, but from the perspective of the payer: see [14] above.

29. Thus, to take an example referred to by Gummow J in *Roxborough*,[32] where a party pays a witness conduct money tendered with a subpoena ad testificandum and the case subsequently settles before trial, the party is entitled to recover the money as money had and received, on the basis that the consideration (not contractual) has failed. The consideration is referable to the reason for payment, which does not necessarily involve or turn on the receipt of "value" or a benefit.

30. Even in a contractual case, it is too simplistic to see consideration as merely a correlation between a payment and value received. An example considered by the Court in *David Securities* makes the point.[33] The plaintiff bought a car from the defendant, unaware that the car had been stolen before it came into the defendant's possession. The defendant resisted the claim for repayment of the price on the basis that the plaintiff had used the car for several months (i.e., argued that there was not a total failure of consideration, or put another way, that the plaintiff had received good consideration). This was dismissed on the basis that the plaintiff had not received "any part of that which he contracted to receive – namely the property and right to possession". There is a correlation between the payment and the value received; but for the payment the plaintiff would not have enjoyed the use of the car. But the use of the car was not the *reason* why the plaintiff made the payment.

31. Further, the Appellant's posited test of "correlation", when applied to the case of wrongly levied imposts and likewise if applied more generally, is of uncertain application and unclear boundaries. Take, for example, the case of a person who paid the special levies but then sold their property after the works commenced but prior to their completion. On the Appellant's case, the extent to which that person would have

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[32] *Roxborough* at 555-556 [102] per Gummow J, referring to *Martin v Andrews* (1856) 7 El & Bl 1; 119 ER 1148.
[33] *David Securities* at 382-383, referring to *Rowland v Divall* [1923] 2 KB 500.

a good claim for moneys had and received would depend upon whether at the time of sale the works had advanced to such a stage as to confer "value" on the person, a fact-specific enquiry untethered to any sound reason in principle for treating different ratepayers differently. What if the special levies are used to fund canal works which are themselves required because, due to prior negligence of the council, part of the canal has fallen into disrepair? To what granular level must the Court enquire on each item of expenditure in an overall program of work? If components of the works in truth add no value to the ratepayers, should the council be permitted to retain moneys spent on them? To what extent is the Court to examine, for example, the reasonableness of the terms of the contracts between the council and its works contractors? To what extent should the Court reduce the measure of value to account for benefits conferred on the community generally? Courts are not well-placed to engage in enquiries as to such matters, but they will be inevitable if the Appellant's novel defence is recognised.

32. This shows that there is no neat analogy between "consideration", in the sense in which that term is used in the law of restitution, and "value received" whether considered in general or in the specific context of invalid levies spent for the public benefit.

33. *Secondly*, the defence is without any support in authority. The Appellant has not cited any decision, in any common law or other jurisdiction anywhere in the world, in which a public authority is able to retain invalid levies only on the basis that they have been spent for the statutory purpose for which they were collected.

34. The Appellant cites the authors of *Mason and Carter* in support of its case: AS [52], [54(b)], [57(c)].[34] In the passage referred to, the authors discuss recovery of "an invalid licence fee *or other impost*" by a taxpayer. The authors in fact provide no instance of a case where it is an "other impost" rather than an invalid licence fee that is in play. They do not conduct any analysis of the very different considerations that may apply to a fee imposed by a public authority for a service requested, as opposed to an "other impost" when, by definition, taxation is involved.[35] The only authority they cite is the decision of Leeming JA in *Adrenaline*, whose analysis was not only limited to an invalid licence fee pursuant to a contract, but also was squarely framed as a good consideration defence

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[34] Mason, Carter and Tolhurst, ***Mason and Carter**'s Restitution Law in Australia* (4th ed. 2021) at 911 [2041].
[35] *Matthews v Chicory Marketing Board (Vict.)* (1938) 60 CLR 263 at 276 per Latham CJ; *Harper v Victoria* (1966) 114 CLR 361 at 377 per McTiernan J; at 382 per Owen J; ***MacCormick** v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 639 per Gibbs CJ, Wilson, Deane and Dawson JJ; *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 467.

and not as some broader "value received" defence.[36] With respect, the authors of *Mason and Carter* offer no coherent reason why an "other impost" should not be recoverable in full by the taxpayer. While the authors assert that where an *ultra vires* impost is the result of "technical breaches" and not a fundamental absence of power, "[r]espect for the constitutional principles underpinning the usual *Woolwich* situation does not require recovery", that is one of the very issues that must be grappled with, and they in no way explain how their extension of the so-called "value received" defence into the field of taxation imposed without valid statutory authority cannot but undermine the constitutional principles involved (see [59]*ff* below).[37] Nor do the authors grapple with the inherent tension between a broad concept of "value received" which is a "direct and comparable benefit", and what they elsewhere (correctly) say about the limits around recovery of remuneration for unrequested work that increases the value of another's property.[38]

35. Contrary to AS [54(b)], the passage of *Mason and Carter* relied upon by the Appellant has not "found favour with lower courts". *Adrenaline* as noted above was a contract case. The two cited decisions of the NSW Land and Environment Court similarly concerned fees paid to a local council for services provided under contract or upon request.[39] None of the three decisions refer to that part of the *Mason and Carter* passage concerning recovery of "other imposts" (not in the nature of fees for service).[40]

36. *Thirdly*, the defence would create incoherence in the common law.[41] As already submitted, it is inconsistent with the long-standing principle that, as a general matter, the bare fact of conferral some benefit upon another does not create a right to remuneration for the expenditure in providing the benefit. It is also inconsistent with the

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[36] *Adrenaline* at [78] ("the Council maintained that there was a 'good consideration' defence, because the payments were made pursuant to a contract); [83] ("enjoyment of the right for which [payment of the invalid licence fee] was consideration"); [84] ("Trackcorp received precisely what it bargained for"); [86] (similar).
[37] *Cf* Edelman and Bant at 308. The writings cited at footnote 226 of *Mason and Carter* do not grapple with the issue. See Field, *The Effect of an Unconstitutional Statute* (2002) at 251-254; Law Commission, *Restitution: Mistake of Law and Ultra Vires Public Authority Receipts and Payments*, Law Com No 227 (1994) at 121-123 [10.45]-[10.48].
[38] *Mason and Carter* at 310 [810]. See the authorities referred to in footnote 13 above.
[39] ***Meriton Apartments*** *Pty Ltd v Council of the City of Sydney (No 3)* (2011) 80 NSWLR 541 (Pepper J) (fee paid for provision of a works zone on the road outside construction sites); ***Nash Bros*** *Builders Pty Ltd v Riverina Water County Council (No 2)* [2015] NSWLEC 156 (Pepper J) (fee paid by developer of a retirement village for provision of a potable water supply for use by residential villas in the retirement village).
[40] *Adrenaline* at [83]; *Meriton Apartments* at [172]; *Nash Bros* at [201].
[41] See *Lumbers* at 662 [80] per Gummow, Hayne, Crennan and Kiefel JJ; *Breen v Williams* (1996) 186 CLR 71 at 115 per Gaudron and McHugh JJ.

fundamental principle of public law that no tax can be levied by the executive government without parliamentary authority; a principle which traces back to the *Bill of Rights Act 1688* (Imp) and is referred to further under the Notice of Contention below.[42]

37. The Appellant seeks to situate its novel defence within the general category of "matters which would make it unconscionable or inequitable for the plaintiff to recover" (AS [39]), or a factor by reason of which to order restitution would "create, rather than avoid, unjust enrichment" (AS [70]; see also AS [55]). However, as this Court held in *David Securities*, "it is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair or unconscionable."[43] Recovery instead depends on the existence of a recognised category of vitiating factor.[44] The same is true of defences. That is not to say that novel defences cannot be recognised in an appropriate case. However, any posited novel defence must be able to be reconciled with other principles of restitution law and the common law more generally.

38. Nor can the defence be justified by reference to cases concerning the conferral of an "incontrovertible benefit" (AS [57(a)]); a "misleading label used for cases where a necessary expense has been saved".[45] A benefit will only be "incontrovertible" in the relevant sense if "it is clear on the facts … that had the plaintiff not paid, the defendant would have done so. Otherwise, the benefit is not incontrovertible."[46] The benefits here are not of that character. Nor can the present case be seen as analogous to any of the other categories in which the law allows a claim for remuneration by persons who have conferred an unrequested benefit that rescues or preserves the property of another, such as maritime salvors, bailees, tenants, trustees and liquidators.[47]

39. The Appellant asserts that the order of the Court below unjustly enriches the Respondents and Group Members. It does not; it simply requires the return to them of levies to which the Appellant was never entitled. It is no defence to a claim for restitutionary relief to say that the plaintiff was not ultimately impoverished; the claim

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[42] *Royal Insurance* at 69 per Mason CJ; *Commissioner of Stamps (SA) v* ***Telegraph Investment Co*** *Pty Ltd* (1995) 184 CLR 453 at 466-467 per McHugh J and Gummow J.
[43] *David Securities* at 379 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ.
[44] *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 648-649 [212]-[213] per Nettle, Gordon and Edelman JJ.
[45] Edelman and Bant at 67; ***Peel*** *(Reg. Municipality) v Canada* [1992] 3 SCR 762 at 796 per McLachlin J (delivering the judgment of La Forest, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ, and with whom Lamer CJ agreed).
[46] *Peel* at 796 per McLachlin J.
[47] *Brewster* at 647 [197] per Edelman J.

is not one for compensation for loss.[48] Rather, the question (as the Appellant acknowledges at AS [63]) is: as between the Appellant and the Respondents and Group Members, who has the superior claim?[49] The answer to that question is: the Respondents and Group Members. The Appellant was never legally entitled to receive the special levies.[50] It cannot seek to retain them upon a basis that the law does not recognise, namely conferral of an unrequested, unnecessary benefit which it was legally obliged to provide in any event.

No error in the decision of the Court of Appeal

40. Contrary to what is submitted at AS [62]:

(a) the Court of Appeal did not import "contractual analysis into public law" or treat the basis for restitutionary recovery as tied to its historical quasi-contractual origins. The Court of Appeal recognised that "consideration" in the context of a good consideration defence was not used in its contractual sense.[51] It did not speak in terms of a bargain but (as was required by the authorities) asked what was "the matter considered by the payer informing the decision to pay";[52]

(b) the Court of Appeal did not treat the mistake of law as "wholly subsuming the question of what benefit the payers derived". Rather, the Court of Appeal recognised it would be inconsistent with the authorities and inconsistent with principle to look at the matter merely in terms of a benefit that subsequently ensued from the payments (as opposed to what informed the decision to pay);[53]

(c) the Court of Appeal was correct not to simply "take account of any benefit actually received" in light of the authorities and applicable principles.

41. The Appellant further submits it was an error to enquire into the state of affairs in the mind of the payer where, because the payment is of an impost made under a mistake, "already there is a lack of voluntariness in the transaction" (AS [63]; see also AS [56(a)]). These submissions reveal that a defence of good consideration may rarely succeed in some types of invalid impost cases. However, the fact that a recognised

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[48] *Royal Insurance* at 71, 75 per Mason CJ; at 90 per Brennan J (Toohey and McHugh JJ agreeing); *Roxborough* at 528 [23], 529 [26] per Gleeson CJ, Gaudron and Hayne JJ; *Ovidio Carrideo* at [48] per Nettle JA.
[49] *Roxborough* at 529 [27] per Gleeson CJ, Gaudron and Hayne JJ.
[50] *Royal Insurance* at 67 per Mason CJ.
[51] Appeal RJ[51] CAB 52.
[52] Appeal RJ[61] CAB 55.
[53] Appeal RJ[61] CAB 55.

defence may not succeed in a given class of case is not a reason to invent a new defence for that class.

Conclusion

42. For the reasons submitted above, the posited "value received" defence does not exist in Australian law; is unsupported by authority; is inconsistent with long-established principle and would create incoherence in the law. The Court of Appeal was correct to reject the defence. On that basis, the appeal should be dismissed.

Part VI: Respondents' argument on notice of contention and cross-appeal

Notice of contention

Summary

43. The appeal should be dismissed on the additional basis that the principle in *Woolwich* should be accepted by this Court as part of the common law of Australia. The *Woolwich* principle is relevant both to the basis for the *prima facie* right of restitution and to the availability of defences.

44. In *Woolwich*, it was held that tax paid pursuant to *ultra vires* regulations was *prima facie* recoverable from the Revenue even in the absence of any mistake on the part of the taxpayer. The principle has subsequently been extended to encompass any wrongly extracted tax or levy.

45. The *Woolwich* principle:

(a) has been adopted by multiple lower court decisions on the basis that this Court is likely to recognise it as part of the common law of Australia;

(b) has the support of academic opinion;

(c) is sound in principle and policy; and

(d) is the natural counterpart of the constitutional system under which appropriation of monies by public authorities may occur only under valid statute or instrument.

The *Woolwich* principle

46. In *Woolwich*, the plaintiff building society paid instalments of certain taxes under protest, considering that the regulation under which they were payable was invalid. It challenged the regulation and succeeded. The Revenue repaid the taxes with interest from the date of the plaintiff's judgment, but not earlier. The plaintiff sought to recover

interest running from the dates of the payments. The House of Lords, by majority, found in the plaintiff's favour. While the regulations in the *Woolwich* case were held to have been made *ultra vires*, the House of Lords made clear that its reasoning applied to any wrongful extraction of a tax or other levy.[54]

47. *Woolwich* was undoubtedly a development in the law of the United Kingdom. However, it was not a radical development (*cf* AS [67(c)]). The Law Lords in the majority reasoned by analogy from established cases in which restitution on the basis of moneys had and received was available, including moneys paid under compulsion,[55] moneys paid to public officials demanded *colore officii*,[56] and moneys paid for consideration which had wholly failed.[57] The House of Lords also referred to *obiter dicta* of Atkin LJ,[58] and of Dixon CJ in this Court,[59] doubting the need to establish compulsion in order to recover money wrongly demanded from a public authority.[60] Their Lordships referred to persuasive authority from other common law jurisdictions as to the rationale in principle and policy that would underlie the recoverability of such payments.[61]

48. The *Woolwich* principle remains good law in the United Kingdom. It continues to be relied upon, including since the abolition there of the mistake of fact/law distinction,[62] at least as recently as 2020.[63]

This case is a suitable vehicle for consideration of the *Woolwich* principle

49. The Appellant submits that this case is not the appropriate vehicle for this Court to consider the matters raised in the Respondents' Notice of Contention (AS [66]). It advances three reasons, none of which should be accepted. *First*, the Appellant submits

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[54] *Woolwich* at 177F-G per Lord Goff; at 198A-C per Lord Browne-Wilkinson; at 205B per Lord Slynn; see also at 196C-D per Lord Jauncey (in dissent).
[55] Ibid. at 164G, 165C per Lord Goff; at 197H-198C per Lord Browne-Wilkinson; at 204E per Lord Slynn.
[56] Ibid. at 164H-165B per Lord Goff; at 198B per Lord Browne-Wilkinson; at 204E per Lord Slynn.
[57] Ibid. at 166C per Lord Goff; at 197F-H per Lord Browne-Wilkinson; at 201F, 202B, 202F per Lord Slynn.
[58] *Attorney-General v Wilts United Dairies Ltd* (1921) 37 TLR 884 at 887.
[59] *Mason v New South Wales* (1959) 102 CLR 108 at 117.
[60] *Woolwich* at 167E-168A per Lord Goff; at 202D, 202H per Lord Slynn.
[61] *Woolwich* at 172H per Lord Goff; at 198D-F per Lord Browne-Wilkinson; at 203C-F per Lord Slynn (referring to the decision of Holmes J in *Atchison, Topeka & Santa Fe Railway Co v O'Connor*, 223 US 280 (1912) at 285-286; *Woolwich* at 175G-176C per Lord Goff; at 203A per Lord Slynn (referring to the decision of Wilson J (in dissent) in ***Air Canada*** *v British Columbia* (1989) 59 DLR (4th) 161 at 169).
[62] *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349.
[63] *Vodafone Ltd v The Office of Communications* [2020] EWCA Civ 183; see also *Littlewoods Retail Ltd v HM Revenue and Customs* [2010] EWHC 2771 (Ch); *Littlewoods Retail Ltd v HM Revenue and Customs* [2010] EWHC 1071 (Ch); *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] 2 AC 337; *Littlewoods Retail Ltd v HM Revenue and Customs* [2014] EWHC 868 (Ch); *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2014] EWHC 4302 (Ch); *Littlewoods Retail Ltd v HM Revenue and Customs* [2015] 3 WLR 1748.

that the Respondents' case has always been put first and foremost as a claim under a mistake of law (AS [66(a)]). In circumstances where the *Woolwich* principle has not previously been considered by this Court, and where there was a clear (and for the most part, admitted) mistake of law, it is not surprising that the Respondents' first point was mistake of law. It is fair to say that the Respondents placed greater emphasis on *Woolwich* on appeal than at first instance;[64] but no point was taken against them on that basis before the Court of Appeal. The Court of Appeal declined to address *Woolwich*, on the basis that the Appellant's defence to the mistake of law claim failed and would not be any stronger against a *Woolwich* claim.[65] To permit the Respondents to agitate the point before this Court causes no prejudice to the Appellant.

50. Further, and contrary to the Appellant's submission at AS [67(a)], it is not the case that a plaintiff must be put to an election as to whether to rely upon *Woolwich* or a mistake of law. In some cases a plaintiff may need to elect between the two, for example in order to take advantage of a more generous limitation period in the case of a mistake of law. However, that will not be so in all cases. There is no reason why, in principle, there may not be more than one "unjust factor" vitiating a payment made by a plaintiff in a particular case.[66]

51. *Second*, the Appellant submits that the *Woolwich* decision left open the possibility of defences (AS [66(b)]). That is so, but it does not make this case an unsuitable vehicle. It has subsequently been held in England that a change of position defence is not available to a *Woolwich* claim, on the basis that to recognise such a defence would "stultify the policy reason for ordering restitution".[67] In the Respondents' submission, the defence of "value received" as advanced by the Appellants would similarly stultify the policy reason for ordering restitution in the case of an invalidly levied impost, which is another reason to hold such a defence to be unavailable.

52. *Third*, the Appellant submits that consideration of *Woolwich* needs to occur in the context of the *Constitution*, in particular whether or how the principle might operate where tax is paid pursuant to unconstitutional legislation (AS [66(c)]). There is no

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[64] Notice of Cross-Appeal dated 22 October 2021 at [3(c)] and [4] (AFM 50), Respondents' Outline of Argument on Appeal and Cross-Appeal dated 31 January 2022 at [69]-[89] (RFM 70-75).
[65] Appeal RJ[47] CAB 51-52.
[66] Edelman and Bant at 127.
[67] *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2014] EWHC 4302 (Ch) at [309]-[315] (Henderson J). See Edelman and Bant at 307.

reason to defer consideration of the *Woolwich* principle to such a case. The Respondents are not suggesting that this Court reason from *Woolwich* to a right of recovery founded in the *Constitution*. *Hornsby Shire Council v Commonwealth* (S202/2021) may not prove to be a suitable vehicle for consideration of *Woolwich*; the right to repayment if the scheme there is held unconstitutional does not appear to be in dispute and the Court did not require oral submissions on restitution from the defendants or interveners.[68]

53. There are compelling practical reasons for the Court to consider the *Woolwich* principle now. As set out further below, lower courts have been predicting this Court's ultimate adoption of the principle. Acceptance of the principle would obviate the need for a plaintiff to plead and prove mistake of law; a benefit of some significance particularly in a class action context where such a mistake presently needs to be proved on a group-wide basis. The principle would apply in cases of retrospective amendment where a mistake of law may be unavailable.[69] In other cases, plaintiffs may wish to advance either a *Woolwich* case or mistake of law or both, depending upon the legitimate juridical advantages each may carry, such as limitation periods and available defences.

This Court should recognise the *Woolwich* principle as part of the law of Australia

54. Adoption of the *Woolwich* principle is supported by precedent, principle and broader constitutional considerations.

55. As to precedent, beginning with this Court, as noted above the House of Lords in *Woolwich* itself drew support from an *obiter dictum* of Dixon CJ.[70] More recently, in *Royal Insurance*, Mason CJ, referring to *Woolwich*, considered it "perhaps possible that the absence of any legitimate basis for retention of the money by the Commissioner might itself ground a claim for unjust enrichment without the need to show any causative mistake".[71] Reference was also made to *Woolwich*, without disapproval, in *British American Tobacco Australia Ltd v Western Australia*,[72] and in *obiter* remarks of McHugh and Gummow JJ, albeit in a statutory construction context, in *Telegraph*

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[68] *Hornsby Shire Council v Commonwealth of Australia* [2023] HCATrans 44; [2023] HCATrans 45.
[69] *Royal Insurance* at 89-90 per Brennan J, with whom Toohey and McHugh JJ agreed; at 100 per Dawson J; *contra* Mason CJ at 67 (finding a mistake of law).
[70] *Mason v New South Wales* (1959) 102 CLR 108 at 117.
[71] *Royal Insurance* at 67 per Mason CJ.
[72] (2003) 217 CLR 30 at 53 [43] per McHugh, Gummow and Hayne JJ; see also at 42 [7] per Gleeson CJ.

Investment Co.[73] No authority of this Court stands against the adoption of the *Woolwich* principle.[74]

56. In ***State Bank*** *of New South Wales Limited v Commissioner of Taxation*,[75] Wilcox J dealt with a claim advanced on the basis of the *Woolwich* principle.[76] The principal issue before his Honour was interest, but he remarked that "I see no reason why the reformulation of the law effected in *Woolwich* should not be adopted in Australia. It does no more than recognise the realities of the position in which taxpayers may find themselves."[77] In ***SCI Operations*** *v Commonwealth*,[78] a majority of the full Federal Court referred, with approval, to the reasoning of Wilcox J in *State Bank* and referred more generally to *Woolwich* as informing the Court's exercise of discretion to award interest under statute in the case of a restitutionary claim.[79] Other judges of the Federal Court have expressed the view that it is likely that *Woolwich* will be followed in Australia.[80] As Edelman and Bant note,[81] many other cases have adopted approaches consistent with the *Woolwich* principle, including cases emphasising the duty of taxing authorities to collect the correct amount of tax, "not a penny more, not a penny less"[82], and construing taxation legislation consistent with that duty.[83]

57. As to principle, academic opinion also favours adoption of the Woolwich principle in Australia.[84] For the reasons set out in *Woolwich* itself, referred to at [47] above, the *Woolwich* principle is coherent with other recognised grounds upon which a payment will be vitiated, including failure of consideration and compulsion. The doctrine "recognises the special position of the Revenue; the inherent power imbalances and the

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[73] *Telegraph Investment Co* at 465-466.
[74] *Mason and Carter* at 903 [2032(3)].
[75] (1995) 62 FCR 371.
[76] In the *State Bank* case, similar to the facts in *Woolwich*, the bank had paid disputed amounts under protest into a particular bank account controlled by the Commissioner.
[77] *State Bank* at 378E.
[78] (1996) 69 FCR 346.
[79] *SCI Operations* at 369E-372E, 377F-378E per Beaumont and Einfeld JJ.
[80] *Chippendale Printing Co Pty Ltd v Commissioner of Taxation* (1996) 62 FCR 347 at 366 per Lehane J; *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634 at [145]-[148] (Murphy J).
[81] Edelman and Bant at 310.
[82] *Lighthouse Philatelics Pty Ltd v Commissioner of Taxation* (1991) 32 FCR 148 at 155 (Lockhart, Burchett and Hill JJ).
[83] *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [122]-[143] (Hansen and Tate JJA and Robson AJA). See also *Telegraph Investment Co* at 466-467 per McHugh and Gummow JJ.
[84] *Mason and Carter* at 902-905 [2032]-[2034]; Edelman and Bant at 306-310; Cato, *Restitution in Australia and New Zealand* (1997) at 234-235; Butler, "Restitution of Overpaid Taxes, Windfall Gains and Unjust Enrichment: *Commissioner of State Revenue v Royal Insurance Australia Ltd*" (1995) 18 UQLJ 318; Voon, "Restitution from Government in Australia: *Woolwich* and its Necessary Boundaries" (1998) 9 PLR 15; Wong, "The High Court and the *Woolwich* principle: Adoption or another bullet that cannot be bitten?" (2011) 85 ALJ 597.

repugnancy to the rule of law if government bodies are permitted to retain monies to which they are not entitled".[85] It also reflects the "wider public law principle of legality, that bodies invested with power by the state must respect the rule of law, and adhere to the limits of the jurisdictions conferred upon them."[86]

58. Contrary to the position advanced by the Appellant (AS [67]), the availability of mistake of law as a basis for restitution is no reason not to adopt the principle in *Woolwich*. As submitted above, the two claims may have different areas of operation and different defences may apply. Mistake of law has not subsumed the field in the United Kingdom (see [48] above); both doctrines continue to exist side by side.[87] Nor, contrary to the Appellant's submission at AS [67(c)], is there any difficulty applying *Woolwich* in an Australian context. The reference in Lord Goff's speech to "common justice" is consistent with the equitable principles underlying the modern law of restitution;[88] the existence of a right of recovery for payments made under mistake of law only underscores the soundness of the *Woolwich* principle;[89] and consistency with EU law is a minor aspect of Lord Goff's speech.

59. As to broader constitutional considerations,[90] the *Woolwich* principle is also consistent with the fundamental principle of public law, referred to at [36] above, that no tax can be levied by the executive government without parliamentary authority. This is reflected in constitutional arrangements and structures at Commonwealth, State and local levels. At the Commonwealth level, the *Constitution* vests the power to make laws with respect to taxation in the Parliament (s 51(ii)). No power of taxation is vested in the Executive, and the taxation power does not support an "incontestable" tax, i.e. where the criteria attracting liability are at the unreviewable discretion of the Executive.[91] This reflects

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[85] Wong at 604; see *Woolwich* at 172 per Lord Goff.
[86] Mitchell, "Unjust Enrichment" in Burrows (ed.) *English Private Law*, (2nd ed. 2007), quoted in *Test Claimants in the Franked Investment Income Group Litigation v Revenue and Customs Commissioners* [2012] 2 AC 337 at 373F [74] per Lord Walker.
[87] Edelman and Bant at 307.
[88] *Roxborough* at 545-555 [76]-[100] per Gummow J.
[89] *David Securities* at 375.
[90] To be clear: the Respondents do not say that any right of recovery is to be found in the *Constitution* itself, at Commonwealth or State level (*cf Kingstreet Investments Ltd v New Brunswick (Finance)* [2007] 1 SCR 3). However, the common law of Australia may be shaped by, and adapt to, values found or reflected in the *Constitution*: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566; *Lipohar v The Queen* (1999) 200 CLR 485 at 509 [57] per Gaudron, Gummow and Hayne JJ; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 524 [34] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.
[91] *Deputy Federal Commissioner of Taxation v Brown* (1958) 100 CLR 32 at 40 per Dixon CJ; *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 at 378-379 per Kitto J; *MacCormick* at 640-641 per Gibbs CJ, Wilson, Deane and Dawson JJ; *Telegraph Investment Co* at 467 per McHugh and Gummow JJ;

not only the constitutional maxim that a stream cannot rise above its source, but also the structure of the *Constitution* and separate roles of the Legislature, Executive and Judiciary.[92]

60. At State level, s 65 of the *Constitution of Queensland* expressly provides that "[a] requirement to pay a tax, impost, rate or duty of the State must be authorised under an Act". That provision also restricts the power of local government in Queensland to impose levies.[93] Section 94(1) of the *Local Government Act 2009* (Qld) supplies the required statutory authorisation, but on conditions imposed by regulation with which the Appellant has failed to comply.

61. The principle of "no taxation without Parliament"[94] finds reflections in related doctrines, including the principle that an incontestable tax may not be levied (see [59] above); the probation on tax liability imposed arbitrarily or capriciously;[95] and the duty of taxing authorities to collect the correct amount of tax, referred to at [56] above. It is also reflected in the fact that while taxation may only be imposed for public purposes,[96] funds may only be disbursed from the Revenue under statute; again expressed at Commonwealth and State level.[97]

62. The constitutional framework reflects a position at public law whereby payments out of the Revenue (at all levels), as well as payments in, are required to be authorised by valid statute. *Ultra vires* payments out of the Revenue can be recovered if traceable.[98] The basis for such an action – that the payments were unauthorised – provides the rationale for the equivalent rule in *Woolwich* as to unauthorised payments in.[99]

Federal Commissioner of Taxation v ***Futuris*** *Corp Ltd* (2008) 237 CLR 146 at 153 [9] per Gummow, Hayne, Heydon and Crennan JJ; at 170-171 [80]-[82] per Kirby J.

[92] *Futuris* at 170 [80] per Kirby J.

[93] *Island Resorts (Apartments) Pty Ltd v Gold Coast City Council* [2021] QCA 19 at [37] per Jackson J (McMurdo JA and Boddice J agreeing).

[94] *Test Claimants in the Franked Investment Income Group Litigation v Revenue and Customs Commissioners* [2012] 2 AC 337 at 373 [74] per Lord Walker.

[95] See, e.g., *MacCormick* at 640 per Gibbs CJ, Wilson, Deane and Dawson JJ.

[96] *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2011) 244 CLR 97 at 105-112 [18]-[42] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

[97] *Constitution*, s 83 ("No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law."); *Constitution of Queensland 2001*, s 66(1) ("The payment of an amount from the consolidated fund must be authorised under an Act.").

[98] Wong at 606, citing *Auckland Harbour Board v The King* [1924] AC 318; *Maguire v Simpson* (1977) 139 CLR 363 at 388 per Gibbs J.

[99] Wong at 604; but *cf* Jackman, *The Varieties of Restitution* (2nd ed. 2017) 97-98. Jackman's argument is primarily against a private cause of action founded in the *Constitution*, which the Respondents do not advance here. His distinction between unauthorised payments in and out of the Revenue on the basis that payments out are *per se* unlawful while payments in are not is inconsistent with the constitutional values discussed herein.

There is no defence of "value received" to a *Woolwich* claim

63. The considerations of principle underlying why the *Woolwich* principle should be adopted as part of Australian law also illustrate why the "value received" defence advanced by the Appellant cannot be a good defence to such a claim.

64. The *Woolwich* principle recognises that it is unjust for a public authority to retain a tax or impost which it was not authorised to demand, and that this is so regardless of whether the payer was operating under any mistake. It would be subversive of an important constitutional value if the Court permitted public authorities to retain such imposts in the absence of an extraordinary narrow set of circumstances disentitling the payer to recovery.[100] A defence on the basis of mere receipt of a benefit outside those circumstances would permit precisely what the availability of the action is intended to prevent: the unauthorised levying and expenditure of an impost. The policy underlying the availability of restitution would be stultified (see [51] above).[101]

Conclusion

65. This Court should recognise and adopt the *Woolwich* principle as part of the law of Australia. There is no reason for that principle not to extend to invalid levies imposed by a local council. The principle is engaged on the facts of this case, no defence of value received is available, and that is a further reason why the appeal must be dismissed.

Notice of cross-appeal

Summary

66. Both the primary judge, Bradley J, and Callaghan J in the Court of Appeal were of the view that the payments made by the Respondents and Group Members were recoverable in debt pursuant to s 32 of the 2010 Regulation and s 98 of the 2012 Regulation. The majority in the Court of Appeal disagreed. The Respondents respectfully submit that the reasoning of Bradley J and Callaghan J is to be preferred.

67. The relevant provisions stated that where a rate notice included special rates or charges that were levied "on land to which the special rates or charges do not apply" or (after

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[100] *Royal Insurance* at 69 per Mason CJ.

[101] As to policy, it is preferable to distribute loss fairly across the public rather than the individual taxpayer bearing the burden of Government's mistake: *Mason and Carter* at 903 [2032(2)]; *Royal Insurance* at 68 per Mason CJ, citing *Air Canada* at 169 per Wilson J (in dissent). Further, Government may have a right of recovery against the public officials who levy tax and disburse revenues without statutory authority.

5 December 2014) "should not have been levied", then the rate notice is not invalid but "the local government must as soon as practicable return the special rates or charges to the person who paid the special rates or charges."

68. The question is whether the special levies here fall within the ambit of the statutory descriptor as having been levied "on land to which the special rates or charges do not apply" or "should not have been levied". The Respondents submit that they plainly do, as a matter of orthodox statutory construction and having regard to the nature and purpose of the regulations. The majority's approach would seem to have the result of invalidating the rates notices themselves; precisely what the legislature sought to avoid. On that basis, the cross-appeal should be allowed.

Special leave to cross-appeal

69. In the event the Respondents are not otherwise successful, they seek special leave to cross-appeal from orders 1 and 3 of the orders of the Court of Appeal made on 26 August 2022, by which the Court answered agreed common questions 1-3 "No", and question 4 "Unnecessary to Answer".[102]

70. The interests of the administration of justice favour a grant of special leave in the circumstances just identified, where the Appellant has obtained special leave to appeal the decision on restitution; judges of the lower courts split 2-2 on the construction issue; and a significant group will be left without a remedy in the event that the appeal succeeds.

Proper construction of the Regulations

71. As with any legislation, the task of construing s 32 of the 2010 Regulation and s 98 of the 2012 Regulation must start with a consideration of the statutory text. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.[103] Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text.[104]

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[102] Notice of Cross-Appeal dated 3 April 2023 (CAB 74).
[103] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ.
[104] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39] per French CJ, Hayne, Crennan, Bell and Gageler JJ.

72. The ordinary meaning of the Regulations here is clear. Starting with s 32 of the 2010 Regulation, it applies if "a rate notice includes special rates or charges that were levied on land to which the special rates or charges do not apply."

73. That expression is clearly capable of capturing a rate notice which, like those in the present case, includes "special rates or charges" which are invalid for want of compliance with a statutory condition and thus have been levied upon land to which they "do not apply".

74. The mischief sought to be remedied by the section supports that construction. The section has a two-fold purpose: first, to save the validity of rate notices (which may include general rates and charges as well as special rates and charges) in which special rates and charges have been wrongly included, and secondly, to require the return of such special rates and charges to the ratepayer, providing a simple statutory remedy.

75. The majority in the Court of Appeal held to the contrary on the basis that the ordinary meaning of s 32 was that it applied only where there was a *valid* special rate or charge, which had been levied on the wrong ratepayer.[105]

76. That was wrong in principle. As Gageler J observed in *New South Wales v Kable*,[106] "a thing done in the purported but invalid exercise of a power conferred by law, remains at all times a thing in fact" and "[t]he factual existence of the thing might be the foundation of rights or duties that arise by force of another, valid, law". There is no reason to read the expression "special rates or charges" in s 32 of the 2010 Regulation as if it said "*valid* special rates or charges". To do so would defeat the purpose of the section; it would appear to invalidate the *whole* of a rate notice which included invalid special rates or charges, while at the same time providing ratepayers with no statutory remedy for the recovery of the invalid charges. As the primary judge held,[107] there is no apparent reason for the legislature to treat landowners who receive a rate notice containing a valid special charge which has been incorrectly levied on their land, differently to landowners who receive a rate notice containing an invalid special charge.

77. The Court of Appeal in interpreting s 32 of the 2010 Regulation was required to prefer an interpretation which best achieved the purpose of the Regulation to any other

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[105] Appeal RJ[26] CAB 47.
[106] (2013) 252 CLR 118 at 138 [52]; approved in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 273 CLR 21 at 37-38 [20].
[107] Primary RJ[49] CAB 18.

interpretation.[108] The construction placed upon s 32 by the majority did not do that. Nor did it accord with the ordinary meaning of the text.

78. The same analysis applies to s 98 of the 2012 Regulation. As the primary judge held, the addition of the words "or should not have been levied" were clearly intended to enlarge the scope of s 98.[109]

The special levies are recoverable in debt

79. Properly construed, s 32 of the 2010 Regulation and s 98 of the 2012 Regulation obliged the Appellant to return the invalid special levies paid by the Respondents and Group Members "as soon as practicable". Such an obligation is enforceable by way of an action in debt.[110]

80. The obligation to return the special levies under the Regulations is unqualified. Being a right based wholly in statute, it can neither be cut down nor enlarged by resort to general law or to restitutionary principles.[111] Accordingly, the Appellant cannot rely upon any defence that might otherwise be available to an action for monies had and received, in answer to the action in debt based upon statute.

Conclusion

81. If the appeal is allowed, the cross-appeal should succeed and the substantive orders made by the primary judge should not be disturbed. On either basis, the Appellant should pay the Respondents' costs of the appeal and cross-appeal.

Part VII: Estimate of time required

82. The Respondents estimate that they will require 2 hours for oral argument.

Dated: 2 June 2023

J T Gleeson SC
Banco Chambers
(02) 8239 0200
clerk@banco.net.au

A M Hochroth
Banco Chambers
(02) 9376 0624
adam.hochroth@banco.net.au

[108] *Acts Interpretation Act 1954* (Qld), s 14A, as applied by the *Statutory Instruments Act 1992* (Qld), s 14(1) and Sch 1.
[109] Primary RJ[63] CAB 20-21.
[110] ***Commonwealth v SCI Operations*** *Pty Ltd* (1998) 192 CLR 285 at 305 [40] per Gaudron J; at 313 [65] per McHugh and Gummow JJ; *Mallinson v Scottish Australian Investment Co Ltd* (1920 28 CLR 66 at 70.
[111] *Commonwealth v SCI Operations* at 306 [44] per Gaudron J; at 317 [76] per McHugh and Gummow JJ.

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **Redland City Council**
Appellant
and
John Michael Kozik
First Respondent
Simon John Akero
Second Respondent
Sarah Akero
Third Respondent
Neil Robert Collier
Fourth Respondent

ANNEXURE TO THE RESPONDENTS' SUBMISSIONS

Pursuant to Practice Direction No 1 of 2019, the respondents set out below a list of constitutional and statutory provisions referred to in these submissions.

No.	Description	Version	Provisions
1.	*Constitution of Australia*	Current	ss 51(ii), 83
2.	*Constitution of Queensland*	Current	ss 66, 65
3.	*Acts Interpretation Act 1954* (Qld)	Current	s 14A
4.	*Statutory Instruments Act 1992* (Qld)	Current	s 14(1) and Sch 1
5.	*Coastal Protection and Management Act 1995* (Qld)	Current	s 121
6.	*Local Government Act 2009* (Qld)	Current	s 94
7.	*Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld)	Reprint No. 2B (As in force on 1 July 2012)	s 32

No.	Description	Version	Provisions
8.	Local Government Regulation 2012 (Qld)	Reprint No. 1 (As in force on 14 December 2012)	s 98
9.	Local Government Regulation 2012 (Qld)	Current as at 5 December 2014	s 98