Case Note

Sims v Commonwealth: The Ultimate Foundation of Australian Law and the Recovery of Ultra Vires Payments by the Commonwealth Executive

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Abstract

The application of a statutory limitation period to the recovery of mistaken payments by the Commonwealth to a former naval serviceman is not a place one would expect to locate the practical influence of jurisprudence. Yet it emerges in *Sims v Commonwealth*. The issue concerns the accurate identification of the ultimate foundation of Australian law. It is contended that the foundation is materialised by the interaction between the *Australian Constitution* and the common law: the *Constitution* is incomplete without common law doctrines. Therefore, there must be limits to the extent to which legislatures can abolish or amend the operation of common law rules in order to safeguard the constitutional allocation of powers. This necessarily includes limitation of action provisions. The contention is derived from recent High Court authority which was apparently not cited on appeal in *Sims*. A limitation period must be sourced elsewhere in the interaction between the *Constitution* and the unified common law of Australia.

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I Introduction

Jurisprudence and legal history manifest themselves in the strangest of ways and places. So much is exemplified by the New South Wales Court of Appeal decision in *Sims v Commonwealth* ('*Sims*').[1] The facts of *Sims* are shortly stated: the Commonwealth sought restitution after continuing to pay Mr Sims for six years after his service in the Royal Australian Navy had concluded. The issue was whether the Commonwealth's action ceased to be maintainable, due to a delay in bringing proceedings, based on the New South Wales statutory limitation period.[2] Arguably, *Sims* disguises the complex legal issues that arise when particular acts of the Commonwealth executive are undertaken ultra vires. However, the case also highlights the importance of jurisprudence in understanding why the law applies as it does in matters arising under the *Australian Constitution*.

These arguments are advanced in three Parts. The procedural history and judgments in *Sims* are summarised in Part II. Part III outlines the historical basis of the principle relied upon by the Commonwealth in *Sims*, and the law of restitution. It argues that the action forms part of the law of restitution. However, it outlines several propositions, arising from High Court authority, which were not relied upon by the Court of Appeal, and their possible application to *Sims*. Part IV identifies Australian law's ultimate foundation as the interaction between the *Constitution* and the common law. It opines that there must be limits on the extent to which the federal and state legislatures can amend or abolish common law and equitable rules that provide the doctrinal and remedial substance to actions arising under the *Constitution*, lest constitutional restraints on legislative power be rendered otiose. Alternative sources of limitation periods are identified in the concluding remarks for actions arising under the *Constitution*, or involving its interpretation.

II The Case

A *Facts*

Sims separated from the Navy in September 2009, having joined in September 2000.[3] Notwithstanding this separation, the Commonwealth erroneously continued making payments to Mr Sims as salary payments. The error was discovered in 2015. The combined value of these payments exceeded $300,000. However, it was only in 2021 that the Commonwealth commenced the action for money had and received to recover the funds.

B *Judgment at First Instance*

The Commonwealth commenced proceedings to recover the funds from Sims in the New South Wales District Court. The parties agreed that the payments were made without parliamentary authority and were thus ultra vires.[4] The claim for recovery

1 *Sims v Commonwealth* (2022) 109 NSWLR 546 ('*Sims*').
2 *Commonwealth v Sims* (2021) 37 DCLR(NSW) 318–22 [1]–[22] (RJ Webber DCJ) ('*Sims Trial*').
3 Ibid 319–21 [1]–[11] (RJ Weber DCJ).
4 Ibid 322 [17] (RJ Weber DCJ).

was based on *Auckland Harbour Board*, in which the Judicial Committee of the Privy Council advised that governmental payments made by the Crown without parliamentary appropriation are recoverable ('the *Auckland Harbour Board* principle').[5] The issue was whether this was a restitutionary claim and potentially subject to the statutory limitation period,[6] such that the action was only *maintainable* if brought within the relevant period, or a standalone common law cause of action.[7]

At first instance the claim was held to be a standalone cause of action and not a 'mainstream restitutionary claim' for two reasons.[8] First, the liability 'does not arise from any … unjust enrichment'.[9] Second, the ordinary defences to the restitutionary actions are not available for actions of this kind, because the cause of action is based in public policy concerns, and not in restitution.[10] Supposing it were a restitutionary action, Weber DCJ held that it was not an action to which the statutory limitation applied.[11] His Honour ordered Sims' repayment of all monies claimed by the Commonwealth.[12]

C *Decision on Appeal*

Sims brought an appeal before the New South Wales Court of Appeal against the decision of the primary judge. At this stage, the Commonwealth issued notice of a matter 'arising under the *Constitution* or involving its interpretation'.[13] The primary issues on appeal were whether:[14]

(1) *Auckland Harbour Board* claims fell within the law of 'quasi-contract' such that the State statutory limitation period applied to the Commonwealth's claim; and

(2) the claim is entrenched by the *Constitution* such that the limitation period was inapplicable.

The Court, unanimously, answered the first question affirmatively, but rejected the second proposition.[15] The leading judgment was written by Bell CJ;[16] Meagher JA wrote separately;[17] White JA agreed with both the Chief Justice and Meagher JA.[18]

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5 Ibid 322 [16], citing *Auckland Harbour Board v The King* [1924] AC 318, 327 (Viscount Haldane for the Judicial Committee) ('*Auckland Harbour Board*').

6 *Sims Trial* (n 2) 323–4 [28], [32]–[34] (RJ Weber DCJ), citing *Limitation Act 1969* (NSW) s 14(1)(a) ('*Limitation Act*'), which provides: 'An action on any of the following causes of action is not maintainable if brought after the expiration of a limitation period of six years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims — (a) a cause of action founded on contract (including quasi contract) not being a cause of action founded on a deed'.

7 *Sims Trial* (n 2) 324 [30]–[31] (RJ Weber DCJ).

8 Ibid 322 [19], [22] (RJ Weber DCJ).

9 Ibid.

10 Ibid 322 [20] (RJ Weber DCJ).

11 Ibid 324 [30]–[31].

12 Ibid 326 [47]–[49].

13 *Sims* (n 1) 555–6 [30]–[32] (Bell CJ); *Judiciary Act 1901* (Cth) s 79B ('*Judiciary Act*').

14 *Sims* (n 1) 549 [1] (Bell CJ), 573 [112] (Meagher JA), 582 [153] (White JA).

15 Ibid.

16 Ibid 549–73 [1]–[111].

17 Ibid 574 [115], 582 [152].

18 Ibid 582 [153].

1 *Chief Justice Bell*

(a) *Auckland Harbour Board Claims Belong to the Law of Restitution*

While briefly recapitulating both the facts and procedural history of the case,[19] Bell CJ commenced by noting that the Commonwealth's pleadings alleged Sims' 'unjust enrichment at the plaintiff's expense'.[20] His Honour noted that previous invocations of *Auckland Harbour Board* were framed in an action for money had and received,[21] notwithstanding that the 'principle's juristic basis' — the gist of the action — 'is … founded on quasi-constitutional notions of ultra vires'.[22] His Honour accepted that the principle is well established in Australian law.[23]

The Chief Justice outlined the legal concept of quasi-contract, and its juridical metamorphosis into the law of restitution, before explaining that restitutionary claims are subject to the limitation period.[24] Referring to Meagher JA's reasons,[25] he outlined the adoption by the *Judiciary Act 1901* (Cth) ('*Judiciary Act*') of the State limitation period and its application to the exercise of federal jurisdiction.[26] His Honour rejected the Commonwealth's plea to postpone the limitation period.[27]

(b) *Action not Entrenched by the Constitution*

The Chief Justice rejected[28] the constitutional argument[29] raised by the s 79B notice.[30] That is, ss 81–83 of the *Constitution* do not exempt *Auckland Harbour Board* restitutionary claims from the application of the statutory limitation period.[31] He observed that the *Constitution* is concerned with the content of, and restraints upon, government powers and functions.[32] It is not generally a source of rights, let alone individual rights.[33]

His Honour remarked upon the novelty of the argument that the *Auckland Harbour Board* claim was entrenched by the *Constitution*.[34] However, he noted that it would be curious if, in these circumstances, the text, nature or structure of the *Constitution* itself provided direct rights of action for restitution.[35] Additionally, as the *Constitution* did not provide for the action — either expressly or by necessary

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19 Ibid 549–56 [1]–[32].
20 Ibid 550 [11].
21 Ibid 559 [48].
22 Ibid.
23 Ibid 549–56 [1]–[32].
24 Ibid 560–8 [52]–[81]; *Limitation Act* (n 6) s 14(1)(a).
25 *Sims* (n 1) 574 [117]–[118] (Meagher JA), citing *Rizeq v Western Australia* (2017) 262 CLR 1 ('*Rizeq*'); *Judiciary Act* (n 13) s 79(1).
26 *Sims* (n 1) 551 [14].
27 Ibid 568 [82], citing *Limitation Act* (n 6) s 56(1).
28 *Sims* (n 1) 571 [98].
29 Ibid 555–6 [30]–[32].
30 Ibid, citing *Judiciary Act* (n 13) s 79B.
31 *Sims* (n 1) 569–70 [88]–[91].
32 Ibid 571 [95], citing *James v Commonwealth* (1939) 62 CLR 339, 362 (Dixon J).
33 *Sims* (n 1) 570–1 [91], [95].
34 Ibid 570 [92], citing *Commonwealth v Burns* [1971] VR 825, 827–8 (Newton J) ('*Burns*'); *Constitution* ss 81–83.
35 *Sims* (n 1) 571 [95].

implication — the limitation period was not enacted in excess of state legislative competence, and to that extent invalid.[36]

2 *Justice Meagher*

Before accepting that the *Auckland Harbour Board* principle is well established in Australian law,[37] Meagher JA observed that the limitation period is picked up by the *Judiciary Act* and applied to state courts' exercise of federal jurisdiction.[38] Accordingly, his Honour rejected the entrenchment of the action by the *Constitution*.[39] His Honour went on to observe:

(1) the history of restitutionary claims;[40] and

(2) the transformation of the taxonomical nomenclature from 'quasi-contract' into the law of restitution, of which the *Auckland Harbour Board* principle forms part.[41]

Accordingly, he held that the limitation period applies to the Commonwealth's claim.[42]

3 *Justice White*

White JA agreed with the reasons of both Bell CJ and Meagher JA.[43] However, his Honour's judgment contains some interesting observations on the history of restitutionary claims.[44] The claims were originally brought by an information without reference to a cause of action.[45] His Honour invoked s 64 of the *Judiciary Act* which requires the rights of parties in actions involving the Commonwealth to be reconciled as closely as possible with the rights that would exist in matters between citizens. This led White JA to observe that the 'principle falls squarely within a claim for money had and received. It is therefore a claim in quasi-contract to which [the limitation period] applies.'[46]

III The Historical Development of Restitutionary Actions by the Crown in Australia

A *The Fundamental Constitutional Principle*

The effects of the Revolution Settlement, in which the divine right of kings yielded to parliamentary supremacy over the executive, remain widely discussed in

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36 Ibid 571 [97].
37 Ibid 574–5 [119]–[121].
38 Ibid 574 [118], citing *Rizeq* (n 25); *Judiciary Act* (n 13) s 79(1).
39 *Sims* (n 1) 574 [118].
40 Ibid 576–80 [128]–[146].
41 Ibid 580–2 [147]–[151].
42 Ibid 581–2 [151]–[152].
43 Ibid 582 [153].
44 Ibid 582 [157]–[158].
45 Ibid.
46 Ibid 582 [160].

contemporary jurisprudence and legal scholarship.[47] Unsurprisingly, many of the principles arising from the *Bill of Rights* extended to the colonies[48] and are reflected in the Australian *Constitution*.[49] For present purposes, one concept is relevant: parliamentary control of government expenditure.[50]

That constitutional principle is protected by authority enabling the recovery of payments made without statutory authorisation,[51] notwithstanding that the monarch's entitlement to recover the proceeds of ultra vires dealings in the Crown's treasure can be traced to 16th century authority.[52] The advice tendered by the Privy Council in *Auckland Harbour Board* is the archetypal authority on the point.[53] There, Viscount Haldane remarked upon the effect of the ancient constitutional principle regarding parliamentary control of government expenditure — namely, the inevitable transfer of that doctrine to the Crown's colonial possessions.[54] As he discussed, in order to protect that principle, '[a]ny payment out of the consolidated fund without Parliamentary authority is simply illegal and ultra vires, and *may be recovered by the Government* if it can, as here, be traced'.[55] As Bell CJ noted in *Sims*, notwithstanding the establishment of the principle without authority,[56] it is 'well recognised and established in Australian law'.[57]

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47 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214, 242 [128] (Edelman J) ('*Davis*'), citing David Kershaw, 'Revolutionary Amnesia and the Nature of Prerogative Power' (2022) 20(3) *International Journal of Constitutional Law* 1071; Justice William MC Gummow, 'The Constitution: Ultimate Foundation of Australian Law?' (2005) 79(3) *Australian Law Journal* 167, 170, citing *Bill of Rights 1689* 1 Wm & M sess 1, c 2. See also Peter W Hogg, Patrick J Monahan and Wade K Wright, *Liability of the Crown* (Carswell, 4th ed, 2011) 20.

48 See generally *Campbell v Hall* (1774) 98 ER 1045.

49 George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983) 1–11.

50 *Constitution* ss 81–3; *Combet v Commonwealth* (2005) 224 CLR 494, 535–7 [44]–[46] (McHugh J).

51 *Auckland Harbour Board* (n 5) 327 (Viscount Haldane for the Judicial Committee). See also Hogg, Monahan and Wright (n 47) 349.

52 *Dodington's Case* (1596) 78 ER 791; *Earl of Devonshire's Case* (1606) 77 ER 1266, 1269–70.

53 See, eg, *Burns* (n 34) 827–8 (Newton J); *Commonwealth v Crothall Hospital Services* (1981) 54 FLR 439, 453 (Ellicott J); *Director-General of Social Services v Hales* (1983) 78 FLR 373, 409–11 (Sheppard J); *Sandvik Australia Pty Ltd v Commonwealth* (1989) 89 ALR 213, 229–30 (French J) ('*Sandvik*'); *Brown v West* (1990) 169 CLR 195, 205 (the Court), citing *Auckland Harbour Board* (n 5). See also *R v Toronto Terminals Railway Co* [1948] Ex CR 563, [41]–[42] (O'Connor J); *Breckenridge Speedway v The Queen* [1970] SCR 175, 182–4 (Cartwright CJ, Fauteux, Abbott, Martland, Judson, Ritchie and Pigeon JJ); *School Facility Management Ltd v Governing Body of Christ the King College* [2020] PTSR 1913, 2029 [454] (Foxton J); *Surrey County Council v NHS Lincolnshire Clinical Commissioning Group* [2021] QB 896, 929 [104]–[105] (Thornton J).

54 *Auckland Harbour Board* (n 5) 327 (Viscount Haldane for the Judicial Committee).

55 Ibid (emphasis added).

56 *Sims* (n 1) 556 [34], citing *Auckland Harbour Board* (n 5) 319 (Clauson KC, Farwell KC and Mousley) (during argument).

57 *Sims* (n 1) 559 [47].

B *The Vehicle for Recovery*

1 *Historical Crown Proceedings to Recover Unappropriated Funds*

That *Auckland Harbour Board* immediately translates into a qualifying ground within the *private* law of restitution is not obvious.[58] Historically, the Crown would have proceeded by the ancient procedure of information.[59] Blackstone discussed the information as being

> grounded … merely on the intimation of … the attorney-general, who 'gives the court to understand and be informed of' the matter in question; *upon which the party is put to answer … as in suits between subject and subject*. [One of the] most usual informations [is that] of … debt: [to recover] upon any contract for monies due to the king ...[60]

The nature of the claim, upon which the principle relied, was perhaps irrelevant to *Auckland Harbour Board* because that case concerned an appeal from New Zealand about the amount recoverable by a plaintiff on a petition of right.[61] That procedure was the means by which a subject could recover the proceeds of a wrong which had found their way into the Crown's hands.[62] The law as it applied to disputes between subjects was to be applied as closely as possible to relief sought upon the supply of a petition of right for recovery from the Crown.[63] A legal doctrine applicable to a dispute between subjects was necessary before recovery against the Crown was possible.[64] The availability of one type of restitutionary claim, based on the forms of action discussed below, had succeeded.[65] So far as debts were concerned, it appears that both the petitions of right and the information in debt procedures served the same purpose, and resolved matters using the same means.

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58 See, eg, *The Bankers' Case* (1700) 14 How St Tr 1; *Auckland Harbour Board* (n 5) 320 (Viscount Haldane for the Judicial Committee). See also *Earl of Devonshire's Case* (n 52) 1269–70.

59 George S Robertson, *The Law and Practice of Civil Proceedings by and against the Crown and Departments of Government* (Stevens & Sons, 1908) 170. But note the contradistinction between Latin informations in debt (proceedings at law on the revenue side of the King's Bench: see at 170–85) and English informations for account (proceedings in equity on the revenue side of the King's Bench: see at 235–40). Note also that proceedings in money claims in equity could be brought before the Court of Chancery: see at 463–85.

60 William Blackstone, 'Chapter the Seventeenth: Of Injuries Proceeding from, or Affecting, the Crown' in *The Oxford Edition of Blackstone's Commentaries on the Laws of England: Book III — Of Private Wrongs*, ed Thomas P Gallanis (Oxford University Press, 2016) 169, 174 (emphasis added). See also ibid 170–85, 235–40, 463–85. Note also *R v Ward* (1846) 2 Ex 301, 301 (Parke B) ('any one is in privity with the Crown who knows that the money which he receives is the money of the Crown'). Cf *Judiciary Act* (n 13) s 64.

61 *Auckland Harbour Board* (n 5) 319–21 (Viscount Haldane for the Judicial Committee).

62 *Monckton v A-G* (1850) 42 ER 156, 160 (Lord Cottenham LC).

63 Blackstone (n 60) 169.

64 Walter B Clode, *The Law and Practice of Petition of Right under the Petitions of Right Act, 1860* (Clowes & Sons, 1887). See also *Bradley v Commonwealth* (1973) 128 CLR 557, 585 (Menzies J); *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234, 249 [48] (Gageler and Gleeson JJ) ('*Hobart International Airport*'), quoting *Abebe v Commonwealth* (1999) 197 CLR 510, 527–8 [31]–[32] (Gleeson CJ and McHugh J).

65 See, eg, *R v Doutre* (1884) 9 App Cas 745 (quantum meruit); *Baron de Bode's Case* (1849) 116 ER 1302 (money had and received (*obiter*)).

The remedy was *amoveas manus*, or orders in that nature.[66] It seems the Crown could obtain remedies in that nature through the information procedures.[67] However, given the petition of right was held in *Mewett* to have been rendered redundant by s 75(iii) of the *Constitution*,[68] it is unclear how the information procedures could have survived. Nevertheless, the declaration of right remains available.[69] It is a discretionary remedy.[70] The jurisdiction to grant declaratory relief cannot be fettered by Parliament.[71] The Commonwealth has successfully obtained declarations of right in respect of Commonwealth debts.[72] But legal history demonstrates the *necessity* of framing claims for recovery — by or against public authorities — according to established doctrine, of which the law of restitution is an integral part.

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66 See generally Hogg, Monahan and Wright (n 47) ch 1.

67 Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (Butterworth & Son, 1890) 332–6.

68 *Commonwealth v Mewett* (1997) 191 CLR 471, 496–7 (Dawson J), 513 (Toohey J), 549 (Gummow and Kirby JJ, Brennan CJ agreeing).

69 *The Eastern Trust Co v McKenzie, Mann & Co Ltd* [1915] AC 750 (Privy Council), 759–60 (Sir George Farwell for the Judicial Committee); *McLean v Rowe* (1925) 25 SR (NSW) 330, 342 (Long Innes J); *New South Wales v Commonwealth* (1926) 38 CLR 74, 87 (Isaacs J) ('*The Garden Island Case*'); *New South Wales v Commonwealth* (1932) 46 CLR 155, 182 (Rich and Dixon JJ) ('*Garnishee Case No 1*'); *Faithorn v Territory of Papua* (1938) 60 CLR 772, 788 (Rich J), 792 (Dixon J), 795–7 (McTiernan J); *Stenhouse v Coleman* (1944) 69 CLR 457, 472 (Starke J); *Arthur Yates & Co Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37, 69 (Latham CJ), 84 (Dixon J); *Pye v Renshaw* (1951) 84 CLR 58, 77 (the Court); *National Trustees Executors & Agency Co of Australasia Ltd v Commissioner of Taxation* (1954) 91 CLR 540, 585–6 (Kitto J); *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428, 454 (Dixon CJ); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188–9 (the Court); *Mann v O'Neill* (1997) 191 CLR 204, 266 (Kirby J), quoting *Harrison v Bush* (1855) 119 ER 509, 512 (Lord Campbell CJ); *Ha v New South Wales* (1997) 189 CLR 465, 503–4 (Brennan CJ, McHugh, Gummow and Kirby JJ) ('*Ha*'); *Fejo (on behalf of Larrakia People) v Northern Territory* (1998) 195 CLR 96, 123 [31] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 586–7 [56]–[57] (Gleeson CJ, Gaudron and Gummow JJ) ('*Edensor Nominees*'); *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542, 584–5 [123]–[124] (Crennan and Kiefel JJ); *Hearne v Street* (2008) 235 CLR 125, 139–41 [41]–[42] (Kirby J); *Hobart International Airport* (n 64) 250, 252–4 [52]–[53], [61]–[62] (Kiefel CJ, Keane and Gordon JJ), 256–62 [84]–[99] (Edelman and Steward JJ); *Davis* (n 47) 230 [59]–[62] (Kiefel CJ, Gageler and Gleeson JJ); *A-G (Cth) v Huynh* (2023) 97 ALJR 298, 344 [224] (Edelman J).

70 *The Garden Island Case* (n 69) 87 (Isaacs J); *Garnishee Case No 1* (n 69) 182 (Rich and Dixon JJ); *Australian Boot Trade Employees' Federation v Commonwealth* (1954) 90 CLR 24, 45 (Dixon CJ); *Mutual Life & Citizens' Assurance Co Ltd v A-G (Qld)* (1961) 106 CLR 48, 54 (Dixon CJ); *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372, 376 (Dixon CJ) ('*Cigamatic*'); *Bolton v Madsen* (1963) 110 CLR 264, 269 (the Court); *Australian Conservation Foundation v Commonwealth* (1979) 146 CLR 493, 504 (Aickin J); *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, 292 (Aickin J); *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 358 [101] (the Court), quoted in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 392 [237] (Kiefel and Keane JJ).

71 *Momcilovic v The Queen* (2011) 254 CLR 1, 94–5 [179] (Gummow J), quoting *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581–2 (Mason CJ, Dawson, Toohey and Gaudron JJ). See generally *New South Wales v Kable* (2013) 252 CLR 118 ('*Kable*'). Cf *Commissioner of State Revenue (Vic) v ACN 005 057 349 Pty Ltd* (2017) 261 CLR 509, 515 (Kiefel and Keane JJ), 525 [36] (Bell and Gordon JJ), 540 [95] (Gageler J).

72 *Cigamatic* (n 70) 376–80 (Dixon CJ), 390 (Menzies J).

2 *The (Private) Law of Restitution*

Restitution refers to the reversal of some payment or transfer to reinstate some antecedent state of affairs. The concern of the underlying legal doctrine is the grounds upon which a legal obligation to make restitution is based. Some general observations may be made of the Australian position. Restitution describes the result of the operation of a range of ancient forms of action, and doctrines arising from the common law and equity.[73] Relevantly, these include the action for money had and received.[74]

These forms of action belong to the common law.[75] Liability under those actions arises at common law and exists alongside contract and tort in the law of obligations.[76] The defendant's legal liability to make restitution is determined by applying equitable principle — both in terms of attribution and defences — because the aim is to explain '*who* should [properly] bear [liability for] the loss and *why*'.[77] In these circumstances, the application of equitable principle demonstrates whether the defendant's retention of benefits received is unconscionable.[78] Thus, the legal liability to make restitution of benefits — including a payment — arises to avoid unconscionable retention of those benefits.[79] In some cases, this is the meaning of unjust enrichment in Australia.[80] Nevertheless, not every obligation to make restitution of money had and received arises from the defendant's unjust enrichment.[81]

The gist of the action for money had and received is satisfied in payments actuated by:

(1) mistake;[82]

(2) undue influence;[83]

(3) unconscionable conduct;[84]

(4) duress to the person,[85] or their property;[86]

(5) failure of consideration;[87] or

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73 See, eg, Peter J Millett, 'Law of Restitution' (1995) 111(2) *Law Quarterly Review* 517, 517–8.

74 *Moses v Macferlan* (1760) 97 ER 676.

75 David Ibbetson, 'Assumpsit and Debt in the Early Sixteenth Century: The Origins of the Indebitatus Count' (1982) 41(1) *Cambridge Law Journal* 142, 142 n 1.

76 *Roxborough v Rothmans of Pall Mall Pty Ltd* (2001) 208 CLR 516, 539–40 [62]–[64] (Gummow J) ('*Roxborough*').

77 *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 597 (Hayne, Crennan, Kiefel, Bell and Keane JJ) (emphasis in original).

78 *Roxborough* (n 76) 552–5 [92]–[100] (Gummow J).

79 See, eg, ibid 542 [69].

80 *Pavey & Matthews Pty Ltd v Paul* (1987) 12 CLR 221, 255–6 (Deane J).

81 See, eg, *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 ('*David Securities*'); *Roxborough* (n 76).

82 See *David Securities* (n 81).

83 See, eg, *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

84 Ibid.

85 See, eg, *Barton v Armstrong* [1976] AC 104.

86 See, eg, *Sargood Brothers v Commonwealth* (1910) 11 CLR 258; *Mason v New South Wales* (1959) 102 CLR 108 ('*Mason*').

87 *Redland City Council v Kozik* (2024) 98 ALJR 544 ('*Kozik*').

(6) demands from public authorities under the colour of their office and ultra vires.[88]

In Australia, the action for money had and received has been invoked to recover monies paid to satisfy a debt to the Crown as taxes levied pursuant to an ultra vires state law.[89] It has been recognised as the appropriate means for the recovery of monies paid without valid parliamentary appropriation.[90] The primary concern is to address the ultra vires nature of the payment by reversing it.

3 *The (Public) Law of Restitution?*

To say that the principle belongs to the law of restitution seems uncontroversial.[91] Nevertheless, some authors suggest it is desirable for these types of actions to arise at public law.[92] Indeed, the uncritical application of the private law of obligations to public authorities may obstruct, rather than enhance, the rule of law by accentuating the importance of the unjust enrichment at the plaintiff's expense formulae where the components of that doctrine are irrelevant.[93]

Those shortcomings are apparently addressed by the mandate that the law apply in these circumstances *as closely as possible* to its putative application to disputes between private parties.[94] *This does not mean that precisely the same law should apply*.[95] There is clearly capacity for adaptation to ensure coherence in the law. One obvious manifestation of this is the removal of several defences applicable to private law restitutionary obligations from matters involving public authorities where government according to law is at issue.[96] Another example is the refusal to grant a decree of specific performance against the Crown.[97]

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88 *Mason* (n 86) 139–42 (Windeyer J).

89 See, eg, *Roxborough* (n 76).

90 *Williams v Commonwealth* (2012) 248 CLR 156, 225 [156] (Gummow and Bell JJ) ('*Williams*'), cited in *Sims* (n 1) 559 [45] (Bell CJ).

91 As noted above (n 55 and accompanying text), the ultra vires (absence of capacity) and illegal nature of the payments was identified as the juristic basis of the recovery in *Auckland Harbour Board* (n 5) 327 (Viscount Haldane for the Judicial Committee). However, in relation to a claim by citizens against a public authority in *Kozik* (n 87), the Chief Justice together with Jagot J observed, 'the mere fact of illegality … proves the undermining or stultification of the law. The fact of the illegality, however, is the reason the question of possible stultification of the law arises. It does not determine the question [of liability]': at 569 [127]. Any attempt to challenge the status of *Auckland Harbour Board* in Australian law might usefully explore this issue. For further analysis, see *Equuscorp v Haxton* (2012) 246 CLR 498.

92 See, eg, John Alder, 'Restitution in Public Law: Bearing the Cost of Unlawful State Action' (2002) 22(2) *Legal Studies* 165.

93 *Kingstreet Investments Ltd v New Brunswick* [2007] 1 SCR 3, 22–7 [32]–[41] (Bastarache J for the Court).

94 Blackstone (n 60) 173. See also *Judiciary Act* (n 13) s 64.

95 *Commonwealth v Miller* (1910) 10 CLR 742, 751 (O'Connor J), 754 (Isaacs J), 758 (Higgins J); *New South Wales v Bardolph* (1934) 52 CLR 455, 459–60 (Evatt J).

96 *Burns* (n 34) 830 (Newton J); *A-G (NSW) v Gray* [1977] 1 NSWLR 406, 409–10 (Hutley JA); *Sandvik* (n 53) 580 (French J).

97 *McVicar v Commissioner for Railways (NSW)* (1951) 83 CLR 521, 532 (Dixon, Williams, Fullagar and Kitto JJ), citing *Short v Poole Corporation* [1926] Ch 66 and *Fennell v East Ham Corporation* [1926] Ch 641. See also Nicholas C Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 7th ed, 2023) 11–15.

Accordingly, the obligation need not arise from a standalone public law action *dehors* the law of restitution. As Professor Stevens discusses in relation to the *Woolwich* principle[98] — the *Auckland Harbour Board* principle's affiliate for recovery of unlawfully demanded taxes, etc[99] — 'no doubt the claims are part of "public law" [because one party] is part of the State' but also because whether the constitutional validity of a public authority's action 'is within the *vires* of the public body is a public law issue. … However, once the public law issue of validity has been answered, there is nothing particularly "public" involved in [determining] whether [a relevant transaction] … should be reversed.'[100]

C *Federal Jurisdiction and State Legislation*

1 *The Problem*

As discussed, the *Auckland Harbour Board* principle honours one of the fundamental constitutional objectives sought to be achieved by the Revolution Settlement. Constitutional considerations form the gist of the action. The action in question arises under the *Constitution*,[101] and ventilating it involves the plaintiff enlivening federal jurisdiction.[102] Yet the focus in *Sims* appears to have been on the common law recovery mechanism, rather than the constitutional issues that arise when the Commonwealth undertakes expenditure that is not authorised by statute. This renders the Court of Appeal judgments in *Sims* somewhat difficult.

2 *Pape and Williams: A Legacy*

The facts of these cases have been widely discussed. *Pape* concerned the constitutional validity of the federal government stimulus package of 2008 in response to the global financial crisis.[103] *Williams* was a challenge to a school chaplaincy program in state schools funded by the federal government without express statutory authority.[104] They clarify and establish the following propositions. First, the exercise of power by the executive of the Commonwealth relies on s 61 of the *Constitution*. This provides that the executive power of the Commonwealth — vested in the King and exercisable by the Governor-General as the King's representative — extends to the execution and maintenance of the laws of the Commonwealth, and of the *Constitution* itself. Expenditure is an activity which must be authorised by either the execution limb or maintenance limb of that section.[105]

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98 *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70.

99 Ibid 176F–77C (Lord Goff).

100 Robert Stevens, *The Laws of Restitution* (Oxford University Press, 2023) 99.

101 See *Constitution* s 75(iii).

102 *Sims* (n 1) 551 [14] (Bell CJ), 574 [118] (Meagher JA). See also *Judiciary Act* (n 13) ss 39(2), 61, 78B.

103 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 26–30 [18]–[33] (French CJ), 65–9 [139]–[149] (Gummow, Crennan and Bell JJ), 95–8 [258]–[270] (Hayne and Kiefel JJ) ('*Pape*').

104 *Williams* (n 90) 179–84 [2]–[19] (French CJ), 217–22 [85]–[106] (Gummow and Bell JJ), 239 [167] (Hayne J), 336 [450]–[451] (Crennan J), 359–61 [550]–[555] (Kiefel J).

105 *Pape* (n 103) 52–53 [101]–[103] (French CJ), 79–88 [201]–[228] (Gummow, Crennan and Bell JJ), 101–105 [284]–[296] (Hayne and Kiefel JJ).

Second, *Williams* establishes that the Commonwealth cannot rely on a construction of the 'common law' powers of the Crown which ostensibly provides an independent basis for spending activities on the assumption that the Commonwealth enjoys the same 'capacity' to spend money as ordinary people.[106] Mere appropriation of funds, therefore, does not suffice to authorise expenditure by the Commonwealth executive.[107] The power must be located either in a statute, under the implied nationhood power, or otherwise under the *Constitution*.[108]

Thus, the constitutional validity of the mistaken payment in *Sims* rested on a statutory appropriation of the funds, together with constitutional or statutory authorisation within the meaning of s 61.[109] The funds in question were appropriated by Parliament to the use of the Commonwealth to discharge the salary liabilities of defence personnel. Mr Sims was not, at the relevant times the payments were made, a member of the Royal Australian Navy, and so was not a member of defence personnel to which a power to make payments applied.

Moreover, this payment cannot have been a gift. The power to make gratuitous payments cannot have survived *Williams* lest the rule created by that case be circumvented, and thus rendered redundant, by making conditional grants enforceable in equity rather than the Commonwealth entering into contracts.[110] Supposing the power had survived, the Commonwealth's vitiated intent in making the payments would negative the formation of a donor–donee relationship.

The payments were therefore unsupported by s 61, and thus by the *Constitution* itself. Accordingly, in making the payments, the Commonwealth executive transgressed the constitutional limitations upon executive power. In other words, the payments in *Sims* were not *merely* ultra vires: they lacked constitutional validity.

3 *State Tobacco Excise Taxes and British American Tobacco*

The invalidity of state fees on tobacco was declared by the High Court in *Ha*,[111] followed by British American Tobacco's action to recover the funds in question as money had and received from the Western Australian government.[112] The relevant Crown proceedings legislation provided that an action was not *maintainable* without the State Treasurer's approval.[113] *British American Tobacco* was not a challenge to a *federal* limitation period, but to the application of a State statute purporting to debar

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106 *Williams* (n 90) 192–4 [37]–[39] (French CJ), 236–9 [150]–[159] (Gummow and Bell JJ), 243–4 [177]–[181] (Hayne J), 341–55 [477]–[534] (Crennan J), 373–4 [595] (Kiefel J).

107 Ibid; *Pape* (n 103) 71–88 [172]–[228] (Gummow, Crennan and Bell JJ), 100–24 [278]–[357] (Hayne and Kiefel JJ).

108 *Williams* (n 90) 192–4 [37]–[39] (French CJ), 236–9 [150]–[159] (Gummow and Bell JJ), 243–4 [177]–[181] (Hayne J), 341–55 [477]–[534] (Crennan J), 373–4 [595] (Kiefel J); *Pape* (n 103) 71–88 [172]–[228] (Gummow, Crennan and Bell JJ), 100–24 [278]–[357] (Hayne and Kiefel JJ).

109 *Victoria v Commonwealth* (1975) 134 CLR 338, 396–7 (Mason J) ('*AAP (Australian Assistance Plan) Case*').

110 JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) 25–9.

111 See generally *Ha* (n 69).

112 *British American Tobacco v Western Australia* (2003) 217 CLR 30 ('*British American Tobacco*').

113 Ibid 49–50 [28]–[34] (McHugh, Gummow and Hayne JJ).

the maintenance of an action.[114] Nevertheless, the High Court held that as the action was in response to the constitutional invalidity, the matter invoked federal jurisdiction because it arose under the *Constitution*.[115] The State legislation was not cognisable by the courts without being given a supererogatory application, which was impermissible.[116]

4 *Federal Jurisdiction and Rizeq*

British American Tobacco must be reconciled with the result in *Rizeq*, which involved a challenge to the constitutional requirement of unanimous jury verdicts in matters arising under federal law.[117] *Rizeq* explains that the *Judiciary Act* picks up some state laws where state courts exercise federal jurisdiction,[118] because that jurisdiction cannot be regulated by state legislation alone.[119] *Rizeq* differs from *Sims* because federal jurisdiction was only enlivened in *Rizeq* because the defendant was a New South Wales resident being tried for an offence in Western Australia.[120] However, the offence itself arose under a Western Australian statute;[121] the relevant offence was not picked up by the *Judiciary Act*, hence a unanimous jury verdict was not required.[122] Therefore, unless another Commonwealth law or the *Constitution* itself prescribes otherwise, state statutes will be 'picked up' in matters:

(1) before state courts invoking federal jurisdiction; and

(2) arising under either a Commonwealth enactment or the *Constitution*.[123]

In *Sims*, the relevant source of law was the unified Australian common law. However, the common law action has a peculiar nexus with the *Constitution* because it lies to vindicate a transgression of a constitutional restraint on government power by reversing its consequences. The action for money had and received is not, therefore, in the nature of a *Bivens* action — which lies in the United States specifically to vindicate transgressions of, inter alia, individual constitutional rights.[124] The point was emphasised by McHugh, Gummow and Hayne JJ in *British American Tobacco*, where their Honours explained the nexus between the action for money had and received and the *Constitution*.[125] In that case, the action arose because where money is paid pursuant to a statute passed contrary to a constitutionally imposed restraint on legislative power, retaining the value of the payments is 'against conscience'.[126]

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114 Ibid 54 [45] (McHugh, Gummow and Hayne JJ).
115 Ibid 48 [25]–[26] (Gleeson CJ), 58–9 [62]–[63] (McHugh, Gummow and Hayne JJ), 90 [171] (Callinan J).
116 Ibid 60 [67] (McHugh, Gummow and Hayne JJ), 90 [171] (Callinan J).
117 *Rizeq* (n 25) 18–20 [34]–[43] (Bell, Gageler, Keane, Nettle and Gordon JJ).
118 Ibid 27–31 [65]–[76] (Bell, Gageler, Keane, Nettle and Gordon JJ), citing *Judiciary Act* (n 13) s 79(1).
119 *Rizeq* (n 25) 24–6 [57]–[63] (Bell, Gageler, Keane, Nettle and Gordon JJ).
120 Ibid 19 [36]–[37] (Bell, Gageler, Keane, Nettle and Gordon JJ).
121 Ibid.
122 Ibid.
123 Ibid 32–6 [80]–[89] (Bell, Gageler, Keane, Nettle and Gordon JJ).
124 *Bivens v Six Unknown Agents*, 403 US 388 (1971).
125 *British American Tobacco* (n 112) 52–54 [40]–[45] (McHugh, Gummow and Hayne JJ).
126 Ibid 52 [40]–[41] (McHugh, Gummow and Hayne JJ).

Accordingly, if this were a mere common law action, applying the relevant state enactment — that is, the limitation period — would be unproblematic.[127] However, the action in *Sims* arose under (because the payments were unsupported by) the *Constitution*.[128] That is, while the *Auckland Harbour Board* principle supplies a juristic reason for recovery — that is, the gist of the action for money had and received — it also arises under, or involves the interpretation of, the *Constitution* given its interaction with s 61. Although the original jurisdiction in such matters is nevertheless conferred upon the High Court,[129] it is conferred upon other courts reposed of federal jurisdiction.[130] The jurisdiction of the High Court is extended to state Supreme Courts by the *Judiciary Act*.[131] By applying s 79(1) of the *Judiciary Act*, the *Constitution* 'otherwise provides' for the creation and maintenance of the action. It is therefore inconsistent with a state limitation period that purports to regulate the action. Hence, the State limitation was never 'picked up'. It was inapplicable. Following *British American Tobacco*, applying the limitation period gave the State enactment an impermissible supererogatory operation.[132] Therefore, insofar as this renders *Sims* at variance with binding High Court authority, it was uttered *per incuriam*.

IV The Ultimate Foundation of Australian Law: The Common Law and the *Constitution*

A *Authority to Decide versus Choice of Law for Decision*

Rizeq is but one example of case law that highlights the Byzantine complexity which inheres in the relationship between the unified common law of Australia, and both federal and state statutes.[133] Justice Leeming — writing extrajudicially — notes the importance and consequences in the age of statutes of understanding the interaction between those statutes, the common law and equity.[134] That importance is amplified when dealing with constitutional issues, as in *Sims*. The development of case law must therefore cohere with those issues. The process may be facilitated by recourse

127 *Rizeq* (n 25) 35–6 [89] (Bell, Gageler, Keane, Nettle and Gordon JJ).
128 *Constitution* s 75(iii). See also *Judiciary Act* (n 13) ss 61, 64.
129 *Constitution* s 75(iii). See also *British American Tobacco* (n 112) 52–4 [40]–[45] (McHugh, Gummow and Hayne JJ).
130 *Judiciary Act* (n 13) s 39(2).
131 *Rizeq* (n 25) 33 [82] (Bell, Gageler, Keane, Nettle and Gordon JJ), citing *Edensor Nominees* (n 69) 134 [23] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ) and, crucially, *British American Tobacco* (n 112) 60 [68] (McHugh, Gummow and Hayne JJ).
132 *British American Tobacco* (n 112) 59–60 [64]–[67] (McHugh, Gummow and Hayne JJ), 87–88 [157]–[161] (Kirby J); 90 [171] (Callinan J).
133 *Harris v Caladine* (1991) 172 CLR 84, 136 (Toohey J); Mark Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023) 229–40.
134 Leeming (n 133) 268–96.

to legal theory. This analysis deploys Kelsen's deeply influential paper 'The Pure Theory of Law'[135] and subsequent works.[136]

B *The Ultimate Foundation of Australian Law: Common Law or the Constitution?*

1 *The Grundnorm*

In 1957, Sir Owen Dixon identified the common law as the ultimate constitutional foundation of Australian law.[137] In these remarks, he recalled having been rebuked in *Hancock's Survey of the British Commonwealth* for his fascination with the Grundnorm.[138] This term, first deployed by Professor Kelsen, refers to the hypothetical norm which forms the basis for a legal system, and from which all other legal rules develop.[139] The arbitrary nature of the Grundnorm's selection — upon which reasonable differences of opinion are permitted — is one of the salient criticisms of Kelsen's theory.[140] This limitation becomes obvious when one observes that various norms may reasonably be selected as the fundamental norm in the normative hierarchy which underpins Australian law.

2 *The Common Law or the Constitution?*

Dixon had previously discussed the legal development of constitutional principles in Australia in 1935, in remarking upon the reconciliation of ongoing competition between three juristic and political conceptions.[141] These were the supremacy of the law, of the Crown and of Parliament.[142] At any point, the reconciliation achieved between those conceptions represents the fundamental constitutional principles of the legal system.[143] Dixon propounded the view that the prevailing reconciliation of that time was manifested in the Revolution Settlement.[144] However, the process of receiving legal doctrines arising from that reconciliation into British constitutional theory was not completed until the era of Queen Victoria's reign.[145] These doctrines, deriving from the Revolution Settlement, are 'common law' principles par excellence: they include, as discussed previously, parliamentary control of government spending and parliamentary supremacy over the executive.[146]

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135 Hans Kelsen, 'The Pure Theory of Law: Its Method and Fundamental Concepts' (1934) 50(4) *Law Quarterly Review*, 474, 477 and Hans Kelsen 'The Pure Theory of Law: Part II' (1935) 51(3) *Law Quarterly Review* 517, extracted in Michael Freeman, *Lloyds' Introduction to Jurisprudence* (Sweet & Maxwell, 9th ed, 2014) 269–75.

136 See, eg, Hans Kelsen, 'Professor Stone and the Pure Theory of Law' (1965) 17(6) *Stanford Law Review* 1128, 1130; Freeman (n 135) 269–300.

137 Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31(3) *Australian Law Journal* 240, 242.

138 Ibid 242, 245, 254.

139 See above nn 135–136.

140 Freeman (n 135) 257–63.

141 Owen Dixon, 'The Law and the Constitution' (1935) 51(4) *Law Quarterly Review* 590.

142 Ibid 590–1.

143 Ibid.

144 Ibid 591.

145 Ibid.

146 Ibid 593–4.

Dixon reasoned that Australia's federal system is crucial to defining the reconciliation between the three competing conceptions of juristic or political supremacy discussed above.[147] Federalism assumes that powers are divisible into particular areas of activity and competence.[148] The allocation of powers in a federal system is achieved by law. This is now referred to as a 'supreme law'.[149] The validity of the exercise of those powers depends upon that supreme law.[150] Thus, the efficacy of a federal system is contingent upon the supremacy of the law itself.

It is unclear whether the common law can be selected as the fundamental norm from which all other norms in Australian law develop. Dixon opined that the paramount force of the *Constitution* itself, being derived from its status as an Imperial enactment, is an incident of parliamentary sovereignty as a common law rule.[151] With respect, Dixon's view probably cannot withstand recent High Court jurisprudence,[152] nor the passage of the *Australia Acts*.[153] Additionally, Professor Winterton was disinclined to concede that parliamentary sovereignty was a common law rule, because that would entail the proposition that the Parliament at Westminster was capable of abrogating parliamentary sovereignty itself.[154]

Moreover, as a majority in *Williams* shows, some common law rules are not suitable in the Australian Commonwealth.[155] The Court rejected the application of the common law conceptions of extra statutory power to the Commonwealth executive, in the manner discussed above, with respect to contracting and spending.[156] It was held that that conception of executive power is ill suited to a federal structure in which enumerated heads of legislative power are allocated between governmental units.[157] The spectre of using executive powers to cut across the federal balance — achieved by the *Constitution* — led to a rejection of an unbridled executive contracting and spending power.[158]

The fundamental premise of Australian law cannot be parliamentary sovereignty, because the parliaments of the Commonwealth and the various states are not now, nor have they ever been, sovereign in the sense of the Parliament at Westminster.[159] Those parliaments are law-making institutions in the sense that, within the relevant limits on legislative power, they are capable of abolishing or

147 Ibid 595–600.
148 Ibid 604–7.
149 *A-G (WA) v Marquet* (2003) 217 CLR 545, 570 [66] (Gummow J). Cf ibid 597.
150 Dixon, 'The Law and the Constitution' (n 141) 607–8.
151 Ibid 597.
152 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 137–9 (Mason CJ); *McGinty v Western Australia* (1996) 186 CLR 140, 275 (Gummow J); *Sue v Hill* (1999) 199 CLR 462, 490–2 [59]–[65] (Gleeson CJ, Gummow and Hayne JJ).
153 See, eg, *Australia Act 1986* (Cth). See also *Pape* (n 103) 84 [217] (Gummow, Crennan and Bell JJ).
154 George Winterton, 'The British *Grundnorm*: Parliamentary Supremacy Re-Examined' (1976) 92(3) *Law Quarterly Review* 591, 592.
155 *Williams* (n 90) 193–216 [38]–[82] (French CJ), 236–9 [150]–[159] (Gummow and Bell JJ), 240–61 [172]–[224] (Hayne J), 341–58 [477]–[544] (Crennan J), 371–4 [585]–[595] (Kiefel J).
156 Ibid.
157 Ibid.
158 Ibid.
159 Dixon, 'The Law and the Constitution' (n 141) 595.

amending the operation of common law rules.[160] The emanation of these laws from those parliaments occurs pursuant to the 'supreme' law itself.[161]

For example, the powers vested in the Commonwealth Parliament, pursuant to s 51, are relevantly 'subject to [the] *Constitution*'.[162] Indeed, the transfiguration of the various Australian colonies from mere colonial possessions of the Crown into states within the Commonwealth of Australia occurred by force of the *Constitution*.[163] Clearly, the law must be supreme over parliament(s), because the Commonwealth, and the states as such, derive their existence as polities from the *Constitution* as the supreme law, and not from the Crown per se.[164] However, the *Constitution*, at s 61, requires the supremacy of the Commonwealth Parliament over the Commonwealth executive.[165] This perhaps represents the reconciliation reached in relation to the three competing 'supremacies' discussed by Dixon,[166] and originally propounded by Professor Hearn.[167] The *Constitution* itself may therefore provide the fundamental underpinning of Australian law.

The problem with identifying the *Constitution* in vacuo as the ultimate foundation of Australian law is that its terms, nature and structure do not necessarily disclose all features of the law; nor does it exhaust the permissible trajectories for its development. That is because the *Constitution* imposes restrictions on the exercise of governmental power within Australia.[168] The *Constitution* has, as its primary focus, the allocation of powers to the various governmental units — that is, the Commonwealth, states and territories.

As the *Constitution* focuses on the allocation of governmental powers within a federal system, it often omits explicit expression of the core assumptions which provide much of its content.[169] Those assumptions were apparently treated as obvious.[170] Thus, the birth of the *Constitution* 'into a common law world' becomes significant.[171]

As Professor Winterton observed, one of the constitutional realities which present constitutional discourse should reflect is that 'the *Constitution* was not inscribed upon a *tabula rasa*'.[172] That is, the *Constitution* is premised on various

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160 Ibid 611.
161 Ibid 597–603.
162 *Constitution* s 51.
163 Ibid; James Stellios, *Zines and Stellios's the High Court and the Constitution* (Federation Press, 7th ed, 2022) 547–53.
164 *Commonwealth v Colonial Combing, Spinning & Weaving Co Ltd* (1921) 31 CLR 421, 439 (Isaacs J) ('*Wool Tops Case*').
165 *Davis* (n 47) 226–7 [29]–[32] (Kiefel CJ, Gageler and Gleeson JJ), 269–70 [290]–[291] (Jagot J).
166 Dixon, 'The Law and the Constitution' (n 141) 590–1.
167 Ibid 594.
168 See above n 32 and accompanying text.
169 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 462 [214] (Gummow and Hayne JJ) ('*Re Patterson*'); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 90–8 [114]–[136] (Gageler J).
170 John Quick and Robert R Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, rev ed, 2015) 837–42.
171 George Winterton, 'The Relationship between Commonwealth Legislative and Executive Power' (2004) 25(1) *Adelaide Law Review* 21, 34.
172 Ibid.

common law principles.[173] The most obvious example of these unexpressed assumptions arises in relation to s 61 of the *Constitution* which establishes the Commonwealth executive. Section 61 does not firmly state the content of executive power, despite outlining its limits.[174] In addition, interpreting the terms of Ch II of the *Constitution* in a strictly literal sense, and divorcing those terms from their common law meaning, would permit an autocratic form of government. That is because the *Constitution* makes no explicit reference to responsible government.[175] This demonstrates why the common law is critical to understanding the *Constitution*. Understanding the content of executive power merely *commences* with a historical understanding of the common law powers of the Crown. Thus, the common law clearly plays a crucial role in supplementing the *Constitution* itself.

3 *The Constitution and Common Law: An Interaction*

Interpreting the *Constitution* requires finely balancing the various and 'apparently dissonant strands' to achieve an apparently 'imperfect symmetry' which recognises the importance of each strand.[176] Relevantly, the supremacy of the law cannot be guaranteed in a federal system without courts possessing the competence to effectively adjudicate and quell disputes vis-à-vis the validity of purported exercise(s) of government power.[177] Such an observation gives rise to a second assumption, albeit one that is peculiarly adapted to Australian circumstances:[178] the separation of powers doctrine.[179] This is premised on the development of a certain federal jurisdiction, as an inevitable concomitant of enacting the *Constitution*.[180]

As *Rizeq* demonstrates, federal jurisdiction provides courts with the authority to render decision on legal controversies which, inter alia, arise under the *Constitution* or involve its interpretation.[181] The separation of powers necessitates the total denial of parliamentary capacity to enact legislation which operates to impair the institutional integrity of those courts.[182] The alternative would entail the effective impairment of constitutional restraints on governmental power; those restraints would be rendered nugatory if Parliament were capable of abolishing or

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173 *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 521 (Latham CJ); *Cheatle v The Queen* (1993) 177 CLR 541, 552 (the Court). See also ibid; Leslie Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16 *Public Law Review* 279, 279.

174 *Williams* (n 90) 342 [483] (Crennan J).

175 *New South Wales v Commonwealth* (1975) 135 CLR 337, 364–6 (Barwick CJ); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Wool Tops Case* (n 164) 446 (Isaacs J); *Re Patterson* (n 169) 401–3 [11]–[15] (Gleeson CJ).

176 Winterton, *Parliament, the Executive and the Governor General* (n 49) ch 1; Peter A Gerangelos, 'Reflections on the Executive Power of the Commonwealth: Recent Developments in Interpretational Methodology and Constitutional Symmetry' (2018) 37(1) *University of Queensland Law Review* 2017.

177 Dixon, 'The Law and the Constitution' (n 141) 606.

178 Winterton, *Parliament, the Executive and the Governor General* (n 49) ch 1.

179 Ibid; Stellios, *Zines and Stellios's the High Court and the Constitution* (n 163) ch 9.

180 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262–3 (Fullagar J); Dixon, 'The Law and the Constitution' (n 141) 606–7.

181 *Rizeq* (n 25) 33 [82] (Bell, Gageler, Keane, Nettle and Gordon JJ), citing *Edensor Nominees* (n 69) 134 [23] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ) and *British American Tobacco* (n 112) 60 [68] (McHugh, Gummow and Hayne JJ).

182 *Marbury v Madison*, 5 US (1 Cranch) 137, 176–80 (Marshall CJ) (1803).

curtailing the courts' authority to quell such controversies. Such a denial manifests itself in, for example, the *Kable* principle.[183]

Yet part of the creation of federal jurisdiction to quell those controversies apt to arise under the *Constitution*, or which involve its interpretation, necessarily means that the Commonwealth and the states become amenable to that jurisdiction, and the judicial process of its repositories. This extends to subjecting those authorities to legally enforceable liabilities even despite their express protestations to the contrary.[184] As Dixon discussed, this appears to mean that the *Constitution* operates to grant a party capable of satisfying the standing requirements the right to proceed against a state, even where that right may be superior to the right afforded by state law.[185] That right would then become enforceable in courts exercising federal jurisdiction.[186] This appeared to Dixon as one of the most conspicuous examples of the supremacy of the law.[187] These conspicuous examples extend to the Commonwealth by virtue of, for example, ss 75(iii) and (v) of the *Constitution*.

Nevertheless, the Australian *Constitution* does not offer direct remedies for various wrongs beyond those entrenched by s 75(v) and ancillary orders. Consider an example: where monies are levied as taxes, in a manner inconsistent with the *Constitution*, an action for the declaration of invalidity does not per se result in the automatic recovery of payments made pursuant to the invalid law because it is a constitutional action. Rather, the basis for payment in law has been retrospectively deprived of constitutional validity, such that, according to strict general law principle, the public authority's retention of those payments becomes unconscionable.[188] Thus, the action for money had and received to the plaintiff's use will usually lie to recover the funds.[189] An action arising from a breach of a constitutionally prescribed limitation on governmental power — legislative, executive or judicial — must, therefore, be located in the common law. The right to proceed, however, is guaranteed in the original jurisdiction of the High Court by s 75(iii).

This demonstrates that the ultimate foundation of Australian law cannot strictly be either the common law, or the *Constitution* itself, in isolation. At some level of abstraction, the fundamental norm in the hierarchy of Australian law must be located in the interaction between the unified common law of Australia and the *Constitution*.[190] There must, therefore, be some rules of that common law whose operation is unalterable by the parliaments where:

(1) that operation is assumed by the *Constitution* — for example, responsible government;[191] or

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183 *Kable* (n 71).

184 *Garnishee Case No 1* (n 69); *Forge v Australian Investments and Securities Commission* (2006) 228 CLR 45, 90–1 [112] (Gummow, Hayne and Crennan JJ), discussed in *Rizeq* (n 25) 35 [88] (Bell, Gageler, Keane, Nettle and Gordon JJ); Dixon, 'The Law and the Constitution' (n 141) 608–10.

185 Dixon, 'The Law and the Constitution' (n 141) 608.

186 Ibid.

187 Ibid 609.

188 See above Part III(B)(2)–(3); Gummow (n 47) 180.

189 See above Part III(B)(2)–(3); Gummow (n 47) 180.

190 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 141 (Brennan J), quoted in Gummow (n 47) 172; *British American Tobacco* (n 112) 63 [75] (McHugh, Gummow and Hayne JJ).

191 See above nn 179–182 and accompanying text.

(2) the amendment or abolition of those rules would render a constitutional limitation on the exercise of governmental power a 'dead letter'.[192]

And that is so whether the changes are directed to the amendment of the substantive law, or the achievement of a like effect through the conferral of certain procedural rights on the relevant parties. With respect to the latter category, the core issue becomes the location of the types of rules that protect the efficacy of those constitutional restraints. It is suggested that *Auckland Harbour Board* cases are a prime example of the latter category, given their role in safeguarding the parliamentary control of executive spending, as entrenched by the *Constitution*.[193]

The alternative view is unattractive. The Commonwealth could effectively eradicate the requirement to provide just terms compensation on compulsory acquisitions of property by imposing a 100% taxation rate on the recoverable amounts (or property) arising from invalid laws. Limitation periods could be used as circuitous devices to obstruct constraints on the executive contracting and spending power. Conversely, state legislatures could effectively constrain the availability of remedies for breaches of constitutionally prescribed restraints on legislative power. Section 92 of the *Constitution*, on the freedom of interstate trade, could be rendered otiose. This was the issue in *Antill Ranger*.[194] Legislation was passed to preclude restitution of funds paid pursuant to a state taxation law that infringed s 92.[195] That legislation was invalid because barring the right to recovery itself burdened the constitutional restraint.[196]

The alternative view would furthermore fail to explain the rationale for the *Judiciary Act* amendments passed after *British American Tobacco*.[197] These amendments concerned the validity of state legislative provisions that regulate the recovery of money paid to satisfy 'tax' debts, arising from invalid state tax legislation.[198] Accordingly, the amendments authorise, but do not require, the application of state legislation that limits the availability of such claims in the exercise of federal jurisdiction.[199]

V Conclusion

This case note concludes that *Sims* is apparently inconsistent with High Court authority and was therefore incorrectly decided. Moreover, it highlights the importance of legal theory in explaining the law's application or development in particular cases. This conclusion was developed in three Parts. After discussing the procedural history of *Sims*, previous case law was discussed to demonstrate the correctness of the New South Wales Court of Appeal's conclusion that *Auckland Harbour Board* formed part of the law of restitution. However, other cases were

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192 See, eg, *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83, 102–3 (Fullagar J) ('*Antill Ranger*').
193 *Constitution* ss 81–3.
194 *Antill Ranger* (n 192).
195 Ibid 96–98 (Dixon CJ, McTiernan, Williams, Webb, Kitto and Taylor JJ).
196 Ibid 99–101 (Dixon CJ, McTiernan, Williams, Webb, Kitto and Taylor JJ).
197 *Judiciary Act* (n 13) ss 79(2)–(4).
198 Ibid.
199 Ibid.

invoked to demonstrate how state enactments are not picked up in cases such as *Sims*, which either arise under the *Constitution* or involve its interpretation. The role of legal theory was mentioned before consideration was given to the selection of the ultimate foundation of Australian law. Perhaps crudely, the ultimate foundation was identified as the interaction between the *Constitution* and the common law. This case note opines that the absence of restraints on legislative power to curtail the availability of claims — such as those in *Sims* — risks rendering the constitutional restraints on the spending power of the executive a 'dead letter'.

Clearly, claims arising under the *Constitution* should not be perpetually maintainable. This case note offers three means of justifying the ultimate result reached in *Sims*. First, if protecting fundamental constitutional provisions and values is the source of a restraint on legislative power to limit actions arising under the *Constitution*, then those provisions and values must be drawn upon to locate or justify the application of a limitation period. For example, Ch III courts have an entrenched jurisdiction to restrain against the abuse of judicial process, which safeguards the institutional integrity of courts exercising federal judicial power.[200] Thus, an action could be restrained where the delay in bringing the action amounted to an abuse of process.

Second, as White JA shortly stated in *Sims*, the application of the limitation period may represent the operation of s 64 of the *Judiciary Act*: namely, the law applying to a claim between the Commonwealth and the citizen in as close a manner as possible to its application in disputes between citizens.

Third, recall that the remedies arising from actions of the kind pursued in *Sims* were historically regarded as discretionary.[201] As discussed above, these discretionary remedies, or at least orders in their nature, remain available.[202] The discretion to withhold such remedies may, bearing in mind well-recognised public law principles, be exercised based on unwarrantable delay.[203] The presence of a limitation period may be relevant to determining whether a delay in bringing an action is unwarrantable, such that the remedy sought should be withheld.

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200 See, eg, *Condon v Pompano* (2013) 252 CLR 38, 61–2 [42]–[43] (French CJ), 107–8, 115 [187], [212] (Gageler J), citing *Walton v Gardiner* (1993) 177 CLR 378, 393 (Mason CJ, Deane and Dawson JJ). See also *Batistatos v Roads & Traffic Authority of New South Wales* (2006) 226 CLR 256; *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857.

201 See above n 70.

202 Ibid.

203 See, eg, *Bechara v Bates* (2021) 286 FCR 166, 202–4 [158]–[164] (the Court).