

COLLATERAL ATTACKS ON ADMINISTRATIVE DECISIONS: ANOMALOUS BUT EFFICIENT

*Dr Roger Douglas**

The review of administrative decisions has traditionally been the prerogative of the superior courts. The power to issue the public law writs and their equivalents is confined to the Superior Courts. Judicial review legislation normally restricts the relevant jurisdiction to superior courts.¹ Inferior Courts generally lack the jurisdiction to issue public law writs or to make declarations in relation to the validity of administrative acts.²

Yet there are numerous examples of cases where administrative law matters are raised incidentally to matters within the jurisdiction of inferior courts. There is ample English authority and considerable Australian authority for the proposition that the validity of any administrative decision can be challenged in any criminal or civil proceeding in which the validity of the decision is relevant to the question of guilt or liability, and that it is immaterial that it is raised in a court which otherwise lacks an administrative law jurisdiction. Moreover the criteria for determining whether a decision is to be treated as valid may depend on whether the issue is raised collaterally or in public law proceedings. These considerations have prompted some English courts to attempt to limit the scope of collateral attack, most notably in the case of *Bugg v DPP*.³

The formulae used for doing so were unsatisfactory, and soon abandoned, but, I shall argue, the conceptual problems which inspired the decisions remain. Part I of this paper examines the authority for the proposition that administrative law matters may be canvassed in any case to which they are relevant, beginning with a summary of the case law prior to *Bugg*, followed by an analysis of *Bugg*, and concluding with a review of English and Australian courts' reaction to *Bugg*.

In Part II I discuss the difficulty of reconciling the generous rules relating to the availability of collateral attack with the restrictive rules governing jurisdiction in administrative law cases, and the difficulty of reconciling the strict doctrine of nullity which underpins collateral attack with the fact that public law relief may occasionally be refused on discretionary grounds even when the decision would otherwise be a nullity. While these considerations rarely give rise to problems, they received some attention in the recent South Australian decision in *Jacobs v Onesteel Manufacturing Pty Ltd*.⁴ Part III examines the implications of this analysis for understanding administrative law in general.

PART I: COLLATERAL ATTACK⁵

The validity of administrative decisions may occasionally be relevant to criminal or civil liability. Guilt may depend on the validity of a regulation or a by-law under which someone is charged. An offence may involve disobedience to orders in a formal notice, such that no

* This is a revised version of a paper presented to Victorian Chapter, Australian Institute of Administrative Law, 12 April 2006. Dr Douglas is Associate Professor, School of Law, La Trobe University, Bundoora Vic 3086.

offence is committed if the notice is invalid. The validity of administrative acts may also be relevant to civil cases. The invalidity of an administrative act may mean that an act which would otherwise be legal becomes trespass. An agreement which on its face would be enforceable may be unenforceable if one of the parties lacked the authority to enter into the relevant agreement. Property seized pursuant to an unlawful decision may be recoverable by the person from whom it has been seized. Much will depend on the relevant legislation. If legal consequences attach to *de facto* acts, their actual legality may be immaterial. If the error does not deprive the act of legal operation at relevant times, the error will be irrelevant. But if guilt or liability turns on the validity of administrative acts, validity questions are of obvious relevance.

Prior to 1992, it was generally accepted that validity issues could be canvassed in the court in which they arose, notwithstanding that the court lacked the jurisdiction to entertain a direct attack on the validity of the decision in question. In 1992, a somewhat unsatisfactory English decision, *Bugg v Director of Public Prosecutions*,⁶ cast doubt on whether this was the case. *Bugg* was however, soon over-ruled by the House of Lords: *Boddington v British Transport Police*,⁷ and Australian courts have followed *Boddington*.

Pre-1992 authority

Prior to *Bugg*, courts had accepted that validity of administrative acts might be raised in criminal or civil proceedings where validity was relevant to the issues posed by the relevant case, and that those wishing to do so need not have previously sought judicial review of the relevant act.

The Australian High Court accepted that parties could raise the invalidity of legislation as a defence to criminal charges, notwithstanding that the court in which they were charged had no jurisdiction to entertain direct attacks on the validity of the legislation.⁸ There was ample English authority to similar effect.⁹ There have also been cases in which defendants based their defence on the invalidity of administrative acts, a well-known example being *Director of Public Prosecutions v Head*,¹⁰ where the fact that a person had not been lawfully detained in an institution was held to constitute a defence to a charge of having sexual intercourse with a person detained in an institution under the *Mental Deficiency Act 1913* (UK). There was also old authority permitting collateral attack by prosecutors on the validity of decisions which, if valid, would constitute the basis for a successful criminal defence.¹¹

There were numerous examples of collateral attack in the course of civil cases, sometimes by plaintiffs¹² and sometimes by defendants.¹³ Indeed, prior to the rise of certiorari, tort actions were the normal way in which a person aggrieved by a decision of an inferior court or quasi-judicial body attacked the validity of the decision,¹⁴ and even after the development of certiorari as a tool for quashing unlawful decisions, collateral attack continued. Illustrative authority is provided by none other than *Cooper v Wandsworth District Board of Works*,¹⁵ a trespass action, in which the defendant's denial of procedural fairness to the plaintiff meant that it lacked what would otherwise have been a defence to its having demolished the plaintiff's building.

More recently, in another case involving the Wandsworth local authority, the Court of Appeal held that a defendant in an action to recover unpaid rent could rely on the defence that the local authority's decision to increase the rent involved jurisdictional error: *Wandsworth London Borough Council v Winder*.¹⁶ In Australia, one well-known example of collateral attack being used by a plaintiff is the challenge in the *Jehovah's Witnesses* case to the validity of the *National Security (Subversive Associations) Regulations* (Cth) which, like *Cooper*, took place in the context of an action for trespass, albeit one brought in a court with a public law jurisdiction.¹⁷ Conversely, in *Australian Broadcasting Commission v Redmore*,¹⁸

the defendant to a breach of contract action argued in its defence that it had not been empowered to enter into the contract in question.

Collateral attack was not possible in all cases of administrative error. First, the error had to be relevant, and collateral attack was not possible if guilt or liability depended not on the validity of the act, but on its existence. Even when acts were flawed by jurisdictional error, courts were sometimes willing both to give them some legal effect. Courts were sometimes willing to interpret legislation as conditioning outcomes on the existence, rather than the validity of decisions,¹⁹ and there is old authority suggesting that liability for action taken pursuant to warrants issued without jurisdiction might be limited to cases where the error was apparent on the face of the warrant.²⁰

Second, successful collateral attack normally required that the relevant error be jurisdictional.²¹ The significance of this requirement was reduced by the growing tendency of courts to classify almost all legal errors as 'jurisdictional' when the decision-maker was an administrator rather than a judicial officer. But Australian courts recognise that there exists a class of 'non-jurisdictional' errors.²²

But subject to these exceptions, the cases suggested that collateral attack was possible even when the error was not apparent in the absence of evidence, and even when the prosecution or claim was brought in a court which otherwise lacked an administrative law jurisdiction. In *Cooper* the error was, of course, denial of natural justice, a jurisdictional error, but not one which was obvious from the decision itself. In none of the High Court cases challenging the validity of regulations, did either the magistrate who first heard the case or the High Court appear to have any doubt as to the legality of raising the invalidity of the legislation as a defence to charges under the legislation.

From Bugg to Boddington

In *Bugg v Director of Public Prosecutions*,²³ the English Divisional Court cast doubt on these principles, holding that it was not open to a criminal defendant to raise the invalidity of an administrative act as a defence to a criminal charge. *Bugg* was one of a series of cases arising out of prosecutions of anti-war protesters for trespassing on military land. *Bugg's* defence was that he was free to be present on the land in question on the grounds that by-laws purportedly prohibiting him from being present on the land were legally flawed and therefore invalid.

Bugg's case involved two appeals. One, by *Bugg*, was against a conviction after a magistrate had held that he lacked the jurisdiction to consider the validity of the by-law in question. The other was a prosecution appeal against the acquittal of the defendant, on the grounds that the by-law was invalid. The Divisional Court (Woolf LJ and Pitt J) distinguished between 'substantive' and 'procedural' invalidity, and in relation to the latter category, between invalidity which could be proved in the absence of evidence, and invalidity which could be established only on the basis of evidence. In the former case, the invalidity of the by-law could be raised in the magistrates' court as a defence. In the latter case, it could not.²⁴ However the Court considered that the by-laws fell into the former category and, on their face, were invalid. It therefore found in favour of the defendants.

Bugg was in many ways an unsatisfactory decision. The Court considered that if a by-law was procedurally flawed, and if the flaw was a latent one, the by-law was to be given effect unless its validity had been successfully challenged in judicial review proceedings prior to the alleged offence.²⁵ This would mean that even if a criminal defendant sought and obtained a declaration that a by-law was (and therefore always had been) invalid, the criminal court would nonetheless be required to convict. This seems to go well beyond what is necessary to achieve the policy goals underlying the decision, and it is difficult to see how

the conviction of a defendant could be justified if, hypothetically, in a public law action, with the prosecutor joined as a defendant, the defendant-applicant had obtained a declaration that the by-law was and always had been invalid.

The concept of non-patent errors smacked of the administrative law of a by-gone age²⁶ and it was not clear why collateral challenges should be permitted in response to latent substantive errors (such as bad faith), but not latent procedural errors. Nor was it clear why some errors were to be treated as substantive while others were to be classed as procedural. Yet classification of an error would determine whether a defendant could be convicted of an offence against subordinate legislation or a notice flawed by jurisdictional error.

Nonetheless, *Bugg* can be partly understood as a response to concerns about the appropriateness of allowing collateral attack on administrative decisions. One potential source of difficulty arose from developments in administrative law which had meant that virtually all errors were to be classed as jurisdictional. This had the potential vastly to increase the range of decisions which could be attacked collaterally, as well as the complexity of issues surrounding their legality.²⁷ Another was that collateral attack meant that the Magistrates Court could be asked to handle matters which properly belonged in the Divisional Court. The hearing of cases by magistrates could give rise to a number of difficulties. First, English magistrates were usually laypeople, with no formal legal qualifications.²⁸ Second, given the decentralised nature of the courts, permitting collateral attack might mean that there were apparently inconsistent decisions concerning the validity of administrative acts, especially where findings of validity turned on evidence.²⁹ Third, decisions relating to the validity of administrative acts might be made without the relevant decision-maker being heard.³⁰

In England, *Bugg* aroused mixed responses. Some judges considered that it might not have gone far enough in the direction of bringing public law litigation back into the Divisional Courts where it belonged.³¹ Others considered that it was probably wrongly decided, and that justice demanded that criminal defendants be able to raise any relevant matter in their defence, without having to go to the trouble of initiating judicial review proceedings. In *Reg v Wicks*³² the House of Lords was extremely critical of Woolf LJ's reasoning in *Bugg*.

Wicks was an appeal from a conviction on a charge of failing within the prescribed time to comply with a notice under the *Town and Country Planning Act 1990* (UK). *Wicks* had argued in his defence that the notice was invalid. The House of Lords dismissed his appeal on the grounds that the offence was not conditional on the existence of a valid notice, but on the existence of a formally valid notice which had not been set aside. This meant that it was not necessary for the Lords to decide whether *Bugg* was correctly decided. Nonetheless, criticisms of the case by Lords Nicholls and Hoffmann³³ (with whom the other Lords agreed) indicated that their Lordships regarded the decision as fundamentally flawed. Nonetheless, Lord Nicholls was not unsympathetic to the problems which prompted Woolf LJ's attempt to limit collateral attack, suggesting that perhaps:

the guiding principle should be that prima facie all challenges to the lawfulness of an impugned order may be advanced by way of defence in the criminal proceedings, but that the criminal court should have a discretionary power to require an unlawfulness defence to be pursued, if at all, in judicial review proceedings.³⁴

Moreover the decision in *Wicks* represented an alternative approach to some of the problems inherent in collateral attack. The Lords' interpretation of the legislation meant that problems which otherwise would have arisen from permitting collateral attack disappeared. But this might not always be the case. *Wicks* ultimately turned on the legislation, and in interpreting the legislation as they did, the Lords took into account the fact that the notice

was one which related to a single person, rather than being one of general application, along with the fact that it was a notice which had to be served on the person affected, which meant that person was in a position to decide what do about it, and to act on that decision. It was clear that collateral attack would almost invariably be feasible when subordinate legislation was being attacked.

In *Boddington v British Transport Police*³⁵ the House of Lords formally overruled *Bugg*. The case arose from a prosecution for smoking in a railway carriage in which a non-smoking sign was conspicuously displayed contrary to a by-law made under the *Transport Act 1962* (UK). The defendant contended that the decision to post the no smoking signs was invalid since it reflected a decision to prohibit smoking in all carriages and not only in some. He was convicted and appealed to the Divisional Court which upheld the conviction, finding that a defendant in a criminal case was not entitled to raise the invalidity of a by-law or administrative act as a defence to a criminal charge.

The House of Lords gave special leave to appeal, ruling that the validity of administrative acts could be collaterally attacked, but that the act in question was valid. Their Lordships considered that it was irrelevant whether the alleged invalidity was bad on its face, or such that it could be established only on the basis of evidence. Their decision was partly based on an analysis of the relevant authorities, which the Lords concluded, did not support *Bugg*.³⁶ Their Lordships also considered that the distinctions which underlay *Bugg* were unworkable, and uncertain in their application, and should certainly not be the basis for differentiating between cases where a criminal defendant could be convicted pursuant to an ultra vires administrative act, and those in which conviction would be not possible.³⁷ Their decision was also based on policy considerations, and in particular, the primacy of the rule of law, and the importance to be attached to the rights of criminal defendants.³⁸

Bugg and Boddington in Australia

In Australia *Bugg* was followed in the Victorian case of *Flynn v DPP*,³⁹ a case which, like *Bugg*, had its origins in protest, this time in the forests of Eastern Victoria. The defendants had been charged under the *Conservation, Forests and Lands Act 1987* (Vic) s 95A(1)(b) with hindering or obstructing the lawful carrying out of forestry operations. Their defence was that the relevant licences had been improperly granted and were therefore had no legal effect. The defendants were therefore not guilty.

This argument failed before the Magistrates' Court, the County Court and in the Supreme Court, which followed *Bugg*. If *Bugg* was correct, *Flynn* was correct. The alleged errors were procedural and not patent and their proof would have required evidence. But otherwise Australian courts showed little enthusiasm for *Bugg*, even prior to *Boddington*, and insofar as they have referred to *Flynn*, they have not followed it.⁴⁰

The High Court's decision in *Ousley v The Queen*⁴¹ (in which *Bugg* was neither cited nor relevant) left open the question of whether collateral attack would be permitted in cases where the error was a latent one. Following earlier authority, it held that the validity of warrants to install listening devices could be collaterally attacked in any court, notwithstanding that the warrant had been issued by a Supreme Court judge, but a majority of the court considered that this would be the case only if the alleged error was apparent on the face of the warrant.

Toohey J considered that 'it is not open to the judge to adjudicate on the sufficiency of a warrant or whether the issuing authority was in fact satisfied as to any statutory requirements'.⁴² Gummow J agreed and (unlike Toohey J) considered that this even precluded an argument that the warrant was invalid on the grounds that it did not contain an endorsement by the issuing judge to the effect that he was satisfied as to the existence of a

relevant jurisdictional fact.⁴³ Kirby J did not consider it necessary to decide the question, but also inclined to the view that the issuing judge's subjective satisfaction was not relevant to the validity of the warrant.⁴⁴ Gaudron J did not expressly address the question of whether the issuing judge's actual satisfaction could be examined in the course of collateral attack.⁴⁵ McHugh J however, considered that warrant decisions could be collaterally attacked in criminal trials, notwithstanding that the alleged error was one which could be established only with evidence.⁴⁶

But the Court did not have to consider whether the validity of the warrant could be collaterally attacked for latent error, since the appellant's argument was that the alleged defect was either apparent on the face of the warrant, or one which could be inferred from the failure of the warrant to refer to the judge's satisfaction as to the existence of a relevant jurisdictional fact. Moreover, the ground for limiting collateral challenge was that the effect of the legislation and case law governing warrants was to condition the validity of warrants on their face validity rather than on the legality of the processes which had led to their issue. There was therefore nothing in the decision to suggest that collateral attack should not be available in cases where a defendant was asserting latent *jurisdictional* error, and where guilt or liability were predicated on the validity of some administrative act.

But McHugh J's acceptance that this was the case coexisted with observations which suggest that that he entertained reservations about the desirability of collateral attack in certain circumstances. He regretted the fact that collateral attacks could fragment the criminal trial process:

To some extent, the problem of fragmentation can be overcome by having collateral challenges to the validity of warrants determined in pre-trial hearings. Even so, the time of criminal trial judges and the courts of criminal appeals is taken up on matters that should be dealt with in proceedings for judicial review.⁴⁷

He concluded that:

The matter is one which seems to call for examination by the legislature, particularly since the costs sanction that is available in civil proceedings, a sanction that acts as a deterrent against barely arguable applications, is not applicable in a criminal trial on indictment.⁴⁸

Writing shortly after the decision (which he regarded as flawed), Aronson treated it as tending to the establishment of a position 'whereby the grounds for collateral attack might be frozen to those few grounds of judicial review which were available before the massive expansion of the scope and grounds of judicial review'.⁴⁹ However, he argued that it was likely to be read down.

State and federal superior court decisions have borne out that prediction. There is a judicial consensus that collateral attack is permissible whenever the validity of an administrative decision is relevant to a criminal guilt or civil liability,⁵⁰ and regardless of whether the error is patent or latent,⁵¹ and regardless of whether the court hearing the case is a superior or an inferior court.⁵² Courts have been willing to permit collateral attack notwithstanding that they are state courts hearing attacks on federal decisions.⁵³

Moreover, courts have been reluctant to conclude that the relevant legislation might condition guilt or liability on the existence of an administrative act as distinct from its validity. Except in warrant cases, the cases rarely posed the question of whether there might be a legislative intention that the outcome should depend not on the validity of the decision but on the fact that a 'decision' had been made.

In *Grey*, where the issue was canvassed, Whealy J considered that it was arguable that the relevant statutory scheme envisaged that people who did not avail themselves of the

statutory appeal procedures should not be entitled to raise validity as a collateral issue, but he concluded that the better view was that guilt required that the order also be a valid order. Unlike the somewhat analogous English legislation, the New South Wales Act did not preclude persons aggrieved by decisions under the Act from resorting to appeal procedures other than those for which the Act provided. Moreover, following *Boddington*, he considered that 'only the clearest language in a statute should be held to have taken away the right of a defendant in criminal proceedings to challenge the lawfulness of an administrative decision made against him where the prosecution is premised on its validity'.⁵⁴ (He found, however, that the order was valid.)

However, some litigants have been wary about relying on collateral attack, even when it seems to have been clearly available. In the proceedings which culminated in *Jarratt v Commissioner of Police for New South Wales*,⁵⁵ the plaintiff, who was removed from his position as a Deputy Commissioner in the New South Wales Police Service, sought damages for breach of contract, arguing that his purported removal was unlawful since he had not been afforded procedural fairness, and that in consequence the termination of his contract was unlawful. Rather than attack the decision collaterally, his claim in the New South Wales Supreme Court included both a claim for a declaration that his purported dismissal was invalid and claims for relief (including damages) for breach of contract.⁵⁶

Moreover, a recent South Australian case suggests that there might or ought to be some limits to the circumstances in which collateral attack will be permitted. In *Jacobs v Onesteel Manufacturing Pty Ltd*⁵⁷ a five member Full Court of the Supreme Court of South Australia considered whether a tribunal with the jurisdiction to determine questions of law had jurisdiction to determine the validity of its Rules in the context of a collateral attack on their validity. The Full Court opted to follow *Boddington* and held that the validity of subordinate legislation could be collaterally attacked, regardless of whether relevant error was substantive rather than procedural or latent rather than patent, and regardless of whether the collateral attack took place in a superior or an inferior court.⁵⁸ But it left open the question of whether collateral attack would be permitted when the decision under attack was an *administrative* as distinct from a legislative one.

No other court seems to have regarded this distinction as relevant. Indeed, the relevant decisions in *Boddington* itself, and in *Ousley*, *Aerolineas Argentinas*, *Selby*, *Robinson*, and *Grey* were all administrative decisions. The reason the Full Court seems to have regarded the legislative/administrative distinction as potentially relevant was an earlier Full Court decision, *Hinton Demolitions Pty Ltd v Lower (No 2)*,⁵⁹ in which the Court had held that a collateral challenge to the validity of an administrative decision could not be maintained. In choosing to distinguish *Hinton* on the ground that the decision in *Hinton* was an administrative decision, the Full Court seems to have been inspired by caution rather than by commitment to the idea that administrative decisions should not be subject to collateral attack.

Hinton is tenuous authority for the proposition that the validity of administrative acts cannot be attacked collaterally. Bray CJ had held that administrative decisions could be attacked collaterally if they were void, but not if the alleged error made them no more than voidable. He found that the relevant error was intra-jurisdictional and that collateral attack was therefore precluded. Wells J had concluded that administrative decisions could not normally be attacked collaterally even if void, and Mitchell J had unhelpfully agreed with the reasoning of both Bray CJ and Wells J. *Hinton* left open the question of whether 'void' administrative acts could be attacked collaterally, but it can scarcely be treated as having resolved it. Moreover there is no suggestion in the judgments in *Jacobs v Onesteel* that the distinction between legislative and administrative acts had any substantive merit. Indeed, the policy arguments given in favour of allowing collateral attack on rules would also apply to collateral attacks on administrative acts.⁶⁰

The significance of *Jacobs v Onesteel* lies rather in the fact that the Court concluded that it might be desirable that courts should have a discretion to refuse to permit collateral attack. Besanko J identified a number of factors which might bear on the exercise of the relevant discretion:

1. Are the grounds of challenge likely to involve the adducing of substantial evidence?
2. If collateral attack is permitted, will all proper parties be heard before the court or tribunal in which the collateral challenge is to be heard?
3. In the particular case, does the allowing of a collateral challenge by-pass the protective mechanisms associated with judicial review proceedings such as the rules as to standing,⁶¹ delay and other discretionary considerations?
4. Is there a statutory provision which bears in one way or another on the question of whether a collateral challenge should be permitted?
5. Is the issue raised by the collateral challenge clearly answered by authority?
6. Are there other cases pending which raise the same issue?
- 7 (Possibly) Is there a more appropriate forum in terms of expertise and perhaps court procedures such that a collateral challenge should not be permitted?⁶²

The Court concluded that in the circumstances, the tribunal had not erred in considering the validity question as a collateral issue. But it left open the question of whether courts and quasi-judicial tribunals did or should possess a discretion in relation to the consideration of collateral issues and how it might be exercised. This was a matter for the High Court or the legislature.⁶³

PART II: IMPLICATIONS

Acceptance of the principle that the validity of administrative decisions can be collaterally attacked on any ground and in any court has much to commend it.

- It is consistent with administrative law's reluctance to intervene in relation to the legality of criminal justice decisions when these can be adequately handled by the criminal courts.⁶⁴
- It makes for efficiency, by ensuring that litigants can have their matters disposed of in a single trial and in a court which is normally appropriate in the light of the stakes at issue.⁶⁵
- It makes for fairness and social justice in that it avoids the danger that an innocent defendant might be convicted through being unable to afford or run an administrative law case in a higher court.⁶⁶
- But allowing collateral attack has the potential to cause difficulties. There may be cases where it is inappropriate that administrative law cases be determined by magistrates' courts. And problems may arise from the fact that the criteria for determining whether administrative decisions are to be treated as valid appear to vary, according to whether the decision is attacked collaterally or in a public law action.

Hearing public law issues in inferior courts

Some legal scholars have expressed concern at the fact that collateral attack means that administrative decisions can be attacked in courts which otherwise lack a public law jurisdiction⁶⁷ and this possibility has caused concern to English courts even in cases where the court has found in favour of collateral attack.⁶⁸

In *Boddington*, the House of Lords recognised that there were conflicting interests: on one hand, the rule of law and fairness to criminal defendants; on the other, the 'public interest in orderly administration'. Insofar as there was a tension between these two principles, the 'balance between them is ordinarily to be struck by Parliament'.⁶⁹ Lord Slynn of Hadley considered that some of the problems which might arise could be dealt with by the setting up of a system whereby magistrates' courts could refer questions of invalidity to the Divisional Court.⁷⁰ But the Lords were not unduly perturbed by the fact that collateral attack could mean that administrative law matters were being decided by magistrates' courts. Problems posed by conflicting or incorrect decisions could be corrected on appeal.⁷¹ Moreover there was no reason to assume that magistrates were not up to handling administrative law matters:

They sometimes have to decide very difficult legal questions and generally have the assistance of a legally qualified clerk to give them guidance on the law. For example, when the Human Rights Bill now before Parliament passes into law, the magistrates' courts will have to determine difficult questions of law arising from the European Convention on Human Rights.⁷²

Australian courts have rarely commented on this issue. In *Selby v Pennings*⁷³ Owen J considered the qualifications of Western Australian magistrates were among the reasons why courts should permit collateral attack, but in *Jacobs v Onesteel*, Besanko J suggested that collateral attack should possibly not be permitted if there was 'a more appropriate forum in terms of expertise and perhaps court procedures'.⁷⁴ Otherwise, Australian courts have not addressed this issue. Nonetheless the matters which have carried weight with the English courts are of obvious relevance to Australia. Prosecutors may appeal or seek judicial review of magistrates' decisions, thereby reducing the (largely theoretical) possibility of conflicting decisions relating to the validity of the one administrative decision. In addition, there are procedures for transferring *civil* cases which give rise to complex questions of law to higher courts.⁷⁵ Moreover, Australian magistrates are professionally qualified, and if English lay magistrates, assisted by a legally trained clerk of court, can handle administrative law, it follows, a fortiori, that Australian magistrates can do so.

Different validity criteria

A second problem potentially associated with collateral attack stems from the fact that the criteria applied to determine validity may vary according to whether the validity question arises in relation to a criminal or civil law matter on one hand, or an administrative law matter on the other. One difference between direct attack and collateral attack lies in the fact the burdens of proof may vary. If the validity of the act depends on questions of fact, the standard of proof required of the person asserting the validity of the act should logically vary according to whether the issue arises in a public law case, a civil law case or a criminal law case.

In a public law or a civil case, a person challenging the validity of an administrative act must establish facts fatal to the act's validity on the balance of probabilities. In a criminal case, where validity depends on the existence of particular facts and where the existence of those facts is in dispute, the prosecution must establish those facts beyond reasonable doubt. In the criminal case, the prosecution receives assistance from the presumption in favour of the validity of official acts, but once evidence is led casting doubt on the existence of facts on

which validity depends, the defendant has discharged its burden of adducing evidence and it is for the prosecution to prove the relevant facts beyond reasonable doubt.⁷⁶ This means that, other things being equal, a person might be unable to win an application for judicial review of a particular administration, while simultaneously being able to rely on its invalidity in the course of defending a criminal case. The reason for this is that it is logically possible for the probability of the existence of a factual basis for the decision to be both high enough to ensure that an application for judicial review will fail, but not high enough to warrant a conviction in a criminal case. It also follows that the outcome of different cases, all predicated on the validity of the same administrative act could vary depending on the evidence adduced in each case.

But while this might yield apparently anomalous findings, it is inherent in the existence of different standards of proof and in the fact that in cases involving different parties, outcomes may depend on the evidence produced in each case. There would be fewer potential anomalies if all validity issues were dealt with in administrative law proceedings, but this would come at a price, namely a relaxation of the standards protecting criminal defendants. Reducing one type of apparently anomalous finding (the coexistence of decisions upholding and rejecting the validity of a given act) would come at the price of another (different standards of proof of criminal guilt, depending on the issues raised in a criminal case). The law accepts that the outcome of the same factual issue may vary depending on whether it is resolved in a civil or a criminal case, and there is no reason why the same rule should not govern questions relating to the validity of administrative acts. In any case, the issue rarely – if ever – arises.⁷⁷

A second and more problematic difference is that the role of ‘discretionary factors’ appears to vary depending on whether a matter is challenged directly or collaterally. There are suggestions that the discretionary considerations which can occasionally surround the making of orders in public law cases may be irrelevant where validity issues are raised collaterally, although a case has yet to arise which turns on this point. While such a difference (assuming it to exist) does not appear to be inherent in collateral attack, it is nonetheless one with the potential to give rise to problems when issues are canvassed collaterally rather than directly, given current statements of the law.

The issue was discussed in *Federal Airports Corporation v Aerolineas Argentinas* where the Full Federal Court concluded that it was irrelevant that relief might have been refused on discretionary grounds had the matter been brought as a public law case.⁷⁸ In *Wicks*, Lord Hoffmann assumed that in collateral attack, the court could not exercise the discretions which a Divisional Court would exercise in determining whether to grant public law relief in relation to the decision in question.⁷⁹ In *Boddington* Lord Steyn also considered that a defendant might rely on the invalidity of an administrative act, even if, in judicial review proceedings in relation to the same act, a court would refuse relief.⁸⁰

In none of the cases was it necessary to resolve this issue. In *Aerolineas Argentinas* the Full Court concluded that it was open to the trial judge to find that there were no reasons why the plaintiff would not have been permitted to make an ADJR application. In *Wick* their Lordships held that guilt was not conditioned on the validity of the notice, and in *Boddington*, their Lordships all agreed that the administrative decision was valid.

But cases might arise in which a court would conclude that an application for judicial review would have failed on the grounds that the applicant was out of time or on some other discretionary ground. In such a case, a court might be tempted to conclude that the relevant legislation could nonetheless be interpreted as conditioning the outcome of collateral attack on the presumptive invalidity of an act, rather than on the basis of whether in a public law case, a court would quash the decision or declare it invalid.

But there may be cases where the problem could not be disposed of in this way. For instance, consider *Hodgens v Gunn; Ex parte Hodgens*.⁸¹ This case involved an application for orders quashing a decision to take the prosecutor's dogs into care, on the grounds that the prosecutor was not a fit and proper person to have them in his possession. The prosecutor argued that the decision was a nullity on the grounds that he had been denied procedural fairness. The court agreed that this might have been so, but considered that relief should be refused. The final hearing of the case was delayed as a result of the prosecutor's unpreparedness for trial, and the delay had meant that it might be impossible and undesirable to undo transactions entered into in reliance on the validity of the taking of the dogs.

Suppose that following the purported forfeiture of the dogs, the Minister had given the dogs to people who would give them a good home. The logic of permitting collateral attack and of not conditioning its success on discretionary considerations is that if after some delay, Hodgens had demanded the return of the dogs and sued those who refused to return them, in detinue, in the Magistrates Court, he would have succeeded (assuming that the new donees were not purchasers for value).

Indeed he would have been entitled to sue even after losing his case in the Supreme Court case. The outcomes of public law actions would not necessarily preclude an unsuccessful applicant raising the validity issue again in non-public law litigation. First, the parties in the public law case might be different to the parties in the collateral attack case. If so, there would be no question of issue estoppel between the plaintiff and the 'new parties' in the tort action. Second, if discretionary factors are irrelevant to the validity of an act for the purposes of collateral attack, criminal and civil courts may be asking different questions in relation to the act to those asked in judicial review proceedings.

There are two objections which can be made to this kind of outcome. One is that it is hard to avoid the conclusion that the outcome in the hypothetical case given above could bring the courts into a certain amount of disrepute. In the dogs scenario, an order by the Supreme Court dismissing an application for a declaration that a decision was invalid would have been followed by an order by a magistrates court which effectively said that the Supreme Court's decision was irrelevant to the question of whether a plaintiff could sue on the basis that the order was invalid, and effectively, that the Supreme Court litigation was largely pointless.

This is almost certainly correct, but it is not conclusive. Apparent anomalies are inherent in the possibility that validity issues in relation to a given act may turn on different evidence, different parties and different standards of proof. What matters is not whether there are apparent anomalies, but whether they can be justified.

This raises the second question: why should validity in collateral attack cases depend on a strict doctrine of nullity while validity in public law proceedings depends ultimately on whether there are discretionary grounds against ordering relief? If, say, there are good reasons for not taking dogs from their new custodians and these reasons are good enough to warrant refusal of relief in the event of an application challenging their taking, why should their old custodian be allowed to rely on the invalidity of their taking as a basis for a cause of action in detinue, or a defence to trespass following self-help? Conversely, if it is proper that a strict doctrine of nullity apply in relation to validity for the purposes of collateral attack, why should the same strict doctrine not apply to direct attack?

The reality, however, is that the problem appears to be a largely hypothetical one. Cases in which relief is refused on discretionary grounds are exceptional and in none of the reported collateral attack cases does it seem that relief might have been refused on discretionary grounds. This is why the issue can be treated as open. The fact that it has been open for so

long suggests that in practice it is one of Administrative Law's less pressing issues, but that does not strip it of its theoretical importance.

PART III CONCLUSIONS

Despite the potential anomalies inherent in collateral attack, it is difficult to show that laws permitting collateral attack have ever given rise to absurd or anomalous outcomes. There appear to be several reasons for this. One is that there are a number of obstacles to the use of collateral attack as a means of ensuring de facto judicial review. For one thing, it can be used only where the relevant decision is one which directly impinges on a person's rights or duties. It is not available in cases where a person is aggrieved because they have not been afforded a right or privilege which, if afforded, would provide the basis for a claim or a defence.⁸² It is not available when the alleged error is intra-jurisdictional rather than jurisdictional, since in this event the decision has legal validity and operation until quashed by a court with the jurisdiction to do so. It is not available if the relevant law conditions rights or liabilities on the existence of a purported decision, rather than on the existence of a legally valid decision. For instance, criminal guilt may be predicated on the existence of a purported decision rather than on whether the decision was validly made.⁸³ Warrants may legitimate intercepts, listening devices, searches and arrests so long as they are valid on their face.⁸⁴

Legislation may provide immunity in tort for officials who act in good faith and who are not negligent,⁸⁵ and there is some old authority for the proposition that no action lies for false imprisonment if the arrest is pursuant to an apparently regular, extra-jurisdictional order of a judicial officer.⁸⁶ If, in a given context, permitting collateral attack would produce an absurd outcome, this would count in favour of interpretation which conditioned the outcome on the fact, rather than the validity of a purported decision.

Such considerations (along with lack of access to good legal advice) may explain why collateral attack cases appear to be uncommon. Given the apparent rarity of collateral attack cases, and given the rarity with which relief is refused on discretionary grounds in judicial review cases, it is perhaps not surprising that there appear to be no cases in which it is possible that the outcome of the substantive matter would have been different had it been the subject of a judicial review application.

Consistent with this is that it is rare to find legislative attempts to deal generally with the problems which might theoretically arise from collateral attack. Victorian legislation once provided that the validity of municipal by-laws might not be challenged collaterally, following a decision which held that Courts of Petty Sessions could entertain challenges to the validity of Council by-laws.⁸⁷ But no other Australian jurisdiction seems to have followed this legislative precedent, which, in any case, was confined to municipal by-laws and was repealed in 1989.⁸⁸

Collateral attack does, however, raise awkward theoretical questions about administrative law. The contrast between the legal absolutism underpinning collateral attack and the vaguely discretionary nature of judicial review reflects two slightly different images of administrative law. Collateral attack reflects the logic of ultra vires and the rule of law. No decision may have legal effect unless the decision maker has the legal power to make it. Doctrinally the law of judicial review has largely accepted this principle: the withering of the class of errors once called intra-jurisdictional reflects administrative law's contemporary commitment to legality. But procedures and discretions reflect ambivalence about the logic of jurisdictional error and of nullity. Time limits and their application reflect recognition that finality and certainty may occasionally be preferable to legality; discretionary remedies reflect equity's traditional recognition that there may be circumstances in which rights should be subordinated to the other interests.

The contrast between the accessibility of collateral attack and the practical restrictions on access to judicial review in state courts raises the question of why judicial review proceedings may not be initiated in courts which are seemingly capable of hearing administrative law cases. One answer is that there may in fact be no good reason why they shouldn't and that it is indeed possible that one day magistrates' courts might be given a general administrative law jurisdiction.

But even in decisions which have upheld collateral attack in magistrates' courts, judges have sometimes expressed unease about administrative law matters being handled by lower courts. While contemporary magistrates almost certainly possess the legal competence needed to handle administrative law issues, problems could arise as a result of the decentralised nature of magistrates' court justice.⁸⁹ If a particular administrative decision were to be attacked both on legal and factual grounds, there is a theoretical possibility of inconsistent decisions. Moreover while inconsistency could be normally be cured by appeals, this will not necessarily be the case if the different findings reflect the different evidence which has been produced in different cases. This point cannot be pressed far, however. The problem could also arise in cases heard if the relevant validity issue were to be raised in separate trials in higher courts.

Another and in some ways less reputable reason for limiting the judicial review to the superior courts may be to limit access to judicial review by placing a considerable price tag on those who seek judicial review. McHugh J's observations in *Ousley* suggest that he might consider this to be a good thing, and there may be cases where he is right. But while there may be a case for maintaining the Supreme Courts' near monopoly over judicial review applications, the rarity of collateral attack and the absence of problems arising therefrom suggests that nothing is lost by allowing collateral attack in courts which lack an administrative law jurisdiction. Indeed, something is gained, namely enhanced access to justice.

It is tempting to conclude with the suggestion that the law relating to collateral attack be rationalised to remove potential anomalies.⁹⁰ Given the state of current case law, it would be preferable if this were done by legislation rather than by judicial development of the common law, since, except perhaps in South Australia, the latter would almost certainly defeat legitimate expectations arising from the current state of the common law. Legislation might tackle the problem either in an ad hoc manner (such as making explicit whether particular rights or duties depend on the existence of purported decisions, legally valid decisions, or decisions which would be declared invalid if attacked in judicial review proceedings).

Alternatively, legislation might provide that a party to proceedings might make an application for a validity question to be referred to a superior court and that if this were to happen, its status would depend on whether in the exercise of its public law jurisdiction, the court chose to quash the decision or declare it to be void. The criteria suggested by Besanko J in *Jacobs* would constitute a basis for a statutory regime which would maintain the advantages of the status quo while ensuring that an anomalous case could be transferred were one ever to arise.

The former approach would add to the complexity of legislation and it may well be that courts can be trusted on the whole, to anticipate what legislatures would have done had they adverted to the question. The latter approach would be simpler. In practice it would make little difference since there would rarely be occasions for parties either to seek the exercise of the power or for courts to accede to their applications. It would mean that if an anomaly-producing case were to arise, there would be a procedure for dealing with it. But the problems to which collateral attack gives rise seem to be theoretical rather than practical. The possible problems to which I have adverted have not arisen in any of the reported

cases, and in most if not all of them, collateral attack seems to have been the best way of handling the relevant administrative law issues.⁹¹

So, theoretically unsatisfying though this might be, the best thing to do may be to accept the status quo, with all its potential messiness. Theoretically elegant legislation would add to legislative complexity, and its contribution to additional interlocutory disputation might outweigh its substantive weaknesses. Tolerance of ambiguity can be a virtue, and one of the functions of the current slightly illogical system may be to symbolise the messiness which can sometimes make administrative law so theoretically interesting.

Endnotes

- 1 The exception is the Federal Magistrates Court which is an inferior court and which possesses jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
- 2 This result is usually achieved by legislation which fails to confer the relevant jurisdiction eg *District Courts Act 1983* (NSW) (see Part 3); *Local Courts Act 1982* (NSW) (see Part 7); *District Court of Queensland Act 1967* (Qld) (see Part 7); *Magistrates Court Act 1921* (Qld) (see Part 2); *Magistrates Court Act 1991* (SA) (see s 8); *Magistrates Court (Civil Division) Act 1992* (Tas) (see Part 3) (but note the Court's Administrative Appeals jurisdiction: *Magistrates Court (Administrative Appeals Divisions) Act 2001* (Tas)); *District Court of Western Australia Act 1969* ss 50, 51; *Magistrates Court (Civil Proceedings Act) 2004* (WA) (see Part 2). In some jurisdictions, legislation specifically provides that inferior courts lack the jurisdiction to entertain applications for public law writs: *Local Court Act* (NT) s 14(3); *District Court Act 1991* (SA) s 8(1)(b) (also any other direct challenges to the validity of administrative acts); *County Court Act 1958* (Vic) s 37(2)(c); *Magistrates' Court Act 1989* (Vic) s 100(2) (also any other direct challenges to the validity of administrative acts). In the Northern Territory and in the Victorian County Court, applications for equitable relief may be brought if the value of the relief sought is within the jurisdictional limit, or by consent: *Local Court Act* (NT) ss 14(i)(b), 14(1)(d)(ii); *County Court Act 1958* (Vic) ss 37, 39. This seems to permit applications for equitable remedies in relation to administrative acts, subject to it being possible either to attach a value (within the jurisdictional limit) to the declaration, or to the other party's consent. Such applications could, however, be transferred to a superior court.
- 3 [1993] QB 473.
- 4 [2006] SASC 32.
- 5 As Aronson points out, the term 'collateral attack' is used in a number of ways. A common usage involves treating an attack as 'collateral' if it constitutes an abuse of process (as, for example where a person seeks to assert a state of affairs inconsistent with a prior decision which resolves relevant questions of fact and/or law as between the parties to the case): see Mark Aronson, 'Criteria for restricting collateral challenge' (1998) 9 *Public Law Review* 237, 238-9. For the purposes of this paper, 'collateral attack' is used in a non-pejorative sense simply to denote the raising of an administrative law issue in the context of a criminal case or where the plaintiff is seeking some form of private law relief (whether the administrative law issue is raised by the plaintiff or the defendant) and in this respect, follows Aronson and also Amnon Rubinstein, *Jurisdiction and illegality* (1965), 37-39. The paper is concerned with its availability in cases where it would not constitute abuse of process.
- 6 Bugg, note 3.
- 7 [1999] 2 AC 143.
- 8 Examples include *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73; *Wishart v Fraser* (1941) 64 CLR 470. See too *Widgee Shire Council v Bonney* (1907) 4 CLR 977; and *Foley v Padley* (1984) 154 CLR 349 (validity of by-laws).
- 9 See, eg *Reg v Reading Crown Court. Ex parte Hutchinson* [1988] QB 384, the Divisional Court (Lloyd LJ and Mann J) held that justices could, and were obliged to entertain challenges to the validity of relevant byelaws.
- 10 [1959] AC 83.
- 11 For some old authority, see Aronson, note 5, 250 (n 7); Rubinstein, note 5, 7-8, 42-43. There appear to be no recent examples, but this may reflect a mixture of stricter *mens rea* requirements and prosecutorial good sense. Illustrative of judicial hostility to such prosecutions is *Pearson v*

- Broadbent* (1871) 36 JP 485 (cited by Rubinstein, note 5, 43), where the appellant had been convicted, notwithstanding that he had not been aware of the defect of a licence which had been issued to him, but where no order as to costs was made in relation to his unsuccessful appeal.
- 12 Rubinstein, note 5, 44-45 (challenges to distress of goods), 121 (action for wrongful denial of right to vote), 124-127 (liability of enforcement officers), 127-139 (liability of decision-makers and officials under 'ministerial' duties).
 - 13 Rubinstein, note 5, 44.
 - 14 Rubinstein, note 5, 54-80, 122.
 - 15 (1863) 14 CB (NS) 180; 143 ER 414.
 - 16 [1985] AC 461.
 - 17 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116.
 - 18 (1989) 166 CLR 454.
 - 19 Rubinstein, note 5, 44-5, 158-59. Recent English authority to this effect includes: *Quietlynn Ltd v Plymouth City Council* [1988] 1 QB 114; *Reg v Wicks* [1998] AC 92 ('enforcement notice' for the purpose of a charge of non-compliance with an enforcement notice meant a formally valid enforcement notice which had not been set aside).
 - 20 Rubinstein, note 5, 124-126.
 - 21 Rubinstein, note 5, 44, but cf 124-126, 170-193, 221-223. Rubinstein notes old authority for the proposition that there are circumstances in which actions in tort may lie in connection with the execution of warrants even if the irregularity surrounding the warrant does not amount to jurisdictional error, but argues that these may have been erroneously decided and may have confused the requirements with collateral attack with those for certiorari. There is, however, no reason in principle why criminal or civil liability should not sometimes depend not on the validity of an administrative act, but on whether an administrative act is or appears to be legally flawed in particular ways. Just as legislation may attach legal consequences to an 'invalid' administrative act, so it may implicitly provide that for some purposes, no consequences are to attach to an act flawed by non-jurisdictional error. Rubinstein argues that the House of Lords majority in *DPP v Head* considered that it was an element of the relevant offence that the victim's detention was pursuant to a properly made order, whether the order was a nullity or not: at 186.
 - 22 See for instance, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 507-8 ([81]) (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), 522-3 ([125]) (Callinan J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at 24-5 ([76]-[77]) (McHugh and Gummow J); *Dranichnikov v Minister for Immigration and Multicultural Affairs; Re Minister for Immigration and Multicultural Affairs* [2003] HCA 26 at [87] (Kirby J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30 at [59] (McHugh and Gummow JJ), [122]-[123] Kirby J. Kirby J has expressed doubts about the utility and coherence of the distinction. See eg *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 123 ([212]) where he described the distinction as 'chimerical' and hoped for its interment, and *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1, where he observed at 33-4 ([97]) that 'Trained lawyers often find it difficult to distinguish jurisdictional from non-jurisdictional error. I have confessed to difficulty myself'. The decision in *ABC v Redmore* note 18 is an example of collateral attack failing on the grounds that the error was non-jurisdictional (although the language of jurisdictional error was not used in the decision).
 - 23 [1993] QB 473.
 - 24 The court distinguished *Hutchinson* (note 9) on the grounds that in that case the court had not discussed the distinction between latent and patent procedural errors.
 - 25 *Bugg* note 3, 500.
 - 26 As to whether there was a time when extrinsic evidence was inadmissible to sustain collateral attack based on want of jurisdiction, see Rubinstein, note 5, 74-79, 168
 - 27 *Bugg* note 3, at 492-5.
 - 28 *Bugg* note 3, at 497.
 - 29 *Bugg* note 3, at 499.
 - 30 *Bugg* note 3, at 499-500.
 - 31 In the Divisional Court hearing in *Boddington v British Transport Police* Auld J had concluded that there was no place for collateral attack in the magistrates courts.
 - 32 Note 19.
 - 33 *Wicks*, note 19 at 108-9 and 113-7 respectively.
 - 34 *Wicks*, note 19 at 107.
 - 35 *Boddington*, note 7.

- 36 *Boddington*, note 7, at 152-7 (Lord Irvine), 172-3 (Lord Steyn).
- 37 *Boddington*, note 7, at 159 (Lord Irvine), 169-70 (Lord Steyn).
- 38 *Boddington*, note 7, at 159-62 (Lord Irvine), 171-3 (Lord Steyn).
- 39 [1998] 1 VR 322.
- 40 *Flynn* has been expressly rejected in two Federal Court cases involving the availability of collateral attack in superior courts: *Re Churchill* (2001) 109 FCR 105, [17] (Finkelstein J) and *Elliott v Knott* [2002] FCA 1030 (Finkelstein J).
- 41 (1997) 192 CLR 69.
- 42 *Ousley*, note 41 at 80.
- 43 *Ousley*, note 41 at 126-127.
- 44 *Ousley*, note 41 at 151.
- 45 She accepted that warrants could not be challenged on the basis of insufficiency of the material supporting the application for the warrant, and that decisions to issue interception and listening device warrants were effectively unreviewable, except for patent jurisdictional error: *Ousley*, at 87, 89-90.
- 46 *Ousley*, note 41 at 101-3 (McHugh J).
- 47 *Ousley*, note 41 at 104-5.
- 48 *Ousley*, note 41 at 105.
- 49 Aronson, note 5 at 241.
- 50 *Federal Airports Corporation v Aerolineas Argentinas* (1997) 76 FCR 582 (Full Court, dismissing appeal from Beazley J; claim for recovery of money paid pursuant to an allegedly invalid determination of airport charges); *Selby v Pennings* (1998) 19 WAR 520 (Full Court, allowing appeal from Parker J; defence to a charge that the appellant had entered an area of forest classified under conservation legislation as a 'temporary control area' was that the notice purporting to classify the relevant area as a temporary control area was invalid, since the wording of the notice suggested that the notice may not have been issued in accordance with statutory requirements); *Robinson v Vanston* [1999] VSC 541 (Ashley J, allowing an appeal against a Magistrates' Court decision to convict the appellants of charges under the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic). One of the grounds of appeal was the alleged invalidity of certificates issued under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth)); *Gray v Woollahra Municipal Council* [2004] NSWSC 112 (Whealy J, allowing appeal against a magistrate's decision to convict on a charge under the *Environment Planning and Assessment Act 1979* (NSW) of failing to comply with an order under the Act, defendant having argued that she was not obliged to do so because the relevant order was invalid, the Council having allegedly committed a variety of legal and procedural errors).
- 51 *Aerolineas Argentinas*, note 50 at 599 (Lehane J with whom Beaumont and Whitlam JJ agreed); *Robinson v Vanston*, note 50 (not explicitly discussed, but implicit given some of the grounds for alleging that the certificate was flawed); *Gray v Woollahra Municipal Council*, note 50.
- 52 Re lower courts, see *Selby v Pennings* note 50; *Robinson v Vanston*, note 50; *Gray v Woollahra Municipal Council*, note 50.
- 53 *Robinson v Vanston*, note 50.
- 54 *Robinson*, note 50 at [111].
- 55 [2005] HCA 50.
- 56 In his analysis of the case, Michael Will points out that Jarratt was able to claim damages only because he had already been removed from office. Had he sought judicial review of the Commissioner's failure to afford him procedural fairness prior to the termination of his contract, he would have won, but he would not have had a cause of action for breach of contract, and would have had no right of redress if he had received his hearing and nonetheless been dismissed: 'From Barratt to Jarratt: Public sector employment, natural justice, and breach of contract' (2006) 49 *AIAL Forum* 9.
- 57 Note 4.
- 58 *Jacobs*, note 4 at [14]-[24] (Debelle J), [74]-[96] (Besanko J, with whom Duggan, Vanstone and Layton JJ agreed).
- 59 (1971) 1 SASR 512. A Court of five justices had been convened on the basis that it might have been necessary to reconsider *Hinton*: [3] (Debelle J).
- 60 *Jacobs*, note 4 at [18] (Debelle J), [93] (Besanko J with whom Duggan, Vanstone and Layton JJ agreed).
- 61 It is not clear why collateral attack would ever enable a person to 'by-pass' standing requirements. If the validity of an administrative act were relevant to a person's criminal or civil

- liability this would suffice to give the person the kind of ‘special interest’ needed for an application for a an application for declaratory and injunctive relief in relation to the decision: *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493.
- 62 *Jacobs*, note 4 at [93] (Besanko J with whom Duggan, Vanstone and Layton JJ agreed).
- 63 *Jacobs*, note 4 at [[95]-[96].
- 64 As to this consideration *Selby*, note 50, 550 (Owen J), *Ousley*, note 41 at 147 (Kirby J, who also concluded that there were (somewhat weaker) arguments to the effect that collateral attack could fragment the trial process.
- 65 See eg *Selby*, note 50 at 550 (Owen J); *Jacobs*, note 4 at[18] (DeBelle J).
- 66 See eg *Selby*, note 50 at 543 (Wallwork J), 550 (Owen J); *Boddington*, note 174-5 (Lord Steyn).
- 67 Carl Emery, ‘Collateral attack – Attacking *ultra vires* action indirectly in courts and tribunals’ (1993) 56 *Modern Law Review* 643, 654-5, and see his analysis of whether the English law relating to collateral attack also means that parties to tribunals may attack the validity of decisions indirectly related to the subject matter of an appeal to a tribunal: 655-9. See too: P P Craig, ‘Collateral attack, procedural exclusivity and judicial review’ (1998) 114 *Law Quarterly Review* 535, 539-40.
- 68 *Bugg* note 3, at 499-500; *Wicks*, note 19 at 106-7 (Lord Nicholls), 116 (Lord Hoffmann).
- 69 *Boddington*, note 7 at 152 (Lord Irvine of Lairg LC), with whom Lord Browne-Wilkinson agreed (164); 165-66 (Lord Steyn).
- 70 *Boddington*, note 7 at 164.
- 71 See eg *Ousley v The Queen*, note 41 at 148 (Kirby J).
- 72 *Boddington*, note 7 at 162 (Lord Irvine of Lairg LC).
- 73 *Selby*, note 50 at 550.
- 74 *Jacobs*, note 4 at [93].
- 75 See n 89.
- 76 *Selby*, note 50 at 527-33 (Ipp J). The Full Court noted however, that the authorities in this area were not always easy to reconcile.
- 77 But the facts of *Selby* suggest circumstances in which courts might indeed make different findings. Suppose, for example, that the magistrate in *Selby* had accepted that he was entitled to consider the validity of the notice, and further that he made a finding that the notice was invalid for the reasons given by the Full Court. Warned by this precedent, the prosecution might well have learned its lesson, so that in other forest protest prosecutions, it would have supported its case with evidence that the Minister had indeed acted on the recommendation of the relevant authority. An alternative scenario is that the outcome in *Selby v Pennings* could have been avoided. Wallwork J observed that it had been suggested at the hearing of the appeal that ‘when the question of the defect in the notice was raised at the hearing, the prosecution should have applied for leave to adduce evidence to clear up the doubts raised on the fact of the notice’: note 50 at 529.
- 78 It relied on *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* (1969) 121 CLR 137, a case in which a plaintiff (B) sued for moneys had and received, following an earlier decision in which another plaintiff (M) had successfully challenged the validity of the by-law under which M and B had purportedly been required to pay money to the Shire. The High Court had not regarded the collateral nature of the attack as posing problems to B’s action. Lehane J (with whom Beaumont and Whitlam JJ agreed) noted that there was no discussion of whether discretionary considerations might have defeated B’s claim, but this might simply be because the defendants did not consider that there might be any such considerations: *Aerolineas Argentinas*, note 50 at 597. In particular, it is hard to imagine a court ruling that a by-law was invalid as against one defendant, but valid as against anyone who had not challenged its validity ‘in time’. The Full Court’s observations were also obiter in the sense that it considered that the judge at first instance had not erred in concluding that the plaintiff’s delay would not have precluded its bringing an ADJR application in connection with the relevant decision.
- 79 *Wicks*, note 19 at 132.
- 80 *Boddington*, note 7 at 176.
- 81 [1990] 1 Qd R 1.
- 82 *Cook v Buckle* (1917) 23 CLR 311, where the court considered that this would be the case even if mandamus would lie to require the making of a particular decision. See generally Rubinstein, note 5, 36-37.
- 83 *Quietlynn*, note 19; *Wicks*, note 19.
- 84 *Ousley*, note 41, and see *Von Arnim v Federal Republic of Germany (No 2)* [2005] FCA 662, [5] (Finkelstein J, warrants under the *Extradition Act* 1988 (Cth)).

- 85 See for example, the following Victorian Acts which exempt officials from *personal* liability both for acts done under legislation and acts which the person reasonably believes to have been done under legislation: *Building Act* 1993 ss 127, 128; *Country Fire Authority Act* 1958 s 92; *Dental Practice Act* 1999 s 81; *Infertility Treatment Act* 1995, s 132; *Medical Practices Act* 1994 s 76; *Professional Standards Act* 2003 ss 8, 11. See more generally, Rubinstein, note 5, 139-145.
- 86 See *Von Arnim*, note 84 at [6], where Finkelstein J cited these authorities and suggested that they were probably fatal to a claim for damages for false imprisonment, pursuant to a warrant issued under the *Extradition Act* 1988 (Cth). But it was not necessary for His Honour to resolve this issue, given his finding that the applicant had not shown that the respondent's decisions were in any way flawed. In dismissing the applicant's appeal the Full Court agreed that error had not been demonstrated and expressed no views as to whether the applicant might have had a cause of action had error been demonstrated: *Von Arnim v Ellinson* [2006] FCAFC 49.
- 87 The decision was *Gunner v Holding* (1902) 28 VLR 303. The legislation was *Local Government Act* 1903 (Vic) s 213, which after successive consolidations appeared in the *Local Government Act* 1958 (Vic) as s 232(2).
- 88 *Local Government Act* 1989 (Vic). The Act retained a section equivalent to old s 232(1) which provided a relatively accessible procedure whereby a ratepayer could challenge the validity of a by-law in the Supreme Court, on payment of a small charge as security for costs: see *Local Government Act* 1989 (Vic) s 124; *Supreme Court Act* 1986 s 103. The 1903 amendment followed a decision that this section did not preclude collateral attack. In *Widgee Shire Council*, note 8, in which the High Court upheld a conviction under a collaterally attacked by-law, Griffith CJ and Higgins J made no comment on whether a similarly worded Queensland statute (*Local Authorities Act* 1902 (Qld) s 187) precluded collateral attack, but Isaacs J expressly stated that it didn't.
- 89 In any case, even if magistrates were not capable of handing administrative law cases, a party to a civil case could apply to have the case transferred to the Supreme Court: *Magistrates Court Act* 1930 (ACT) s 270 (by order of Supreme Court); *Local Court Act* (NT) s 18 (by order of Local Court); *Civil Procedure Act* 2005 (NSW) ss 140(1); *Supreme Court of Queensland Act* 1991 (Qld) s 75; *Magistrates Court (Civil Division) Act* 1992 s 30 (by order of Supreme Court); *Courts (Case Transfer) Act* 1991 (Vic) s 17 (on application to the Magistrates' Court, and with consent of the Supreme Court); *Magistrates Court (Civil Proceedings) Act* 2004 (WA) s 39. Similar provisions exist in relation to the transfer of cases from intermediate courts (where they exist) to the Supreme Court. In several jurisdictions, procedures exist for referring questions of law in criminal cases to the Supreme Court: *District Court Act* 1991 (SA) s 44(2); *Criminal Law Consolidation Act* 1935 (SA) ss 350, 351; *Magistrates' Court Act* 1921 (Qld), s 46. Even in the absence of such provisions, defendants and prosecutors both have a right to appeal against, and to seek judicial review of, magistrates' decisions.
- 90 For some suggested reforms, see Carl Emery, 'The vires defence – 'ultra vires' as a defence to criminal or civil proceedings' (1992) 51 *Cambridge Law Journal* 308, 344-8; Enid Campbell, 'Collateral challenge to the validity of governmental action' (1998) 24 *Monash University Law Review* 272, 288-9. In *Jacobs*, note 4 at [93], Besanko J concluded that courts might possess a discretion in relation to whether they would permit collateral attack and that this discretion should be exercised on the basis of criteria similar to those suggested by Campbell and Aronson.
- 91 While problems may have arisen in relation to cases which never reached the superior courts, this seems unlikely. One would expect that cases which gave rise to anomalies would be particularly likely to generate appeals.