Collateral attack in the criminal jurisdiction: the lack of a unifying theory

*Chris Bleby**

The focus of this article is the apparent absence of any unifying theory of when collateral attack will be permitted in the criminal jurisdiction.

In the 1971 case of *Hinton Demolitions Pty Ltd v Lower (No 2)* ('*Hinton (No 2)*'),[1] Bray CJ of the Supreme Court of South Australia wrote, of the question whether a collateral challenge could be brought in a criminal prosecution:

> I desire, however, to express myself with considerable caution because it seems to me, with respect, that the authorities are in such a state of flux and confusion that it is hardly likely that this Court will be able to construct an enduring causeway through the flood. The task of imposing order on this chaos must, I think, be reserved for the High Court, the Privy Council and the House of Lords. It seems to me that it is hardly possible to disentangle any general principle which will not be opposed to some decision which is binding on us or would be if it stood alone.[2]

In that case, the Registrar of Motor Vehicles had determined and certified the load capacity of a truck. The registered owner was charged with various offences of failing to deliver to the Commissioner of Highways an accurate record of journeys on public roads and failing to pay the charges in respect of those journeys. The owner challenged the validity of the certificate. One head of challenge was that the Registrar had not afforded natural justice to the owner before certifying the load capacity of the vehicle, and that there was therefore no valid determination of that capacity.

I mention this case at the outset because it represents an early, Australian engagement with the difficulty of articulating any sort of unifying principle. I then move forward to another South Australian case, the 2006 case of *Jacobs v Onesteel Manufacturing Pty Ltd* ('*Jacobs v Onesteel*').[3]

This was a civil case, which considered whether a party could challenge collaterally the validity of certain costs rules in the South Australian Workers Compensation Tribunal. Justice Besanko's judgment in that case provides a careful analysis of the development of the strands of doctrine in the English and Australian cases. In doing so, he remarked:

> At all events, the formulation of a general principle (if there is to be one) as to when the validity of government action, whether it be legislative or administrative in character, may be challenged collaterally must be reserved for the High Court.[4]

The distinction between challenges to delegated or subordinate legislation on the one hand, and administrative acts on the other, was crucial to Besanko J's analysis of whether collateral attack would be permitted. Justice Besanko considered the attack to be permissible in that

* Judge of the South Australian Court of Appeal. This article is an edited version of his Honour's paper presented at the Australian Institute of Administrative Law 2023 National Conference in Adelaide on 27–28 July 2023.

1 (1971) 1 SASR 512 ('*Hinton (No 2)*').
2 Ibid 520–1.
3 (2006) 93 SASR 468 ('*Jacobs v Onesteel*').
4 Ibid [96].

case. This was a challenge to the validity of a Rule of Court, being delegated or subordinate legislation. Justice Besanko drew on a long line of authority that when the challenge was on the narrow ground of ultra vires, a person prosecuted for breach of a by-law or regulation can invoke, as a defence, the invalidity of the provision grounding the charge.[5]

This case post-dated *Ousley v The Queen* ('*Ousley*'),[6] which concerned a challenge to an administrative act, the issuing of a warrant under the *Listening Devices Act 1969* (Vic). Notwithstanding the effect of *Ousley* in limiting the grounds of challenge, Besanko J considered that there was nothing in *Ousley* that suggested that a challenge to delegated legislation on a narrow, ultra vires ground, should not be permitted.[7]

So we might start any search for a theoretical framework with the distinction between challenges to legislative and administrative acts. This distinction only goes so far either way. Subordinate legislation is, of course, capable of being challenged on process grounds as well as simple ultra vires grounds.[8]

When it comes to collateral challenges to administrative acts in criminal prosecutions, the search for a unifying theory might start with the 1959 case of *Director of Public Prosecutions (Vic) v Head* ('*DPP v Head*').[9] The defendant was charged with having carnal knowledge of a woman under care or treatment in an institution. The woman to whom the charge related had been ordered into the care of an institution as a 'moral defective'. The offence provision said nothing about whether the offence was conditional on the validity of the order placing the woman in care. At trial, however, the Attorney-General conceded that medical certificates on which the order was made contained no evidence that the woman was a 'moral defective', and that the order could be challenged on an application for certiorari or a writ of habeas corpus. The Victorian Court of Criminal Appeal quashed the conviction.

The House of Lords upheld this decision. The majority held that proof of detention in an institution established a prima facie case that the woman was a 'defective' lawfully in care, but this could be rebutted if the defendant could show that the detention was unlawful. Here, the unlawfulness was conceded.

Lord Denning dissented, although ultimately would not have restored the conviction. He considered that the original order was only voidable, not void. Something would have to be done to void it, such as an application for certiorari by the woman.

Lord Denning's dissent appears to have been the source of the distinction between void and voidable administrative acts that was then endorsed by the Privy Council in 1967, in *Durayappah v Fernando*.[10] It was a distinction ultimately abandoned in England in 1998 in *Boddington v British Transport Police* ('*Boddington*').[11] In Australia, it was in 2002 that a majority of the High Court expressed this to be an unhelpful distinction, in *Minister for*

5 Ibid [83].
6 (1997) 192 CLR 69 ('*Ousley*').
7 *Jacobs v Onesteel* (n 3) [88].
8 See *Disorganized Developments Pty Ltd v South Australia* (2022) 140 SASR 206 (currently on appeal to the High Court).
9 [1959] AC 83 (HL).
10 [1967] 2 AC 337 (PC).
11 [1998] 2 AC 143 (HL) ('*Boddington*').

Immigration and Multicultural Affairs v Bhardwaj.[12] Twenty years later, it is an orthodoxy that such a distinction 'overlooks the fact that an administrative decision has only such force and effect as is given to it by the law pursuant to which it was made'.[13]

In the context of collateral attacks, the distinction developed in England along its own lines.[14] In 1983, the House of Lords in *O'Reilly v Mackman*[15] developed a doctrine described as 'procedural exclusivity'. This required challenges to validity to be brought via an application for judicial review, thereby preserving the procedural and discretionary protections to the government p arty that attached to those procedures. It was intended as a device to prevent abuses of process. It did not last and was finally disapproved of in *Boddington*.

Before this though, in the 1993 case of *Bugg v Director of Public Prosecutions (UK)*,[16] Woolf LJ in the Court of Appeal proposed limiting collateral challenges in criminal proceedings to those of substantive, rather than procedural, invalidity. In drawing this distinction, Woolf LJ suggested that only the narrower or easier grounds of review would be within the cognitive competence of magistrates or judges not in the Divisional Court, that the body whose decision is challenged will not always be a party to the collateral challenge, and that successful collateral challenges do not actually quash the decision. He also thought that those accused of criminal offences should not be able to outflank the discretionary hurdles in the way of applicants for judicial review.

The House of Lords expressed strong doubts about this reasoning in the 1998 decision of *R v Wicks* ('*Wicks*'),[17] a case ultimately decided on statutory interpretation grounds, and then disapproved of the reasoning the same year in *Boddington*. Just by way of example, in *Boddington*, Lord Steyn picked up on a criticism made by Lord Hoffmann in *Wicks*, that procedural issues can be quite simple and substantive issues extremely complex. In any event, the distinction can be difficult to draw. More fundamentally, however, it was unsatisfactory that a posited boundary between substantive and procedural invalidity could represent the difference between committing a criminal offence and not committing a criminal offence. The rule of law, Lord Steyn held, required a clear distinction between what is lawful and what is unlawful.[18]

So this was the course of development in England. Back in 1971 South Australia, the void/voidable distinction held sway. Chief Justice Bray in *Hinton (No 2)* considered himself bound by the endorsement of that distinction in *Durayappah v Fernando*, not that he particularly liked it. He said:

> But it seems to me that, if the analogy, dangerous though it is, with the distinction between acts which are nullities and acts which are merely voidable in other branches of the law is logically applied, it must follow that even the party affected can only assert the invalidity of a voidable act of the type in question in proceedings appropriate for the purpose and not whenever the question arises incidentally. The prerogative writs would, of course, be appropriate for the purpose; so would an action for a declaration against the authority concerned …[19]

12 (2002) 209 CLR 597 at [45]–[46] (Gaudron and Gummow JJ), [66] (McHugh J), [144]ff (Hayne J).
13 Ibid [46] (Gaudron and Gummow JJ).
14 See, generally, Mark Aronson, 'Criteria for restricting collateral challenge' (1998) 9 *Public Law Review* 237.
15 [1983] 2 AC 237.
16 [1993] QB 473 (CA).
17 [1998] AC 92.
18 *Boddington* (n 11) 171.
19 *Hinton (No 2*) (n 1) 522 (Bray CJ).

In an action for prerogative relief or a declaration, both the aggrieved party and the relevant authority would be parties to the proceedings. In any event, Bray CJ concluded that once the law made a distinction between nullities and acts which were merely voidable, it must follow that that invalidity on the basis of being a nullity could be asserted by anyone in any proceeding where the invalidity is relevant. A challenge to an act on the basis it is voidable, on the other hand, could only be made in the appropriate proceedings by the appropriate party. His Honour acknowledged that this was contrary to *DPP v Head* but considered it to be the inevitable consequence of *Durayappah v Fernando* which, as a Privy Council decision, bound him in priority to a decision of the House of Lords.[20] The asserted denial of natural justice was, he considered, a complaint of voidability, not voidness.

In *Hinton (No 2)* Wells J took a narrower view of the principles, in a comprehensive view of the authorities. I cannot do his judgment justice here, but I would just note his key conclusion:

> Except for those cases where what is claimed to be an administrative act has not even the colour of lawful authority, or where an authority or public official, who is a party to a civil action, pleads, and relies on his own administrative act, an allegedly unlawful administrative act cannot be collaterally impeached in any cause of matter, civil or criminal, unless an Act of Parliament or a valid regulation unequivocally authorises such impeachment. The only correct way of attacking an allegedly unlawful administrative act is by means of a separate proceeding appropriate for the purpose.[21]

Ousley is of course the current, enduring authority on the subject of collateral challenges to administrative acts. *Ousley* supports the existence of a presumption of amenability to collateral attack of administrative acts. The High Court in *Attorney-General (Cth) v Breckler*[22] confirmed this. However, the effect of the majority position in *Ousley* was to restrict challenges to warrants on the basis of invalidity on the face of the warrants.

This position has been criticised, such as in that there would seem to be no reason of principle for a challenge not to be available on the basis of irrationality or unreasonableness in issuing a warrant, that is, for jurisdictional error not on the face of the record. Then, as Aronson, Groves and Weeks have observed,

> [f]orcing accused persons to challenge their warrants in separate proceedings imposes an unwarranted costs burden, fragments the criminal process and sometimes proves impossible in terms of legal aid or available evidence.[23]

By way of comparison, the House of Lords in *Boddington* exhorted the desirability of legislative reform to allow the transfer of such challenges to the Divisional Court, but observed that the requirement of leave and the discretionary nature of judicial review would have to be addressed where what is at stake is conviction of a criminal offence.

In any event, *Ousley* was decided a year before *Boddington* and, more broadly, well before the theoretical distinction between void and voidable administrative acts was determined in Australia to be unhelpful. The criticisms of *Ousley* suggest that it is not the product of any sort

20 Ibid 523.
21 Ibid 549 (Well J).
22 (1999) 197 CLR 83 [36].
23 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 7th ed, 2022) [13.280].

of unifying theory. In any event, as Aronson, Grove and Weeks note, in the Commonwealth sphere, legislative amendments have now mostly removed the possibility of collateral challenges once a prosecution is underway.

Returning to *Jacobs v Onesteel*, Besanko J observed it was for the High Court to find a unifying principle, if there was one to be found. In the meantime, and having regard to the academic literature[24] as well as the authorities, he identified the following factors as relevant to whether collateral challenge will be permitted in a particular case:

1. Are the grounds of challenge likely to involve the adducing of substantial evidence?
2. If a collateral challenge 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, delay and other discretionary considerations?
4. Is there a statutory provision that 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 any other cases 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?[25]

In the 2016 case of *Police v Stacy*,[26] which was a criminal matter concerning the alleged breach of a broad barring order by a member of an outlaw motorcycle gang, Parker J drew on these factors when considering whether a collateral challenge to the barring orders was permitted. He concluded that it did not go beyond *Ousley* to permit a challenge to the barring order on the basis that it had been issued contrary to the Act or was defective on its face. He also considered that it may be the case that a collateral challenged based on *Wednesbury*/*Li* unreasonableness could be made.[27] However, he echoed Besanko J's observation that the High Court had not determined whether a collateral challenge could be brought where it was necessary to adduce substantial evidence.

Ultimately, the quest for a unifying theory might be better described, in light of the modern jurisprudence of jurisdictional error, as a quest for a unifying judicial policy. We do not at present have that. The current approach, which at best looks to indicative factors, effectively requires an evaluative task. There are some hard edges to this, most notably on account of *Ousley*. To the extent that those edges are referable back to distinctions in administrative law that are no longer accepted or regarded as helpful, review seems to be necessary. It is also necessary to be clear-eyed about the factors that appear to still be accepted as relevant.

24 M Aronson, 'Criteria for restricting collateral challenge' (1998) 9 *Public Law Review* 237; Enid Campbell, 'Collateral challenge to the validity of government action' (1998) 24 *Monash University Law Review* 272.
25 *Jacobs v Onesteel* (n 3) [93].
26 (2016) 125 SASR 50.
27 Ibid [99]–[100].

For example, to what extent should the discretionary considerations on judicial review, such as delay, be able to stand in the way of a challenge on which guilt of a criminal offence may depend?

Perhaps the best that can be done for now is to recognise, as Besanko J did, that in some cases there are good reasons to allow a collateral challenge and in other cases there are good reasons to deny it.[28] But if the question is not addressed in context by the relevant statute, imputed restrictions on the availability of challenge in the criminal context would seem to require further principled consideration.

28 *Jacobs v Onesteel* (n 3) [93].