Collateral attack in criminal cases

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My approach to this topic is greatly influenced by my own experience, in my days at the Bar, in both seeking to review administrative decisions in the context of criminal trials, and in resisting such review. I will refer at various points to the notion of 'fragmentation' of the criminal justice system, a practice that was rife throughout the latter part of the 20th century.

A criminal trial is unique and, in its own way, fundamentally distinct from a civil trial. At one time there were members of the Bar who could switch regularly from civil to criminal work, and vice versa. No longer is that the case. This is an age of specialisation. The particular skills required of a criminal barrister are very different from those expected of those who practise regularly in the civil law, whether engaged in commercial litigation, common law, or public law.

The fragmentation of federal criminal law practice

The Federal Court was created as a purely civil court. It was never anticipated that it would undertake criminal trials. The judges appointed to that court tended to be drawn from the ranks of commercial and public lawyers, as well as industrial lawyers, and almost never from the ranks of the criminal Bar.

In the latter part of the 1980s, things began to change. The judges of the Court found themselves confronted with novel applications for judicial review, or for injunctive relief, arising out of federal criminal proceedings being conducted in state courts, as they had to be.

In the early days of the Commonwealth, there was little federal criminal law to speak of. From about the 1970s all that changed. Since then, there has been an enormous expansion in the scope of Commonwealth criminal law.

When I was the Commonwealth Director of Public Prosecutions, in the latter part of the 1980s, the overwhelming bulk of the work undertaken by my office consisted of drug cases, and fraud upon the Commonwealth. The position today is very different. The enactment of the Commonwealth *Criminal Code*[1] in 1995 has led to a vast expansion of Commonwealth criminal law, many of the new offences being of a novel, and extraordinarily complex, character.

The same can be said of Commonwealth criminal procedure. The *Crimes Act 1914* (Cth), which originally contained just a handful of provisions, has now grown into something quite different, and vast in scope.

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1 *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*').

These days, defending a Commonwealth criminal trial requires a great deal more than merely addressing a jury, 'Rumpole style', about the 'golden thread'. A defence barrister who today engages in this type of work must be a blend of jury advocate and skilled legal technician. In a sense, those who practise in complex areas of state or federal criminal law must today have a knowledge of related disciplines, including in particular public law.

There developed in the 1980s a practice on the part of the defence Bar of challenging investigative and prosecutorial decisions, though not by raising these points within criminal trials, but rather by forays into the state and federal superior courts. This strategy, at the very least, achieved delay, and was successful, at least for a time.

For example, challenges were mounted to:

- the decision to lay charges;[2]
- the validity of any search warrant, surveillance device warrant, or telephonic interception warrant, complaining of formal invalidity, or perhaps invalidity on the face of the warrant;[3]
- the validity of any such warrant based upon an alleged failure to make full disclosure of material that might possibly tell against the grant of the warrant; [4]
- the validity of any search conducted pursuant to a search warrant, having regard to the manner of its execution;
- the decision to commit for trial;[5]
- numerous other administrative decisions taken en route to the ultimate criminal trial itself, including by way of challenge to Constitutional validity.[6]

If the charges in question were federal in nature, the first port of call was generally to the Federal Court, whether by way of judicial review pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth), or perhaps s 39B of the *Judiciary Act 1903*, where injunctive relief was sought.

If the proceedings concerned purely state offences, the application for review would be made to the state Supreme Court, utilising analogous provisions within the state regime. In Victoria, for example, this generally meant the *Administrative Law Act 1978* (Vic), or proceedings for judicial review under the *Supreme Court Rules* at the time.

Some Federal Court judges seemed to welcome the diversion from their steady diet of Federal Court work. There were frequently, in complex federal criminal law proceedings, challenges mounted to the various investigatory and prosecutorial decisions taken along the

2 *Jarrett, Elliott & Camm v Seymour* (1993) 46 FCR 521.
3 *Beneficial Finance Corporation v Commissioner, Australian Federal Police* (1991) 31 FCR 523; *Grollo v Palmer* (1995) 184 CLR 348 ('*Grollo*'); *Ousley v The Queen* (1997) 192 CLR 69 ('*Ousley*').
4 *Karina Fisheries Pty Ltd v Mitson* (1990) 26 FCR 473; overruled by the Full Court of the Federal Court in *Lego Australia Pty Ltd v Paraggio* (1994) 53 FCR 542.
5 *Yates v Wilson* (1989) 168 CLR 338.
6 *Grollo* (n 3).

path to an eventual criminal trial. These proceedings often resulted in great delay, and what was, in truth, 'fragmentation' of the criminal justice system.

In one case that I can vividly recall, a challenge was mounted to the validity of a search warrant which had been executed upon the premises of a well-resourced client. The case was heard in the Federal Court. The judge reserved his decision. It took almost two years for a short judgment dismissing the application to be delivered. However, by the time that judgment was delivered, the period that had elapsed from the commission of the alleged offence was such that it was determined that prosecution was no longer viable.

In complex cases, involving well-resourced defendants, challenges of various kinds to committal proceedings became almost *de rigueur*. Irrespective of whether they won or lost, this was a considerable benefit to those suspected of having committed offences. Generally, delay tends to work in favour of the accused, and rarely of the prosecution.

All this overuse of the civil courts to supervise criminal proceedings eventually came to an end. Both the *Administrative Decisions (Judicial Review) Act* and the *Judiciary Act* were amended to restrict the availability of judicial review, and its various analogues in the original jurisdiction of the superior courts, in criminal matters.

These amendments to the legislation may well have been influenced by the High Court's decision in *Yates v Wilson*[7] to put an end to what was happening. In what is probably the shortest judgment ever published in the *Commonwealth Law Reports*, Mason CJ, Toohey and Gaudron JJ, in refusing special leave to appeal, arising out of a decision to commit for trial, stated:

> It would require an exceptional case to warrant the grant of special leave to appeal in relation to a review by the Federal Court of a magistrate's decision to commit a person for trial. The undesirability of fragmenting the criminal process is so powerful a consideration that it requires no elaboration by us. It is a factor which should inhibit the Federal Court from exercising jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and as well inhibit this Court from granting special leave to appeal.[8]

Yates v Wilson had an immediate impact. It acted as a deterrent to the Federal Court's willingness to entertain applications for judicial review against all administrative decisions made in the course of criminal proceedings. The notion of 'fragmentation' of the criminal justice system was thereafter regarded as a somewhat pejorative expression. That notion came to be constantly invoked in response to administrative law challenges of various kinds arising in relation to criminal law proceedings.

This was all to the good, in terms of avoiding delay and 'fragmentation' in the truest sense. Yet this line of jurisprudence posed its own difficulties. It left open the question, under what circumstances should a trial judge (or magistrate) conducting criminal proceedings consider arguments as to the validity of an administrative step as part of the overall conduct of a criminal trial?

7 (1989) 168 CLR 338.
8 Ibid 339.

Ousley v The Queen

The High Court had an opportunity to resolve this issue in *Ousley v The Queen* ('*Ousley*').[9] That case left many unanswered questions. Even now, and with the benefit of much additional case law, a number of those questions remain unresolved. Put simply, the members of the High Court in the majority held that the issue of a warrant of the type that featured in that case was an administrative, and not judicial, act. The High Court had resolved that issue several years earlier in *Love v Attorney-General (NSW)*,[10] as well as in *Grollo v Palmer*.[11] In *Ousley* Toohey J, along with Gaudron J and Gummow J, in separate judgments, all accepted that collateral review was available, in relation to a challenge to the validity of a warrant. They held that the trial judge in the County Court had erred in concluding that he could not engage in such review having regard to the fact that the warrants in question had been issued by Supreme Court judges.

Nonetheless, their Honours severely limited the grounds upon which such collateral review could proceed. According to Toohey J, the warrant would have to be said to have been invalid 'on its face'. No challenge based upon evidential insufficiency would be accepted. Justice Gaudron agreed, at least to that extent. So too did Gummow J, who insisted that the trial judge, while engaged in collateral review, could only determine whether the warrant had been 'regularly granted', and could not consider any broader attack based, for example, on evidential insufficiency.

Justice Toohey went on to observe that, in his view, the warrants in *Ousley* were valid. Justice Gaudron disagreed. She concluded that the warrants were invalid, but held that the appeal should, in any event, be dismissed. Justice Gummow agreed that the trial judge had erred in refusing to enter upon the matter, but concluded that this was insufficient, in the circumstances, to give rise to a miscarriage of justice.

Justice McHugh accepted that the trial judge could, and should, have considered the collateral attack upon the warrants. However, unlike the other members of the Court in the majority, he held that a collateral challenge to a warrant 'cannot be confined to defects appearing on the face of the warrant'.[12] According to his Honour, collateral attack extended to establishing 'jurisdictional error', going beyond error on the face of the warrant. However, as with the other members of the majority, McHugh J said that insufficiency of evidence would not normally ground an attack upon validity.

Of particular interest in McHugh J's judgment was his Honour's consideration of the merits of allowing collateral review in the course of criminal proceedings. Justice McHugh noted that 'efficient administration of the criminal law would be better served if trial judges lacked the power to determine collateral attacks on the validity of warrants'.[13]

Consider also the dissenting judgment of Kirby J, who acknowledged that controversy existed about the extent to which a trial judge may permit a collateral attack on the validity of

9 (1997) 192 CLR 69 ('*Ousley*').
10 (1990) 169 CLR 307.
11 *Grollo* (n 3).
12 *Ousley* (n 9) 102 (McHugh J).
13 Ibid 104.

a warrant in the course of a trial. He noted the reluctance of lower court judges to entertain challenges to the validity of warrants issued by Supreme Court judges, and other practical reasons (such as delay) for discouraging such attacks in the course of a trial. In other words, his Honour was concerned about the dangers of 'fragmentation' through collateral attack but, presumably, only because too readily permitting such challenges to be mounted might, for example, encourage interlocutory appeals to be brought. This would also bring about unnecessary delay, but through a process of a different form of fragmentation.

On balance, Kirby J concluded that collateral attacks were the lesser evil, in terms of avoiding fragmentation. He said that 'in respect of legal challenges based upon suggested defects appearing on the face of the warrant, the trial judge appears competent to make the necessary ruling whatever place he holds in the judicial scheme of things'.[14] Justice Kirby, in dissent, found that the appeal should be allowed, as the appellant had lost the chance to exercise the right to have a judicial determination of the admissibility of the evidence obtained from the illegal use of the listening device.

It is apparent that *Ousley* is a difficult judgment, with no clear ratio. In that regard, it is singularly unhelpful.

Director of Housing (Vic) v Sudi

I had to grapple with some of the implications of *Ousley* in my judgment in *Director of Housing (Vic) v Sudi* ('*Sudi*').[15] The case concerned a decision on the part of the Director of Housing to evict a tenant from public housing. The Director applied to the Victorian Civil and Administrative Tribunal ('VCAT') for a possession order of the premises under s 344(1) of the *Residential Tenancies Act 1997* (Vic). In answer to that application, the occupier of the premises — who was the son of a Somalian refugee who had earlier been granted occupation — claimed that the Director had failed to comply with s 38(1) of the Victorian *Charter of Human Rights and Responsibilities 2006* ('*Charter*') by failing to have regard to some of the various rights spelt out therein.

Justice Bell, who was the President of the Tribunal, dismissed the Director's application for possession by reason of his alleged failure to comply with the requirements of s 38(1) of the *Charter*. In doing so, his Honour effectively engaged in collateral review of the Director's decision, since the actual issue before VCAT was simply whether the occupant, who was in arrears of rent, should for that reason be evicted.

Each member of the Court of Appeal in *Sudi* favoured allowing the appeal, but not quite for the same reasons.

Chief Justice Warren concluded that, as a matter of construction, the *Residential Tenancies Act 1997* (Vic) and the *Victorian Civil and Administrative Tribunal Act 1988* (Vic) evinced an intention to deny VCAT the power to collaterally review the validity of the Director's purported administrative decision. Her Honour determined that the Director's decision to institute the application for possession could only be set aside by a court of competent jurisdiction, which

14 Ibid 148.
15 (2011) 33 VR 559 ('*Sudi*').

VCAT manifestly was not. In other words, she decided that VCAT did not have power to undertake collateral review.[16]

President Maxwell held that it was improbable, in the extreme, that the Parliament intended VCAT to have power to examine, in its original jurisdiction, the legal validity of a decision such as that by the Director to institute proceedings for recovery of possession.

My judgment went perhaps a little further, and explained why, in my view, collateral attack which, theoretically, might otherwise be thought to be available, should not be accepted in the context of *Charter* issues.

In coming to that conclusion, I examined the nature and powers of VCAT, and its composition. I held that issues under the *Charter* were inherently unsuitable for determination by a body such as VCAT. That was particularly so given that VCAT could be constituted by lay members. It was largely on that basis that I determined that the appeal should be allowed.

In other words, in applying *Ousley*, I accepted that at least in the context of the decision under challenge in *Sudi*, collateral review might be appropriate, at least theoretically, in some circumstances. However, it could not be justified in the context of a complex human rights challenge, necessarily involving consideration of a significant body of difficult international human rights jurisprudence.

For what it is worth, having just recently re-read my judgment in *Sudi*, I would not now change my analysis.

The scope of jurisdictional error

The recent decision of the High Court in *Stanley v Director of Public Prosecutions (NSW)* ('*Stanley*'),[17] where a majority held that the failure by a District Court judge to make the assessment required under the *Crimes (Sentencing Procedure) Act 1999* (NSW) gave rise to jurisdictional error, purported to do no more than apply the law as stated in *Craig v South Australia*[18] and *Kirk v Industrial Court (NSW)*.[19]

In my respectful opinion, the actual decision of the majority is difficult to reconcile with the traditional understanding of the limits of jurisdictional error, as laid down in *Craig* and *Kirk*. The error made by the District Court judge seems to me to be a classic error of law within jurisdiction, notwithstanding the specific approval given, by the majority in *Stanley* to both those cases. If I am right, *Stanley* may not yet be the last word on the scope of jurisdictional error. Self-evidently this poses the question, in accordance with *Ousley*, whether, and in what circumstances collateral attack can be mounted upon an administrative decision said to be vitiated by error of that kind.

16 Cf *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 614–15 where it was suggested that although an administrative tribunal may not have the power to quash a purported administrative action vitiated by jurisdictional error, it could simply treat the decision as having no legal effect. In that regard, *Ousley* (n 9), which concerned the power of a court to engage in collateral review, was distinguished.

17 (2023) 97 ALJR 107 ('*Stanley*').

18 (1995) 184 CLR 163.

19 (2012) 239 CLR 531.

Conclusion

The present state of the law regarding the availability in the course of criminal proceedings of collateral attack upon administrative decisions, is both uncertain and unsatisfactory.

Even worse, from my point of view, is the law relating to interlocutory appeals in criminal proceedings. I have long harboured doubts as to the wisdom of permitting such appeals, particularly in the largely unrestricted form in which they can be brought in a state such as Victoria.[20]

Such appeals often achieve little, other than protracted delay. They result in a form of 'fragmentation' which, while different in many respects from judicial review, outside the realm of collateral attack, result in similar unsatisfactory consequences.

In short, the criminal justice stream should be left largely untouched by civil courts. When a trial begins, it should generally be permitted to continue to verdict. The criminal law is sufficiently complex and difficult without the intrusion of public law concepts into the mix. Trial judges should be trusted to control proceedings and to ensure that, as far as possible, the case once begun continues until the jury has spoken. I understand, of course, that there are many judges and others who might take a different view. Such is life.

20 See my Foreword to Greg Taylor, *Interlocutory Criminal Appeals in Australia* (Lawbook, 2016).