Collateral Challenge of the Validity of Governmental Action

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INTRODUCTION

The question with which this article is concerned is: When and when not may the validity of governmental action, whether it be legislative or administrative in character, be challenged collaterally? In 1971 an Australian Chief Justice found it 'hardly possible to disentangle any general principle' from the case law on the subject. He considered the law to be 'in a state of flux and confusion.'[1] In 1982 Sir William Wade concluded that:

> probably . . . there can be no hard and fast rules for determining when the court may or may not allow collateral challenge. In some situations it will be suitable and in others it will be unsuitable, and no classification of the cases is likely to prove exhaustive.[2]

Over the ensuing years, no general principle has emerged from the authorities. What has emerged, however, are differences of judicial opinion about when and when not collateral challenge is suitable.[3]

THE CONCEPT OF COLLATERAL CHALLENGE

The term 'collateral challenge' has not been used consistently[4] but it is normally used in contradistinction to that of direct challenge of the validity of some governmental action by means of an application for a prerogative writ or like order,[5] a suit for a declaration or for an injunction to restrain a course of action alleged to be unauthorised. Direct challenges also include

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1 *Hinton Demolitions Pty Ltd* v *Lower* (No 2) [1971] 1 SASR 512, 520–1 per Bray CJ

2 HWR Wade, *Administrative Law* (5th ed, 1982) 299–300. This observation also appears in the latest edition of this work (7th ed, 1994) 326.

3 Australian texts which deal with the subject are M Aronson and B Dyer, *Judicial Review of Administrative Action* (1996) 644–7 and EI Sykes, DJ Lanham, RR Tracey and KW Esser, *General Principles of Administrative Law* (4th ed, 1997) Ch 23. English texts which deal with the subject include P P Craig, *Administrative Law* (3rd ed 1994) 447–50, 553–62; S A de Smith, Lord Woolf and J Jowell, *Judicial Review of Administrative Action* (5th ed, 1995) paras 3–073 to 3–076, 5–049 to 5–056, 9–156; H W R Wade and C Forsyth, *Administrative Law* (7th ed, 1994) 321, 693–4. See also M Taggart, 'Rival Theories of Invalidity in Administrative Law: Some Practical and Theoretical Consequences' in M Taggart (ed), *Judicial Review of Administrative Action in the 1980s* (1986)70, 85–8; C Emery, 'The Vires Defence — "Ultra Vires" as a Defence to Criminal or Civil Proceedings' (1992) 51 CLJ 308; C Emery, 'Collateral Attack' (1993) 56 MLR 643; D Feldman, 'Collateral Challenge and Judicial Review: The Boundary Dispute Continues' [1993] *Pub Law* 37.

4 Aronson and Dyer loc cit (fn 3).

5 Questions of validity raised in applications for habeas corpus have, however, been regarded as questions raised collaterally. See Wade and Forsyth op cit (fn 3) 322–3.

proceedings by way of applications for judicial review under statutes such as the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).[6]

For the purposes of this article I adopt the description of collateral challenge offered by McHugh J in the recent case of *Ousley* v *The Queen:*

> A collateral attack on an act or decision occurs when the act or decision is challenged in proceedings whose primary object is not the setting aside or modification of that . . . decision . . . [It occurs] in proceedings where the validity of the administrative act is merely an incident in determining other issues.[7]

This description is one which covers both challenges by way of defence to civil or criminal proceedings, and challenges made by the initiator of curial proceedings, for example by a plaintiff who pleads invalidity as an element in a claim for recovery of money paid or for damages.

Some examples of collateral challenge are as follows:

(a) D is prosecuted for a criminal offence. He/she pleads not guilty. The (or a) defence is that the legislation creating the offence is invalid.[8]

(b) D is prosecuted for the offence of driving a motor vehicle without a driver's licence. D pleads not guilty. His defence is that a prior decision by a magistrate to cancel his/her driver's licence was invalid and that the licence previously granted remains in force.[9]

(c) A public officer sues D to recover tax assessed to be owing under legislation. D denies liability on the ground that the legislation is invalid.[10]

(d) P sues D claiming damages for breach of a duty imposed by regulations. D denies liability on the ground that the regulations are ultra vires.[11]

(e) P sues D, a public officer, claiming damages for false imprisonment. D's defence is statutory authority. P's answer is that the legislation on which D relies is invalid.[12]

(f) D is prosecuted for a criminal offence. At the trial D requests that certain evidence be ruled inadmissible on the ground that it was procured by means of a search (or similar) warrant which was invalid.[13]

(g) P sues D claiming damages for trespass to land. D's defence is statutory authority. Ps answer is that the statutory power on which D relies cannot be exercised except in accordance with the requirements of natural justice and that P was denied his/her right to natural justice.[14]

[6] See also *Administrative Law Act* 1978 (Vic) and *Judicial Review Act* 1991 (Qld).

[7] (1997) 71 ALJR 1548, 1562–3.

[8] For example, *Kruse* v *Johnson* [1898] 2 QB 91; *Widgee Shire Council* v *Bonney* (1907) 4 CLR 977; *Flinn* v *James McEwan and Co Pty Ltd* [1991] 2 VR 434.

[9] For example, *Muir* v *Morton* [1984] WAR 254.

[10] For example, *Deputy Commissioner of Taxation* v *State Bank of New South Wales* (1992) 174 CLR 219. See also *Commissioners of Customs and Excise* v *Cure and Deeley Ltd* [1962] 1 QB 340; *Daymond* v *South West Water Authority*[1976] AC 609; *Wandsworth London Borough Council* v *Winder* [1985] AC 461.

[11] For example, *Utah Construction and Engineering Pty Ltd* v *Pataky* [1966] AC 629.

[12] For example, *Liversidge* v *Anderson* [1942] AC 206.

[13] For example, *Ousley* v *The Queen* (1997) 71 ALJR 1548.

[14] For example, *Cooper* v *Wandsworth Board of Works* (1863) 14 CB (NS) 180; 143 ER 414.

(h) P sues D to recover monies which P paid to D under legislation or some governmental determination which P alleges is invalid.[15]
(i) P seeks an injunction against D to restrain D from acting in contravention of certain legislation. D's defence is that the legislation is invalid.[16]

REASONS FOR RESTRICTING COLLATERAL CHALLENGE

Traditionally, collateral challenge of governmental acts has been restricted to cases in which the governmental act under challenge is alleged to be ultra vires or in excess of jurisdiction and in consequence void.[17] But in recent times, some judges have questioned the desirability of allowing collateral challenge so wide a compass. Their reasons have been several.[18]

The first is that courts of supervisory jurisdiction have, over the last 30 or so years, extended the grounds on which the actions of public bodies may be held ultra vires or in excess of jurisdiction, and almost to the point where the distinction between jurisdictional error and non-jurisdictional error of law has been obliterated.[19] The law relating to judicial review is now a complex and sophisticated body of law and, some have suggested, has become a body of law which is best administered by central, superior courts invested with a supervisory jurisdiction. In Australia, these are the Supreme Courts of the States and the Territories of the Commonwealth, the Federal Court of Australia and the High Court of Australia. In England, that central court is the High Court of Justice, sitting as a Divisional Court of the Queen's Bench Division.

A second and related source of concern is that collateral challenge may provide a means of circumventing limitations on judicial review by direct challenge. These limitations include those imposed by rules about standing to sue; time limitations which are generally much shorter than those for ordinary civil actions; and, above all, the discretion of the reviewing court in the award of remedies.[20] The existence of these restrictions has meant that in relation to at least administrative action (as distinct from legislation), there will be

[15] For example, *Federal Airports Corporation* v *Aerolineas Argentinas* (1997) 147 ALR 649.

[16] For example, *Actors and Announcers Equity Association of Australia* v *Fontana Films Pty Ltd* (1982) 150 CLR 169; *Koowarta* v *Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth* v *Tasmanian Attorney-General*(1983) 158 CLR 1. See also *Hoffman-La Roche & Co* v *Secretary of State for Trade & Industry* [1975] AC 295.

[17] See A Rubinstein, *Jurisdiction and Illegality* (1965) Ch 3.

[18] The main cases in which the reasons have been spelled out are *Quietlynn Ltd* v *Plymouth City Council* [1988] QB 114 and *Bugg* v *Director of Public Prosecutions* [1993] QB 473. The reasons were summarised (and criticised) by Lord Nicholls of Birkenhead in *R* v *Wicks* [1997] 2 WLR 876, 881–2.

[19] See *Anisminic Ltd* v *Foreign Compensation Commission* [1969] 2 AC 147; *Re Lord President of the Privy Council; Ex parte Page* [1993] AC 682; *Craig* v *South Australia* (1995) 184 CLR 163.

[20] The relevant court of supervisory jurisdiction may be required to grant leave to make an application for judicial review: For example, *Supreme Court Act* 1981 (UK) s 31. That court may have discretion to dismiss an application for judicial review at the outset For example, *Administrative Decisions (Judicial Review) Act* 1977 (Cth) s 10 and *Administrative Law Act* 1978 (Vic) s 4(2).

relatively few cases in which it can be said that the action must be treated as invalid (void) for all purposes. The theory of absolute invalidity has largely been repudiated.[21] But, as Taggart has pointed out, 'historically, collateral challenge to the validity of administrative (and judicial) action has been premised on the absolute theory of invalidity. It was because the decision was null and void that its invalidity could be raised collaterally.'[22]

A third concern is that collateral challenge may result in trials within a trial. This concern has been expressed mainly in relation to criminal trials and particularly where the collateral challenge, if allowed, would involve production and evaluation of extrinsic evidence.[23]

A fourth concern is that the governmental body whose action is sought to be challenged collaterally will not necessarily be a party to the proceedings in which the validity of its action is under challenge and will not, therefore, have an opportunity to defend its action. A local government council will, for example, not necessarily be a party to a criminal prosecution in which the defendant contests the validity of a council by-law which he/she is alleged to have violated.[24]

Yet another worry which some judges have had is that collateral challenges may result in inconsistent judicial decisions about the validity of the same, or much the same, governmental action. For example, the same local governmental by-law, or the same kind of decision made in relation to several individuals when each of the decisions is, or could be, contested on the same ground. This objection has particular force in legal systems in which the bulk of judicial work is handled by inferior courts, sitting in various places, and constituted by different judicial officers.

COURT IMPOSED RESTRICTIONS ON COLLATERAL CHALLENGE

In light of concerns of the kinds described above, some superior courts have sought to place restrictions on the circumstances in which the validity of governmental acts may be challenged collaterally. The ways in which they have sought to impose these restrictions have been several. They include (a) the ground(s) on which the collateral challenge is made; (b) whether the alleged cause of invalidity can be demonstrated simply on the face of relevant

[21] See Aronson & Dyer op cit (fn 3) Ch 11; Craig op cit (fn 3) Ch 2; Wade & Forsyth op cit (fn 3) 329–44.

[22] Taggart op cit (fn 3) 85. See also *F Hannan Pty Ltd* v *Electricity Commission (New South Wales) [No 3]* (1985) 66 LGRA 306, 326–7 per McHugh JA; *Ousley* v *The Queen* (1997) 71 ALR 1548, 1563 per McHugh J.

[23] *Ousley* v *The Queen* (1997) 71 ALJR 1548, 1566 per McHugh J and 1590–1 per Kirby J.

[24] A related concern is that if the governmental agency whose action is the subject of the challenge is not a party to the proceedings, it will not, under the principles of *res judicata*, be estopped from contesting the ruling on the question of validity in subsequent curial proceedings to which it is a party. I have examined the application of principles of *res judicata* in cases in which the validity of governmental acts has been an issue in 'Relitigation in Government Cases . . .' (1994) 20 *Mon* LR 21.

documentation or whether it can be established only on admission of extrinsic evidence; (c) whether the statute under which the governmental action sought to be challenged discloses an intention, express or implied, to preclude or limit collateral challenge. These ways of restricting collateral challenge are not entirely severable from one another. Nor are they capable of being considered in isolation from the nature of the proceedings in which the collateral challenge is made, that is, whether the proceedings are civil or criminal in character.

(1) English Experience

In England, constraints on the use of ordinary civil actions as a means of collateral challenge have been imposed by the principle enunciated by the House of Lords in *O'Reilly* v *Mackman*.[25] There it was held that:

> it would . . . as a general rule be contrary to public policy, and as such an abuse of the process of the court [the Divisional Court of the High Court], to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by . . . ordinary action and by this means evade the provisions of [RSC] Order 53 for the protection of such authorities.[26]

This doctrine has not been embraced by Australian courts.[27] And in England it has not been applied so rigorously as to preclude collateral challenge in civil actions of governmental acts which impinge on rights under private law.[28] Furthermore, the doctrine does not apply to collateral challenges in the course of criminal proceedings.

For a time the Divisional Court of the Queen's Bench of the High Court of Justice sought to restrict collateral challenge in criminal proceedings of the validity of subordinate legislation — notably local government by-laws. But even within that court there were differences of opinion about whether restrictions were justified.

In *R* v *Reading Crown Court; Ex parte Hutchinson*[29] the Divisional Court rejected the suggestion made in *Quietlynn Ltd* v *Plymouth City Council*[30] that collateral challenges in criminal proceedings should be confined to cases where the governmental act under attack was bad on its face. But in the later case of *Bugg* v *Director of Public Prosecutions*[31] a differently constituted Divisional Court took the view that the grounds on which the validity of by-laws may be contested in criminal proceedings were limited. They were limited to

[25] [1988] 2 AC 237.
[26] Id, 285 per Lord Diplock.
[27] One reason may be that under the Australian judicial review regimes, applicants for judicial review are not required, as are applicants under the English regime, to obtain the court's leave to proceed with the application.
[28] See *Wandsworth London Borough Council* v *Winder* [1985] AC 461; *Roy* v *Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624. The applications of the *O'Reilly* v *Mackman* doctrine are dealt with in the English texts mentioned in fn 3 supra.
[29] [1988] QB 384.
[30] [1988] QB 114.
[31] [1993] QB 473.

substantive ultra vires, capable of being established without resorting to extrinsic evidence. Substantive ultra vires might be established by demonstration that the by-law in dispute was not one of a kind its maker was authorised to make or was unreasonable in the *Wednesbury* sense.[32] In criminal proceedings, however, the validity of a by-law could not be contested on the ground that its author had made it in contravention of controlling procedural requirements. Anyone who sought to contest the validity of a by-law on procedural grounds would have to do so by way of a direct challenge in the Divisional Court.

In the course of his opinion in *Bugg*, Woolf LJ (as he then was) made the following observations:

> You cannot in respect of non-compliance with the public law duties of public bodies treat individual members of the public in the same way whether or not their private rights or interests have been infringed. They have no private right which entitles them to complain of procedural defects in delegated legislation unless they have been prejudiced by the default.
>
> So far as procedural invalidity is concerned, the proper approach is to regard byelaws and other subordinate legislation as valid until they are set aside by the appropriate court with the jurisdiction to do so. A member of the public is required to comply with byelaws even if he believes they have a procedural defect unless and until the law is held to be invalid by a court of competent jurisdiction. If before this happens he contravenes the byelaw, he commits an offence and can be punished. Where the law is substantively invalid, the position is different. No citizen is required to comply with a law which is bad on its face. If the citizen is satisfied that that is the situation, he is entitled to ignore the law.[33]

In 1997 the House of Lords, in the case of *R* v *Wicks*,[34] disapproved the position which had been adopted by the Divisional Court in *Bugg* in relation to restrictions on collateral challenge in criminal proceedings. Their Lordships did not attempt to establish 'rules' about limitations on collateral challenge. They did however reject the distinction made in *Bugg* between substantive and procedural ultra vires and they advanced various arguments in answer to those which the judges below had offered in defence of limitation of collateral challenge. At the same time they recognised that restrictions on collateral challenge may be expressly or impliedly imposed by particular statutory regimes.

The distinction between substantive and procedural invalidity was considered by the Lords to be unsound for several reasons. First, it could not be

[32] The *Wednesbury* concept of unreasonableness is that enunicated by Lord Greene MR in *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223, 229–30. There is a considerable body of literature which draws attention to the fuzziness of this concept and the problems it has generated. For example, T McEvoy, 'New Flesh on Old Bones: Recent Developments of Jurisprudence in Relating to *Wednesbury* Unreasonableness' (1995) 3 *A J Admin L* 36. In *Bugg* the Division Court accepted 'that there may be cases within a grey area.' It had in mind particular cases in which the validity of subordinate legislation is challenged collaterally on the grounds that it has been made in bad faith: [1993] QB 473, 500 per Woolf LJ.

[33] [1993] QB 473, 500 per Woolf LJ.

[34] [1997] 2 WLR 876.

assumed that questions of substantive validity would always be less complex than questions of procedural validity or that issues of fact arising in cases of alleged procedural validity would necessarily occupy a great deal of the court's time.[35] Secondly, objections to collateral challenge based on the risk of inconsistent decisions, and the fact that the author of the action whose validity was contested would not always be party to the proceedings, applied irrespective of the alleged cause of invalidity.[36] Thirdly, and more fundamentally, the distinction between substantive and procedural invalidity could 'represent the difference between committing a criminal offence and not committing a criminal offence.'[37] In answer to what Woolf LJ had said in *Bugg*, Lord Nicholls observed:

> Setting aside an impugned order for procedural invalidity, as distinct from substantive invalidity, has no effect on the criminality of earlier conduct Despite a court decision that the order was not lawfully made, the defendant is still guilty of an offence, by reason of his conduct.
>
> Further, it would seem to follow that in the case of procedural invalidity, the defendant could be convicted even after the order is set aside as having been made unlawfully, so long as the non-compliance occurred before the order is set aside. In cases of substantive invalidity the citizen can take the risk and disobey the order. If he does so, and the order is later held to be invalid, he will be innocent of any offence. In cases of procedural invalidity, the citizen is not permitted to take this risk, however clear the irregularity may be.[38]

(2) Australian Experience

So far, Australian courts have not had much occasion to consider at length the problems attending collateral challenges. Relevant Australian case law does, however, reveal some support for the view that collateral challenges should be restricted to cases in which the validity of the governmental act sought to be attacked can be determined on the face of documentary materials.[39] Australian case law also reveals a degree of support for the distinction made in *Bugg* between substantive and procedural ultra vires.[40]

The broadest statement of general principle so far advanced by an Australian judge is that of Wells J, of the South Australian Supreme Court, in

[35] Id 881 per Lord Nicholls.
[36] Id 882 per Lord Nicholls.
[37] Id 883.
[38] Id 883–4.
[39] See *Posner* v *Collector for Inter-state Destitute Persons (Vic)* (1946) 74 CLR 461, 384 per Dixon J; *Muir* v *Morton* [1984] WAR 254. See also *Reid* v *Rowley* [1977] 2 NZLR 427, 483 per Cooke J. The concepts of 'error on the face' and 'patent invalidity' are, however, rather vague: see A Rubinstein, 'Error on its Face' [1964] *Public Law* 256; M Taggart op cit (fn 3) 87–8. In *Ousley* v *The Queen* (1997) 71 ALJR 1548 there was a difference of opinion among the Justices of the High Court of Australia about what warrants issued under the *Listening Devices Act* 1969 (Vic) had to show, on their face, to qualify as valid warrants, and also on whether the warrants under challenge did disclose error on their face.
[40] See *Hinton Demolitions Pty Ltd* v *Lower (No 2)* [1971] 1 SASR 512 and in that case the comments of Wells J on *Hinton Demolitions Pty Ltd* v *Lower (No 1)* [1968] SASR 370, 544. See also *Flynn* v *Director of Public Prosecutions* [1998] 1 VR 322, 347–52.

Hinton Demolitions Pty Ltd v *Lower (No 2)*.[41] His statement of principle was as follows:

> 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 party to a civil action, pleads, and relies on his own administrative act, an allegedly unlawful action cannot be collaterally impeached in any cause or matter, civil or criminal, unless an Act of Parliament or a valid regulation unequivocally authorised such impeachment. The only correct way of attacking an allegedly unlawful act is by way of separate proceedings appropriate for the purpose.[42]

In *Hinton Demolitions (No 2)* the Full Court of the Supreme Court of South Australia held that a defendant to criminal proceedings could not, in those proceedings, challenge the validity of an administration decision (one determining the load carrying capacity of a motor vehicle) on the ground that it has been made in violation of the defendant's right to natural justice. The author of that decision was not a party to the criminal proceedings.

Wells J distinguished the case of *Director of Public Prosecutions v Head*[43] on the ground that the legislation creating the offence with which Head had been charged — carnal knowledge of a female mental defective who had been detained in an institution by ministerial order — placed an onus on the prosecution of showing the validity of the order for detention of the victim of the alleged offence. At the trial the prosecution had produced the order and the medical certificates on which the Minister had purported to act. The certificates showed that there was no evidence on which the Minister could have adjudged the victim of Head's alleged offence to be mentally defective. The prosecution had not therefore discharged the onus of proving that the detention of the victim was lawful. A majority of the House of Lords agreed with the judgment of the Court of Criminal Appeal that Head's conviction should be quashed.[44]

In *Ousley* v *The Queen*[45] the High Court of Australia endorsed the proposition that the validity of search or like warrants may be contested in criminal trials when they have been used to obtain evidence which the prosecution proposes to tender. Since the issue of search warrants is an administrative rather than a judicial process,[46] it is immaterial that the warrant

[41] [1971] 1 SASR 512.

[42] Id 549. This statement appeared towards the end of a lengthy analysis of case law, most of it to do with restrictions on review on applications for certiorari.

[43] [1959] AC 83. See *Hinton Demolitions (No 2)* [1971] 1 SASR 513, 548.

[44] Some judges have treated *Head's* case as one of error on the face: see *Quietlynn Ltd* v *Plymouth City Council* [1988] QB 114, 129–30; *Bugg* v *Director of Public Prosecutions* [1993] QB 473, 496. In *Ousley* v *The Queen* (1997) 71 ALJR 15481563 McHugh J treated *Head* as authority for the proposition that 'a litigant affected by an administrative act may challenge it collaterally even though the person most directly affected is not a party to the litigation.'

[45] (1997) 71 ALJR 1848. See also *Coco* v *The Queen* (1994) 179 CLR 427, 435, 444–6, 462; *Carmody* v *Mackellar* (1996) 68 FCR 265; *Flanagan* v *Commissioner of Police* (1996) 60 FCR 149; *Swanevelder* v *Holmes* (1990) 52 SASR 549; *Re Lawrence; Ex parte Goldbar Holdings Pty Ltd* (1994) 11 WAR 549, 560–5.

[46] *Love* v *Attorney-General* (NSW) (1990) 169 CLR 307, 320–22; *Grollo* v *Palmer* (1995) 184 CLR 348, 360.

under challenge in criminal proceedings has been issued by a court. The County Court judge who had presided at the trial of Ousley had, the High Court held, erred in ruling that he had no jurisdiction to consider the validity of warrants issued under the *Listening Devices Act* 1969 (Vic), simply because they had been issued by judges of the Supreme Court.

A majority of the five Justices of the High Court in *Ousley* appear to have been of the view that the validity of warrants can be challenged collaterally only on the ground that they are defective on their face. McHugh J, however, suggested that collateral challenge of the validity of warrants is not so confined and may also be made on the more general ground of jurisdictional error.[47]

A few months before delivery of judgment in *Ousley* a Full Court of the Federal Court of Australia had occasion to consider the question whether the validity of an administrative decision which is reviewable under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) — the *ADJR* Act — may be challenged collaterally in a civil action. In this case, *Federal Airports Corporation* v *Aerolineas Argentinas*,[48] it was an action to recover money paid under a determination fixing aeronautical charges, made by the Corporation in purported exercise of the power conferred by s 56 of the *Federal Airports Corporation Act* 1986 (Cth).[49] The plaintiffs alleged that the determination was ultra vires. The court held that the validity of the determination could be challenged collaterally in the civil action.[50] Even though the validity of the determination could be challenged directly under the *ADJR* Act, s 10 of that Act had made it clear that the Act had not established an exclusive method of challenge.[51]

The Federal Court recognised that there are limits on collateral challenge, though they could not be described with precision.[52] It seems to have accepted that the plaintiffs' collateral challenge would not have been precluded simply because an application by them for judicial review might have been out of time.[53] The court expressed no opinion on whether the collateral challenge was limited, as the judge below had suggested,[54] to jurisdictional error, or whether it could be made on any of the grounds specified s 5 of the *ADJR* Act. These grounds include any error of law. On the other hand the court found no

[47] (1997) 71 ALJR 1848, 1564–5. His Honour relied on *Coco* v *The Queen* (1994) 179 CLR 427.

[48] (1997) 147 ALR 649.

[49] The action had been commenced in the Supreme Court of New South Wales, but had been transferred to the Federal Court under s 6(1) of the *Jurisdiction of Courts (Cross Vesting) Act* 1987 (NSW) on the ground that it raised a special federal matter.

[50] Lehane J, Beaumont and Whitlam JJ concurring. The Court accepted that it had jurisdiction to try the action under the cross-vesting legislation, but indicated that it might have jurisdiction independently of that legislation by reason of s 39B(1A) of the *Judiciary Act* 1903 (Cth), enacted in April 1997: *Federal Airports Corporation* v *Aerolineas Argentinas* (1997) 147 ALR 649, 665.

[51] *O'Reilly* v *Mackman* [1983] 2 AC 137 and the legislation on which it was based were distinguished: *Federal Airports Corporation* v *Aerolineas Argentinas* (1997) 147 ALR 649, 661.

[52] *Federal Airports Corporation* v *Aerolineas Argentinas* (1997) 147 ALR 649, 661.

[53] Id 665–7.

[54] Id 654, 665.

reason in principle why the plaintiffs' collateral challenge should be limited to a lack of power appearing on the face of the determination. In the opinion of the court:

> There is no apparent reason why a different result should ensue simply because it is necessary to call evidence, even substantial evidence, of facts in order to establish lack of power.[55]

STATUTORY RESTRICTIONS ON COLLATERAL CHALLENGE

Statutes may expressly or impliedly preclude collateral challenge of the validity of acts in purported exercise of the powers they confer, or else they may limit the grounds on which collateral challenge is permitted.

In one case it was held that collateral challenge of a magisterial order was precluded by virtue of a statutory provision which allowed for an appeal to the County Court against the order. The party aggrieved by the order could not therefore contest its validity when he was subsequently prosecuted for breach of the order.[56] In another case it was held that collateral challenge of an order was precluded, having regard to the object of the statutory provision under which the order was made.[57] It was a provision which empowered magistrates to order that persons suffering from infectious diseases be removed to hospitals. When such an order was made, a person charged with obstructing the execution of the order could not, in defence, assail the validity of the order.

Statutory objectives were of paramount concern in *Quietlynn Ltd* v *Plymouth City Council.*[58] The statute in question in that case had introduced a scheme under which persons were prohibited from using premises as 'sex shops' except under licence. But it has also provided that persons who were using premises for this purpose before the Act came into force, and who had applied for a licence, were entitled to continue to so use the premises until their applications for licences had been determined. The applications by the defendants for licences had been refused.

When prosecuted for continuing to operate their 'sex shops' without a licence, the defendants argued that their applications for licences had not been 'determined' because the decisions of the licensing agency to refuse their applications were invalid. The alleged causes of invalidity were failure to accord natural justice and deciding with reference to irrelevant considerations. On appeal against conviction, the Crown Court had allowed this defence. But on further appeal, the Divisional Court ruled that an application for a licence had been, relevantly, 'determined' when the licensing agency had

[55] Id 665. The court referred to *Posner* v *Collector for Inter-State Destitute Persons (Vic)* (1946) 74 CLR 461, 483 per Dixon J but considered that what was there said relates only to decisions of inferior courts.

[56] *Vestry of St James and St John, Clerkenwell* v *Feary* (1890) 24 QBW 703.

[57] *R* v *Davey* [1899] 2 QB 301.

[58] [1988] QB 114.

made a decision in response to an application, even though the decision might be set aside on an application for judicial review to the Divisional Court. To have allowed collateral challenge on the grounds raised by the defendants, in defence of the criminal proceedings against them, would have frustrated the objects of the licensing code.[59]

The importance of statutory context and objectives has been underlined by the House of Lords in *Wicks*.[60] In this case the question whether the validity of an administrative act was susceptible to collateral challenge was resolved by reference to the 'elaborate statutory code' contained in the *Town and Country Planning Act* 1990 (UK).[61] Under this Act, local planning authorities had been empowered to serve enforcement notices requiring persons to take specified measures, so as to comply with applicable controls over land use. Persons served with such notices could appeal to a Minister. Non compliance with a notice was a criminal offence. Wicks had been prosecuted for this offence, after an unsuccessful appeal to the Minister.

At his trial before the Canterbury Crown Court he sought to challenge the validity of the enforcement notice which had been served upon him, on the ground that it had been made in bad faith and with reference to irrelevant considerations. The Crown Court ruled that although the validity of the enforcement notice could be challenged on these grounds in an application to the Divisional Court for judicial review, in the criminal proceedings the validity of the enforcement notice could not be attacked on those grounds. In these proceedings the court had to accept the existence of an enforcement notice if it was valid on its face (formally valid), and not yet set aside on appeal to the Minister or an application for judicial review. The Court of Appeal and the House of Lords affirmed this ruling by the Crown Court. In the House of Lords, Lord Hoffman documented the correctness of this construction of term 'enforcement notice' by reference to the long legislative history of the relevant statutory provisions.[62]

Statutes rarely contain provisions which expressly exclude or restrict collateral challenge. They may, however, establish a particular regime for determination by a court of the validity of actions taken in purported exercise of powers conferred by the statute. A statute may, for example, allow a ratepayer to seek from a Supreme Court an order to quash a local government by-law on the ultra vires ground. A Victorian statutory provision of this kind, enacted in the last century, was held by some judge of the Supreme Court to have precluded collateral challenges, by way of defence of criminal prosecutions for breach of by-laws.[63] But in 1902, a Full Court of the Supreme Court held that this statutory provision did not have such an effect.[64]

[59] Id 129, 130.
[60] [1997] 2 WLR 876.
[61] Id 884.
[62] Id 893–6.
[63] *Rider* v *Phillips* (1884) 10 VLR 147, 153 per Higinbotham J; *R* v *Huntley; Ex parte Tootell* (1887) 13 VLR 606, 608 per A'Beckett J; Mayor of Brighton v Lott (1892) 14 ALT 91.
[64] *Gunner* v *Helding* (1902) 28 VLR 303. See El Sykes, DJ Lanham and RR Tracey, *General Principles of Administration Law* (3rd ed, 1989) para 2309.

The following year the State Parliament enacted legislation to make it clear that the validity of local government by-laws could not be contested in proceedings before magistrates.[65] The legislation proved to be unsatisfactory. It did not prevent collateral challenge of subordinate legislation made by persons or bodies other than local government councils.[66] There were also differences of opinion about whether it applied when a party alleged that a by-law was inconsistent with other subordinate legislation having paramount force.[67]

The current Victorian *Local Government Act* 1989 (Vic) preserves the provision for direct challenge of what are now termed local laws by proceedings in the Supreme Court.[68] But the preclusive clause introduced in 1903 has been omitted. This change was contemporaneous with the enactment of the *Magistrates' Court Act* 1989 (Vic). Under this Act the judicial functions of the court are entrusted to stipendiary magistrates who must be legally qualified.

Section 100 of *Magistrates' Court Act* 1989 (Vic) however, appears to introduce into the law of the State a principle akin to the *O'Reilly* v *Mackman*[69] doctrine. The section defines the civil jurisdiction of the court. Subsection 1 delineates the extent of that jurisdiction, in terms of causes of action and monetary claims. Subsection 2 subtracts from the jurisdiction conferred by subsection 1. It does so in the following terms:

> The Court does not have jurisdiction in any cause of action —
> (a) in which the effect of, or the validity or invalidity of, any act, matter or thing done or omitted to be done by any person or body whatsoever in the exercise or purported exercise of any power or duty conferred or imposed on that person or body or purportedly conferred on that person or body by or under —
> (i) any royal prerogative; or
> (ii) any statute —
> is sought to be determined or declared; or
> (b) in the nature of a proceeding for prerogative writ.

Section 100(2) is expressed as a limitation on the jurisdiction of the Magistrates' Court. It clearly precludes direct challenge by a plaintiff of the validity of acts in purported exercise of statutory or prerogative powers. But to what extent, if at all, it precludes collateral challenge is by no means clear. The causes of action in which the Magistrates Court now has jurisdiction are many. Questions which are presented by s 100(2) include the following: Is the jurisdiction conferred by s 100(1), lost the moment in which a defendant raises a defence of ultra vires, or when a plaintiff answers a defence by a plea of ultra vires? Or does the Court retain jurisdiction in the cause and simply lack authority to decide it with regard to the ultra vires issue(s)? These questions await authoritative determination. But I think it likely that the Supreme Court would construe the jurisdiction limit sought to be imposed by s 100(2)

[65] Sykes op cit (fn 64) para 2311.
[66] *Brudenell* v *Nestle Company (Australia) Ltd* [1971] VR 225.
[67] Sykes op cit (fn 64) para 2314.
[68] Section 124.
[69] [1983] 2 AC 237.

in such a way as not to preclude collateral challenges which are integral to determination of the ultimate question of liability.

The Parliament of Victoria cannot be said to have expressed a clear intention that questions of ultra vires cannot be decided in the Magistrates' Court, on jurisdictional grounds, for there is no counterpart of s 100(2) in s 25 of the *Magistrates' Court Act* 1989 (Vic), the section defining the criminal jurisdiction of the court.

HOW TO RESOLVE THE PROBLEMS ABOUT COLLATERAL CHALLENGE?

Over twenty five years ago it seemed to Chief Justice Bray of the Supreme Court of South Australia that

> the authorities [on when and when not the validity of administrative acts can be challenged collaterally] 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 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.[70]

The Divisional Court of the Queen's Bench Division later attempted to impose order on this chaos but without success. In *Wicks*[71] the House of Lords rejected the solution by the Divisional Court in *Bugg*[72] that collateral challenges, at least in criminal proceedings, should be restricted to challenges on substantive as distinct from procedural grounds. Although the Lords declined to lay down any general principle, Lord Nicholls suggested that —

> 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 criminal proceedings, but the criminal court should have a discretionary power to require an unlawfulness defence to be pursued, if at all, in judicial review proceedings.[73]

The present uncertainty about where the boundary between permissible and impermissible collateral challenge should be drawn was, his Lordship recognised,

> a by-product of the development of the law of judicial review over the last 30 years. The greatly widened supervisory role now exercised by the court emerged largely from a much expanded application of the concept of ultra vires. Thus, if the ancient boundary line, distinguishing simply between challenges based on lack of vires and other challenges, were applied today, the result would be to bring within the purview of the criminal courts a

[70] *Hinton Demolitions Pty Ltd* v *Lower (No 2)* [1971] 1 SASR 513, 520–2.
[71] [1997] 2 WLR 876.
[72] [1993] QB 473.
[73] [1997] 2 WLR 876, 882.

> much wider range of challenges than formerly. This result would not attract universal approval.[74]

The much expanded application of the concept of ultra vires and excess of jurisdiction is not the only source of the present uncertainty. Another is the fact that the discretionary elements in judicial review proceedings are necessarily absent when a question of legal validity is raised collaterally in civil or criminal proceedings. There is, Bray CJ noted in *Hinton Demolitions*,[75]

> the apparent contradiction contained in the notion that even when the court [the Supreme Court in exercise of its supervisory jurisdiction] in exercise of its discretion refuses certiorari, either because it does not consider the applicant to have sufficient *locus standi*, or because it thinks that the applicant has in some way disqualified himself from relief, or because it thinks the grant would be futile, or for any other reason, yet nevertheless the disputed order or adjudication may still remain a nullity which can be asserted by anyone in any proceedings in which its validity is incidentally called in question.[76]

Absent statutory indications to the contrary, issues of legal validity which are properly raised in collateral proceedings must be determined to resolve the main issue(s) before the court.

Bray CJ acknowledged 'the great force of the practical arguments which' his fellow judge, Wells J had urged 'about the evil consequences which might result if the nullity of an unknown quality of administrative acts can be urged by anyone at any time in any form of proceeding in which they are incidentally in question.'[77] The 'unknown quantity of administrative acts' may range from acts in purported exercise of legislative powers, to decisions made in relation to particular individuals. Some of these decisions may have been relied upon by third parties and assumed by them to have been a valid decision.[78] In between there may be a whole series of decisions which, although made in relation to particular individuals, have been made with reference to some policy or interpretation which is illegitimate.

The reasons why some challenges to the validity of governmental action should be raised only in proceedings for judicial review are, Lord Nicholls observed in *Wicks*, largely ones of practical convenience.[79] However, in his view, 'hard and fast rules should have no place when deciding questions of practical convenience.'[80] Hard and fast rules would include those which limit collateral challenges by reference to the grounds of challenge. In his Lordship's opinion: 'If convenience is the governing factor, then at some point in the system there should be space for a discretionary power, to be exercised having regard to all the circumstances.'[81] By a discretionary power he meant a power in the court before which the collateral challenge is raised to decide the

[74] Id 880.
[75] [1971] 1 SASR 513.
[76] Id 521.
[77] Id 520.
[78] On third party reliance see *Martin* v *Ryan* [1990] 2 NZLR 209, 237–8.
[79] [1997] 2 WLR 876, 882.
[80] Ibid.
[81] Ibid.

validity issue itself or require it to be 'pursued, if at all, in judicial review proceedings.'[82]

In some jurisdictions there are already statutory provisions which allow some inferior courts to refer questions of law to the appropriate superior court, and to do so on the request of a party or on the court's own motion or both.[83]

A much more radical proposal than that made by Lord Nicholls, is that collateral challenge should itself become discretionary in the sense that the governmental action under challenge be 'remediable at the discretion of whatever court is considering the question.'[84] It is said that: 'In this way a person adversely affected by a defective provision or decision would retain the right to have the defect taken into account in any court proceedings in which the question is relevant.'[85] This suggested solution overlooks the fact that in most court proceedings in which the validity of governmental action is challenged collaterally, the ultimate issue to be decided is one legal liability. Determination of issues of that kind seldom allows scope for the exercise of judicial discretion. If a defendant's liability for an alleged civil wrong depends on whether some administrative action or decision was invalid, the court could not decline to rule on the validity of that action or decision, even if it could be shown that a direct challenge of the action or decision by way of an application for judicial review would be out of time or would probably be dismissed on discretionary grounds.

It is, of course, one thing for a court to reject a collateral challenge of the validity of administrative action on the ground that it lacks jurisdiction to entertain such a challenge, or on the ground that the validity of that action is not relevant to the question of a defendant's liability. It is another thing for a court to refer the matter raised by way of collateral challenge to another court and to adjourn the proceedings before it pending the outcome of that reference.

If courts do have a discretion to refer legal issues raised by way of collateral challenge to the appropriate superior court, or to require a party to present those issues by way of an application for judicial review, they will inevitably have to develop principles to guide them in the exercise of their discretion. Such principles cannot be expressed or applied as hard and fast rules. But they may be formulated in terms of factors which may be and should be taken into account in the exercise of the discretion. Those facts might include:

(a) the complexity of the issue raised and the court's competence to decide it;
(b) whether relevant precedents provide clear enough guidance on how the issue should be decided;

[82] Ibid.
[83] For example, *County Court Act* 1958 (Vic) s 76; *District Court Act* 1991 (SA) s 44 *Criminal Law Consolidation Act* 1935 (SA) ss 350, 351; *Magistrates' Court Act* 1921 (Qld) s 46; *District Court of Western Australia Act* 1969 (WA) s 49.
[84] Sykes op cit (fn 64) para 2323.
[85] Ibid.

(c) whether the interests of persons other than those of the parties to the proceedings will or could be affected by the court's determination of the issue and, if so, whether the court can accommodate those interests by permitting intervention by those persons in defence of their interests;[86]
(d) whether determination of the question of validity can be resolved promptly and without recourse to extrinsic evidence;
(e) whether it is desirable that the validity issue be decided promptly, and in the course of the proceedings before the court;
(f) whether it would be reasonable to expect the party who has raised the issue, by way of defence, to have initiated or to initiate, separate proceedings for judicial review, having regard to the expenses involved and the availability of legal aid in those proceedings.[87]

A particular problem arises when the cause of invalidity alleged in the collateral proceedings is denial of a right to natural justice. The solution to this problem may be to regard that right as one which is personal to individuals. An alleged denial of this right can be raised for judicial determination, directly or collaterally, only when the parties allege denial of that personal right. For example, if a Commissioner of Police has been dismissed from office and replaced by another, it would make no sense to allow a junior officer to contest the validity of disciplinary action taken against him/her by the successor Commissioner on the ground that the previous Commissioner had been invalidity dismissed from office, on account of a failure to accord his/her right to natural justice.[88]

In *Wicks* Lord Hoffman doubted whether the problems attending collateral challenges can 'be solved by judicial creativity.'[89] He was inclined to the view that 'if it is thought inconvenient to have questions of ultra vires decided by magistrates, Parliament must change the law.'[90]

Questions of ultra vires may, of course, arise in the course of proceedings before any inferior court and not merely courts constituted by magistrates. They may also arise, collaterally in proceedings before superior courts, including those invested with the relevant supervisory jurisdiction. Questions of ultra vires may even arise in proceedings before administrative appeals tribunals. In deciding an appeal against a decision to revoke someone's occupational or business licence, a tribunal may, for example, have to consider whether the relevant statute confers a power to revoke a licence in the circumstances of the particular case.[91] If the licence was revoked in purported

[86] Interveners become parties to the proceedings. Those permitted to appear as amici curiae do not. Under ss 78A and 78AA of the *Judiciary Act* 1903 (Cth) Attorneys-General have rights to intervene in federal constitutional cases.
[87] In *R* v *Wicks* [1997] 2 WLR 876, 882. See also *R* v *Reading Crown Court; Ex parte Hutchinson* [1988] QB 384, 392 per Lloyd LJ.
[88] See Wade and Forsyth op cit (fn 3) 530.
[89] [1997] 2 WLR 876, 891.
[90] Ibid. Lord Fraser of Tulleybelton had expressed the same view in *Wandsworth London Borough Council* v *Winder* [1985] AC 46, 510.
[91] See *Collector of Customs (NSW)* v *Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307.

exercise of a power conferred by regulations, it may be asked to rule on the validity of the regulations.[92]

While institutional competence is certainly one factor to be taken into account in deciding whether a court or tribunal should have jurisdiction to rule on questions of ultra vires, it is not the only factor. Statutes which seek to deal with the problems associated with collateral challenge of the validity of governmental acts by means of limitations on the jurisdiction of courts are, in my view, too crude a method of dealing with those problems. They are too crude a method because the nature and extent of the problems are likely to vary from case to case, and from one statutory context to another. There may be circumstances in which it is entirely appropriate for a parliament to preclude or restrict collateral challenge of decisions made or action taken under a particular statute.[93] But otherwise, the preferable approach, is to accord to the courts before which a vires question may be raised, collaterally, a discretion to refer the question to the most appropriate forum.[94] That forum will usually be the central superior court invested with a supervisory jurisdiction.

There is also merit in legislative arrangements under which a central superior court has authority to order removal into that court of causes pending before lower courts in which the validity of governmental action is in issue. Section 40 of the *Judiciary Act* 1903 (Cth) gives such a power to the High Court of Australia. It is exercisable where any cause or part of a cause is pending in a court other than the High Court, and the cause (or part thereof) arises under the federal Constitution or involves its interpretation. The High Court is required to order removal of such causes on the application of any of the Attorneys-General. It has a discretion when removal is sought by other parties. In addition, s 40 allows the High Court to order removal to it of causes pending before lower courts which involve the exercise of federal jurisdiction.

Section 78B of the *Judiciary Act* 1903 (Cth) facilitates exercise by the Attorneys-General of their right to require that federal constitutional causes be removed into the High Court. It imposes on the lower courts, before whom such causes are pending, a duty not to proceed in the cause 'unless and until the court is satisfied that notice of the cause, specifying the nature of the matter has been given to the Attorneys-General . . . and a reasonable time has elapsed for consideration by the Attorneys-General, of the question of intervention in the proceedings or removal of the cause to the High Court.' The lower courts are authorised to direct parties to give notice to the Attorneys-General.

These provisions in the *Judiciary Act* 1903 (Cth) provide a means whereby, on application, Australia's ultimate constitutional court may make an order which is effective to preclude a lower court from deciding a constitutional

[92] See *Re Johnson and Marine Council (No 2)* (1990) 12 AAR 323; *Chief Adjudication Officer* v *Foster* [1993] AC 754.

[93] See *R* v *Wicks* [1997] 2 WLR 876.

[94] In *Ousley* v *The Queen* (1997) 71 ALJR 1548, 1566 McHugh J suggested that the problems of fragmentation of criminal trials by contest of the validity of search and similar warrants receive legislative attention.

issue which has been raised, collaterally or directly, in proceedings before the lower court, notwithstanding that the court has jurisdiction to decide the constitutional issue. The effect of such a removal order is that the High Court decides the constitutional issue at first instance, and usually at last instance also.

Under the cross vesting legislation of 1989 the Supreme Courts of the States have jurisdiction to determine questions about the validity of federal administrative action. But in most cases the Supreme Courts will be obliged to transfer causes in which such questions are raised to the Federal Court.

In the States, the inferior courts now have substantial jurisdiction in both civil and criminal matters. In general the statutes defining the jurisdiction of these courts do not preclude them from deciding questions about the validity of governmental acts which are raised collaterally. Often an inferior court will have no ability to avoid determination by it of such questions.

Should it be desirable to promote reference of questions of this kind to the States Supreme Court, one means of achieving that object would be the enactment of legislation, along the lines of s 40 of the *Judiciary Act* 1903 (Cth), to empower the Supreme Courts to order removal of causes, or parts thereof, to them. State legislation of this nature would need to identify the causes which enliven the Supreme Court's power to order removal with as much precision as possible. Those causes would certainly have to include ones in which the validity of subordinate legislation, under State law, was in dispute. Removable causes might be defined more broadly to encompass ones in which an issue raised for determination in proceedings before a lower court could be the subject of an application to the Supreme Court for a prerogative writ or like order.

State legislation to invest the Supreme Court with a power to order removal to that court of defined causes, or parts of those causes, would need, in addition, to indicate who has standing to seek such an order. The framers of the legislation would also need to consider whether the Attorney-General of the State should be entitled to apply for a removal order and to be granted his/her application as of course. Standing to apply for a removal order should, I think, be accorded to all the parties to the proceedings before the lower court and also to the Attorney-General, in his/her capacity as the first law officer of the Crown and as *parens patriae*. I would not, however, recommend that the Attorney-General be accorded a right to command an order for removal. To accord the Attorney-General such a right would be to give him/her a substantive power to control the agenda of the Supreme Court and to compromise the court's independence.

Should a Supreme Court be endowed by statute with a capacity to order removal of defined causes (or parts thereof) to it, the statute should, I think, make it clear that the Supreme Court has a discretion to grant or refuse an application for a removal order, and that it should not make such an order unless it is satisfied that it is appropriate to make it 'having regard to all the circumstances, including the interest of the parties and public interest.'

Postscript

This article was written before the decision of the House of Lords in *Boddington v British Transport Police*.[95] In that case it was held that the validity of subordinate legislation (and of administrative decisions made under the legislation) may be challenged collaterally in criminal proceedings, on procedural as well as substantive grounds.

[95] [1998] 2 WLR 639. The case is discussed by C Forsyth in [1998] *Public Law* 364–70.