SUPREME COURT OF QUEENSLAND

CITATION:	*Stenner v Crime and Corruption Commission & Ors* [2019] QSC 202
PARTIES:	**MICHELLE STENNER** (applicant) **v** **CRIME AND CORRUPTION COMMISSION** (first respondent) **CHAIRMAN OF THE CRIME AND CORRUPTION COMMISSION** (second respondent) **STATE OF QUEENSLAND** (third respondent)
FILE NO:	BS No 2947 of 2019
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 August 2019
DELIVERED AT:	Brisbane
HEARING DATE:	22 July 2019
JUDGE:	Ryan J
ORDER:	**1. The application is dismissed.** **2. I will hear the parties as to costs.**
CATCHWORDS:	PROCEDURE – STATE AND TERRITORY COURTS – DECLARATIONS – GENERALLY – where the applicant was charged on indictment with offences of perjury which were before the District Court – where applicant applied for a declaration in the Supreme Court which, she contended, would have a "determinative" effect on the criminal proceedings – whether application should be dismissed in the exercise of the court's discretion to ensure there was no fragmentation of the criminal proceedings – whether the case was exceptional, and warranted the Supreme Court's intervention, including because the issue fell within the realm of administrative law – whether District Court a "singularly inapt" forum for the determination of such an issue by way of collateral challenge

Anderson v AG (NSW) (1987) 10 NSWLR 198

CEO of Customs v Jiang (2001) 111 FCR 395

Coco v Shaw [1994] 1 Qd R 469

Cousins v Merrington [2007] VSC 542

Director of Housing v Sudi (2011) 33 VR 559

Frugtniet v Attorney General (NSW) (1997) 41 NSWLR 588

Gedeon v Commissioner of the NSW Crime Commission (2008) 236 CLR 120

Graves v Duroux [2014] QSC 198

Hinton Demolitions Pty Ltd v Lower (No 2) [1971] 1 SASR 512

Kirk v Industrial Relations Commission (NSW) (2010) 239 CLR 531

Leisure Coolum Pty Ltd & Anor v Magistrate Court of Queensland & Ors [2019] QSC 8

Minister for Aboriginal Affairs v Peko-Wallsend (1986) 162 CLR 24

Ousley v R (1997) 192 CLR 69

PRS v Crime and Corruption Commission [2019] QSC 83

Sankey v Whitlam (1978) 142 CLR 1

Sibelco Australia Ltd v Magistrate Graham C Lee & Anor [2013] QSC 270

The Queen v Iorlando and Another (1983) 151 CLR 678

COUNSEL:	JR Hunter QC and AD Scott for the applicant JG Rennick SC and R Withana for the first and second respondents JM Horton QC for the third respondent
SOLICITORS:	Creevey Russell for the applicant Crime and Corruption Commission for the first and second respondents Crown Solicitor for the third respondent

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[1] The applicant, Ms Stenner, is charged on indictment with three counts of perjury under section 123(1) of the *Criminal Code*. Proof of the offence of perjury requires proof that a defendant knowingly gave false testimony *in a judicial proceeding*.[1] The relevant judicial proceeding in Ms Stenner's case is a Crime and Corruption Commission hearing, which was held on 4 August 2017. Such a hearing must be authorised. In the present case, the hearing was authorised by the Chairperson of the Crime and Corruption Commission on 31 July 2017.

[2] The applicant contends that the decision of the Chairperson to authorise the hearing was of no effect because the Chairperson failed to have regard to up-to-date information in making it. It follows, the applicant contends, that there was no jurisdiction to hold the hearing and the hearing was not therefore a "judicial proceeding" under section 123.

[3] The applicant's criminal trial has been adjourned to allow her to apply to this court for relevant declarations, including a declaration that the hearing was not a section 123 "judicial proceeding", which would effectively end the prosecution.

[4] As well as responding to the substance of the applicant's arguments, the first and second respondents (the Crime and Corruption Commission and its Chairperson) submitted that, even if I were to conclude that there was no jurisdiction to hold the hearing, I ought not to grant the declaratory relief sought because to do so would interfere with criminal proceedings, contrary to the anti-fragmentation principle. The third respondent, the State, representing the interests of the Director of Public Prosecutions, submitted that it would be inappropriate for me to grant the declaratory relief sought for the same reason.

[5] For the reasons which follow, I dismiss the application. There is nothing about the matter which warrants the intervention of this court in the criminal proceedings in the District Court.

[6] I will hear the parties as to costs.

Facts

[7] Amy Borland, the daughter of a Chief Superintendent of Police, was appointed to a temporary, junior, administrative position in the Queensland Police Service on 10 May 2016.

[8] On 25 October 2016, the Crime and Corruption Commission (CCC) received an anonymous complaint that Ms Borland's father, Chief Superintendent Borland, had used his influence to have her appointed, which would amount to corrupt conduct. The anonymous complainant alleged that the person influenced by Chief Superintendent Borland was the applicant, who was an acting Chief Superintendent of Police.

[9] On 17 November 2016, the CCC referred the complaint to the Ethical Standards Command (ESC) of the Queensland Police Service (QPS) for investigation.

[10] In the opinion of the ESC, having reviewed the documentation relating to the appointment of Ms Borland, and her resume, there had been no corrupt conduct. The CCC were so advised on 23 January 2017.

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[1] Among other things.

[11] The CCC did not agree with the ESC's opinion, and the matter was returned to the ESC for further investigation on 8 February 2017. Detective Senior Constable Lockhart conducted that further investigation.

[12] In the course of it, on 23 March 2017, she interviewed Inspector Simon Chase, whose name appeared on a document relevant to the appointment of Ms Borland (that is, a form QP0320), which document he had never seen; nor had he been involved in the appointment of Ms Borland. She also interviewed Acting Senior Sergeant Henry, whose name and signature appeared on the same QP0320. Henry said she was given a document to sign in relation to the appointment of Ms Borland, which she did. She had no idea what she signed when she signed it but understood that there was an "administrative requirement" that she sign it.

[13] On 24 March 2017, ESC requested the CCC to assume responsibility for the matter, which it did.

[14] The CCC determined to continue the investigation of the complaint. The investigation was code named "Operation Access".

[15] Those responsible for the investigation (that is, officers within the Corruption division of the CCC) planned an investigative strategy which included a pretext conversation with the applicant; the collection of relevant documents and emails; and interviews. They also wished the Commission to conduct a hearing at which Ms Borland, her father and the applicant might be examined.

[16] To that end, the "Assistant Director, Corruption Legal" prepared a document entitled –

"APPLICATION TO COMMISSION FOR APPROVAL

TO HOLD AN INVESTIGATIVE HEARING

Crime and Corruption Commission

Section 176(1)"

[17] The application referred to the matter as "CO-16-1986".

[18] The application document recited the history of the matter, the investigative strategy for the matter and the purpose of an investigative hearing in the matter – namely "to further explore and/or identify the subject officer's (sic) (Stenner and Borland) involvement in the employment of Amy Borland". It set out the reasons why the Assistant Director considered a hearing appropriate. It also dealt with the question of whether the hearing ought to be public or not – arguing that the hearing ought to be closed.

[19] The application was signed by the Assistant Director on 26 April 2017. It was co-signed by the Director of Corruption Operations on the same date – without recording, although the form provided for it, the Director's "agreement" or "disagreement" with the application.

[20] It was signed by the Senior Executive Officer, Corruption, Dianne McFarlane, on 15 May 2017, recording her agreement with the application. On that same date, Ms McFarlane signed a document entitled –

"AUTHORISATION TO HOLD A CLOSED HEARING

Crime and Corruption Act 2001

Section 176"

[21] That authorisation document "hereby" authorised "closed hearings in relation to CO-16-1986, being a matter relevant to the performance of the corruption function of the [CCC]".

[22] The investigation was given the code name Operation Access.

[23] On 23 May 2017, in the course of Operation Access; "file number CO-17-1184",[2] Chase covertly recorded a conversation with the applicant about Ms Borland's appointment.

[24] On 31 May 2017, in the course of Operation Access, CCC officers interviewed Leisha Linderberg (an administrative office at the QPS) about Ms Borland's appointment.

[25] On 2 June 2017, in the course of Operation Access, CCC officers interviewed Karen Hage (who provided human resources support to the QPS) about Ms Borland's appointment.

[26] Two hearings were scheduled for 6 June 2017, which did not proceed.

[27] On 31 July 2017, a decision was made to reschedule a hearing for one witness (the applicant). It was noted that the authorisation made by Ms McFarlane in May 2017 referred to the incorrect file number. It was decided to have a "fresh authorisation signed by the Chairperson".

[28] The Chairperson signed an authorisation in these terms on 31 July 2017 –

> "Whereas s 176 of the *Crime and Corruption Act* 2001 (**the Act**) provides that the Crime and Corruption Commission **(the CCC**) may authorise the holding of a hearing in relation to any matter relevant to the performance of its functions –
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> I, **ALAN JOHN MACSPORRAN QC**, Chairperson, and a delegate of the Commission for the purposes of s 176 of the Act, hereby authorise the holding of a hearing in relation to an investigation, code-named **Operation Access**, being a matter relevant to the performance of the corruption function of the CCC."

[29] The hearing was held on 4 August 2017. The Chairperson of the Commission presided. After the hearing was called on by the hearing room orderly, Counsel Assisting said –

> "… this is the first hearing being conducted in relation to Operation Access it's appropriate at this time that I tender an Authorisation to Hold a Hearing under section 176 of the Crime and Corruption Act under your hand on the 31st of July 2017."

[30] A little later, during preliminaries, Counsel Assisting said –

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[2] A different file number from the number originally assigned to the matter.

> "… Ms Stenner attends today pursuant to a Notice issued under your hand on the 31st of July 2017 …"

[31] The indictment was presented on 11 June 2018. It alleges, in effect, that it was during the course of the CCC hearing that Ms Stenner gave false testimony. The applicant implicitly argues that she will not have committed the perjury offences if the hearing was not "a judicial proceeding".

[32] The applicant's matter was listed as the number one trial in the District Court in the week commencing 25 February 2019.

[33] The matter was mentioned before his Honour Judge Smith on 20 February 2019 to allow the applicant to apply for the adjournment of her trial to enable her to bring the present application in the Supreme Court.

[34] Queen's Counsel for the applicant informed his Honour Judge Smith that he had received instructions the day before to apply to this court for a review of the decision to hold the CCC hearing. He said –

> "That's been the subject of some anxious consideration over the past few days, and discussions with the prosecution, and it seemed to us, in the end, that the Supreme Court was the better venue for the resolution of that question."

[35] The Director of Public Prosecutions, Michael Byrne QC, appeared for the Crown. He did not oppose the application for an adjournment of the trial. He said –

> "There's no question that if my opponent's successful in the judicial review application, it will affect the trial. Depending on the reasons given for the success will depend on whether the trial can proceed at all or not, or whether there is at least an argument that can further proceed. So it's quite central, and I can't sensibly oppose the … application."

[36] The present application was filed (in its original form) on 19 March 2019.

[37] On 11 June 2019, the CCC wrote to the solicitors for the applicant, observing that while the State was a respondent to the application, the DPP was not. The CCC invited the applicant to join the DPP as a respondent so as to ensure the DPP was bound by any declaration made by this court.

[38] The solicitor for the applicant replied to the CCC, informing the CCC that the DPP was on notice of the proceedings and that it was a matter for him whether he wished to be joined or not.

[39] The CCC wrote to the DPP and, in effect, invited him to consider applying to be joined as a respondent to the application. The DPP replied to the CCC on 27 June 2019. In his reply, the DPP acknowledged that an application analogous to the one brought by the applicant could have been made to the criminal court. He said –

> "As I stated in the District Court on 20 February 2019, the outcome of the application has the potential to affect the conduct of the criminal proceedings. This Office independently conducts prosecutions on the basis of the available evidence. In my opinion, the mere potential to affect the course of a prosecution

> will not usually be a sufficient basis for this Office to join in an application of this nature, especially where it is not contended that any conduct by this Office or its staff is relevant to the determination of the issue.
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> Had an analogous application been made in the District Court pre-trial this Office would inevitably have responded in its role as prosecutor. However the application has not been brought in that manner and that is not, in my opinion, a sufficient basis to join the proceedings which are related to, but separate from, the criminal prosecution.
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> Accordingly, I do not intend to join the proceedings, at this time …."

[40] The State of Queensland, represents the Crown in this matter. The only relevant Crown interest here is the interest of the Director of Public Prosecutions.

The anti-fragmentation principle

[41] The first and second respondents' position was first, that the hearing was lawfully authorised; and secondly, that even if I were to find that the hearing was not lawfully authorised, I should decline to make the declarations sought having regard to the "anti-fragmentation" principle which is to the effect that the administration of the criminal law should – other than in exceptional cases – be left to the criminal courts.

[42] In accordance with that principle, courts are reluctant to make declarations in matters which bear upon criminal proceedings to ensure that criminal proceedings are permitted to take their course without disruption. As Gibbs ACJ said in *Sankey v Whitlam* –[3]

> "Once criminal proceedings have begun they should be allowed to follow their ordinary course unless it appears that for some special reason it is necessary in the interests of justice to make a declaratory order."

[43] The third respondent, having had no part to play in the authorisation of the hearing, submitted that I should decline the declaratory relief for the same reason – that is, having regard to the anti-fragmentation principle.

[44] There was no application by any respondent to strike out the applicant's application on the basis that it was an abuse of process (or similar) because it offended the anti-fragmentation principle. Instead, the respondents urged the court to rely on that principle in exercising its discretion not to grant the declaratory relief sought.

[45] While it was possible for me to deal first with the question of substance before the question of discretion (which was the first and second respondents' approach), I considered it more consistent with the anti-fragmentation principle to deal first with the question whether this court ought to become involved in the criminal proceedings in the way contemplated by the applicant.

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[3] (1978) 142 CLR 1 at 25 – 26.

Consideration of authorities

[46] The applicant argued that there were exceptional features of the present case warranting this court's intervention in the criminal proceedings, including that this court was the better forum for the determination of an issue of administrative law. For its better forum argument, the applicant relied particularly on the decision of Weinberg JA in *Director of Housing v Sudi.*[4]

[47] In support of their position that declaratory relief ought to be refused in accordance with the anti-fragmentation principle, the first and second respondents relied upon *Gedeon v Commissioner of the NSW Crime Commission*[5] and *CEO of Customs v Jiang,*[6] as well as to the decisions of two single Justices of this court in *Sibelco Australia Ltd v Magistrate Graham C Lee & Anor*[7] and *PRS v Crime and Corruption Commission*.[8]

[48] The State lied referred me to *Gedeon*,[9] *Cousins v Merrington*,[10] *Graves v Duroux*[11] and *Anderson v AG (NSW)*[12] for their statements in support of the anti-fragmentation principle, and in support of its argument that there was nothing exceptional about the present matter.

[49] I will consider first the authorities which discuss or apply the anti-fragmentation principle. I will consider the matter of *Sudi* later in this judgment.

CEO of Customs v Jiang

[50] The decision of the Full Court of the Federal Court in *Jiang* commences with a detailed consideration of the reasons why there is a need for restraint on the part of the civil courts in reviewing decisions taken in the course of the criminal justice process. The Court referred to –

- the many decisions of the High Court which "…repeatedly stressed the need for civil courts to avoid becoming involved in aspects of the criminal justice system";[13]
- the many decisions of its own court which have "…noted the importance of avoiding discontinuity, disruption and delay in the well-established procedures of the criminal law";[14]

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4 (2011) 33 VR 559.

5 (2008) 236 CLR 120.

6 (2001) 111 FCR 395 at [6] – [12].

7 [2013] QSC 270 (Dalton J).

8 [2019] QSC 83 (Davis J).

9 (2008) 236 CLR 120.

10 [2007] VSC 542.

11 [2014] QSC 198.

12 (1987) 10 NSWLR 198.

13 (2001) 111 FCR 395 at [7].

14 Ibid, [8].

- the similar views expressed at State level;[15] and
- the strength of the public interest in the expeditious resolution of accusations of crime.[16]

[51] The Court continued (my emphasis) –

> [12] It is clear that civil courts appreciate that it is of vital importance that regulatory bodies and law enforcement agencies not be hindered unduly in their task of investigating fully allegations of criminality. The civil courts also appreciate the need to ensure that the work of the criminal courts is not frustrated by such applications, particularly those which are quite unmeritorious and designed to achieve little more than delay. **Most complaints regarding decisions taken in the context of the criminal justice process can adequately be addressed by the criminal courts. Civil courts generally deny judicial review of such decisions on discretionary grounds.**
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> [13] In M Aronson and B Dyer, *Judicial Review of Administrative Action* … the learned authors comment:
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> > "Underlying many of the cases denying judicial review on this discretionary ground is a sub-text that the courts are wary of allowing judicial review mechanisms to be abused by litigants wealthy enough to postpone their day of reckoning."

Sibelco Australia Ltd v Magistrate Graham C Lee & Anor

[52] In *Sibelco*, the applicant sought an order in the nature of *certiorari*, arguing that there was error of law on the face of the record, or jurisdictional error, affecting the decision of a Magistrate that the applicant had a case to answer on a charge brought under environmental protection legislation. Dalton J found that there was no error of law on the face of the record or jurisdictional error. Her Honour also dealt with the argument that she ought not to grant the relief sought on discretionary grounds. Her Honour noted the court's traditional reluctance to interfere with the criminal process. Her Honour acknowledged that the matter was unusual, because the error relied upon was one of statutory construction which could be determined without the court hearing from witnesses and because the trial had been adjourned for other reasons, which meant that her Honour's determination of the application could not itself result in the fragmentation of the summary trial before the Magistrate. However, even if there were grounds for making the order sought, her Honour would not have done so. Her Honour said (footnotes omitted) –

> [16] … The legislature has set out the process for the trial and appeal, after trial, of criminal contraventions such as the subject of this application. Respect ought to be accorded to that structure, and to that process. It cannot help but diminish that respect if this Court sits as some sort of supervisory body

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[15] Ibid [9].

[16] Ibid [10] and [11].

> overseeing the process and substituting its own views for the views of those entrusted to deal with those matters. The criminal process here ought to be allowed to run its course …

PRS v CCC

[53] In *PRS v CCC*, the applicant brought an application under section 332 of the *Crime and Corruption Act* 2001. That section provides for judicial review of the CCC's activities in relation to corrupt conduct.

[54] The applicant sought orders regulating or stopping the CCC's investigation of the applicant and a person, AB, including an order restraining the CCC from further hearings.

[55] By the time of the hearing of the application, the CCC's investigation had concluded. It was in that context that Davis J made the statement relied upon by the first and second respondents – that is, his Honour's statement at [34] about the undesirability of his expressing views about the criminal proceeding (see below).

[56] His Honour determined to refuse the relief sought on discretionary grounds. His Honour said, in full context (footnotes omitted) –

> [32] The Court, generally, has jurisdiction to review decisions made in the course of a criminal investigation. See, for instance, the cases where the decision to issue search warrants, which is an exercise of executive power, has been reviewed …
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> [33] Here, discretionary considerations point inevitably towards the refusal of relief. The further exercise of coercive investigative powers against the applicant is not contemplated. The investigation is complete. Any court exercising criminal jurisdiction, once the applicant is charged, has power to exclude evidence improperly obtained … and to regulate any prosecution, even to the point of ordering a permanent stay if that is necessary in the interests of justice …
>
> [34] Any impact of the conduct of the investigation under the *CC Act* upon criminal proceedings brought against the applicant, is a matter for the assessment of the court in which those criminal proceedings are brought. It is for that court to fashion any relief which might be thought to be necessary. No purpose is served by me on an application such as the present, reviewing the various complaints made by the application and then expressing views. Indeed, any views that I might express now might influence any decision made in the criminal court. That is inappropriate. For these reasons it is undesirable that I review the material and express views. Review of the complaints is unnecessary and inappropriate as I have concluded that there is no current investigation and no basis, whether under s 332 of the *CC Act* or otherwise, to grant injunctive relief concerning the exercise of the CCC's investigative powers.

[57] The first and second respondents submitted that the observations of their Honours Dalton and Davis were "apposite in the present case".

Anderson v AG (NSW)

[58] Notwithstanding his failing to oppose the adjournment, the Director of Public Prosecutions was not "actively behind" the applicant's application to have this court intervene in the criminal proceedings.[17] The State submitted that the declaratory relief sought ought to be refused in the exercise of the court's discretion because "this was not one of the special or exceptional cases where both parties have requested that the Court issue a declaration where a declaration as to the correct state of the law is sought at the outset to save a lengthy trial from being vitiated". The State cited *Anderson v AG (NSW)*[18] for that submission.

[59] *Anderson* involved an application for a declaration that an indictment, which had been presented in the District Court of New South Wales, was "bad in law", contrary to a ruling of the trial judge made after the trial had commenced and a jury had been empanelled.

[60] Each member of the Court of Appeal was persuaded that its intervention in the criminal proceedings was warranted.

[61] Kirby P was persuaded that exceptional or special circumstances existed to warrant the intervention of the Court of Appeal in criminal proceedings. Those exceptional or special circumstances included –

- that the Attorney General and the claimants (the criminal defendants) supported the making of the declaration;
- that the trial judge had placed his full reasons before the court, thereby removing one of the reasons for restraint – that is, the need to pay due deference to a judge in whose charge a criminal trial is placed;
- the costs were the trial to miscarry because of an uncorrected error in the indictment;
- the area of law was unfamiliar;
- social considerations (that is, the then prevalence of the offence (riot)); and
- practical considerations – the declaration may cause the Crown to apply to the judge to amend its indictment and proceed to trial upon the amended indictment.

[62] Samuels JA found the following factors favoured the court granting the declaratory relief sought –

- that both parties asked the court to do so;
- the desirability of avoiding a long and expensive trial which might prove wholly abortive because it was conducted according to an erroneous view of the law; and

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[17] Transcript of hearing 1- 57 – 1 – 58.

[18] (1987) 10 NSWLR 198.

- the declaration sought was more than one "designed merely to regulate questions of the admissibility of evidence and procedural matters of that kind".[19]

[63] His Honour found that the absence of any coercive element of the declaration did not diminish the purpose it was designed to serve.[20]

[64] McHugh JA was impelled to take the exceptional course of making a declaration because the Crown and the claimants wanted the question answered and the six month trial would otherwise be vitiated by misdirections of law.[21]

Gedeon v Commissioner of the NSW Crime Commission

[65] Each of the respondents referred me to *Gedeon v Commissioner of the NSW Crime Commission.*[22] Factually, there was some similarity between *Gedeon* and the present matter because the defendants in *Gedeon* sought declarations that certain controlled operations had not been "authorised".

[66] In its written submissions, the State quoted the following from the judgment –[23]

> "The power to make declaratory orders should be exercised sparingly where [a] declaration would touch the conduct of criminal proceedings. The fragmentation of the criminal process is to be actively discouraged."

[67] It is instructive to consider that quote in context.

[68] Gedeon and Dowe were charged with taking part in the supply of a prohibited drug. The evidence against them included evidence obtained in the course of controlled operations which had been purportedly "authorised" under certain legislation. After they were committed for trial, Gedeon and Dowe commenced proceedings in the Supreme Court of New South Wales for declarations that the authorities were invalid and that the evidence collected during the controlled operations was unlawfully obtained and open to exclusion in the exercise of the trial judge's discretion.

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[19] Ibid at 204.

[20] Although his Honour noted, as a matter which did not favour the intervention of the court, that the trial judge had expressed the view that the trial should proceed on the indictment presented.

[21] *cf* the decision of the Court of Appeal in *Coco v Shaw* [1994] 1 Qd R 469*,* in which the Court of Appeal found that the primary judge erred in exercising his discretion to make declarations about whether the use of listening devices had been authorised under section 43(2) of the *Invasion of Privacy Act* 1971. The special circumstances erroneously found by the primary judge included that the declaration would determine at least one serious charge and might assist in the disposal of others; that the desirability of a prompt and reliable decision on a question of law (where there was no dispute of fact) outweighed the reluctance of the court to intervene in committal proceedings; and that the plaintiff was not claiming "a mere declaration that the evidence proposed to be tendered before the stipendiary magistrate was inadmissible, he was also claiming a proprietary right in confidential information in the tapes and transcript.

[22] (2008) 236 CLR 120.

[23] Paragraph 7 of the submissions: (2008) 236 CLR 120 at 133.

[69] The validity of the authorities was upheld at first instance in the Supreme Court and on appeal to the Court of Appeal. Gedeon and Dowe applied for special leave to appeal to the High Court. At the time of the special leave application, Dowe had been convicted and sentenced: Gedeon had not been tried.

[70] In a judgment of the Court, the High Court granted special leave and allowed the appeals. The fragmentation issue was relevant to the decision to grant special leave. As appears from the following paragraphs of the judgment, the public interest in the issue at stake in the proceedings was a consideration which favoured the granting of leave; as was the fact that none of the respondents suggested it was inappropriate for the civil courts to deal with the matter.

[71] The Court said (footnotes omitted, my emphasis) –

> [35] With respect to the exercise of the power to make the declaratory orders now sought by the applicants, authority in this Court affirms an important general principle. **This is that power to make declaratory orders should be exercised sparingly where the declaration would touch the conduct of criminal proceedings. The fragmentation of the criminal process is to be actively discouraged.** In any event, a declaration may be of limited utility where founded, as would be the case here, on facts admitted only for the purposes of the satellite litigation.
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> [36] In *Sankey v Whitlan* Gibbs A-CJ remarked:
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> "I would respectfully endorse the observations of Jacobs P (as he then was) in *Shapowloff v Dunn* that a court will be reluctant to make declarations in a matter which impinges directly upon the court of proceedings in a criminal matter. Once criminal proceedings have begun they should be allowed to follow their ordinary course unless it appears that for some special reason it is necessary in the interests of justice to make a declaratory order."
>
> [37] **However, as the outcome in this Court in *Sankey v Whitlam* itself indicates, in particular circumstances the interest of justice may militate in favour of the making of a declaratory order.** In the present litigation **none of the respondents has at any stage suggested that the proceedings for declaratory relief were inappropriate**. Indeed, the applicants moved in the Supreme Court in apparent response to the stance taken by the Commission during the committal proceedings. **That stance reflected an appreciation that what was at stake was more than a question of the admissibility of evidence in the ordinary sense mentioned by Stephen J in *Sankey v Whitlam.*** There is a considerable public interest in the observance of due process by law enforcement authorities by putting beyond doubt important questions of construction of the [legislation which provided for the granting of authorities to conduct controlled operations].

[72] The "stance" taken by the Commission during the committal hearing referred to in [37] of the quote above was as follows. Senior counsel for the Commissioner of the New South Wales Crime Commission, who had issued the authorities, moved to have set aside a subpoena

addressed to his client. Senior counsel submitted that the authorities had to be accepted for what they purported to be and that any question directed to the Commissioner which attempted to "go behind" them was irrelevant. Senior Counsel suggested that declaratory relief might be available to the applicants but it was a matter for them. It was after those submissions that an application to the Supreme Court was made.

[73] As to "the admissibility of evidence in the ordinary sense" referred to in [37] of the quote: In *Sankey v Whitlam*, in discussing whether the declarations sought in that case ought to be refused in the exercise of discretion, Stephen J said –[24]

> It being a matter of discretion, this Court should, in the particular circumstances of this case, grant such declaratory relief as the parties are entitled to. In many like cases an exercise of discretion in the contrary sense may be called for so as to avoid interference with the due and orderly administration of the law and with the proper exercise by magistrates of their functions in committal proceedings. The past history of this case, to which sufficient reference has already been made, is such that these considerations, often proper to be taken into account and which may even prove decisive, are here of little if any weight. In conclusion on the question of discretion, it is, of course, relevant that in these proceeding it is no mere question of the admissibility of evidence in any ordinary sense that it is issue.

[74] *Sankey v Whitlam* concerned Crown Privilege over documents regarding the highest level of executive government; the deliberations of Cabinet Ministers; and the advice given to Ministers by heads of Commonwealth Departments in an extraordinary or exceptional context – that is, criminal proceeding brought by an individual against former Ministers of the Crown in relation to their conduct in office. That the proceedings had been long delayed provided another cogent reason for the Court to put the matter to rest. However Gibbs ACJ said that the attitude of an ultimate appellate court "may necessarily be somewhat different from that which would be taken by a court lower in the judicial hierarchy".[25]

Cousins v Merrington Pty Ltd

[75] In its written submissions, the State suggested that the following "strong policy reasons" favoured the discouragement of the fragmentation of criminal proceedings – namely, that "the seeking of a declaration of a civil court may prejudice the result of a criminal trial and may be used to delay it". The State also referred to the "problems" which may arise because of differing standards of proof and the possibility of the civil court usurping the role of the jury. It cited *Cousins v Merrington Pty Ltd*[26] for those propositions.

[76] I did not find that case of particular assistance because the issue of the appropriateness of declaratory relief arose in a completely different context – where those nominated policy reasons were particularly apt.

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[24] (1978) 142 CLR 1 at 80.

[25] Ibid at 26.

[26] [2007] VSC 542 at [31].

[77] In *Cousins*, the Director of Consumer Affairs Victoria (David Cousins) sought, among other orders, declarations that a corporation which owned a chain of optometrists' stores had contravened certain sections of the *Fair Trading Act* 1999 (Vic).

[78] The corporation submitted that the power to make the declarations sought should not be exercised in respect of contraventions of sections 12 or 19 of the *Fair Trading Act* because those sections provided only for the imposition of a penalty by way of a criminal proceeding and that the court in its civil jurisdiction, as a matter of discretion, should not make a declaration in respect of alleged criminal conduct. In dealing with that submission, Hansen J of the Supreme Court of Victoria said (footnotes omitted) –

> [31] … Counsel referred to Principles of Remedies where the authors refer to policy reasons why Courts exercising civil jurisdiction have traditionally been reluctant to make declarations concerning matters of criminal law, especially once criminal proceedings have been commenced. There is the matter of the different standard of proof, that the civil court may usurp the function of the criminal jury or prejudice the result of the trial and that the declaration may be sought as a means of delaying a criminal trial.
>
> [32] …
>
> [33] As far as the first submissions is concerned the position is made clear in *Sankey v Whitlam* where Gibbs ACJ observed that the power of the Supreme Court of New South Wales to make a declaration … is a very wide one … Gibbs ACJ then stated that:
>
> > "It is clear that the power of the court is not excluded because the matter to which a declaration is sought may fall for decision in criminal proceedings."
>
> [34] While the power to make declaratory orders exists, such orders lie in the discretion of the Court and are made only if it is appropriate to do so on a consideration of the relevant circumstances. It is axiomatic that a relevant and important consideration would be if the proposed declaration pertained to conduct the subject of a pending, threatened or apprehended criminal proceeding. If nevertheless the declaration were made it would be because it was considered appropriate, and a responsible exercise of the power to do so, in the circumstances. The first thing to observe about the present case is that there is neither a pending nor a threatened criminal proceeding nor on the materials would such a proceeding seem to me to be reasonably apprehended.

His Honour ultimately made the declarations sought. As I have already said, I did not find the case of particular assistance. I acknowledge that *Cousins* was referred to by the State for its general statements of principle and only by way of footnote but there are many, more relevant, authorities available. Having recently dealt with this issue (as I informed the

parties),[27] I was aware of the more relevant authorities which typically referred to the following policy reasons in support of an argument that criminal proceedings ought not be fragmented by applications for declarations in the civil courts, namely –

- that the administration of criminal justice ought to be left to the criminal courts;
- the undesirability of fragmentation per se;
- the desirability of criminal matters proceeding in the ordinary way;
- the risk of abuse inherent in the use of applications for declarations to delay criminal proceedings; and
- even in the absence of improper motives – that fragmentation detracts from the efficiency of criminal proceedings.

Graves v Duroux

[79] The State referred me to *Graves v Duroux*,[28] quoting in its written submissions the following from McMurdo J –[29]

> "This reluctance to exercise the court's civil jurisdiction to interfere with the course of criminal proceedings has been recognised in a number of decisions of this court: see eg *Chen v ASM* [1999] QSC 181; *Batemberski v Fitzsion* [2000] QSC 185; *Leahy v Barnes* [2013] QSC 266."

[80] In *Graves v Duroux*, the applicant sought a statutory order of review of the decision of the respondent Magistrate to commit him for trial. McMurdo J observed that in such a matter, generally the court would exercise its discretion to refuse relief. His Honour referred to *Lamb v Moss*[30] and *Sankey v Whitlam*. Those cases concerned committal proceedings. The paragraph set out in the written submissions (as immediately above) was not set out in full, as the applicant pointed out. In full, and in the context of the end of the paragraph immediately before it and the whole of the paragraph immediately after it, it states (footnotes omitted, my emphasis) –

> [3] …In [*Sankey v Whitlam*] Stephen J, with whom Aickin J agreed, said that in many cases in this context, relief should be refused, as an exercise of discretion, "so as to avoid interference with due and orderly administration of the law and with the proper exercise by magistrates of their functions in committal proceedings".

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[27] In *Palmer Leisure Coolum Pty Ltd & Anor v Magistrates Court of Queensland & Ors* [2019] QSC 8.

[28] [2014] QSC 198.

[29] [2014] QSC 198 at [4].

[30] (1983) 49 ALR 533 at 564.

> [4] This reluctance to exercise the court's civil jurisdiction to interfere with the course of criminal proceedings has been recognised in a number of decisions in this court: see *Chen v ASM; Batemberski v Fitzsimon*; *Leahy v Barnes.* **But in the last of those cases, Henry J was persuaded to make a statutory order of review to set aside a decision of a coroner to commit the applicant for trial, where "the approach of the learned Coroner involved an exceptional deviation from legal principle** in respect of an aspect of the evidence which must have had a significant bearing upon the question whether there was sufficient evidence to commit the applicant for trial".
>
> [5] In the present case, there is no suggestion that the magistrate's decision involved an "exceptional deviation from legal principle". Rather, the argument is that the magistrate erred in law in deciding that the evidence which was tendered in the committal hearing presented a case upon which the applicant should be committed for trial. Cases in which courts will judicially review such conclusions by magistrates, as administrative decisions affected by legal error, will be rare. Were it otherwise, the course of criminal proceedings would be unduly hampered and delayed by civil proceedings, brought either by the prosecution or the defendant and there would be a risk that such proceedings routinely would be brought as a rehearing of committal proceedings. Therefore, at least where it is arguable that a magistrate was correct in deciding to commit a defendant for trial, this court should not exercise its discretion to grant relief under the Judicial Review Act.

[81] The applicant pointed to Henry J's decision, which McMurdo J referred to, as an example of this court exercising its discretion to intervene in criminal proceedings.

The Queen v Iorlando and Another

[82] In response to a question from me about whether there was some efficiency in my dealing with the matter now that it was before me and had been argued, the State referred me to the decision of the High Court in *The Queen v Iorlando and Another,*[31] in which the High Court emphasised the undesirability of interrupting criminal proceedings, even though in that case it had determined the Crown's application to review a ruling made by a trial judge which concerned the interpretation of the *Customs Act* 1901 (Cth). The Court said –[32]

> … it seems necessary to repeat that it is highly undesirable to interrupt the ordinary course of criminal proceedings by applications for leave to appeal or prerogative relief for the purposes of challenging rulings on questions of admissibility of evidence. The fact that the Court has expressed its conclusion on

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[31] (1983) 151 CLR 678.

[32] At 680.

the substantive question in the present case is not intended to encourage applications of this kind.

Applicant's submissions on discretionary considerations

[83] The applicant submitted that special reasons existed in her case, warranting this court's intervention in the criminal proceedings. The special reasons were that –

- the consent of the Crown to the adjournment indicated that it was appropriate for the matter to be dealt with in this court;
- the declarations were likely to have a decisive impact on the District Court proceedings and dealt with a matter which was fundamental to those proceedings; and
- the issue raised was one of "general importance" and the Supreme Court was the most suitable forum for its resolution.

[84] I will deal with the first two of those special reasons immediately.

DPP's consent to the adjournment

[85] The applicant argued that a "solid answer" to the complaint about fragmentation was that the Director of Public Prosecutions himself did not oppose the adjournment of the trial to allow the applicant to bring this application and conceded the significance of the point at issue.

[86] I note also that while the Director's letter to the CCC recognises that the criminal courts would be able to deal with the question whether the CCC hearing was a judicial proceeding pre-trial, it makes no reference to the public interest in the non-interference by civil courts in criminal matters.

[87] The respondents all submitted that it was not to the point that the Director of Public Prosecutions consented to the adjournment of the trial to allow this application to be brought.

[88] Queen's Counsel for the applicant contrasted the position of the Director here, in taking no active role himself in the proceedings, with the position of the Commonwealth Director of Public Prosecutions in *Palmer Leisure Coolum Pty Ltd & Anor v Magistrate Court of Queensland & Ors*[33]. In *Palmer,* the Commonwealth Director applied to strike out the criminal defendants' applications for declarations, relying on the anti-fragmentation principle. Queen's Counsel argued that it was a "weighty matter" that the Director of Public Prosecutions did not complain that the applicant was fragmenting the criminal proceedings and was "quite content" to allow these proceedings to occur.[34]

[89] I do not know the extent to which the Director considered the anti-fragmentation principle before he determined not to oppose the applicant's application for an adjournment to make this application. It may be, as Queen's Counsel for the State submitted, that the Director was "simply permitting today to occur" and being "administratively efficient". But whatever might have been his position previously, the Director is not "actively behind" this application. In my view, it cannot be said that his decision not to be joined as a respondent in these proceedings provides a "special reason" for this court's intervention in the criminal proceedings.

That the declarations would likely have a decisive impact on the criminal proceedings

[90] Declarations favourable to the applicant are likely to have a decisive impact on the criminal proceedings, as the Director recognised in the course of the application for the adjournment of the trial. But so too would a ruling, favourable to the applicant, by the criminal court pre-trial, be likely to have a decisive impact on the criminal proceedings.

[91] A declaration by this court, at first instance, favourable to the appellant is no more decisive than a ruling by the District Court on the same topic. It follows that I do not find "special reasons" in the fact that a favourable declaration by this court would be likely to be determinative.

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[33] [2019] QSC 8.

[34] Transcript of hearing 1 – 59.

[92] Also, declarations by this court unfavourable to the applicant may well be the subject of an appeal by the applicant – further delaying the criminal proceedings. Indeed, declarations by this court favourable to the applicant may well be the subject of appeal by the respondents.[35]

[93] That leaves the issue of the preference for this forum, over the criminal court, for the determination of an administrative law issue.

Director of Housing v Sudi

[94] The applicant relied upon *Director of Housing v Sudi*[36] at paragraphs 221 – 244 to argue that the District Court would be a "singularly inapt forum" in which to litigate an issue of administrative law by way of a "collateral attack" upon the decision to authorise the hearing. Relying on *Sudi,* the applicant argued that administrative law was complex and best administered by courts with the experience and expertise to engage in it – not the District Court.[37]

[95] Responding to the *Sudi* argument about the unsuitability of the District Court as a forum for the determination of a question of administrative law, the State submitted that the case did not assist the applicant because –[38]

- it concerned the Victorian Civil and Administrative Tribunal (VCAT) – not the District Court;
- the District Court was a "public law oriented body" and it could not be said that it was inapt to conduct itself in administrative matters;
- the observations of Weinberg JA, upon which the applicant relied, were "offhand" insofar as they concerned Courts like the District Court of Queensland;
- Weinberg JA relied upon *Ousley* (and academic commentary) for his remarks. *Ousley* concerned warrants – "a very special case in the administration of criminal justice". Limitations experienced in the review of warrants cannot be transposed upon administrative review generally;
- *Sudi* was a case involving statutory construction: it concerned a specific statute and its statements were not to be applied generally; and
- there was no relevant limit to the way in which the District Court might undertake the collateral review sought in this case.

[96] The facts of *Sudi* are as follows. The Director of Housing in Victoria applied to VCAT (in accordance with the *Residential Tenancies Act* 1997 (Vic) (RTA)) for an order for possession of

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[35] I note however the power of the Attorney General to refer a point of law to the Court of Appeal under section 668A.

[36] (2011) 33 VR 559.

[37] Transcript of hearing, 1 – 30 – 1 – 31.

[38] Transcript of hearing, 1 – 51 – 1 – 56.

the premises occupied by Mr Sudi and his son. Bell J, as President of VCAT, held that he had the power to review the lawfulness of the Director's decision to make the application. His Honour concluded that the application decision was unlawful because it was in breach of the *Charter of Human Rights and Responsibilities Act* 2006. The application therefore was a nullity.

[97] Bell J's review of the lawfulness of the decision was described as a "collateral" review or attack upon it. The substantive proceeding before VCAT was an application by the Director for possession of the premises. The legal validity of her decision to make the application was not in issue in the proceedings. The question of its validity arose only incidentally, or collaterally, as part of Mr Sudi's defence to the application.[39]

[98] The Director appealed from Bell J's decision – arguing that VCAT had no jurisdiction to determine the legal validity of her application.

[99] The Court of Appeal concluded that VCAT had no judicial review jurisdiction – nor did it have an implied power to undertake a collateral review of the decision of the Director to apply for a possession order.

[100] Drawing particularly on the judgment of Weinberg JA, the applicant urged me to conclude that the District Court is an unsuitable forum for the review of the decision to authorise the hearing. Before considering Weinberg JA's judgment, I will consider the decisions of the other members of the court.

[101] Warren CJ noted that the effect of Bell J's decision was in the nature of *certiorari* – a prerogative remedy traditionally exercised only by relevant Supreme Courts.

[102] Her Honour referred to the special supervisory role of State Supreme Courts in Australia's common law system. She contrasted that role with the role and jurisdiction of VCAT. Her Honour said, first quoting from *Kirk* (footnotes omitted) –[40]

> [18] The High Court has recognised the special supervisory role of State Supreme Courts in Australia's common law system:
>
> > "The supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of state executive and judicial power by persons and bodies other than the Supreme Court. That supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts.
>
> [19] In contrast, the role and jurisdiction of VCAT is quite different. As an administrative tribunal, the jurisdiction of VCAT derives entirely from statute. The powers of an administrative tribunal in any particular instance flow from the statute that establishes the tribunal … and any subject-specific legislation granting further jurisdiction, in this instance, the RTA.

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[39] Which Mr Sudi argued breached his human rights.

[40] *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531.

[103] Her Honour concluded that the relevant legislation did not confer upon VCAT judicial review jurisdiction in its original jurisdiction. However, VCAT's lack of judicial review jurisdiction was not necessarily fatal to its ability to undertake an inquiry into the validity of the Director's decision. Her Honour said (footnotes omitted, my emphasis) –

> [24] … **An inferior court with no judicial review jurisdiction may still be able to entertain a collateral challenge to the validity of an administrative decision.** For example, in *Ousley v R* the High Court considered whether an accused in a criminal trial in the County Court can mount a collateral attack on the validity of a listening device warrant, in order to challenge the admissibility of recordings made through the listening device. Having found that the issuance of the warrant was an administrative act, the High Court held that the County Court trial judge was able to examine the validity of the warrant. The trial judge was able to do so despite the fact that the County Court was an inferior court with no judicial review jurisdiction.
>
> [25] Subsequently, in *Attorney General (Cth) v Breckler*, the joint judgment of Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinin JJ held that:
>
> > … in the absence of legislative prescription to the contrary, [an administrative decision] would be open to collateral review by a court in the course of dealing with an issue properly arising as an element in a justiciable controversy of which the court was seized.
>
> [26] ***Ousley* and *Breckler* make it clear that administrative decisions can generally be collaterally challenged in a court. But the scope of permissible collateral challenge remains a matter of some controversy.**
>
> [27] *Ousley* drew a distinction between permissible and impermissible grounds for collaterally challenging the listening device warrants. On one view, *Ousley* stands for the proposition that collateral review of an administrative decision in an inferior court is confined to the review of validity of the decision *on its face*. But *Ousley* can also be read as being consistent with the proposition that an administrative decision can be collaterally challenged in an inferior court on the basis that the decision is vitiated by jurisdictional error, irrespective of whether the jurisdictional error is apparent on the face of the decision.
>
> [28] The extent, if any, to which an inferior court can undertake collateral review of an administrative decision is ultimately a matter of construction of the statutory provisions conferring jurisdiction and function on the court, as well as any privative clauses limiting the review of administrative decision. The general statements about collateral challenge in *Ousley* and *Breckler* are best understood as merely expressing the presumptive position on the question in relation to courts.

[104] *Sudi* concerned collateral review by a tribunal. It was therefore unnecessary for her Honour to express any view about the available scope of permissible collateral challenge in a court. Her Honour resolved the question in *Sudi* by reference to the relevant provisions of the RTA, the

VCAT Act and the Charter of Human Rights and Responsibilities Act 2006 (breach of which, in Bell J's view, rendered the decision unlawful). Her Honour concluded that VCAT could not undertake a collateral review of the Director's decision.

[105] After explaining how it was that the question of the validity of the application arose "incidentally" or "collaterally", Maxwell P stated, by way of footnote "Compare *Ousley v R* (1997) 192 CLR 69 at 98-9 per McHugh J; *Frugtniet v Attorney General (NSW)* (1997) 41 NSWLR 588 at 602B [per Beazley JA]". Those references were to explanations of the meaning of "collateral challenge".

[106] Both of those cases concerned warrants. *Ousley* concerned a collateral challenge to a warrant which permitted the use of a listening device. *Frugtniet* concerned a collateral challenge in a New South Wales court to an arrest warrant issued in Victoria.

[107] In *Frugtniet,* Beazley JA said (my emphasis) –[41]

> Collateral challenge is a well-established means of attacking the validity of an administrative or official act in proceedings where the validity of the act is relevant to matters in issue but the proceedings are not specially designed to challenge the validity of the administrative act or conduct – as would be the case in prerogative proceedings brought to quash the warrant … The boundaries of collateral challenge are unsettled. Emery[42] comments … that: "… The English law on collateral attack is flawed by uncertainties and inconsistencies and lacks a basis in sound principle." Nor is its operation in Australia well defined.
>
> M I Aronson and B Dyer, *Judicial Review of Administrative Action,* 2nd ed (1996) state (at 645-646):
>
> "… **The Courts are strongly inclined towards allowing both criminal and civil defences which impugn the legal effectiveness of a decision on which the prosecution or plaintiff (respectively) must rely. It is often more convenient and fairer than the alternative, which is to require that defence argument to be tested in a separate proceeding seeking judicial review.** Concerns are occasionally voiced, however, if the defence will be heard by a court (or even a tribunal) which could not entertain a direct application for judicial review, or if the defence comes a long time after the time allowed for judicial review. Even here, however, the cases allow such defences unless there is a clear legislative intention to the contrary."
>
> This indicates a much broader approach than has, to date, been recognised in the authorities. To the extent that there has been any determination of the matter in Australia, Dixon J stated in *Posner v Collector for Inter-State Destitute Persons (Victoria) …* that collateral challenge is only available for patent invalidity: cf *Aerolines Argentinas v Federal Airports Corporation …* A similarly narrow view has recently been expressed in England in *R v Wicks* …

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[41] (1997) 41 NSWLR 588 at 602 – 603.

[42] C Emery *Collateral Attack-Attacking Ultra Vires Action Indirectly in Courts and Tribunals* (1993) 56 MLR 643.

…

> The starting point for determining whether collateral challenge is available is the legislation governing the matter central to the proceedings. In this case it is the *Prisoners (Interstate Transfer) Act* [NSW legislation]. Collateral challenge appears to have been invited by the wording of s 12 as it is only in respect of a warrant issued in accordance with the law of a participating State" that the provisions of the section, and Pt 3 as a whole, come into operation … [Her Honour considered the other relevant sections of the Act.]
>
> In my opinion, the scheme of Pt 3 of the *Prisoners (Interstate Transfer) Act* is such as to preclude collateral challenge to the validity of the executive or administrative acts which precede the making of an order other than for the matters specified in s 13, for which the Act expressly provides for the availability of challenge. It follows that the validity of the warrant cannot be attacked collaterally in proceedings under s 15 of the *Prisoners (Interstate Transfer) Act.* Having regard to this conclusion, it is not necessary to determine the boundaries of collateral challenge generally nor to deal with the complication which otherwise would have arisen, namely the question of the availability of collateral challenge to an administrative act in another State.

[108] Returning to *Sudi*, Maxwell P resolved the question of the tribunal's power to conduct a collateral review by reference to the legislature's intention. Referring to *Frugtniet*, his Honour said that in determining whether collateral review was available, the starting point was the legislation under which the government action is sought to be challenged and concluded that it was "improbable in the extreme" that Parliament intended the tribunal to have power to examine the legal validity of a decision by a government agency to commence proceedings in the original jurisdiction of the tribunal.

[109] Weinberg JA identified three reasons why VCAT lacked the power to dismiss an otherwise valid application on Charter grounds (my emphasis) –

> [155] First, it might be thought unlikely that Parliament would have vested in VCAT, which is not a court, far-reaching powers of collateral review. Secondly, the very nature of VCAT's limited statutory functions suggest that it does not have any such far-reaching powers, and that they are not conferred by implication. **Thirdly, common law limitations upon collateral review, which apply with equal force to both courts and tribunals, suggest that the question of Charter compliance is a matter for judicial review, and nothing less.**

[110] As I understood her argument, the applicant sought to reply upon the "common law limitations" in contending that the District Court was not the appropriate forum for the challenge to the validity of the authority to hold the hearing.

[111] In his judgment's conclusions, Weinberg JA made it clear that the question to be determined in *Sudi* was "purely one of statutory interpretation". It was not whether VCAT should, as a matter of policy, have the power to engage in collateral review of Charter issues. His Honour considered the practical benefits of permitting collateral review and observed that it was more readily accepted in relation to criminal matters (footnotes omitted, my emphasis) –

> [286] The doctrine of collateral review is, as *Ousley* makes clear, highly contentious. It represents a departure from the ordinary procedure by which the legality of executive action is tested. There are, undoubtedly, some practical benefits in having all issues that arise in the course of any legal proceeding determined at the one time, and by the same body. **In criminal cases, for example, collateral review assists in avoiding fragmentation. Such review has, for that reason, and perhaps on pragmatic grounds, been more readily accepted in relation to criminal matters**.

[112] With that paragraph in mind, I have considered the paragraphs of his Honour's decision upon which the applicant particularly relied (paragraphs [221] – [244]). In those paragraphs of his Honour's judgment, his Honour defined what collateral review was and the reasons why courts had tended to restrict its ambit. Those reasons included that –

> [225] … courts of supervisory jurisdiction have, in recent years, extended the grounds upon which public bodies can be held to have acted ultra vires … As a result, the law relating to judicial review is now highly complex and, it has been suggested, is best administered by those courts with the experience, and expertise, to engage in this role.
>
> [226] … collateral review allows the limitations properly imposed on judicial review to be circumvented. If collateral review is too widely permitted, the rules about standing, time limits, and the discretion vested in reviewing courts in relation to the granting of remedies, may fall by the wayside.
>
> [227] … collateral review can bring about undesirable consequences. For example, it can result in lengthy hearings on tangentially related matters, all within the course of a trial designed to deal with quite different issues. This concern relates mainly to criminal trials. Where collateral review occurs, it has the potential to cause the trial to go off the rails. The trial comes to a standstill while the court embarks upon a consideration of matters such as whether a particular warrant had been validly issued, or whether an appropriate authorisation had been properly obtained. On occasion, this involves the calling of witnesses and the production of a significant body of extrinsic evidence.
>
> [228] … collateral review is likely to lead to an inconsistency in decision-making regarding the validity of government action. This objection may have particular force in relation to decisions taken by inferior courts and tribunals.

[113] His Honour explained that, in light of those considerations, a number of superior courts had imposed severe restrictions upon the circumstances in which there might be collateral challenge to government acts. His Honour said Australian courts have "supported the view that collateral review should be restricted to cases where the validity of the government act sought to be attached can be determined on the face of the documentary material". His

Honour observed that some writers spoke of the need to confine collateral review to "obvious defects".[43]

[114] His Honour referred to a decision of the Court of Appeal of South Australia (a case involving a statutory offence)[44] and the High Court decision in *Ousley*. The two warrants issued in *Ousley* had been issued by the Supreme Court and the County Court judge (presiding over the criminal trial) was concerned about the propriety of the County Court reviewing decisions made by Justices of the Supreme Court. The High Court held that the issuing of a warrant was an administrative – not a judicial – act which could be the subject of collateral review.

[115] His Honour described *Ousley* as a difficult case. It accepted that administrative acts were presumptively susceptible to collateral challenge but "severely limited the grounds upon which any such challenge could be mounted'.[45] His Honour summarised the views of the Justices of the High Court (which were not unanimous on this point) and said –

> [244] *Ousley* seems to me to place significant constraints upon collateral review, whether because such review is confined to a narrowly specified class of defects or whether, as McHugh J thought, it is generally to be deprecated. *Ousley*, so far as I can tell, remains good law.

[116] The "narrowly specified class of defects" upon which collateral review was confined were those apparent on the face of the warrant.[46]

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[43] *Sudi* at [231].

[44] *Hinton Demolitions Pty Ltd v Lower (No 2)* [1971] 1 SASR 512, in which *Hinton* challenged its convictions for breaches of the *Road Maintenance (Contribution) Act* (1963 - 1968) by arguing *inter alia* that the regulations authorising the determination of load capacity by the Registrar of Motor Vehicles were invalid and that the determination of the load capacity of the vehicles had been made contrary to the rules of natural justice. The Court of Appeal held that the question whether the determination had been made contrary to the rules of natural justice could not be raised by the owner upon the hearing of the complainant made against him to which the Registrar was not a party.

[45] *Sudi* at [238].

[46] Collateral review was confined to defects apparent on the face of the warrrant (per Gaudron and Gummow JJ). There could be no inquiry into the validity of a warrant which intruded upon extraneous matters, such as the sufficiency of the material supporting the application for its issue (per Toohey, Gaudron and Gummow JJ) or whether the issuing authority was in fact satisfied as to any statutory requirements (per Toohey J).

McHugh J saw no reason to confine collateral review to "facial invalidity" – but agreed that it would not be available simply on the basis that there was insufficient evidence to justify the granting of the particular warrant. McHugh J thought that fragmentation of a criminal trial might be preferable to the disruption that would occur if, after empanelment of a jury, a criminal court was required to consider a collateral challenge – but noted that that sort of disruption could be avoided by the speedy determination of the matter pre-trial. However, his Honour considered the better approach would be to have such challenges heard and determined by way of judicial review.

Kirby J dissented. His Honour was strongly in favour of trial judges dealing with challenges to the validity of warrants to avoid the fragmentation of criminal trials that would ensue were challenges to the validity of warrants to be brought by way of judicial review. See *Sudi* at [239] – [243] for that summary.

[117] Having stated that *Ousley* remained good law, Weinberg JA went on to make these observations (my emphasis) –

> [246] It may be that the reasons why some challenges to the validity of government action should be raised only by way of judicial review are … largely ones of practical convenience.
>
> [247] **As Bell J noted in the present case, there are circumstances were it would be preferable to have the court (or perhaps tribunal) that is hearing the matter determine all issues, including any matters raised by of defence, rather than requiring a party to initiate separate proceedings for judicial review. That approach would avoid fragmentation with all its attendant difficulties.**
>
> [248] On the other hand, as I have already noted, **unrestricted collateral review has its disadvantages.** For example, questions of ultra vires can arise in the course of proceedings before any inferior court or tribunal. Some such bodies may be ill-equipped to deal with such matters.
>
> [249] **The problems associated with collateral review are perhaps more acute in relation to proceedings before tribunals than they are in relation to courts** …

[118] His Honour's focus then turned to the question of the extent to which a tribunal should have power to determine questions of ultra vires.

[119] Having considered *Sudi* and the judgment of Weinberg JA, as well as the judgments of the other Justices, I do not consider it authority for the proposition that the District Court is a "singularly inapt forum" for the determination of the question of the lawfulness of the authority to hold the hearing as the applicant suggested.

[120] Associated with the forum issue is the suggestion that the issue here involves a matter of "general importance".

[121] I acknowledge that the issue raised in the present case is not one of the admissibility of evidence and that it falls squarely within the realm of administrative law and lawful decision making. However, the issue in this case only arises because of the unique circumstances of this case which are unlikely to be replicated. The only reason the authorisation to hold the hearing is the subject of challenge on the basis that the Chairperson failed to take into account the up-to-date information is because the CCC believed the file reference in the original authorisation was incorrect and considered it necessary to correct it by way of further authorisation. Also, the authority relied upon by the applicant for its unlawfulness argument (*Peko-Wallsend*) makes it plain that a decision which has been made by a decision maker who has not taken into account up-to-date information is only liable to be set aside if the information which has been ignored could have made a different to the decision (see below).

Should this court involve itself in the criminal proceedings?

[122] Other than in exceptional cases, where there are special reasons in the interests of justice for the making of a declaratory order, the civil courts must avoid becoming involved in the criminal justice system (*Sankey v Whitlam, Iolando, Jiang*).

[123] The applicant submitted that exceptional or special reasons existed in the present case to warrant this court's intervention in the criminal proceedings which are on foot in the District Court. Those exceptional circumstances were said to be found in the Director's consent to the adjournment of the trial for the purposes of this application; that a declaration by this court would have a decisive impact on the criminal proceedings; and that the issue raised was one of general importance and the Supreme Court was the appropriate forum for its resolution.

[124] As I have already discussed, the Director of Public Prosecutions is not actively behind the applicant's application (*cf Anderson, Gedeon*). Also as discussed, as a judge at first instance, my decision is no more determinative than a decision of a judge of the District Court in its criminal jurisdiction (*cf Sankey v Whitlam, Iorlando*).

[125] It was not suggested that the applicant's trial would be a long and expensive trial which should be avoided if it was likely to miscarry (*cf Anderson*) – assuming, without deciding, that such a consideration is relevant in the case of an application to a civil judge at first instance.

[126] I acknowledge that what is sought here is a declaration in lieu of a decision by the criminal trial court pre-trial, rather than a review of a decision made by a committing magistrate or the criminal trial court, but the anti-fragmentation principles apply to each situation (*cf Coco v Shaw*).

[127] I accept that the issue raised by this application is not merely an issue of the admissibility of evidence, but in my view, it does not rise to the same level of public interest as the issue raised in *Gedeon.* The issue has arisen in the particular circumstances of this CCC investigation which are unlikely to be repeated. Nor, in my view, does the issue involve the suggestion of an exceptional deviation from legal principle (*cf Graves v Duroux*).

[128] Nothing in the arguments made to me about the substantive issue cause me to think that the District Court would be a "singularly inapt" forum for the determination of the issue. In my respectful view, the applicant placed more weight than was warranted in the decision of Weinberg JA in *Sudi.* Indeed, *Sudi* recognises that –

- an inferior court with no judicial review jurisdiction may entertain a collateral challenge to the validity of an administrative decision;
- there are practical benefits in having all issues that arise in any legal proceeding determined at the one time and by the same body;
- in criminal cases, collateral review assists in avoiding fragmentation; and
- the problems associated with collateral review are more acute in relation to tribunals than they are in relation to courts.

[129] Overall, in my view there is nothing exceptional about the issue raised in this application such as to warrant this court taking the exceptional step of involving itself in criminal proceedings. To do so would be to fragment the criminal trial process. I dismiss the application.[47]

Should the court comment on the merits of the application?

[130] I raised at the hearing the appropriateness of my expressing an opinion on the substance of the application if I were to decide that this court ought not to intervene in the criminal process.

[131] The respondents submitted that I ought to go no further than dismissing the application on discretionary grounds.

[132] The applicant submitted that I ought to decide all of the controversies before me – including the issue of substance.

[133] As I have mentioned, the respondents did not apply to strike out the applicant's application – which would have confined the issue before me to the question whether I ought to entertain the application at all. Instead, the first and second respondents only intended to raise the anti-fragmentation principle were I to decide the substantive issue in the applicant's favour. The third respondent raised the anti-fragmentation principle only.

[134] It seems to me that it would undermine all that has been said about the need for the civil courts to avoid becoming involved in criminal trial processes were I to express an opinion on the substantive issue. I will not do so. I note that Davis J took a similar approach in *PPC*.

[135] However, because I took into account the nature of the substantive argument in my consideration of the applicant's submission that the District Court was not an appropriate forum for its determination, I will provide my overview of the substantive argument to make good my conclusion that the District Court is perfectly well equipped to deal with it.

[136] The applicant argued that, in granting the authority to hold the hearing, the Chairperson failed to take into account up-to-date information which he was bound to consider – that is, the other evidence which had been obtained in the course of Operation Access between the issuing of the authority by Ms McFarlane on 15 May 2017 and the date of issue of the Chairperson's authority, 31 July 2017. The applicant relied principally upon the decision of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend*[48] for her argument.

[137] It was not suggested that the Chairperson had in fact taken the up-to-date information into account and the matter proceeded on the basis that he did not. However the first and second respondents submitted that there is no "free standing" principle, which requires a decision maker to take into account "up-to-date information", divorced from the context of the Act in

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[47] The State also relied upon the delay in the applicant raising this issue – which was unexplained – as a further reason for this court's declining to grant declaratory relief. Because I have determined to exercise my discretion not to intervene in the criminal proceedings on the strength of the anti-fragmentation principle, I do not need to consider the delay on the applicant's part any further.

[48] (1986) 162 CLR 24.

which it is said to operate. The first and second respondents submitted that the applicant over-stated the principle: Whether the "up-to-date information principle" was a mandatory relevant consideration in the exercise of a particular power was "ultimately a matter of statutory construction".

[138] The relevant decision in *Peko-Wallsend* was the recommendation of a land grant under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) (the Land Rights Act) to a Land Trust for the benefit of a group of Indigenous Australians who had traditional land claims in the Alligator Rivers region of the Northern Territory. The whole of a valuable uranium deposit was within the land. The explorations of Peko-Wallsend, a mining company, had revealed that deposit and it wished to exploit it.

[139] In deciding to make a land grant, the Minister was bound under the Land Rights Act to take into account the detriment to Peko Wallsend were the land claim to be granted. The Minister relied on the report of the Aboriginal Land Commissioner about the detriment to Peko Wallsend. The report did not include relevant up-to-date information about Peko Wallsend which was, at least constructively, in the Minister's possession. It was held that the Minister's decision was void.

[140] Mason J relevantly said (references to authority omitted) –[49]

> The failure of a decision maker to take into account a relevant consideration in the making of an administrative decision is one instance of an abuse of discretion entitling a party with sufficient standing to seek judicial review of ultra vires administrative action …
>
> [The authorities establish the following propositions.]
>
> (a) The ground of failure to take into account a relevant consideration can only be made out if a decision maker fails to take into account a consideration which he is *bound* to take into account in making that decision …
>
> (b) What factors a decision maker is bound to consider in making a decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account … If [the factors a decision maker is bound to consider] … are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act … [W]here the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject-matter, scope and purpose of the Act.
>
> (c) Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A

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[49] *Peko-Wallsend* at pages 39 – 45.

> factor might be so insignificant that the failure to take it into account could not have materially affected the decision …
>
> (d) …
>
> (e) …
>
> …
>
> … Once it is accepted that the subject matter, scope and purpose of the [Land Rights Act] indicate that the detriment that may be occasioned by a proposed land grant is a factor vital to the exercise of the Minister's discretion, it is but a short and logical step to conclude that a consideration of that factor must be based on the most recent and accurate information that the Minister has at hand.
>
> … It would be a strange result indeed to hold that the Minister is entitled to ignore material of which he has actual or constructive knowledge and which may have a direct bearing on the justice of making the land grant, and to proceed instead on the basis of material that may be incomplete, inaccurate or misleading. In one sense this conclusion may be seen as an application of the general principle that an administrative decision maker is required to make his decision on the basis of material available to him at the time the decision is made. But that principle itself is a reflection of the fact that **there may be found in the subject matter, scope and purpose of nearly every statute conferring power to make an administrative decision an implication that the decision is to be made on the basis of the most current material available to the decision maker.**

[141] Having regard to the passage relied upon by the applicant (in bold in the quote above) in context, the first matter for the District Court to determine will be whether Mason J was asserting a "free-standing" principle that a decision maker is to take into account the most "up-to-date" information, in an all-encompassing, or abstract sense, in exercising a power conferred by legislation.

[142] The power to authorise a hearing under section 176 of the *Crime and Corruption Act* 2001 is not expressly conditioned by a requirement that the decision to authorise be made by reference to the most up-to-date information. Nor, the first and second respondents contended, was such a condition to be implied – particularly having regard to the nature of the statutory function engaged by the making of a decision to hold a hearing.

[143] The first and second respondents submitted that the decision to authorise a hearing was made in the context of the performance of the CCC's function to investigate corruption by public officials or within public institutions. The hearing was intended to be inquisitorial – designed to discover facts. Depending on the product of the hearing (and the product of other investigative methods) further action might be taken. The hearing was not "an adversarial procedure designed to find facts or decide questions of law" and its inquisitorial nature weighed against the implication of the condition contended for by the applicant.

[144] The applicant submitted that the legislation under which the decision was made anticipated that, as an investigation evolved, those charged with making decisions about how the matter would be investigated (or continued to be investigated) were required to make ongoing

decisions having regard to up-to-date information. The applicant submitted that, by implication, the legislation required the decision maker to have regard to up-to-date information in deciding whether to authorise a hearing under section 176.

[145] Thus, statutory construction is at the heart of the substantive issue and statutory construction is not beyond the criminal courts.

[146] It is also worth noting that, as explained in (c) in the quote from Mason J above, at least from a discretionary point of view, if the omitted consideration could not have materially affected the decision, then setting aside the decision may not be justified.

[147] Gibbs CJ said something similar (my emphasis) –[50]

> … But if the Minister relies entirely on a departmental summary which fails to bring to his attention a material fact which he is bound to consider, and **which cannot be dismissed as insignificant or insubstantial**, the consequence will be that he will have failed to take that material fact into account and will not have formed his satisfaction in accordance with the law.

[148] It is well within the province of the District Court to evaluate the likely impact of the up-to-date information on the decision to authorise a hearing.

Observation and conclusion

[149] My formal order is that the application is dismissed.

[150] The work done on the substantive part of this matter will not go to waste. The applicant's work is done and the filed submissions of the first and second respondents will be available to the Director of Public Prosecutions should he wish to consult them for the purposes of an analogous application in the District Court.

[151] I will hear the parties as to costs.

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[50] *Peko Wallsend* at 31.