Second actor theory: A principled and practical resolution to the legality of domino effect administrative decision-making

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Nullity may be public law's great equalizer,[1] but it has become one of its most vexing puzzles.[2] The conceptual difficulty associated with the nature of invalid administrative decisions is that they otherwise appear to be valid unless and until they are set aside by a court of competent jurisdiction. In the words of Lord Radcliffe, the invalid decision 'bears no brand of invalidity upon its forehead'.[3] For this reason invalid decisions can often support further administrative decisions that are (otherwise) legally valid. This has been aptly described as the 'domino effect'.[4] At face value, an initial invalid decision would appear to render the second decision invalid. Therein lies the main controversy: how should the courts approach (otherwise) valid decisions taken in reliance upon invalid administrative action? The validity of the second decision will depend upon an application of Professor Christopher Forsyth's Theory of the Second Actor. The theory provides a principled and practical solution to resolving the question of the validity of the subsequent decision. The validity of the second act will turn upon the proper construction of the act empowering the 'second actor', diverting attention from the initial invalid decision. Such an approach should be adopted in Australia, where its theoretical underpinnings are already widely accepted.

This article has four key parts. Its scope is limited to consideration of administrative decisions taken pursuant to statutory powers; it does not extend to judicial decision-makers. The first part will discuss the concepts of jurisdiction and the problem of invalidity. The second part will articulate second actor theory and outline the principles that should guide its application. The third part will explain that an invalid administrative decision that is void *ab initio* remains a decision in fact, which can have legal consequences. The fourth part will discuss judicial treatment of second actor theory. The article will conclude with a discussion of a recent case example from Western Australia, because of its effective application of the principles and demonstration of second actor theory's practical utility.

Jurisdictional error and the problem of invalidity

An administrative act is invalid when it is taken outside of jurisdiction and thus vitiated by jurisdictional error.[5] 'Jurisdiction' refers to the authority to decide,[6] and jurisdictional error arises where a decision-maker makes a decision outside the limits of the authority conferred upon them by statute.[7] The concepts of jurisdiction and jurisdictional error are somewhat deceptive.[8] This is particularly emphasised at the margins, where the line between what constitutes jurisdictional error and what does not is incapable of definition.[9]

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1 Mark Aronson, 'Nullity' (2004) 40 *Australian Institute of Administrative Law Forum* 19, 19.

2 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 [101] (Kirby J) (*Bhardwaj*).

3 *Smith v East Elloe Rural District Council* [1956] AC 736, 769.

4 Jack Beatson, Martin Matthews and Mark Elliott, *Administrative Law: Text and Materials* (Oxford University Press, 2011) 97.

5 *Hossain v Minister for Immigration and Border Protection* (2018) 92 ALJR 780 [24] (Kiefel CJ; Gageler and Keane JJ) (*Hossain*).

6 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 [6] (Gleeson CJ and McHugh J); Mark Leeming, 'The Riddle of Jurisdictional Error' (2014) 38 *Australian Bar Review* 139, 140.

7 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 141 (Hayne J) (*Aala*).

8 See generally *Bros Bins Systems Pty Ltd v Industrial Relations Commission of New South Wales* (2008) 74 NSWLR 257 [36] (Spigelman CJ) citing *City of Yonkers v United States* (1944) 320 US 685, 695, in which Frankfurter J referred to the use of the word 'jurisdiction' as one of the most deceptive legal pitfalls.

9 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 [71] (French CJ; Gummow, Hayne, Crennan, Kiefel and Bell JJ) (*Kirk*).

In *Hossain v Minister for Immigration and Border Protection*[10] (*Hossain*), the High Court sought to clarify the concepts of jurisdiction and jurisdictional error. Explaining the concept of jurisdiction, Kiefel CJ and Gageler and Keane JJ observed:

> Jurisdiction, in the most generic sense in which it has come to be used in the field of discourse, refers to the scope of the authority that is conferred on a repository. In its application to judicial review of administrative action the taking of which is authorised by statute, it refers to the scope of the authority which a statute confers on a decision-maker to make a decision of a kind to which the statute then attaches legal consequences.[11]

Their Honours then went on to observe that jurisdictional error refers to a failure to comply with one or more statutory preconditions or conditions, to an extent which results in a decision that has been made in fact but that lacks characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it.[12] I will return to the notion of 'made in fact' shortly.

It is clear from *Hossain*, and other decisions of the High Court, that the distinction between jurisdictional and non-jurisdictional error of law must be maintained in Australia.[13] So, while the distinction has essentially ceased to exist in the United Kingdom,[14] in Australia it persists in light of its constitutional function.[15] In Australia, an administrative decision taken without jurisdiction is regarded, in law, as no decision at all.[16] The position is similar to, and inherited from, the United Kingdom, where there is ample judicial authority for that proposition.[17] Accordingly, a decision affected by jurisdictional error is said to be invalid.[18] The vexing puzzle at the centre of our inquiry is the status of invalid administrative decisions. They are legally invalid, but the nature of this invalidity is unclear. Accordingly, the idea of 'invalidity' suggests that a decision has no legal consequence. Unless and until the decision is set aside, however, it will not necessarily appear to be unlawful. Understandably, this poses difficulty for other decision-makers relying upon the validity of the decision, as there is often no immediate indication that the decision is unsupported by a legal norm. Therefore, the question becomes: what is the status of administrative decisions that are otherwise lawful but taken in reliance upon invalid administrative decisions? The appropriate approach to resolving the question is to apply second actor theory.

Professor Forsyth's Theory of the Second Actor

Professor Forsyth's Theory of the Second Actor rests principally on the foundation that an administrative decision or act may be invalid at law though nonetheless exist in fact.[19] The

10 *Hossain* (2018) 92 ALJR 780.
11 Ibid [23].
12 Ibid [24].
13 Ibid [17]; *Kirk* (2010) 239 CLR 531 [100] (French CJ; Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *Plaintiff S157 v The Commonwealth* (2003) 211 CLR 476 [80]–[81] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) (*Plaintiff S157*); *Craig v South Australia* (1995) 184 CLR 163, 179; *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132, 141, 149, 165.
14 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 170 (Lord Reid); *R v Hull University Visitor; Ex parte Page* [1993] AC 682, 701–2 (Lord Browne-Wilkinson); *R (Cart) v Upper Tribunal* [2012] 1 AC 663 [39] (Baroness Hale of Richmond), [110] (Lord Dyson); Lord Diplock, 'Administrative Law: Judicial Review Reviewed' (1974) 33 *Cambridge Law Journal* 233, 242–3.
15 Jurisdictional error marks the limits of the legislature's constitutional authority to oust judicial review of administrative decision-making. The constitutional writs of mandamus and prohibition (and the writ of certiorari as ancillary relief) are only available to correct jurisdictional errors of law; the power to exclude non-jurisdictional errors of law from review is permissible. On this point see generally *Plaintiff S157/2002* (2003) 211 CLR 476 [71]–[83].
16 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 [51] (Gaudron and Gummow JJ) [63] (McHugh J) [152] (Hayne J); *Plaintiff S157/2002* (2003) 211 CLR 476 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
17 See, eg, *Ridge v Baldwin* [1946] AC 40; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *Director of Public Prosecutions v Hutchinson* [1990] 2 AC 783.
18 *Hossain* (2018) 92 ALJR 780 [24] (Kiefel CJ; Gageler and Keane JJ); *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 248 [63] (*Probuild*); *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114, 157.
19 Benjamin Coles, 'The Effect of Legally Infirm Administrative and Judicial Decisions' (2017) 24 *Australian Journal of Administrative Law* 158, 162.

second actor theory can be expressed as the theory that the validity of the 'second act' (the act taken in reliance upon the validity of the invalid administrative act) will depend upon the powers of the second actor as prescribed by the law. Forsyth articulates this theory as follows:

> [U]nlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. The crucial issue to be determined is whether the second actor has legal power to act validly notwithstanding the invalidity of the first act. And it is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void.[20]

The theory itself cannot provide the answer to the question of whether the second actor has power — according to second actor theory, the focus of the inquiry must fall upon the relevant statutory provision that gives rise to the second actor's decision-making authority. This point was made forcefully in Forsyth's most recent enunciation of the theory.[21] Second actor theory only offers guidance in ascertaining the legal authority of the second actor. In effect, the principle directs the focus of the inquiry; its resolution will depend upon a process of statutory construction, set against a number of principles to be borne in mind.

Whether the second actor had the power to make the decision they made, notwithstanding the invalidity of the first act, will turn upon an application of the following principles. First, the powers of the second actor are to be determined by law, which is fundamental to the inquiry. The principal exercise is statutory construction. The exercise of statutory construction should begin and end with the text of the legislation, but that text should be considered in light of the context and purpose of the statute.[22] That is, the ordinary language of the statute is paramount, but that meaning is ascertained in light of the context and purpose of the relevant Act. The legislation empowering the second actor must contemplate that the validity of the initial decision is not a necessary precondition to the exercise of the second actor's power.

Secondly, the presumption in favour of a person's right to have access to a court to correct errors of law should apply less strongly in circumstances where the administrative decision affects only an individual rather than cross-sections of the population. In *Boddington v British Transport Police*[23] (*Boddington*), which will be discussed in detail below, Lord Irvine pointed out that the presumption in favour of collateral challenge applies less strongly when the relevant administrative act applies to an individual as opposed to the broader public.[24] Forsyth adopted the observations of Lord Irvine.[25] It can be further reasoned that if legislation provides for alternative avenues of appeal and review then the Act itself provides for redress to individuals affected by unlawful decisions. In such circumstances, the strength of the presumption that the legislature did not intend to preclude an

20 Christopher Forsyth, 'The Metaphysics of Nullity: Invalidity, Conceptual Reasoning and the Rule of Law' in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Clarendon Press, 1998) 159.

21 Christopher Forsyth, 'Showing the Fly the Way Out of the Fly Bottle: The Value of Formalism and Conceptual Reasoning in Administrative Law' (2007) 66(2) *Cambridge Law Journal* 325, 341.

22 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 [69]; *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936 [14], [37]; *Probuild* (2018) 92 CLJR 248 [34]; *Theiss v Collector of Customs* (2014) 250 CLR 664 [22]–[23].

23 *Boddington v British Transport Police* [1999] 2 AC 143 (*Boddington*).

24 Ibid 161–2.

25 Christopher Forsyth, 'The Theory of the Second Actor Revisited' (2006) 1 *Acta Juridica* 209, 220.

individual from accessing a court to correct legal errors applies much less strongly.[26] The consequences of the weakened presumption are that the second act is more likely to be valid in circumstances where the administrative decision targeted an individual and there was ample opportunity to remedy the error.

Lastly, it is relevant to consider the nature of the collateral attack and consequence of its success. Forsyth draws attention to the Canadian Supreme Court decision of *R v Consolidated Mayrbun Mines Ltd*.[27] Here their Honours applied a set of criteria and an approach to resolving a second actor question in an almost identical manner to that which Forsyth proposes. The Supreme Court affirmed the decision of the Court of Appeal, and among the factors that were identified as guiding the determination of whether collateral challenge was available were the nature of the collateral attack and the penalty on conviction for failing to comply with the order.[28] This second aspect can be adapted to a more general principle that involves consideration of the consequences attributable to the second (otherwise) lawful decision being invalid. This consideration is necessary because, depending on the extent of the domino effect, there may be a need to place great weight on the difficulty associated with unravelling the chaos that would ensue if the subsequent decision is invalid.

Mark Elliott notes that practical considerations, such as the amount of chaos that would result if the actions of the second actor are to be undone, might well indicate to some that the theory is highly discretionary.[29] However, regard must be had to the nature of the collateral attack and its consequences because they form part of background against which the process of statutory construction must take place. The determination of the validity of the second act cannot take place in a vacuum. The nature of the challenge and the consequences of its success form part of the broader factual circumstances to which the appropriate construction applies. That is, whether a second actor's decision is valid will depend on whether the proper construction of the Act contemplates the validity of the initial act as a precondition to the validity of the second act, set against the background of the nature of the collateral attack and consequence of its invalidity. The significance of these factors will depend on the proper construction of the Act in question. For this theory to have any merit, however, it must be shown that legal consequences are capable of attaching to invalid decisions.

The status of administrative decisions vitiated by jurisdictional error

As indicated above, the High Court has made plain that the position in Australia is that an administrative decision affected by jurisdictional error is, at law, no decision at all.[30] The extent to which the decision is 'non-existent' is the puzzling feature of invalidity. In this part I will explain why administrative decisions vitiated by jurisdictional error must be considered void, although they nonetheless continue to exist in fact.

26 As an analogy, see Edelman J's discussion of the narrow approach to the construction of privative clauses in the context of non-jurisdictional error of law where the narrow approach is much less strictly applied because the decision-maker is not exercising unrestrained power. Such a proposition is analogous to this one because the restriction of collateral challenge on the basis that statutory review rights are available is in the context of an environment where the restriction of unrestrained power is otherwise provided for — there is much less need for the presumption: *Probuild* (2018) 92 CLJR 248 [86]–[87]; see also *Bhardwaj* (2002) 209 CLR 597 [48] (Gaudron and Gummow JJ).

27 [1998] 1 SCR 706.

28 Ibid [45], [52] (L'Heureux-Dubè J delivering the English version of the judgment of the Court).

29 Beatson, Matthews and Elliott, above n 4, 100.

30 *Bhardwaj* (2002) 209 CLR 597 [51] (Gaudron and Gummow JJ); see also *Plaintiff S157/2002* (2003) 211 CLR 476 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Hossain* (2018) 92 ALJR 780 [24] (Kiefel CJ; Gageler and Keane JJ).

Void or voidable and the presumption of validity

The characterisation of unlawful administrative decisions as 'voidable' is an import from the law of contract and is an unsatisfactory conclusion. The conclusion that invalid decisions are void, not voidable, is necessary for the continued functionality of administrative law generally. Unlawful administrative decisions cannot be considered voidable because that conclusion presupposes that the decision is in some way supported by the statute from which the power to make a decision arose. If the decision is vitiated by jurisdictional error the decision is, by definition, unsupported by a legal norm. On this point, Sir William Wade made the following observation:

> There is clear meaning in statements ... that a contract is voidable by a party misled by fraudulent misrepresentation ... In [the contractual context] 'void' means that neither party is contractually bound, and 'voidable' means that both parties are contractually bound, but that one of them is empowered to disclaim his obligation. But there is no comparable situation in relation to the exercise of statutory powers by public authorities. In that field the distinctions matter, and [those] which the courts have been using [in] a clear cut fashion for centuries, are between acts that are authorised by statute and acts which are void; between acts which are *intra vires* and acts which are not ...[31]

The only utility that classifying administrative decisions as voidable *may* have in Australian administrative law is in the case of a non-jurisdictional error of law on the face of the record. In the case of a non-jurisdictional error of law, the decision is taken within jurisdiction but involves an error of law.[32] Wade conceded that there may be a place for characterisation of an administrative decision as voidable in the narrow context of error of law on the face of the record.[33] Australia has maintained the distinction between jurisdictional and non-jurisdictional error of law. A non-jurisdictional error of law is an error of law that is within jurisdiction and is supported by a legal norm arising pursuant to the statute under which the decision was made. In the case of a jurisdictional error, however, the decision has no legal foundation at all. Such a decision then cannot be classed as voidable because that conclusion suggests that some legal basis exists in support of it. To give legal effect to a decision which is beyond power would, in effect, allow decision-makers to exercise power that is unrestricted — an authoritarian conclusion. This is inconsistent with the most fundamental rule of law principles.

A second common approach to resolving the controversy at the centre of this essay is the presumption of validity. This proposition must also be rejected. In *Minister for Immigration and Multicultural Affairs v Bhardwaj*[34] (*Bhardwaj*), Gaudron and Gummow JJ, with whom McHugh J agreed, observed that administrative decisions, if we are to continue to uphold the rule of law, must not be given greater force and effect than is strictly necessary.[35] The presumption of validity is more appropriately understood as an evidentiary presumption.[36] Such a presumption is inadequate to resolve the puzzle that surrounds the nature of invalidity. Lord Irvine observed, in *Boddington*, that administrative decisions are sometimes presumed to be lawful but that this does not mean that such an act is valid until quashed; rather, the decision is presumed to be valid until recognised as unlawful and never having any legal effect at all.[37] This conclusion is essential for the function of our system of government. Chaos would follow if administrative decisions could be safely ignored on the basis that individuals thought them invalid.

31 HWR Wade, 'Unlawful Administrative Action: Void or Voidable?' (1967) 83 *Law Quarterly Review* 499, 519.
32 *Aala* (2000) 204 CLR 82, 141 (Hayne J).
33 Wade, above n 31, 519–20.
34 (2002) 209 CLR 597.
35 Ibid [63] (Gaudron and Gummow JJ).
36 *R v Wicks* [1998] AC 92 (*Wicks*), 115 (Lord Hoffmann); *Boddington* [1999] 2 AC 143, 174 (Lord Steyn).
37 *Boddington* [1999] 2 AC 143, 147–8.

In any event, the desire to classify administrative decisions that are unlawful as either 'void' or 'voidable' or 'valid' or 'invalid' was described in *Bhardwaj* as potentially being the result of a need to treat a decision as having at least sufficient effect to ground an appeal or other legal proceedings.[38] This need is resolved by the observation that the decision exists in fact, independent of any existence at law and by the observation that the question of legal consequence is contextual. In *Bhardwaj*, their Honours went on to say that the terms 'void' and 'voidable' were neither necessary nor helpful and to categorise decisions in such a way ignores the fact that the real issue is whether the rights and liabilities of the individual to whom the decision relates are as specified in that decision.[39]

Void administrative decisions continue to exist in fact

Invalidity is not absolute. Absolute invalidity posits that the decision can never have existed at all and can be ignored. The dicta of Dixon J, in *Posner v Collector of Interstate Destitute Persons (Vic)*,[40] is often cited in support of that proposition. His Honour said of truly invalid decisions that they 'may safely [be ignored], at all events, for most purposes'.[41] It is clear, however, that his Honour did consider that invalidity involved some relativity (hence, 'most'). However, in any event, the complete non-existence of invalid decisions is self-evidently an incorrect proposition. As Kirby J points out in *Bhardwaj*, if the invalid decision does not exist then it cannot support an appeal or proceedings for judicial review.[42] The High Court has rejected absolute invalidity as an appropriate conceptual understanding of the invalidity of administrative decisions.[43] Rather, invalidity is variable depending on context. A decision is invalid insofar as the court and individuals can treat the decision as if it had not been made — an observation which, notably, underscores the fact that invalidity is variable. The proper question, as Sir William Wade put it, is 'void against whom?'[44] The legal consequences associated with invalid decisions are perhaps best understood in the manner enunciated by Professor Mark Aronson, who classifies invalidity as a 'bundle of legal consequences'.[45]

The proper position is that a decision vitiated by jurisdictional error is void but must be properly regarded as valid by the law and by individuals unless and until set aside by a court of competent jurisdiction.[46] This is not to contradict the point made above — as noted, chaos would follow if administrative decisions could be safely ignored on the basis that individuals thought them invalid. The proper position is that they are to be treated as valid unless and until set aside, but that does not alter the legal consequences that attach to the decision.

Bhardwaj is authority for the proposition that a decision affected by jurisdictional error is, at law, no decision at all. However, it is not a logical extension of that conclusion that the invalid decision itself can have no legal consequence. In *Bhardwaj*, Gaudron and Gummow JJ did not explore the consequences of an invalid decision and whether its factual existence could attract any legal consequences. This observation was made by Gray and Downes JJ in *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care*[47] (*Jadwan*), where their Honours observed that no explanation was provided for whether the factual and legal consequences of an invalid decision might be distinct:

38 *Bhardwaj* (2002) 209 CLR 597 [45] (Gaudron and Gummow JJ).
39 Ibid [46] (Gaudron and Gummow JJ).
40 (1946) 74 CLR 461.
41 Ibid 483 (Dixon J).
42 *Bhardwaj* (2002) 209 CLR 597 [101]–[102] (Kirby J).
43 For example, orders of superior courts of record, although they might be vitiated by jurisdictional error, are valid unless and until set aside: see, eg, *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 [77] (Kirby J); *Re Macks; Ex parte Saint* (2000) 204 CLR 158, 185 [52] (Gaudron J); see also *Bhardwaj* (2002) 209 CLR 597 [107] (Kirby J).
44 Wade, above n 31, 501.
45 Mark Aronson, Matthew Groves and Greg Weeks *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 2017) [10.120]; Aronson, above n 1, 23.
46 See generally the observations of Sir William Wade in Wade, above n 31, 508.
47 (2003) 145 FLR 1.

> Gaudron and Gummow JJ did not explain in detail the consequences of the proposition that the decision has no legal effect. They did not deal with issues such as the status of the first decision of the IRT if the IRT had not chosen to ignore it and make another. Indeed, their Honours did not discuss what might be the factual, as distinct from the legal, consequences attaching to an administrative decision if no challenge to its validity is ever made.[48]

Their Honours went on to observe that *Bhardwaj* cannot be taken as authority for the proposition that jurisdictional error will lead to the decision having no consequences at all but, rather, that the legal and factual consequences of the decision will depend on the particular statute.[49] Those observations have been cited with approval in a number of intermediate courts of appeal[50] and in the Supreme Court of Western Australia.[51]

In developing second actor theory, Forsyth drew upon Hans Kelsen's Pure Theory of Law. In 'The Metaphysic of Nullity', Forsyth discusses and relies upon Kelsen's distinction between the *Sein* (the Is) and the *Sollen* (the Ought)[52] — the distinction between the realm of facts and the realm of norms. The invalid decision is incapable of existing as a legally valid act because it is unsupported by a legal norm. However, this cannot alter the observation that the decision exists in fact (having in fact been made). This factual existence can, therefore, attract legal consequences. An act or decision taken in reliance on an unlawful administrative decision may then be supported by a valid legal norm if the factual existence of the unlawful decision is all that is necessary to support the lawfulness of the second act.

In 2018, in *Plaintiff M174/2016 v Minister for Immigration and Border Protection*[53] (*Plaintiff M174*), a plurality of the High Court gave a strong indication that the distinction to be drawn between a decision made in law and a decision made in fact indeed existed. Their Honours determined that there was no need to ascertain whether a decision to refuse or grant a visa made in noncompliance with s 57 of the *Migration Act 2001* (Cth) was a valid decision because it was sufficient to proceed on the basis that it was 'a decision that is made in fact'.[54] Justice Gageler (who contributed to the plurality's observations in *Plaintiff M174*) said, in *New South Wales v Kable*,[55] that a thing done in the purported but invalid exercise of power remains a decision in fact:

> [A] thing done in the purported but invalid exercise of a power conferred by law, remains at all times a thing in fact. That is so whether or not it has been judicially determined to be invalid. The thing is, as is sometimes said, a 'nullity' in the sense that it lacks the legal force it purports to have. But the thing is not a nullity in the sense that it has no existence at all or that it is incapable of having legal consequences.[56]

In making those remarks, his Honour relied upon Forsyth's 'The Metaphysic of Nullity' as authority.

Finally, in *Hossain*, a majority of the High Court clearly indicated that an invalid decision had some existence in fact. Their Honours stated unequivocally that a decision made outside of

48 Ibid [40].
49 [2003] FCAFC 288; (2003) 145 FLR 1 [42] (Gray and Downes JJ), [64] (Kenny J).
50 See, eg, *Minister for Immigration and Border Protection v Hossain* [2017] FCAFC 82 [22]; *Minister for Immigration and Citizenship v Maman* (2010) 200 FCR 30 [44]; *R v Rapolti* [2016] NSWCCA 264 [137]; *Director of Public Prosecutions v Edwards* [2012] VSCA 293 [181].
51 *Tulloh v Chief Executive Officer of Corrective Services* [2018] WASC 105 [23]–[27] (Le Miere J) (*Tulloh*); *Wintawari Guruma Aboriginal Corporation RNTBC v The Hon Benjamin Sana Wyatt* [2019] WASC 33 [90] (Kenneth Martin J) (*Wintawari*).
52 Forsyth, above n 20, 147; Forsyth, above n 21, 340; see also the discussion in Coles, above n 19, 162.
53 (2018) 92 ALJR 481.
54 Ibid [12] (Gageler, Keane and Nettle JJ).
55 (2013) 252 CLR 118.
56 Ibid 138–139 [52] (Gageler J) citing Forsyth, above n 20, 147–8.

jurisdiction is a decision made in fact.[57] The relative nature of invalidity and the observation that an invalid decision, although invalid in law, remains in existence in fact provides the conceptual foundation for second actor theory. The legal consequences that attach to decisions taken in reliance on invalid decisions will turn upon the legal authority of the second actor.

Judicial appetite for second actor theory

Second actor theory has been specifically considered and applied in the United Kingdom and South Africa. There are two important cases where second actor theory was applied that require discussion — namely, *Boddington*[58] and *Oudekraal Estates (Pty) Ltd v The City of Cape Town*[59] (*Oudekraal Estates*). Examination of these cases is informative because they demonstrate judicial support for second actor theory and, in reliance upon these cases (amongst others, but these two in particular), Forsyth developed a more nuanced approach to the application of second actor theory. A number of other cases will also be touched on briefly, including *R (on the application of Shoesmith) v Ofsted*,[60] *D v Home Office*,[61] *R v Wicks*[62] (*Wicks*) and *Director of Public Prosecutions v Head*[63] (*Head*).

In *Boddington*, the House of Lords was tasked with determining whether a collateral challenge to a by-law or administrative act could be brought as a defence to a criminal charge and, if so, whether the defence would be successful if the by-law or administrative act was proven to be invalid. The appellant, Mr Boddington, had been charged with an offence contrary to the British Railways Board by-laws — in particular, smoking on a carriage in which smoking was prohibited. The by-laws were enacted pursuant to s 67(1) of the *Transport Act 1962* (UK). The British Railways Board enacted a by-law prohibiting smoking where there were signs displayed prohibiting the behaviour. Mr Boddington argued that s 67(1) of the *Transport Act 1962* (UK) only empowered the making of by-laws for the use of the railway in respect of smoking on carriages and that complete prohibition of smoking on all carriages by the posting of no smoking notices in all carriages went beyond permissible regulation.

The House of Lords dismissed the appeal, finding that, although collateral challenge was a valid defence to a criminal charge, it was no defence in this case because the British Railway Board acted within their powers. Lord Steyn, with whom Lord Browne-Wilkinson and Lord Hoffman agreed, cited with approval Forsyth's Theory of the Second Actor. In reliance upon Forsyth's 'The Metaphysic of Nullity', Lord Steyn observed that an unlawful by-law is a fact and may have legal consequences depending on the circumstances.[64] In *Boddington*, the first actor was the British Railway Board in making the by-law and the second act was the administrative decision to ban smoking on all carriages, relying upon the validity of the by-law. Notwithstanding any reference to second actor theory, the initial making of the by-law was valid and so the prosecution was lawful.

Oudekraal Estates involved the provincial administrator granting Oudekraal Estates' predecessor in title permission to establish a township. The land that was the subject of the approval had been a refuge for slaves who had escaped the colonial authorities after the turn of the 18th century. Buried among them were prominent religious figures. The decision of the provincial administrator to grant approval ignored the existence of sacred sites of

57 *Hossain* (2018) 92 ALJR 780 [24].
58 [1998] 2 WLR 639.
59 2004 (6) SA 222 (SCA).
60 [2011] EWCA Civ 642.
61 [2005] EWCA Civ 38; [2006] 1 WLR 1003.
62 [1998] AC 92.
63 [1959] AC 83.
64 *Boddington* [1998] 2 WLR 639, 172.

spiritual significance on the land and, accordingly, the decision was invalid. The question then arose as to whether the subsequent granting of approval for engineering services by the Cape Metropolitan Council (in reliance upon the administrator's approval) was also void. The decision of the South African Supreme Court of Appeal was that the approval granted by the council was valid. In reliance upon second actor theory, Howie P and Nugent JA (Cameron and Brand JJA and Southwood AJA agreed) said the following:

> Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question ...[65]

> [T]he proper enquiry in each case — at least at first — is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of the consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect will have legal effect for so long as the initial act is not set aside by a competent court.[66]

The South African Supreme Court of Appeal explicitly relied upon second actor theory in coming to those conclusions.

The Court of Appeal in the United Kingdom was faced with a 'domino effect' problem in 2011. In *R (on the application of Shoesmith) v Ofsted*,[67] it was observed by Maurice Kay LJ, with whom the rest of the House of Lords agreed, that no authoritative principle could necessarily be gleaned from *Boddington*.[68] His Lordship then went on to rely upon *Mossell (Jamaica) Limited v Office of Utilities Regulation*,[69] where Lord Phillips had applied the approach of Lord Irvine in *Boddington*. Lord Irvine argued that invalid decisions are to be presumed valid and that they may have legal consequences until they are declared invalid by a court.[70] However, Lord Irvine's approach is not inconsistent with Forsyth's formulation. Second actor theory was also cited with approval by Brooke LJ (Thomas and Jacob LJ agreeing) in the earlier decision of *D v Home Office*.[71]

In *Wicks*, a planning authority issued an enforcement notice that required the defendant to remove parts of the building he had constructed on the basis that it breached planning control regulations, having exceeded a particular height. The notice was found to have been void. The House of Lords was required to determine whether a prosecution could still take place, notwithstanding the invalidity of the notice. Lord Hoffman took the view that the answer lay in construction of the statute under which the prosecution was to be brought.[72] The conclusion reached by the House of Lords was that the legislation only contemplated an enforcement notice that appeared to be valid. The second act could be lawfully performed despite the invalidity of the first act. *Wicks* was decided before 'The Metaphysic of Nullity' was published, so Lord Hoffman did not apply second actor theory in name, but his Lordship applied a principled approach that resembles second actor theory.

In *Head*, a similar circumstance emerged, with the opposite conclusion. The criminal liability of the accused depended upon the validity of the first act. The first act was an order

65 2004 (6) SA 222 (SCA) [26].
66 Ibid [31].
67 [2011] EWCA Civ 642.
68 Ibid [116], [136] (Stanley Burton LJ) [140] (Master of the Rolls).
69 [2010] UKPC 1.
70 [2011] EWCA Civ 642 [117] (Maurice Kay LJ).
71 [2005] EWCA Civ 38; [2006] 1 WLR 1003.
72 *Wicks* [1998] AC 92, 117.

for the institutionalisation of the alleged victim. If the prosecution of the defendant (for carnal knowledge of a 'mental defective') was to be valid as a second act, it necessitated the validity of the first order. The key difference between *Wicks* and *Head* was to be found in the proper construction of the relevant provisions of the legislation. In *Wicks*, the legislation supported a valid prosecution where the first act was made in fact and in *Head* the legislation did not. The approach taken resembles the approach advanced by Forsyth, and its practical utility is observable in the way in which it can guide judicial determination of the validity of second acts. The law benefits from certainty and consistency, which are obtained by the application of rules which guide judicial decision-making. The status of administrative decisions benefits from the application of consistent rules which can provide that certainty and consistency; second actor theory provides such certainty by providing an overarching principle for the determination of the validity of second acts.

It is clear from the brief outline of authorities above that there is significant judicial appetite for second actor theory and the principles that underpin it. The approach has substantial utility as a principle to guide judges in their consideration of domino effect questions. However, as I have mentioned, the theory has not yet been approved by the High Court of Australia or intermediate courts of appeal. The theory has, though, recently received support in Western Australia in circumstances that offer further insight into the utility of the theory.

Tulloh: A local illustration of the utility of second actor theory

I have chosen to explore the recent application of second actor theory in Western Australia because, at this stage, it is the only overt acceptance of the theory in Australia, and the application of the theory in *Tulloh v Chief Executive Officer of the Department of Corrective Services*[73] (*Tulloh*) is a simple and elegant local example of the theoretical and practical benefits of second actor theory. I will also draw upon the comments of Kenneth Martin J in *Wintawari Guruma Aboriginal Corporation RNTBC v The Hon Benjamin Sana Wyatt*[74] (*Wintawari*). In both cases second actor theory was applied to ascertain whether lawful administrative action (taken in reliance upon an unlawful administrative decision) was invalid by virtue of the jurisdictional error underlying the initial decision. In both cases, second actor theory provided a reasoned and practical solution to the question, and in both cases the second act was found to have been a valid exercise of power notwithstanding the initial unlawful decision.

Facts

On 13 December 2002, Mr Tulloh was sentenced to 15 years in prison. On 25 November 2010, Mr Tulloh was granted parole and then released on 8 December 2010. A urine test provided by Mr Tulloh in August 2012 was positive for methamphetamine use and on 30 August 2012 Mr Tulloh's parole was cancelled by order of the Prisoner's Review Board. Mr Tulloh requested a review of the Board's decision and later, on 12 September 2012, the Board confirmed its decision and Mr Tulloh was returned to custody. He then applied to the Supreme Court of Western Australia for judicial review of the Board's decision. Ultimately, on 4 July 2014, the Court found that the decision of the Board to cancel Mr Tulloh's parole consisted of jurisdictional errors of law and the decision was quashed.[75] Subsequently, Mr Tulloh had his sentence status updated and he was advised that he would serve the whole of his sentence, to be released on 8 December 2017. Mr Tulloh then applied for a writ

73 [2018] WASC 105.
74 [2019] WASC 33.
75 See generally *Tulloh v Prisoner's Review Board (No 1)* [2014] WASC 239.

of habeas corpus, which was granted by Chaney J, and Mr Tulloh was released on 22 September 2014.[76]

Relevantly, on the basis of his unlawful imprisonment, Mr Tulloh then brought an action for damages for false imprisonment for the period 8 December 2012 to 22 September 2014. The issue at hand was the determination of a preliminary question of law. The question for Le Miere J was: was the detention of the plaintiff by the first defendant between 8 December 2012 and 4 July 2014 done without lawful authority?

The first decision is the decision of the Board to cancel Mr Tulloh's parole — a decision which is vitiated by jurisdictional error and is invalid. The second act is the Chief Executive Officer's (CEO's) detention of Mr Tulloh in reliance upon the cancellation order made by the Board (which, at the time of the CEO's decision, appeared to be a valid exercise of power by the Board).

Finding

In consideration of the question, Le Miere J canvassed the leading Australian authorities on the question of jurisdictional error and invalidity. Crucially, coming to the conclusion that, while their Honours in *Bhardwaj* and *Plaintiff S157/2002*[77] found that a decision tainted by jurisdictional error is, at law, no decision at all, it does not follow (in reliance upon Gray and Downes JJ in *Jadwan*) that a legally invalid decision can have no legal consequences.[78] His Honour's observations were cited with approval and adopted by Kenneth Martin J in *Wintawari*.[79] Justice Le Miere concluded that the question of whether a legally invalid decision has any legal effect until it is set aside or declared to be invalid depends upon the statutory framework under which the decision is made.[80] Justice Le Miere proceeded to enunciate and rely upon Forsyth's Theory of the Second Actor. His Honour said:

> The apparent anomaly that a legally invalid act can produce legally effective consequences is explained by Professor Forsyth's distinction between what exists in law and what exists in fact. While a void administrative act is not an act in law, it is an act in fact, and its mere factual existence may provide the foundation for the legal validity of later decisions or acts ... The proper inquiry is not whether the initial act was valid but rather whether its substantive validity is a precondition for the validity of the consequent act.[81]

Justice Le Miere guided his application of the second actor theory largely by reference to the principles discussed above. In *Wintawari*, Kenneth Martin J took the same approach.[82] In concluding that the detention of Mr Tulloh was lawful, Le Miere J outlined a number of characteristics of the *Sentence Administration Act 2003* (WA) (SAA) that indicated that an invalid decision of the Board was still to be regarded as having legal consequence.

First, the decision was a 'reviewable decision' for the purposes of s 115 of the SAA, under which a prisoner could request a review of the Board's decision; accordingly, an invalid decision must continue to have some effect as a 'reviewable decision'. Secondly, and related to the previous point, under s 49 of the SAA the CEO could apply to a judge of the Supreme Court for an order resolving any doubt or difficulty. Thirdly, the SAA intended for the cancellation order to be relied and acted upon by people other than the Board; in s 70(1) the SAA provides that when a cancellation order is made the original warrant of commitment

76 See generally *Tulloh v Chief Executive Officer, Department of Corrective Services* [2014] WASC 368.
77 2002 (2003) 211 CLR 476.
78 *Tulloh* [2018] WASC 105 [28] (Le Miere J).
79 *Wintawari* [2019] WASC 33 [91].
80 *Tulloh* [2018] WASC 105 [28] (Le Miere J).
81 Ibid [38] (Le Miere J).
82 *Wintawari* [2019] WASC 33 [71]–[91].

is once again in force, and s 70(2) of the SAA mandates that a judge of the Supreme Court must issue a warrant for the detention of the person who is the subject of the cancellation order.

Justice Le Miere further identified a number of characteristics relevant for consideration, including the fact that the CEO could not know that the cancellation order was invalid (except in extreme cases) and that the legislature, upon the proper construction of the SAA and the context of the subject matter, could not have intended the CEO to inquire about the validity of every cancellation order before acting on it.[83] Lastly, drawing upon the comments of Lord Steyn in *Boddington*, the cancellation order was aimed at an individual, not a cross-section of the population; therefore, it was much less likely that the legislature intended for collateral challenge to be available. Accordingly, the existence of the cancellation order in fact was sufficient to form the basis of the lawful detention of Mr Tulloh, up to the point at which the writ for habeas corpus was issued by Chaney J on 22 September 2014.

Concluding remarks

Tulloh is a good illustration of the utility of second actor theory. While the application of second actor theory involves some exercise of discretion, it is fundamentally a question to be answered through a principled examination of the legal authority of the second actor. The authority of the second actor will only extend so far as the proper construction of the statute permits. This area of the law is naturally imbued with elements of pragmatism — as Lord Slynn pointed out in *Boddington*, the law surrounding the validity of administrative acts has developed in a pragmatic way on a case-by-case basis.[84] The Theory of the Second Actor is a pragmatic approach, guided by principle, to resolving the puzzle of the domino effect.

In a similar vein, Mark Elliott described second actor theory as an elegant solution to the problem of second actors relying upon administrative decisions that are subsequently identified as being invalid.[85] The broader judicial treatment of second actor theory, illustrated above, demonstrates Elliott's point. The puzzle of the domino effect is resolved by turning attention toward the legal powers of the second actor. The validity of the second act is then determined by process of statutory construction. The test to be applied, guided by the principles explained above, is to ask whether the validity of the initial decision is a necessary precondition to the valid exercise of the second actor's power. The conceptual foundation for second actor theory — that an invalid administrative decision exists in fact — is widely acknowledged in Australia. Given the utility of second actor theory as a solution to domino effect controversies, courts in Australia should go further and adopt the theory as a principled and practical solution to the problem of the domino effect.

83 *Tulloh* [2018] WASC 105 [40] (Le Miere J).
84 *Boddington* [1999] 2 AC 143.
85 Beatson, Matthews and Elliott, above n 4, 99.