Judicial and Administrative Review During a Prosecution

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1. Overview of CDPP's Relationship with the Attorney General

In some jurisdictions there are legislative provisions which allow the prosecution an avenue to test rulings by trial judges, for example, in Queensland the prosecution can 'no bill' a trial, seek a ruling, and then file a fresh indictment.

The CDPP should not normally use such provisions to seek review of rulings made in the course of a trial, except, perhaps, where a trial judge has ruled that:

- he/she lacks jurisdiction to deal with the case, or
- the alleged misconduct does not disclose an offence known to the law.

2. Judicial review as collateral attack by defence

Defendants have frequently used applications for review of criminal justice decisions to delay the commencement or continuation of a trial, sometimes for several years. This has occurred particularly in relation to well-resourced persons charged with corporate offences and commonly involved the parallel jurisdiction of a federal court system and State or Territory criminal courts.

In 2000, the *Administrative Decisions (Judicial Review) Act 1977* and the *Judiciary Act 1903* were amended to:

- limit the access of defendants to a Federal review system for review of criminal justice process decisions *after* the commencement of a trial; and
- invest State/Territory courts with jurisdiction in relation to remaining constitutionally entrenched appeal rights flowing from section 75 of the Constitution.

Where a defendant has commenced proceedings for the review of a related criminal justice process decision in a federal court *before* the institution of a prosecution, the CDPP may apply to the court for a permanent stay of proceedings, which may be granted if the court determines that:

- the matters the subject of the application are more appropriately dealt with in the criminal justice process; and
- a stay of proceedings will not substantially prejudice the applicant.

3. Simultaneous Administrative and Criminal Proceedings in Social Security Matters

As far as the Office is concerned it is generally preferable that the Social Security Appeals Tribunal ("*SSAT*") or the Administrative Appeals Tribunal ("*AAT*") not hear an appeal where the issues raised by the appeal are before the criminal courts, or are likely to come before the criminal courts.

However, the *SSAT* or the *AAT* could hear an appeal where there is some special feature of the matter that warrants the appeal being heard despite the criminal proceedings (for example, where the appeal does not relate to the same matters as the criminal charges).

In some cases it would be unfair to an appellant for the *SSAT* or the *AAT* to hear an appeal while charges are pending because of the possibility that the appeal may result in the appellant having to disclose the nature of his or her defence, or make incriminating admissions.

The *SSAT* or the *AAT* should not proceed to hear an appeal in these circumstances because, under the Australian system of justice, the responsibility for deciding whether a person has committed a criminal offence rests with the criminal courts and not with bodies such as the *SSAT* or the *AAT*.

Findings by the *SSAT* or the *AAT* would not be binding on a criminal court, but the public may be confused and public confidence impaired if either tribunal were to make a finding in a related appeal which differed from the conclusions ultimately reached by a criminal court applying criminal rules of evidence and standards of proof. A number of cases have the made the point that where criminal charges are on foot or pending, it is generally undesirable for administrative tribunals to proceed with related matters. See *Re A Solicitor* (1938) 55 WN (NSW) 110; *Re Levy; Ex parte Incorporated Law Institute of NSW* (1887) 8 LR (NSW) 347; Herron *-v- McGregor* (1986) 6 NSWLR 246; *Lee -v- Naismith* (1989) 45 A Crim R 271; and *Edelsten -v- Richmond* (1987) 11 NSWLR 51. This proposition has even been accepted by the *AAT* itself in a number of cases. See *Pluta* 62 SSR 873; *Lane* (1984) 5 ALN 297; and *Gruzman* (1986) 9 ALN 111.

The general practice of both the *SSAT* and the *AAT* is to adjourn the hearing of any appeal where related criminal charges have been laid or are pending, but there have been cases in the past where both tribunals have refused to follow the general practice.

The CDPP should ensure that its views are made clear to the courts, the *SSAT* and the *AAT* whenever there is an opportunity to do so.