

You can't ask that! Submitting questions of law to the Court of Criminal Appeal under s. 5AE of the *Criminal Appeal Act 1912* (*Orr v Cobar Management Pty Limited* [2020] NSWCCA 220)

KEY POINTS

- ▶ The Crown, as prosecutor in summary proceedings in the Supreme Court, District Court, or Land and Environment Court, may require questions of law to be referred to the Court of Criminal Appeal for determination after judgment has been delivered in proceedings, but prior to the making of final orders, under s. 5AE of the *Criminal Appeal Act 1912*.
- ▶ However, s. 5AE is not a de facto right of appeal: it is a mechanism for the CCA to determine pure questions of law to facilitate the first instance Court to come to a decision.

BACKGROUND

Section 5AE allows the Crown, "[a]t any time prior to the completion of" summary proceedings in the Supreme Court, District Court or LEC to require the judge to "submit any question of law arising at or in reference to the proceedings to the" CCA.

There is an emerging practice in work health and safety and LEC prosecutions where the Crown:

- seeks an adjournment after delivery of judgment that the prosecutor has not proved all elements of the offence beyond reasonable doubt, but before the making of final orders;
- to consider, and potentially request the Court to submit to the CCA, a question of law pursuant to s. 5AE.

That practice was followed in *Orr*, a prosecution in the District Court for an alleged breach of the *Work Health and Safety Act 2011*. The defendant argued that this created a de facto right of appeal against an acquittal and exposed it to double jeopardy.

THE COURT OF CRIMINAL APPEAL

The threshold question of law in *Orr* was whether the District Court had the power under s. 5AE to state a question of law after delivery of reasons for judgment, but before making final orders. The CCA unanimously held that it did. However, this question was the *only* permissible question of law for the purposes of s. 5AE. The remaining six questions were not.

The key points of the judgment are as follows:

- The making of final orders disposing of a proceeding is the point at which a proceeding has been "completed" for the purposes of s. 5AE.

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- However, s. 5AE is not "a surrogate right of appeal". Its purpose is for the CCA to determine *undetermined* questions of law which have been submitted to it for determination. It facilitates a first instance judge coming to a decision where there is a difficult or unsettled question of law, or a question of law where there are conflicting authorities or no clear authority.
- A question of law under s. 5AE must be a "pure" question of law on its face and should not draw the CCA into questions of fact. Such a question can be decided without any reference to facts or by reference to assumed facts.
- Questions which take the form "Did I err in...?", "Was it open to me to find...?", "Did I fail to...?", "Was my finding...?" or similar are not questions of law for the purpose of s. 5AE.
- Even if a question submitted pursuant to s. 5AE is a question of law, the CCA retains a discretion to decline to answer such a question. Although, the fact that a question has been submitted after delivery of reasons, but before final orders, cannot itself be a reason to decline to do so.

IMPLICATIONS FOR PROSECUTORS

While prosecutors should carefully consider the timing of requiring questions of law to be submitted to the CCA under s. 5AE, it is still permissible to wait until after judgment has been delivered, but prior to the making of final orders.

However, this is only available where the question to be posed is a pure question of law and does not require the CCA to traverse factual findings. An example might be if the prosecutor considers, from the reasons for judgment, that the primary Court would benefit from CCA guidance in interpreting an applicable provision.