

IMPLICATIONS OF THE HIGH COURT'S DECISION IN

Kirk v Industrial Relations Commission of NSW & WorkCover NSW [2010] HCA 1 (“Kirk”)

GENERAL OVERVIEW

The High Court decision in the matter of *Kirk V Industrial Relations Commission of NSW & WorkCover NSW [2010] HCA 1 (“Kirk”)* has forever changed the way in which OH&S/WH&S prosecutions in NSW & Qld are instituted, heard and determined.

It is also likely that the issues determined in Kirk will have implications for other specialist State Courts including in particular the extent to which the Supreme Courts of the States and ultimately the High Court supervise those Specialist Courts to ensure that they do not exceed their jurisdiction or otherwise engage in jurisdictional error.

Employers facing charges under the OH&S or WH&S Acts in NSW and Qld should take advice on the impact of the High Court's decision in *Kirk v Industrial Relations Commission of NSW & WorkCover NSW*¹.

Unanimously scathing in its criticism of how OHS prosecutions have been instituted, heard and determined in NSW, the impact of the High Court's decision extend beyond OHS prosecutions into other areas involving specialist courts and tribunals.

¹ [2010] HCA 1

WHAT WAS THE KIRK CASE ABOUT?

The Facts

Kirk Group Holdings Pty Ltd (Kirk Group) owned a farm in New South Wales. Mr Kirk, a director of Kirk Group, had no farming experience and did not take an active part in the running of the farm. Instead, Kirk Group employed Mr Graham Palmer as farm manager, and who was responsible for the day to day operation of the farm. Mr Palmer was widely experienced in farm management and had previously run a large property of his own.

Mr Palmer was killed when he drove an All Terrain Vehicle (ATV) along an unformed track down the side of a steep slope, even though he could have driven down a paved road. The ATV overturned resulting in Mr Palmer's death.

Charges were laid against Kirk Group and Mr Kirk, personally, in his capacity as a director of Kirk Holdings. They were charged and convicted of breaching sections 15 and 16 of the *Occupational Health and Safety Act 1983 (NSW)* (the Act)² over failures to ensure the health, safety and welfare of Mr Palmer. The Industrial Court of NSW heard the charges and convicted Kirk Group and Mr Kirk.

It found that Mr Kirk had not exercised all diligence to ensure that Kirk Group had met its OHS obligations, and so convicted him of the charge.

² The predecessor to the current *Occupational Health and Safety Act 2000 (NSW)*

An appeal was lodged in the Court of Criminal Appeal and Court of Appeal. The appeal to the Court of Criminal Appeal was dismissed on the basis that there was no right of appeal to that Court.

The appeal to the Court of Appeal denied relief on the basis that the questions raised were appropriate to be raised before a Full Bench of the Industrial Court of NSW and that those matters should be agitated before the Industrial Court before being entertained by the Court of Appeal.

The company and Mr Kirk then sought leave to appeal to the Full Court of the Industrial Court.

The Full Court declined leave to appeal except in respect of one issue. In respect of that issue, the appeal was dismissed.

The company and Mr Kirk then sought special leave to appeal to the High Court. On 1 May 2009 special leave was granted.

Ultimately, the High Court quashed the convictions, unanimously and emphatically. Both the majority judgment and the separate judgment of Justice Heydon contained many highly critical observations of the manner in which the prosecution was conducted.

Some of those observations and criticisms are extracted below:-

- “[Kirk was] **treated very unjustly** and in a manner causing [him] much harm; [emphasis added]
- “...the prosecutions **should never have been instituted**; [emphasis added]

- **“It is absurd** to have prosecuted the owner of a farm and its principal on the ground that the principal had failed properly to ensure the health, safety and welfare of his manager, who was a man of optimum skill and experience – skill and experience much greater than his own – and a man whose conduct in driving straight down the side of a hill instead of on a formed and safe road was inexplicably reckless. The absurdity is the greater in view of the trial judge's acceptance of the propositions that Mr Kirk was "a 'scrupulous and dedicated professional'", that when "'Mr Kirk is operating something in a business mode we know he will be attending to it or causing others to attend to it with the full discretion that he can'", that for 20 years he had "operated as a good industrial citizen", that he was extremely remorseful because of the death of a good friend, and that in various other respects he had "paid a high price"; [emphasis added]
- "...even if the proceedings were not misconceived from the outset, they were **conducted unsatisfactorily**: The form of the applications rendered them liable to be struck out, the actual hearing was not conducted within jurisdiction or according to law because the prosecution called Mr Kirk as its own witness, and the reasons for judgment of the trial judge proceeded on an **erroneous construction of the legislation**"; [emphasis added]
- "...the cumulative effect [of the manner in which the prosecutions were conducted and the delays involved] on the appellants is **oppressive**. It is time for the WorkCover Authority of New South Wales to **finish its sport** with Mr Kirk. The applications in the Industrial Court should be dismissed" [emphasis added];
- "...since **the proceedings have been so oppressive** that, for reasons given above, they should be dismissed, it is desirable for this Court to bring complete finality by dealing with the appellants' costs of them as

well by ordering that the second respondent pay them” [emphasis added];

- “When **tactical decisions by [WorkCover NSW]**...of that kind enjoy several successes but eventually fail, as they did in this Court, it is just that the second respondent should pay the appellants' costs of the entire series of proceedings”. [emphasis added];
- “The reasoning of the majority indicates that the orders made by the trial judge rest on **several injustices**”; [emphasis added].

KEY ELEMENTS OF THE HIGH COURT DECISION

1. The evidence act breach.
2. The misunderstanding of the legal obligation imposed by the OH&S Act and hence the failure to properly charge an offence under the Act. In dealing with this issue the Court interpreted the Act and restated the obligation that arose and reflected on the Common law and statutory obligations to identify (in the charge) those particular acts or omission said to constitute the offence.
3. The power of the High Court to intervene notwithstanding the terms of the Privative Provisions of the Industrial Relations Act NSW (s.179). In dealing with this issue the high Court touched upon such matters as the hierarchy of courts in Australia as established by the constitution, the place of Specialist State Courts (ie. the Land & environment Court - Industrial Court etc.) and in particular the place and status of the State Supreme Courts and whether State legislatures could seek to limit the role of the State Supreme Courts in supervising Specialist State Courts and granting relief in circumstances where they have acted without or beyond their jurisdiction (jurisdictional error).

Failure to identify any particular acts or omissions that should have been taken

The charges did not identify what measures Kirk Group or Mr Kirk should have taken to ensure the health and safety of Mr Palmer or specify how Kirk Group failed to prevent Mr Palmer's death. The omission of that critical information deprived the defendants of the opportunity to utilise the defences, contrary to their fundamental, constitutional rights.

In the circumstances the form of the charges:

- deprived Kirk Group of the opportunity to prove that it was not reasonably practicable to take the measures that were (not) alleged in the particulars of the charge; and
- Deprived Mr Kirk of the opportunity to show how he had exercised all diligence to ensure that Kirk Group protected Mr Palmer against the risks (not) alleged in the particulars of the charge.

The Court was particularly scathing of the failure of the statement of offences to do more than paraphrase the general provisions in the legislation, with almost no consideration of how the failures applied specifically to the business, undertaking or workplace in question.

While this case was decided in the context of NSW OHS laws, the implications have a much wider reach, emphasising the fundamental right of all defendants to know, with sufficient particularity, the case they have to answer.

Adequate detail of the failings alleged is essential in all jurisdictions, and a failure to give adequate particulars deprives a defendant of the opportunity to

properly understand how it would have avoided breaching the legislation, and deprives a defendant of the opportunity to make out a defence.

The Industrial Court's power to convict was never triggered

The High Court found that the Industrial Court's jurisdiction - and therefore its power to convict - is triggered only in the circumstances set out in the legislation. It said that because of the fundamental misconception in the way the charges had been laid, and the failure to identify the offending conduct, that power was never enlivened, and so the Industrial Court had no jurisdiction to exercise its powers, such as the power to convict. The resulting jurisdictional error meant that the convictions were invalid and could not stand.

State legislation cannot establish specialist courts that override the hierarchy of courts set out in the Australian Constitution

The High Court reaffirmed that the Australian Constitution creates a hierarchy of courts in Australia which includes the State Supreme Courts, and that this hierarchy cannot be changed by privative (finality) provisions in State legislation. To meet the requirements of the Constitution, a State's Supreme Court retains its power to provide relief in the event of "jurisdictional error" by specialist State Courts and a State law that purports to prevent that review is unconstitutional and therefore invalid.

In this case, the NSW legislation that establishes the Industrial Court expressly provides that its decisions (or purported decisions) are final and cannot be reviewed or quashed by any court or tribunal (see s179 of the Industrial Relations Act NSW). The High Court confirmed that State legislation cannot remove or diminish a State Supreme Court's power to supervise specialist State courts, to ensure they do not engage in jurisdictional error or otherwise act beyond their jurisdiction.

Justice Heydon was extremely critical of the Full Bench of the Industrial Court's understanding of the court system and specifically, of its repeated characterisation of an appeal to the Court of Appeal as 'forum shopping' by the appellants. He concluded that the Full Bench operated under a 'misconception' about the structure of the courts in NSW and stated that to describe an appeal to the highest courts in NSW as 'forum shopping' is:

...to treat the Full Bench as if it were the only proper forum, and to treat the Court of Appeal as a court which, if it has jurisdiction at all, is a most unworthy receptacle of it. It approaches an assertion of exclusive dominion over the fields within its jurisdiction.

Jurisdictional error

The High Court acknowledged the ongoing difficulty in distinguishing between jurisdictional and non-jurisdictional errors particularly in specialist courts. In its decision the High Court helpfully reflects on its previous *Craig v South Australia*³ decision which addresses the differences between jurisdictional and non-jurisdictional error. The High Court emphasised the *Craig* decision should not be taken as providing a rigid classification of jurisdictional error or as marking the boundaries of the relevant field.

This prosecution was 'absurd'

In a separate judgment Justice Heydon was appalled by the institution of the case against Mr Kirk, making clear his view that the owner of the farm and its principal should never have been prosecuted.

³ (1995) 184 CLR 163

It is absurd to have prosecuted the owner of a farm and its principal on the ground that the principal had failed properly to ensure the health, safety and welfare of his manager, who was a man of optimum skill and experience – skill and experience much greater than his own – and a man whose conduct in driving straight down the side of a hill instead of on a formed and safe road was inexplicably reckless. The absurdity is the greater in view of the trial judge’s acceptance of the propositions that Mr Kirk was a ‘scrupulous and dedicated professional’.

Justice Heydon found “astonishing” the suggestion that the owners of farms are obliged to conduct daily supervision of employees and contractors when very often they do not live near those farms. He noted that if this was the purpose of the legislation then it would very simply be imposing obligations “*which were impossible to comply with and burdens which were impossible to bear*”.

In a damning assessment of the way in which the WorkCover Authority of NSW managed the matter, Justice Heydon referred to the treatment of the defendants as “*unjust*” and “*causing them much harm*”, noting that the “*cumulative effect on the appellants is oppressive*”. He concluded that “*It is time for the WorkCover Authority of New South Wales to finish its sport with Mr Kirk*”.

Fundamental rules of evidence cannot be waived

Mr Kirk gave evidence for the prosecution at first instance, by agreement between the parties. The High Court recognised the fundamental right of any accused not to be called by the prosecutor. It found that the provision and acceptance of such evidence, even by agreement, amounted to a substantial departure from the rules of evidence which provide that a defendant is not

competent to give evidence as a witness for the prosecution. This departure constituted a jurisdictional error requiring the conviction to be quashed.

IMPLICATIONS OF THE DECISION

- This decision changes OHS prosecutions forever.
- From the outset, a prosecutor must ensure that the charge contains adequate and detailed particulars of the failing in question, identifying the measures that, it is said, the defendant should have been taken to minimise obvious risks. Those particulars must be sufficient to allow a defendant to know the case it has to answer.
- While this may lead to the biggest change in approach in NSW and Queensland, where the practice has been very different, it is equally true in other States and under the Commonwealth OHS scheme.
- It opens the way for defendants who have already been convicted of “general” charges, in NSW, Queensland or elsewhere, to consider whether there is a basis to suggest that there has been jurisdictional error, and if so, to seek to have their convictions quashed.
- Justice Heydon’s remarks regarding the relative skills and qualifications of Mr Palmer, combined with his inexplicably reckless actions, potentially paves the way in certain circumstances, for broader defences to be argued by employers involving the individual skill and extreme recklessness of an injured worker. In addition, questions and arguments will no doubt arise about the required level of managerial supervision in the workplace.

- The High Court's extremely unflattering review of this prosecution and the implication that commonsense and the rule of law must now return to the OHS jurisdiction, suggest that employers will be better placed to minimise the lengthy prosecutions of the past. In this new legal landscape, the implementation of thorough safety systems may now more effectively increase an employer's ability to defend charges and even assist in warding off charges being laid in the first place.
- Unsuccessful parties may have a basis to challenge the decision of a wide range of courts and tribunals, purportedly immune from Supreme Court review due to privative or finality provisions in the legislation under which they operate.
- Whilst duties, defences and onus of proof vary across Australian OH&S legislation, we expect that prosecutors around the country will review their practices to ensure that their charges are not exposed to legal challenges of this nature. It is yet to be seen whether there will be an impact on what cases a prosecutor may pursue, and the number, scope and nature of the cases the prosecutor in NSW no longer pursues.

POST-KIRK DEVELOPMENTS

The proper form of charges alleging a breach of the OH&S Act NSW

The charge in the matter of Kirk was in the following terms:

"... that the Defendant, on 28 March 2001, at 'Mount Hercules Farm' ... a work place operated by the Defendant FAILED TO ensure the health, safety and welfare at work of its employees, in particular Graham George Palmer, contrary to s 15(1) ...".

The following particulars were given of the offence:

"The particulars of the offence are that the Defendant failed to:

- i. provide or maintain systems of work that were safe and without risks to health in relation to the operation of the Polaris All Terrain Vehicle ('ATV');*
- ii. provide such information, instruction, training and supervision as may be necessary to ensure the health and safety at work of its employees in relation to the operation of the Polaris All Terrain Vehicle ('ATV');*
- iii. to take such steps as are necessary to make available in connection with the use of any plant (namely the ATV) at the place of work adequate information about the use for which the plant is designed and about any conditions necessary to ensure that, when put to use, the plant is safe and without risks to health;*
- iv. ensure that the Polaris All Terrain Vehicle ('ATV') was only operated by persons with appropriate training.*
- v. adequately identify, assess and control risks and hazards in relation to the operation of the ATV on the farm."*

The statement of the offences concluded with the allegation that, as a result of the Kirk company's failures, its employees, in particular Mr Palmer, were "placed at risk of injury" and that Mr Palmer had suffered fatal injuries.

The High Court in dealing in *Kirks* case in that matter said as follows:

It may be inferred from the concluding statements to the charges that it was considered sufficient to allege that, as a consequence of a series of unspecified failures on the part of the employer, there remained present general risks to the health and safety of employees and others. This mirrors the approach to the requirements of ss 15 and 16 which appears to have been taken in a series of previous cases in the Industrial Court and which was followed in the present case.

Form of “charge”

The general approach to drafting charges (pre-Kirk) under the OH&S Act has been to assert, by reference to the relevant section of the OH&S Act, that the Defendant has allowed a particular “state of affairs” to arise, i.e. if it were a charge alleging a breach of s.15 of the 1983 Act, that the Defendant did not provide a place of work that was free from risk to health and safety...

What *Kirk* requires however is that even though a Defendant may fail to attain the state of affairs called for by the statute, that failure will not constitute an offence unless the complainant can identify (and prove beyond reasonable doubt) some act which the Defendant has committed or some measure which he has failed to take which would have ensured that the statutory state of affairs was achieved.

Since Kirk defendants are seeking to argue that the statutory requirements of s.8 of the OH&S Act are as follows:

- (a) The defendant must have been an employer at the time of the alleged offence;
- (b) That a risk arose;
- (c) That the risk was caused by an act or omission of the defendant;

- (d) That employees were exposed to the risk;
- (e) That there were practicable steps or measures available to the defendant which would have obviated or eliminated the risk and that the defendant failed to take these steps or implement these measures at the relevant time of the risk.

The elements set out above differ to those which the Industrial Court of NSW previously adopted for defences under s.8(1) of the OH&S Act NSW.

Similar, defendants are now seeking to argue that the elements for s.26 of the OH&S Act NSW are as follows:

- (a) A corporation exists;
- (b) The corporation has contravened the Act as set out above;
- (c) The person the subject of the charge is a director or person concerned in the management of the corporation;
- (d) That the person was in a position to control or influence the corporation with respect to the act or omission;
- (e) That the person did not take steps to ensure the company did not do the act or omission in question and was thereby not duly diligent.

THE VIEWS OF THE CHIEF JUSTICE OF NEW SOUTH WALES

In the “keynote address” to the AGS Administrative Law Symposium delivered on 25 March 2010, entitled “The Centrality of Jurisdictional Error”⁴, The Honourable J J Spigelman AC, the Chief Justice of NSW, described the High Court’s decision in *Kirk V The Industrial Relations*

⁴ See paper delivered as the Keynote Address to the AGS Administrative Law Symposium, on 25 March 2010, by The Honourable J J Spigelman AC, the Chief Justice of NSW entitled “The Centrality of Jurisdictional Error”

Commission [2010] HCA 1, (in the context of the development of Australian administrative law) as a “dramatic step forward” in the process of “convergence” of the “constitutional dimension applicable to Commonwealth decision making and the common law dimension applicable to State decision making.

In his analysis of the implications of the Kirk decision, the Chief Justice identified the following:-

It is Constitutionally impermissible for the Parliament of a State to deprive a Supreme Court of a State of its supervisory jurisdiction

“*Kirk* extends the *Kable*⁵ doctrine beyond matters of procedure and appearance to matters of substance. The Court concluded that it was constitutionally impermissible for the Parliament of a State to deprive a Supreme Court of a State of its supervisory jurisdiction with respect to both inferior courts and tribunals. It did so on the basis that it was a requirement of Chapter III of the Constitution that “there be a body fitting the description ‘the Supreme Court of a State’”⁶

A New Constitutional Expression

Kirk has now applied the terminology [*constitutional expression*] to the expression “State Supreme court”. The concept of a “constitutional expression” provides a textual basis for and, therefore, an aura of orthodoxy to, significant changes in constitutional jurisprudence.

There is an entrenched minimum provision of judicial review

The effect of *Kirk* is that there is, by force of s 73 [of the

⁵ See *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51

⁶ See *Kirk v Industrial Relations Commission* [2010] HCA 1 at [96]; (2010) 84 ALJR 154

Constitution], an “entrenched minimum provision of judicial review” applicable to State decision-makers of a similar, probably of the same, character as the High Court determined in *Plaintiff S157* to exist in the case of Commonwealth decision-makers by force of s 75(v) of the Constitution.

Privative provisions

Kirk requires a reappraisal of the legal options available to persons affected by administrative decisions in the contexts hitherto protected from judicial review by privative provisions. Most would have been read down by traditional techniques of interpretation so as not to protect from review for jurisdictional error. However, the impact of *Kirk* will not be confined to s 179 of the *Industrial Relations Act*. Until the judgment in *Kirk* there was, as far as I am aware, no judicial or academic commentary doubting the ability of a State Parliament to restrict review for jurisdictional error, within limits, by means of a properly drafted privative clause.

A full range of jurisdictional error must remain

The effect of *Kirk* will be that the full range of jurisdictional error must remain at both Commonwealth and State levels. State privative clauses can no longer protect from jurisdictional error. The principal focus of attention, in both Commonwealth and State administrative law, is now the identification in any particular case of whether or not an error is jurisdictional.

Time bar provisions

By parallel reasoning, [to that applied by the High Court in *Bodruddaza*⁷] time

⁷ *Bodruddaza v MIMA* [2007] HCA 14; (2007) 228 CLR 651

bar provisions contained in State legislation could not validly compromise the capacity of a State Supreme court to exercise its supervisory jurisdiction given constitutional protection by *Kirk*. The position of State courts may differ, in this respect, from that of federal courts other than the High Court. The practical significance of time bar clauses is highlighted by the jurisprudence that has developed in this State in the context of environmental planning appeals. The *Environmental Planning and Assessment Act* 1979 (the “EP&A Act”) provides in s 101 that the validity of any consent or certificate cannot be questioned except in proceedings commenced before the expiration of three months from the date on which public notice was given. Similarly, s 35 of the EP&A Act provides that the validity of an environmental planning instrument cannot be questioned except in proceedings commenced within three months of the date of publication on the New South Wales website of the instrument. *Kirk* may require further attention to the validity of these sections. Although I cannot express a concluded view, in the context of the particular statutory framework, I think it likely that the three month limit in both s 33 and s 101 is permissible. However, I expect that, in the light of *Kirk*, this may be tested.

No Invalidity Clauses

Such a clause does not expressly deprive a court of its jurisdiction. It states that some act or decision that may be in breach of a statutory requirement or, perhaps some principle or administrative law, does not have the consequence that the act or decision is invalid. As a matter of substance, clauses of this character deprive the affected citizen of any substantive right to review for jurisdictional error, by removing the basis upon which that course could be undertaken. In effect, this extends the jurisdiction retrospectively to whatever happened. The Land and Environment Court has been invested with the supervisory jurisdiction of the Supreme Court by way of judicial review pursuant to s 20(2)(b) of the *Land and Environment Court*

Act 1979. Furthermore by s 71(1) of that Act, proceedings of that character “may not be commenced or entertained in the Supreme Court”. *Kirk* could be seen to call in question the validity of s 71(1) of the *Land and Environment Court Act*. However, although again I cannot express a concluded view, the fact that decisions of the Land and Environment Court are subject to appeal to the Court of Appeal would probably save this particular provision.

NATIONAL HARMONISATION OF OH&S LAWS

Even before the High Court’s decision in *Kirk*, the model act released by Safe Work Australia had adopted the Victorian standard and approach over the NSW/Qld standard and approach.

In short, the model act included the qualified standard of “reasonably practicable”.

The NSW and Qld governments and the Unions in those States had resisted the adoption of the Victorian standard and approach because they regarded it as imposing a “low” standard of obligation upon employers and thus exposed workers to greater risks to their health and safety at work.

This of course was a non-sense because it acted upon a fundamental misunderstanding of the legal obligation imposed by the NSW / Qld [OH&S / WH&S Acts]. The decision of the High Court in *Kirk* clarified the obligation imposed by the NSW OH&S Act, which is in relatively similar terms to the Qld WH&S Act.

What *Kirk* also served to do was to highlight the risks inherent with the allocation of a criminal jurisdiction to a specialist court that did not feel itself bound by the general body of criminal laws supervised by the High Court and

did not necessarily have the expertise to properly administer such matters.

In particular, the minority judgment of his Honour Justice Haydon is pointed in its criticism of the conduct of the proceedings against Mr Kirk, describing them as involving a number of “injustices”.

The High Court’s criticism of the Industrial Court in the conduct of the Kirk proceedings (and WorkCover for that matter) has reportedly struck a cord with the NSW Attorney General. It has been reported to me by those who are well acquainted with Mr Herz that he has taken the High Court’s criticisms to heart and is giving consideration to the most appropriate court to hear and determine OH&S prosecutions under the harmonised model.

As the harmonised scheme is presently structured, each of the States will pass their own legislation [based on the model act] but with liberty to develop their own guidelines and to nominate the prosecuting body [likely to be WorkCover in NSW] and prescribing the Court to hear and determine prosecutions. In Victoria, the County Courts and other mainstream criminal courts hear and determine such prosecutions while in NSW and Qld it is the Magistrate’s Courts and the specialist State Industrial Trivunals that deal with prosecutions.

Has Kirk spelled the end of the specialist Court hearing and determining OH&S prosecutions?

The Federal Attorney-General, Robert McClelland, has also entered the debate on harmonisation and confirmed that the multiplicity of regulators and different State Courts hearing and determining prosecutions will act to hinder true harmonisation. Mr McClelland has reportedly flagged the issue as one

that may require a second-term 'referendum'⁸.

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⁸ Reported in Australian Financial Review, 26 March 2010: article entitled, "OH&S divergence feared" by Hannah Low.