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Note on Kirk v Industrial Relations Commission of New South Wales [2010] HCA 1 (3 Feb 2010)

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Note on *Kirk v Industrial Relations Commission of New South Wales; Kirk Group Holdings v Workcover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 (3 Feb 2010)

This decision of the Full Bench of the High Court has cast into some doubt the interpretation of the NSW *Occupational Health and Safety Act* 2000, and throws a shadow over the continuing work of the Industrial Court of NSW in this important area of law.

History of the Proceedings

The proceedings involving Mr Kirk have been long and drawn-out. They flow from an incident where Mr Palmer, the manager of a farm owned by Kirk Group Holdings Pty Ltd (whose main director was Mr Kirk), died when an “all-terrain vehicle” (ATV) he was driving overturned while he was carrying a load of steel pipes. The company, and Mr Kirk, were convicted of offences under the Act in 2004,¹ and sentenced in 2005.² They then sought to avoid the appeal process within the Industrial Court³ by seeking judicial review of the conviction before the NSW Court of Appeal. That Court⁴ refused to allow the “bypassing” of the usual appeal system.

Mr Kirk and the company then applied for leave to appeal their conviction to the Full Bench of the Industrial Court. Leave was granted,⁵ but on the hearing of the final appeal the appeal was dismissed.⁶ A further application for judicial review was made to the Court of Appeal, but this also failed.⁷ Mr Kirk’s determination to have his case reviewed, however, is seen by the fact that he then made a further application for special leave to appeal to the High Court of Australia, an application which was successful.⁸ The High Court heard the appeal in September 2009,⁹ and handed down its judgment on 3 Feb 2010.

The Outcome of the Appeal

The outcome of the appeal was that all of the members of the High Court found that Mr Kirk’s, and the company’s, initial convictions were invalid, and that the Court of Appeal should have issued a writ of certiorari quashing the convictions.¹⁰ The reasons for the invalidity of the convictions were essentially

¹ (2004) 135 IR 166; [2004] NSWIRComm 207.

² (2005) 137 IR 462; [2005] NSWIRComm 1.

³ As the High Court does, I will refer to the Industrial Relations Commission in Court Session (as it was in 2004) by the name it now bears, the Industrial Court of NSW (or simply, the Industrial Court.)

⁴ *Kirk Group Holdings Pty Ltd and anor v WorkCover Authority of NSW* (2006) 154 IR 310; [2006] NSWCA 172.

⁵ See *Kirk Group Holdings Pty Ltd and anor v WorkCover Authority of NSW* (2006) 158 IR 284, [2006] NSWIRComm 355- although leave to appeal was granted on only one, quite limited, point; see paras [51]-[55].

⁶ [2007] NSWIRComm 86.

⁷ *Kirk v Industrial Relations Commission of New South Wales* [2008] NSWCA 156.

⁸ See *Kirk & Anor v Industrial Relations Commission of NSW & Anor* [2009] HCATrans 93 (1 May 2009).

⁹ [2009] HCATrans 237, 238, 239 (29, 30 September, 1 October 2009).

¹⁰ Six members of the Court delivered a joint judgment; Heydon J delivered a dissent on the question of costs (the majority ordered only some of the costs of the overall proceedings to be borne by WorkCover, leaving some to be paid by Mr Kirk; Heydon J would have relieved Mr Kirk of all costs.) Heydon J agreed with the majority, however, on all points other than costs.

- (1) that the Industrial Court had misapplied the provisions of the 1983 legislation; and also that
- (2) Mr Kirk had, contrary to a fundamental rule of evidence, been called as a witness in his own prosecution by the prosecutor.

These two matters were held to be both “jurisdictional errors” by the Industrial Court, and also “errors on the face of the record”.

The route by which these results were achieved was somewhat complicated. I will take the judgment in reverse order to best explain, for those most interested in the OHS aspects of the case rather than the somewhat technical “administrative law” points, how the Court got there. I will then try to spell out the implications of the judgment for the OHS area.

1. Why the Court of Appeal had power to quash the orders of the Industrial Court

It may seem obvious to a lay person that the Court of Appeal of NSW should have been able, if it wanted to, to overturn a conviction by the Industrial Court of NSW. But in fact an odd feature of the NSW legal system is what is called a “privative clause” in s 179 of the *Industrial Relations Act* 1996 (NSW), which purports to prevent appeals to the NSW Court of Appeal from decisions of the Industrial Court.

So the High Court had to rule on whether there was some way, other than a technical “appeal”, by which the Court of Appeal could have reviewed the decision. After a lengthy discussion of most interest to administrative lawyers, they concluded that there was. An ancient remedy called the writ of certiorari allowed a superior court to control any attempt by a court of “limited jurisdiction” to exceed its statutory or other limits. One clear case where this writ was available was in a case of what is called “jurisdictional error”- effectively where the lower court exceeds its jurisdiction.

The High Court held that, even if a State Parliament wanted to completely remove the power of a State Supreme Court to issue writs of certiorari in cases of jurisdictional error, it could not do so- as it was an essential part of the Constitutional court system that there be State Supreme Courts with this power.¹¹

Hence despite s 179, the NSW Court of Appeal retained this jurisdiction.¹²

2. The Industrial Court’s wrong view of the OHS Act

Clearly not every minor mistake made by a court of limited jurisdiction would amount to a “jurisdictional error”. However, the High Court held that the way that Walton J had interpreted the *OHS Act* 1983 was so fundamentally wrong that it amounted to such an error. (It seems clear that, since the structure

¹¹ See para [100]: “Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power.”

¹² The High Court went on to discuss another ground for certiorari, “error on the face of the record”, and concluded that the Industrial Court had committed such errors- [89]; but in the case of this type of error the “privative clause” in s 179 was effective to block review on this ground- [90]. It was not unconstitutional for the State to remove jurisdiction to review a decision for “error on the face of the record”- [100].

of the current legislation, the *OHS Act* 2000, is so similar to the 1983 Act, the same criticisms are meant to apply to the 2000 Act.)¹³

So what mistake did Walton J make? The error should be put in context by noting, as the High Court itself did, that his Honour was only applying previous decisions of both trial judges and the Full Bench of the Industrial Court, and hence any critique of his approach amounted to a critique of this long line of pre-existing authority.¹⁴

The analysis of the proper approach to prosecutions is provided in paras [7]-[38]. It is perhaps important to start by outlining the relevant provisions briefly. Section 15 of the 1983 Act (like s 8 of the present Act) provides that an employer must “ensure the health, safety and welfare at work of all the employer’s employees”. Specific examples of how that duty might be breached are given in s 15(2). Later in the Act there is a defence provision, s 53 (cf s 28, 2000 Act), which provides that there is a defence to prosecution for the accused “to prove that: (a) it was not reasonably practicable for the person to comply with the provision of this Act... the breach of which constituted the offence”.

The accepted view of the operation of these provisions which has been applied in countless decisions since 1983 is that s 15 is an “absolute” duty which has been *prima facie* breached whenever there is a failure to “ensure” safety- in other words, whenever there is a risk of harm or an actual injury. It is then up to the defendant to provide evidence that it was not reasonably practicable to have prevented the risk arising or the harm ensuing.

But now, some 25 years after the court started interpreting the Act, the High Court has discovered that this approach is so deeply flawed that to apply it to a prosecution is a “jurisdictional error”. What is the proper approach? It is difficult to sum up briefly, but in essence the secret seems to be that a prosecution under the Act is only possible where there is an “identifiable” risk (para [12]), and hence a prosecution is invalid if the initiating document does not specify with some particularity what should have been done by the accused to have dealt with the risk. Phrases used by the majority which support this include

- “those provisions are contravened where there has been a failure, on the part of an employer, to take a *particular* measure”- [12];
- “Sections 15 and 16 are contravened where there has been a failure, on the part of the employer, to take *particular* measures to prevent an *identifiable* risk eventuating. That is the relevant act or omission which gives rise to the offence”- [14];
- “the necessity for a statement of offence to *identify* the act or omission of the employer said to constitute a contravention of s 15 or s 16”- [15]. {emphasis added}

¹³ The 1983 legislation was applicable because the incident occurred on 28 March 2001, prior to the commencement of the current Act on 1 September 2001. But note that the High Court goes out of its way to cross-reference provisions of the 1983 Act to provisions of the current Act in a way which surely implies that their Honours intend the judgment to be applicable to the current Act- see footnotes 4, 12 and 15 for example.

¹⁴ See [32] of the High Court judgment, citing the discussion at para [123] ff of the trial decision in (2004) 135 IR 166; [2004] NSWIRComm 207, which in turn cited a large number of decisions going back as far as one of the earliest reported decisions under the legislation, *Carrington Slipways Pty Ltd v Callaghan* (1985) 11 IR 467.

This interpretation is supported by reference to the application of the defence provision in s 53. The reference to the need for a defendant to prove that it was not “reasonably practicable” to take “the measure in question”, is said in [16] to imply that

16.... Such a defence can only address *particular* measures *identified* as necessary to have been taken in the statement of offence. {emphasis added}

The other view, that a risk need not be particularised in the prosecutor’s pleadings, is said to have the consequence that under s 53 an employer would have to establish “that every possible risk was obviated”.

It is difficult for someone who is familiar with the course of decisions in the Industrial Court to grasp what the High Court is saying here- just as it seems to have been difficult, with great respect, for the High Court to have read and digested the quarter of a century’s worth of decisions in the Industrial Court. Perhaps the problem arises because the members of the High Court look at the legislation as an abstract piece of text with which they are almost totally unfamiliar, and see the possibilities for misreading.

The fact is that there is nothing unworkable or impossible about the interpretation that has been offered by the Industrial Court. More to the point, the view that all that needs to be shown by the prosecution is creation of a risk seems to flow naturally from the provisions of the actual legislation. The words “particular” or “identifiable” or “specific” are just not present in s 15 or current s 8. In the course of actual litigation it has become abundantly clear to the accused person, through provision of particulars, what the prosecutor alleges they have failed to do. They have perfect liberty to focus on that particular risk in their s 53/ s 28 defence. No accused has ever had to mount some “universal” defence countering all possible risks in the universe of harm.

Nevertheless, the High Court has now ruled that a prosecutor must plead with great precision what it is alleged should have been done.

27 The acts or omissions the subject of the charges here in question had to be *identified* if Mr Kirk and the Kirk company were to be able to rely upon a defence under s 53....

28 The statements of the offences as particularised do not *identify* what measures the Kirk company could have taken but did not take...

32...The step which was not undertaken was to *identify* the measure which the employer should have taken as relevant to the offence...

34 Walton J referred to earlier case law that the duty imposed upon an employer "is to be construed as meaning to guarantee, secure or make certain" and that the duty is directed at obviating "risks" to safety at the workplace. References to guarantees, and emphasis upon general classes of risks which are to be eliminated, tend to distract attention from the requirements of an offence against ss 15 and 16. The approach taken by the Industrial Court fails to distinguish between the content of the employer's duty, which is generally stated, and the fact of a contravention in a particular case. It is that fact, the act or omission of the employer, which constitutes the offence. Of course it is necessary for an employer to identify risks present in the workplace and to address them, in order to fulfil the obligations imposed by ss 15 and 16. It is also necessary for the prosecutor to *identify* the measures which should have been taken. If a risk was or is

present, the question is – what action on the part of the employer was or is required to address it? The answer to that question is the matter properly the subject of the charge. {emphasis added}.

This mis-understanding of the legislation, then, is said to be a jurisdictional error of such magnitude that the convictions of Mr Kirk and the company should be quashed.

It is perhaps worth pointing out that this allegedly erroneous view of the legislation has not been seen to be a problem by other superior courts, in other jurisdictions. In particular, in the UK, from whence the current model of OHS legislation derived, the *Health and Safety at Work Act 1974* has consistently been interpreted as workable on the basis that all the prosecution has to show is a “risk”. Most recently the legislation was commented upon in a decision of the House of Lords in *R v Chagot Limited (t/a Contract Services)*¹⁵. In that case an employee of Chagot, who had been assisting in works being carried out on a farm, was killed when a dump truck he was driving overturned and buried him. Mr Ruttle, who was apparently managing director of a group of companies including Chagot, and on the board of a contracting company which was also charged in relation to the incident, Ruttle Contracting Ltd, was charged under s 37 *HSW Act*.¹⁶ The trial judge having entered convictions and fines against both companies and Mr Ruttle, and an appeal to the Court of Appeal having failed,¹⁷ an appeal proceeded to the House of Lords. In a unanimous judgment the Appellate Committee of the House dismissed the appeal and affirmed the convictions of all the defendants.

A large part of the discussion in the judgment concerned the nature of the charges under ss 2 and 3 of the *HSW Act*, and the interaction of the duty to do what was “reasonably practicable” with the reversal of onus of proof provided by s 40 of the Act. The House affirmed that the UK legislation operates in precisely the way that the NSW *OHS Act 2000* does- that once there is a risk to safety proved on the facts, then the onus falls on the company concerned to show that it was not reasonably practicable to do more. It is not necessary for the prosecutor to prove the precise particulars of the alleged risk.¹⁸ Their Lordships also confirmed the view that had been taken by the Court of Appeal in *R v Davies*,¹⁹ that this reversal of onus was not in breach of the obligations of the UK under article 6(1) of the *European Convention on Human Rights*, as it was a “proportionate” response to the social, legal and economic purposes of the law relating to workplace safety.²⁰

Yet none of these issues- the historical background to the Act, the nature of the social problem being dealt with, the history of how prosecutions had been dealt with for many years in both the UK and in NSW- received any consideration in the High Court. There is simply the staggering comment in para [33] at the end of a cursory examination of the legislation and its previous interpretation by the Industrial Court that

¹⁵ [2008] UKHL 73 (10 Dec 2008); [2009] 2 All E.R. 645.

¹⁶ A personal liability provision like s 50 of the *OHS Act 1983*, under which Mr Kirk had been charged here.

¹⁷ *R v Chagot Ltd* [2007] EWCA Crim 3032; [2008] ICR 517.

¹⁸ See Lord Hope, above n 15 at [21].

¹⁹ [2003] ICR 586.

²⁰ See Lord Hope, above n 15, at [28]-[30].

The provisions of the OH&S Act relating to offence and defence were not intended to operate in this way.

(It should be noted, as it is a particular interest of mine, that there is no substantial discussion of the precise provision of the Act under which Mr Kirk was charged, s 50, equivalent to the current s 26. Para [24] effectively recites s 50, but the logic of the judgment is simply to deal with the liability of the company under ss 15 & 16. This is appropriate, as once the liability of the company falls away, there is no longer any room for the operation of s 50. Hence none of the complexities of the personal liability provision were really addressed, although two points should be noted:

- At para [27] there is a passing comment that the relevant acts or omissions “had to be identified if Mr Kirk and the Kirk company were to be able to rely upon a defence under s 53”. In my view, explained in other papers, the defence under s 53 was never directly available to a company officer charged under s 50.²¹ I would argue that this comment of the High Court seeming to support the application of s 53 to the personal prosecution of Mr Kirk was in the traditional sense *obiter dicta*, said “by the way” and without the benefit of full argument on the point, and should in no way be seen as undermining the decisions of the Full Bench of the Industrial Court holding that s 53 is not relevant to a s50 prosecution.
- The issue touched on below, as to whether Mr Kirk should have been allowed (even with his consent) to be called to give evidence in the proceedings, cannot be properly understood without an appreciation of the difficulty faced by the prosecution in a case where the guilt of a company under, say, s 8 of the 2000 Act, may depend on the testimony of a single major company officer, but where the guilt of the officer under the personal liability provisions of s 26 will then be conditioned on the guilt of the company. While the resolution of the issues is by no means clear, it is unfortunate, to say the least, that the judgment of the High Court gives no hint that it had addressed its mind to the matter.²²)

3. The error in calling Mr Kirk as a witness

The High Court identified another problem, then, with the trial proceedings, which does not seem to have been noticed or commented on at any prior stage before the hearing of the High Court appeal itself.

Justice Gummow noted that Mr Kirk had been called as a witness in the trial in which he was one of the accused. Justice Heydon then pointed out that under s 17(2) of the *Evidence Act* 1995 (NSW) an accused is explicitly said not to be a competent witness in his own trial. Even though this course of action was undertaken with consent of Mr Kirk, there had been a clear breach of the

²¹ See for example NRCOHSR WP No 63, “Recent Developments in Personal Liability of Company Officers for Workplace Safety Breaches – Australian and UK Decisions” at <http://ohs.anu.edu.au/publications/pdf/wp%2063%20-%20Foster.pdf>.

²² See para [12] of the trial judgment: “Mr L Aitken of counsel, with whom Mr C Ward of counsel appeared for the defendants, initially submitted that the s50 charges against Mr Kirk should be heard separately to the charges laid against the Company, on the basis that the evidence given by Mr Kirk against the Company would incriminate himself. However, the parties ultimately agreed for the matters to be joined.”

Act, and on being given this hint on the second day of the hearing of the appeal his counsel applied (and was given permission) to amend the grounds of appeal to add this one.

At paras [50]-[53] of the High Court judgment this error is identified as another reason for the original conviction to be overturned. The Court dismissed quickly (with respect, too quickly) the argument that a distinction should be made between Mr Kirk's competence to give evidence against himself, and his competence to give evidence against the company. The High Court simply said that this could not be a reason for the rule to be waived where there was a joint trial of both director and company. This comment alone may well lead to greatly increased time and effort in trials of company officers in NSW, as presently they are usually conducted together.

The departure from the rules of evidence was said to be so "substantial"- [53]- that it too amounted to a "jurisdictional error"- [76]. Heydon J in particular, in his minority judgment, expanded at some length on the policy reasons for the evidential rule, at [117].

4. The application for special leave to appeal from the Industrial Court to the High Court

It is worth noting that one argument that occupied some time at the hearing of the appeal was given very short and dismissive treatment in the judgment. An application for "special leave to appeal" to the High Court from the decisions of the Industrial Court was made. This was unusual in that usually there would be no such direct appeal route unless through the Court of Appeal. The argument that was presented was that for the purposes of the provisions in the Constitution allowing appeals to the High Court, the Industrial Court should be treated *as if it were* the Supreme Court.

The success of such an argument would have had wide-reaching implications. But at para [49] the High Court holds that it is not necessary to consider the argument (since the convictions were being quashed through the writ of certiorari), and hence the argument will have to be made on another day.

5. The unfortunate attitude of the High Court to the Industrial Court

Discussion of the judgment would not be complete without noting the unfortunate attitude of the High Court to the Industrial Court. For whatever personal or historical reasons, the members of the High Court seem to have an animosity towards the Industrial Court, and in general towards the idea of "specialist tribunals". Some quotes will have to suffice to give the flavour of the comments:

- The majority: "[64] As Jaffe rightly pointed out²³, it is important to recognise the use to which the principles expressed in terms of "jurisdictional error" and its related concept of "jurisdictional fact" are put. The principles are used in connection with the control of tribunals of limited jurisdiction on the basis that a "tribunal of limited jurisdiction should not be the final judge of its exercise of power; it should be subject to the control of the courts of more general jurisdiction". Jaffe expressed the danger, against which

²³ "Judicial Review: Constitutional and Jurisdictional Fact", (1957) 70 *Harvard Law Review* 953 at 962-963.

the principles guarded, as being that "a tribunal *preoccupied with special problems or staffed by individuals of lesser ability* is likely to *develop distorted positions*. In its concern for its administrative task it may strain just those limits with which the legislature was most concerned"²⁴." {emphasis added}

- In his minority judgment Heydon J worked up to an attack on the Industrial Court by first objecting in fairly scathing terms to the way that the Industrial Court, in one of Mr Kirk's many visits, had characterised his attempt to seek judicial review from the Court of Appeal as "forum shopping", calling the remarks effectively the comments of the Full Bench of the Industrial Court as a purported "powerful territorial magnate", and the comments approaching "an assertion of exclusive dominion over the fields within its jurisdiction"- see [121].
- His Honour then moved on to a full frontal assault in para [122], citing a quote from an author urging suspicion of "specialist courts" established "because proceedings conducted in accordance with normal judicial standards of fairness are not producing the outcomes that the government wants." He continued, referring to the danger:

the courts on which the jurisdiction has been conferred, while in some sense specialist, are not familiar with all the relevant rules. Thus a major difficulty in setting up a particular court, like the Industrial Court, to deal with specific categories of work, one of which is a criminal jurisdiction in relation to a very important matter like industrial safety, is that the separate court tends to *lose touch with the traditions, standards and mores of the wider profession and judiciary*. It thus *forgets fundamental matters* like the incapacity of the prosecution to call the accused as a witness even if the accused consents. Another difficulty in setting up specialist courts is that they tend to become *over-enthusiastic about vindicating the purposes for which they were set up...* [C]ourts set up for the purpose of dealing with a particular mischief can tend to exalt that purpose above all other considerations, and pursue it in too absolute a way. They tend to feel that they are not fulfilling their duty unless all, or almost all, complaints that that mischief has arisen are accepted. Courts which are "preoccupied with special problems", like tribunals or administrative bodies of that kind, are "likely to develop distorted positions."²⁵ {emphasis added}

It must be said that this seems to approach a new "low" in inter-curial relations. While I have been of the opinion for some years that it would be better for justice generally, and for the standard of decision-making in the Industrial Court in particular, if appeals were allowed within the usual State system to the Court of Criminal Appeal, it seems to be highly inappropriate for a member of the High Court to link the Industrial Court with the Star Chamber (see the quote from Walker in [122] at n 153)! Such comments can only leave the observer with the fear that the High Court's decision on the interpretation of the OHS legislation was influenced at least in part by its personal dislike for the concept of a specialist tribunal. Despite Heydon J's disclaimer at the end of para [122] that he is not attacking the importance of increased industrial safety, or questioning the very concept of specialist courts in meeting that goal, it is hard

²⁴ (1957) 70 *Harvard Law Review* 953 at 963.

²⁵ See above at [64].

to avoid the view that precisely these things are being accomplished by the judgment.

6. The consequences of the decision

The long-term consequences of this decision are hard to predict. In the short term it will no doubt lead to a massive amount of work by WorkCover officers to attempt to ensure that prosecution pleadings conform to the newly discovered interpretation of the legislation. In addition there are important and difficult questions about the status of the last 25 years' worth of convictions which have been entered by the Industrial Court- are they all now to be regarded as invalid? Should there be a case by case review of all those convictions involving an examination of the pleadings to determine if they were specific enough? Can any appeals be filed out of time to the Full Bench of the Industrial Court, or will all previous accused form an orderly queue outside the door of the Court of Appeal requesting a writ of certiorari? If the NSW Parliament chooses to deal with the possible problems by enacting legislation validating previous convictions, are there any Constitutional constraints on their doing so?

The impact of the decision on the Industrial Court, and public confidence in that important specialist court, seems likely to be highly detrimental. Longer term the precise issues may eventually fade into the background if the current proposals for a national uniform *Workplace Health and Safety Act* come to fruition, in 2012 as proposed or later if drawing up the uniform regulations proves as difficult as I suspect it is likely to be. The current form of the WHSA does not follow the NSW legislation, and seems likely to meet the approval of the High Court as it follows in general the Victorian model discussed by the Court in *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 (referred to with approval in footnote 17).

But the general tone of the comments in the judgment does raise important ongoing issues about the courts who will exercise jurisdiction under any new national legislation. At the moment choice of judicial venue seems to have been left open to individual States. But if the hostility of the High Court to specialist tribunals continues, it may be necessary to reconsider the model of the Industrial Court for NSW very carefully.

I would argue that this would not be a good move. For all its flaws (among which, as noted above, is the lack of an appeal to the Court of Criminal Appeal) the Industrial Court, in my view, has done an excellent job in difficult circumstances wrestling with hard safety issues, and has in the course of doing so developed an important expertise in those issues. It is to be regretted that more of an attempt was not made by the High Court of Australia to carefully weigh up the course of decisions and the reasons for the decisions, and to defer to some extent to the experience gained by the Court in those decisions, before deciding to overturn 25 years' worth of hard won expertise.

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