

Landmark decision to affect OHS prosecutions

In a landmark decision that will affect future occupational health and safety prosecutions in New South Wales and Queensland, the Full Court of the High Court of Australia unanimously quashed a decision by the New South Wales Industrial Relations Commission to convict an employer of OHS offences where the charges did not identify the acts or omissions by the employer that constituted those offences.

The *Kirk* decision¹, handed down on 3 February, is a turning point for occupational health and safety prosecutions in New South Wales and Queensland, where employers have an absolute duty to ensure the health, safety and welfare of their employees at work. Under current legislation in those States, prosecutions for safety incidents have been very difficult to defend. Typically, prosecutors were able to establish the employer's criminal liability simply because the accident occurred. The *Kirk* decision means courts will require a more robust examination of how, in real terms, particular acts or omissions by the employer led to a breach of the duty to ensure the health and safety of employees.

Background to the decision

The High Court application arose out of the successful prosecution of Kirk Group Holdings and its director, Graham Kirk, by the New South Wales WorkCover Authority in the New South Wales Industrial Relations Commission (since renamed the Industrial Court).

The Kirk Group owned a farm near Picton in New South Wales. Mr Kirk, who was lacking in farm experience and was not in good health, had employed Graham Palmer as farm manager. Mr Palmer was himself very experienced, having run a large property of his own. Mr Kirk left Mr Palmer to run the day-to-day operations of the farm.

In June 1998, Kirk Group purchased an all terrain vehicle on Mr Palmer's recommendation. On 28 March 2001, Mr Palmer was killed when he left a formed road on the farm for no apparent reason and drove the vehicle down the side of a steep slope, causing the vehicle to overturn.

After a two year investigation into Mr Palmer's death, WorkCover prosecuted Kirk Group and Mr Kirk for

breaches of the *Occupational Health and Safety Act 1983* (NSW) (since replaced) in the Commission.

The Kirk Group was charged with breaching sections 15 and 16 of the Act. Section 15 imposed an absolute obligation on employers "to ensure the health, safety and welfare at work of all the employer's employees". Section 16 imposed a similar obligation for people at the workplace who were not employees. Mr Kirk was charged with the same offences through the "deeming" provisions in the Act, which said that where a corporation breaches a provision of the Act, each director of the corporation has committed an offence by failing to make sure that the corporation has complied with its obligations.

The particulars of the charges levelled at Kirk Group were that the company failed to, in relation to the operation of the vehicle:

- provide or maintain systems of work that were safe and without risks to health;
- provide the information, instruction, training and supervision necessary to ensure the health and safety at work of its employees;
- ensure that those people not in the employer's employment were not exposed to risks to their health or safety arising out of the employer's conduct while they were at the employer's place of work;
- take necessary steps to make adequate information available about the use of any plant (the vehicle) at the place of work and about any conditions necessary to ensure that, when put to use, the plant is safe and without risks to health;
- ensure that the vehicle was only operated by people who had appropriate training;
- adequately identify, assess and control risks and hazards associated with the operation of the vehicle on the farm.

Kirk Group and Mr Kirk tried to rely on section 53(a) of the Act, which allows a defendant to defend proceedings under section 15 and 16 if the employer establishes that it was not "reasonably practicable" to comply with the provision of the Act or the associated regulations. They claimed that the accident was not foreseeable, and because of this, it was not practicable for the company to guard against the risk. Justice Walton rejected this defence, and Kirk Group and Mr Kirk were convicted of the offences. A penalty totalling \$121,000 was imposed against them.

¹ *Kirk v Industrial Court of New South Wales; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales* [2010] HCA 1 (3 February 2010)

The defendants tried a number of times to appeal the conviction, with no success, before they were granted special leave to appeal against the decision of the Court of Appeal in the High Court.

The High Court decision

The Full Court of the High Court unanimously quashed the conviction of, and penalties imposed against, Kirk Group and Mr Kirk, and ordered WorkCover to pay their costs for the Court of Appeal and High Court appeals.

The Industrial Court's approach to sections 15 and 16

In reaching their decision, the majority of the High Court considered the absolute obligations imposed by the Act, which say that "the generally stated duty is contravened when a measure should have been taken by an employer to obviate an identifiable risk". This, the majority said, is a higher standard than the common law standard to take 'reasonable care'. It also stands apart from similar legislation in most other States in Australia, where the employer's obligation to take care of the health and safety of employees is limited to measures that are practicable.

According to the majority's judgment, it follows that a statement of offence under the Act must identify the act or omission said to breach sections 15 or 16. This requirement is more apparent when considering the defences available under section 53 of the Act. For instance, the defence under section 53(a) of the Act - that it was not 'reasonably practicable' to take a certain measure - can only apply to particular measures identified as having been necessary in the statement of offences. The majority made the following comment:

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.

The High Court found that the statement of offences against the defendants did not identify what measures Kirk Group could have taken (but failed to take).

Instead, it largely repeated the general wording of the offence provisions of the Act. This meant that the defendants were denied the opportunity to properly put forward a defence under section 53(a) of the Act. As a result, the Industrial Court had exceeded its power by convicting an employer on charges which failed to identify the acts or omissions that constituted the alleged offences.

Justice Heydon, who agreed with most of the majority's reasoning, dissented from the orders proposed. In a separate judgment, His Honour was scathing of WorkCover, stating:

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"... It is time for the WorkCover Authority of New South Wales to finish its sport with Mr Kirk.

Jurisdictional errors and right of appeal

As well as agreeing that WorkCover failed to properly identify the acts or omissions that constituted a breach of the Act, the majority considered the jurisdictional errors made by the Industrial Court which, of themselves, should have led the Court of Appeal to quash the convictions and sentences imposed on Kirk Group and Mr Kirk.

The Industrial Court permitted Mr Kirk to be called as a witness by the prosecution, which contravenes the principles of criminal and evidentiary law and the *Evidence Act 1995* (NSW).

The majority went on to consider the ability of higher courts to quash decisions on the basis of such jurisdictional errors, where clauses exist in State legislation to limit appeals from, or other challenges to, decisions of the court in error. In this case, the High Court considered the effect of such a clause in the *Industrial Relations Act 1996* (NSW), which supposedly limits challenges to or appeals from

decisions of the Industrial Court. The High Court held that this provision was subject to constitutional limitations. Specifically, it could not take the power to grant relief on account of jurisdictional error from the Supreme Court - as that was beyond State legislative power.

Implications of the *Kirk* decision

The High Court's decision will have a significant impact on the way employers are prosecuted for breaches of New South Wales OHS laws under the Act. It will no longer be acceptable for statements of offences to merely regurgitate the relevant provisions of the Act. Specific details about the relevant acts or omissions that were allegedly offences will need to be provided.

Further, and particularly in light of the comments made by Justice Heydon, it is likely that employers will now be better placed to successfully defend prosecutions for breaches of workplace health and safety legislation where the claim involves an experienced manager who was appointed by an employer who had little experience in the relevant field, and whose injury arose from a system of work designed or implemented by the manager.

Impact on Queensland OHS laws

The decision is also likely to have direct implications for prosecutions by Workplace Health and Safety Queensland under our equivalent legislation - the *Workplace Health and Safety Act 1995* (Qld). Queensland is the only other Australian jurisdiction which imposes the same absolute duty on employers to discharge their workplace health and safety obligations.

Like the New South Wales legislation, Queensland's legislation states that an employer contravenes their duty when a measure to prevent a risk should have been taken, but was not. While section 53(a) of the NSW Act has no counterpart in Queensland's legislation, one of the legal defences available to a prosecution in Queensland is that the injury occurred because of causes over which the employer had no control.

We anticipate that the *Kirk* decision will be applied to these provisions so that the Queensland regulator, in maintaining a prosecution, will need to include specific details about the employer's acts or omissions that are said to constitute the offence. This will represent a significant departure from established Queensland authorities, such as that of the Queensland Industrial Court in *Newman v Holyoake Industries (Qld) Pty Ltd*. In that case, it was

held that that the onus of proof lies on the respondent employer to demonstrate that they discharged their workplace health and safety obligation, and that the prosecution has no obligation to limit the burden placed on the employer by showing how the employer fell short of the relevant standard.

Historically, all that the prosecution in New South Wales and Queensland OHS cases needed to be able to prove was that the relevant employee was exposed to risk. This is now likely to change. Incidents that might have been prosecuted in the past may not be prosecuted in the future if it is difficult to identify exactly what the employer should have done to eliminate or reduce risks.

Fallout from the decision

Calls have already been made for a Royal Commission enquiry into all convictions under the NSW legislation over the last 15 years. Some people have also suggested that decisions should be quashed and penalties repaid to employers where appeal time limits have expired in cases where similar flaws have been identified.

The *Kirk* decision also has some bearing on the incoming national OHS laws, due to begin in 2012. These have met with some opposition from the union movement because, unlike the existing law in NSW and Queensland, they do not retain the 'reverse onus' of proof provisions - that (except in extraordinary circumstances) an offence has been committed and criminal liability should follow if a risk to safety is identified. *Kirk* is authority for the view that, even if the national scheme was to evolve down this path, criminal liability would still require proof of specific, rather than general, failures by employers and other obligation holders to eliminate safety risks.

For more information about this decision, please contact HopgoodGanim's Industrial and Employment Law specialists.

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