Captain Kirk boldly goes

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In this article, Jeffrey Phillips and Stephanie Vass consider the High Court's findings in Kirk v NSW IRC, as well as its implications for the formulation of prosecutions under New South Wales occupational health and safety law and procedure more generally for WorkCover and the New South Wales Industrial Court.

In its first decision of 2010, the High Court has handed down *Kirk v Industrial Relations Commission of New South Wales; Kirk Group Holdings Pty Ltd v Work Cover Authority of New South Wales (Inspector Childs)* (2010) 239 CLR 531 (*Kirk v NSW IRC*), which deals with the conduct of occupational health and safety prosecutions in New South Wales. The High Court criticised the way in which the WorkCover Authority formulates charges under the *Occupational Health and Safety Act 1983* (NSW) (OHS Act) and the way in which the Industrial Relations Commission (now the Industrial Court) conducted the trial contrary to the rules of evidence.

The High Court also rebuked the IRC's "settled" view that it was not necessary for the prosecution in such a case to demonstrate with particularity what specific measures the defendant(s) should have taken to ensure the safety of persons in the workplace.

The decision represents a fundamental change to New South Wales OHS law, bringing it into line with the law of other States. It is also yet another challenge to the position and status of the Industrial Court and sets the agenda for genuine consideration of who should retain the right to prosecute in the context of harmonised work health and safety laws.

FACTS OF THE CASE

The appellants before the High Court were Kirk Holdings Pty Ltd (the Company) and its director, Mr Kirk. The Company owned a farm near Picton in the State of New South Wales and employed Mr Graham Palmer as the farm manager. Mr Palmer, a man experienced and competent in the management of a large property, took responsibility for the running of the farm, including the implementation of safety measures. Mr Kirk, by contrast, did not have any experience in farming and did not have a day-to-day role in the operation of the farm. On the recommendation of Mr Palmer, the Company purchased an All-Terrain Vehicle (ATV).

On 28 March 2001, when Mr Palmer was towing three lengths of steel using the ATV, he left a purpose-built road and drove overland down the side of a hill. The ATV overturned and Mr Palmer was killed. These actions were subsequently described by Heydon J, at [125], as "inexplicably reckless".

Mr Kirk and the Company were charged with offences under ss 15(1) and 16(1) of the OHS Act for failing to ensure the health and safety of Mr Palmer and the contractors working on the farm. Mr Kirk was charged because he was concerned with the management of the Company. Mr Kirk and the Company pleaded not guilty to the charges, relying on the defence in s 53(a) of the Act that it was not "reasonably practicable" for Mr Kirk and the Company to comply with their duties, since it was unforeseeable that Mr Palmer would ride down the side of the hill as he did. Walton J of the New South Wales Industrial Relations Commission found both Mr Kirk and the Company guilty of the offences, and accordingly fined Mr Kirk and the Company $11,000 and $110,000 respectively.

Interest in this case extended beyond the normal legal journals and was reflected in wide coverage in the general press. The Legal Affairs section of The Australian on 5 March 2010, reported that the conviction rate for defendants charged under the OHS Act before the Industrial Court of New South Wales was running at 98.4%. This rate was said to be far in excess of conviction rates in other States.

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Mr Kirk and the Company sought and were granted special leave to appeal to the High Court. In a unanimous judgment, the High Court quashed the convictions of Mr Kirk and the company. The combined decision of their Honours French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ was accompanied by a single judgment of Heydon J, which contained his strong views on the errors made by both the prosecutor and the court.

ISSUES OF CONCERN TO THE HIGH COURT

The High Court highlighted several matters of concern in the case, including particulars, the nature of identifiable risks, evidentiary matters and the privative clause.

Particulars

Consistent with accepted precedent in the Industrial Relations Commission, the formulation of charges by the prosecutor against Mr Kirk did not identify what measures should have been taken to prevent the risk of injury to Mr Palmer. Further, aside from ensuring that only trained people used the ATV, the charges did not specify the grounds on which Mr Kirk and the Company failed to ensure Mr Palmer's health and safety. Despite the established nature of this approach in New South Wales, it was found to be in error by the High Court.

The problem for the Industrial Relations Commission on the issue regarding the provision of particulars started with the single judge decision in *WorkCover Authority v Fernz Construction* (1999) 91 IR 119 at 132, which was more keenly followed than the more traditional criminal pleading principles found in the Full Bench of the then Industrial Court of New South Wales and trial judge's decisions in *Boral Gas (NSW) Pty Ltd v Magill* (1995) 58 IR 363; (1993) 53 IR 7.

Importantly, at [34] of the combined judgment of the High Court, the following is stated:

> 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, an 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 the 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 that 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 combined judgment further criticised the judge in the court below in that by not requiring the particular measures that should have been taken to have been pleaded, the defendant company and its director were unable then to call upon the operation of the statutory defences. Rather, the defendant company and its director were required to show why it was not reasonably practicable to eliminate possible risks associated with the use of the ATV.

The High Court found that these deficiencies in the particulars were unfair because it deprived Mr Kirk and the Company from "knowing what measures they had to prove were not reasonably practicable". This prevented Mr Kirk and the Company from properly understanding the case against them and therefore be able to defend it.

The Industrial Relations Commission was required to judge the reasonableness of any precautions taken by Mr Kirk and the Company with the benefit of hindsight. The High Court rejected this obligation. It held that the provisions of the OHS Act were not intended to operate in a way which required an employer to establish that there were no reasonably practicable measures, of any kind, which could have addressed the risk in order to defend a prosecution. The High Court commented that if considered in that manner, it was always possible to think of something further that could have been done.

Accordingly, the High Court found that WorkCover failed to give proper particulars of the alleged offence committed by Mr Kirk and the Company. In doing so, the High Court overturned a long line of case law (notably in New South Wales and Queensland), which held that, where the onus of proof

to establish a defence is on the employer, the regulator is not required to particularise what it alleges the defendant should have done to prevent the breach.

Identifiable risks

The High Court further rejected the previously accepted principle that the absolute nature of the obligation meant that the prosecution must only prove that a risk existed and that it was not eliminated by the employer. The High Court said, at [34], that the provisions relating to offences and defences in the OHS Act were not intended to operate this way:

> [I]t 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?

Heydon J, at [125], separately made significant comments in relation to the supervisory obligations of an employer with an experienced employee who has been reckless:

> 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.

Evidentiary matters

The High Court criticised the conduct of the prosecution in its failure to adhere to the rules of evidence. Mr Kirk was called by the prosecution as a witness even though that course had been agreed by both sides. This problem partly arose out of the fact that Mr Kirk was a competent witness against his company. The fact that he was called in the case against himself was contrary to s 17(2) of the *Evidence Act 1995* (NSW), as against himself he was not competent to give evidence as a witness for the prosecution. This failure amounted to jurisdictional error. Subsection 17(2) of the *Evidence Act* was an absolutely fundamental rule underpinning the whole accusatorial and adversarial system of criminal trial in New South Wales, and departure from it was said to be "substantial".

Privative clause

The combined judgment also dealt with more technical issues dealing with jurisdictional error and the privative provision found in s 179 of the *Industrial Relations Act 1996* (NSW), which purportedly protects decisions of the Industrial Relations Commission from appellate review. It was said that such finality or privative provisions have been a prominent feature in the Australian legal landscape for many years; however, they are affected by constitutional considerations. It was said that the supervisory role of State Supreme Courts to control the exercise of State executive and judicial power by persons and bodies other than the Supreme Court was one of the defining characteristics of such courts. If it deprives State Supreme Courts of this power it would be to "create islands of power immune from supervision and restraint" and develop "distorted positions". Importantly, legislation that would "take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power".

Clearly and loudly it has been stated that the Industrial Relations Commission is a court subordinate and subject to the supervisory jurisdiction of the Supreme Court of New South Wales.

Particular criticism from Justice Heydon

The judgment of Heydon J was strongly critical of the Industrial Relations Commission. Part of his Honour's judgment was dedicated to the conduct of the proceedings before the Full Bench of the commission. The Full Bench described the appellants' earlier application to the Court of Appeal as "forum shopping". He said it was inappropriate to describe the conduct of litigants who, aggrieved by the decision of a court of New South Wales attempted to remedy it by making an application to the Court of Appeal. This amounted to (at [121]):

> an assertion of exclusive dominion over the fields within its jurisdiction and did not recognise that the Industrial Court was controllable by the Court of Appeal and that the Industrial Court was bound, both

> its trial judges and Full Bench to follow the law as stated by the Court of Appeal…its merits should not have been the subject of pejorative language.

This led in turn to Heydon J stating how sometimes the legislature elects to create separate or specialist courts to determine particular types of litigation. He said some specialist courts "tend to lose touch with the traditions, standards and mores of the wider profession and judiciary", and that they become over-enthusiastic about vindicating the purposes for which they were set up and exult that purpose above all other considerations. His Honour, at [122], cited Walker in *The Rule of Law* (Melbourne University Press, 1988, p 35), as follows:

> History teaches us to be suspicious of specialist courts and tribunals of all descriptions. They are usually established precisely because proceedings conducted in accordance with normal judicial standards of fairness are not producing the outcomes that the government wants. From the Court of Star Chamber to the multitude of military courts and revolutionary tribunals in our own century, this lesson has been repeated time and time again.

The judgment of the High Court in *Kirk v NSW IRC* represents a fundamental change to New South Wales occupational health and safety law and gives a new direction for the Industrial Relations Commission and WorkCover. First, with regard to OHS law in New South Wales, the previous system has been brought into line with the law of other States. The decision will impact on the way in which prosecutions are commenced, pleaded and run.

THE WAY FORWARD

Any WorkCover proceedings against employers for a breach of the OHS Act will now be required to specify not only the "risk" that gave rise to the incident but also what measures an employer should have taken to prevent an accident or injury. The Kirk decision will also have implications on the prosecution of directors and managers and the responsibilities of these people in their roles. It will lead the way for more clarity by WorkCover in such prosecutions.

The decision is indicative of an Industrial Relations Commission under siege from several quarters. Its scope has been slowly reduced by State legislative change and more profoundly by the Howard Government's Work Choices legislation. The effect of those changes has been enhanced by the State government and the passing late last year of the *Industrial Relations (Commonwealth Powers) Act 2009* (NSW), which transferred the rest of New South Wales employers to the national system save for employers in the public sector and local government. Importantly, the harmonisation of occupational health and safety laws is something which will come about in the next few years. Heydon J's criticism of the court not being one where people with wide criminal law experience are to be found may be a telling reason why some may argue that the OHS jurisdiction ought be transferred to one of the ordinary courts, such as the District or Supreme Courts or both. The Industrial Relations Commission and the Industrial Court has at least 12 to 18 months to recognise its position in the hierarchy of courts in New South Wales, should it be determined that it retain this important part of its jurisdiction.

Finally, the High Court decision forces a calm consideration as to whether WorkCover, and in turn the Department of Mineral and Forest Resources and indeed secretaries of trade unions with the advent of harmonisation of OHS laws, should retain the right to prosecute. The right to prosecute might be thought better to be given to the Director of Public Prosecutions, an independent prosecutorial body perhaps better placed and more used to prosecuting breaches of the criminal law. Rumour has it that WorkCover is reviewing all its current investigations and prosecutions. To overcome its past failures and the erroneous application of the safety laws as revealed by the High Court, WorkCover ought to closely consider closed files where there have been bad convictions and sentences imposed, particularly against individuals. The provisions of the *Crimes (Appeal and Review) Act 2001* (NSW) may assist WorkCover to show true remorse and provide an avenue for some of the unfairly treated personal defendants to have their convictions quashed and receive a pardon.

STOP PRESS! KIRK NOT FOLLOWED IN QUEENSLAND

As the first issue of Workplace Review was being finalised, there were developments concerning Kirk's application outside New South Wales.

On 27 April, the Industrial Court of Queensland declined to follow *Kirk v NSW IRC* when presented with an appeal on the basis of a prosecution lacking the particulars of a charge relating to a workplace death. *NK Collins Industries Pty Ltd v Peter Vincent Twigg* (C/2009/56) was differentiated from *Kirk v NSW IRC* on the basis of differences between applicable State legislation.

NK Collins Industries Pty Ltd was charged under s 28(1) of the *Workplace Health and Safety Act 1995* (Qld) following the death of a worker in June 2007 who was crushed while felling dead trees. The respondents in this case identified only the risk of death and the source of the risk when making their complaint against the company, and not the particulars of preventative action the company should have taken.

While this would not have been sufficient to comply with the *Occupational Health and Safety Act 1983* (NSW), failing to address the issue of preventative action was not found to be a barrier to prosecution under the *Workplace Health and Safety Act*. The court characterised these particulars as necessary for the case of the appellant, rather than the respondent, under the defences provided by s 37 of the Act.

The court did not indicate that *Kirk v NSW IRC* was irrelevant. In fact, while this case turned on a distinction between workplace safety legislation in New South Wales and Queensland, other breaches of workplace safety and other pieces of workplace safety legislation may provide a different outcome with regard to the particulars of prosecution.

The influence of Kirk has been felt in New South Wales with the Court of Appeal recently making orders against a decision of the NSW IRC. To read Jeffrey Phillips' take on Department of Health (NSW) v Industrial Relations Commission (NSW) [2010] NSWCA 47, see "Captain Kirk Strikes Again" on the Thomson Reuters' Workplace portal at www.thomsonreuters.com.au/workplace.