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IMPLICATION OF THE HIGH COURT'S DECISION IN KIRK

GENERAL OVERVIEW:-

The High Court decision in the matter of *Kirk V Industrial Relations Commission of NSW & WorkCover NSW* [2010] HCA 1 (3 February 2010) ("**Kirk**") has forever changed the way in which OH&S prosecutions in NSW 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 supervised those Specialist Courts to ensure that they do not exceed their jurisdiction or otherwise engage in jurisdictional error.

In its decision, one of the Court's most senior, eminent and conservative Justices felt compelled to make some very pointed observations about the "injustices" that Mr Kirk and the Kirk Company were made to endure under the NSW OH&S system.

The Court's observations are an indictment of WorkCover NSW and the processes by which it purports to exercise its OH&S prosecutorial functions and the NSW State Government's OH&S legislative scheme that has allocated a criminal jurisdiction to a specialist Industrial Court that has resulted in a body of "distorted positions" developing in that Court, inconsistent with main stream Australian Criminal law as determined and supervised by the High Court of Australia.

Some of the specific observations made by the High Court include:-

- "…[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

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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 ISSUES THAT ARISE FROM THE KIRK DECISION:-

1. ***The Industrial Court of NSW has systemically misinterpreted and misapplied the provisions of sections 15, 16 and 53 of the OH&S Act resulting in a body of [distorted positions] developing in that Court.***

   It has been determined by the High Court that charges laid in relation to an alleged breach must contain particulars that identify "...what measures the employer could have taken but did not take" - there must be some identification of "...the act or omission which constituted a contravention" of the section alleged to have been breached.

   The identification of the risk which has not been addressed by appropriate measures by the employer must be undertaken by an inspector authorised to bring the prosecution under the OH&S Act. It is the measures so identified which assume importance to any charge brought. Sections 15 & 16 are contravened where there has been a failure, on the part of an employer, to take a "particular measure" to prevent an identifiable risk eventuating.

   The Criminal Procedures Act does not dispense with the common law requirement that a charge specifying the time, place and manner of the defendant's acts or omission.

   When an employer seeks to avail itself of the defence under section 53 in the context of proceedings under ss15 and 16, the employer is not required to negative the general provisions of ss15 and 16 by establishing that "every possible risk was obviated". Rather, the defence requires that regard be had to the breach of the provision which is alleged constituted the offence. A breach or contravention of s15 or s 16 is the measure to be taken, the particular act or omission of the employer referred to in the charge and it is that which the employer is required to establish on

"the balance of probabilities" it was not reasonably practicable for the employer to have undertaken.

The Industrial Court was wrong in approaching its interpretation of the OH&S Act by taking it as sufficient that it be alleged that "as a consequence of a series of unspecified failures on the part of an employer that there remained present general risks to the health and safety of employees and others". The Industrial Court's established proposition that a prosecutor was not "...required to demonstrate that particular measures should have been taken" is wrong. Further, since it was considered unnecessary by the Industrial Court for the prosecutor to identify any particular measures, the employer in its defence was required to establish that there were "no reasonably practicable measures of any kind" which could have been addressed to the type of risk. In short, the Industrial Court's approach was that if there was "....something that could be done, the causal connection with the risk would remain and the employer would be found guilty of the offence. The High Court has definitively determined that the provisions of the OH&S Act were not intended to operate in this way.

In particular, the High Court has determined that the approach adopted by the Industrial Court failed to distinguish between the content of the employer's duty, which is generally stated, and the fact of a contravention in a particular case. The High Court observed that:

> "...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 in the matter properly the subject matter of the charge.

The charges in the Kirk prosecutions were general in nature (as is common in many OH&S prosecutions initiated by WorkCover NSW) and relevantly they did not contain particulars that identified the act/s or omission/s which constituted the contravention. As a consequence, absent the identification of the measures the Kirk company should have taken, or failed to take, the Kirk company was denied the opportunity to properly put its defence under s 53(a). Instead, the Kirk company was required to show why it is not reasonably practicable to eliminate all possible risk. In the circumstances, the Industrial Court misunderstood the obligation imposed by the Act and consequently made orders beyond its jurisdiction.

2. ***The Industrial Court of NSW is an inferior Court to the Supreme Court of NSW in the Australian Hierarchy of Courts and is subject to the supervision of the Supreme Court of NSW when it comes to allegations of jurisdictional error and acting in excess of jurisdiction***.

The High Court has reaffirmed, in no uncertain terms, that notwithstanding that the State legislation that established the Industrial Court of NSW expressly provides that the Industrial Court of NSW is a Court with equivalent status to the Supreme Court of NSW, the Australian Constitution creates a Hierarchy of Courts in Australia which preserves the supremacy of the State Supreme Courts.

In particular, the Australian Constitution preserves the State Supreme Courts' powers to supervise the jurisdictions of specialist State Courts. The High Court has

reaffirmed that State legislation cannot remove or diminish a State Supreme Court's powers to supervise specialist State Courts to ensure that they do not engage in jurisdictional error or otherwise act beyond their jurisdiction. In short, if a State specialist Court, like the Industrial Court of NSW, makes orders beyond its powers, the Supreme Court of NSW has the power to issue an order in the nature of certiorari to quash the orders of the Industrial Court of NSW.

In this regard the High Court found that the privative provisions of Section 179 of the *Industrial Relations Act 1996* (NSW), correctly interpreted, could not prevent the Supreme Court of NSW from making an order in the nature of certiorari in the face of jurisdictional error or the exercise of jurisdiction where the Industrial Court had no power.

3. ***The High Court has sought to clarify the differences between jurisdictional and non-jurisdictional error by reflecting upon their decision in Craig V. South Australia (Craig) and making it clear that Craig should not be taken as marking the boundaries of the field.***

The High Court has again acknowledged the difficulty of distinguishing between 'jurisdictional" and "non-jurisdictional" error and indeed the difficulties that can arise in applying the principles in *Craig* to State specialist Courts. The High Court has made it clear that an "authoritative decision" (final decision) of an inferior State specialist Court is not free from review if it is based on jurisdictional error.

The High Court determined that it was important to recognise that the reasoning in *Craig* was not seen as providing a rigid classification of jurisdictional error. In short, the examples in *Craig* are not to be taken as marking the boundaries of the relevant field.

In relation to the Kirk matter the High Court held that the Industrial Court's error in the construction of Section 15 of the OH&S Act was "jurisdictional error" of the third kind identified in *Craig* (ie. that the Industrial Court misapprehended the limits of its functions and powers). By misconstruing s.15 of the OH&S Act the Industrial Court convicted Kirk and the Kirk Company of offences when what was alleged and what was established did not identify offending conduct. The High Court also found that such an error was not only beyond the limits of the Industrial Courts functions and powers, it was an error that led to the making of orders convicting Kirk and the Kirk company where the Industrial Court had no power to do so. It follows that the Industrial Court made orders beyond its power to make. Both of these errors entitled Kirk and the Kirk Company to an order in certiorari quashing the orders of the Industrial Court.

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