General Risks or Specific Measures? The High Court Decision in *Kirk*

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***Kirk v Industrial Relations Commission of New South Wales; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* (2010) 239 CLR 531; 113 ALD 1; [2010] HCA 1; BC201000230**

The decision in *Kirk v Industrial Relations Commission of New South Wales; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)*[1] (*Kirk*) is an important decision of the Full Bench of the High Court which provides guidance on the proper interpretation of the Occupational Health and Safety Act 2000 (NSW) (OHS Act 2000), and has implications for the continuing work of the Industrial Court of New South Wales in this important area of law. The decision is also important for administrative lawyers. This note, however, focuses primarily on the implications of the decision for the area of occupational health and safety law. Administrative law issues are likely to be explored in greater depth in other comments.[2]

History of the Proceedings

The proceedings involving Mr Kirk were long and drawn-out. They flowed 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' he was driving overturned while he was carrying a load of steel pipes. The company, and Mr Kirk, were convicted of offences under the Occupational Health and Safety Act 1983 (NSW) (OHS Act 1983) in 2004,[3] and sentenced in 2005.[4] They then sought to avoid the appeal process within

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1 (2010) 239 CLR 531; 113 ALD 1; [2010] HCA 1; BC201000230 (*Kirk*).

2 See, eg, the Hon J J Spigelman 'The Centrality Of Jurisdictional Error', Keynote Address, AGS Administrative Law Symposium; Sydney, 25 March 2010, at <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/spigelman250310.pdf/$file/spigelman250310.pdf> (accessed 15 July 2010).

3 *WorkCover Authority of New South Wales v Kirk Group Holdings Pty Ltd* (2004) 135 IR 166; [2004] NSWIRComm 207.

4 *WorkCover Authority of New South Wales v Kirk Group Holdings Pty Ltd* (2005) 137 IR 462; [2005] NSWIRComm 1.

the Industrial Court[5] by seeking judicial review of the conviction before the NSW Court of Appeal. That court refused to allow the 'bypassing' of the usual appeal system.[6]

Mr Kirk and the company then applied for leave to appeal the convictions to the Full Bench of the Industrial Court. Leave was granted,[7] but on the hearing of the final appeal, the appeal was dismissed.[8] A further application for judicial review was made to the Court of Appeal, but this also failed.[9] Mr Kirk then made a further, successful, application for special leave to appeal to the High Court of Australia.[10] The High Court heard the appeal in September 2009,[11] and handed down its judgment on 3 February 2010.[12]

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.[13] The reasons for the invalidity of the convictions were:

(1) that the Industrial Court had convicted Mr Kirk's company and Mr Kirk without giving any proper particulars of the breach of the OHS Act 1983; and 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 by the High Court to be both 'jurisdictional errors' on the part of the Industrial Court, and also 'errors on the face of the record'.

The Court of Appeal's power to quash the orders of the industrial court

A long-standing feature of the NSW legal system is a 'privative clause' found in s 179 of the Industrial Relations Act 1996 (NSW), which purports to restrict appeals to the NSW Court of Appeal from decisions of the Industrial Court.

The High Court had to rule on whether there was some way by which the Court of Appeal could review the decision, notwithstanding the privative

5 As the High Court does in the decision in *Kirk*, this note refers to the Industrial Relations Commission in Court Session (as it was) by the name it now bears, the Industrial Court of New South Wales (or simply, the Industrial Court.)
6 *Kirk Group Holdings Pty Ltd v WorkCover Authority of NSW* (2006) 66 NSWLR 151; 154 IR 310; [2006] NSWCA 172; BC200604944.
7 See *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW) (Inspector Childs)* (2006) 158 IR 281; [2006] NSWIRComm 355.
8 *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 164 IR 146; [2007] NSWIRComm 86.
9 *Kirk v Industrial Relations Commission of New South Wales* (2008) 173 IR 465; [2008] NSWCA 156; BC200805243.
10 See *Kirk v Industrial Relations Commission of NSW* [2009] HCATrans 93 (1 May 2009).
11 *Kirk v Industrial Relations Commission of NSW* [2009] HCATrans 237, 238, 239 (29, 30 September, 1 October 2009).
12 *Kirk* (2010) 239 CLR 531; 113 ALD 1; [2010] HCA 1; BC201000230.
13 Six members of the court delivered a joint judgment; Heydon J delivered a dissent on the question of costs, but essentially agreed on all other points.

clause. They concluded that there was. The ancient remedy known as the writ of certiorari allows 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 is available is in a case of 'jurisdictional error'; effectively, where the lower court exceeds the jurisdiction it has been given by parliament.

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: it is an essential part of the Constitutional court system that there should be State Supreme Courts with this power.[14] Hence, despite s 179 of the State industrial legislation, the NSW Court of Appeal retained this jurisdiction.[15]

The Industrial Court's wrong view of the OHS Act

Not every error of law made by a court of limited jurisdiction would amount to a 'jurisdictional error'. However, the High Court held that the Industrial Court's approach to prosecutions under the OHS Act 1983 (applied in this case by Walton J)[16] was so fundamentally wrong that it amounted to such an error. It seems clear that, since the structure of the current legislation, the OHS Act 2000, is similar to the 1983 Act, the criticisms will be applicable to the interpretation of the current Act.[17]

The analysis of the proper approach to prosecutions is provided in the High Court judgment.[18] It is worth outlining the relevant provisions briefly. Section 15 of the OHS Act 1983 (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 of the OHS Act 2000), 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 was that s 15 is an 'absolute' duty which has been prima facie breached whenever there is a

14 *Kirk* (2010) 239 CLR 531; 113 ALD 1; [2010] HCA 1; BC201000230 at [100].

15 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 also committed such errors; but in the case of this type of error the 'privative clause' in s 179 was effective to block review on this ground. It was not unconstitutional for the State to remove jurisdiction to review a decision for 'error on the face of the record': ibid, at [89]–[90] and [100].

16 Although Walton J was simply applying a long line of previous Industrial Court decisions — see *Kirk* (2010) 239 CLR 531; 113 ALD 1; [2010] HCA 1; BC201000230 at [32], citing the discussion at [123]ff of the trial decision in *WorkCover Authority of New South Wales v Kirk Group Holdings Pty Ltd* (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 OHS Act 1983, *Carrington Slipways Pty Ltd v Callaghan* (1985) 11 IR 467.

17 The 1983 legislation was applicable because the incident occurred prior to the commencement of the current Act on 1 September 2001. But note that the High Court cross-references provisions of the 1983 Act to provisions of the current Act in a way which clearly implies that their Honours intend the judgment to be applicable to the current Act: see, eg, *Kirk* (2010) 239 CLR 531; 113 ALD 1; [2010] HCA 1; BC201000230 nn 4, 12 and 15.

18 (2010) 239 CLR 531; 113 ALD 1; [2010] HCA 1; BC201000230 at [7]–[38].

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 from arising or the harm ensuing.

Broadly speaking, the High Court agreed with this analysis. The majority judgment noted that the standard required by the OHS Act 1983:

> is not expressed in terms of the standard recognised by the common law, to take reasonable care. It is higher. So much is evident from the requirement 'to ensure' the health, safety and welfare of employees or that persons are not exposed to risks to their health and safety at the place of work.[19]

The court also noted that the defence provision in s 53 was a key component of the Act, and that when this defence is taken into account the duty under ss 15 and 16 is not 'unworkable' as had been claimed at some earlier stages of the proceedings.[20]

The essence of the High Court's view on interpreting the legislation is that a prosecution under the Act can only be validly brought where the prosecutor alleges an 'identifiable' risk, 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 deal with the risk.[21]

This interpretation was 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', was said to imply that '[s]uch a defence can only address *particular measures identified* as necessary to have been taken in the statement of offence'.[22]

The other view, that a risk and the measures to avoid that risk need not be particularised in the prosecutor's pleadings, was said to have the consequence that under s 53 an employer would have to establish 'that every possible risk was obviated'.[23]

While the interpretation of the legislation offered by the High Court is one possible reading of the Act, it is not the only one. In particular, despite the repeated references to the need for an 'identifiable' risk, the words 'particular' or 'identifiable' or 'specific' are not present in s 15 of the OHS Act 1983 (or s 8 of the OHS Act 2000). In the United Kingdom, source of the current Australian model of OHS legislation, the Health and Safety at Work Act 1974 (HSW Act) has consistently been interpreted as workable on the basis that all the prosecution has to show is a general 'risk'.

The House of Lords recently commented on the UK legislation in the decision *R v Chargot Ltd t/as Contract Services*.[24] The facts of this case bear

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19 *Kirk* (2010) 239 CLR 531; 113 ALD 1; [2010] HCA 1; BC201000230 at [10]. See also the passing comment by the High Court in *Leighton Contractors Pty Ltd v Fox* (2009) 240 CLR 1; 258 ALR 673; [2009] HCA 35; BC200908002 at [37], referring to duties under the OHS Act 2000 as 'obligations of strict liability subject only to the defences set out in s 28 of the OHS Act, proof of which lies on the defendant'.

20 *Kirk* (2010) 239 CLR 531; 113 ALD 1; [2010] HCA 1; BC201000230 at [18].

21 See references to the need for a 'particular' measure or 'identifiable' risk: ibid, at [12], [14] and [15].

22 Ibid, at [16] (emphasis added).

23 Ibid, at [17].

24 [2008] All ER (D) 106 (Dec); [2009] 2 All ER 645; [2009] 1 WLR 1; [2008] UKHL 73

some similarity to those in *Kirk*. In that case an employee of Chargot, who had been assisting in works being carried out on a farm, was killed when a dump truck he was driving overturned. Mr Ruttle, a senior officer, was charged under s 37 of the HSW Act.[25] The trial judge, having entered convictions and fines against both companies and Mr Ruttle, and an appeal to the Court of Appeal having failed,[26] the unanimous judgment of the Appellate Committee of the House of Lords dismissed a further 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,[27] 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 1983 had been consistently read, that once there is a risk to safety proved on the facts, 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.[28] In practice, their Lordships noted, the prosecution provides particulars that clarify the alleged failures.[29] Their Lordships also confirmed the view that had been taken by the Court of Appeal in *R v Davies*,[30] that this reversal of onus was not in breach of the obligations of the UK under Art 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.[31]

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 United Kingdom and in New South Wales — received detailed consideration by the High Court in *Kirk*. So far as can be seen, the UK cases were not even drawn to the attention of the court.

One specific comment of the High Court provides a good illustration of how the approach of the Industrial Court can be misunderstood. Justice Heydon criticised the trial judge, Walton J, for making the comment that Mr Kirk 'did not supervise the daily activities of employees or contractors working on the farm'.[32] This indeed does seem a ridiculous proposition on which to base a conviction; as Heydon J notes, many farm owners cannot be present on a

(*Chargot*). For commentary, see B Barrett, 'Whose Burden of Proof?: *R v Chargot Limited (t/a Contracts Services)*' (2009) 38(2) *Ind L J* 215.

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

26 *R v Chargot Ltd* [2007] All ER (D) 198 (Dec); [2008] 2 All ER 1077; [2008] ICR 517; [2007] EWCA Crim 3032.

27 Equivalent to ss 15 and 16 of the OHS Act 1983 (and ss 8 and 9 of the OHS Act 2000).

28 See Lord Hope, *Chargot*, above n 24, at [21].

29 *Chargot* [2008] All ER (D) 106 (Dec); [2009] 2 All ER 645; [2009] 1 WLR 1; [2008] UKHL 73 at [24]–[25].

30 [2003] ICR 586.

31 See Lord Hope, [2008] All ER (D) 106 (Dec); [2009] 2 All ER 645; [2009] 1 WLR 1; [2008] UKHL 73 at [28]–[30].

32 *Kirk* (2010) 239 CLR 531; 113 ALD 1; [2010] HCA 1; BC201000230 at [120]. Justice Walton's comment was made in the trial proceedings, *WorkCover Authority of New South Wales v Kirk Group Holdings Pty Ltd* (2004) 135 IR 166; [2004] NSWIRComm 207 at [105].

day-to-day business (and a similar remark applies to many other types of business owners).

However, with respect, Walton J's comment seems to have been taken out of context. In the context of the trial judgment, his Honour was simply reciting a list of factors that had been established by the evidence, and noting that a number of things that *may* have provided a safer workplace did not happen. In the list of 12 factors, the fact that there was not day-to-day supervision is simply a part of the background information, and it implied that there was an obligation on Mr Kirk to see that *someone* was attending to safety issues, even if he was not personally present. The lack of personal supervision was not a fundamental basis of the conviction, as seems to be implied by the prominence it is given in Heydon J's comment.

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 legislation. In the course of litigation it usually becomes clear to the accused person, through the provision of particulars, what the prosecutor alleges they have failed to do, and hence they are able to focus on that particular risk in their s 53 (or s 28) defence. No accused, contrary to the suggestion made by the High Court,[33] has ever had to mount a '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.[34] This misunderstanding of the legislation by the Industrial Court was said to be a jurisdictional error of such seriousness that the convictions of Mr Kirk and the company should be quashed.

It should be noted that there is no substantial discussion in the High Court decision of the precise provision of the OHS Act 1983 under which Mr Kirk himself was charged, s 50 (equivalent to the current s 26).[35] The court recites s 50,[36] but the logic of the judgment is simply to deal with the liability of the company under ss 15 and 16. This in itself is entirely 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. But one point should be noted.

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'.[37] However, the accepted view in the Industrial Court and arguably in the NSW Court of Appeal is that the defence under s 53 is not directly available to a company officer charged under s 50.[38] It is arguable that

33 *Kirk* (2010) 239 CLR 531; 113 ALD 1; [2010] HCA 1; BC201000230 at [33].

34 See, eg, the conclusion in *Kirk* (2010) 239 CLR 531; 113 ALD 1; [2010] HCA 1; BC201000230 at [34].

35 For previous comment on s 26, see N Foster, 'Personal Liability of Company Officers for Corporate Occupational Health and Safety Breaches: section 26 of the OHS Act 2000 (NSW)' (2005) 18 *AJLL* 107.

36 *Kirk* (2010) 239 CLR 531; 113 ALD 1; [2010] HCA 1; BC201000230 at [24].

37 Ibid, at [27]; see also Heydon J at [117]: 'on the vital s 53 issue Mr Kirk and the Kirk company bore the legal burden of proof.'

38 See N Foster, 'Recent Developments in Personal Liability of Company Officers for Workplace Safety Breaches — Australian and UK Decisions', National Research Centre for OHS Regulation, WP No 63, 2009, at <http://ohs.anu.edu.au/publications/pdf/wp%2063%20-%20Foster.pdf>, p 8 (accessed 15

this comment of the High Court seeming to support the application of s 53 to the *personal* prosecution of Mr Kirk does not in fact do so; the High Court's comment relates to the ability of the company to rely on the s 53 defence, which would have had the implication (if successful) that the director could not be prosecuted under s 50.

The error in calling Mr Kirk as a witness

The High Court identified another problem with the trial proceedings. Justice Gummow noted in the course of the appeal that Mr Kirk had been called by the prosecution as a witness in the trial in which he was one of the accused. Justice Heydon pointed out that under s 17(2) of the Evidence Act 1995 (NSW), an accused is explicitly said not to be a competent witness who can be called by the prosecution in his own trial. Even though this course of action was undertaken with the consent of Mr Kirk, there had been a clear breach of that Act.[39]

This error was identified as another reason for the original conviction to be overturned.[40] The court dismissed 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 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. The departure from the rules of evidence was said to be so 'substantial' that it too amounted to a 'jurisdictional error'.[41]

It seems apparent that there was indeed a breach of s 17 of the Evidence Act in the proceedings, and that this is an important provision for the protection of accused persons that should not be ignored. However, this highlights difficult issues that are faced by the prosecution in charges laid under s 26 of the OHS Act 2000. That provision provides that an officer is 'deemed' to be liable for an offence where the officer's company has contravened the legislation. In order to establish the company's contravention, it may be necessary to call the officer.

That the dilemma is not insoluble arises from the fact that the company's offence will usually be committed under provisions such as s 8 of the OHS Act 2000, which require that a company 'ensure' safety. If there has been an injury or death it will usually be apparent without any more than there has been a failure to ensure safety. The company, to make out a defence under s 28 of 'reasonable practicability', or lack of control, will then need to decide whether or not to call the officer. If they do, then it will not be necessary for the

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July 2010), citing *Newcastle Wallsend Coal Co Pty Ltd v WorkCover Authority (NSW) (Inspector McMartin)* (2006) 159 IR 121; [2006] NSWIRComm 339 at [498]–[499]; *Morrison v Powercoal Pty Ltd* (2004) 137 IR 253; [2004] NSWIRComm 297 at [163]–[167], and *Powercoal Pty Ltd v Industrial Relations Commission of New South Wales* (2005) 64 NSWLR 406; 145 IR 327; [2005] NSWCA 345; BC200507643, noting the Industrial Court's approach to the matter at [118]–[124] and, while not finding it necessary to decide the issue, not expressing any doubts about the interpretation.

39 As Heydon J in *Kirk* (2010) 239 CLR 531; 113 ALD 1; [2010] HCA 1; BC201000230 at [114] notes, s 190 of the Evidence Act 1995 means that the rule providing that a person is not competent to be called by the prosecution as a witness in their own trial, cannot be waived by agreement of the parties.

40 See *Kirk* (2010) 239 CLR 531; 113 ALD 1; [2010] HCA 1; BC201000230 at [50]–[53].

41 Ibid, at [53] and [76]. See also Heydon J at [117].

prosecution to call the officer, and s 17(2) will not be engaged. Should there exceptionally be a need for the prosecution to call an officer to make out a case against a company, then it will be possible to do this by trying the officer in separate proceedings.[42]

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

One argument that occupied some time at the hearing of the appeal was given very short treatment in the judgment. An application for 'special leave to appeal' to the High Court from the decision 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 Australian Constitution allowing appeals to the High Court (particularly s 73(ii)), 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 the High Court held that it was 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 again on another day.[43]

Comments about the Industrial Court's jurisdiction

Discussion of the judgment would not be complete without noting the potential impact of some comments made by the High Court about the jurisdiction exercised by the Industrial Court. The High Court gives the impression of some concern about the idea of 'specialist tribunals'.[44]

In his individual judgment Heydon J in particular cited 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'.[45] He continued, referring to the danger that:

> the courts on which the jurisdiction has been conferred, while in some sense specialist, are not familiar with all the relevant rules . . . [T]he 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 . . .[46]

It could be argued that these concerns are over-stated. It is true that it would be better if appeals were allowed within the usual state system to the Court of

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42 See s 17(3).
43 *Kirk* (2010) 239 CLR 531; 113 ALD 1; [2010] HCA 1; BC201000230 at [49].
44 See, eg, for the majority, *Kirk* (2010) 239 CLR 531; 113 ALD 1; [2010] HCA 1; BC201000230 at [64].
45 Ibid, at [122].
46 Ibid.

Criminal Appeal.[47] But there seem to be many obvious benefits to allowing expertise to be developed in an area of criminal legislation which has a number of special features (as noted in the High Court decision itself), and in which it seems clearly desirable that there be consistency in approach and sentencing.

The Consequences of the Decision

The long-term consequences of the High Court's decision in *Kirk* are hard to predict. In the short term it has no doubt led to a large amount of work by WorkCover to attempt to ensure that prosecution pleadings conform to the newly-clarified interpretation of the legislation.

In addition, there are important and difficult questions about the status of the last 25 years' worth of convictions that 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 convictions proceed to 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?[48]

So far the decisions that have applied *Kirk* have mostly done so on the administrative law points.[49]

Apart from its effect on the current operation of the OHS Act 2000, the impact of the decision in *Kirk* on the Industrial Court, and public confidence in that important specialist court, seems likely to be problematic. The precise issues may eventually fade into the background if current proposals for a

47 Such a recommendation was made in a report for the NSW Government prepared by R McCallum et al, *Advice in Relation to Workplace Death, Occupational Health and Safety Legislation and Other Matters; Report to the WorkCover Authority of New South Wales*, 2004.

48 See the legislation passed following the High Court's decision invalidating 'guideline judgments' in *Wong v R* (2001) 207 CLR 584; 185 ALR 233; [2001] HCA 64; BC200107047, noted in *R v Whyte* (2002) 55 NSWLR 252; 37 MVR 1; [2002] NSWCCA 343; BC200204713. For comment, see J Anderson, 'Leading Steps Aright: Judicial guideline judgments in New South Wales' (2004) 16(2) *Current Issues in Criminal Justice* 140 at 144–7.

49 See *Fair Trading Administration Corp v Owners Strata Plan 58185* [2010] NSWSC 96; BC201000921 at [15]; *Director General, New South Wales Dept of Health v Industrial Relations Commission of New South Wales* [2010] NSWCA 47; BC201001584 at [15]; *Cheltenham Park Residents Association Inc v Minister for Urban Development and Planning* (2010) 172 LGERA 314; [2010] SASC 93; BC201002091 at [37]–[39]. Decisions in other states on other OHS legislation have not provided much guidance for NSW courts; see *R v FRH Victoria Pty Ltd* [2010] VSCA 18; BC201000709 and *NK Collins Industries Pty Ltd and Twigg* (unreported, C/2009/56, Qld Indust Ct, Hall J, 27 April 2010). At a late stage in finalising this note, the Full Bench decision of *Inspector Hamilton v John Holland Pty Ltd* [2010] NSWIRComm 72 (4 June 2010) was handed down. This decision, which it is not possible to analyse here, will provide invaluable future guidance on application of the *Kirk* decision to NSW prosecutions.

national uniform Work Health and Safety Act (WHSA) come to fruition.[50] The present form of the WHSA does not follow the NSW legislation, and seems likely to meet with the approval of the High Court, as it follows in general the Victorian model discussed by the court in *Chugg v Pacific Dunlop Ltd*.[51]

However, the tone of the comments in the judgment in *Kirk* does raise important ongoing issues about the courts that will exercise jurisdiction under any new national OHS legislation. At the moment, choice of judicial venue seems to have been left open to individual states. But if the concern of the High Court about specialist tribunals continues, it may be thought necessary to reconsider the model of the Industrial Court of New South Wales.

Interestingly, the Reports of the National Review into Model Occupational Health and Safety Law seem to suggest that the most serious offences (which they call Category One offences, involving recklessness) should be tried as 'indictable' offences before 'ordinary' criminal courts.[52] Perhaps implementing this recommendation would provide a means of meeting some of the concerns expressed by the High Court.

However, the vast bulk of prosecutions should still be brought, in the author's opinion, in the well-established specialist courts where such exist. Despite some flaws, the Industrial Court of New South Wales 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 relation to those issues. It is to be regretted that a greater attempt was not made by the High Court of Australia in *Kirk* to carefully weigh up the course of decisions and the reasons for those decisions. The concerns expressed by the High Court, where valid, can be met without losing that expertise.

50 For the current proposed draft legislation, see <http://www.safeworkaustralia.gov.au/swa/Model+Legislation/Model+Work+Health+and+Safety+Act/> (accessed 15 July 2010).

51 (1990) 170 CLR 249; 95 ALR 481; [1990] HCA 41; BC9002934, referred to with approval in *Kirk* (2010) 239 CLR 531; 113 ALD 1; [2010] HCA 1; BC201000230 in n 17.

52 *National Review into Model Occupational Health and Safety Laws*, First Report, October 2008, recommendation 53, para 11.6, p 128.