



## HIGH COURT OF AUSTRALIA

Manager, Public Information

3 February 2010

GRAEME JOSEPH KIRK & ANOR v  
INDUSTRIAL COURT OF NEW SOUTH WALES & ANOR [2010] HCA 1  
KIRK GROUP HOLDINGS PTY LTD & ANOR v  
WORKCOVER AUTHORITY OF NEW SOUTH WALES & ANOR  
(S347 and S348 of 2008)

The New South Wales Industrial Court exceeded its power in convicting an employer on charges which did not identify the acts or omissions which constituted the offences alleged. The Industrial Court had also exceeded its power in allowing one of the defendants to be called as a prosecution witness at trial. These two errors justified quashing the conviction and sentencing of the defendants and it would be beyond the powers of the State legislature to prevent the Supreme Court of the State to do as much, the High Court held today.

Graeme Kirk is the director of a company, Kirk Group Holdings Pty Ltd, which owned a farm near Picton on the outskirts of Sydney. Mr Kirk had no farming experience and left the day to day operation of the farm to Graham Palmer, who was employed as a farm manager. The company purchased an All Terrain Vehicle (ATV) on Mr Palmer's recommendation in June 1998. On 28 March 2001 Mr Palmer used the ATV to deliver three lengths of steel, secured to carry racks at the rear of the vehicle, to contractors working in the far back paddock of the farm. Although a formed road led to the area where the contractors were working, Mr Palmer left the road and drove the ATV down the side of a steep slope. Mr Palmer's reasons for leaving the road were never ascertained. The ATV overturned and Mr Palmer was killed.

In March 2003 a judicial member of the Industrial Court of NSW issued orders for Mr Kirk and the company to attend to answer charges under ss 15 and 16 of the *Occupational Health and Safety Act* 1983 (NSW) (the OH&S Act), including that the company had failed to ensure Mr Palmer's health, safety and welfare at work. Mr Kirk and the company were convicted of the offences charged. They appealed to the Court of Appeal of the Supreme Court of New South Wales and to the Full Bench of the Industrial Court, seeking to overturn or quash the convictions. The Court of Appeal declined to intervene until the Full Bench had decided certain issues, but the Full Bench refused leave to appeal on all but a limited ground which it ultimately dismissed. Mr Kirk and the Kirk company were then unsuccessful in a second appeal to the Court of Appeal seeking to quash the decisions of the Industrial Court and the Full Bench. In the High Court they sought and were granted special leave to appeal against the second decision of the Court of Appeal. Their applications for leave to appeal the decisions of the Full Bench were referred to a panel of seven judges, to be considered at the hearing of the appeal for which special leave had been granted.

Section 15 of the OH&S Act requires every employer to "ensure the health, safety and welfare at work of all the employer's employees". Section 16 imposes a similar obligation in relation to persons present at the workplace who are not employees. Offences against ss 15 and 16 arise when an employer fails to take a measure which should have been taken to obviate an identifiable risk. Section 53(a) provides a defence in the context of proceedings against ss 15 or 16, if an employer can establish it was not reasonably practicable to take the measure which would have obviated the identifiable risk.

The High Court held that any statement of an offence arising under either ss 15 or 16 of the OH&S Act had to identify not only the risk but also what measure the employer could have taken to address the risk, otherwise it would be impossible for a defendant to establish whether it was reasonably practicable to take such a measure. The offences with which Mr Kirk and the company were charged did not identify the acts or omissions which constituted the alleged offences. Thus no measures which could reasonably practicably have been taken to obviate the risks could be identified and the defendants were denied the opportunity to properly defend the charges. The Industrial Court fell into jurisdictional error when it convicted Mr Kirk and the company of having contravened ss 15 and 16 of the OH&S Act in circumstances where offences against ss 15 and 16 had not been proved.

The Industrial Court was also obliged to apply the laws of evidence at the trial of the criminal charges. Sub-section 17(2) of the *Evidence Act* 1975 (NSW) provides that a defendant is not competent to give evidence as a witness for the prosecution. It is not possible to waive the provision. In allowing Mr Kirk to be called as a prosecution witness the Industrial Court had conducted a trial otherwise than in accordance with the laws of evidence, which it had no power to do. That error also was jurisdictional.

These jurisdictional errors should have led the Court of Appeal to quash the convictions and sentences applied to Mr Kirk and the company. Although s 179 of the *Industrial Relations Act* 1996 (NSW) prohibits an appeal against, a review, the quashing or calling into question of “a decision of the Industrial Court”, the High Court held that “decision” does not include a purported decision made outside the limits of the powers of the Industrial Court. Furthermore, Chapter III of the Constitution requires there to be a body in each state fitting the description “the Supreme Court of a State”. A necessary feature of a Supreme Court, which it is beyond the power of a State legislature to take away, is the ability to grant relief on account of jurisdictional errors made by courts and tribunals of limited jurisdiction. Thus s 179 could not prevent the Court of Appeal, nor the High Court on appeal, from quashing the convictions and sentences of Mr Kirk and the company. As Mr Kirk succeeded in having the decision of the Court of Appeal overturned, it was unnecessary for the Court to consider whether special leave to appeal the decisions of the Full Bench of the Industrial Court should be granted.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court’s reasons.*