Beyond power: state supreme courts, the Constitution and privative provisions

The High Court's decision in *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1; (2010) 84 ALJR 154 (Kirk) transcends its factual core as one relating solely to industrial safety. It is worthy of close examination not only because it considers the proper approach to the construction of the primary offence provisions for employers under the Occupational Health and Safety Act 1983 (NSW) (the OHS Act)[1], but also because it, first, examines the purpose, meaning and content of jurisdictional error and, secondly, considers the entrenched constitutional purpose of the Supreme Court of New South Wales and the equally entrenched constitutional minimum of judicial review of state tribunals and decision-makers.

Facts

Kirk Group Holdings Pty Ltd (Kirk Group) owned a farm near Picton in New South Wales. Mr Kirk was a director of Kirk Group but was not actively involved in the running of the farm. Kirk Group employed Mr Palmer in the position of farm manager. Mr Palmer managed and operated the farm on a day to day basis.

In June 1998, Kirk Group had purchased an all terrain vehicle (the vehicle) on Mr Palmer's recommendation. On 28 March 2001, Mr Palmer was fatally injured whilst driving the vehicle to deliver three lengths of steel to fencing contractors who were working on another part of farm. In order to deliver the steel, Mr Palmer drove the vehicle along a road that led to the area where the fencing contractors were working. However, immediately prior to the incident, Mr Palmer left the road and proceeded to drive the vehicle down the side of a steep hill. There was no road or track on the slope of that hill. The vehicle overturned down the slope of the hill and this led to Mr Palmer's fatal injuries.

The OHS Act and the charges

At the time of the incident, s 15(1) of the OHS Act provided that 'Every employer shall ensure the health, safety and welfare at work of all the employer's employees.' Section 16(1) of the OHS Act provided that 'Every employer shall ensure that persons not in the employer's employment are not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they are at the employer's place of work.'

Section 47(1) of the OHS Act provided that proceedings for offences under the Act were to be dealt with summarily and could be brought before the Industrial Court of New South Wales (the Industrial Court). Section 53 of the OHS Act provided for a defence to proceedings for offences against the Act if the defendant could prove that, amongst other things, it was not 'reasonably practicable' for the defendant to comply with the offence provision. In addition, s 50(1) of the OHS Act provided that, if a corporation contravened the Act, then each director of that corporation and each person concerned in its management, would be deemed to have contravened the same provision unless certain defences could be satisfied by the person.

Both Kirk Group and Mr Kirk were charged with offences under ss 15(1) and 16(1) of the OHS Act. The charges did no more than repeat the statutory text contained in ss 15(1) and 16(1) of the OHS Act. The particulars of the charges alleged that Kirk Group had failed to take certain steps in relation to the operation of the vehicle and thereby exposed Mr Palmer and other workers to the risk of injury. Neither the charges nor the particulars identified what Kirk Group or Mr Kirk should have done to eliminate the risk of harm. Rather, the particulars simply asserted a number of general failures on the part of Kirk Group.

Procedural history

After a full trial before the Industrial Court, both Kirk Group and Mr Kirk were convicted of offences under ss 15(1) and 16(1) of the OHS Act.[2] Somewhat surprisingly, the prosecutor called Mr Kirk as a witness in the prosecution case, without objection by the defendants. In convicting both defendants, the trial judge applied well-settled authorities established by the Industrial Court which held that the duty imposed upon an employer, to ensure the health, safety and welfare of employees at work, was absolute. The trial judge found that Kirk Group had failed to eliminate the risk of the vehicle being used 'off-road' and was not satisfied that the defendants had made out a defence on the basis that it could not be said that it was not reasonably practicable to have taken precautions against the risk of harm. Kirk Group was fined a total amount of $110,000 and Mr Kirk was fined a total amount of $11,000.[3]

Both defendants instituted appeals against conviction and sentence in the Court of Criminal Appeal and also brought proceedings in the Court of Appeal of that court seeking orders in the nature of certiorari and prohibition. The Court of Appeal held that it should not intervene until the full court had decided the issue of jurisdiction or refused leave to appeal from the decision in question.[4] In arriving at this conclusion, the Court of Appeal relied upon s 179 of the Industrial Relations Act 1996 (NSW) (the IR Act) which provides that, subject to an appeal to the full bench of the Industrial Court, a decision of the Industrial Court 'is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal' and extends to proceedings for any relief or remedy,

whether by order in the nature of prohibition, certiorari or mandamus, injunctions, declaration or otherwise.

Kirk Group and Mr Kirk then applied to the full court of the Industrial Court granting leave to institute an appeal out of time. This application was rejected except on limited grounds on the basis that the delay in prosecuting the appeal was brought about by a conscious choice made by Mr Kirk and Kirk Group to pursue the question of jurisdictional error in the Court of Appeal as they considered their prospects of success in that court were better than in the Industrial Court.[5] Leave was also refused because the full court reasoned that the proposed appeal sought to challenge a body of jurisprudence which had been well settled in the Industrial Court over 20 years.[6] The full court heard a limited appeal from conviction and dismissed it.[7]

Mr Kirk and Kirk Group applied to the Court of Appeal for orders in the nature of certiorari quashing the decisions of the Industrial Court at first instance and orders in the nature of certiorari quashing the two decisions of the full court. An order was also sought pursuant to s 474D of the Crimes Act 1900 (NSW) for an inquiry into the convictions. The defendants contended that the Industrial Court had failed properly to interpret ss 15, 16 and 53 of the OHS Act so as to make compliance impossible and rendering ineffective the statutory defences. The Court of Appeal held that any such errors were based on findings of fact and did not amount to jurisdictional error.[8] The appeals and applications were dismissed.

The High Court's decision

In a unanimous decision, the High Court found that the Industrial Court had engaged in jurisdictional error and quashed the decisions of the Industrial Court convicting Kirk Group and Mr Kirk. In essence, no error was found in the reasoning of the New South Wales Court of Appeal. The substantive grounds which Mr Kirk and the Kirk Group succeeded on in the High Court, were grounds that were neither argued before the New South Wales Court of Appeal or the Industrial Court. The primary reasons are set out in the decision of the plurality (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). In a separate judgment, Heydon J agreed with the plurality's orders with the one exception being that his Honour also made orders that Kirk Group and Mr Kirk be awarded the costs of the hearings before the Industrial Court and the Court of Appeal. There were three essential limbs to the plurality's reasons for quashing the orders made by the Industrial Court.

First, the plurality found that the Industrial Court had misconstrued ss 15, 16 and 53 of the OHS Act.[9] The plurality held that charges under ss 15 and 16 must identify the act or omission said to constitute a contravention of those provisions and that in many instances this required specification of the safety measure which should have been taken by the alleged offenders (as opposed to simply asserting the steps they had not taken).[10] In the present case, the charges did little more than copy the words of ss 15 and 16 and did not identify what measures that Kirk Group could have taken but did not take.[11] The plurality explained that specification of these matters was critical because the offence provisions in ss 15 and 16 had to be read conformably with the defence in s 53 of the OHS Act.[12] Contrary to well-settled authority in the Industrial Court, the plurality held that 'The duties referred to in ss 15(1) and 16(1) cannot remain absolute when a defence under s 53 is invoked…[t]he OH&S Act delimits the obligations of employers by the terms of the defences provided in s 53.'[13]

The plurality held that the acts or omissions the subject of the charges had to be identified if Mr Kirk and Kirk Group were to be able to rely upon a defence under s 53 of the OHS Act and that in the instant case they were not in a position to satisfy the defence because they had not been told what measures they were required to take and therefore were not in a position to prove that the taking of those measures was not reasonably practicable.[14]

In addition, the plurality found that the Industrial Court had erred by permitting Mr Kirk to be called as a witness in the prosecution case (despite Mr Kirk's counsel not objecting).[15] Section 163(2) of the IR Act provided that the rules of evidence applied to the Industrial Court. Relevantly, s 17(2) of the Evidence Act 1995 (NSW) provides that a defendant is not competent to give evidence as a witness for the prosecution. The plurality held that by permitting Mr Kirk to be called in the prosecution case, the Industrial Court had conducted the trial of Mr Kirk and Kirk Group in breach of the limits on its power to try charges of a criminal offence.[16]

Secondly, the plurality held that the errors engaged in by the Industrial Court were jurisdictional errors. In so concluding, the plurality examined the purpose and meaning of jurisdictional error and observed that it was neither necessary, nor possible, to attempt to 'mark the metes and bounds of jurisdictional error'.[17] Whilst relying upon *Craig v South Australia*[18], the plurality cautioned that the reasoning in Craig is not to be seen as providing a rigid taxonomy of jurisdictional error.[19] In the instant case, the plurality found that the Industrial Court had misconstrued the OHS Act and in so doing had engaged in a jurisdictional error of a kind identified in Craig in that it had misapprehended the limits of its functions and powers.[20] The Industrial Court had no power to convict and sentence Mr Kirk and Kirk Group because no particular act or omission,

or set of acts or omissions, had been identified at any point in the proceedings so as to constitute an offence against the OHS Act.

Thirdly, the plurality reasoned that the privative provision contained in s 179 of the IR Act could not immunise the Industrial Court from the exercise of the Supreme Court's supervisory jurisdiction.[21] In arriving at this conclusion, the plurality held that the operation of a privative provision is affected by constitutional considerations.[22] In this regard, Chapter III of the Australian Constitution requires that there be a body fitting the description 'the Supreme Court of a State'. The plurality held that a defining characteristic of state supreme courts as and from the time of federation was and is their exercise of supervisory jurisdiction as the mechanism for the determination and the enforcement of the limits on the exercise of state executive and judicial power.[23] To deprive the Supreme Court of its supervisory jurisdiction would:

> …be to create islands of power immune from supervision and restraint…it would remove from the relevant State Supreme Court one of its defining characteristics.[24]

The plurality observed that their conclusions should not be taken to mean that there can be no legislation affecting the availability of judicial review in state supreme courts or that no privative provision is valid.[25] However, the plurality concluded that privative provisions such as s 179 of the IR Act, must be read in a manner that takes account of the necessary limits on legislative power brought about by Chapter III of the Australian Constitution.[26] The plurality held that s 179 of the IR Act did not preclude the grant of certiorari for jurisdictional error and accordingly quashed the decisions of the Industrial Court convicting Kirk Group and Mr Kirk.[27]

Conclusion

Aside from its relevance to the proper construction of the OHS Act and providing another timely reminder that it is difficult to exhaustively state the content of jurisdictional error, the decision in Kirk stands as a further example of the development and reach of what is an increasingly growing body of Chapter III jurisprudence. If it was ever in doubt, there is now no room for quarrel about the prominent role of state supreme courts as an entrenched part of the Australian judicial system. What follows from that axiomatic proposition is that any incursion or limitation upon the exercise of judicial power by state supreme courts necessarily affects the integrity of the Australian Constitution itself. The practical dimension of this constitutional truth is borne out by the decision in Kirk in that it has been authoritatively held that privative provisions in state legislation cannot oust the exercise of judicial review by state supreme courts. So much has been recognised in an extra-curial speech delivered by Spigelman CJ where his Honour observed that 'The effect of *Kirk* is that there is, by force of s 73 [of the Australian Constitution], an 'entrenched minimum provision of judicial review' applicable to State decision-makers…'[28]

A further development arising from the reasoning in *Kirk* is that the principles stated in *R v Hickman; Ex parte Fox and Clinton*[29] may be of limited or no relevance to the validity of privative provisions found in state legislation. The decision in *Kirk* now stands for the proposition that a privative provision in state legislation must be construed so as not to oust the entrenched constitutional role of the Supreme Court to exercise supervisory jurisdiction over inferior courts and tribunals.

By Arthur Moses SC and Yaseen Shariff

Endnotes

1. The OHS Act has since been repealed and replaced by the *Occupational Health and Safety Act 2000* (NSW).
2. *WorkCover Authority of New South Wales v Kirk Group Holdings Pty Ltd* [2004] NSWIRComm 207; (2004) 135 IR 166.
3. *WorkCover Authority (NSW) v Kirk Group Holdings Pty Ltd* [2005] NSWIRComm 1; (2005) 137 IR 462.
4. *Kirk Group Holdings Pty Ltd v WorkCover Authority* (NSW) [2006] NSWCA 172; (2006) 66 NSWLR 151.
5. *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW) (Inspector Childs)* [2006] NSWIRComm 355; (2006) 158 IR 281 at 293 [40].
6. *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW) (Inspector Childs)* [2006] NSWIRComm 355; (2006) 158 IR 281 at 295 [48].
7. *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2007) 164 IR 146.
8. *Kirk v Industrial Relations Commission (NSW)* [2008] NSWCA 156; (2008) 173 IR 465 at 474 [38]-[39].
9. [2010] HCA 1; (2010) 84 ALJR 154 at [74].
10. Ibid., at [14].
11. Ibid., at [25]-[27].
12. Ibid., at [27].
13. Ibid., at [18].
14. Ibid., at [27]-[28].
15. Ibid., at [50]-[53].
16. Ibid., at [76].
17. Ibid., at [71].
18. [1995] HCA 58; (1995) 184 CLR 163 at 177-180.
19. [2010] HCA 1; (2010) 84 ALJR 154 at [73].
20. Ibid., at [74]-[75].
21. Ibid., at [93].
22. Ibid., at [95].
23. Ibid., at [96]-[98].
24. Ibid., at [99].
25. Ibid., at [100].
26. Ibid., at [101].
27. Ibid., at [105] and [108].
28. Spigelman CJ, 'The Centrality of Jurisdictional Error', Keynote Address to the AGS Administrative Law Symposium Commonwealth and New South Wales, 25 March 2010.
29. [1945] HCA 53; (1945) 70 CLR 598.