

February 2010

## WHAT DID I DO WRONG?

### *New guidelines established for occupational health and safety prosecutions*

A recent [High Court decision](#) on occupational health and safety prosecutions should bring comfort to employers. The decision of *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 provides that defendants must be notified of the measures that should have been taken when charged with an offence.

### **Facts**

Mr Kirk was the director of a company that owned a farm in New South Wales (Kirk Group Holdings Pty Ltd). Mr Kirk delegated the task of running the farm to Mr Palmer, a man who he believed to be competent and experienced. Because of his poor health and lack of farming experience, Mr Kirk effectively left Mr Palmer in charge.

Mr Palmer purchased an "All Terrain Vehicle" for the company and on 28 March 2001 used the vehicle to transport lengths of steel to contractors working in the back paddock. Instead of taking the road, however, Mr Palmer decided to drive down the side of a steep hill. The vehicle overturned and Mr Palmer was killed.

Both Mr Kirk and his company were charged with failing to "ensure the health, safety and welfare at work" of employees and failing to ensure that non-employees (the contractors) were not exposed to risk of injury.

In providing the particulars or details of these offences, the prosecution largely replicated the wording of the *Occupational Health and Safety Act 2000* (NSW).

### **How did the case come before the High Court?**

Judge Walton of the Industrial Court heard the case at first instance and convicted Mr Kirk and the company, imposing financial penalties on both. An appeal was then made by Mr Kirk and the company to the Court of Appeal in New South Wales; however this was not successful. The High Court gave special leave for this appeal.

### **The Decision**

The High Court reiterated that "a defendant is entitled to be told not only of the legal nature of the offence with which he or she is charged, but also of the particular act, matter or thing alleged as the foundation of the charge".

In particular, a statement of offences "must at the least condescend to identifying the essential factual ingredients of the actual offence" and specify "the time, place and manner of the defendant's acts or omissions".

The High Court held in relation to this case that "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 a 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 [the Act]. It is also necessary for the prosecutor to identify the measures which should have been taken."

### **Application to Victoria**

The *Occupational Health and Safety Act 2004* (Vic) expresses a different conception to the New South Wales legislation of what constitutes an offence.

In New South Wales the obligations on an employer are absolute - in that “every employer shall ensure the health, safety and welfare at work of all the employees”, and “ensure that persons not in the employer’s employment are not exposed to risks to their health or safety”. The wording of the Act has changed slightly since the charges were laid, however the nature of the obligations remain the same.

In Victoria, the obligation on the employer extends to that which is “reasonably practicable” in providing and maintaining for employees of the employer “a working environment that is safe and without risks to health”, and for non-employees - ensuring they are “not exposed to risks to their health or safety”.

The “reasonably practicable” element is provided for as a defence in the New South Wales Act.

In *Chugg v Pacific Dunlop Ltd* [1990] HCA 41 it was held that the Victorian expression of the offence “places the onus upon the prosecution to show that the means which should have been employed to remove or mitigate a risk were practicable”. The New South Wales version however meant that it was “necessary for the employer to establish one of the defences available...in order to avoid conviction.” It was recognised by the court that it is very difficult for an employer to show that everything reasonably practicable has been done. It is far too easy for a prosecutor to point a finger in hindsight and say that an action should have been taken, when at the time it would simply not have been readily evident to the employer.

While the onus of proof differs between states, the general principle of the High Court decision remains, in that the prosecutor must sufficiently identify the details of what measures should have been taken in order that the defendant may be able to properly respond.

### Practical realities facing employers

Justice Heydon agreed with the majority’s reasoning but went even further, providing helpful insight into the practical realities facing employers. Walton J had concluded that “Mr Kirk did not supervise the daily activities of employees or contractors working on the Farm”. Heydon J remarked that “the suggestion that the owners of farms are obliged to conduct daily supervision of employees and contractors – even the owners of relatively small farms like Mr Kirk’s – is, with respect, an astonishing one. A great many farms in Australia are owned by natural persons who do not reside on or near them, and a great many other farms are owned by corporations the chief executive officers of which do not reside on or near them”. If the trial judge’s reasoning was correct, he submitted that it would justify the view that the legislation “imposed obligations which were impossible to comply with and burdens which were impossible to bear”.

Heydon J also provided comment suggesting that the recklessness of the employee should have been taken into account in deciding whether to prosecute: “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.”

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#### The Moores Legal Workplace Relations Team

For further advice and guidance on any employment issue and how it may impact your business and commercial operations, contact the Workplace Relations team at Moores Legal.

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