

At the Centre

In this edition of *Regulation at Work* we present the regular updates on *Developments in Regulation, Key Research and Reports, Key Cases, International News and Other Developments*. In the Feature Article at the end of this edition we present a discussion of the decision of the High Court in *Kirk v Industrial Relations Commission of New South Wales; Kirk Group Holdings v Workcover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 (3 Feb 2010). This article was written for *Regulation at Work* by Mr Neil Foster of the University of Newcastle.

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Working papers

There are five new Centre working papers online at: <http://ohs.anu.edu.au>. The working papers are:

- Number 72 - *Risk Management and Rule Compliance. Decision Making in Hazardous Industries*, by Professor Andrew Hopkins, Adjunct Professor, The Australian National University;
- Number 73 - *Personal Corporate Officer Liability under the Model Work Health and Safety Bill*, by Mr Neil Foster, University of Newcastle;
- Number 74 - *Safety Decision Making – Drawing a Line in the Sand*, by Dr Jan Hayes, PhD Australian National University;
- Number 75 - *Reflections on General Deterrence and OHS Prosecutions*, by Professor Ron McCallum and Associate Professor Toni Schofield, University of Sydney.
- Number 76 - Case Note on *Kirk v Industrial Relations Commission of New South Wales; Kirk Group Holdings v Workcover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 (3 Feb 2010), by Mr Neil Foster, University of Newcastle.

At the Centre (continued)

Note also that working papers at the Centre's website now include details of any **peer-reviewed publications** subsequently published from these working papers. These additional references are designed to assist OHS regulators, researchers and professionals to identify peer reviewed sources relevant to legislative reviews and inquiries, regulatory research and professional practice.

Would you like to be notified when a new working paper is available? If so, please let us know by email to nrcohsr@anu.edu.au.

Annual OHS Regulatory Research Colloquium

Readers can find power point presentations from the Centre's annual Colloquium for OHS regulatory researchers and OHS regulators, which was held on 2nd and 3rd February 2010. There are presentations relating to personal corporate officer liability; electricity safety regulation; enforceable undertakings; problem solving in OHS enforcement; alternatives to OHS prosecution; inspecting and enforcing psychosocial issues; and general deterrence and OHS prosecutions. There are also presentations on workers' compensation and OHS coverage for non-standard workers; occupational health in the mining industry; human factors and mining incidents; regulatory lessons from Beaconsfield; and mine safety regulation in China. Other presentations address OHS and small business; knowledge, motivation and safe design; the global financial crisis and OHS; OHS decision making in high hazard organisations; the influence of regulation on major hazards and security; OHS culture and nursing; noise exposure; psychosocial stressors; and occupational light vehicle use. The power point presentations are online at:

<http://ohs.anu.edu.au/projects/events.php#past>.

Please let us know if you conduct OHS regulatory research

Are you based in Australia and conducting research relating to OHS regulation – as a PHD candidate, early career researcher or otherwise. If so, and you are not already a member of the Centre's OHS Regulatory Research Consortium, we would like to hear from you so we can keep you informed about the Centre's Annual OHS Regulatory Research Colloquium and the Centre's other activities in OHS regulatory research. Please let us know by email to nrcohsr@anu.edu.au.

At the Centre (continued)

More information about the Centre

More information about the National Research Centre for OHS Regulation, its publications and activities, and about OHS regulation and OHS regulatory research more generally, can be found online at: <http://ohs.anu.edu.au>.

Developments in Regulation

Australia – Following the endorsement of the model *Work Health and Safety Act* on 11 December 2009 by the Workplace Relations Ministers Council (WRMC), Safe Work Australia is now making technical and drafting amendments aimed at: improving and clarifying the operation of the provisions; removing overlap, unnecessary prescription and unintended consequences; achieving consistency with WRMC determinations; and ensuring the provisions are effective and operate as intended. Safe Work Australia members will be provided with the amended draft of the model Act for final approval prior to their meeting on 29 April 2010.

Safe Work Australia's Strategic Issues Group on Occupational Health and Safety (SIG-OHS) is progressively considering various parts of the draft *Model Work Health and Safety Regulations* prepared by Parliamentary Counsel's Committee. It is intended that the SIG-OHS will have received a first draft of all matters to be subject to regulation by June 2010 and that Safe Work Australia Members will be provided with an exposure draft of the WHS Regulations for approval in September 2010. If approved, the model will be provided to WRMC for endorsement and then released for public comment for a period of four months.

More information about developments with the national model WHS Act and regulations is online at: <http://www.safeworkaustralia.gov.au>.

Australia – The Productivity Commission released its draft report, *Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety*. In 2006, as part of the National Reform Agenda of the Council of Australian Governments (COAG), a common framework was adopted for benchmarking, measuring and reporting on the regulatory burden imposed by all levels of government through different types of business regulation. In January 2010, the Productivity Commission released its draft report on OHS regulatory regimes. In 14 chapters, the report provides an overview of regulatory objectives and frameworks in Australia; OHS outcomes; approaches to benchmarking regulatory burdens; regulator characteristics and enforcement practices; accountability of regulators; risk, duty of care and advice; OHS training; worker participation and representation; regulating hazardous substances; psychosocial hazards; other hazards and activities; duplication; and responses by governments to the report. The final report will be presented to the government by the end of March 2010. The draft report is online at: <http://www.pc.gov.au>.

Developments in Regulation (continued)

Also in Australia – Safe Work Australia members agreed to begin the process to declare the *National Code of Practice for the Prevention of Falls in Housing Construction*. More information is online at: <http://safeworkaustralia.gov.au>.

Queensland – Workplace Health and Safety Queensland inspectors will visit every medium sized business in Queensland by 2011 to check the systems they use to meet their obligations under the *Workplace Health and Safety Act 1995*. Businesses will be offered a free voluntary advisory session to identify issues and develop better practices to manage health and safety before an inspection takes place. For this initiative, medium sized businesses are defined as those with declared wages (in 2008-2009) between \$1 million and \$10 million. More information is online at: <http://www.justice.qld.gov.au/fair-and-safe-work>.

South Australia – SafeWork SA has called for submissions on the review of the state's mining regulations. Public comment closes on 6 April 2010. A discussion paper and other materials for making a submission are online at <http://www.safework.sa.gov.au>.

South Australia – The Minister for Industrial Relations approved a *Code of Practice on Working Hours*. The code is intended to address risks arising from excessive working hours and fatigue, and provides an approach to formulating policy on rostering and hours of work. The development of the code was initiated as part of the work of SafeWork SA's *Work Life Balance Strategy*. Particular considerations relating to employees and volunteers providing frontline emergency services are being addressed in guidelines supporting the code. The code will have effect from 1 July 2010 and is online at: <http://www.safeworksa.gov.au>.

Also in South Australia - The South Australian Government has approved a new *Code of Practice for First Aid in the Workplace*. Following a 12-month transitional period the new code will come into operation on 10 December 2010. The code is online at: <http://www.safework.sa.gov.au>.

Other Developments

History of developments in national OHS and workers' compensation systems – The Parliamentary Library of the Parliament of Australia has published a chronology of events, from 1974 to date, relating to establishing national systems for OHS and workers' compensation. The chronology is online at:

http://www.aph.gov.au/library/pubs/bn/eco/Chron_OHS.htm.

Forestry industry OHS tool – WorkCover NSW has issued a *Forest Industry Safety Tool* which provides detailed advice about OHS management in this industry. The forestry tool is online at: <http://www.workcover.nsw.gov.au>.

Key Research and Reports

Changing conceptions of occupational health and safety

Loudoun R and Johnstone R, 'International influences on occupational health and safety and employee well-being' in Wilkinson A et al (eds), *Handbook of Human Resource Management*, Sage Publications, London, 2009, 286-307. This chapter explores the broadening definition of occupational health and safety, and the drivers behind this change. It then examines international developments affecting work and production, together with their influence on occupational injury and disease. The chapter finishes by exploring developments in strategies to manage and regulate health and safety along with current and future challenges for policy makers, workers and managers of health and safety.

OHS standards setting

Johnstone R, 'From catch up to innovation: a history of occupational health and safety regulation in Queensland' in Bowden B et al (eds), *Work and Strife in Paradise: The History of Labour Relations in Queensland 1859-2009*, Federation Press, 2009, 95-112. This chapter outlines the history of OHS legislation in Queensland since 1896, focusing on regulatory models, form and content, implementation and enforcement.

Gunningham N and Sinclair D, 'Organizational trust and limits of management-based regulation' (2009) 43(4) *Law and Society Review* 865-899. This article examines the relationship between management-based regulation and occupational health and safety through two case studies in the mining industry. Key findings are that commitment at corporate level does not necessarily percolate down to individual facilities where ritualistic responses or resistant sub-cultures may resist change. The authors conclude there are implications for management-based regulation and meta-regulation more broadly.

Gunningham N and Bluff L, 'What determines efficacy? The roles of codes and guidance materials in occupational health and safety regulation' (2009) 7(2) *Policy and Practice in Health and Safety* 3-29. This article reviews the key characteristics that determine the efficacy of codes of practice and guidance materials, drawing on evidence from Australia, New Zealand and other countries.

Administration and enforcement

Verhoest K et al, *Autonomy and Control of State Agencies. Comparing States and Agencies*, Palgrave Macmillan, Melbourne, 2010. This book compares the autonomy, control and internal management of state agencies across three European states showing how new public management doctrines work in different politico-administrative regimes. Based on survey data on 226 state agencies in Norway, Ireland and Flanders, the study explains differences in agency autonomy, control and management by referring to international isomorphic pressures, state-specific politico-administrative regimes and characteristics of agencies. The study used organisation theory and neo-institutional

Key Research and Reports (continued)

schools to formulate and test four competing theoretical perspectives and hypotheses about why public organisations are granted autonomy, why they are controlled in specific ways, and how autonomy affects internal management.

Bruhn A, 'Occupational unity or diversity in a changing work context? The case of Swedish labour inspectors' (2009) 7(2) *Policy and Practice in Health and Safety* 31-50. This article discusses the professional representations (culture, identity and practice) of Swedish labour inspectors. Drawing data from three research and evaluation projects about inspection and the inspectorate, the article identifies important differences in professional representations between a male dominated group of experienced technicians and a female dominated group of newly recruited inspectors with tertiary qualifications, often in behavioural sciences. The article discusses how these two distinct groups might develop towards a unified culture and inspection practice.

Lehman Nielsen V and Parker C, 'Testing responsive regulation in regulatory enforcement' (2009) 3 *Regulation and Governance* 376-399. This article reports research testing two different formulations of responsive regulation – the 'tit for tat' strategy and 'restorative justice' responsive regulation. The research, which involved Australian competition and consumer protection legislation, found that to the limited extent that tit for tat responsiveness occurred in practice, it had some effect on behaviour but not attitudes. On the other hand, restorative justice responsiveness had clearer effects on attitudes but not on behaviour.

O'Malley P, 'Theorizing fines' (2009) 11(1) *Punishment and Society* 67-83. This article reviews the theoretical literature on fines as a sanction in criminal justice. The article argues that there is a misleading conviction that sanctions are driven by production relations which seriously underestimates the impact of penal discourses and practice, which can better account for variations in the rise, uneven distribution and recent decline in fines' dominance as a punishment. Also important is the failure of the literature to consider the nexus between the rise of the modern regulatory fine (for example 'on the spot' fines) and the rise of consumer societies. The article is online at: <http://pun.sagepub.com/cgi/content/abstract/11/1/67>.

Etienne J, *The Impact of Regulatory Policy on Individual Behaviour: A Goal Framing Theory Approach*, Centre for Analysis of Risk Regulation Discussion Paper 59, The London School of Economics, London, 2010. This paper presents a theoretical framework for analysing regulatees' responses to behavioural expectations set in public regulation. It identifies the main variables and mechanisms through which regulatory policy may influence individual choices. It provides a theoretical base capable of encompassing the findings of diverse empirical studies of compliant and providing a consistent account of the influence of heterogeneous motives on (non-)compliance decisions. The paper is online at: <http://www.lse.ac.uk>.

McAllister L, 'Dimensions of enforcement style: factoring in regulatory autonomy and capacity' (2010) 32(1) *Law and Policy* 61-78. This article sets out a dimensional conception of enforcement style and explores how this can be applied in the study of the regulatory behaviour of state enforcement agencies.

Key Research and Reports (continued)

Bouder F and Lofstedt R, *Improving Health and Safety. An Analysis of HSE's Risk Communication in the 21st Century*, Health and Safety Executive Research Report RR 785, HMSO, Norwich, 2010. This report examines theory and policy developments relating to risk communication, with the aim of supporting risk communication by the UK OHS regulator. The report is online at:

<http://www.hse.gov.uk>.

Management of OHS

Golbe D and Filer R, *Debt, Profitability, and Investment in Workplace Safety*, Hunter College and the Graduate Centre, Cuny, USA, 2009. This paper reports on research investigating how firms' financial performance affects their OHS performance with regard to compliance with the US Occupational Health and Safety Administration (OSHA) requirements. It finds evidence that firms with higher operating margins are safer as, in general, are firms with more debt in their capital structure. The paper is online at: <http://ssrn.com/abstract=1542364>.

Risk analysis

Hansson S O, 'Risk: objective or subjective, facts or values' (2010) 13(2) *Journal of Risk Research* 231-238. This article examines two contradictory conceptions of risk – risk as objectively given and determined by objective facts, and risk as a social construction independent of physical facts. The author concludes that risk is both fact-laden and value-laden and that this complexity must be reflected in a more sophisticated analysis of risk.

Transport industry

Lekka C and Okunribido O, *A Review of Workplace Transport Safety and HSE Commissioned Work on Manual Handling and Delivery of Goods*, Health and Safety Executive Research Report RR 777, HMSO, Norwich, 2010. This report presents the findings of a literature review conducted by the UK Health and Safety Laboratory to establish significant developments in the field of workplace transport safety, and manual handling and the delivery of goods. The report is online at:

<http://www.hse.gov.uk>.

Workplace arrangements

Johnstone R, 'Institutional arrangements on health and safety representation in Australia' in Walters D and Nichols T (eds), *Workplace Health and Safety - International Perspectives on Worker Representation*, Palgrave MacMillan, London, 2009. This chapter examines the provisions governing worker participation in OHS in Australia, including the functions and powers of health and safety repre-

Key Research and Reports (continued)

sentatives, and rights of entry vested in union officials. The chapter analyses provisions across the nine general OHS statutes, with a particular focus on the New South Wales, Queensland and Victorian OHS statutes.

Sørensen O, Hasle P and Navrbjerg S, 'Local agreements as an instrument of management employee collaboration on occupational health and safety' (2009) 30(4) *Economic and Industrial Democracy* 643-672. This article discusses a new approach to negotiating worker participation in Denmark. The approach involves legislative support for the negotiation of local agreements, between management and union representatives, to tailor health and safety organisation to the workplace level.

Quinlan M and Johnstone R, 'The implications of de-collectivist industrial relations laws and associated developments for worker health and safety in Australia, 1996-2007' (2010) 41 *Industrial Relations Journal* 426-443. This article examines institutional and regulatory linkages between industrial relations (IR) and occupational health and safety (OHS) in Australia, drawing on federal government laws during a period of neoliberal government, events and cases arising from these laws, and empirical research with state OHS inspectorates. The article argues that de-collectivist changes to IR laws exacerbated problems posed by the growth of flexible work arrangements and declining union density, weakening participatory provisions in OHS laws and promoting work arrangements that undermined OHS standards. The article provides evidence of a divergence between IR and OHS laws, and argues for better integration of worker protection laws.

Health, injury and exposure surveillance, and public policy

Landsbergis P, 'Assessing the contribution of working conditions to socioeconomic disparities in health: a commentary' (2010) 53 *American Journal of Industrial Medicine* 95-103. This article discusses some considerations in evaluating the impact of physical and psychosocial working conditions on health, and disparities in socioeconomic health produced by working conditions.

Calvert G and Higgins S, 'Using surveillance data to promote occupational health and safety policies and practice at the state level: a case study' (2010) 53 *American Journal of Industrial Medicine* 188-193. This article reports on the investigation of a cluster of birth defects involving migrant farm workers in the US states of North Carolina and Florida, which led to the creation and passage of new legislation. The legislation resulted in funding to strengthen pesticide poisoning surveillance, pesticide compliance inspections and pesticide safety training. The legislation also extended anti-retaliation rules to cover agricultural workers and increased record keeping requirements relating to pesticide application.

Bugeja L et al, 'Expanding definitions of work-relatedness beyond the worker' (2009) (25(6) *Journal of Occupational Health and Safety – Australia and New Zealand* 461-475. This article presents a classification system developed to identify and categorise an expanded range of injury deaths related to work. The classification system was informed by a review of existing definitions, classification systems and research studies on work-related injury. It was tested on almost 1500 injury deaths reported to the Victorian Corner's Office. The authors suggest the approach has the capacity to more broadly identify and examine the nature and extent of work factors associated with injury deaths.

Key Research and Reports (continued)

Three new exposure surveillance reports from Safe Work Australia are intended to inform preventive strategies by local, state and federal governments. The reports, summarised below, are online at: <http://www.safeworkaustralia.gov.au>.

Safe Work Australia, *Asbestos Exposure and Compliance Study of Construction and Maintenance Workers*, Safe Work Australia, Canberra, 2010. This report presents the findings of a study of awareness, worker compliance with legislation, attitudes of workers and exposure levels to asbestos in construction and maintenance workers.

Safe Work Australia, *National Hazard Exposure Worker Surveillance Report: Noise Exposure and the Provision of Noise Control Measures in Australian Workplaces*, Safe Work Australia, Canberra, 2010. This report describes the demographic and employment characteristics of workers who reported exposure to loud noise and the types of noise control measures provided in workplaces of various industries.

Safe Work Australia, *National Hazard Exposure Worker Surveillance Report: Exposure to Direct Sunlight and the Provision of Sun Exposure Controls in Australian Workplaces*, Safe Work Australia, Canberra, 2010. This report describes the demographic and employment characteristics of workers' who reported exposure to sunlight and the types of exposure controls that were provided in workplaces.

Small enterprises

Hasle P, Bager B and Granerud L, 'Small enterprises – accountants as occupational health and safety intermediaries' (2010) 48 *Safety Science* 404-409. This article reports on a pilot study conducted in Denmark to test whether accountants can act as intermediaries on health and safety. Accountants (164) attended health and safety training and were then surveyed (74 replied) about their experience of advising small enterprise clients about OHS. Most respondents had provided advice but faced constraints due to the relatively minor role OHS played in their agendas with clients and their own limited OHS knowledge. The authors conclude that accountants may act as intermediaries but that institutional support is needed to secure broader application of the approach.

Older workers

Bohle P, Pitts C and Quinlan M, 'Time to call it quits? The safety and health of older workers' (2010) 40(1) *International Journal of Health Services* 23-41. This article reviews evidence on the nature of OHS risks faced by older workers, focusing on contingent work, working hours and work ability (the capacity to meet the physical, mental and social demands of a job). The article discusses some organisational practices and regulatory policies to protect and enhance the health and safety of older workers.

Key Research and Reports (continued)

Migrant workers

Sargeant M and Tucker E, 'Layers of vulnerability in occupational safety and health for migrant workers: case studies from Canada and the UK' (2009) 7(2) *Policy and Practice in Health and Safety* 51-73. This article examines the OHS implications of increasing migration. The article identifies risk factors for migrant workers and compares at-risk workers in Canada and the UK.

Temporary workers

Eiken TE and Saksvik PO, 'Temporary employment as a risk factor for occupational stress and health' (2009) 7(2) *Policy and Practice in Health and Safety* 75-91. This article explores the relationship between temporary employment and occupational stress and health, using data from a longitudinal study in the service sector in Norway and a cross-sectional study in the working population in Norway. Temporary employees reported lower levels of control, but also lower levels of demands and less stress. They were also less likely to be union members or involved in systematic OHSM in their workplaces. The authors suggest some implications for the overall OHS competence and motivation of organisations to take OHS action.

Workplace bullying

Yamada, D, 'Workplace bullying and American employment law: a ten-year progress report and assessment, *Comparative Labor Law and Policy Journal* (forthcoming). This article details the early history of efforts to make American employment law more responsive to workplace bullying, covering a period from 2000 to the present day. The article examines research, education, and advocacy efforts concerning workplace bullying and its legal implications. It then explains the major provisions of the latest version of the model anti-bullying legislation drafted by the author, the *Healthy Workplace Bill*, which has been the basis of bills introduced in a number of states since 2003. The article closes with an assessment of the future of legal and policy initiatives to protect workers against severe workplace bullying in the United States.

Caponecchia C and Wyatt A, 'Distinguishing between workplace bullying, harassment and violence" a risk management approach' (2009) 25(6) *Journal of Occupational Health and Safety – Australia and New Zealand* 439-449. This article outlines the ways that bullying is distinctly different from violence and harassment, and suggests how recognition of this distinction can lead to improved risk management based interventions.

International News

Occupational Health and Safety Administration (OSHA) Regulatory Agenda – OSHA published its half yearly regulatory agenda in December 2009 in the Federal Register. Among the 29 regulatory items on OSHA's agenda is a proposed rule that would define musculoskeletal disorders for reporting and record keeping purposes, and measures to track work-related musculoskeletal disorders to improve statistics and assist policy making on these disorders. Other regulatory matters under consideration are protection of health care workers from airborne infectious diseases, silica, hearing conservation for construction workers, walking and working surfaces, and alignment of hazard communication with the Global Harmonization System for Classification and Labelling of Chemicals (GHS). More information is online at: <http://www.osha.gov> (under Federal Registers).

Needle Stick Regulation in Europe – The European Union's Employment and Social Affairs Ministers have adopted a Directive to prevent injuries and infections to healthcare workers from sharp objects such as needle sticks. The Directive implements a framework agreement on prevention from sharp injuries in the hospital and healthcare sector signed in July 2009 by the European Public Services Union (EPSU) and the European Hospital and Healthcare Employers' Association (HOSPEEM). More information is online at: <http://osha.europa.eu>.

Key Cases

OHS Sentencing: Role of Particulars, and Admissibility of Evidence

R v FRH Victoria Pty Ltd [2010] VSCA 18

An employee died after entering a sewer shaft without a harness and falling three metres into a sewerage pit. The appellant, FRH Victoria Pty Ltd (FRH) was prosecuted for two contraventions of the employer's general duty to employees under section 21(1) of the *Occupational Health and Safety Act 1985* (Vic), for failing to undertake a job safety analysis and for failing to provide the worker with adequate written instructions. FRH entered a guilty plea to both charges but contended that on the day of the incident the worker had only been instructed to clean and grease manhole covers and to note any defects, and had not been instructed to perform maintenance. Judge Murphy found that the employee had been provided with the tools to repair the ladder and dismissed FRH's argument that repairs to the shaft, in a geographically remote location, were to be performed at a later date. Judge Murphy found that although the employee had made an 'unauthorised confined-space entry', as he was working around the shaft "it was reasonably foreseeable that he may have undertaken the task in an unauthorised or impromptu manner".

Key Cases (continued)

FRH appealed to the Victorian Supreme Court of Appeal (Nettle and Neave JJA) against a fine of \$120,000 imposed by the County Court of Victoria. The Court of Appeal upheld the first ground of the Appeal – that Judge Murphy had ‘sentenced on a basis which was not open on the particulars which formed the basis of the plea, namely that [the employee and another employee] had been tasked ... to replace damaged rungs on the manhole shaft.’

Nettle JA agreed with Neave JA’s reasoning that FRH pleaded guilty on the basis that the employees’ job was to lift and grease the man-hole covers. The particulars in the presentment did not allege that the employees’ job included repairing and replacing ladder steps. (FRH had declined to plead guilty to a previous presentment which had alleged this). Neave J (at [49]) noted that the High Court in the *Kirk* case ([2010] HCA 1, see Feature article in this newsletter) recently emphasised the importance of particularising alleged breaches of OHS legislation. Unlike in *Kirk*, Neave JA noted that in the FRH case the particulars of presentment adequately identified the breaches committed by FRH but that ‘it would subvert the principle that an accused must be aware of breaches alleged to constitute an offence under s 21, if it were open to the judge to draw inferences inconsistent with those particulars’ (Neave JA at [50]). In this case the inference drawn by Judge Murphy was directly relevant to the ‘essential legal ingredients’ of the offences committed by FRH and to the question of whether it should be sentenced on the basis that its breaches caused the employee’s death. It was not open to the Judge to infer that FRH instructed the men to repair the ladder steps, when FRH had pleaded guilty on that basis (see [52]).

In relation to the second ground of appeal, Neave JA held that evidence of a conversation involving the deceased employee as to instructions received from a third party were admissible as evidence of the deceased’s belief as to the scope of the job, but not admissible as to evidence of the deceased’s receipt of instructions.

In relation to the Court of Appeal’s exercise of the re-sentencing discretion, Counsel for FRH argued that it could not be established beyond reasonable doubt that FRH’s failure to provide written instructions as to how to carry out the task of greasing the manholes and to prepare a job safety analysis would have caused the deceased’s death. Neave JA accepted that there was evidence of the deceased’s conscious disregard of the safety measures in which he had been trained and that this broke the chain of causation between the incident and the alleged breaches. The prosecutor had failed to prove this chain of causation to the criminal standard – beyond reasonable doubt. At para [71] Neave JA concluded that:

It cannot be proven to the criminal standard that [the worker] would not have got onto the ladder if he had received written instructions limiting the job to greasing manhole covers.

In reducing the fine to \$80,000, the Court of Appeal also took into account that FRH: had been in business for 46 years without prior conviction; invested "considerable funds" in safety and training programs; had ISO certification and had won an award for safety; conducted a safety audit after the incident; provided support to the worker's family; considered safety outcomes when remunerating senior executives; and had a WorkCover premium rate below the industry average.

Key Cases (continued)

Common Law Negligence: Asbestos and Causation

Amaca Pty Ltd v Ellis; The State of South Australia v Ellis; Millennium Inorganic Chemicals Ltd v Ellis [2010] HCA 5

From 1975 to 1978 an employee worked with asbestos pipes manufactured by Amaca Pty Ltd while he was employed by the South Australian Engineering and Water Supply Department. He then was exposed to asbestos while working for Millennium Inorganic Chemicals Ltd from 1990 until he died in 2002. The employee also smoked up to 20 cigarettes a day for more than 26 years. His executor sued the three employers in negligence. The issue before the High Court of Australia was whether the executor had proved that the employee's exposure to asbestos in each of the different workplaces was a cause of his lung cancer. The executor argued that because of the synergistic effect of asbestos and smoking, the court should infer that the exposure to asbestos contributed to the lung cancer.

The High Court unanimously overturned a decision by the Western Australian Court of Appeal that the deceased's exposure to asbestos fibres had materially contributed to his lung cancer, and that all three employers had breached their duty of care. After examining the epidemiological evidence, the High Court concluded that the link between a long-term smoker's lung cancer and his exposure to asbestos fibres at the three workplaces was too tenuous to find that the three employers had breached their duties of care. No scientific or medical examination could say, with any certainty, what caused the employee's cancer in any particular case (see [70]). The High Court noted that the cancer suffered by the deceased was not one of the cancers peculiarly associated with exposure to asbestos. None of the expert witnesses who had testified in the case had assigned a probability greater than 23 per cent to the chance that the deceased's cancer was caused by exposure to asbestos – either alone or in combination with smoking. The High Court noted that it was one thing to state that a small percentage of cases of cancer were probably caused by exposure to asbestos – it was another thing to identify whether a particular individual was a member of that group. The Court observed that the executor could only succeed if she established that exposure to asbestos was a 'necessary condition' in the development of the deceased's lung cancer.

Host Employer Required to Indemnify Labour Hire Agency

Hodge v v CSR Limited [2010] NSWSC 27

Hislop J in the New South Wales Supreme Court found that both a host employer and a labour hire agency were negligent and caused a neck and shoulder injury to the plaintiff worker after the host employer had supplied the worker with a full-sized jackhammer weighing 25 kilograms – rather than the usual 'Kanga' jackhammer weighing 11 kilograms. Hislop J, however, accepted the agency's cross claim that even if it had conducted a safety inspection when the procedure was underway it would have been unlikely to have identified the safety contravention as the usual practice involved appropriate equipment as part of a safe system of work. Hislop J ordered the host employer to indemnify the agency for the damages it was ordered to pay the worker.

Key Cases (continued)

Duty of the Designer of Plant

Ching v Simpson Design Associates Pty Ltd [2009] NSWIRComm 213

The designer of automatic sliding gates was prosecuted under section 11 of the *Occupational Health and Safety Act 2000* (NSW) after a visitor to another employer's workplace was killed by a falling gate while assisting a worker of the employer manually to close the gates after the electronic system had failed. The designer argued that its role as designer was limited to "ensuring the structural integrity of the gates under load", and did not include preventing the gates from falling or to make provision for manual operation. Haylen J convicted the designer. Haylen J held that if the designer had followed basic design principles and had conducted a basic risk analysis, it would have known that the components of the automatic system could sometimes fail, requiring the use of a manual system. It had ignored a foreseeable hazard, and consequently failed to include a simple remedial step to prevent the gates from falling during manual operation. The designer could not close its mind to the future use of the gate.

Dismissal for Failing to Enforce Safe Procedures

Peter Graham Butson v BHP Billiton Iron Ore Pty Ltd [2010] FWA 640

A BHP team leader was dismissed after the employer's investigations showed that the team leader was not enforcing a safe procedure for crossing gaps between walkways and locomotives that were located over three metres above ground level. Fair Work Australia Deputy President McCarthy found that even though he accepted that it was a relatively common practice for workers to cross the gap, the dismissal had been fair. The employer was entitled to seek and expect confidence in the team leader's approach to safety, and as the evidence showed that the team leader displayed ambivalence about safety, it was open to the employer in this case to decide that it no longer had trust and confidence in the team leader to fulfil his responsibilities.

Anti-Victimisation Provisions

Hogan v Police and Community Youth Clubs New South Wales Ltd [2010] NSWIRComm 23

In this case, the worker was a manager at the Bankstown Police and Community Youth Club. He was only informed that a hazardous material survey had revealed asbestos containing materials at the club 10 months after the survey had taken place – whereupon he sealed the rooms in question, lodged an incident report, and complained about the late receipt of the report by email to his superior. Later on the same day he directed a fellow worker to enter one of the sealed rooms to turn off a light. The fellow worker complained to a senior manager, who sacked the worker giving the direction. The latter worker alleged that there had been a contravention of the anti-victimisation provisions in section 23 of the *Occupational Health and Safety Act 2000* (NSW)

Key Cases (continued)

for raising a concern about OHS in his incident report and email complaint. The NSW Industrial Relations Commission held that the report and email did constitute a “complaint” for the purposes of section 23, but that the evidence showed that the senior manager was not aware of the complaint when he sacked the worker. On the facts, he was sacked for serious misconduct in directing a fellow employee to enter an area he knew to contain chrysotile asbestos.

Prosecution of Parent Company, Wholly Owned Subsidiary and Contractor.

***Morrison v Centennial Coal Company Ltd* [2010] NSWIRComm 4**

***Morrison v v Fuchs Lubricants (Australasia) Pty Ltd* [2010] NSWIRComm 5**

These are interesting cases relating to the responsibilities of multiple parties. A parent company, its wholly owned subsidiary, and the contracting company which directly employed the deceased worker were convicted and fined for contraventions of the employer’s general duty under the *Occupational Health and Safety Act 2000* (NSW).

Feature Article: The Kirk Decision

The decision of the Full Bench of the High Court in ***Kirk v Industrial Relations Commission of New South Wales; Kirk Group Holdings v Workcover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 (3 Feb 2010)** has cast into some doubt the interpretation of the New South Wales *Occupational Health and Safety Act 2000* and throws a shadow over the continuing work of the Industrial Court of NSW in this important area of law. This article about the decision was written for *Regulation at Work* by Neil Foster, Senior Lecturer at the Newcastle Law School, University of Newcastle, New South Wales.

History of the Proceedings

The proceedings involving Mr Kirk have been long and drawn-out. They flow 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 (ATV) he was driving overturned while he was carrying a load of steel pipes. The company, and Mr Kirk, were convicted of offences under the 1983 *OHS Act*, in 2004,¹ and sentenced in 2005.² They then sought to avoid the appeal process within the Industrial Court³ by seeking judicial review of the conviction before the NSW Court of Appeal. That Court⁴ refused to allow the “bypassing” of the usual appeal system.

Mr Kirk and the company then applied for leave to appeal their conviction to the Full Bench of the Industrial Court. Leave was granted,⁵ but on the hearing of the final appeal the appeal was dismissed.⁶ A further application for judicial review was made to the Court of Appeal, but this also failed.⁷

Feature Article: The Kirk Decision (continued)

Mr Kirk's determination to have his case reviewed, however, is seen by the fact that he then made a further application for special leave to appeal to the High Court of Australia, an application which was successful.⁸ The High Court heard the appeal in September 2009,⁹ and handed down its judgment on 3 Feb 2010.

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.¹⁰ The reasons for the invalidity of the convictions were essentially that:

- (1) the Industrial Court had misapplied the provisions of the 1983 legislation; and
- (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 to be both "jurisdictional errors" by the Industrial Court, and also "errors on the face of the record". The route by which these results were achieved was rather complicated. The decision involved somewhat technical "administrative law" points, not of primary interest to those concerned with the OHS law matters. This note deals with the administrative law issues briefly and then attempts to spell out the implications of the judgment for the OHS law area.

Why the Court of Appeal had power to quash the orders of the Industrial Court

It may seem obvious to most people that the Court of Appeal of NSW should have been able, if it wanted to, to overturn a conviction by the Industrial Court of NSW. However, an odd feature of the NSW legal system is what is called a "privative clause" in s 179 of the *Industrial Relations Act 1996* (NSW), which purports to prevent appeals to the NSW Court of Appeal from decisions of the Industrial Court. So the High Court had to rule on whether there was some way, other than a technical "appeal", by which the Court of Appeal could have reviewed the decision. After a lengthy discussion, the High Court concluded that there was. An ancient remedy called the writ of *certiorari* allowed 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 was available was in a case of what is called "jurisdictional error"- effectively where the lower court exceeds its jurisdiction.

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 was an essential part of the Constitutional court system that there should be State Supreme Courts with this power.¹¹ Hence, despite s 179 the NSW Court of Appeal retained this jurisdiction.¹²

Feature Article: The Kirk Decision (continued)

The Industrial Court's wrong view of the OHS Act

Clearly not every minor mistake made by a court of limited jurisdiction would amount to a "jurisdictional error". However, the High Court held that the way that Walton J, in the NSW Industrial Court, had interpreted the *OHS Act 1983* 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 so similar to the 1983 Act, the same criticisms are meant to apply to the 2000 Act.)¹³

So what mistake did Walton J make? The error should be put in context by noting, as the High Court itself did, that his Honour was only applying previous decisions of both trial judges and the Full Bench of the Industrial Court, and hence any critique of his approach amounted to a critique of this long line of pre-existing authority.¹⁴

The analysis of the proper approach to prosecutions is provided in paras [7]-[38]. It is worth outlining the relevant provisions briefly. Section 15 of the 1983 Act (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 section 15(2). Later in the Act there is a defence provision, section 53 (cf s 28, 2000 Act), 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, which has been applied in countless decisions since 1983, is that section 15 is an "absolute" duty which has been *prima facie* breached whenever there is a 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.

Now, some 25 years after the NSW Industrial Court started interpreting the Act, the High Court has discovered that this approach is so deeply flawed that to apply it to a prosecution is a "jurisdictional error". What is the proper approach? It is difficult to sum up briefly, but in essence the secret seems to be that a prosecution under the Act is only possible where there is an "identifiable" risk (para [12]), 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 have dealt with the risk. Phrases used by the majority of the Full Bench which support this include (*emphasis added*):

"those provisions are contravened where there has been a failure, on the part of an employer, to take a *particular* measure" - [12];

"Sections 15 and 16 are contravened where there has been a failure, on the part of the employer, to take *particular* measures to prevent an *identifiable* risk eventuating. That is the relevant act or omission which gives rise to the offence" - [14];

"the necessity for a statement of offence to *identify* the act or omission of the employer said to constitute a contravention of s 15 or s 16" - [15].

This interpretation is supported by reference to the application of the defence provision in section 53. The reference to the need for a defendant to prove that it was not "reasonably practicable" to take "the measure in question", is said in para [16] to imply that:

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[16]... Such a defence can only address *particular* measures *identified* as necessary to have been taken in the statement of offence. (*emphasis added*)

The other view, that a risk need not be particularised in the prosecutor's pleadings, is said to have the consequence that under section 53 an employer would have to establish "that every possible risk was obviated".

It is difficult for someone who is familiar with the course of decisions in the Industrial Court to grasp at first what the High Court is saying here - just as it seems to have been difficult, with great respect, for the High Court to have read and digested the quarter of a century's worth of decisions in the Industrial Court. Perhaps the problem arises because the members of the High Court look at the legislation as an abstract piece of text with which they are almost totally unfamiliar, and see the possibilities for misreading.

The fact is that there is nothing unworkable or impossible about the interpretation that has been offered for many years by the Industrial Court. More to the point, 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 actual legislation. The words "particular" or "identifiable" or "specific" are just not present in section 15 or current section 8. In the course of actual litigation it becomes abundantly clear to the accused person, through provision of particulars, what the prosecutor alleges they have failed to do. They have perfect liberty to focus on that particular risk in their section 53/section 28 defence. No accused has ever had to mount some "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 (*emphasis added*):

[27] The acts or omissions the subject of the charges here in question had to be *identified* if Mr Kirk and the Kirk company were to be able to rely upon a defence under s 53....

[28] The statements of the offences as particularised do not *identify* what measures the Kirk company could have taken but did not take...

[32] ...The step which was not undertaken was to *identify* the measure which the employer should have taken as relevant to the offence...

[34] Walton J referred to earlier case law that the duty imposed upon an employer "is to be construed as meaning to guarantee, secure or make certain" and that the duty is directed at obviating "risks" to safety at the workplace. References to guarantees, and emphasis upon general classes of risks which are to be eliminated, tend to distract attention from the requirements of an offence against ss 15 and 16. 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 ss 15 and 16. It is also necessary for the prosecutor to *identify* the measures which 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 is the matter properly the subject of the charge.

This "mis-understanding" of the legislation (by the NSW Industrial Court), then, is said to be a jurisdictional error of such magnitude that the convictions of Mr Kirk and the company should be quashed.

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It is perhaps worth pointing out that this allegedly erroneous view of the legislation has not been seen to be a problem by other superior courts, in other jurisdictions. In particular, in the UK, from whence the current model of OHS legislation derived, the *Health and Safety at Work Act 1974* has consistently been interpreted as workable on the basis that all the prosecution has to show is a “risk”. Most recently the legislation was commented upon in a decision of the House of Lords in *R v Chargot Limited (t/a Contract Services)*.¹⁵ 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 and buried him. Mr Ruttle, who was apparently managing director of a group of companies including Chargot, and on the board of a contracting company which was also charged in relation to the incident, Ruttle Contracting Ltd, was charged under section 37 of the *HSW Act*.¹⁶ The trial judge having entered convictions and fines against both companies and Mr Ruttle, and an appeal to the Court of Appeal having failed,¹⁷ an appeal proceeded to the House of Lords. In a unanimous judgment the Appellate Committee of the House dismissed the appeal and affirmed the convictions of all the defendants.

A large part of the discussion in the *Chargot* judgment concerned the nature of the charges under sections 2 and 3 of the *HSW Act*, and the interaction of the duty to do what was “reasonably practicable” with the reversal of onus of proof provided by section 40 of the Act. The House affirmed that the UK legislation operates in precisely the way that the NSW *OHS Act 2000* does - that once there is a risk to safety proved on the facts, then 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.¹⁸ Their Lordships also confirmed the view that had been taken by the Court of Appeal in *R v Davies*,¹⁹ that this reversal of onus was not in breach of the obligations of the UK under article 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.²⁰

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 UK and in NSW - received any consideration in the High Court. There is simply the fairly bald comment in para [33], at the end of a cursory examination of the legislation and its previous interpretation by the Industrial Court, that:

The provisions of the OH&S Act relating to offence and defence were not intended to operate in this way.

It should be noted that there is no substantial discussion of the precise provision of the Act under which Mr Kirk was charged, section 50, equivalent to the current section 26. Para [24] effectively recites section 50, but the logic of the judgment is simply to deal with the liability of the company under sections 15 and 16. This is entirely appropriate, as once the liability of the company falls away, there is no longer any room for the operation of section 50. Hence none of the complexities of the personal liability provision were really addressed, although two points should be noted.

At para [27] 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”. As explored in other papers, the accepted view at the moment (both in the Industrial Court and arguably in the NSW Court of Appeal) is that the defence under s 53 was never directly available to a company officer charged under section 50.²¹ It is arguable that this comment of the High Court seem-

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ing to support the application of section 53 to the personal prosecution of Mr Kirk was in the traditional sense *obiter dicta*, said “by the way” and without the benefit of full argument on the point, and should in no way be seen as undermining the decisions of the Full Bench of the Industrial Court holding that section 53 is not relevant to a section 50 prosecution.

The issue touched on below, as to whether Mr Kirk should have been allowed (even with his consent) to be called to give evidence in the proceedings, cannot be properly understood without an appreciation of the difficulty faced by the prosecution in a case where the guilt of a company under, say, section 8 of the 2000 Act, may depend on the testimony of a single major company officer, but where the guilt of the officer under the personal liability provisions of section 26 will then be conditioned on the guilt of the company. While the resolution of the issues is by no means clear, it is unfortunate that the judgment of the High Court gives no hint that it had addressed its mind to the matter.²²

The error in calling Mr Kirk as a witness

The High Court identified another problem, then, with the trial proceedings, which does not seem to have been noticed or commented on at any prior stage before the hearing of the High Court appeal itself. Justice Gummow noted in the course of the appeal that Mr Kirk had been called as a witness in the trial in which he was one of the accused. Justice Heydon then pointed out that under section 17(2) of the *Evidence Act* 1995 (NSW) an accused is explicitly said not to be a competent witness 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 the Act, and on being given this hint on the second day of the hearing of the appeal his counsel applied (and was given permission) to amend the grounds of appeal to add this one.

At paras [50]-[53] of the High Court majority judgment this error is identified as another reason for the original conviction to be overturned. The Court dismissed quickly (with respect, too quickly) 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 High 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. This comment alone may well lead to greatly increased time and effort in trials of company officers in NSW, as presently they are usually conducted together.

The departure from the rules of evidence was said to be so “substantial”- [53]- that it too amounted to a “jurisdictional error”- para [76]. Heydon J in particular, in his minority judgment, expanded at some length on the policy reasons for the evidential rule, at para [117].

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 and dismissive 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 Constitution allowing appeals to the High Court, the Industrial Court should be treated *as if it were* the Supreme Court.

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The success of such an argument would have had wide-reaching implications. However, at para [49] the High Court holds that it is not necessary to consider the argument (since the convictions were being quashed through the writ of certiorari). Hence the argument will have to be made on another day.

The attitude of the High Court to the Industrial Court

Discussion of the judgment would not be complete without noting the attitude of the High Court to the NSW Industrial Court as expressed in both the tone and substance of the judgment. For whatever reasons, the members of the High Court give the impression of an animosity towards the Industrial Court, and in general towards the idea of "specialist tribunals". Some quotes will have to suffice to give the flavour of the comments. At para [64] the majority found:

As Jaffe rightly pointed out,²³ it is important to recognise the use to which the principles expressed in terms of "jurisdictional error" and its related concept of "jurisdictional fact" are put. The principles are used in connection with the control of tribunals of limited jurisdiction on the basis that a "tribunal of limited jurisdiction should not be the final judge of its exercise of power; it should be subject to the control of the courts of more general jurisdiction". Jaffe expressed the danger, against which the principles guarded, as being that "a tribunal *preoccupied with special problems or staffed by individuals of lesser ability* is likely to *develop distorted positions*. In its concern for its administrative task it may strain just those limits with which the legislature was most concerned."²⁴ (*emphasis added*)

In his minority judgment Heydon J objected in fairly scathing terms to the way that the Industrial Court, in one of Mr Kirk's many visits, had characterised his attempt to seek judicial review from the Court of Appeal as "forum shopping", stating that the reference to forum shopping was to treat the Court of Appeal as "a most unworthy receptacle" and the Full Bench as a "powerful territorial magnate", and that the remark approached "an assertion of exclusive dominion over the fields within its jurisdiction" – see [121]. His Honour then moved on to a very serious attack in para [122], citing a quote 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." He continued, referring to the danger that:

[T]he courts on which the jurisdiction has been conferred, while in some sense specialist, are not familiar with all the relevant rules. Thus a major difficulty in setting up a particular court, like the Industrial Court, to deal with specific categories of work, one of which is a criminal jurisdiction in relation to a very important matter like industrial safety, is that the 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...* [C]ourts set up for the purpose of dealing with a particular mischief can tend to exalt that purpose above all other considerations, and pursue it in too absolute a way. They tend to feel that they are not fulfilling their duty unless all, or almost all, complaints that that mischief has arisen are accepted. Courts which are "preoccupied with special problems", like tribunals or administrative bodies of that kind, are "likely to develop distorted positions."²⁵ (*emphasis added*)

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It must be said that this seems to not be a very helpful approach. While it could well be argued that it would be better for justice generally, and for the standard of decision-making in the Industrial Court in particular, if appeals were allowed within the usual State system to the Court of Criminal Appeal, it seems to be highly inappropriate for a member of the High Court to link the Industrial Court with the Star Chamber.²⁶ Such comments can only leave the observer with a fear that the High Court's decision on the interpretation of the OHS legislation was influenced at least in part by its personal dislike for the concept of a specialist tribunal. Despite Heydon J's disclaimer at the end of para [122] that he is not attacking the importance of increased industrial safety, or questioning the very concept of specialist courts in meeting that goal, it is hard to avoid the view that precisely these things are being accomplished by the judgment.

The consequences of the decision

The long-term consequences of this decision are hard to predict. In the short term it will no doubt lead to a massive amount of work by WorkCover officers to attempt to ensure that prosecution pleadings conform to the newly discovered interpretation of the legislation. In addition there are important and difficult questions about the status of the last 25 years' worth of convictions which 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 accused form an orderly queue outside the door of 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?

The impact of the High Court's decision on the Industrial Court, and public confidence in that important specialist court, seems likely to be highly detrimental. Longer term, the precise issues may eventually fade into the background if the current proposals for a national, uniform *Workplace Health and Safety Act* (WHS Act) come to fruition, whether in 2012 as proposed or later (if drawing up the uniform regulations proves as difficult as some suspect it is likely to be). The current form of the WHSA does not follow the NSW legislation, and seems likely to meet the approval of the High Court as it follows in general the Victorian model discussed by the Court in *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249.

However, the general tone of the comments in the High Court judgment in *Kirk* does raise important ongoing issues about the courts that will exercise jurisdiction under any new national legislation. At the moment, the choice of judicial venue seems to have been left open to individual States. If the hostility of the High Court to specialist tribunals continues, it may be necessary to reconsider the model of the Industrial Court for NSW very carefully.

It is submitted that this would not be a good move. For all its flaws (among which, as noted above, is the lack of an appeal to the Court of Criminal Appeal), the Industrial Court 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 those issues. It is to be regretted that more of an attempt was not made by the High Court of Australia to carefully weigh up the course of decisions and the reasons for the decisions, and to defer to some extent to the experience gained by the Court in those decisions, before deciding to overturn 25 years' worth of hard won expertise.

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¹ (2004) 135 IR 166; [2004] NSWIRComm 207.

² (2005) 137 IR 462; [2005] NSWIRComm 1.

³ As the High Court does, I will refer to the Industrial Relations Commission in Court Session (as it was in 2004) by the name it now bears, the Industrial Court of NSW (or simply, the Industrial Court).

⁴ *Kirk Group Holdings Pty Ltd and Anor v WorkCover Authority of NSW* (2006) 154 IR 310; [2006] NSWCA 172.

⁵ See *Kirk Group Holdings Pty Ltd and Anor v WorkCover Authority of NSW* (2006) 158 IR 284, [2006] NSWIRComm 355- although leave to appeal was granted on only one, quite limited, point; see parasa [51]-[55].

⁶ [2007] NSWIRComm 86.

⁷ *Kirk v Industrial Relations Commission of New South Wales* [2008] NSWCA 156.

⁸ See *Kirk & Anor v Industrial Relations Commission of NSW & Anor* [2009] HCATrans 93 (1 May 2009)

⁹ [2009] HCATrans 237, 238, 239 (29, 30 September, 1 October 2009).

¹⁰ Six members of the Court delivered a joint judgment; Heydon J delivered a dissent on the question of costs (the majority ordered only some of the overall proceedings to be borne by WorkCover, leaving some to be paid by Mr Kirk; Heydon J would have relieved Mr Kirk of all costs.) Heydon J agreed with majority, however, on all points other than cost.

¹¹ See para [100]: "Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power."

¹² 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 committed such errors- [89]; but in the case of this type of error the "privative clause" in s 179 was effective to block review on this ground- [90]. It was not unconstitutional for the State to remove jurisdiction to review a decision for "error on the face of the record". [100].

¹³ The 1983 legislation was applicable because the incident occurred on 28 March 2001, prior to the commencement of the current NSW *OHS Act* on 1 September 2001. But note that the High Court goes out of its way to cross-reference provisions of the 1983 Act to provisions of the current Act in a way which surely implies that their Honours intend the judgment to be applicable to the current Act – see footnotes 4, 12 and 15 for example.

¹⁴ See [32] of the High Court judgment, citing the discussion at para [123] of the trial decision in (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 legislation, *Carrington Slipways Pty Ltd v Callaghan* (1985) 11 IR 467.

¹⁵ [2008] UKHL 73 (10 Dec 2008); [2009] 2 All E.R. 645.

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¹⁶ A personal liability provision like s 50 of the *OHS Act* 1983, under which Mr Kirk had been charged here.

¹⁷ *R v Chargot Ltd* [2007] EWCA Crim 3032; [2008] ICR 517.

¹⁸ See Lord Hope, above n 15 at [21].

¹⁹ [2003] ICR 586.

²⁰ See Lord Hope, above n 15, at [28]-[30].

²¹ See for example NRCOHSR working paper no 63, *Recent Developments in Personal Liability of Company Officers for Workplace Safety Breaches* – Australian and UK Decisions at <http://ohs.anu.edu.au/publications/pdf/wp%2063%20-%20Foster.pdf>

²² See para [12] of the trial judgment: “Mr L Aitken of counsel, with whom Mr C Ward of counsel appeared for the defendants, initially submitted that the s 50 charges against Mr Kirk should be heard separately to the charges laid against the Company, on the basis that the evidence given by Mr Kirk against the Company would incriminate himself. However, the parties ultimately agreed for the matters to be joined.”

²³ “Judicial Review: Constitutional and Jurisdictional Fact”, (1957) 70 *Harvard Law Review* 953 at 962-963.

²⁴ (1957) 70 *Harvard Law Review* 953 at 963.

²⁵ See above at [64].

²⁶ See the quote from Walker in [122] at n 153.