Shake-up needed on the safety front as judgment adds to IRC pressure

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THE High Court case of Kirk v Industrial Relations Commission handed down this year continues to reverberate in legal and safety circles.

THE decision has come at a bad time in the history of the IRC of NSW, a tribunal under threat.

The appellants before the High Court were a company and its director, Graeme Kirk. The company owned a farm. As Kirk had no farming experience he left its day-to-day operation to a manager.

One day the manager, rather than use a safe road, drove an off-road vehicle down the side of a hill and was killed.

The manager's behaviour was described by judge Dyson Heydon as "inexplicably reckless".

The appellants had been found guilty by a single judge and on appeal by the IRC of NSW (now the Industrial Court) in a prosecution by the WorkCover Authority of NSW under the Occupational Health & Safety Act.

The conviction rate for defendants charged under this NSW act, prior to the High Court's Kirk decision, was said to be 98.4 per cent -- well above the conviction rates in other states dealing with comparable safety laws.

NSW defendants like Kirk were generally advised to plead guilty to minimise costs and penalties. Clearly Kirk, like his intergalactic namesake, was made of sterner stuff and was unwilling to genuflect before this IRC's jurisprudence. Neither was the High Court.

The judgment was a combined decision of Chief Justice Robert French and judges Bill Gummow, Ken Hayne, Susan Crennan, Susan Keifel and Virginia Bell with a separate judgment by Heydon.

The tone of Heydon's judgment expresses firm views as to how both the prosecutor and the IRC had got it wrong.

The combined judgment said of the charges brought, recalling the fate of Josef K in The Trial by Kafka: "They did not quote or identify the deficiency in the system or the measures that should have been taken to address it."

The charges lacked the necessary particularity for a valid summons. They were broad and failed to state the specific act or omission.

Therefore, the defendants had been unable to enlist the statutory defence.

The combined judgment also found an error in that Kirk was called by the prosecutor as a witness. He was a competent witness against his company. He could not be a competent witness against himself in accordance with the Evidence Act.

Heydon was critical of the law that had been applied. The allegation that the defendants failed to supervise this very experienced employee imposed obligations that were "impossible to comply with . . . and to bear". Heydon reserved stern remarks for specialist courts like the IRC. He said some specialist courts "tend to lose touch with the traditions, standards and mores of the wider profession and judiciary".

They become over-enthusiastic about vindicating the purposes for which they were set up which are exulted above other considerations.

The privative clause in the Industrial Relations Act which had been significantly protective of decisions of the IRC was found ineffective and could not be used to prevent a challenge against decisions such as this

against decisions such as this.

This judgment comes at a difficult time for the IRC. It is a tribunal under siege. It has slowly had its role reduced by state legislation and profoundly by the Howard government's Work Choices legislation.

All this has been heightened by the passing late last year of the Industrial Relations (Commonwealth Powers) (NSW) Act 2009 which transferred NSW employees to the national IR system, save for employees of the public sector and local government.

Importantly, the national harmonisation of occupational health and safety laws will occur soon.

Heydon's criticism of the IRC as not being a place where people with wide criminal law experience are found may be a telling reason why this jurisdiction may be transferred to the ordinary courts.

The IRC, which is more than 100 years old, has many supporters and is unlikely to give in without a fight.

The Kirk case has provoked many defendants to try to secure a strike out or an acquittal.

Recently the Full Bench of the IRC (probably correctly) dismissed a challenge by the construction company John Holland over a technical concern about how a summons had been pleaded against it.

Another judge (Justice Marks) was not satisfied that a defendant who pleaded guilty should have done so on the material before him. He adjourned the matter for further evidence and argument. What is likely is that the conviction rate referred to above will tumble. More challenges will follow with the right to appeal from the IRC now open on jurisdictional grounds.

The WorkCover Authority's, the Department of Mineral & Forest Resources' and union secretaries' rights to prosecute need to be reconsidered and perhaps removed.

Such bodies should continue with their investigatory roles. However, the right to prosecute may better be given to the Director of Public Prosecutions, an independent body perhaps better placed to prosecute.

Since the Kirk decision, the WorkCover Authority has been reviewing its current investigations and prosecutions. Applications have been amended to provide the particulars of the charge hitherto lacking.

To overcome the erroneous application of the safety laws, the WorkCover Authority ought to examine closed files where there may have been bad convictions.

The provisions of the Crimes (Appeal and Review) Act 2001 may assist the authority to show remorse and provide relief to some of the unfairly treated personal defendants to have their convictions quashed and be pardoned. Like the ash cloud from Iceland's Eyjafjoell volcano, the fallout from the decision in Kirk has dramatically upset the normal order of events. How long it will take to settle and where, at this stage, remain unknown.

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