Industrial court subject to judicial review

Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs) [2010] HCA 1 (3 February 2010)

By Gavin Rebetzke

In its first decision for 2010, the High Court declared a constitutional constraint upon the power of state legislatures to restrict judicial review, and revisited the boundaries of jurisdictional error previously outlined in *Craig v South Australia* (1995) 184 CLR 163.

The case involved the summary conviction of Mr Kirk, and his company, in the NSW Industrial Court for a breach of statutory occupational health and safety requirements to ensure the health, safety and welfare at work of employees. Mr Kirk was a director of his company, which employed a farm manager to undertake the daily operations of a farm. The farm manager died in an accident when he was riding an All Terrain Vehicle (ATV) along a route that took him steeply down a hill. The route taken appeared unnecessary, given the existence of a road. Several attempts were made to overturn the convictions, including an application to the NSW Court of Appeal in its supervisory jurisdiction for orders in the nature of *certiorari*. The Court of Appeal declined to grant relief, holding that any errors made by the Industrial Court were errors based on findings of fact and not jurisdictional errors. Other attempts to appeal the convictions were unsuccessful. The High Court's decision concerns the refusal of the Court of Appeal to grant prerogative relief against the Industrial Court.

The Industrial Court adopted an approach to the offences that suggested that an employer must guarantee a worker's health, safety and welfare absolutely, and that the prosecution was not required to (and did not) particularise measures that Mr Kirk and his company failed to take to avoid the particular risk of injury. The High Court found this approach to be erroneous and that it confused the general statutory duty placed upon an employer, and the act or omission constituting the contravention of that duty in a particular case. The prosecution should have identified the acts or omissions that Kirk did or failed to do that would have avoided the accident. A further error occurred in the proceedings before the Industrial Court, in that the defendant Kirk was called by the prosecution as a prosecution witness, contrary to the laws of evidence.

The six justice majority reviewed the history of the concept of jurisdictional error and affirmed that the examples set out in *Craig v South Australia* are not exhaustive. In particular, it rejected the notion that errors of law made by inferior courts are not reviewable because a court (as opposed to a lay tribunal or public servant) can make an 'authoritative' decision as to the law. Instead, it rather nebulously posited that the only 'authoritative' decisions of inferior courts are those not attended by jurisdictional error. The boundary of what is and what is not jurisdictional error remains elastic. In *Kirk*, the errors of law made by the Industrial Court led to convictions and sanction when the Court had no power to impose convictions or to sanction the defendants. It had no power to do so because no particular act or omission in breach of the statutory duty was ever identified in the proceedings and, accordingly, no offending conduct was established.

The *Industrial Relations Act* 1996 (NSW) contains a privative provision that purports to prevent judicial review of the decisions of the Industrial Court. The High Court held that a privative clause is unconstitutional, to the extent that it purports to prevent a state supreme court from granting relief on account of jurisdictional error. To allow the provision would interfere with a defining characteristic of state supreme courts as at Federation. Supervision (by prohibition, *certiorari*, *mandamus* and *habeas corpus*) is a role of supreme courts that defines them. In so holding, the High Court affirmed that there is one common law of Australia, and the states are not permitted to create islands of jurisprudence or power immune from supervision and restraint by the state supreme courts and, ultimately, the High Court, sitting at the pinnacle of the federal judicial structure.

In declaring this constitutional principle, the High Court confirmed that the continued distinction between jurisdictional and non-jurisdictional error is constitutionally required and, accordingly, any speculation that Australia could follow the UK[1] in relegating this difficult dichotomy to history is at an end.

The majority decision also contains a useful discussion about the provision of particulars in criminal proceedings, as well as the rule that a defendant cannot be called as a prosecution witness, even with consent. The minority judgment of Heydon (who differs only as to appropriate orders and one discrete issue) has an interesting discussion on the topic of 'forum shopping', as well a discourse on the various disadvantages of specialist courts and tribunals. ■

Note: **1** See *R v Hull University Visitor; Ex parte Page* [1992] UKHL 12; [1993] AC 682.

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