

# ISR SERVICES PTY LTD

## INDEPENDENT SAFETY & RISK SERVICES

▼ OCCUPATIONAL HEALTH AND SAFETY ▼ RISK MANAGEMENT ▼ INSURANCE SURVEYING & REPORTING

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Protecting your Workplace and Business Assets

## TECHNICAL NEWSLETTER

### Occupational Health & Safety

# GOOD NEWS !

#### EXECUTIVE SUMMARY

Tuesday 9 February 2010

The High Court of Australia

#### **KIRK v WORKCOVER**

In a landmark decision, the High Court of Australia has brought practical common sense into the judging of liability under the NSW OH&S Act laws.

#### FACTS

- Graeme Kirk ran a printing business. He also owned a farm in NSW. He employed an experienced farmer to manage his farm, and he supplied an all-terrain vehicle (ATV) for the farm manager to ride on formed roads on his farm.
- The farm manager drove down a steep slope, instead of driving on the formed road, the ATV rolled over and killed him.
- WorkCover investigated, and prosecuted Mr Kirk (employer failing to ensure the health and safety of an employee).
- This NSW Government legislation provides virtually no right of appeal from a decision of the NSW Industrial Court. (In Australia, a person is innocent until proven guilty. Not so with the OH&S Act!)
- This unfortunate and untenable situation sees WorkCover as both regulator (prosecutor) and source of expertise (educator).
- The prosecutor (WorkCover Authority of New South Wales) failed to identify the acts or omissions by Mr Kirk which constituted the alleged offences.
- Mr Kirk claimed his rights of natural justice were denied.
- The High Court of Australia found in his favour, the conviction was quashed and NSW WorkCover was ordered to repay the \$121,000 in penalties as well as all of Mr Kirk's legal costs.

## **KEY POINTS FROM THE DECISION**

Graeme Kirk won his appeal on a WorkCover prosecution.

The standard used by the Industrial Court that an employer was guilty of a criminal offence under the OH&S Act 2000 simply because a worker sustained an injury has now been rejected.

To mount a prosecution against an employer, WorkCover must NOW be more specific when drafting the particulars of any charge. WorkCover may no longer prosecute on the absolute standard – “failed to ensure the health and safety of employees”.

NOW, they are required to assess the risk and determine all particular measures or actions which should have been taken by the employer to eliminate, control or reduce the risk.

Based on a prosecution under these stated charges, an employer can NOW defend more successfully should they be able to prove that it was not reasonably practicable to adopt the measures or actions listed in the charges.

**NOTE** - This landmark decision which is good news for NSW Employers and Others Responsible does not in any way diminish their responsibility in providing a healthy and safe workplace.

**BUT** - It does mean, however, that NSW Employers and Others Responsible are less likely to suffer prosecution and pay penalties under the OH&S Act 2000, PROVIDED they are able to demonstrate their formal compliance with this Statute law, and that their workplace is a healthy and safe workplace.

No longer should we see an alarming 60% of all OH&S prosecutions across Australia being brought about in NSW, nor an astounding 96% of those NSW prosecutions being won by WorkCover.

It will cost WorkCover more to mount a case against a NSW employer. WorkCover must NOW assess the risk which led to the accident, and determine all particular measures or actions which should have been taken by the Employer or Others Responsible to eliminate, control or reduce the risk.

This will enable the Employer or Others Responsible a defence should they be able to prove that they did all that was reasonably practicable to provide a safe workplace. This is, after all, the intention of the OH&S Act 2000.

## **SUMMARY**

Employers and Others Responsible (eg. Directors) will NOW be able to rely on the quality of their OH&S risk management policies, systems and procedures to assist them in defending future prosecutions following workplace injuries. Effective defence is not only vital but is now more likely to succeed.

Penalties imposed under the OH&S Act 2000 can be severe. Where RECKLESSNESS is proven in a workplace fatality, a corporate fine of \$1,650,000 may apply, with maximum personal fines of \$165,000 and / or five years imprisonment.

ISR Services Pty Ltd provides NSW Employers and Others Responsible with a unique and tailored OH&S Employer Protection Programme;

- Workplace Safety Inspection and Risk Management Report
- legal compliance in OH&S and Workers Compensation laws
- OH&S Manual with all necessary policies, systems and procedures
- peace of mind.