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# Amendments to OH&S pleadings post *Kirk*[1]

## Overview

1. The fundamental principles and issues underlying the making of proper or appropriate pleadings arise in a plethora of cases in various jurisdictions in Australia, including in the Occupational Health and Safety (**OH&S**) field. The decision of the High Court in *Kirk v Industrial Relations Commission of New South Wales* (2010) HCA 1 (***Kirk***) simply throws them into stark relief.[2]

2. This presentation is focused upon (and limited to) the technical issue of amendments to pleadings in OH&S prosecutions in New South Wales. It will cover pleadings (and amendments to pleadings) post *Kirk* and will address the extent to which the outcome in *Kirk* still provides for OH&S offences to be amended.

[1] This paper is based upon a paper I delivered to the NSW State Legal Conference in Sydney in March 2011
[2] Kirk has not been followed in Queensland on the basis of differences between NSW and QLD OH&S legislation, see *NK Collins Industries Pty Ltd v Peter Vincent Twigg* (C/2009/56), 27 April 2010

## Pleadings in OH&S matters generally

3. While offences under the *Occupational Health and Safety Act* 2000 (**the Act**) are dealt with as summary offences, and not on indictment, as that word is used to indicate a process, the Application for Order in an OH&S prosecution in New South Wales is an *"indictment"* for the purposes of s 15 the *Criminal Procedure Act* 1986 (**the CP Act**).

4. As a document by which criminal proceedings are commenced, the Application for Order is subject to certain requirements at common law and under statute.

5. The CP Act applies to prosecutions in the Industrial Court just as it applies to prosecutions for any criminal offence in a court of criminal jurisdiction.

6. The interconnection of the criminal procedure and the OH&S jurisdiction of the Industrial Court of New South Wales illustrate the relevance of that procedure to the formal and legal prerequisites of an Application for Order. The requirements applicable to a criminal indictment are also applicable, including as a consequence of various statutes, to the process in the Industrial Court. As the High Court has found, the common law also plays a significant part.

7. In *Doja v R* [2009] NSWCCA 303 Spigelman CJ describes the purpose of an indictment in the following terms:

> *"[5] There is no doubt that the law takes a different view of technicalities in the criminal law than it once did. Nevertheless, an indictment performs a number of important functions in the administration of criminal justice. See R v Janceski [2005] NSWCCA 281; (2005) 64 NSWLR 10 at [52]-[53], [205]:*
>
> *(i) Informing the court of the precise identity of the offence with which it is required to deal.*

> *(ii) Providing the accused with the substance of the charge which he or she is called upon to meet, including identification of the essential factual ingredients.*
>
> *(iii) Enabling the court to ensure that only relevant evidence is admitted and to properly instruct the jury on the relevant law.*
>
> *(iv) Determining the availability of a plea of autrefois acquit and autrefois convict.*
>
> *(v) Investing the trial court with jurisdiction to hear and determine the prosecution.*
>
> *[9] There are circumstances in which a document which purports to be an indictment will be held not to be such. It is convenient to speak in terms of a "valid" indictment as the relevant requirement of the statutory regime. In many circumstances such validity is jurisdictional."*

8. One consequence, particularly of the last observation of the Chief Justice, is that where the indictment does not contain an essential ingredient, it may not serve the relevant purpose set out in [5](i) to (v) above, and is consequently invalid.

9. If the invalidity is because an essential element of an offence is not established, yet the indictment purports to delineate an offence under statute, the invalidity will mean that not only is the Court unable to identify an offence, or the accused person able to properly know what the charge is and answer it by way of plea or defence,[3] but the Court is not in a position to determine the relevance of any evidence to the charge.[4] The consequence of not identifying the essential ingredients of the charge under a statute is that the Court has nothing before it which enlivens its jurisdiction.

10. Notoriously, *Kirk* is authority for the general proposition that an Application for Order must set out the particular measure which must be taken, not merely a failure to carry out a general obligation in terms which (in effect) recite general measures. It is not enough merely to plead a general obligation. The charge

[3] See *Johnson v Miller* (1937) 59 CLR 467; *King v R* (1986) 161 CLR 423; *John L Pty Ltd v Attorney-General* (NSW) (1987) 163 CLR 508
[4] *John L Pty Ltd v Attorney-General* (NSW) (1987) 163 CLR 508 at [14]

must contain the particular act or omission it is said comprises the offence. If the element is not charged, no offence is identified (see *Kirk* at [26]; *R v Australian Char* [1995] VICSC 168 at [19]).

11. The inescapable logic arising from *Kirk* is that in particularising the act or omission of a defendant, the prosecutor has not only to identify the risk – the broad error or failure in process, procedure, plant, management or the like – but must specify the *specific measures he or she alleges the employer should have taken to overcome the identified risk*.

12. That the statement of charge should identify the acts or omissions which are constituted by the measures the employer ought to have taken in relation to the particular risk was the finding in *Kirk* (at [28]), and was, it was found, not overcome by an appeal to s 11 of the CP Act,[5] which reads:

> ***"11 Description of offences***
>
> *The description of any offence in the words of an Act or statutory rule or other document creating the offence, or in similar words, is sufficient in law."*

13. As the High Court points out in *Kirk*, the description of the offence provision, appears on the authorities and in the practice of the Court, not to dispense with the common law rule, and that, in *Johnson v Miller* (1937) 59 CLR 467, Dixon J (at 486) held that statutory provisions of this nature do not dispense with the necessity of specifying time, place and manner of the defendant's acts or omissions. The recitation of the duty is not enough. The description of the offence must not only set out the duty but must isolate the contravention by act or omission. The penalty provision, the time provision (and the restoration provision) require the identification of a specific act or omission in respect of *the specific measures identified to overcome the risk*.

[5] Contrast *WorkCover Authority v Fernz Construction* (1999) 91 IR 119 and *Boral Gas (NSW) Pty Ltd v Magill* (1995) 58 IR 363; (1993) 53 IR 7

14. Without this, the charge lacks an essential (arguably the most essential) element and must be bad.[6] Importantly, at [34] the combined judgement of the High Court in *Kirk* states:

> *"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."*

## Amendments to OH&S pleadings post *Kirk*

15. By way of example, the charge in an Application for Order, after noting the statutory framework, has ordinarily (previously) been pleaded by WorkCover, as follows:

> *I, Inspector XX, an Inspector duly appointed under Division 1 of Part 5 of the Occupational Health and Safety Act 2000 ("the Act") .... allege that XX Pty Ltd (ACN ... ... ...) .... being an employer, on [date], at [address] ... failed to ensure the health, safety and welfare at work of all its employees and in particular, XX and XX, contrary to s 8(1) of the Act.*
>
> *INSERT PARTICULARS HEREAFTER*

16. In considering the adequacy of the foregoing, it is appropriate to briefly return to the judgment of the High Court in *Kirk*, and in particular to the joint judgment of

[6] See also *Kirk* at [26]

French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. At [14] their Honours said:

> *"A statement of an offence must identify the act or omission said to constitute a contravention of s 15 or s 16. It may be expected that in many instances the specification of the measure which should have been or should be taken will itself identify the risk which is being addressed. The identification of a risk to the health, safety and welfare of employees and other persons in the workplace is a necessary step by an employer in discharging the employer's obligations. And the identification of a risk which has not been addressed by appropriate measures must be undertaken by an inspector authorised to bring prosecutions under the Act (s 48). But it is the measures which assume importance to any charges brought. 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."*

17. In *John Holland*[7] the Full Bench of the Industrial Court of New South Wales confirmed that:

> *"It is unquestionably the case arising from Kirk that an Application for Order must plead the acts or omissions of the defendant that are alleged to give rise to the risk to health and safety: see Kirk at [14], [19]."*[8]

18. In the Court of Appeal in *John Holland*,[9] Chief Justice Spigelman, with Beazley and Giles JJA agreeing, went one step further (at [47]):

> *"[47] These provisions constitute a direct route to the proposition that a failure to identify the nature of the offence constitutes jurisdictional error. An Application under s 246(1)(a) of the Criminal Procedure Act requires an accused to answer "to the offence charged in the order". Section 246(2) and r 217B, as noted, both use the word "must". The reasoning in Kirk gives these mandatory requirements specific content."*[10]

19. The principal submission advanced for *John Holland* in the Court of Appeal was that the charge (and the particulars) did not identify contraventions in

[7] *Inspector Hamilton v John Holland Pty Ltd* [2010] NSWIRComm 72
[8] Ibid at [59], see also at [19]
[9] *John Holland Pty Ltd v Industrial Court of New South Wales; Parsons Brinckerhoff (Australia) Pty Ltd v Industrial Court of New South Wales* [2010] NSWCA 338
[10] See also at [32]

accordance with *Kirk*. In response, the Chief Justice, relevantly, stated at [56], [65], [67], [71], [78], [79] as follows:

> *"[56] ... An Application for Order, in its entirety, is the document which invokes the jurisdiction of the Court. If the offence is appropriately identified in the document as a whole, then there is no reason to conclude that the jurisdiction of the Court was not properly invoked.*
> *...*
> *[65] The fact that the Application for Order expresses a range of matters in terms of a single offence does not, in the specific context under consideration, raise the kind of issues of duplicity which often arise in a criminal prosecution. That is by reason of s 31 of the OH&S Act, which I have set out at [15] above.*
> *...*
>
> *[67] Section 31 permits "more than one contravention" to "be charged as a single offence". Nevertheless, the charge must identify each alleged "contravention". It is to the principles established in Kirk that reference must be made as to whether the contraventions, pleaded as a single offence, have been validly stated.*
> *...*
> *[71] In my opinion, it is not necessary to expressly plead the "factual circumstances" said to be the same for purposes of s 31(1). Section 31(1) is facultative and permits a course which common law principles of duplicity would not permit. Nevertheless, so long as each contravention is appropriately identified it will be possible to determine whether or not the respective alleged contraventions arise from "the same factual circumstances".*
> *...*
> *[78] Where words of general application are used such as "adequate system of ground support" or "adequate system of communication" they may give rise to an application for further better particulars. However, in this context, such terminology does not fail to identify a "particular measure" within the reasoning of Kirk. What is alleged in each respect against the applicant in terms of a failure to take specific steps is clearly pleaded. What is an "adequate system of ground support" is identified in the following further particulars,*
>
> *[79] I do not assess every reference to 'adequacy' as the applicant did not seek to make out a case on the basis of each such particular. The possibility of further particularisation does not detract from the validity of the charge for purposes of determining whether or not the Industrial Court has had its jurisdiction properly invoked. Since writing [77], [78] and the preceding sentences of this paragraph I have read the additional comments of Giles JA on the 'adequacy' submissions and I agree with his Honour's comments."*

20. The judgement of the Court of Appeal in John Holland has a special leave hearing before the High Court on 8 April 2011.[11] Issues raised in the Appeal are likely to go to:

(a) Whether it is the "Charge" or the "Application for Order" (in its entirety) which invokes the jurisdiction of the Court.

(b) Where the Charge or the Application for Order is able to express a range of matters in terms of a single offence by reason of s 31 of the Act, which reads:

> ***"31 Multiple contraventions of general duties under Division 1***
>
> *(1) More than one contravention of a provision of Division 1 by a person that arise out of the same factual circumstances may be charged as a single offence or as separate offences.*
>
> *(2) This section does not authorise contraventions of 2 or more of those provisions to be charged as a single offence.*
>
> *(3) A single penalty only may be imposed in respect of more than one contravention of any such provision that is charged as a single offence."*

(c) In John Holland's case, whether the charge and the particulars contained within the Application for Order properly identify contraventions in accordance with *Kirk*. In other words, when read as a whole, does the charge identify specific acts or omissions which constitute measures that could have been taken, but were not taken, to prevent an identified risk. Alternatively, and properly understood, does the charge and the detailed particulars set out separate acts or omissions, or does it simply plead matters which create or refer to a state of affairs, namely, a general failure to ensure safety.

[11] By reference to pleadings, contrast outcome in *Inspector Castro v Stratabuild Pty Ltd* [2010] NSWIRComm 191 with the more recent decision of Backman J in *Morrison v Pybar Mining Services Pty Limited* [2011] NSWIRComm 1

## Practical matters re OH&S pleadings post *Kirk*

21. Special leave applications to the High Court aside, on the current state of the law, relevant considerations when reviewing an Application for Order, or seeking further particulars on same, encompass:

    (a) the name and address of the person by whom the proceedings are brought (*the prosecutor*); and

    (b) the capacity in which the prosecutor is taking the proceedings; and

    (c) the name and address of the person against whom the proceedings are brought (*the defendant*); and

    (d) the Act and the section under which the defendant is alleged to have committed an offence; and

    (e) the nature of the offence that is alleged. This may be taken to mean the essential legal elements of the charge: see *Johnson v Miller* (at 486) where Dixon J distinguishes between “the nature of the offence” (he later refers to it as the “legal nature of the offence” (at 489)) and the essential factual ingredients of the “time, place and manner of the defendant's acts or omissions” (see also *Kirk* at [26]); and

    (f) the essential factual ingredients which must include the time, place and manner of the defendant's acts or omissions, extending to considerations and matters such as:

        (i) each act or omission of the defendant which is said to establish a contravention of the applicable section of the Act.

(ii) in respect of each act or omission referred to, where same is indentified in the Application for Order.

(iii) if more than one such act or omission is identified, all of the facts, matters and circumstances upon which the prosecutor will rely to assert that he/she is entitled by virtue of s 31 of the Act to plead all of those contraventions as one offence;

(iv) as to each act or omission identified, the risk that it is asserted that the particular acts or omissions gave rise to;

(v) as to each identified risk, the part of the Application for Order that is to be relied upon by the prosecutor as identifying the relevant risk;

(vi) as to each identified risk, the names of any person whom it is alleged was placed at the particular risk/s; and

(vii) all of the facts, matters and circumstances which are said by the prosecutor to establish the necessary casual linkage between each act or omission identified and the corresponding identified risk to the nominated person(s).

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