SUPREME COURT OF QUEENSLAND

CITATION:	*NK Collins Industries Pty Ltd v The President of the Industrial Court of Queensland & Anor* [2013] QCA 179
PARTIES:	**NK COLLINS INDUSTRIES PTY LTD** (applicant/appellant) **v** **THE PRESIDENT OF THE INDUSTRIAL COURT OF QUEENSLAND** (first respondent) **PETER VINCENT TWIGG** (second respondent)
FILE NO/S:	Appeal No 9403 of 2012 SC No 5328 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time/General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 July 2013
DELIVERED AT:	Brisbane
HEARING DATE:	26 March 2013
JUDGES:	Holmes and Fraser JJA and Margaret Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the application for an extension of time within which to appeal.** **2. Allow the appeal.** **3. Set aside the orders made by Martin J on 8 June 2012.** **4. Set aside the order of the first respondent made on 22 March 2011 dismissing the applicant's appeal from the Industrial Magistrate's decision.** **5. Remit the matter to the first respondent for hearing and determination according to law.** **6. Order that the second respondent pay the applicant its costs of and incidental to the application for judicial review of the decision of the Industrial Court of Queensland filed 21 June 2012 and its costs of this appeal other than the costs of the application for leave to appeal.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – WHEN GRANTED – where the application for an extension of time was filed some

three months after the expiry of the appeal period – where the delay in bringing the appeal was explained by affidavit material – where the second respondent alleged prejudice in its inability to locate witnesses – whether an extension of time within which to file a notice of appeal should be allowed

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – where the applicant was convicted in the Industrial Magistrates Court on the second respondent's complaint that it had failed to discharge its obligation under s 24 of the *Workplace Health and Safety Act* 1995 to ensure the workplace health and safety of its workers – where the Industrial Magistrate declined to order that the second respondent give further and better particulars of the act or omission alleged to have constituted the offence – where the applicant appealed to the first respondent, who ruled that the particulars were not required and dismissed the appeal – where the primary judge dismissed an application for review of the first respondent's decision, holding that it involved no jurisdictional error – whether the Act required that an act or omission be identified as constituting the offence – whether the High Court's decision in *Kirk* was properly distinguished – whether the structure of the Act required that the measure a defendant employer should have taken to ensure its workers' safety from risk be identified in order to permit an effective defence under s 37 – whether there was jurisdictional error by the first respondent

ADMINISTRATIVE LAW – JUDICIAL REVIEW – POWERS OF COURT UNDER JUDICIAL REVIEW LEGISLATION – ORDERS TO QUASH DECISION – where the parties proposed that if the appeal were to be upheld, the Court should quash the decision of the Industrial Magistrate under s 47(3) of the *Judicial Review Act* 1991 and remit the matter to the Industrial Magistrates Court – where r 766 of the *Uniform Civil Procedure Rules* 1999 gives this Court all the powers and duties of the Court that made the decision appealed from – where the decision appealed from did not concern jurisdictional error by the Magistrate, but by the first respondent on appeal from the Magistrate's decision – whether the primary judge, and accordingly this Court, had any power to quash the Industrial Magistrate's decision and remit the matter to the Industrial Magistrates Court

Industrial Relations Act 1999 (Qld), s 349
Judicial Review Act 1991 (Qld), s 47(3)
Justices Act 1886 (Qld), s 222
Occupational Health and Safety Act 1983 (NSW), s 15, s 16, s 53
Uniform Civil Procedure Rules 1999 (Qld), r 766
Workplace Health and Safety Act 1995 (Qld), s 24, s 26, s 28, s 29, s 37, s 164, s 166

Bourk v Power Serve Pty Ltd & Anor (2008) 175 IR 310; [2008] QCA 225, considered
Doonan v McKay [2002] QCA 514, cited
Johnson v Miller (1937) 59 CLR 467; [1937] HCA 77, cited
Kirk v Industrial Court (NSW) (2010) 239 CLR 531; [2010] HCA 1, followed
Parker v President, Industrial Court of Queensland [2010] 1 Qd R 255; [2009] QCA 120, cited
Parry v Woolworths Limited [2010] 1 Qd R 1; [2009] QCA 26, considered
R v Australian Broadcasting Tribunal; Ex parte Hardiman (1980) 144 CLR 13; [1980] HCA 13, cited
R v McEwen & Ors, unreported, Court of Criminal Appeal, Qld, CA Nos 10, 11, 12, 19, 20, 28 of 1983, 11 April 1983
R v T [1995] 2 Qd R 192; [1994] QCA 326, cited
Shield v Topliner Pty Ltd [2005] 1 Qd R 551; [2004] QCA 476, cited

COUNSEL: P F Mylne for the applicant/appellant
No appearance for the first respondent
R S Douglas QC, with P H Major, for the second respondent

SOLICITORS: Davidson & Sullivan for the applicant/appellant
Crown Solicitors for the first respondent
Legal and Prosecution Services, Workplace Health and Safety for the second respondent

[1] **HOLMES JA:** The applicant seeks an extension of time within which to file a notice of appeal against a decision of Martin J, dismissing an application for review of an Industrial Court decision.

[2] The chain of decisions which led to Martin J's judgment was as follows: the applicant was convicted on the second respondent's complaint of a breach of the *Workplace Health and Safety Act* 1995. The first respondent dismissed the applicant's appeal from the Industrial Magistrate's decision. The decision to dismiss the appeal was in turn the subject of a successful application for review to Boddice J, who remitted the matter to the first respondent for further consideration and determination. The first respondent gave a further decision dismissing the applicant's appeal, which again was the subject of an application for review to the trial division.

[3] Martin J, on the applicant's second application for judicial review, found that the first respondent's decision was within jurisdiction and was not, therefore, open to review. Martin J's judgment was delivered on 8 June 2012; the application for an extension of time was not filed until 9 October 2012. The applicant and the second respondent agreed that should the application be granted, the appeal should be dealt with on the parties' submissions as to its merits. The first respondent, in accordance with the *Hardiman*[1] principle, took no active part in the appeal.

The complaint

[4] The complaint made against the applicant was as follows:

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[1] *The Queen v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13.

"… that on the 4th day of June 2007, at the Forestry Entitlement Area 5A within the Woodlands area – Mitchell / St George Road, approximately 92 km South of Mitchell Qld in the Magistrates Court District of Mitchell **N.K. COLLINS INDUSTRIES PTY LTD** being a person on whom a workplace health and safety obligation prescribed by section 28(1) of the *Workplace Health and Safety Act 1995* is imposed, did fail to discharge that obligation contrary to section 24 of the *Workplace Health and Safety Act 1995* in that being a person who conducted a business or undertaking **N.K. COLLINS INDUSTRIES PTY LTD** failed to ensure the workplace health and safety of each of it's [sic] workers was not affected by the conduct of the said business or undertaking.

Particulars

Business/undertaking: The harvesting of trees and the cutting of wood in sawmills.

Worker: Jiandong GUO

Workplace: Forestry Entitlement Area 5A within the Woodlands area – Mitchell / St George Road, approximately 92 km South of Mitchell Qld.

The source of the risk emanates from:

- Falling dead cypress trees, and/or
- System of work for the felling of dead cypress trees.

The risk is the risk of death or injury including the risk of crush injuries to Jiandong GUO

AND IT IS ALLEGED that the breach caused the death of one Jiandong GUO

Contrary to the Acts and Regulations in such case made and provided."

The Workplace Health and Safety Act

[5] Section 24 of the *Workplace Health and Safety Act*, in force at the time of the offence,[2] provided as follows:

"(1) A person on whom a workplace health and safety obligation is imposed must discharge the obligation.

[Penalties were specified for breach of such an obligation.]

(2) Subsection (1) applies despite Criminal Code, sections 23 and 24."

[6] Section 28(1) of the Act imposed an obligation on a person conducting a business or undertaking

"to ensure the workplace health and safety of ... each of the person's workers... is not affected by the conduct of the relevant person's business or undertaking."

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2 The *Workplace Health and Safety Act* was repealed by s 277 of the *Work Health and Safety Act* 2011.

Section 28(2) provided that the obligation was discharged

> "if the person, each of the person's workers and any other persons are not exposed to risks to their health and safety arising out of the conduct of the relevant person's business or undertaking."

[7] Section 29 contained a non-exhaustive list of measures necessary to discharge an obligation under s 28:

> "**29 What obligations under s 28 include**
>
> Without limiting section 28, discharging an obligation under the section includes, having regard to the circumstances of any particular case, doing all of the following—
>
> (a) providing and maintaining a safe and healthy work environment;
>
> (b) providing and maintaining safe plant;
>
> (c) ensuring the safe use, handling, storage and transport of substances;
>
> (d) ensuring safe systems of work;
>
> (e) providing information, instruction, training and supervision to ensure health and safety."

[8] Section 26 of the Act set out how obligations could be discharged where there existed a relevant code of practice[3]:

> "**26 How obligations can be discharged if regulation etc. made**
>
> ...
>
> (3) If a code of practice states a way of managing exposure to a risk, a person discharges the person's workplace health and safety obligation for exposure to the risk only by—
>
> (a) adopting and following a stated way that manages exposure to the risk; or
>
> (b) doing all of the following—
>
> (i) adopting and following another way that gives the same level of protection against the risk;
>
> (ii) taking reasonable precautions;
>
> (iii) exercising proper diligence."

[9] Section 27(2) applied where there existed no regulation, ministerial notice or code of practice stating a way to manage a risk:

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[3] In the Industrial Magistrates Court the prosecution tendered two codes of practice said in closing submissions to be relevant: the Forest Harvesting Code of Practice 2007 and the Risk Management Advisory Standard Code of Practice.

"(2) A person discharges the person's workplace health and safety obligation for exposure to the risk by doing both of the following—

(a) adopting and following any way to discharge the person's workplace health and safety obligation for exposure to the risk;

(b) taking reasonable precautions, and exercising proper diligence, to ensure the obligation is discharged."

[10] Section 37 established defences:

"**37 Defences for div 2 or 3**

(1) It is a defence in a proceeding against a person for a contravention of an obligation imposed on the person under division 2 or 3 for the person to prove—

(a) if a regulation or ministerial notice has been made about the way to prevent or minimise exposure to a risk—that the person followed the way prescribed in the regulation or notice to prevent the contravention; or

(b) if a code of practice has been made stating a way or ways to manage exposure to a risk—

(i) that the person adopted and followed a stated way to prevent the contravention; or

(ii) that the person adopted and followed another way that managed exposure to the risk and took reasonable precautions and exercised proper diligence to prevent the contravention, or

(c) if no regulation, ministerial notice, or code of practice has been made about exposure to a risk—that the person chose any appropriate way and took reasonable precautions and exercised proper diligence to prevent the contravention.

(2) Also, it is a defence in a proceeding against a person for an offence against division 2 or 3 for the person to prove that the commission of the offence was due to causes over which the person had no control." (Footnotes omitted.)

The Magistrates Court prosecution

[11] At the outset of proceedings in the Industrial Magistrates Court, counsel for the applicant sought particulars of the alleged failure to ensure the workplace health and safety of workers, asking to be told "what act or omission it is alleged by the prosecution either has been done or has been omitted to have been done". The Magistrate, following decisions of the Industrial Court, declined to order the giving of particulars. He accepted the second respondent's argument that the complaint did not require the identification of any act or omission by the applicant; the breach consisted in the exposure of workers to risk.

[12] The hearing proceeded with evidence being given for both prosecution and defence. The worker referred to in the complaint, Mr Guo, was employed with another Chinese worker, Mr Xu, to fell trees in a harvesting operation in western Queensland. It was admitted that Mr Guo died as the result of being crushed by a tree. Evidence was led that his body was found lying under a dead cypress tree, the roots of which had rotted away. He was still holding his chainsaw. The freshly cut stump of a felled live tree was about a metre directly in front of him, and the tree itself was lying nearby. The prosecution tendered as exhibits, *inter alia*, the Forest Harvesting Code of Practice and the Risk Management Advisory Standard Code of Practice.[4]

[13] The applicant adduced evidence of the training given to Mr Guo, particularly as to dealing with risks in respect of decayed and dead trees, and of a risk assessment which it had undertaken in relation to hazards including falling trees. The risk assessment identified levels of risk and, in very general terms, measures to be taken; for example, ensuring workers were properly certified and assessing the forest area for hazards. Evidence was elicited that the number of dead or dying trees on the harvesting site made it impracticable to remove them by use of machinery before the tree-fellers started work.

[14] In his closing address, the prosecutor submitted that the applicant had failed to establish a defence under s 37(1)(b). It had failed to observe its obligations under the Forest Harvesting Code of Practice and, in particular, had failed to identify the hazard of standing decayed trees and had failed to have them removed from the felling zone. Contrary to the requirements of that code, it had allowed Mr Guo to work alone when there was not a high standard of safety in place and had failed to ensure that he and Mr Xu were provided with proper supervision and training; in particular, there was a failure to comply with a requirement for site specific induction training.

[15] And, the prosecutor said, without further detail, the applicant had "generally" failed to comply with an appendix to the code entitled "Risk management". That appendix sets out, under the headings "Hazard identification", "Risk assessment" and "Risk control" an array of steps to be taken in relation to workplace risks. It is not directed to any particular form of risk; part of the process is for the employer to identify the risks relevant to its work environment. Instead, it contemplates a range of sources of risk, such as work practices leading to strain injuries and chemical use causing burns.

[16] In similar vein, the prosecutor submitted that the applicant had also failed to comply with the Risk Management Advisory Standard Code of Practice, which sets out five steps:

> "1. **Identify** hazards
>
> 2. **Assess** risks that may result because of the hazards
>
> 3. **Decide** on control measures to prevent or minimise the level of the risks
>
> 4. **Implement** control measures
>
> 5. **Monitor** and **review** the effectiveness of measures"

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[4] Workplace Health and Safety Risk Management Advisory Standard 2000.

and makes broad suggestions as to how they might be approached. Again, the prosecutor did not descend into any detail of what had been missed.

[17] The Industrial Magistrate concluded that the risk of death arose out of the applicant's tree felling operation. The training it had given to Mr Guo and Mr Xu was deficient. The dead tree which crushed Mr Guo presented a risk of injury or death when it was tangled in the crown of the live cypress tree which he felled. (This was a matter of inference; there was no direct evidence as to the positioning of the dead tree before it fell.) The risk had not been identified by the applicant, and its eventuation had caused Mr Guo's death. The Magistrate found the applicant guilty as charged.

The first hearing of the appeal to the Industrial Court

[18] The applicant appealed the finding of guilt on a number of grounds, which included the second respondent's failure to provide sufficient particulars of the charge. That ground was expanded in written submissions to read:

> "(a) that the complaint failed to disclose the acts or omissions which were alleged to constitute the offence;
>
> (b) that insufficient particulars of acts or omissions alleged to constitute the offence were provided to the appellant."

[19] At the first hearing of its appeal to the Industrial Court, the applicant submitted that the second respondent should have given particulars of the act or omission alleged against it and the measures it had not taken. The first respondent, in his reasons for dismissing the appeal, noted that the complaint gave particulars of the person on whom the obligation was said to fall and of the obligation (that it was one imposed by s 28(1) of the Act); stated that it was imposed on the applicant because it conducted a business or undertaking; and identified when and where the applicant had failed to discharge its obligation.

[20] The complaint had, the first respondent said, identified the essential factual ingredients and the legal elements of the offence, and went further to identify the relevant risk and its source. It was unnecessary that it specify acts or omissions by which the breach was committed, because liability did not depend on specific acts or omissions but on a failure to discharge an obligation. The defendant was at liberty to make out a defence by identifying its adoption of one of the prescribed ways of managing exposure to the risk. Indeed, a complainant should not be permitted to constrain a defendant's case by particularising the way exposure to risk should have been managed under the relevant code of practice.

The first application for review

[21] The applicant sought review of the decision to dismiss the appeal, alleging jurisdictional error. (Section 349 of the *Industrial Relations Act* 1999 makes the decision of the Industrial Court final and conclusive and not subject to review by any court. A decision involving jurisdictional error, however, is subject to judicial review.[5]) The error was said to be that

> "The Industrial Court misconstrued provisions contained in Part 3 of the *Workplace Health & Safety Act* 1995 and thereby misconceived

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5 *Parker v President of the Industrial Court of Queensland* [2010] 1 Qd R 255.

the extent of its powers by confirming the conviction of the applicant by the Industrial Magistrate on 21st September 2009".

[22] On the hearing of the application for review, the parties identified three issues for determination:

> "(a) Is the decision of the Industrial Court susceptible to review ("first issue");
>
> (b) Was the second respondent, as prosecutor, obliged to aver or particularise acts of, or omissions by the applicant, as defendant, in respect of the contravention complained of ("second issue")?
>
> (c) If the principles in *Kirk* have application, is the complaint invalid for lack of particularity ("third issue")."

[23] The allusion to *Kirk* in (c) is to the decision of the High Court in *Kirk v Industrial Court (NSW)*,[6] on which the applicant placed heavy reliance. In that case, in the context of an alleged contravention of the *Occupational Health and Safety Act* 1983 (NSW), the High Court held that it was necessary that the statement of offence identify the act or omission said to contravene the relevant section and, more particularly, with regard to the defences available, the measure said not to have been taken to obviate the relevant risk. Without particularisation, the court would be in the position described in *Johnson v Miller*,[7] of acting as "an administrative commission of inquiry", rather than carrying out a judicial function.

[24] Boddice J distinguished *Kirk* on the basis that the statutory scheme of the New South Wales Act was different from that of the *Workplace Health and Safety Act*:

> "[15] The WH&S Act provides that a person on whom a workplace health and safety obligation is imposed must discharge the obligation, that a person has an obligation to ensure the workplace health and safety of the person, that that obligation is discharged if persons are not exposed to risks to their health and safety arising out of the conduct of the relevant person's business or undertaking, and that discharging the obligation under s 28 includes doing all of the matters specified in s 29 of the Act. The WH&S Act does not give a range of measures that may be undertaken in discharging the obligation. All of the matters specified in s 29 must be complied with by the defendant. Further, the WH&S Act does not impose an obligation based on practicability. Under the WH&S Act, the offence of a failure to discharge the obligation is complete when a person suffers an injury to their health and safety in the workplace subject to any defence which may be proven by the defendant pursuant to s 37 of the Act.
>
> [16] The NSW Act provides for a different statutory scheme. Sections 15 and 16 of the NSW Act, whilst imposing obligations to ensure health, safety and welfare at work, and

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6 (2010) 239 CLR 531.

7 (1937) 59 CLR 467 at 495.

> identifying types of measures an employer may take to obviate those risks, comprehend that the generally stated duty is contravened when a measure should have been taken by an employer to obviate an identifiable risk. The fact that any number of measures may or may not have been taken to obviate that risk necessitates that the prosecutor give the defendant particulars of the measures the prosecution contends should have been taken by the defendant. This is particularly so where s 53(a) of the NSW Act made it a defence for a person charged with an offence to prove that it was not reasonably practicable to comply with the provision of the Act the breach of which constituted the offence. This defence allows that not all measures which may have guaranteed against the risk have to be taken – only those measures which are reasonably practicable." (Citations omitted.)

[25] Boddice J regarded as correct the first respondent's conclusion that the complaint disclosed the legal elements and essential factual ingredients of the offence, and was valid. However, he continued:

> "[22] The complaint identified the risk and the source of that risk. There was no obligation on the prosecutor to particularise anything further to found a valid complaint. However, that does not mean that a prosecutor cannot be required, in an appropriate case, to particularise the applicable code of practice or other measures it asserts ought to have been taken by an employer if such particulars are necessary to apprise a defendant of the case it has to answer. For example, where there are conflicting codes of practice that may be applicable to the factual circumstance. The provision of such particulars in that event would be on the grounds of procedural fairness, not because they were necessary matters for the prosecutor to aver to found a valid complaint."

[26] In his conclusion, while reiterating that the complaint was valid, his Honour went on to say:

> "[28] However, in dismissing the appeal, the first respondent, whilst accepting there are occasions where a complainant may be required to particularise inadequacies in precautions or lapses in diligence, erroneously held there was no obligation on a complainant to particularise 'the measures not taken' so as to apprise a defendant of the case it was to meet in preparing any defence.
>
> [29] That finding did not involve the application of established law to the facts as found by the first respondent. That finding constituted a misconstruction of the relevant statute and a misconception of the extent of the Court's powers in the particular case in relation to a matter which was specifically the subject of a ground of appeal before the first respondent. As such, the finding constitutes a jurisdictional error as that term is identified in *Kirk*."

[27] Accordingly, Boddice J set aside the decision and orders of the first respondent and remitted the matter for further consideration and determination according to law.

The further hearing of the Industrial Court appeal

[28] On the further hearing of the appeal, the first respondent noted that of the three issues identified by the parties for determination in the Supreme Court, it had been held that his decision was susceptible to review but that the complaint was not invalid for lack of particularity. That left the question of whether the second respondent was "obliged to aver or particularise acts or omissions by the applicant as defendant in respect of the contravention complained of". In paragraph [22] of his judgment, Boddice J had gone no further than saying that it might, in an appropriate case, be necessary, in order to accord procedural fairness, to require the prosecutor to particularise the measures which ought to have been taken by an employer. That, the first respondent said, indicated that it was for him to determine whether fairness did, in fact, require further and better particulars of the measures not taken.

[29] The first respondent noted that at first instance, counsel for the applicant had sought further particulars of the act or omission alleged by the prosecution, rather than of the measures not taken. The case had been conducted, in any case, on the footing that the only relevant measure was the Forest Harvesting Code of Practice 2007. (This was not entirely correct: as already mentioned, the prosecutor did also raise the Risk Management Advisory Standard Code of Practice in his final address, although the claimed significance of that code had certainly not been articulated up to that point.) The applicant had adduced evidence about its reliance on a harvesting plan and about the difficulty, in rough terrain, of identifying dead trees and removing them, as the code of practice proposed. There was a further submission that the training requirements of the code had been met in relation to Mr Guo. In those circumstances, the first respondent held, there was no procedural unfairness in the second respondent's failure to particularise a non-compliance with the code of practice.

The second application for review

[30] The applicant filed a further application for a review to the Trial Division of this court on the grounds that:

> "(a) The Industrial Court misconstrued provisions contained in Part 3 of the *Workplace Health & Safety Act* 1995 and thereby misconceived the extent of its powers by confirming the conviction of the applicant by the Industrial Magistrate on 21st September 2009;
>
> (b) The Industrial Court misconstrued the judgment of Boddice J delivered 14 October 2010 and failed to find that there was an obligation on the second respondent to particularise in a complaint the measures not taken so as to apprise the applicant of the case it was to meet in preparing any defence. It thereby misconceived the extent of its powers by dismissing the appeal from the decision of the Industrial Magistrates Court dated 21 September 2009…"

[31] Martin J, who heard the application, recorded as the issues the subject of the debate:

> "(a) Is the decision of the Industrial Court of Queensland susceptible to review?
>
> (b) In *Kirk v Industrial Relations Commissioner (New South Wales)* the High Court determined, in respect of similar New South Wales legislation, that the prosecuting authority was required to identify each act or omission relied upon in a prosecution of this nature. Here the question to be addressed is: Is the prosecution required to particularise acts of, or omissions by, the applicant in respect of a prosecution brought by way of complaint and summons for contravention of the relevant provision of the WH&S Act?"

[32] Martin J held that the first respondent had correctly identified that he was to decide whether particulars ought to be ordered so as to accord procedural fairness, and his decision in the negative was within his jurisdiction. The applicant had submitted that Martin J should reconsider whether *Kirk* had direct application to the *Workplace Health and Safety Act*. His Honour said that he agreed with the reasons of Boddice J as to the differences between the New South Wales and Queensland legislation and the inapplicability of *Kirk*. He dismissed the application.

The extension of time application

[33] The application for an extension of time within which to appeal was not filed until 9 October 2012, some three months after the expiry of the appeal period. The managing director of the applicant, Mr Donald Collins, and the applicant's solicitor, Mr David Meara, swore affidavits in support of the application. Mr Collins said, in effect, that the applicant could not afford to appeal until the compromise of an unrelated dispute which led to the company's receiving $100,000. On receiving the funds, Mr Collins gave instructions to his solicitors to institute an appeal. Mr Meara confirmed that those instructions were received on 31 August 2012. The barrister who had previously appeared for the applicant was unavailable until 18 September 2012. He gave oral advice on 21 September 2012, which resulted in Mr Meara's informing the Division of Workplace Health and Safety (which employs the second respondent) of the applicant's intention to make this application. On 28 September 2012, Mr Meara attempted, but was not permitted, to file the application without the necessary supporting affidavit material.

[34] The second respondent filed an affidavit by Ms Tyra-Louise Bopf, Acting Regional Investigations Manager for Workplace Health and Safety Queensland for the southwest region. She identified prejudice to the second respondent in the fact that two witnesses, Mr Xu and an interpreter who had translated for him and Mr Guo during their training, could no longer be located. The second respondent argued, further, that because the applicant had chosen not to appeal the decision of Boddice J in October 2010, in reality, the extension sought was far greater than 12 weeks; it was the 100 weeks between the expiry of the appeal period in relation to Boddice J's decision and the filing of the application.

[35] In response, the applicant submitted that Boddice J's decision could not have been the subject of an appeal. He had found that the first respondent had erred in holding that there was no obligation on a complainant to particularise measures not taken

and had made the order which the applicant sought, remitting the matter to the first respondent for further consideration according to law. If there were prejudice resulting from delay, that was the result of the second respondent's refusal to provide particulars and should not be laid at the applicant's door.

[36] There is an argument that Boddice J's decision could have been appealed on the ground that he erred as to the law pursuant to which the first respondent was to reconsider the appeal before him; but it would by no means have been obvious to the applicant that it ought to appeal against an order which was, on its face, favourable. I do not consider that the failure to appeal that decision should count against the application. The delay in appealing from the decision of Martin J was explained, although not entirely justified, and is not so extensive as to preclude the allowing of the application for an extension of time, provided that the appeal itself has merit. If it should prove that the applicant was wrongly convicted because of the refusal to particularise, prejudice to the second respondent in the form of the difficulty of calling witnesses should not stand in the way of the appeal.

[37] The applicant's proposed grounds of appeal were that the primary judge erred

> "(a) by finding that the decision of the President of the Industrial Court of Queensland which determined that particulars of acts of or omissions by the appellant ought not be provided was an error within jurisdiction;
>
> (b) by failing to find that the second respondent was required to particularise acts of or omissions by the appellant in respect of a prosecution brought against the appellant for contravention of s. 24 Workplace Health and Safety Act 1995".

[38] Central to the proposed appeal was the question of whether the *Workplace Health and Safety Act* required that any particular act or omission be identified as constituting the offence. That question, in turn, led to consideration of whether the legislation under examination in *Kirk*, the *Occupational Health and Safety Act*, was relevantly different in its effect from the *Workplace Health and Safety Act*, so that *Kirk* could, as the second respondent contended, be distinguished.

The cognate provisions of the Occupational Health and Safety Act

[39] Section 15 of the New South Wales Act provided in ss (1):

> "Every employer shall ensure the health, safety and welfare at work of all the employer's employees."

Subsection (2) continued:

> "Without prejudice to the generality of subsection (1), an employer contravenes that subsection if the employer fails..."
>
> [There followed a number of measures such as providing safe plant and systems of work and providing training and supervision.]

Section 15(4) provided that if, in proceedings against a person for an offence under s 15, the court was not satisfied that the section had been contravened, but was "satisfied that the act or omission concerned constituted a contravention of section 16", the court could convict of an offence against that section.

[40] Section 16(1) required employers to:

> "ensure that persons not in the employer's employment are not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they were at the employer's place of work."

Subsection 16(3) was the equivalent of ss 15(4), allowing the court, if satisfied "that the act or omission concerned" was a contravention of s 15 rather than of s 16, to convict under the former section.

[41] Section 53, which created a defence, provided

> "It shall be a defence to any proceedings against a person for an offence against this Act or the regulations for the person to prove that:
>
> (a) it was not reasonably practicable for the person to comply with the provision of this Act or the regulations the breach of which constituted the offence, or
>
> (b) the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision."

The decision in Kirk

[42] The way those particular provisions were framed was certainly of critical importance in *Kirk*. The High Court noted the references in ss 15(4) and 16(3) to "the act or omission concerned" as constituting the contravention. The act or omission was constituted by the employer's failure to take particular measures to prevent an identifiable risk eventuating; it was "the measures which assume[d] importance to any charges brought".[8] Section 53 required an employer to establish one of the defences available under it, and in the case of s 53(a), to show that it was not reasonably practicable to take the measure in question. A defence under that subsection could only address particular measures which the statement of offence identified as necessary. The provision was not to be understood as requiring an employer to negative ss 15 and 16 at large, establishing that every possible risk was obviated. It required regard to be had to the breach of the provision which it was alleged constituted the offences.[9] It was necessary, then, that the employer's act or omission with respect to the measures to be taken to address identifiable risks be identified in the statement of offence.[10]

[43] The lower court had proceeded on the bases that the employer had an obligation to guarantee safety against risks in the workplace and that there was no requirement for the prosecutor to identify what measures should have been taken. There had been no consideration of how the defences under s 53 could co-exist with the obligation at large; and since it was considered unnecessary for the prosecutor to identify measures for the purposes of the provision, it would follow that the employer had to establish there were no reasonably practicable measures of any

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8 At 553.
9 At 554.
10 At 554.

kind which could have been addressed to the type of risk.[11] That approach had involved a failure to distinguish between the generally stated content of the employer's duty and the contravention in a particular case which constituted the offence. The subject of the charge was properly the action the employer was required to take to address a given risk.[12] The lower court's approach disclosed a wrong understanding of what constituted an offence under ss 15 and 16 and how the defence under s 53(a) was to be applied; it denied the employer the opportunity to properly put a defence under s 53(a).[13]

[44] It was a misconstruction of s 15 to convict and sentence the employer where the court had no power to do so. There was an absence of such power

> "because no particular act or omission, or set of acts or omissions, was identified at *any* point in the proceedings, up to and including the passing of sentence, as constituting the offences of which Mr Kirk and the Kirk company were convicted and for which they were sentenced."[14]

The failure to identify the act or omission which constituted the contravening conduct was the result of misconstruction of s 15 of the *Occupational Health and Safety Act* which, in turn, had resulted in the conviction of the defendants although

> "what was alleged and what was established did not identify offending conduct".[15]

That was a jurisdictional error for which *certiorari* would lie.

The second respondent's arguments for distinguishing Kirk

[45] The second respondent argued that the relevant offence was a breach of s 24(1) and consisted of the failure to discharge the obligation imposed by s 28, of ensuring that the safety of the applicant's workers was not affected by its conduct of its business or undertaking. The contravention did not involve any act or omission by the employer. Once it was shown that there was a risk to the employee, there was a *prima facie* contravention and it fell to the employer to mount a defence under s 37; in this case, because there was a code of practice, under s 37(1)(b). It followed that there was no requirement for the second respondent to identify more than the type of the risk and its source, and the business or undertaking the conduct of which had created it. For the proposition that the existence of the risk constituted the contravention, and nothing more by way of particulars was required, the second respondent relied on decisions of this court in *Parry v Woolworths Limited*[16] and *Bourk v Power Serve Pty Ltd & Anor*.[17]

[46] The second respondent placed particular reliance on the difference between the defence provisions in the *Occupational Health and Safety Act* and the *Workplace Health and Safety Act* respectively. The existence of a defence in s 53 concerning what was "reasonably practicable" made it necessary that the defendant be able to

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11 At 560.
12 At 561.
13 At 561-2.
14 At 575.
15 At 575.
16 [2009] QCA 226.
17 (2008) 175 IR 310.

address particular measures for compliance identified in the statement of the offence. In respect of s 37(1)(b), in contrast, it was simply a matter of complying with the relevant code or adopting some equivalent way of responding to the risk.

Decisions in civil proceedings concerning s 28

[47] I do not consider that *Bourk* and *Parry* assist in resolving the question of jurisdictional error here. In *Bourk*, the appellant was a linesman who sued for injuries suffered in a fall from a power pole when his safety harness failed. The primary judge found that the employer was obliged by s 28(1) to maintain safety equipment it provided to its employees, and its failure to do so constituted a breach of s 28. That finding was unchallenged on appeal, the argument there turning on whether the appellant had proved that the breach had caused his injuries. At no point was it suggested that it was unnecessary to establish of what the failure on the part of the employer amounting to a breach consisted. And as the applicant pointed out here, the case was not concerned with what was necessary to prove a contravention of s 24 of the Act.

[48] *Parry*, similarly, was not concerned with a breach of s 24. The appellant/plaintiff had contended that the respondent/employer breached s 28 by requiring him to assist in lifting a heavy tub of meat. The trial judge did not accept an expert report as to the risk of injury involved in the lift, and found, consequently, that the plaintiff had not proved the breach. The appeal was allowed, the court holding that the report did support the view that the lift involved a risk of injury. The expert had identified counter-measures: the use of smaller tubs or a requirement that the tubs not be lifted when they were more than half full. There was an advisory standard in place which set out a means of managing exposure to risks of the kind. Fraser JA, delivering the leading judgment, observed that, although the report was in some respects vague, it supported the view that the lift involved a risk of injury and the fact that the risk might have been managed in the various ways described in the report and the standard served to emphasise that there was a risk.[18] Again, there was no suggestion in this case that it was unnecessary to identify what the employer had done or failed to do.

The absence of reference to an "act or omission"

[49] Nor do I think that the absence of reference to an "act or omission" in s 24 is conclusive of what is entailed in a contravention of the section. As the applicant pointed out, s 164 of the Act, which dealt with proceedings for offences, provided in ss (2) that more than one contravention could be charged as a single charge "if the acts or omissions giving rise to the claimed contravention" happened at the same time and place. Section 166 had the effect that a defendant was responsible for acts done or omitted to be done by his representatives within the scope of their actual or apparent authority unless he proved that he "could not, by the exercise of reasonable diligence, have prevented the act or omission". The applicant submitted that it would be an odd result if it were necessary for the prosecution to particularise acts or omissions where it was sought to establish vicarious liability, but not where it relied on direct liability.

[50] The applicant made another point which has some force. Section 24(2) of the Act provides that the preceding subsection applies despite ss 23 and 24 of the *Criminal*

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18 At [64].

Code, which deal, respectively, with acts, omissions and events which occur by accident and acts or omissions done pursuant to an honest and reasonable but mistaken belief as to the facts. It would be unnecessary to exclude the application of those provisions if s 24 of the *Workplace Health and Safety Act* were not concerned with criminal responsibility for acts or omissions.

Mounting a defence under s 37

[51] The contravention in this case was identified as the failure to discharge the obligation to ensure that the workplace health and safety of the applicant's workers was not affected by the conduct of its business or undertaking. That allegation, which merely repeats the words of s 28(1), could hardly be more general; it gives no guidance at all as to what the contravention actually consists of. What was specified as the relevant risk – "death or injury including the risk of crush injuries to [Mr] Guo" - was, at best, particulars of the results of eventuation of the risk. The risk was identified as emanating from two sources: falling dead trees and/or the system of work for felling dead trees. The applicant thus had to respond to the general allegation of contravention with the elaboration that the risk included crush injuries and its source was either the mere existence of the dead trees, or some unidentified aspect of the way in which it went about its tree-felling; or both.[19]

[52] There was no allegation in the complaint that the Forest Harvesting Code of Practice or the Risk Management Advisory Standard Code of Practice stated a way of managing exposure to the risk of death or injury from the specified sources; although the prosecutor's address at the end of the case suggested that both were relevant. It was thus left to the applicant, in mounting his defence, to identify whether this was a case in which s 26(3) applied. If it did, the only means by which the applicant could discharge its obligation was by adopting or following a way stated in the relevant code or an equivalent means, in the latter case also taking reasonable precautions and exercising proper diligence. If s 26(3) did not apply, there were various provisions dealing with how the obligation might be discharged: generally, under s 28(2), by not exposing any of the workers to risks to their health or safety in the conduct of the business or undertaking; by proof, under s 27, of having adopted any way to discharge the obligation, taken reasonable precautions and exercised proper diligence; or by doing all of the things set out in s 29 relevant to the circumstances of the particular case.

[53] It was, accordingly, left to the applicant to examine the codes of practice and attempt to ascertain what stated ways there were to manage exposure to the risk of death or injury emanating firstly, from falling dead trees and secondly, from its system of work for the felling of dead trees. Notwithstanding the prosecutor's submissions in the Magistrates Court, it seems improbable that a perusal of the Risk Management Advisory Standard Code of Practice, which is pitched at a very general level, would yield a way of managing the risk from either source. However, the fact that the prosecutor suggested that there was a relevant failure to take measures contained in it serves to illustrate the difficulties confronting an employer in defending a complaint which does not refer to any code of practice.

[54] An examination of the Forest Harvesting Code of Practice, on the other hand, would have revealed in relation to the risk posed by falling dead trees that

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[19] It may have been intended to indicate that the existence of dead trees was the source of risk, which the system of work had failed to remove, but given that the system of work was itself identified as a source of risk, one could not safely infer that.

> "[t]he danger from dead or dry standing decayed trees can be reduced firstly by their identification, and secondly by their removal from within the felling zone."[20]

and, under a heading, "Working with machinery", that

> "[d]anger from dead or dry standing decayed trees can be reduced by their removal, both along proposed snig tracks, and within the drop zone of a landing."[21]

[55] The second aspect of the exercise, of discerning whether the Forest Harvesting Code of Practice states a way of managing exposure to the risk of death or injury from the system of work for the felling of dead trees is rather more difficult, in the absence of identification of any particular aspect of the system of work as creating the relevant risk. The code deals with a number of ways in which forest harvesting is to be done safely. It requires a harvesting plan detailing the methods and conditions of operation for any given harvesting area:

> "The harvesting plan must describe how work should be performed to eliminate or minimise the risks faced when harvesting."[22]

In conducting harvest operations, employers are to ensure that their workers are competent and hold appropriate certificates or are undergoing training.[23] Individuals are not to be required to work alone during felling except "where a high standard of safety is in place";[24] personal protective equipment is to be used.[25] Manual felling is to be undertaken by certain methods of cutting.[26] Any of those stated measures might minimise the risk arising from the employer's system of felling dead trees, if one knew what it was about the system that gave rise to the risk.

[56] Putting to one side the difficulty of not knowing what aspect of the system of work created the risk, there is the more general problem of how an employer is to defend a charge when there is more than one relevant code of practice or where a code of practice states more than one measure for dealing with a risk. On one view (which seems generally to have been the approach of the prosecutor at first instance), it would fall to the employer to adduce evidence of what it had done in respect of every one of the measures, whatever their relevance, or absence of it, to the actual hazard involved in the case. The second respondent did not argue here for that construction, accepting that it would suffice under s 37(1)(b) to show that the applicant adopted and followed any one way stated in the code of practice to manage exposure to the identified risks. Given the wording of the sub-section, that concession is not surprising.

[57] But accepting that position as correct, the respondent's construction of s 24, as not requiring that the actual nature of the contravention be identified, can only produce absurdity. For example, although in reality the cause of injury might be the failure to identify and remove dead trees, or a lack of training of workers in felling around

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20 Section 2, "Felling" at page 5.
21 Section 3.1, "Snigging" at page 9.
22 Section 1, "Harvesting plan" at page 1.
23 "Part A: Harvesting operations safety" at page 3.
24 At page 3.
25 At page 3.
26 Section 2.1, "Manual felling" at page 5.

dead trees, in the absence of any particularisation to that effect, it would suffice for the applicant to prove that there were no dead trees within the drop zone of a landing. That is a way stated in the code for managing the risk of falling dead trees. There need not, on that approach, be any nexus between the measure advanced under s 37 as a means of managing exposure to the risk and the actual manifestation of the risk. But for a defence under s 37 to have a rational relationship to ensuring workplace health and safety, it must be responsive to some identified aspect of what the employer has done or failed to do in the conduct of its business which has created the risk.

[58] The respondent's construction should not be accepted. For s 37 to have any sensible application, the same approach must be taken to a contravention of s 24 as was taken in *Kirk* to contravention of s 15 and s 16 of the New South Wales Act, so that the relevant breach "is the measure not taken, the act or omission of the employer". In the present case, the only suggestion of what measures might have been taken came after the defence case was closed and the applicant's submissions were made. What was then raised was a miscellany of steps under two different codes, at varying levels of generality, with no attempt made to isolate any particular measure as of relevance to the risk in question.

[59] In my view, it was incumbent on the prosecution to identify the measure or measures which should have been taken to ensure workers' safety from the risk; which would, presumably, have been a means stated in the Forest Harvesting Code of Practice. That would in turn clarify what the risk was, and whether it was alleged to emanate from the existence of dead trees which might fall or whether it was posed by some feature of the system of work. It would then fall to the applicant to make out its defence under s 37(1)(b)(i) or (ii).

Conclusion as to jurisdictional error

[60] It follows that the Industrial Magistrate misconstrued s 24, in consequence of which he convicted the applicant of an offence under the section where he had no jurisdiction to do so, because no relevant act or omission had been identified as constituting the offence. The first respondent correspondingly committed jurisdictional error by upholding a conviction for which there was no jurisdiction, and Martin J erred in dismissing the application for review of that decision.

The orders which should now be made

[61] At the hearing of this appeal, counsel were asked to consider what orders should be made if the court reached the conclusion that the applicant was wrongly convicted because the offence was not identified. They have, helpfully, provided a joint submission, proposing that, if the appeal were to be upheld, the court should quash the decision of the Industrial Magistrate and act under s 47(3) of the *Judicial Review Act* 1991 to remit the matter to the Industrial Magistrates Court. That sub-section provides:

> "If—
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> (a) the relief sought in an application for review is a certiorari order; and
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> (b) the court is satisfied that there are grounds for setting aside the decision to which the application relates;

> the court may, in addition to setting aside the decision, remit the matter to the court, tribunal, person or body concerned for further consideration, subject to such directions (including the setting of time limits for the further consideration, and for preparatory steps in the further consideration) as the court considers appropriate."

Three cases were cited in which a similar procedure was adopted: *R v McEwen & Ors*,[27] *R v T*[28] and *Shield v Topliner Pty Ltd*.[29]

[62] The first of the cases referred to, *R v McEwen & Ors*, is of doubtful assistance. There, the appeal seems to have been brought directly from the Magistrate who, the Court of Criminal Appeal concluded, did not have power to deal with the offence as he purported to do. The court reconstituted itself as a Full Court, ordered the issue of a writ of *certiorari*, removed the proceedings into the court, quashed the orders and set aside the sentences. In *R v T*, on an appeal from a District Court judge's sentence, this court made orders remitting the matter to the District Court so that a sentence could proceed once a report necessary to give jurisdiction had been obtained. McPherson JA and Ambrose J considered that the power to remit the matter arose under the general law or under s 47(3) of the *Judicial Review Act* 1991.

[63] In *Shield v Topliner Pty Ltd*, this court was dealing with an appeal from the District Court which had, in turn, dismissed an appeal under s 222 of the *Justices Act* against a Magistrate's decision dismissing complaints. The appeal was allowed; the question was as to which court the proceedings on the complaint should be remitted. Section 222 did not contain any procedure allowing proceedings to be remitted from the District Court to the Magistrates Court. The appellant, however, without dissent from the respondent, asked this court to remit the proceedings to the Magistrates Court. That step was taken, the majority adverting to *R v T* and the application in that case of s 47(3) of the *Judicial Review Act*, while Jerrard JA noted that in *Doonan v McKay*[30] the court had remitted a matter, which had come to it via an appeal to the District Court, directly to the Magistrates Court.

[64] Rule 766 of the *Uniform Civil Procedure Rules* 1999 gives the Court of Appeal "all the powers and duties of the court that made the decision appealed from". The difficulty in the present case is that Martin J's decision, and the appeal from it, did not concern jurisdictional error by the Magistrate but by the first respondent; it was the decision of the first respondent in respect of which the order in the nature of *certiorari* was sought. Martin J had no power or duty on that appeal to set aside the Industrial Magistrate's decision. Convenient though it would be to remit the matter directly to the Industrial Magistrates Court, to do so would be to overlook the nature of the proceedings which have brought it here.

[65] The power which Martin J did possess, and which should be exercised now, was to set aside the first respondent's decision and remit the matter to him for hearing and determination according to the law. It may be, in light of these reasons, that a consent order can expedite the matter in its return to the Industrial Magistrate from the Industrial Court.

[66] I would make the following orders:

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27 CA Nos 10, 11, 12, 19, 20, 28 of 1983, unreported 11 April 1983.
28 [1995] 2 Qd R 192.
29 [2005] 1 Qd R 551.
30 [2002] QCA 514.

1. Allow the application for an extension of time within which to appeal.

2. Allow the appeal.

3. Set aside the orders made by Martin J on 8 June 2012.

4. Set aside the order of the first respondent made on 22 March 2011 dismissing the applicant's appeal from the Industrial Magistrate's decision.

5. Remit the matter to the first respondent for hearing and determination according to law.

6. Order that the second respondent pay the applicant its costs of and incidental to the application for judicial review of the decision of the Industrial Court of Queensland filed 21 June 2012 and its costs of this appeal other than the costs of the application for leave to appeal.

[67] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with those reasons and with the orders proposed by her Honour.

[68] **MARGARET WILSON J:** I agree with the orders proposed by Holmes JA and with her Honour's reasons for judgment.