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The Last Hurrah - The decision of NK Collins holds fast to the past as legislation pushes us to the future

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On 22 March 2011, President Hall of the Industrial Court of Queensland handed down his decision in *N K Collins Industries Pty Ltd v Peter Vincent Twigg*, a decision for which Workplace Health and Safety practitioners had waited with baited breath. President Hall had decided on the matter of N K Collins once before, been appealed from, and received the matter back for his final decision.

In a previous article, MVM Legal provided our take on the appeal decision of N K Collins, and its potential ramifications on workplace health and safety operations in Queensland. Without repeating the content of that article, it suffices to say the appeal decision in N K Collins left significant unanswered middle ground as to what was required in terms of the detail required of any prosecution charging someone with an offence under the *Workplace Health and Safety Act 1995*.

The case from which N K Collins took its basis, the High Court decision in *Kirk v. The Industrial Relations Commission of New South Wales and Another*, attempted to define the obligations of a public body in bringing a prosecution against a private entity for a breach of legislation. The High Court fell back on the established principle that in order to give an accused party the ability to defend against an accusation, the party accused needed to be able to identify exactly of what they were being accused. The legislation in question in that case, the *Occupational Health and Safety Act* was deemed by the High Court to require, for a prosecution to be good in law, not just for the prosecuting party to allege some form of failure by the prosecuted party, but to describe in detail **in what way** they failed. This was not just a procedural requirement, the court ruled, but a basic requirement of constituting any activity as an 'offence'. Identifying how a person failed under the *Occupational Health and Safety Act* would require, therefore, particularising how that party could **have fulfilled its obligations**. In circumstances where the prosecutor was unable to identify what should have been done, no prosecution could be brought. Accordingly, whilst issues of

onus of proof remained in place for the defence of a prosecution, particularising the prosecution meant the prosecutor had to be able to establish where the defendant went wrong.

This was potentially a notable shake-up. The fact that injury or accident occurred would no longer be sufficient to establish a breach of the Workplace Health and Safety laws, because the specific failure under those laws: the time, the date, the place and the events leading up to the injury or accident, would need to be detailed. A potential ramification of *Kirk* was that where Workplace Health and Safety was unable to find that information, the matter would necessarily rest.

In Queensland, however, this position has been distinguished by Justice Boddice. His Honour's decision is authority for the fact that the *Workplace Health and Safety Act 1995* contains the essential factual ingredients of an offence under that act without the need to detail the key elements of the offence. This means that a lack of 'particulars' would not, as a matter of law, lead to the potential of a prosecution being struck out for being insufficiently detailed. That was not, however, the end of his Honour's reasoning. Whilst a lack of 'particulars' would not be fatal to a prosecution, the party defending against that prosecution should have the right to request them so as to be able to mount a proper defence. With this reasoning set out, His Honour referred the matter back to the Industrial Court for President Hall's decision.

The decision of 22 March 2011 itself further limits this scope. It was not in question at this stage as to whether or not the complaint was valid. What was primarily to be determined was whether or not the facts of N K Collins and the legislation relied upon were of a character to require further detail as outlined by Justice Boddice on request from the defendant. This centred on notions of fairness in being able to readily identify

what portion of the legislation and associated documentation (such as Codes of Practice, Regulations or Ministerial Directions) the prosecuting party relied upon. In the case of N K Collins, it was established on the evidence that these facts were undisputed. Even though the specific Code of Practice in the case should have been pleaded, both parties were well aware of which Code of Practice the defendant was accused of violating. Telling in this regard were references by the Defendant's counsel to the Code of Practice, establishing that the defendant had an opportunity to defend the substance of its case.

Emphasis in the decision was placed on Paragraph 22 of Justice Boddice's reasoning, which read:

"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."

The President made reference to the decision of His Honour Justice Boddice with particular reference to the words: "to particularise the measures not taken in order to apprise the Defendant of the case". The Industrial Court has drawn a distinction between the "measures not taken" and the "acts and omissions not taken". This appears to follow from the reasoning of the appeal decision, which likewise drew a similar distinction. To put the distinction in practical examples, the measure you fail to take might be compliance with a particular Code, with judicial reasoning being you can determine from the Code what acts you might have done to comply with the Code.

The question, therefore, is not for the validity of the complaint when dealing with the legislation in Queensland, it is, where a valid complaint is brought, does procedural fairness require specific *legal* allegations to be made out. A requirement for specific *factual* allegations has been explicitly rejected.

Despite the fact that the Court accepted that 'in hindsight it would have been prudent to specifically plead the Code of Practice', this was not deemed fatal to the complaint or even requiring of remedy in the proceedings on foot. Even though there was a relevant Code of Practice in these circumstances, which was not specifically pleaded or particularised, because the parties had a genuine understanding of their obligations, the failure to particularise was insufficient to require any further action by the prosecutor.

The consequences of this line of reasoning serve to further narrow the ambit of the decision in *Kirk* in relation to Workplace Health and Safety laws in Queensland. Whilst they do provide a positive step in allowing for specific legislative elements to be identified in isolation, they do not provide further certainty for the layperson, or even for the Courts and practitioners. Most people going before a court, as observable from the latest round on the NK Collins carousel, are aware of the legislative provisions they are alleged to have violated. Often (and rightly so) the first step of the process for defendants is to obtain legal advice. This decision does, where a code of practice is identifiable, serve to narrow the scope of the arguments and potentially identify early on disagreements as to which code is alleged to have been breached. It does not, however, deal with the principal ambiguities in the legislation. Unfortunately, current Workplace Health and Safety legislation, required as it is to cover a great variety of workplaces and situations, is generally couched in wide terms. These terms need to be wide to encompass the undertakings which attract workplace health and safety obligations, but therefore conversely cannot be specific enough to curtail debate and discretion about the correctness of steps taken to fulfil your obligations.

Even as the decision serves to narrow the scope of argument, it still has yet to finalise into a consistent requirement on the prosecuting entity. It is decided that in some circumstances it may be proper to plead the Code alleged to be

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breached. It is not decided as to whether or not the way that Code has been breached needs to be pleaded, a question likely to be raised in the cases following *N K Collins*. There is still significant doubt as to what will constitute sufficient particulars, as the general nature of the requirement 'in some circumstances' to plead a Code does not indicate what occurs where there are multiple relevant Codes or where there are inconsistencies between pleaded Code.

Interestingly, with the Court's preference to focus the decision in *N K Collins* to the specifics of the current Queensland legislation rather than to a statement of general principles, the attempts of the last few months to clarify *Kirk's* application in Queensland may be of less utility when the proposed national uniform legislation becomes applicable.

The model laws themselves bring in, via statute, the proposition rejected in *Kirk*. Section 17 of the model bill contains within it the novel (for Queensland) concept of steps being taken being 'reasonably practical'. It is understood that any prosecution for an offence that requires 'reasonably practical' steps will require Workplace Health and Safety to establish that the person with a workplace health and safety responsibility did not take 'reasonably practical' steps. This obligation is clearly in line with the particularisation duty in *Kirk*.

By placing the onus on the prosecuting entity to establish that all reasonably practical steps were not taken, it will be necessary for that prosecuting entity to establish what steps would have been reasonably practical.

This concept of reasonable practicability is reinforced throughout the obligation provisions of the model legislation. The general duty has now been broadened to include a wider variety of obligations, which Workplace Health and Safety broadly categorise as:

1. provision and maintenance of a work environment without risks to health and safety
2. provision and maintenance of safe plant and structures
3. provision and maintenance of safe systems of work
4. safe use, handling, and storage of plant, structures and substances
5. provision and maintenance of adequate facilities for the welfare of workers
6. provision of information, training, instruction or supervision that is necessary to protect persons from risks to health and safety arising from work, and
7. monitoring the health of workers and conditions at the workplace for the purpose of preventing illness or injury arising from the conduct of the business or undertaking

but each of these broader duties is underpinned by this notion of reasonable practicability. More than the technical amendments to definitions, this underlying philosophical shift looks to significantly change the operation of Workplace Health and Safety laws.

The model legislation is expected to come into effect on 1 January 2012, and is subject to further review over the coming months. Nevertheless, this concept of reasonable practicability is so intrinsic to the model legislation it is unlikely to be significantly curtailed or removed.

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