

## **The High Court Strikes Two Blows for the Rule of Law**

**By Suri Ratnapala. Professor of Public Law, T C Beirne School of Law, University of Queensland**

In its first judgment of 2010, the High Court of Australia struck two major blows in defense of the rule of law in Australia. In *Kirk v Industrial Relations Commission* [2010] HCA 1, the High Court unanimously quashed the convictions entered by the NSW Industrial Court against employers accused of health and safety offences under the NSW Occupational Health and Safety Act. The decision has profound constitutional significance. First, the Court ruled that State Parliaments have no legislative power to 'strip the Supreme Court of the State of its authority to confine inferior courts within the limits of their jurisdiction by granting relief on the ground of jurisdictional error'. In short, it is no longer possible for State Parliaments to immunise judicial or administrative decisions from being challenged on the grounds that they have acted outside their legal powers. This is what the NSW Parliament sought to do when it provided in s 179 (1) of the NSW *Industrial Relations Act* that a decision of the Industrial Court 'is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal'. The provision extended to the prevention of the Supreme Court from granting the traditional remedies in the nature of the writs of prohibition and certiorari, and mandamus, injunctions and declarations.

Second, the High Court overturned precedents of the NSW Industrial Court that allowed that tribunal to convict employers for health and safety offences without giving them sufficient particulars concerning the offence. The joint judgment held that the failure to state what measures should have been taken by the employer to prevent the identified risk denied the employer the opportunity to properly present a defence. The judges stated: 'The common law requires that a defendant is entitled to be told not only of the legal nature of the offence ... but also of the particular act, matter or thing alleged as the foundation of the charge'. The High Court re-interpreted the legislation to uphold the treasured principle of common law and human rights law that a person must not be punished except on conviction after a fair trial. The Court also found that the Industrial Court of NSW had unlawfully used the evidence for the prosecution given by the accused employer Mr Kirk.

The case arose out of the conviction of the Kirk Proprietary Holding Company the owners of a farm and the company Director Mr Kirk for failing to take measures to prevent the death of the manager of the farm Mr Palmer. Kirk had left the day to day management of the farm with Palmer. The fatal accident occurred when Palmer drove the farm's all terrain vehicle (ATV) down a hill side off the regular road and it overturned. Evidence showed that the ATV was bought on Palmer's recommendation and that Palmer had read its manual. Palmer, not Kirk was the expert on the use of the ATV. Nevertheless the IR Court found the absentee Kirk and his company guilty without alleging specifically what he should have done to eliminate the risk.

The High Court's decision to quash the convictions of Kirk and his firm sends a salutary message to legislators. It is that sacrificing the most fundamental principles of justice and the rule of law is a price we cannot afford to pay even in the pursuit of worthy social goals. It can lead us down the slippery slope of constitutional decay which ultimately will defeat our best aspirations. The kind of statutory scheme that the High Court condemned in *Kirk* has become an unfortunate trend in legislation.

The most important consequence of the Court's decision from the constitutional standpoint is the widening of the separation of powers in State Constitutions. The separation of powers is not a formal feature of State Constitutions but that position has been changing under the gravitational force of the Federal Constitution. *Kirk* is the third and most important of a series of High Court rulings that have strengthened the independence and integrity of State Supreme Courts against legislative incursions. *Kable v DPP* debarred the NSW legislature from using the Supreme Court to secure the further detention of a named dangerous prisoner. In *Forge*, the Court declared that State legislatures were not free to harm the defining features of the Supreme Court and warned that the practice of employing acting judges can reach the point of damaging the essential character of the court. Now in *Kirk*, the High Court has ruled that not only are State legislatures prevented from vesting incompatible functions in the Supreme Courts but they are also barred from divesting the Supreme Courts of their historical jurisdiction to ensure that public decision makers including other courts do not exceed their powers or otherwise transgress the law. The Supreme Courts, the High Court held, may not only correct jurisdictional errors but also other errors of law on the face of the record that affects jurisdiction. This is a power that lies beyond the reach of legislative control.

Well done Your Honours!