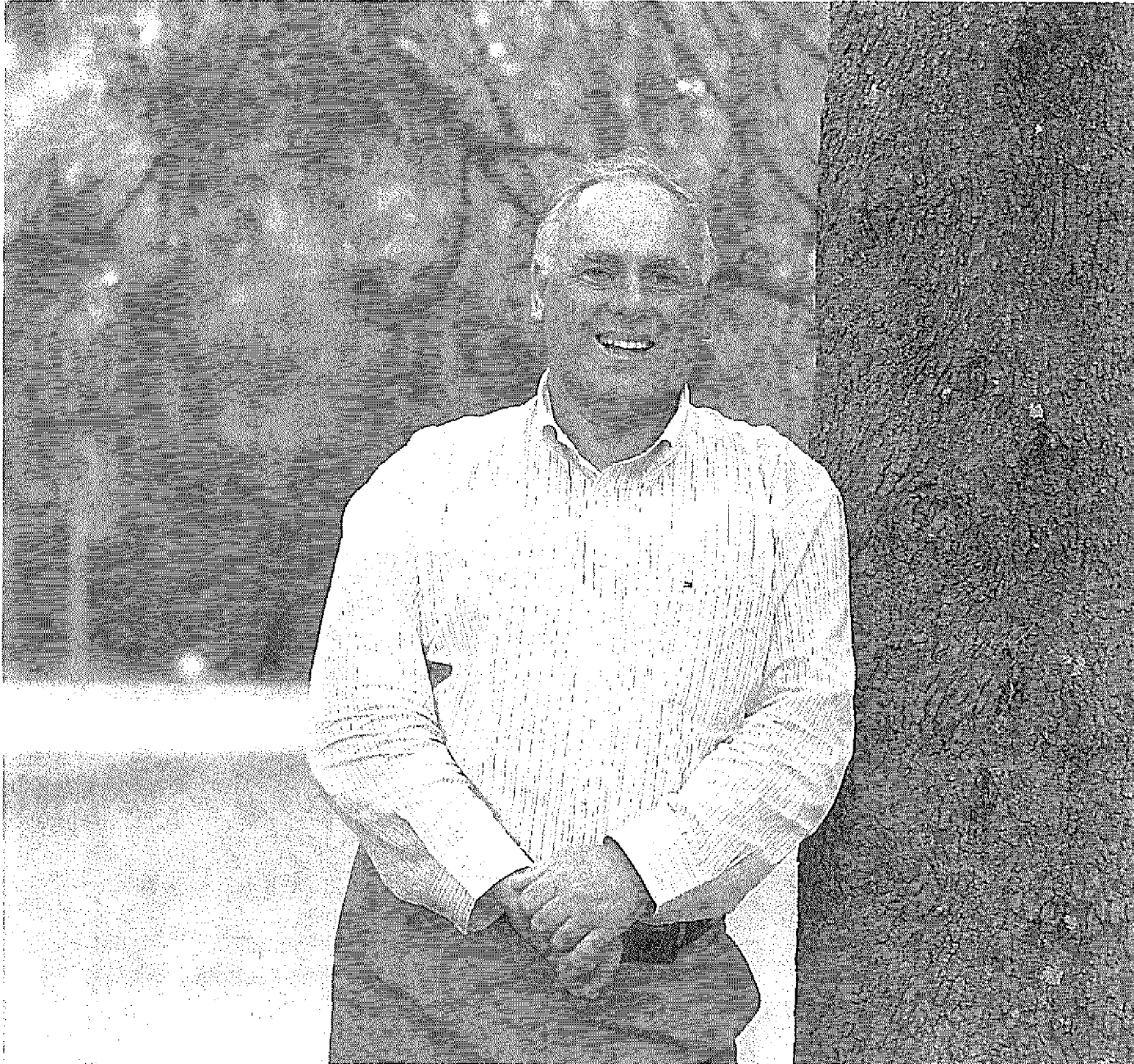


# I was accused of murder, declares innocent boss



Graeme Kirk celebrates his High Court win in Canberra. He now faces a huge legal bill

The inquiry into a farm worker's death exposed a major defect in industrial law

CHRIS MERRITT  
LEGAL AFFAIRS EDITOR

HOBBY farmer Graeme Kirk gained an insight into workplace justice in NSW when a WorkCover inspector accused him of industrial murder.

It happened when Mr Kirk was being interviewed about the death in 2001 of his friend and farm manager Graham Palmer.

Mr Kirk was vindicated last month by the High Court, which quashed his conviction on the far less serious charge of failing to provide a safe workplace.

But nine years ago, the fact that Palmer had died at work meant the law of NSW presumed Mr Kirk was guilty.

That legal reality offends one of the basic principles of the rule of law. But it helps explain what Mr Kirk describes as the zealotry of WorkCover's investigation.

"The inspector took me on like it was a personal vendetta," Mr Kirk said.

"I said to him in the interviews, 'What are you trying to allude to here?'"

"And he said, 'This is industrial murder. Somebody has died in an industrial accident and you are responsible.'"

"He used the term several times. They were out to get me."

This exchange, which WorkCover says never took place, occurred on Mr Kirk's farm and was witnessed by his son-in-law David Thorn, who was surprised by the inspector's choice of words.

"I recall him using the term industrial murder," Mr Thorn said.

Later, when Mr Kirk was interviewed by the same inspector in the WorkCover office at Wollongong on the NSW south coast, the discussion was recorded and transcribed. What the transcript does not show is the conversation that took place when the inspector briefly suspended the interview due to Mr Kirk's ill health.

According to Mr Kirk: "He said, 'This is industrial murder we are talking about here.'"

Employer groups have long complained that workplace safety law in NSW reverses the onus of proof and places an absolute duty on employers to prevent all workplace injuries, regardless of whether they are foreseeable.

Industrial lawyer Andrew Tobin said prosecutors had been able to argue that an employer was criminally liable "simply because the accident has occurred".

When Mr Kirk was interviewed by WorkCover, he was unaware of the state of the law, and said he was "totally co-operative".

But after fighting for nine years to clear his name, he said he would advise all employers not to cooperate when WorkCover's inspectors come calling.

"I co-operated fully because I had done nothing wrong. What I should have done is got legal representation and said nothing."

WorkCover said all the activities of its inspectors and prosecutions are governed by official guidelines. And the organisation denies its inspector accused Mr Kirk of being responsible for industrial murder.

"WorkCover denies the allegations it understands have been made to *The Australian* by Mr Kirk," the organisation said in a statement.

"WorkCover staff work under a strict code of conduct when they

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investigate workplace incidents to determine if there has been a breach of workplace safety laws.

"Prosecution action is only considered when it is in line with WorkCover's published compliance policy and prosecution guidelines," the statement said.

The Australian Federation of Employers and Industries said it had received plenty of complaints about the behaviour of other WorkCover inspectors, whose approach had changed since the introduction of the current workplace safety laws in 1983.

"WorkCover is the one that changed the approach," said the federation's chief executive Garry Brack.

Because the law had been interpreted in a way that meant employers "had to be perfect", inspectors could no longer provide advice to employers, he said.

"WorkCover could not allow inspectors to give advice because if you had to be perfect any accident would demonstrate that WorkCover's advice was faulty and therefore they would be in the gun," Mr Brack said.

NSW Finance Minister Michael Daly, who is responsible for WorkCover, said that if Mr Kirk wished to complain about his treatment during the investigation he should contact WorkCover's chief executive, who would be happy to address his

concerns. Mr Kirk's main concern at the moment, however, is the crippling cost of his victory.

The High Court majority left him with a legal bill of between \$800,000 and \$1 million.

That is almost nine times greater than the original fine of \$121,000 that the NSW Industrial Court imposed in 2003 after an error-filled trial.

Just one High Court judge, Dyson Heydon, believed WorkCover and the Industrial Court should be made to compensate Mr Kirk for every cent he spent defending himself.

The costs order favoured by the other six judges has the effect of leaving Mr Kirk to bear the costs of some of the earlier proceedings.

His solicitor, David Lardner, has already written to WorkCover asking the organisation to pay for all of Mr Kirk's costs.

"I had to sell two investment properties to fund this case and now I'm at the whim of WorkCover to see what they will give me back," said Mr Kirk.

"I'm 60-odd years old — that's not retirement age but is getting close to it."

The conviction rate in the NSW Industrial Court is 98.4 per cent, well above those states where the onus of proof in workplace safety cases is not reversed and where workplace safety law is not administered by specialist courts.

As well as quashing his conviction, the High Court majority pointed to a series of flaws in the way the law had been applied in the Industrial Court.

It found that Mr Kirk had not been given the opportunity to properly defend himself. There had been a departure from the rules of evidence.

The Rule of Law Association, which has long been concerned about occupational health and

**"There needs to be political pressure to resolve this"**

MALCOLM STEWART  
VICE-PRESIDENT RULE OF LAW

safety law in NSW, said every employer owed Mr Kirk a debt of gratitude.

As a result of the Kirk case, future prosecutions under workplace safety laws in NSW will be handled in ways that are closer to the procedures used in the mainstream courts.

But Rule of Law Association vice-president Malcolm Stewart said there was still a case for urgent reform of the occupational health and safety system in NSW.

"These are criminal matters," Mr Stewart said. "You can go to jail for breaching the Occupational Health and Safety Act.

"There are very substantial

finances. They can't wait. It has to happen now.

"This is the state government's problem. It has to be fixed by the state government now."

He believed the NSW government also needed to consider whether a specialist court such as the Industrial Court should continue to administer criminal matters or whether this responsibility should be given to the mainstream courts.

It was unacceptable for the state government to do nothing and merely wait for the problems to be fixed by the planned introduction of harmonised national workplace safety laws in about two years.

"There needs to be political pressure to resolve this," said Mr Stewart.

He said Mr Kirk deserved a vote of thanks for making it clear that the NSW Industrial Court had been interpreting occupational health and safety laws "in a way in which it is virtually impossible for employers to comply with the provisions".

"The NSW parliament should have seen this and done something about it, rather than letting it go and have it remedied by the High Court," Mr Stewart said.

He said the NSW government needed to accept the criticism of the state's workplace safety system and strengthen the defences available to managers and employers.

of Catholic religious orders.

"Defendants selected the children, arranged for their transport and exploited them as forced labour in an unlawful child trafficking scheme," the statement of claim says.

"Despite receiving numerous subsidies from the governments of Australia, Britain and Malta for the education, clothing and welfare of child 'migrants', defendants provided them with little or no education, feeding them a starvation diet and even failed to provide them with proper clothing."

The case is unusual because it is using the Alien Torts Statute, which was first enacted in 1789.

New York lawyer Rajan Sharma said the statute allowed non-US citizens to bring a suit in a US court, usually for violation of customary international law.

"The statute has been challenged in the US Supreme Court ... but basically they affirmed the right of action under the statute," Mr Sharma said. "It is an important tool for vindicating human rights around the world."

The US courts still needed to have jurisdiction over the defendants and the foreign plaintiffs had to explain why the case should be brought in an American court, Mr Sharma said.

He said it was ironic that Mr Brown had set up a £6 million (\$10m) fund to help victims find their families but the religious groups had yet to fully acknowledge their role.

Mr Sharma said lawyers for the Christian Brothers and Sisters of Mercy had indicated they would try to have the case dismissed.

Super 14 game in Canberra, he spearheaded Western Force to an upset win against the Brumbies.

It was certainly a confidence

in Pretoria last Sunday.

scrumming 48-58 loss to the Bulls