

# Australian High Court overturns workplace safety law

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A decision by Australia's High Court last week will make it far easier for employers to avoid liability for workplace deaths and injuries. The ruling dovetails with the Rudd government's new "model" work safety legislation, unveiled last December, specifically designed to cut employers' obligations and costs.

The seven members of Australia's highest court unanimously overturned a conviction and \$121,000 fine imposed on a New South Wales farmer, Graeme Kirk, for failing to provide a safe workplace, resulting in the death of his farm manager while moving heavy steel using an all-terrain vehicle. Although the ruling only has immediate effect in NSW and Queensland, it has far wider implications.

In essence, the ruling reverses the principle of "strict liability" for workplace safety imposed on employers in those two states. Under the NSW legislation, if workers are killed or injured, employers must prove that it was "not reasonably practicable" for them to have provided a safe and healthy workplace.

With a few brief paragraphs, the judges brushed aside 15 years of legal precedents to declare that the enforcement of this provision was inconsistent with common law principles that require defendants to be told the "particular act, matter or thing" alleged against them. This is despite the fact that legislation can always override common law rules.

The court declared that the NSW WorkCover Authority must specify in detail what measures the employer should have taken to ensure safety. It is likely to be difficult in many cases to identify the "acts or omissions" with sufficient precision to satisfy an appeals court that an employer should have been convicted.

In a joint judgment, six judges ruled that the NSW Industrial Court had "no power" to convict Kirk. They admitted that their verdict reversed "a body of jurisprudence

which had been settled in the (NSW) Industrial Court over some years".

The remaining judge, Justice Dyson Heydon, went further, agreeing with the outcome but dissenting on the majority's failure to levy full costs against the Industrial Court. Heydon also made explicit the attitude that was implicit in the majority judgment. He expressed contempt for the industrial court and other specialist courts, accusing them of becoming "over-enthusiastic about vindicating the purposes for which they were set up". Heydon claimed that industrial judges felt obliged to accept "all, or almost all," complaints about breaches of industrial safety.

Hailing the decision as a "landmark," Norton Rose occupational health and safety (OHS) lawyer Michael Tooma said: "The prosecution can no longer rely on the apparent absolute nature of the (employer's) duty. This spells the end of what some people have called the reverse onus—guilty until proven innocent—approach to the legislation." He predicted that the decision would influence the way courts interpret employers' duties under Labor's national laws, which are scheduled to come into force in 2012.

A peak employers' body, the Australian Chamber of Commerce and Industry, said the ruling would overcome "oppressive OHS laws" and "hopefully pave the way for fairer and more workable health and safety laws" across the country. The Australian Federation of Employers and Industries demanded a royal commission into the operation of the NSW law, and the possible reversal of all employer convictions over the past 15 years.

The ruling can only lead to rising numbers of deaths and injuries, which have already jumped dramatically in recent years. A March 2009 report by the federal government's Australian Safety and Compensation Council revealed that the number of people who experienced a work-related injury

grew by 44 percent between 2000–01 and 2005–06, far exceeding the 12 percent expansion in the workforce over that period. The council recorded 2,603 work-related fatalities in 2005–06, but warned that this was a conservative estimate, with studies indicating that as many as 7,000 fatalities may occur annually as a result of work-related diseases.

This worsening toll demonstrates that the existing state-based OHS legislation is grossly inadequate. No state has industrial manslaughter laws making employers criminally liable for causing workers' deaths. Now, the Rudd government is introducing national uniform legislation that scraps the NSW and Queensland strict liability provisions and other measures that the corporate elite regards as "oppressive".

Working closely with the state Labor governments, Prime Minister Kevin Rudd and Deputy Prime Minister Julia Gillard, the Workplace Relations Minister, made the "harmonisation" of the OHS laws one of the highest priorities of their pro-business economic restructuring agenda when they took office in 2007.

Last December, after protracted negotiations with employers and trade unions, Gillard published the proposed legislation, declaring that it would "support a productive, streamlined national economy and ensure Australia's future economic prosperity". She claimed that the Model Work Health and Safety Bill would both "enhance productivity" and "deliver improved safety for workers".

Nothing could be further from the truth. The Bill is designed to enhance corporate profitability at the expense of workers' safety. It requires employers to take only "reasonably practicable" steps to ensure health and safety, and specifies that financial cost is a "relevant matter" to be weighed up in deciding what is reasonably practicable.

The legislation also imposes a duty on workers to take reasonable care for their own health and safety, while substantially shielding company executives from liability by requiring them only to exercise "due diligence" to ensure that their companies comply with health and safety rules.

Further, the Bill undermines the right of workers' elected OHS representatives to direct cease-works to avert safety risks. OHS reps will have the authority to do so only once they are deemed to be fully trained. Even then, they must first exhaust an "issue resolution" procedure with management (unless the risk is "serious, immediate and

imminent").

One of the most revealing features of the Bill is that registered trade unions are awarded a central function in this regime, with the specific task of preventing walkouts or other forms of independent action by workers to enforce safety standards. Having already presided over widespread destruction of safety conditions, reflected in the growing numbers of casualties, the unions will have their role officially reinforced. Accredited union officials can be granted Work Health Safety permits, giving them entry rights onto business premises to "consult and advise" workers on the procedures for dealing with safety complaints. These permits can be revoked if production is hindered or obstructed.

The Labor governments have been able to proceed with this assault only because the union movement has stifled workers' opposition and channelled it into appealing to the Labor leaders to incorporate further pro-union provisions. At limited protest rallies last September, Australian Council of Trade Unions (ACTU) secretary Jeff Lawrence urged workers to send a message to the governments that they must "sit down with the ACTU and unions and address our concerns" (see: "Workers protest against Labor government assault on safety laws").

In 2007, the unions backed Labor's election and claimed that a Rudd government would restore basic rights lost under the Howard government. On work health and safety, as on every other issue, the opposite has proven to be the case. The Rudd administration is going well beyond the Liberals in carrying through measures directed against working people, at the direct behest of the employers.



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