

## ***The High Court of Australia's has overturned a decision of the NSW Industrial Relations Commission in OH&S convictions***

The High Court has overturned the conviction of a NSW farm owner in an appeal against a decision by the New South Wales Industrial Relations Commission's arising out of the death of an employee in a vehicle accident.

The NSW WorkCover Authority prosecuted the owner of the farm, and one of its directors over the death of the farm's manager when he rolled an all-terrain vehicle while driving on the property.

The NSW IRC convicted the director and the company under an old version of NSW's OHS Act and fined them a total of \$121,000. The majority High Court decision quashed the decisions of Justice Walton and the IRC full bench and ordered WorkCover to pay the director's and the company's costs for the appeals to the High Court and Court of Appeal.

One Judge launched an extraordinary attack on WorkCover's handling of the prosecution. The authority had treated the director and the company "very unjustly and in a manner causing them much harm," he said. "It is absurd to have prosecuted the owner of a farm and its principal on the ground that the principal had failed properly to ensure the health, safety and welfare of his manager, who was a man of optimum skill and experience – skill and experience much greater than his own – and a man whose conduct in driving straight down the side of a hill instead of on a formed and safe road was inexplicably reckless." He went on to observe that constant surveillance of employees' work activities is an impossible and unfair obligation on chief executive officers and did not represent the law in this area.

These comments recognise the reality of a Chief Executive Officer's role in the modern Australian corporation. The same argument could well extend to cover directors who, similarly, are involved in the oversight of companies rather than the management of day-to-day operations.

This case also draws attention to the consequences that follow for directors when prosecuted under inappropriate laws that provide limited avenues for appeal. These are matters of significant importance and concern for all directors.

This decision was based on existing NSW OH&S law. COAG has agreed to enact uniform national OH&S legislation and regulations by the end of 2011.

The important aspects of this decision include:

- **Access to appeals** - The OH&S Act limits the rights of appeal of parties convicted by the Industrial Court of NSW of OH&S offences. However, the Court ruled that parties are entitled to appeal jurisdictional errors to the Supreme Court of New South Wales.
- **Recognition of the defendant's obligation** - The prosecutor must properly identify the ways in which the defendant ought to have acted to manage health and safety, not just claim that a failure to ensure health and safety has occurred.
- **The extent to which supervision is possible** - While the duty under OH&S legislation to 'supervise', constant surveillance of employees' work activities is an impossible and unfair obligation on Chief Executive Officers and incorrectly identifies the law in this area.