A Different Form of Employment Relations in CQ's Coalmines: Legal Implications for Contractual Arrangement

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ABSTRACT

This paper notes the extent of contractors working in the Central Queensland's (CQ) coalmines and proposes a different form of managing employment relations in the coal industry, based on Dunlop's industrial relations (IR) model. The paper argues that due to the complexity of defining 'employee' and distinguishing between 'independent contractors' and 'dependent contractors' within the Australian federal and state IR legislation, the employers and managers in the industry may not have sufficient awareness of their firms' legal occupational health and safety (OHS) obligations which nevertheless arise under independent contractual arrangements at the workplace. The paper concludes that further investigation is required to verify whether, and how, firms in the coal industry have effectively managed, or are managing, the issue of OHS under the new employment relations framework.

***Keywords**: employment relations, contractors, employees, coalmines, legal, OHS, Central Queensland*

INTRODUCTION

Employment relations in the Australian mining industry have undergone many changes in the past decade (Nils 1997; Patrickson and Hartmann 2001; Moore and Gardner 2004). Notably the fundamental changes in work and employment patterns are largely centred around the notion of 'flexibility'. This is reflected in three key areas: 1) increased flexibility in the labour market (Barry, Bowden and Brosnan 1998; Barry and Waring 2000; Waring and Barry 2001); 2) increased flexibility in working hours (Heiler & Pickersgill 2001; Heiler, Pickersgill and Briggs 2003); and 3) increased flexibility in payment systems (Kent, Siu and Walker 2001; Waring 2005). Flexibility in all aspects of employment relationship has become the driving force for changing the organisational structures and employment practices of many mining companies in order to enhance productivity, increase organisational efficiency and effectiveness, and maintain market competitiveness (Rio Tinto 1997; Tasman Asia Pacific 1997). The industry uses these flexibility practices to adopt new technology and new production systems, to reorganise jobs, making greater use of outsourcing and contract work, and to take a different employment relations management approach to gain a competitive advantage (Chappell and Johnston 2003; Gollan and Hamberger 2003; Moore and Gardner 2004).

The use of flexible practices seems also evident in the coalmines of Central Queensland (CQ). Many companies in the region have used shiftworkers, contractors and project teams (Bowden 2003). It appears that there is a different form of employment relations, which incorporates not only the traditional forms of employer and employee relations, but also the relationship between principal (mining companies) and independent contractors. Yet, relatively little attention has been given to examine the legal implications of such contractual arrangements. Indeed, the implications may have not been fully considered by the contracting parties. In particular, the principal (mining companies in this paper) may be under the misapprehension or assumption that by 'contracting out' the labour component of the work, they are also 'contracting out' the principal liability for various legal obligations, such as occupational health and safety (OHS) and workers' compensation. It is the main purpose of this paper, which also fits into this year's ANZAM's theme on 'pragmatism, philosophy and priority', to address the practical issue of OHS liability in the contractual relationship under the different form (new philosophy) of employment relations (ER).

The discussion commences with a brief overview on the extension of the Dunlop's philosophical industrial relations (IR or employment relations - ER) framework. The rationale of managing the dynamics of emerging employment relations in CQ's coalmines is then discussed. This leads to the important issue of managing contractual relationships under the new ER framework, with attention given to the aspect of legal liability, in particular occupational health and safety.

EXTENSION OF DUNLOP'S ER FRAMEWORK

The simple and useful conceptual model for understanding the employment relations system of a particular nation or state is best presented by John Dunlop. In his classic book, *Industrial Relations Systems*, Dunlop (1958) argues that in any given industrial relations system, there are three participants: employees, employers (or management) and the state (see also Huat 2004; Bamber, Lansbury and Wailes 2004). The system can become more complex when the relationships of these three parties (or 'actors' according to Dunlop) involve more interactions among their respective representatives. However, there is often a set of beliefs, *ideology per se* commonly understood by

these three actors and their associations, which have bound the system together and governed the relationships and responsibilities among them.

The *ideology* or philosophy often changes along with the changes in the environment where a particular employment relations system is embedded. Two major environmental contexts influencing the ideology are market forces and advancement in education and technology[i]. For the past two decades, it is evident that the extent of globalisation and international market competition has shaped the national patterns of employment relations in many developed countries (Bamber et al. 2004). The changes to employment practices and industrial relations arrangements in the Australian coal industry were also the direct result of management response to the increasing pressure to enhance profitability, productivity and market competitiveness (CIT 1988; Wooden et al. 1996; Rio Tinto 1997). These market forces, representing a new philosophy of 'neoliberalism', have also pushed the recent Australian IR reform (with passing of the WorkChoice Bill 2005) to the far-ranging edge that has basically dismantled the Australian fundamental ideology on social democracy (Sappey et al. 2006; Teitcher, Lambert and O'Rourke 2006).

Another environmental context that influences the change in ideology is the advancement in education and technology. Education allows the supply of highly skilled labour who are more likely to enter into direct negotiation with employers about their working conditions rather than relying on their representatives (trade unions *per se*) in bargaining for better pay and working conditions. Technological advancement has led employers to redesign and re-organise job and work patterns, and in some ways has allowed employees to choose where to work, when to work and how to work; replacing the traditional employer-determined time and place to work. Nonetheless, the rapid advancement of technology and pressure to compete on the global market has placed greater pressure on business and corporations to cut costs and operate at the peak of their efficiency, at all times, in order to remain competitive. As a result of these pressures, the practice of outsourcing has become a dominant trend (Holland and Deery 2006; Moore 2006; Sappey et al. 2006). Many companies have not only outsourced their ancillary activities but also some core activities as well. In the mining

industry, some large companies have substantially made the use of contractors in their mine operation. For example, employment at BMA (BHP Billiton Mitsubishi Alliance) has increased by 80 percent in the last two years from around 4,500 in 2003 to 8,100 in 2005. But BMA's own permanent workforce is only about 4,000. Over half of BMA's workforce is contractors employed on specific expansion projects (www.bmacoal.com).

The segregated data on proportion of sub-contractors in the coal industry in regional Queensland is not available. The Australia Bureau of Statistics (ABS), Australia Coal Association and Queensland Government's Natural Resources and Mines (NRM) usually provide only general statistics for the mining industry as a whole, and individual companies sometimes provide such data on their website (as in the case of BMA). However, Di Milia and Bowden (2004) sourced some data from the Statistical Office in NRM, which indicate a substantial drop of on-book employees in open-cut mines in CQ from 6665 in 1996 to only 3954 in 2002. In contrast, the number of contractors increased dramatically from 416 in 1996 to 2480 in 2002. Another study by Heiler, Pickersgill and Briggs (2003) of 180 Australian coal and metalliferous mines (77 surveyed were coal companies, 41 in Queensland) indicated that only 8 percent of all Queensland companies surveyed had never contracted out, the rest would have between 5-75 percent of contractors in their workforce. A large proportion of the companies (36 percent) had between 10-24 percent of their workforce as contractors (Heiler et al. 2003, p. 31). These studies suggest that there has been a substantial shift from traditional fixed term employment to a more fluid workforce in the mining industry with noticeable proportion of contractors.

A substantial increase of contractors in the mining workforce indicates a different form of employment relationship, which may be beyond the scope of the classical Dunlop model given these 'modern' added complexities. Employment relations are no longer a clear-cut relationship between employer and employee. Instead, they may encompass multiple relationships among the principal, outsourcing organisations and various sub-contractors. Managing this new form of employment relations is deemed to be challenging to human resource managers and practitioners in the mining industry. In

particular, when organisations are facing the issues of faint boundary lines between employees and contractors, it is difficult to determine control without ownership[ii] and to be certain of corporate liability. Before addressing the issue of liability, the terms 'employee' and 'independent contractor' need to be clearly defined, with specific regard to the complexity of differentiating between an 'independent contractor' and a 'dependent contractor'.

EMPLOYEE V. CONTRACTOR

The key difference between an 'employee' and a 'contractor' is that an employee works under a contract *of service* with the employer, whilst a contractor works under a contract *for services* with a principal (Moore 2006, p. 93). A contract *of service* is one made between an employer and an employee. A person is really an employee only when s/he works for someone merely for wages in return to their performance of allocated tasks. In contrast, a contract *for services* is made between a principal and a contractor who agrees to 'perform specific services for payment or other consideration' (van Gramberg, Gough and McKenzie 2006, p. 204). Contractors are responsible for their own taxation, superannuation and leave and they often perform duties without direction.

The line between 'employee' and 'contractor' becomes blurred when there is a 'dependent contractor'. These people are also called 'fake self-employed' or 'disguised wage labourers' (Landsbury and Callus 2006, p. 418). The labourers are, in legal term, 'contractors', but are, paradoxically, economically dependent on a single employer for income. The term 'independent contractor' is commonly used to cover a variety of legal structures. It can be a 'natural person', as in the contractor being an individual or a sole trader. Alternatively, it can be 'partnership' between husband and wife or even a company that provides labour services to a principal. From the perspective of the operation of employment and industrial relations law, the relationship between employer (or principal) and independent contractor operating as a sole trader can be very much like an employer and employee relationship. These forms of engagement are critical. However, the legal picture starts to change as soon as the independent contractor engages other people to assist in the provision of labour services to the principal (Moore 2006, p. 93). However, when the sole trader or other legal entity is contracted to

supply services only to one principal for an indefinite period of time, the legal character of the worker may be that of independent contractor or it may be that of employee.

The ABS *Forms of Employment* (2005) indicates that about 12 percent of employed persons are self-employed in Australia. The dilemma is that data is not collected on a basis readily fit with the current legal structures. Moore (2006) describes the complexity of determining whether a person is an 'employee' or a 'contractor' as follows:

> *'What cannot be readily gleamed from these statistics is that proportion in each category who have an independent trade or business, compared to those whose contracts require them to provide services to a single principal or employer, or who in fact so provide their services. Moreover, it cannot be certain that none of these persons would be employees at law'* (pp. 94-95).

To distinguish between the concept of an 'employee' and a 'contractor', the common law has traditionally applied a 'control test'. The control test examines the degree of control exercised by an 'employer' over the 'worker's activities to determine whether the worker is an employee or not (van Gramberg et al. 2006, p. 205). However, the test depends predominantly upon whether the terms of the contract give the employer actual control, or a right to control of the worker's activities, or whether the terms only allow the employer to purchase the result of those work activities from the worker. Over time, the courts have considered additional factors in account to characterising the employment relationship. The body of case law that now exists makes it even more difficult to determine where the dividing line between the employment relationship and contractual relationship lies (Moore 2006). It is particularly difficult to evaluate the relationship of a 'dependent contractor' to an employing organisation. The Australian Council of Trade Unions (ACTU) (2005) estimated that 25 percent of independent contractors Australia-wide now are in a dependent employment relationship with their employing organisation. Unexclusively, a substantial number of 'dependent contractors' may also exist in CQ's coalmines.

At federal level, changing some dimensions of the environment governing independent contractors may come into operation[iii] in near future as the current government seems holding a strong view that 'the policy in respect of independent contractors should be to quarantine them from the operation of the industrial relations system' (Moore 2006, p. 91). However, in some areas, at least, unions are likely to endeavour to identify typical cases, such as 'dependent contractors' to pursue as test cases, seeking determinations that the legal status of a worker in such 'typical' circumstances is that of employee rather than independent contractor – particularly in the case of natural persons. This so-called 'third category' ('dependent contractors' *per se*) has not been recognised in the law. If it was, then, persons in this category should be regarded as warranting provision of minimum conditions of engagement, and if so, the complexity on how to determine such a dependent contractor would come into play.

The relationship between employees and employer, under common law, is more clearly expressed than the relationship between independent contractors, the principal and/or engaging organisation. Liability for OHS and personal injuries caused to contractors will be used to highlight this difference. It would be to the benefit of the coal mining companies to pay attention to their obligations to contractors with respect to OHS liability. The extent to which attention is given to these matters is a question worthy of further inquiry.

LEGAL IMPLICATIONS OF CONTRACTUAL ARRANGEMENT

In Australia, occupational health safety liability comprises two aspects. The first, quasi-criminal liability in the form of breaching the duties imposed upon principals under the applicable safety legislation. The second is civil liability for a tortious wrong, in other words, a breach of the principal's duty of care to the contractor. In Queensland, coalmining is regulated by the Coal Mining Safety and Health Act 1999 (Qld) and the Mining and Quarrying Safety and Health Act 1999 (Qld).

Many companies, when undergoing changes in organisational structure, or mergers and acquisitions, tend to neglect, or pay minimum attention, to reassessing their OHS management system (Quinlan

2004). In his study on the perception of OHS legislation regulators to the changing landscape of contractor engagement, Quinlan (2004) made the following remarks:

> *The regulators expressed concern that employers often presumed that outsourcing an activity or leasing a worker diminished their responsibility (in law it doesn't). Regulators interviewed also complained that the short-term nature of temporary employment affected employer attitudes about providing adequate induction and training, or to ensuring that contingent workers be represented by HSRs (Health and Safety Representatives) or on workplace committees. Management tends to treat OHS responsibility as the lowest priority in their list while managing changes in work processes. In particular, large employers often fail to see the connection between organisational restructuring and their OHS responsibilities and do not see 'all this appendage stuff like occupational health and safety, workers' compensation claims and liability' good for their business* (pp. 127-128).

This apparent 'lack of thought' can have particularly far-ranging liability issues in the regulated occupational health and safety environment. Under the Queensland legislative scheme, an obligation is placed upon the operator of the mine, to ensure the risk to workers while at the operator's mine is at an acceptable level. The obligation is further extended to require that the operator ensure, not only the operator's own safety and health, but that the safety and health of others is not affected by the way the operator is conducting its operations (s.44 *Coal Mining Health and Safety 1999* (Qld); s38 *Mining and Quarrying Health and Safety Act 1999* (Qld)). The term 'others', whilst not defined in the legislation, was intended to include contractors and other non-employees. Additionally, the operator is required to appoint a senior site executive. The senior site executive is given the responsibility to develop and implement a safety and health management system and to develop, implement and maintain a management structure that helps to ensure the safety and health of persons at the mine (s.41 *Coal Mining Health and Safety 1999* (Qld); s38 *Mining and Quarrying Health and Safety Act 1999* (Qld)). Whilst this obligation is imposed on the operator, the legislation also imposes an obligation upon contractors on the mine. Under the legislation, contractors also have a statutory health and safety

obligation. Contractors have an obligation to ensure that the provisions of the Act, together with any operator-implemented safety management system is complied with, to the extent the safety management system applies to the work that they are performing (s.43 *Coal Mining Health and Safety 1999* (Qld); s40 *Mining and Quarrying Health and Safety Act 1999* (Qld)).

This obligation upon contractors, however, does not displace the general duty that is imposed upon the principal (the mine operator) to ensure the workplace health and safety of its own employees as well as of 'others' (contractors) on site.

In this sense, it must be remembered by principals that the duty to ensure health and safety imposed upon them is a personal duty and is non-delegable. The nature of the duty being non-delegable means that a firm (the principal) cannot delegate its duty merely by engaging an independent contractor to do the work or perform a task. Rather, the principal will be liable for contraventions of the relevant OHS legislation based upon the acts or omissions of independent contractors. As clearly explained by Johnstone and Wilson:

> *The principle of non-delegability enables responsibility for OHS to be sheeted home to the firms higher in the contractual chain, rather than those firms being responsible only for the acts and omission of their own employees or agents* (2006, p. 70).

Thus, an organisation can decide what sorts of contractual arrangements it wants to enter to ensure that its undertaking is carried out. But this decision cannot rule out its obligations to comply with the OHS statute (Johnstone and Wilson, 2006). In other words, the mine operator or self-employed person or contractor, who is under a duty to exercise control over the activity, must ensure that the activity is carried out without exposing employees and/or non-employees to risk. Therefore, the principle of non-delegability imposes a hierarchy of overlapping and complementary responsibilities on the different levels of contractors and sub-contractors. Consequently, employers, contractors, and sub-contractors at each level have duties to protect all parties below them in the contractual chain (Johnstone and Wilson 2006, p. 80).

The position with respect to the civil liability of principals for injuries sustained by contractors also cannot be 'contracted out'. Civil liability arises from the 'neighbour principle', which upholds the duty of care that one person owes to another. The seminal case related to this principle is the High Court of Australia's decision in *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16. The fact in this case was that the injured worker, a log carrier, was injured as a consequence of the negligence of a snigger. The injured log carrier was an independent contractor and the snigger an employee of the sawmilling company. The snigger had negligently loaded a log on the independent contract's truck, which resulted in his being injured. Justice Brennan's decision in this case is regarded as representing the general proposition that an entrepreneur does owe a duty of care to an independent contractor.

However, the general law is not as settled or absolute as its legislative counterpart is. Whilst it is acknowledged that a principal does owe a duty of care to its independent contractors, the content, scope and extent of the duty of care remains the subject of debate (Mylne 2005, p. 25). In that respect, it is important to note that Justice Brennan in *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) also considered that, with respect to the duty owed:

> *once an activity has been organised and its operation is in the hands of independent contractors, liability for negligence by them within the area of their responsibility is not borne vicariously by the entrepreneur. If there is no failure to take reasonable care in the employment of independent contractors competent to control their own systems of work, or in not retaining a supervisory power or in leaving undefined the contractor's respective areas of responsibility, the entrepreneur is not liable for damages caused by a negligent failure of an independent contractor to adopt or follow a safety system of work either within his area of responsibility or in an area of shared responsibility* (pp. 47-48).

This ‘test’ has generated its own body of case law. The case law comprises cases where the independent contractor has failed to establish liability against the principal (see *Van der Sluice v Display Craft Pty Ltd* [2002] NSWCA 204; *Kolodziegczyk v Grandview Pty Ltd* [2002] NSWCA 267; *Pack-Trainers Pty Ltd v Moore* [2005] NSWCA 43), and cases where the contractor has been successful (see *Hoekstra v Residual Assco Industries Pty Ltd* [2004] NSWSC 564; *Surf Coast Shire Council v Webb* [2003] VSCA 162 and *Woolworths v Thompson* [2003] QCA 551). The outcome will largely depend upon the facts of the case and the evidence of the relationship, both legal (ie. the system of work) and financial between the principal and the contractor.

Whilst the common law position is not settled, Peter Mylne, a Queensland Barrister practicing in the area of personal injuries litigation, suggests that:

> *It respect of contractors, it is submitted that a theme [from the cases] can be detected. In circumstances in which an [injured contractor] finds himself or herself in a dangerous or unsafe situation as a consequence of the system which he or she is required to work within, it appears that there will be significantly greater chance of a [injured contractor] establishing a relevant duty owed to him or her* (2005, p. 31).

This highlights the need for principals to have in place appropriate systems at the workplace by which they can manage and assess compliance of independent contractors with any health and safety systems in force. This requires a relationship between principals and their contractors so that both parties are aware not only of their legislative OHS obligations but also of their duty of care to each other. It is not sufficient for contractors and principals to regard themselves as ‘independent’ of each other. They may be ‘independent’ in a financial sense. The law (both legislative and common law) may nevertheless apply to establish a legal relationship of connectedness, which may give rise to a finding of liability against the principal.

CONCLUSION

Dunlop's employment relations framework is not necessarily representative of today's labour arrangements. This is particularly so in the coal mining industry where there is a high incidence of 'contracting out' work. Whether these contractors are 'independent' or 'dependent' should be the focus of further investigation. It is of importance that 'contracting out' does not remove, by itself, the principal's liability under the legislative occupational health and safety regime, which exists in Queensland, or the principal's liability to the independent contractor based upon the principal's duty of care to the independent contractor. There is little information or research which reveals how coal mining operators have managed, or are managing, the issue of liability to independent contractors in the area of occupational health and safety. Further research in this area will be of benefit not only in understanding the complex employment relationships that exist in today's economy but also to principals and independent contractors. Such research may help to facilitate the development of an employment relations framework that recognises and considers the obligations of both parties to each other.

Endnotes:

[i] Dunlop identified three environmental contexts: market, technology and distribution of power in society. The 3rd element is arguably determined by the previous two. Education is another key element, not well discussed in the Dunlop model, but is important as it has enabled many people to become highly skilled and knowledgeable about their rights and responsibilities at workplace, so they do not necessarily rely on their representatives (eg. trade unions) to protect their working rights.

[ii] Jones (2006) indicated a number of challenges in managing new organisational forms, among those, managing outsourcing and alliances with many external suppliers and controlling production process without having ownership of productive assets (eg human resources) and managing casualisation of workforce and fluid & boundless teams are relevant to managing employment relations in the coal industry (see Jones, 2006, pp. 18-19).

[iii] We have seen that in 2005, the traditional basis of the distinction between employees and independent contractors has been under extensive review. So far, there have been two reports, as a result of such review: *The Final Report: Labour Hire* (2005), and *Make it Work* (2005), as well as a Discussion Paper at federal level, considering proposals for an *Independent Contractors Act* (Moore, 2006, p. 91).

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