Minister was willing to approve the Project because its overarching benefits were considered to outweigh its costs. This is a very high standard to meet, which proponents of projects with a comparable level of impact should expect to be required to demonstrate in future in order to obtain project approval. In such cases, where the public interest can be made out despite the nature of resulting environmental impacts, proponents should expect that the conditions imposed on the Project may become a benchmark for future approvals.

The approval also appears to highlight the primacy of the Department of Planning's views over those of other government departments, when the economic benefits to the State are driving factors. In this case, the Department of Environment and Climate Change had refused to support the Project for a number of reasons including that it would 'represent an unacceptable impact on an entire community'. Similarly, the Department of Water and Energy did not initially support the Project and expressed continuing concerns about the proposed water access arrangements. Despite these views, the Director-General concluded, and the Minister has accepted, that the Project's benefits sufficiently outweighed its residual costs and therefore that it is justifiable in the public interest.

Further Proceedings

There is no right of merit appeal against the Minister's approval of the Project.[3] However, there are ongoing proceedings in the Federal Court challenging the decision of the Commonwealth Environment Minister that the Anvil Hill project is not a controlled action under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

EMPLOYMENT ARRANGEMENTS[*]

Wilton & Cumberland v Coal & Allied Operations Pty Ltd [2007] FCA 75 (Conti J)

Workplace Relations Act 1996 – Employment arrangements – Labour hire

Background

The applicants, Wilton and Cumberland, sought an order for payment of employment entitlements and the imposition of a penalty under s 178 of the *Workplace Relations Act 1996* against Coal and Allied Operations Pty Ltd (CAO), the respondent in the proceedings, for breach of a Certified Agreement. CAO operated a number of open cut coalmines in the Hunter Valley region, described as the Hunter Valley Operations (HVO).

In August 2002 CAO engaged Mining & Earthmoving Services Pty Ltd (MES) for the supply of maintenance and production labour hire. The applicants were engaged by MES as part of the labour supply to CAO.

The central issue in the proceedings was whether the applicants were the subject of an employment relationship according to general law, as between themselves (as employees) and CAO (as employer). Despite an employment agreement existing between the applicants and MES, if the applicants were found to be employed by CAO they would be entitled to look to CAO for remuneration and other pecuniary employment benefits under the Certified Agreement.

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3 The effect of s 75L of the EP&A Act is that there is no right of objector appeal where the project has been the subject of a report by a panel of experts, as occurred in this case.

* Svetlana German, BSc, LLB, Allens Arthur Robinson.

MES was responsible for supplying workers for engagement at the HVO by CAO. Upon receipt of CAO's formal request for the provision of workers, MES would furnish a number of names and CAO would make a selection. Thereafter the selected workers would attend at the site of HVO for work as part of CAO's general workforce and in accordance with rosters prepared by CAO. Those selected workers were paid by MES for hours worked. MES in turn invoiced CAO on a weekly basis. No moneys were paid by CAO to either applicant for their respective services, MES performing the function of a labour hire provider.

Applicant Submissions

The applicants contended that in substance and reality, therefore according to law, the applicants were at all material times employees of CAO and should have been remunerated accordingly. The applicants pointed to the fact that they were fully integrated into CAO's operations, performing similar duties to recognised CAO employees, under the directions of CAO.

The applicant relied on English authority of *Dacas v Brook Street Bureau (UK)* Ltd[1] and *Cable & Wireless plc v Muscat*[2] for the proposition that 'conduct which might not have manifested mutual intention to enter a contract had it lasted only a brief time may become unequivocal if it is maintained over a lengthy period of time'. The applicants argued that the total engagement at HVO constituted an employment relationship with CAO.

The applicants also submitted that CAO had charge and control over their activities, including daily supervision, directions as to performance, provisions of rosters and equipment and ability to remove applicants from HVO site as well as the imposition of disciplinary measures. It was contended that, the evidence established that 'in practice' CAO had responsibility for discipline whereas MES had only so-called 'token responsibility'. The actions taken by MES were essentially taken at the behest of CAO and the final decisions were made by CAO. The applicants asserted the need to consider the reality of the 'paper arrangements' and consider the real relationship between the parties (*Pitcher and Anor v Langford and Anor.*[3] Heavy reliance was placed by the applicant on the control test outlined by Clarke JA in *Dalgety Farmers Ltd t/as Grazcos v Bruce & Anor.*[4]

Respondent Submissions

CAO's submission focused on the fact that there was no contractual relationship between itself and the applicant. Alternatively their relationship was not one of employment. CAO's primary submission was that there was no intention to create legal relations between itself and the applicants, that the parties never discussed, considered or agreed upon the essential terms and neither CAO nor the applicants regarded themselves as engaged in an employment contract.

CAO pointed to the fact that the applicants were paid by MES. Moreover MES made provision for superannuation, workers compensation and deducted income tax payments. Monthly occupational health and safety briefings, provision of a uniform and personal protective equipment displaying the MES logo were all indicia of an employment relationship between the applicants and MES.

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1 [2004] IRLR 358.
2 [2006] IRLR 354.
3 (1991) 23 NSWLR 142).
4 (1995) 12 NSWCCR 36.

CAO paid MES and did not deduct tax from the amounts, did not make any wage, superannuation, annual leave, sick leave or other payments to the applicants. CAO did not pay MES for those occasions when the applicants could not attend the HVO. Furthermore the applicants signed a MES 'Employment Undertaking' form, hence demonstrating that they were employed by MES.

In response to the applicants' emphasis on 'general control' CAO stated that this was no more than one would expect in the operation of a mine where outside contractors work as part of the crew. It was submitted that it is well established that a worker may be subject to detailed control over what they do and how they do it, yet still not be an employee.[5]

With respect to CAO's disciplinary powers the evidence was disputed on the basis that the applicants did not identify the legal basis for any such right. CAO had no right to impose any fine or other detriment on the applicants. Although CAO was able to remove the applicants from the HVO site and caution them this was no different from how CAO could treat any person entering the site including, for example, the local fuel oil supplier. Moreover the fact that disciplinary measures by MES were reactive to CAO's view, did not mean they were merely token, and should be perceived as indicators as to where primary responsibility for the applicants contractually lay.

Decision

The court considered principles for determination of the existence of an employment relationship found in *Stevens v Broadribb Sawmilling Co Pty Ltd.*[6] However, the court found that in the present context there was no issue as to the status of the applicants as employees per se. Rather the issue was whether they were employed by CAO, as opposed to MES the labour hire agency. The written contracts between MES and the applicants do not, as a matter of law, preclude the implication of an employment contract. Employment existing by mutual assent may be recognised by law in circumstances where the traditional analysis of offer and acceptance is inappropriate. This however was not the case on the facts.

Intention to Create Legal Relations

The first question considered was whether a contract existed between the applicant and CAO. The requirement for an intention to create contractual legal relations had to be satisfied. This according to *Ermogenous v Greek Orthodox Community SA Inc*[7] involves an objective assessment of the state of affairs between the parties. After considering the total relationship between the parties the court held that there was a lack of agreement on essential terms. Primarily remuneration normally an essential term of a contract for the provision of services at arms length, was never broached. Furthermore the applicants did not assert they were employed by CAO during the course of their time at HVO. The court accepted CAO's evidence that the applicants perceived themselves having a contractual relationship with MES and that MES acted as the employer of the applicants. In the absence of discussion or agreement upon crucial terms, an employment relationship could not be established.

Exercise of control

The court held that whilst the totality of the relationship between the parties needs to be considered, the measure of control exercised is only a prominent factor, not the sole criterion. The

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5 R*eady Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497.

6 (1986) 160 CLR.

7 (2002) 209 CLR 95.

mode of remuneration, provision of equipment, obligation to work and the legal basis for any requirements upon the parties are also key. According to *Mason & Cox Pty Ltd v McCann*[8] attention is to be placed on the legal right to control rather than the practical fact of control. In the present circumstances the labour hire agency paid the wages, was in charge of the employment and held the legal right to control the applicant. The direction and control of CAO arose de facto rather than de jure.

Generally, and in accordance with *Damevski v Guidance and Ors,*[9] the interposition of a labour hiring agency between its clients and the workers it hires out to them does not result in an employee-employer relationship between the client and the workers. MES, a hiring agency, retained the personnel on its own employment books when hiring them to third parties at arm's length. Therefore the court held that the applicants were employed by MES, in the context of its business of labour hire, and their respective employment functions were undertaken contractually for MES, as employees of MES alone according to law.

The fact that the applicants performed similar work to actual employees did not operate to establish a relationship between CAO and each of the applicants as one of employment. Persons' subject of a labour hire may be engaged in activity alongside undisputable employees without the creation of an employment relationship. Furthermore the sole function of paying wages, undertaken by MES, is normally perceived as the essence of an employer's obligation.

English Authority of Brook Street

The court did not follow the United Kingdom Court of Appeal authorities of *Brook Street* and *Cable & Wireless* which held that employment contracts may arise from implication and that the degree of control exercised was crucial. Rather the court preferred to follow the minority decision of Munby J in *Brook Street* stating that it was consistent with prevailing authority in Australia. The court found that whilst terms in employment contracts may be implied, imputing implied contracts of employment in circumstances of labour hire, a transaction which inherently constitutes dual contractual arrangements, was not appropriate in the present context.

The court ultimately found that CAO was paying not for work done by the applicants, but for services provided by MES and that there was no obligation on the part of CAO to remunerate the applicants. Instead, the only obligation of remuneration and other benefits to the applicants rested with MES.

The case was dismissed.

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8 (1999) 74 SASR 438 at 443.

9 (2003) 133 FCR 438.