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The Transferability of Property Rights
and the Scope of Industrial Relations'
Legislation: Some Lessons from the
NSW Road Transport Industry

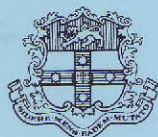
by

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Abstract:

The Industrial Relations Act (1991) of New South Wales features an addendum (Chapter 6) which has recently been the subject of a wide ranging review. Chapter 6 provides for regulation of contract rates for those owner-drivers who have an *exclusive* contract with a particular company. The objective of such regulation is to guarantee a minimum return to the owner-drivers' labour input reflecting the award rates for employee-drivers. In May 1993 we were commissioned by the Transport Workers Union to provide an economic assessment of Chapter 6. In this paper we make the following suggestions: that the degree of transferability of property rights over the means of production ought to be an important determinant of the scope of industrial relations legislation.

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1. Introduction

Any industrial relations legislation must incorporate a defensible mechanism for selecting those who ought to be subject to its protection. Economic theory has traditionally been a poor source of insights on this front. The task is made more difficult by the self-interested actions of agents with an incentive to confound attempts at a proper delineation. In this paper we propose one economic criterion which may prove helpful in alleviating this difficulty.

In the presence of an industrial relations framework which improves the remuneration of employees, the self-interest to obfuscate the nature of one's work operates in two ways. On the one hand, the self-employed have an incentive to dissemble as employees in order to acquire an illicit institutional shelter from slumps in the demand for their services. On the other, employers who seek to reduce their labour costs by bypassing the legislated awards, have an incentive to disguise their employees as self-employed providers of a service. Industrial relations' legislation must find ways of successfully negotiating these two perils. If it does not, it runs the risk of being abandoned either by governments unwilling to underwrite the business risks of the self-employed, or by trades unions whose lack of faith in the regulations leads them to adopt alternative strategies.

In this paper we draw from recent experience with the Review of Chapter 6 of the NSW Industrial Relations Act 1991 (see Rolfe, 1993 and Kafouros and Varoufakis, 1993). Chapter 6 provides for regulation of contract rates for those owner-drivers who have an *exclusive* contract with a particular company. The objective of such regulation is to guarantee a minimum return to owner-drivers' labour input reflecting the award rates for employee-drivers. Our objective in this paper is to highlight one particular criterion which we believe should play a significant role in determining whether industrial relations' legislation ought to be extended to individuals formally classified as non-employees: the transferability of property rights.

Section 2 briefly summarises economics' track record in these debates. Section 3 offers an illustration which motivates our proposed criterion. Section 4 outlines the reason for looking at the transferability of property rights over means of production as a guide to whether non-employees ought to be protected by industrial relations' legislation. Finally Section 5 concludes.

2. The economist's perspective: a brief review

Paul Samuelson (1957) famously claimed that, from an economic point of view, it makes no difference whether labour hires capital or vice versa. This phrase explains like no other the difficulty the neoclassical economist has in accepting the proposition that the relationship between the employer and the employee is special and ought to be subject to supervision. Alchian and Demsetz

(1972), for example, suggest that "...[the employer] can fire or sue, just as I can fire my grocer by stopping purchases from him, or sue him for delivering faulty products". The moment one thinks of the capital-labour link as an instance of pure exchange between a buyer and a seller, it is difficult to feel passionate about the need to devise legislation regulating industrial relations.

What room there is for justifying regulation in the labour market is created by the fear of market failure due to imperfect competition or externalities. If, for example, a particular labour market is monopsonistic, the mainstream economist may recognise the need to intervene. The improvement in workers' remuneration following the establishment of an award is justified by the prospect of simultaneously increasing output and decreasing the rents of monopsonists (see Section 3, Kafouros and Varoufakis, 1993). However, concern for workers' income *per se* is absent since a perfectly elastic labour supply (perhaps due to high unemployment) would make, from the neoclassical point of view, an intervention unnecessary.

Similarly, if the operations of a specific industry are such that the interests of employees and of the general public can be served simultaneously by measures that place constraints on employers, then again an economic logic for intervention may prevail. For example, a scheme for keeping the wages of long-haul truck drivers above a certain minimum independently of kilometres travelled may prove a simple mechanism for reducing road accidents thus removing the externality which competitive forces within this industry inflict upon the public (see Section 2, Kafouros and Varoufakis, 1993).

Nevertheless the industrial relation between employers and employees remains conceptually undifferentiated from that between any other buyer and seller. The result is that the scope of any system of industrial relations legislation (whose purpose is to impose non-market wage outcomes) is blurred. For if it is theoretically impossible to see the worker as conceptually distinct from any other seller (or entrepreneur) then how can we determine who ought to be covered by regulation and who ought not? How, for example, do we answer the question posed by the Review of why owner-drivers in exclusive contracts with firms (or even bailee taxi-drivers who 'rent' their vehicles on a daily basis from owners) should be covered by an industrial relations bill when other entrepreneurs are not?

Answers to these questions must involve a recognition of the importance of the economic and social context in which employers and employees relate to each other. They require the abandonment of the pure exchange paradigm according to which the socio-economic relations within a factory are, in their essence, identical to those in an open-air flea market. Once the social context of production is taken into consideration, both sensible economic analysis and a framework for legislated industrial relations becomes possible. The problem however arises immediately of how wide the coverage of such intervention in the market place ought to be.

Granted that if coverage is too wide then some non-employees may receive

illegitimate shelter from risks which other entrepreneurs face constantly, the danger is that a system of industrial awards can be bypassed by shrewd employers who disguise their employees as self-employed. In what follows we isolate one important criterion for differentiating between employees and the genuinely self-employed.

3. An example

Consider the following two hypothetical cases:

(a) *The car manufacturer and the worker-cooperative*

Imagine an hypothetical car manufacturer and the segment of its workforce who are currently employed making car instruments. Workers are covered by industrial awards and, although most of them can look forward to receiving wages over the award rates, the award system provides them with a safety net. These workers (perhaps encouraged by the company) consider the prospect of leaving the company in order to set up their own cooperative plant which will manufacture the same car instruments under contract. The car manufacturer proposes an exclusive contract under which the cooperative will supply its instruments exclusively to this manufacturer.

Our hypothetical workers make their calculations and either decide to go ahead or decide to stay put. Their decision will hinge on whether they expect that forming a business, a cooperative, will lead to a return which is no less than the award wage currently enjoyed. Suppose their calculations (following meetings with the car manufacturer's managers, the bank manager, local council, government officials etc.) persuade them to go ahead. Is there an argument for introducing a chapter in the Industrial Relations Act (similar to Chapter 6) which would set up a regulatory authority whose purpose will be to set minimum contract rates for the instruments produced by the fledgling business?

(b) *The Cement Company and its drivers*

A cement company employs a number of drivers covered by industrial awards. They are encouraged to buy the trucks they are currently driving and continue working under exclusive contract rates to be determined by the cement company. Effectively, they will be driving the same trucks, doing the same work as before and will be contractually prevented from offering their services to any other companies. Is there an argument for setting up a mechanism for regulating their contract rates within a legal framework (eg. the NSW Industrial Relations Act of 1991)?

The trades union position (see Transport Workers' Union, 1993) has been that the exclusive contract removes the entrepreneurial aspect of the owner-drivers' activities thus rendering them disguised workers. This is the reason presented for continued industrial regulation (via Chapter 6) of owner-drivers'

returns under case (b) above. However, so far the only case for maintaining, or extending, award-related coverage to the owner-drivers is built on two criteria: (i) the restrictiveness of the contract (eg. that they are not allowed to offer their services in the open market), and (ii) the fact that these drivers could have (and probably have in the past) worked as employees of the company to which they are now contracted.

The problem is that (i) and (ii) apply with equal force to both case (a) and case (b) above. Our instinct tells us that regulation of spare part prices by means of a piece of industrial relations legislation is not appropriate. We conclude either that there must be another reason (other than (i) and (ii) above) why an industrial relations bill is relevant in the case of owner-drivers (case (b)), or that both cases (a) and (b) ought to fall outside the scope of industrial relations' legislation. We believe that the two cases are sufficiently different to warrant different treatment viz. industrial regulation. Our reason why case (b) calls for regulation - whereas case (a) does not - lies in the nature of the productive process and its repercussions vis-a-vis the transferability of ownership of the means of production. If we are right, then the breadth of industrial relations law should not be determined without due consideration given to the nature of the productive process in different industries.

4. Property rights and entrepreneurship

Non-mainstream economics has traditionally seen property rights as an essential aspect of the organisation of production. Unlike the orthodox approach which casts workers and employers in a pure exchange relation characterised by so much symmetry that it does not matter who employs whom, other economists read much important information into who has the right to the residual in any transaction which involves the production of a surplus.

On the left of the theoretical spectrum, Marxist economists saw the ownership of productive means as central in determining not only the distribution of the surplus but the efficiency of the production process as well. On the right of the spectrum, neo-Austrian views ascribed special importance to property rights as a means of transcending coordination problems and the ensuing conflicts. More recently, neoclassical economics (see Williamson, 1993 and Stiglitz, 1993) has been nudged towards a recognition of the importance of *who* is the residual claimant and who has the role of enforcing the terms of the contract. Bowles and Gintis (1993) is a good example of such nudging. At the very least, property rights have begun to feature as important determinants of economic and social outcomes.

In the context of our discussion, property rights appear in a tantalisingly novel way. Whereas ownership of productive means is usually presented as a boost to one's power to extract a surplus for one's self, as well as from others, property rights may prove a handicap for workers *in the presence of industrial awards*. We wish to flag this puzzling aspect of property rights as an important

criterion for determining the breath of coverage of industrial regulation. Our two examples in the previous section illustrate the point.

In case (a) the group of workers making instruments choose whether they wish to develop and employ significant entrepreneurial skills in setting up a new company. If they expect to receive rewards that will at the very least match the industrial awards they are entitled to as employees, then and only then will they make the decision to set up an independent company. In this sense they are making entrepreneurial decisions for which they should be held accountable. If in the future it turns out that they miscalculated, they cannot blame anyone but themselves. Thus it is difficult to argue against those who recommend that contract rates in this case should be determined by de-centralised bargaining.

Should the same not apply to the owner-drivers in case (b)? The difference turns on the word 'choice'. If they indeed choose quite freely to exit the regulated work environment and set up their own mini-company, then again regulation is uncalled for. What if, however, their choice is not voluntary? What if they are forced to make it under the threat of retrenchment? As McPherson (1973) aptly puts it, a choice is free not when one is at liberty to make it but, rather, when one is free *not* to make it and yet one does. But, does this not apply equally to case (a) and the workers who form a cooperative? Could it not be that the car manufacturer threatens them with retrenchment if they do not exit the award-regulated environment in order to circumvent industrial relations' legislation? We believe the employers' power to coerce workers in this manner is profoundly different in our two cases.

If the car manufacturer could bypass the awards as readily as the cement company, there would be no difference. But it cannot! The reason is that the transfer of property rights (ie. the machinery for making the instruments, the site on which to put them etc.) and of entrepreneurial skills is not as straightforward in the case of the car manufacturer as it is in the case of the cement company. In the latter, all that is necessary is a signature on a contract transferring the truck from the company to the driver; property rights are *immediately and costlessly* transferable. The company may even be in a position to make a modest profit from the sale of the truck. In addition, no significant extra entrepreneurial skills are required from the owner-driver than from the employee-driver, thus ensuring that the employer will not have to worry about the continuing provision of the service.

In general, the setting up of an autonomous business by ex-employees for the purpose of providing an ex-employer with a service previously supplied under an employment contract, necessitates the over-coming of two crucial constraints:

- (iii) the reluctance of workers to go ahead unless they can confidently expect to earn at least as much as the industrial awards;
- (iv) the reluctance of employers to jeopardise a steady supply of the required goods (eg. car instruments) or services (eg. road transport).

Provided (iii) and (iv) are binding simultaneously there is no need for regulation as there can be no systematic coercion in the presence of those two counter-balancing constraints. If on the other hand (iv) is absent, then (iii) can be swept to one side by employers whose only objective is to violate awards. It is worth noting that such considerations are non-sensical unless our theoretical model of the industrial relation between the two sides transgresses the pure exchange abstraction.

Returning to the case of the car manufacturer, (iii) and (iv) keep each other in check. This means that if the new company is set up it must be due to the real efficiency gains to be had from de-centralisation and from the stimulation of entrepreneurial skills, and creativity, amongst workers. The car manufacturer will be unable to force workers (on the threat of dismissal) to develop successful entrepreneurial skills. One reason is that such activity is not readily spawned by fear. Moreover, such coercion is made very difficult by the fact that capital and the other factors of production necessary for such endeavours are not transferable in an environment of non-cooperation and coercion¹.

Lastly it is interesting to ponder the generality of our conclusion. Could transferability be relevant only in the case of transport workers, who find themselves in an extreme situation in which the location of capital is exactly the same irrespective of the ownership of property? Naturally, the transport industry presents a pointed example since the labour process is almost invariant to whether the driver is a wage-worker or a subcontractor. Nevertheless it seems to us that in many other industries which rely on easily transferable capital this distinction remains a useful analytical tool. Moreover, technological advances will increase the physical mobility of capital and thus help divorce the character of the labour process from its location and ownership. With time, the lessons we learned from the transport sector will gain steadily in pertinence.

5. Summary

Any industrial relations legislation which does not carefully demarcate the types of economic activity which it is aimed at, will be at best ineffective and at worst iniquitous. In this paper we have pinpointed an important criterion which must be taken into consideration when planning the scope of such legislation.

¹The reader will have noticed that these two examples are distinguished by something other than the ease with which property rights can be transferred: in the case of the car manufacturer, property rights are transferred to a collective, while in the case of the cement company they are transferred to an individual (or individuals). However important this detail may be for all sorts of other reasons, the fundamental difference between the two cases which we draw upon in this paper would be preserved regardless. For even if the cement company was considering transferring trucks to a collective of drivers (as opposed to isolated individuals), it would retain the opportunity to impose on its drivers a transfer of ownership rights which systematically precludes mutual gains. Thus the nature of capital (and therefore the ease of transfer of its ownership) prevails as the central difference between our two examples.

Drawing from the recent review into an addendum to the Industrial Relations Act 1991 of New South Wales whose purpose is to extend industrial coverage to non-employee workers in the road transport industry, we argued that the transferability of property rights over productive means is a crucial determinant of the relevance of such legislation.

If a transfer in property rights over the means of production requires a bilateral agreement motivated by the prospect of mutual benefit and cannot be based on unilateral coercion, then industrial relations' legislation can safely allow the parties to slip out of its jurisdiction. However, when property rights can be unilaterally and costlessly passed on to employees, thus turning them into unwilling quasi-entrepreneurs, the imposition of minimum contract rates compatible with industrial awards for similar (if not identical) work is an essential extension of any Industrial Relations Act that does not wish to be undermined.

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