

**THE LEGISLATIVE FRAMEWORK FOR COMBATING
TRAFFICKING IN PERSONS**

A BACKGROUND PAPER PREPARED BY:

Dr Julie Debeljak, Professor Susan Kneebone, Ms Miriam Cullen,
and Ms Fiona Ransom

FOR A WORKSHOP ON:

*Legal and Criminal Justice Responses to Trafficking in Persons in Australia:
Obstacles, Opportunities and Best Practice Workshop.*

TO BE HELD:

Monday 9 November 2009
Monash University Law Chambers, 472 Bourke Street, Melbourne

**An outcome of an Australian Research Council Linkage Grant entitled *Australia's
Response to Trafficking in Women: A Model for the Regulation of Forced Migration
in the Asia-Pacific Region?***

The Criminal Legislation

The Commonwealth *Criminal Code 1995* (Cth) (*'Criminal Code'*) contains a number of offences related to trafficking through amendments enacted in 1999, 2002 and 2005.¹ The 2005 amendments directly relate to trafficking in persons and culminated in Australia's ratification of the *UN Protocol* on 14 September 2005. However, it is important to consider all of the amendments for two reasons. First, it facilitates an understanding of the historical development of this area of the law. Secondly, and more importantly, the amendments create cumulative and alternative offences, which gives law enforcement agencies the opportunity to pursue convictions on lesser offences if trafficking in persons cannot be proved. The relevant offences are grouped together as follows:

Slavery, Sexual Servitude and Deceptive Recruiting: The 1999 Amendments²

In 1998 the Model Criminal Code Officers Committee (MCCOC) tabled a report in parliament recommending new offences of slavery and sexual servitude be introduced into the *Criminal Code* (Cth). The *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* was subsequently adopted, based largely on the recommendations of the MCCOC. The Act criminalises slavery, sexual servitude and deceptive recruitment.³ As stated above, these offences are cumulative or alternative offences to trafficking in persons and are thus important supplements to the trafficking-specific Division 271. The offences are constructed as follows:

1) Slavery offences: s 270.3

There are two offences:

- (1) A person is guilty of an offence with a penalty of 25 years imprisonment if they *intentionally*:
 - i) possess a slave or exercise over a slave any powers attaching to the right of ownership; or
 - ii) engage in slave trading; or
 - iii) enter into any commercial transaction involving a slave; or

¹ See Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999 (Cth), Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002 (Cth), and Criminal Code Amendment (Trafficking in Persons Offences Act) 2005 (Cth) respectively.

² Introduced via the Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999 (Cth), and amended via the Criminal Code Amendment (Trafficking in Persons Offences) Act 2005 (Cth).

³ The sexual servitude and deceptive recruiting offences relate to: (a) Australian citizens and residents who commit offences overseas; (b) persons who commit conduct overseas where the sexual services are provided in Australia; and (c) persons who commit the conduct in Australia where sexual services are provided overseas: see s 270.5 of *Criminal Code*; PJCACC, *Inquiry 2004*.

- iv) exercise control or direction over, or provide finance for, any act of slave trading or commercial transaction involving a slave.
- (2) A person is guilty of an offence with a penalty of 17 years imprisonment if:
- i) The person (a) enters into any commercial transaction involving a slave; or (b) exercises control or direction over, or provides finance for, any commercial transaction involving a slave; or (c) exercises control or direction over, or provides finance for, any act of slave trading; and
 - ii) The person is *reckless* as to whether the transaction or act involves a slave, slavery or slave trading.

“Slavery” is defined as ‘the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such condition results from a debt or contract made by the person’ (s 270.1).

The legislation does not define ‘the powers attaching to the right of ownership’. However, in the recent decision of *R v Wei Tang*,⁴ the High Court of Australia has clarified its meaning. Hayne J⁵ made clear that the terms ‘ownership’ and ‘powers attaching to the right of ownership’ should be given their ordinary meanings in the context, and that the primary feature of that context is that the subject of the exercise of those powers is a human being.⁶

While the question as to whether an allegation of slavery is made out is ultimately one for the jury, some of the relevant considerations included ‘a capacity to deal with a complainant as a commodity, ... exercise of powers of control over movement which extend well beyond powers exercised even in the most exploitative of circumstances, and absence or extreme inadequacy of payment for service.’⁷ In addition, his Honour stated that the existence of a contract lends no legitimacy to a situation which would otherwise amount to slavery. To decide conversely would ‘construct a false dichotomy between employment and effective ownership’.⁸

Gleeson CJ⁹ was careful to point out that harsh and exploitative working conditions will not of themselves amount to slavery. Moreover, his Honour held that there is no need to draw boundaries between slavery and other related offences, such as forced labour or debt bondage, because the various concepts are not mutually exclusive. Indeed, ‘[t]hose who engage in the traffic in human beings are unlikely to be so obliging as to arrange their practices to conform to some convenient taxonomy’.¹⁰

⁴ *R v Wei Tang* [2008] HCA 39.

⁵ With whom Gummow, Heydon, Crennan and Kiefel JJ agreed on this matter.

⁶ Ibid. [138]-[139] and [145]-[146] (Hayne J).

⁷ Ibid. [44] (Gleeson CJ with whom Gummow, Hayne, Crennan, Heydon and Kiefel JJ agreed).

⁸ Ibid. [45] (Gleeson CJ with whom Gummow, Hayne, Crennan, Heydon and Kiefel JJ agreed).

⁹ With whom Gummow, Hayne, Crennan, Heydon and Kiefel JJ agreed.

¹⁰ Ibid. [12] (Gleeson CJ with whom Gummow, Hayne, Crennan, Heydon and Kiefel JJ agreed).

Case Study: *R v Wei Tang; and R v DS*

The Wei Tang decision is the first time the High Court of Australia has had the opportunity to clarify the meaning and extent of the slavery provisions in the *Criminal Code*. This was clearly an instance of trafficking in persons in the circumstances but was charged under slavery because the trafficking offences were not yet in force.

The case centred on the conduct of Wei Tang and ‘DS’ who jointly operated a brothel in Melbourne.¹¹ DS had herself been brought to Melbourne as a contracted prostitute several years before, but had paid off her debt and moved into the managerial side of the business. Wei Tang was the owner of the brothel¹².

The two were engaged in a trafficking scheme involving five women who were brought from Bangkok to Sydney between August 2002 and May 2003.¹³ The women were usually escorted from Thailand to Australia by an elderly couple so as not to arouse suspicion. After meeting her ‘owner’ at the airport, the victim would have her passport and return air ticket confiscated. Their accommodation consisted of apartments controlled by their ‘owners’ for which they had no keys and were not permitted to leave without an escort.¹⁴

The women were required to work six days per week in one brothel and would not be paid at all until her “debt” of between \$40,000 and \$45,000 was repaid. The brothel charged each client \$110 for sex of which \$50 would be put towards the woman’s contract debt and the rest went to the owners and managers of the brothel.¹⁵ Each woman could choose to work for a seventh day and if she did so she would usually receive \$50 of what the client paid.¹⁶ This was the only time any income was paid.

DS pleaded guilty to possessing a slave and engaging in slave trading¹⁷ and was

¹¹ Note also that Wei Tang was co-accused with Paul Pick but the latter was acquitted by a jury on eight charges related to slavery: Fiona David, *Trafficking of Women for Sexual Purposes*, Australian Institute of Criminology, Research and Public Policy Series Report 95 (2008) 49.

¹² *R v Wei Tang* [2007] VSCA 134, [8].

¹³ Ibid.

¹⁴ *R v DS* [2005] VSCA 99; (2005) 191 FLR 337, 340 [6].

¹⁵ *R v Wei Tang* [2007] VSCA 134, [13].

¹⁶ Ibid.

¹⁷ Three counts of possessing a slave contrary to s 270.3(1)(a) of the *Criminal Code*, and two counts of engaging in slave trading contrary to s 270.3(1)(b).

ultimately sentenced to six years imprisonment. Wei Tang, on the other hand, pleaded not guilty at first instance but was convicted by a jury of five offences of intentionally possessing a slave and five offences of intentionally exercising over a slave powers attaching to the right of ownership.¹⁸ At first instance, Judge McInerney applied a broad approach to the concept of slavery stating:

One asks the rhetorical question: How could they run away when they had no money, they had no passport or ticket, they entered on an illegally obtained visa, albeit legal on its face, they had limited English language, they had no friends, they were told to avoid immigration, they had come to Australia consensually to earn income and were aware of the need to work particularly hard in order to pay off a debt of approximately \$45,000 before they were able to earn an income for themselves?¹⁹

In essence Judge McInerney took the view that modern forms of slavery might not require that the powers of ownership were exercised over another in the literal sense, but instead were effectively exercised.²⁰

Wei Tang appealed against her conviction in the County Court on the basis that the judge had misdirected the jury as to the meaning of the term ‘slavery’. The Court of Appeal disagreed with McInerney’s broad approach and determined that criminal offences must be strictly construed.²¹ Where slavery offences are not clearly made out then other criminal offences might better address the conduct.²²

The Court of Appeal’s decision focused on the trial judge’s direction to the jury as to Wei Tang’s state of mind.²³ It determined that the judge at first instance had not addressed the question of intentional exercise of a power attached to the right of ownership. Acting Justice Eames, with whom Buchanan J and Maxwell P agreed, determined that the direction should have made clear that the matter for consideration by the jury was whether Wei Tang ‘acted with the knowledge that she was dealing with the victim as

¹⁸ Contrary to s 270.3(1)(a) of the *Criminal Code*

¹⁹ *R v Wei Tang* [2006] VCC 637, 6-7.

²⁰ Bernadette McSherry and Miriam Cullen, ‘The Criminal Justice Response to Trafficking in Persons: Practical Problems with Enforcement in the Asia-Pacific Region’ (2008) 19(3) *Global Change, Peace and Security* 205, 217.

²¹ *R v Wei Tang* [2007] VSCA 134, [85].

²² *Ibid.*

²³ Note that the prosecution conducted its case on the basis that the relevant fault element in this instance was intention (not recklessness): *R v Wei Tang* [2008] HCA 39, [46] (Gleeson CJ).

²⁴ *Ibid.* [113].

²⁵ *R v Wei Tang* [2007] VSCA 144, [13].

though she was mere property over whom Wei Tang could exercise the rights an owner would have over property'.²⁴ Eames JA pointed out that it would not be sufficient that Wei Tang was dealing with the victim as an employee or on some other basis.²⁵ Nevertheless, the Court of Appeal decided that it was open on the facts for a charge of trafficking to be made out and as such ordered a retrial rather than an acquittal.

The prosecution appealed to the High Court which overturned the decision of the Court of Appeal, the majority deciding that it was open to the jury to find that the elements of slavery were made out on the facts. In the lead judgment, Gleeson CJ asserts that the Court of Appeal was right to concern itself with how a jury is to distinguish between slavery and harsh and exploitative employment conditions.²⁶ The method for determining this difference, his Honour explained, can be found in the nature and extent of the powers exercised.²⁷ Including,

In particular, a capacity to deal with a complainant as a commodity, an object of sale and purchase, may be a powerful indication that a case falls on one side of the line. So also may the exercise of powers of control over movement which extend well beyond powers exercised even in the most exploitative of employment circumstances, and absence or extreme inadequacy of payment for services.²⁸

Gleeson CJ went on to make the point, however, that contrary to the opinion expressed in the Court of Appeal's judgment, the answer is not to be found in what the accused person believed was the source of their power.²⁹ That is, it is not necessary for the prosecution to show that 'the complainant intentionally exercised a power that an owner would have over property *and was doing so with the knowledge or in the belief that the complainant was no more than mere property.*'³⁰ The knowledge or belief of Tang may be relevant to whether there was intention, but are not requisite elements of the offence.³¹ The majority of the High Court agreed with Gleeson CJ. The decision of the Court of Appeal was set aside and appeals against conviction dismissed.³²

Kirby J gave the sole dissenting opinion. His Honour agreed with Eames JA that the

²⁶ Ibid. [44] (Gleeson CJ).

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid. [44], [51] (Gleeson CJ).

³⁰ Ibid.

³¹ Ibid. [47] (Gleeson CJ).

³² Ibid. [57] (Gleeson CJ).

‘critical issue’ in proceedings concerned the character of the power exercised by the accused over the victim.³³ He points out that there is no benefit gained from bending the meaning of existing criminal offences in order to make room for modern forms of slavery, nor is there any benefit in diluting the fault elements of existing offences for the same reason.³⁴ Kirby J agreed with the Court of Appeal that the jury had been misdirected having received ‘complex and confusing instructions’ on the subject and as such determined that an appropriate outcome would be an order for retrial.³⁵

Case Study: Rahardjo, Ho, Ho and Hoo³⁶

These four accused faced charges of sexual slavery in relation to five women brought to Australia from Thailand. The Supreme Court jury heard that these women were forced to provide sexual services to between 650 and 750 clients in order to repay debts of up to \$90,000 for their passage to Australia.³⁷ The women were allegedly permitted to keep \$5 from each client³⁸ who each paid between \$120 and \$125 for sex.³⁹ Each woman was required to work six days per week and if they chose to work on the seventh day they could keep \$50 per client. Housed in Mount Waverley and Ashburton, it was claimed that the women were not given keys to the premises and were permitted out only under careful supervision.⁴⁰

Conditions at the brothel were allegedly poor, involving significant risks for the women’s sexual health with some sex acts having to be performed without a condom.⁴¹

³³ *R v Wei Tang* [2008] HCA 39, [65] (Kirby J).

³⁴ *Ibid.* [68] (Kirby J).

³⁵ *Ibid.* [70], [75] (Kirby J).

³⁶ Report pending. Trial commenced 21 April 2009, verdict handed down 27 July 2009.

³⁷ Kate Hagan, ‘Prostitutes Likened to AFL Draftees in Trial’, *The Age* (Melbourne), 24 April 2009, 3.

³⁸ *Ibid.*

³⁹ Farah Farouque, ‘Thai Sex Workers in Refugee Scam – Women Forced into Slave Conditions’, *The Age* (Melbourne), 23 April 2009, 2.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

Kim Tan Ho was alleged to be the head of the trafficking ring and was charged with 14 counts of intentionally possessing a slave.⁴² He was convicted of five counts and sentenced to 14 years imprisonment.⁴³ In a second trial⁴⁴ he was convicted of using a sixth woman as a slave,⁴⁵ but not guilty of possessing her.⁴⁶ Ho Kam Ho (Kim Tan Ho's brother) was convicted of three counts of exercising over a slave powers attaching to the right of ownership⁴⁷ and one count of entering into a commercial transaction involving a slave⁴⁸ and was sentenced to 10 years imprisonment.

Slamet Rahardjo faced only one count of intentionally entering a commercial transaction involving a slave⁴⁹ and was acquitted, while Chee Fui Hoo was charged with two counts of possessing a slave⁵⁰ and one count of exercising powers attaching to the right of ownership over a slave.⁵¹ Hoo was acquitted of the latter, and no verdict was delivered on the possessing a slave charges.⁵²

It is relevant here to consider that an offence of slavery may have been committed in these circumstances. As mentioned above, the High Court has noted that relevant considerations in determining a case of slavery include *inter alia* 'a capacity to deal with a complainant as a commodity... exercise of powers of control over movement which extend well beyond powers exercised even in the most exploitative of circumstances and absence or extreme inadequacy of payment for service'.⁵³

⁴² Contrary to s 270.3(1)(a) *Criminal Code*.

⁴³ Cummins J. Ho was also convicted of four counts of conducting transactions to avoid financial reporting requirements, contrary to s 31 *Financial Transaction Reports Act 1988* (Cth).

⁴⁴ Before Lasry J, verdict handed down 15 October 2009. Pre-sentence submissions were scheduled to be heard 22 October 2009.

⁴⁵ Contrary to 270.3(1)(a)

⁴⁶ Kate Hagan, 'Man found guilty in sex slave case', *The Age* (Melbourne), 16 October 2009.

⁴⁷ Contrary to s 270.3(1)(a)

⁴⁸ Contrary to s 270.3(1)(c)

⁴⁹ Contrary to s 270.3(1)(c)

⁵⁰ Contrary to s 270.3(1)(a)

⁵¹ Contrary to s 270.3(1)(a). Andreas Schloenhardt, *Case Report: DPP v Kam Tin Ho, Ho Kam Ho, Chee Fui Hoo and Slamet Edy Rahardjo 2* (2009)

<<http://www.law.uq.edu.au/documents/humantrafficking/case-reports/ho-et-al.pdf>> at 28 October 2009.

⁵² Ibid.

2) **Sexual Servitude offences: s 270.6**

There are two offences:

- 1) A person whose conduct causes another person to enter into or remain in sexual servitude and who intends to cause, or is reckless as to causing, that sexual servitude is guilty of an offence.
- 2) A person who conducts any business that involves sexual servitude of other persons and who knows about it, or is reckless as to that sexual servitude, is guilty of an offence.

“Sexual servitude” is defined as the condition of a person who provides sexual services and who, because of force or threats: (a) is not free to cease providing sexual services; or (b) is not free to leave the place or area where the person provides the sexual services. “Threat” means a threat (a) of force, (b) to cause a person’s deportation; or (c) of any other detrimental action. (See s 270.4.)⁵⁴

To be ‘not free’ to stop providing services, or ‘not free’ to leave the place where those services are provided has a particular meaning, according to Campbell JA in the *Sieders* case.⁵⁵ This element of the offence does not require that the person suspected of being in sexual servitude necessarily possesses the desire to leave or stop providing sexual services. Nor is it required that the circumstances which render a person ‘not free’ are such that the action is completely impossible in all senses.⁵⁶ Rather, according to *Sieders*, being ‘not free’ means ‘that, if they *were to want to*, there would be some circumstance or set of circumstances in which they live that would prevent, or seriously inhibit, their taking that action.’⁵⁷

The penalty for both offences is 15 years imprisonment (unless it is an aggravated offence, being against a person who is under the age of 18, in which case the penalty is 20 years imprisonment (s 270.6 and 270.8)).

⁵³ *R v Wei Tang* [2008] HCA 39 [44] (Gleeson CJ with whom Gummow, Hayne, Crennan, Heydon and Kiefel JJ agreed).

⁵⁴ There is also an offence of enforced prostitution under s 68(16) of *Criminal Code*.

⁵⁵ *Sieders v R* [2008] NSWCCA 187. Discussed below.

⁵⁶ *Ibid.* [91].

⁵⁷ *Ibid.* [93] (emphasis in original).

*Case Study: Sieders and Yotchomchin*⁵⁸

Joseph Sieders and Somsri Yotchomchin owned and operated lawful brothels in Surry Hills and Penrith respectively, New South Wales. Each was charged and convicted in 2006 of ‘conducting a business involving the sexual servitude of another’ in relation to their treatment of five Thai women. All the women were told before coming to Australia that they would be working as prostitutes and would be required to repay the sum of \$45,000.

The court heard that the services of a ‘corrupt’ migration agent were sought to create a false application for refugee status on the basis that the women were lesbians who suffered persecution in Thailand.⁵⁹ Upon arrival they were informed that they would not be free to leave the brothel nor receive any income until that sum had been repaid and were required to surrender their passports and return airline tickets to either Sieders or Yotchomchin.⁶⁰

Shortly after arriving, one of the women, a 19 year old, began asking clients if they would call the immigration authorities, preferring arrest to having to continue performing sexual services.⁶¹ One of her clients did call the authorities which led to a raid on the premises by DIAC and the AFP. However, by this stage the woman had been moved to another brothel where she was eventually discovered.⁶²

During initial proceedings one of the Crown witnesses, a former prostitute in the Surry Hills brothel operated by Sieders and Yotchomchin recognised one of the jurors as a former client forcing the judge to order a new trial with a fresh jury.⁶³ Both accused were unsuccessful in their respective appeals against conviction. Sieders and Yotchomchin received sentences of four and five years respectively for conducting a business that involved the sexual servitude of other persons, knowing about that sexual servitude.⁶⁴

⁵⁸ [2008] NSWCCA 187.

⁵⁹ Leonie Lamont, ‘Client took Pity over Sex Slave, Court Told’, *Sydney Morning Herald* (Sydney), 20 June 2006, 7.

⁶⁰ *Sieders v R* [2008] NSWCCA 187 [13].

⁶¹ Leonie Lamont, ‘Client took Pity over Sex Slave, Court Told’, *Sydney Morning Herald* (Sydney), 20 June 2006, 7.

⁶² Ibid.

⁶³ Warren Owens, ‘Trial Aborted – Prostitute Claims Juror was Client’, *Sunday Telegraph* (Sydney), 6 August 2006, 34.

⁶⁴ Contrary to s 270.6(2) of the *Criminal Code*

Case Study: *R v Kovacs*⁶⁵

Melita and Zoltan Kovacs were convicted of offences of slavery in 2007. They organised for a woman from the Philippines, G, to come to Australia to work in their takeaway shop and mind their children for no pay until the debt for bringing her to Australia was repaid, which they estimated would take five years.⁶⁶ To do this, they arranged for G to engage in a sham marriage. When she arrived in Australia in August 2002, G was met by Mr Kovacs and was then taken to a motel and repeatedly raped. She was subsequently put to work 12 hours per day in their takeaway shop and was also required to do housework and care for the Kovacs' three children. Mr Kovacs' continued to rape G when his wife was not home and sexually assault her on the drive to the shop in the mornings. On one occasion she tried to escape but was found by the Kovacs almost immediately, and forcibly taken back to their house at which point they took her passport from her.⁶⁷

The Kovacs were each convicted of the offence of intentionally possessing a slave.⁶⁸ On appeal Melita Kovacs' conviction for slavery offences was set aside on the basis that the judge had misdirected the jury and a retrial was ordered which will be heard later this year.⁶⁹

⁶⁵ [2008] QCA 417.

⁶⁶ *R v Kovacs* [2008] QCA 417 [8]; and Commonwealth Director of Public Prosecutions, *Annual Report 2007-08* (2008) 61.

⁶⁷ *R v Kovacs* [2008] QCA 417 [12]-[13]; and Commonwealth Director of Public Prosecutions, *Annual Report 2007-08* (2008) 61.

⁶⁸ At trial Zoltan Kovacs was convicted of arranging a marriage for visa purposes contrary to s 240(1) of the *Migration Act 1958* (Cth), intentionally possessing a slave and intentionally exercising powers of ownership over a slave, contrary to s 270.3(1)(a) of the *Criminal Code*. He was sentenced to eight years imprisonment for the slavery offences and 1 year for the migration offence, with a non-parole period of three years and nine months. Melita Kovacs was convicted of the same offences and received four years imprisonment for the slavery offences, one year imprisonment for the migration offence and a non-parole period of 18 months. Zoltan Kovacs was also charged with rape and sexual assault of G, contrary to ss 349 and 352 of the *Criminal Code* (Qld).

⁶⁹ *R v Kovacs* [2008] QCA 417 [107].

Case Study: R v McIvor and Tanuchit

This case is strikingly similar to *R v Wei Tang* (outlined above). Trevor McIvor and his wife Kanokporn Tanuchit owned and operated a brothel in Fairfield, New South Wales.⁷⁰ Between 2004 and 2006 they recruited five women from Thailand to work in the brothel. Four of the women knew that they would be engaged in sex work and one woman was misled and told that she would be a masseuse.

Upon arrival the women were told that they would be required to pay back debts to the brothel owners of between \$35,000 and \$45,000 each. Each woman was required to work 16 hours per day, six days a week and would receive payment, albeit minimal, only if she chose to also work on the seventh day.⁷¹ The women worked and slept in the brothel which was kept locked and they were not permitted to leave without an escort. They were required to work while they were menstruating and while suffering vaginal infections and severe illness.⁷²

The situation was discovered when the woman who had been deceived about the fact that she would be performing sex work obtained the phone number for the Thai Consul General and telephoned for help.⁷³ Each defendant was found guilty of five counts of possessing a slave and five counts of exercising over a slave powers attaching to the right of ownership.⁷⁴ McIvor was sentenced to 12 years imprisonment with a non-parole period of 7.5 years, while Tanuchit received 11 years with a non-parole period of 7 years. Both have since lodged an appeal against their sentences.

3) Deceptive Recruiting for Sexual Services (s 270.7)

A person will be guilty of an offence of deceptive recruiting for sexual services if that person, with the intention of inducing another person to enter into an agreement to provide sexual services, deceives the other person about:

- a) The fact it involves the provision of sexual services;
- b) The nature of the sexual services to be provided;

⁷⁰ Kim Arlington, 'Sex Slave Family Trevor McIvor, Kanokporn Tanuchit 'Psycho' Victim Says', *The Daily Telegraph* (Sydney), 14 July 2008 <<http://www.news.com.au/dailytelegraph/story/0,22049,24016895-5001021,00.html>> at 2 June 2009.

⁷¹ Commonwealth Director of Public Prosecutions, *Annual Report 2007-08* (2008) 63.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Contrary to s 270.3(1)(a) of the *Criminal Code*. Commonwealth Director of Public Prosecutions, *Annual Report 2007-08* (2008) 63.

- c) The extent to which the other person will be free to leave;
- d) The extent to which the other person will be free to cease providing the sexual services;
- e) The extent to which the other person will be free to leave their residence;
- f) If there is a debt, the quantum or existence of the debt owed or claimed to be owed; or
- g) The fact that the engagement will involve exploitation, debt bondage, or the confiscation of the person's travel or identity documents.

Again, when considering deception, the factors relevant to the s 271.8 debt bondage offence (see below under 2005 amendments) are relevant here. The penalty is 7 years imprisonment, unless it is an aggravated offence, being against a person who is under the age of 18, in which case the penalty is 9 years imprisonment (s 270.7 and 270.8). Paragraphs (b) to (g) clearly cover the scenario when the deceived person is aware that they will be working in the sex industry, but deceived about the exploitative conditions of their employment. The focus in these provisions is therefore on deception in relation to the provision of sexual services, rather than the broader trafficking deception for a multitude of end-purposes types of exploitation. Nevertheless it is foreseeable that some instances of trafficking can also be instances of deceptive recruiting.

Proceeds of Crime Act 2002 (Cth)

The *Proceeds of Crime Act 2002* (Cth) can be used to confiscate or restrict the proceeds of crime, including offences related to trafficking in persons. In *DPP v Xu*⁷⁵ Sally Xu had been charged with *inter alia* knowingly causing another person to enter into and remain in sexual servitude,⁷⁶ knowingly conducting a business that involved the sexual servitude of another person,⁷⁷ and intentionally exercising control over a slave.⁷⁸ In this case, section 17 of the *Proceeds of Crime Act* was relied upon to place a restraining order over Ms Xu's property because one of the facts in issue was her proprietary connection with the premises where the offences were alleged to have been committed.⁷⁹

In fact, the *Proceeds of Crime Act* can be utilised to place a restraining order in respect of property where a person has been charged with *any* indictable offence. The property must be the property or bankruptcy property of the suspect; the property of a person under the suspect's effective control; or property that is proceeds of, or an instrument of, the offence.⁸⁰

⁷⁵ (2005) 154 A Crim R 173.

⁷⁶ s 270.6(1) of the *Criminal Code*, later replaced by the equivalent s80D(1), *Crimes Act 1900* (NSW)

⁷⁷ s 270.6(2) of the *Criminal Code*, later replaced by the equivalent s80E(1), *Crimes Act 1900* (NSW)

⁷⁸ s270.2(1) of the *Criminal Code*

⁷⁹ *DPP v Xu* (2005) 154 A Crim R 173, 176.

⁸⁰ *Proceeds of Crime Act 2002* (Cth) s 17(2).

Trafficking in Persons and Debt Bondage: The 2005 Criminal Code Amendments⁸¹

Under the 2005 amendments, Division 271 criminalises trafficking in persons and debt bondage. Rather than adopting the wording of the *Trafficking Protocol* definition of “trafficking in persons”, the *Criminal Code* outlines numerous scenarios that each constitute an offence of “trafficking in persons”. The three elements in the *Trafficking Protocol* definition are not present in each of the offences. In fact ratifying countries have implemented the definition in significantly different ways,⁸² which arguably undermines acceptance of the *Trafficking Protocol* definition as *the* internationally recognised definition of trafficking in persons. This also compounds problems associated with compilation of accurate statistics on trafficking⁸³ and could lead to difficulties with mutual legal assistance and extradition.

There are eight separate offences of trafficking in persons: four offences apply to trafficking into Australia, and a parallel set of four offences pertain to trafficking out of Australia. Essentially, there are only four sets of circumstances in which trafficking in persons can occur,⁸⁴ as follows:

- 1) **Facilitating forced movement to or from Australia, ss 271.2(1) and (1A):**
 - a) The first person must organise or facilitate the entry or receipt of another person into Australia (s 271.2(1)) or the exit of another person from Australia (s 271.2(1A)); and
 - b) The first person uses force or threats; and
 - c) The force or threats must result in the first person obtaining the other person’s compliance in the entry or receipt (s 271.2(1)) or exit (s 271.2(1A))⁸⁵.

Neither the entry and receipt scenario, nor the exit scenario, requires exploitation as the end-purpose at the destination country. These scenarios are directed at the ‘illegal’ movement of people across borders. In focusing on the forced movement aspect of trafficking, these two scenarios arguably go beyond the purpose of the *Trafficking Protocol*,⁸⁶ which is directed at end-purpose exploitation. Removing the

⁸¹ Introduced via the *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth). This legislation was passed by the Parliament on 21 June 2005, received Royal Assent on 6 July 2005, and came into force on 3 August 2005.

⁸² Bernadette McSherry, ‘Trafficking in Persons: A Critical Analysis of the New Criminal Code Offences’ (2006) 18(3) *Current Issues in Criminal Justice* 385, 389.

⁸³ Susan Kneebone, ‘Refugees, Crime and Security: The trafficking-refugee nexus’ (A paper prepared for the Refugees Futures Conference, 10-12 September 2009, Monash University Prato Centre).

⁸⁴ Elaine Pearson, ‘Australia’ in Global Alliance Against Trafficking in Women, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the World* (2008) 33.

⁸⁵ The third element is an absolute liability element. That means that (a) no fault element needs to be proved, whether it be intention or recklessness, and (b) there is not defence of mistake of fact.

⁸⁶ Elaine Pearson, ‘Australia’ in Global Alliance Against Trafficking in Women, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the World* (2008) 33-34; and Bernadette McSherry, ‘Trafficking in Persons: A Critical Analysis of the New Criminal

element of exploitation and focusing on forced movement arguably blurs the distinction between trafficking in persons and people smuggling. People smuggling, unlike trafficking, does not necessarily require that exploitation occur.

2) Facilitating movement to or from Australia being reckless as to exploitation, s 271.2(1B) and (1C):

- a) The first person must organise or facilitate the entry or receipt of another person into Australia (s 271.2(1B)) or the exit of another person from Australia (s 271.2(1C)); and
- b) In doing so the first person is reckless as to whether the other person will be exploited by the first person or another after that entry or receipt (s 271.2(1B)) or exit (s 271.2(1c)).

These offences appear to focus on the initial stages of movement. Neither the entry and receipt scenario, nor exit scenario, requires force or coercion. This is consistent with the fact that movement in a trafficking context is often voluntary at the initial stages of the movement. The force and coercion may happen at a later stage linked to the exploitation.

Moreover, the entry, receipt and exit scenarios require only recklessness as to exploitation. Although from a prosecutorial perspective, recklessness as to exploitation is easier to prove than an intention of end-purpose exploitation, it is inconsistent with the *Trafficking Protocol* which requires intention.⁸⁷ Also, lowering the bar from intentional acts to reckless acts may highlight a pre-occupation with people movement.

⁸⁷ Code Offences' (2006) 18(3) *Current Issues in Criminal Justice* 385, 389-390; Kneebone, above n.83.
UN Protocol, opened for signature on 12 December 2000, UN Doc A/55/383 (2000), art 5 (entered into force 2003).

Case Study: Yogalingham Rasalingam⁸⁸

This was the first case of an offence of trafficking in persons brought under the *Criminal Code* (Cth) and the first criminal prosecution for labour exploitation.⁸⁹ Yogalingham Rasalingam arranged for Anabalagan Rajendran to come to Australia from India to work in his restaurants. The arrangement was that Rajendran would work seven days per week, from 9am until midnight⁹⁰ for the first year for no pay.⁹¹ In July 2006 the AFP executed a search warrant at which point the situation was uncovered and Rasalingham was charged with trafficking offences.⁹² During the trial it was alleged that Rajendran was not only forced to work without pay, but also to live in the backyard tin shed.⁹³ The court also heard that Rajendran was occasionally permitted to sleep on the living room floor when the rest of the Rasalingham family was away.⁹⁴

Although ultimately a not-guilty verdict was reached by the jury in relation to the charge of trafficking, the Workplace Ombudsman subsequently brought a civil claim against Mr Rasalingham for violation of award terms, in particular, for substantial underpayment of Rajendran.⁹⁵ The underpayment was not rectified until after the investigation by the Workplace Ombudsman commenced. As a result the Federal Magistrates' Court determined that penalties were appropriate and ordered Mr Rasalingham to pay \$18,200 for breaching provisions of a Notional Agreement Preserving State Award (NAPSA) including failing to pay Rajendran in accordance with that NAPSA.⁹⁶

⁸⁸ *Fryer v Yoga Tandoori House* [2008] FMCA 288

⁸⁹ See Commonwealth Director of Public Prosecutions, *Annual Report 2007-08* (2008) 59.

⁹⁰ *Fryer v Yoga Tandoori House* [2008] FMCA 288 [16].

⁹¹ Commonwealth Director of Public Prosecutions, *Annual Report 2007-08* (2008) 60.

⁹² Rasalingham was charged with facilitating the entry of a person into Australia, whilst reckless as to whether that person would be exploited once in Australia, contrary to section 271.2(1B) of the *Criminal Code*, and with submitting a falsified VISA application to DIMIA with the intention of dishonestly influencing a public official in the exercise of the official's duties as a public official, contrary to s 135.1(7) of the *Criminal Code*. Commonwealth Director of Public Prosecutions, *Annual Report 2007-08* (2008) 60.

⁹³ Leonie Lamont, 'Worker not Paid for 16 – Hour Days', *Sydney Morning Herald* (Sydney), 11 April 2007, 5.

⁹⁴ *Ibid.*

⁹⁵ *Fryer v Yoga Tandoori House* [2008] FMCA 288.

⁹⁶ *Ibid.* [3] and [47].

It was alleged that Rasalingham told Rajendra before coming to Australia that he would be required to work 365 days per year, he would not be paid for the first year, and would be expected to “work very hard, like machine.”⁹⁷ However, the High Court decision in *Wei Tang* highlighted that the existence of a contract adds no legitimacy to an exploitative situation.⁹⁸

3) Facilitating movement to or from Australia with deception as to destination conditions, s 271.2(2) and (2A):

- a) The first person must organise or facilitate the entry or receipt of another person into Australia (s 271.2(2)) or the exit of another person from Australia (s 271.2(2A)); and
- b) The first person deceives the other person about the fact that their entry or receipt (s 271.2(2)) or exit (s 271.2(2A)) will involve the provision by the other person of sexual services, or the other person’s exploitation or debt bondage, or the confiscation of the other person’s travel or identity documents.

These scenarios contain the three elements contained in the *Trafficking Protocol* definition.⁹⁹ The scenarios also recognise that end-purpose exploitation goes beyond the provision of sexual services. It remains to be seen how broad a conception of “exploitation”¹⁰⁰ will be sanctioned under Australian law. In particular, it remains to be seen whether the phrase ‘other person’s exploitation or debt bondage’ will be interpreted widely enough to cover the additional forms of exploitation contained in the *Trafficking Protocol*, namely “forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”¹⁰¹

Criminalising the confiscation of travel and identity documents is a welcome development, in terms of its acknowledgment of the variety of forms of control employed in trafficking events, and because it is consistent with obligations to prevent and combat trafficking in the *Trafficking Protocol*.¹⁰² There is some overlap between these scenarios and the offence of deceptive recruiting (see above).

⁹⁷ Leonie Lamont, ‘Worker not Paid for 16 – Hour Days’, *Sydney Morning Herald* (Sydney), 11 April 2007, 5.

⁹⁸ *R v Wei Tang* [2008] HCA 39 [45] (Gleeson CJ with whom Gummow, Hayne, Crennan, Heydon and Kiefel JJ agreed).

⁹⁹ Elaine Pearson, ‘Australia’ in Global Alliance Against Trafficking in Women, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the World* (2008) 34.

¹⁰⁰ James Hathaway, ‘The Human Rights Quagmire of “Human Trafficking” (2008) 49 *Virginia Jo of Int law* (no 1) 1, 9-11.

¹⁰¹ *UN Protocol*, opened for signature on 12 December 2000, UN Doc A/55/383 (2000), art 3(b) (entered into force 2003).

¹⁰² *Ibid.* arts 9, 12 and 13 .

- 4) **Facilitating movement to or from Australia with deception as to nature or conditions of sexual services, s 271.2(2B) and (2C):**
- a) The first person must organise or facilitate the entry or receipt of another person into Australia (s 271.2(2B)) or the exit of another person from Australia (s 271.2(2C)); and
 - b) There is an arrangement for the other person to provide sexual services in Australia (s 271.2(2B)) or outside Australia (s 271.2(2C)); and
 - c) The first person deceives the other person about: (i) the nature of the sexual services to be provided; (ii) the extent to which the other person will be free to leave; (iii) the extent to which the other person will be free to cease providing the sexual services; (iv) the extent to which the other person will be free to leave their residence; and (v) if there is a debt, the quantum or existence of the debt owed or claimed to be owed.

These scenarios are focused solely on deceit in relation to the provision of sexual services and are thus narrower than the scope of the *Trafficking Protocol*. These scenarios could have included deceit in relation to other forms of labour. They should not, however, be considered in isolation, but in conjunction with the other scenarios.

Case Study: R v Dobie¹⁰³

Keith William Dobie was a hairdresser on the Gold Coast who got into significant debt from loans he had used to finance his hairdressing business and from gambling.¹⁰⁴ Between 2005 and 2006 Dobie brought two Thai nationals to Australia. Emails between the women and Dobie indicated that the women had already been working as prostitutes in Thailand, so were not deceived about the nature of the work, but were deceived about conditions. Both women had families and claimed to have taken the work in Australia to send remittances back to Thailand.¹⁰⁵ Dobie presented false documents to authorities in Thailand in order to obtain immigration visas for the women to enter Australia. They were assured that per day they would receive an income of up to \$600 but although Dobie earned up to \$1000 per day from the sexual services the women were providing, the most the women ever received was \$20 per day.¹⁰⁶ Dobie forced the women to work both when they were menstruating and when they were suffering physical pain from

¹⁰³ Not reported. Sentenced December 23 2008, Queensland District Court, before Judge Leanne Clare SC.

¹⁰⁴ Tristan Swanwick, 'Gold Coast Pimp Jailed for Forcing Women to be Sex Slaves', *Courier Mail* (Brisbane), 24 December 2008, 15.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

sex, and told them that they would be arrested by immigration officials if they tried to escape.¹⁰⁷

Dobie was charged *inter alia* with two counts of trafficking in persons, using deception as to the nature of sexual services to be provided.¹⁰⁸ He was sentenced to five years imprisonment and is currently appealing against this sentence.¹⁰⁹

The penalty for each scenario of trafficking in persons is 12 years imprisonment. In comparison to other criminal offences in Australian law, this is relatively lenient. For example, there is a penalty of 25 years imprisonment for the intentional slavery offences and 17 years imprisonment for the reckless slavery offences in Division 270 of the *Criminal Code* (discussed below). Under the *Trafficking Protocol*, end-purpose exploitation in trafficking includes slavery and practices similar to slavery.¹¹⁰ It is unclear why, given the Division 270 penalties and the *Trafficking Protocol* definition of exploitation, the Division 271 penalties are, comparatively speaking, so much lower.¹¹¹ Moreover, the 2005 amendments are in the “Crimes Against Humanity” chapter of the *Criminal Code*; yet the penalties do not seem to reflect this gravity.

There are additional offences under Division 271 as follows:

5) Aggravated Trafficking (s 271.3)

It is an aggravated offence of trafficking in persons if the first person:

- a) commits the offence of trafficking (as outlined in scenarios 1 to 8) intending that the victim will be exploited; or
- b) in committing the offence, subjects the victim to cruel, inhuman or degrading treatment; or
- c) in committing the offence, engages in conduct that gives rise to a danger of death or serious harm to the victim or is reckless as to that danger.

The first limb of the “aggravated trafficking in persons” offence more closely reflects the *Trafficking Protocol* definition of “trafficking in persons” because of

¹⁰⁷ Tristan Swanwick, ‘Gold Coast Pimp Jailed for Forcing Women to be Sex Slaves’, *Courier Mail* (Brisbane), 23 December 2008 <<http://www.news.com.au/couriermail/story/0,23739,24837076-3102,00.html>> at 2 June 2009.

¹⁰⁸ Dobie was also charged with one count of dealing in the proceeds of crime contrary to s 400.6(1) *Criminal Code*, and four counts of giving false information to an immigration official contrary to s 234(1)(a) *Migration Act 1958* (Cth).

¹⁰⁹ Grounds of appeal heard by the Queensland Court of Appeal on 30 September 2009. Court of Appeal has reserved its decision.

¹¹⁰ *UN Protocol*, opened for signature on 12 December 2000, UN Doc A/55/383 (2000), arts 3(b) (entered into force 2003).

¹¹¹ The same can be said for the penalty of 15 years imprisonment for sexual servitude in Division 270 of the *Criminal Code 1995* (Cth), with servitude also being recognised as a form of exploitation under the *UN Protocol*, opened for signature on 12 December 2000, UN Doc A/55/383 (2000), arts 3(b) (entered into force 2003)

the inclusion of intention to exploit as an aggravating factor. The fact that Australia considers the presence of the third element – intention to exploit – to constitute an aggravated offence, rather than being sufficient to constitute an ordinary offence, sends a confusing message.

Aggravated offences are usually reserved for particularly repugnant behaviour – exceptions to “normal criminality”. Because of the stigma associated with such exceptionality, aggravated offences are treated with more caution than ordinary offences and convictions are more difficult to secure. By placing intention to exploit in the aggravating category, the Australian Parliament is saying that what the international community and international law categorises as amounting to ordinary criminal liability, the Australian law categorises as extraordinary criminal liability. The Australian position may be premised on very subtle biases: are there underlying racial, ethnic, class and gender biases that cause Australia to treat as extraordinary, behaviour which the international community considers ordinary?¹¹² The risk lies in the underlying message: the sorts of harms caused to victims of trafficking are not worthy of ordinary criminality; the harm caused and the consequential criminality are something “other” than ordinary, with this “other” perhaps being influenced by racial, ethnic, class and gender biases.

In addition, the 2005 amendments set the bar lower than the *Trafficking Protocol* for the ordinary trafficking offence by excluding vital elements (such as intention to exploit), and in the first limb of the aggravated trafficking offence by including elements considered to be part of an ordinary trafficking offence. It must be acknowledged that from a prosecutorial perspective, it will be easier to secure convictions under the ordinary offence, whilst cases where the evidence is stronger can be argued under the aggravated offence. Setting the respective bars too low, however, may come with costs and have potential unintended consequences: it may undermine the legitimacy of the laws, confuse trafficking with smuggling, hinder Australia’s ability to meet its international obligations, and make it more difficult for Australia to have regional cooperation on a range of matters because the behaviour criminalised in Australia is not criminalised elsewhere (e.g. intelligence exchanges, mutual legal assistance and extraditions).

The criminalisation of the other two aggravating factors is not required under the *Trafficking Protocol*. From a human rights perspective, these aggravating factors threaten the enjoyment of human rights, including non-derogable rights,¹¹³ and are deserving of special responses. It must be recalled that the *Trafficking Protocol*, as with all international instruments, establishes the minimum standards required of States Parties. These additional aggravating factors are welcome additions above and beyond the minimum standards set down in the *Trafficking Protocol*. In

¹¹² Sally Moyle, ‘Trafficking in Women’ (Paper presented at *Stop the Traffic Symposium: Addressing Trafficking in Women for Prostitution*, Melbourne, 25 February 2002)
<http://www.hreoc.gov.au/speeches/sex_discrim/trafficking_women.html> at 3/11/03.

¹¹³ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171, arts 6 and 7 (entered into force 23 March 1976) (‘ICCPR’).

focussing on the movement element contained in each of the regular trafficking offence scenarios, and adding to it the aggravating treatment, danger or recklessness as to death or serious injury, a link to people smuggling emerges. The typical people smuggling story has similar elements to the additional aggravating factors. Indeed, scenarios 1, 2 3, and 4 coupled with either of the additional aggravating factors could apply to people smuggling activities.

The penalty for the aggravated offences is 20 years imprisonment. This more appropriately reflects the seriousness of the offence and the impact it has on victims. Arguably, 20 years imprisonment is the more appropriate penalty for the regular offence, with 25 years imprisonment for the aggravated offence.

6) Trafficking in Children: s 271.4(1) and (2)

- a) The first person must organise or facilitate the entry or receipt of another person into Australia (s 271.4(1)) or the exit of another person from Australia (s 271.4(2)); and
- b) The other person is under the age of 18; and
- c) The first person intends that, or is reckless as to whether, the other person will be used to provide sexual services or will be otherwise exploited after the entry or receipt (s 271.4(1)) or exit (s 271.4(2)).

The penalty is 25 years imprisonment

7) Domestic Trafficking

There is also an offence of domestic trafficking in persons with a penalty of 12 years imprisonment (s 271.5), an aggravated offence of domestic trafficking in persons with a penalty of 20 years imprisonment (s 271.6), and an offence of domestic trafficking in children with a penalty of 25 years imprisonment (s 271.7).

Debt Bondage

The 2005 Amendments also criminalise debt bondage. Debt bondage describes the status or condition arising from a pledge to perform personal services as security for a debt owed where that debt is manifestly excessive, or the reasonable value of those services is not applied to the liquidation of the debt, or the length and nature of those services are not respectively limited and defined.¹¹⁴ Under s 271.8, it is an offence of debt bondage if: (a) the first person engages in conduct that causes a second person to enter into debt bondage; and (b) the first person intends to cause the second person to enter into debt bondage. Numerous factors can be accounted for in considering paragraph (a):

- The economic relationship between the first and second persons;

¹¹⁴ *Criminal Code* (Cth) Dictionary. The personal service pledged can be that person's own services or that of another person under his or her control: *Criminal Code* (Cth) Dictionary.

- Any written or oral contract or agreement between the second person and another person (whether or not the first person);
- The personal circumstances of the second person, including their immigration status; their ability to speak, write and understand the language in which the deception/inducement occurred; and their social and physical dependence on the first person.

Unlike the offence of sexual servitude, a condition of debt bondage can occur in relation to any kind of service, whether or not a sexual service.¹¹⁵ For example, a situation of debt bondage could include domestic labour, fruit picking or working in a factory.

This offence is a summary offence and carries a penalty of 12 month imprisonment. The offence of aggravated debt bondage applies where the second person is under the age of 18 years, with a penalty of 2 years imprisonment (s 271.9). There is one clear advantage associated with summary offences: summary offences are triable by judge alone, not by jury. Using juries in the context of trafficking and related offences introduces a wholly uncontrollable “x” factor which makes conviction difficult. Indeed, juries will have their own (not necessarily generous) views on the seriousness of the alleged offences, the harm done to the alleged victims, and the credibility of the victims. The unpredictability of jury trials has been blamed for the low success rate of prosecution in Australia.¹¹⁶ One clear disadvantage, however, is the relatively low penalty attached to such offences and the implicit message this contains about the seriousness of the behaviour and harms suffered.

To date there have been no prosecutions for debt bondage in Australia. However, in the only High Court judgment to consider trafficking-related offences, the *Tang* case, Gleeson CJ approved of the remarks in the lower Court of Appeal that the offence of debt bondage would have been clearly made out on the facts.¹¹⁷ Unfortunately, the debt bondage offence did not exist at the time that the relevant criminal conduct took place, so was not in issue.

Aggravated People Smuggling and Related Offences: The 2002 Amendments¹¹⁸

Division 73 of the *Criminal Code* contains additional relevant offences. Section 73.2 creates an offence of aggravated people smuggling, which is where the offence of people smuggling is coupled with an intention that the victim be “exploited”. “Exploitation” is defined to include slavery, sexual servitude, forced labour and the removal of organs. The offence carries the penalty of 20 years imprisonment, or a fine of 2,000 penalty units, or

¹¹⁵ *Criminal Code* (Cth) Dictionary; see also *Sieders v R* [2008] NSWCCA 187 [133].

¹¹⁶ Commonwealth, *Parliamentary Joint Committee on the Australian Crimes Commission*, Commonwealth House of Representatives and Senate, 23 June 2006, ACC8-ACC10.

¹¹⁷ *R v Tang* (2008) 82 ALJR 1334, 1364 (Gleeson CJ) quoting *R v Tang* (2007) 16 VR 454 [86].

¹¹⁸ Introduced via the Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002 (Cth).

both.¹¹⁹ There are also numerous identity and travel document offences under Division 73.¹²⁰

The very existence of the aggravated people smuggling offence highlights the historical focus on migration and border control, with end-purpose exploitation and trafficking being tagged on – almost after thoughts. This may be an historical anomaly, given that the new trafficking in persons offences under Division 271 of the *Criminal Code* were not in place when the aggravated people smuggling offences were enacted. Conversely, the perception that trafficking is being pursued under a migration and border-control lens may be reinforced when the structure of the aggravated people smuggling offence is considered in conjunction with the structure of the offences in Division 271 of the *Criminal Code*.

The Migration Act - Sanctions for Employers

The *Migration Amendment (Employer Sanctions) Act 2007* imposes sanctions on employers who employ workers who are in Australia unlawfully, and employers who allow employees to work in breach of visa conditions.¹²¹ The Explanatory Memorandum to the Bill acknowledges that the absence of effective penalties for the employment of illegal workers encourages trafficking in persons.¹²²

The amending legislation inserts offences into the *Migration Act* for allowing or referring an unlawful non-citizen to work, and allowing or referring a person to work in breach of a visa condition. For each of these offences, it is an aggravated offence where the accused knows or is reckless as to the fact that the worker is being exploited.¹²³ The amending legislation defines “exploitation” as having occurred where a person is in a condition of forced labour, sexual servitude or slavery, with these terms being given the same meanings as under the *Criminal Code* (Cth).¹²⁴ The amending legislation does not mention trafficking in persons.

¹¹⁹ The offence of aggravated people smuggling has a jurisdictional limit. It only covers (a) movement from Australia to another country; or (b) from country X to country Y either (i) with transit through Australia, or (ii) without transit through Australia provided the (A) the accused is an Australian citizen or resident, or (B) the criminal conduct occurs wholly or partly in Australia (s 73.4).

¹²⁰ There are equivalent travel and identity offences under s 233A of the *Migration Act 1958* (Cth).

¹²¹ *Migration Amendment (Employer Sanctions) Act 2007* (Cth). The new employer sanctions replace the administrative warning system. Since November 2000, Illegal Worker Notices were issued to employers or employment suppliers who employed or referred for employment illegal workers. The notices were designed to deter future violations by warning of potential prosecution. See generally Department of Immigration and Multicultural and Indigenous Affairs, *Managing the Border: Immigration Compliance* (2004-05 edition, Commonwealth of Australia, 2005), ch 8 <www.immi.gov.au/media/publications/compliance/managing-the-border/pdf/mtb-chapter8.pdf> at 10 October 2006.

¹²² Explanatory Memorandum, *Migration Amendment (Employer Sanctions) Bill 2006* (Cth) 2.

¹²³ *Migration Act 1958* (Cth) ss 245AB(2), 245AC(2), 245AD(2) and 245AE(2) inserted by the *Migration Amendment (Employer Sanctions) Act 2007* (Cth) sch 1.

¹²⁴ *Migration Act 1958* (Cth) s 245AH, inserted by the *Migration Amendment (Employer Sanctions) Act 2007* (Cth) sch 1.

The new legislation poses the question: why would any prosecuting authority pursue prosecutions under the *Migration Act* in favour of the *Criminal Code*? The new migration offences are comparable to sections 271.2(1B) and 271.2(1C) of the *Criminal Code* which create offences where a person organises the entry (or exit) of another person and is reckless as to whether that other person will be exploited. If there is evidence of exploitation amounting to slavery, sexual servitude or forced labour, then surely prosecution of those offences should ensue, rendering the aggravated migration law offence redundant. It is important to note that, if proven, the aggravated offence under the *Migration Act 1958* (Cth) attracts penalties of imprisonment for up to five years;¹²⁵ whereas an offence of slavery, sexual servitude or forced labour under the *Criminal Code* attracts penalties of up to 25 years, 15 years and 20 years imprisonment respectively.¹²⁶ It is a matter of concern that fines can be imposed in these circumstances, instead of imprisonment.

It is also worth noting that the *Crimes Act 1914* (Cth) creates an offence for an employer, or any person or group, to aid or abet foreign nationals to work illegally in Australia, which is punishable by a fine of up to \$10,000.

Labour Legislation

It should be noted that much of the focus of government policy to date has been on trafficking in persons for sexual exploitation. Some argue that this has obscured the larger problem of other forms of exploitation and slavery.¹²⁷ Trafficking in persons does not occur solely in the sex industry, although it is apparent that the sex industry is particularly affected. Investigative resources have tended to be concentrated on trafficking in persons for sexual exploitation which means that the extent of other forms of trafficking is not known. This section aims to explore some possible examples of trafficking in persons for (non-sexual) labour exploitation in Australia, and in particular, situations which have not resulted in criminal prosecutions.¹²⁸

¹²⁵ *Migration Act 1958* (Cth) ss 245AB(3), 245AC(3), 245AD(3) and 245AE(3) inserted by the *Migration Amendment (Employer Sanctions) Act 2007* (Cth) sch 1.

¹²⁶ *Criminal Code* (Cth) ss 270.3, 270.6 and 73.2.

¹²⁷ Kneebone, above n.83, Hathaway, above n.100.

¹²⁸ Note that the following section includes a number of cases involving victims of trafficking for sexual exploitation.

Case Study: Aprint

The Office of the Workplace Ombudsman (OWO) prosecutes employers for the underpayment of wages and failure to uphold workers' minimum entitlements including, but not limited to minimum rates of pay¹²⁹ and maximum hours of ordinary work.¹³⁰ Some cases prosecuted by the OWO have involved exploitation which could amount to trafficking in persons under the *Criminal Code*.¹³¹

In 2005 the OWO brought an application pursuant to the *Workplace Relations Act 1996* (Cth) for the imposition of penalties against Aprint, a printing company based in Melbourne, for the underpayment of wages, failure to pay overtime and failure to require working hours not in excess of 38 hours per week.¹³²

'Jack', 'Harry', 'Nick', and 'Frank' were Chinese nationals recruited in China by the Director of Aprint (Aust) Pty Ltd, Yu Tu Chuan in 2005. The workers were required to pay a total of AUD\$20,000 to work in Australia which was split between a migration agent and Mr Chuan. Mr Chuan deducted \$200 per week from each man's wages in repayment of that debt. He also deducted \$120 per week from each worker for accommodation costs. Initially the men slept in the office where they worked, and travelled to the local swimming pool to wash.¹³³

In addition, each man worked more than 50 hours per week and was significantly underpaid. The Federal Magistrates' Court calculated the total underpayment over the course of their employment to be \$93,667. The employer admitted to breaching the Act but argued that the employees were not any more vulnerable merely because they were temporary migrant workers. However, O'Sullivan Fm did not accept this contention and gave particular weight to the 'size of the underpayments, the period over which they occurred and that the payments were made after the intervention of the Workplace Ombudsman'.¹³⁴ Penalties were imposed of \$9,240¹³⁵ but ultimately no criminal charges were laid.

From what facts available this conduct could amount to an offence of trafficking in persons under the *Criminal Code*, in particular in contravention of sections 271.2(1B) that is having facilitated the entry of these four men into Australia, Mr Chuan acted with recklessness as to whether they would be exploited.

¹²⁹ Workplace Relations Act 1996 (Cth) pt 12 div 2.

¹³⁰ Workplace Relations Act 1996 (Cth) pt 12 div 3.

State and Territory Laws

State and Territory laws complement the Commonwealth legislative regime. Six of the jurisdictions have sexual servitude legislation,¹³⁶ with seven jurisdictions having deceptive recruiting type offences.¹³⁷ These specific offences have penalties similar to the Commonwealth legislation. The major difference is that the State and Territory jurisdictions have limited geographical reach, with their laws being applicable within the domestic jurisdiction only (i.e. intra-Australia activity).¹³⁸ And, of course, the general criminal law in each jurisdiction contains offences that can be used in trafficking situations (e.g. *Prostitution Control Act 1994* (Vic) prohibits forcing a person into, or remaining in, prostitution against their will).

Other Cases of Interest

(a) Discontinued Prosecutions

The CDPP has discontinued prosecutions against 11 defendants.¹³⁹ This includes the prosecution against co-defendants Sally Ciu Mian Xu, Ngoc Lan Tran and Lin Qi. These co-accused were charged with slavery offences for bringing women from Thailand to Australia to work as prostitutes. One of the victims claimed she was promised waitressing work in Australia but upon arrival was told she had a debt of \$200,000 which she was required to pay off by providing sexual services in a Sydney brothel. She ultimately freed herself by calling 000 and notifying police.¹⁴⁰ The trial resulted in a hung jury and the case was not further pursued.

¹³¹ Note that under the *Fair Work Australia Act 2009* (Cth) the Workplace Ombudsman will become the Fair Work Ombudsman and although its role will remain as one which enforces minimum entitlements the nature of those minimum entitlements have shifted somewhat, although will still involve a minimum rate of pay and minimum standards etc, see pt 2-2 of the Act ‘The National Employment Standards’.

¹³² *Inspector Robert John Hortle v Aprint (Aust) Pty Ltd & Anor* [2007] FMCA 1547 (Unreported Judgment of the Federal Magistrates’ Court 7, 10 September 2007, O’Sullivan FM).

¹³³ Working Group of the National Roundtable on People Trafficking, *Guidelines for NGOs Working with Trafficked People* (2008) 11.

¹³⁴ [2007] FMCA 1547, [33] – [34].

¹³⁵ [2007] FMCA 1547 at [7].

¹³⁶ New South Wales, South Australia, Northern Territory, Australian Capital Territory, Victoria, Western Australia.

¹³⁷ South Australia, Northern Territory, Australian Capital Territory, Queensland, Victoria, Western Australia, Tasmania.

¹³⁸ For a discussion of the potential for gaps between the Commonwealth and State/Territorial laws, see PJCACC, *Supplementary Report 2005*, 8.

¹³⁹ Fiona David, *Trafficking of Women for Sexual Purposes*, Australian Institute of Criminology, Research and Public Policy Series Report 95 (2008) 49.

¹⁴⁰ Andreas Schloenhardt, *Case Report: DPP(Cth) v Cui Mian Xu* (2009) <http://www.law.uq.edu.au/documents/humantrafficking/case-reports/xu_tran_qi.pdf> at 1 June 2009.

The discontinued prosecutions also include the case against Daniel Sweeseang Kwok.¹⁴¹ In this case, three Indonesian women contacted police claiming that they had been brought to Australia under false pretences. They claimed to have been told they would be working in hospitality and public relations and arrived in Australia to be put to work as prostitutes to pay off contract debts that they had no knowledge of before they left Indonesia. The case resulted in a statutory *nolle prosequi* being entered by the prosecution after the key prosecution witness was found to be under investigation herself.¹⁴²

In March 2008 a joint investigation by the AFP and DIAC uncovered ten victims of trafficking from South Korea in a Sydney brothel, all of whom had entered Australia on legal work visas. Media reports indicated that they had been forced to work long hours to pay off debts of between \$10,000 and \$40,000. Kwang Suk Ra headed the trafficking syndicate and had previously been imprisoned in the United States for trafficking offences.¹⁴³ Charges against Kwang Suk Ra and her co-accused Jin Hee Do, Na Kyung Kim and Gin Taek Choi were ultimately dropped due to insufficient evidence.¹⁴⁴

(b) Victims of Crime Compensation

In 2007 the first (and only) claim for victims of crime compensation by a victim of sex-trafficking was successful. Jetsadophorn Chaladone was trafficked to Australia at the age of 13 with her father's consent to work as a nanny but upon arrival was put to work in a brothel in Surry Hills. The brothel owners were never prosecuted.¹⁴⁵ Nevertheless, the New South Wales Victims Compensation Tribunal found Chaladone's claim meritorious. The Tribunal stated among its reasons for awarding her the compensation that she 'suffered from chronic post-traumatic stress disorder and moderate to severe depressive disorder' as a result of what had happened to her in Australia.¹⁴⁶

(c) Prosecution for Breaches of Occupational Health and Safety Legislation

In June 2008 a Melbourne based printing company was fined for breaches of occupational health and safety legislation involving two workers on temporary work visas. Both workers were from China and spoke no English, and neither were trained in respect of their duties nor given occupational health and safety training.¹⁴⁷

¹⁴¹ David, above n. 139, 49.

¹⁴² Andreas Schloenhardt, *Case Report: R v Kwok* (2009) <<http://www.law.uq.edu.au/documents/humantrafficking/case-reports/kwok.pdf>> at 1 June 2009.

¹⁴³ Ibid.

¹⁴⁴ Andreas Schloenhardt, *Case Report: Kwang Suk Ra* (2009) <http://www.law.uq.edu.au/documents/humantrafficking/case-reports/kwang_suk_ra.pdf> at 1 June 2009

¹⁴⁵ Natalie Craig, 'Sex Slave Wins Abuse Claim', *The Age* (Melbourne), 29 May 2007, 4.

¹⁴⁶ Ibid.

¹⁴⁷ *Prosecution Result Summaries*, Victorian WorkCover Authority <<http://www1.worksafe.vic.gov.au/vwa/vwa097-002.nsf/content/LSID159684>> at 2 April 2009.

One of the workers fell from a ladder which was inappropriate for the work he was doing and lost two teeth and broke his wrist.¹⁴⁸ He returned to work with his broken arm in plaster and was required to erect scaffolding which was a task he was not trained to perform. He was using a drill with his left arm (he was right handed but his right arm was broken) and was supporting the drill with his shoulder.¹⁴⁹ In doing so, he injured his left arm and continued to work using his broken right arm. Over the course of the day it became apparent that his left arm was sufficiently seriously injured that he was forced to take time off work at which point his employment was terminated.¹⁵⁰

The second worker was working on a machine which he was not trained to operate and his arm got trapped inside the machine, causing him serious permanent injuries which required two weeks of hospitalisation, the insertion of plates and bolts into his arm, and skin grafts.¹⁵¹

The Victorian WorkCover Authority brought charges¹⁵² for failing to provide a safe working environment for which Lakeside Packaging was found guilty and fined \$75,000 plus costs. This behaviour also arguably constitutes offences of trafficking in persons against section 271.2(1B) of the *Criminal Code* and may also have committed an aggravated offence contrary to section 271.3. An aggravated offence will occur where a person commits the offence intending that the victim will be exploited after they enter Australia.¹⁵³ It must also be shown that in committing the offence the accused person subjected the victim to cruel, inhuman or degrading treatment and engaged in conduct which gave rise to a danger of death or serious harm and was reckless to that danger.¹⁵⁴ On the facts available whether the intention element is made out is unclear but cannot be ruled out. However, the second aspect of the aggravated offence has clearly occurred given the severity of the injuries the workers sustained and the complete lack of adequate training.

¹⁴⁸ ABC Radio National, 'Lakeside Packaging Decision', *Law Report*, 8 July 2008 <<http://www.abc.net.au/rn/lawreport/stories/2008/2294991.htm>> at 2 April 2009; Michael Blachard, 'Migrant Worker Sacked While Injured', *The Age* (Melbourne), 15 September 2006, 2.

¹⁴⁹ ABC Radio National, 'Lakeside Packaging Decision', *Law Report*, 8 July 2008 <<http://www.abc.net.au/rn/lawreport/stories/2008/2294991.htm>> at 2 April 2009.

¹⁵⁰ Ibid.

¹⁵¹ *Prosecution Result Summaries*, Victorian WorkCover Authority <<http://www1.worksafe.vic.gov.au/vwa/vwa097-002.nsf/content/LSID159684>> at 2 April 2009.

¹⁵² Under the *Occupational Health and Safety Act 2004* (Vic): s 21(1) & (2)(a) Employer failed to provide & maintain so far as was practicable for employees a safe working environment - plant & systems of work; and s 21(1) & (2)(e) Employer failed to provide & maintain so far as was practicable for employees a safe working environment - information instruction training & supervision.

¹⁵³ *Criminal Code* (Cth) s 271.3.

¹⁵⁴ Ibid.

CONCLUSIONS

- The structure of the trafficking in persons offences does not match the practices of the actual trafficking trade;¹⁵⁵
- The Australian definition of trafficking in persons does not match the definition in the *UN Protocol*;¹⁵⁶
- The failure to include “exploitation” in each of the ordinary “trafficking in persons” offences;
- The omission of some of the means of trafficking outlined in art 3(a) of the *UN Protocol* from the “trafficking in persons” offences, namely: other forms of coercion, the abuse of power or of a position or vulnerability, and the giving or receiving of payments of benefits to achieve the consent of a person having control over another person;¹⁵⁷
- The element of showing that the force or coercion *obtained the other person’s compliance* in the entry or receipt (s 271.2(1)) or exit (s 271.2(1A)) may introduce an element of consent, in violation of art 3(b) of the *UN Protocol*.¹⁵⁸ The UN Protocol makes it clear that consent to the intended exploitation is irrelevant where the elements of trafficking (coercion, fraud, deception, abuse of power, etc) are present. This is because the elements of trafficking are ‘consent-nullifying’.¹⁵⁹
- The failure to include non-commercial sexual exploitation in the definition of “exploitation” in Division 271. “Exploitation” under Division 271 means slavery, forced labour, sexual servitude, and the removal of an organ. Non-commercial sexual exploitation is not expressly covered by this definition, and types of exploitation that are covered, namely slavery and forced labour, may not cover all forms of non-commercial sexual exploitation (e.g. there may be no ownership exercised over the person, and non-commercial exploitation is not “labour”);
- The definition of “exploitation” in Division 271 also does not include servile marriages;
- The overwhelming focus on exploitation in the provision of sexual services in itself, and the fact that this may influence law enforcement agencies to focus only on the sex industry rather than across all industries that are vulnerable to trafficking trade.¹⁶⁰ This is of particular concern when the Human Rights and Equal Opportunity Commission’s Sex Discrimination Commissioner estimates that of the 300 persons trafficked to Australia annually, only 50% of them are trafficked into prostitution, with the balance ending up in domestic work and agricultural work;¹⁶¹

¹⁵⁵ PJCACC, *Inquiry 2004*, 51.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid* 10.

¹⁵⁸ Bernadette McSherry, ‘Trafficking in Persons: A Critical Analysis of the New Criminal Code Offences’, see above n. 82

¹⁵⁹ Anne Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 *Human Rights Quarterly* 975, 985.

¹⁶⁰ McSherry, above n. 158.

¹⁶¹ Pru Goward, *Project Respect Seminar*, Melbourne, 12 August 2005.

- The use of words such as “organise” and “facilitate” to describe the movement element of trafficking in persons, rather than using the less ambiguous terms in the UN Protocol – recruit, transport, transfer, harbour and receipt;¹⁶²
- The absence of formalising the use of Victim Impact Statements in sentencing;¹⁶³
- That the offence of sexual servitude should also address persons that are deceived about their work conditions.¹⁶⁴

¹⁶² Ibid.

¹⁶³ PJCACC, *Inquiry 2004*, 62 (as suggested by NSW Young Lawyers); PJCACC, *Supplementary Report 2005*, 6-7 (supported by HREOC and World Vision Australia). The AGD argued that evidence or statements given in court by victims can be used when sentencing a person for a federal offence (see s 16A(2)(d) of the *Crimes Act 1914* (Cth)). The PJC on ACC rejected this general provision in favour of a specific provision that allows the use of victim impact statements and addresses their content: PJCACC, *Supplementary Report 2005*, 6.

¹⁶⁴ Peg McEntree, ‘Submission to the Parliamentary Joint Commission on the Australian Crime Commission Inquiry into the Trafficking in Women for Sexual Servitude’, Parliamentary Joint Committee of the Australian Crime Commission, Commonwealth House of Representative and Senate, *Inquiry into the Trafficking of Women for Sexual Servitude*, June 2004.

APPENDIX

LABOUR EXPLOITATION OFFENCES

1) CRIMINAL CODE ACT 1995 (CTH)

(a) Slavery offences

s 270.3 Slavery offences:

- (1) A person who, whether within or outside Australia, intentionally:
- (a) possesses a slave or exercises over a slave any of the other powers attaching to the right of ownership; or
 - (b) engages in slave trading; or
 - (c) enters into any commercial transaction involving a slave; or
 - (d) exercises control or direction over, or provides finance for:
 - (i) any act of slave trading; or
 - (ii) any commercial transaction involving a slave;
- is guilty of an offence.

Penalty: Imprisonment for 25 years.

- (2) A person who:
- (a) whether within or outside Australia:
 - (i) enters into any commercial transaction involving a slave; or
 - (ii) exercises control or direction over, or provides finance for, any commercial transaction involving a slave; or
 - (iii) exercises control or direction over, or provides finance for, any act of slave trading; and
 - (b) is reckless as to whether the transaction or act involves a slave, slavery or slave trading;
- is guilty of an offence.

Penalty: Imprisonment for 17 years.

- (3) In this section:

slave trading includes:

- (a) the capture, transport or disposal of a person with the intention of reducing the person to slavery; or
- (b) the purchase or sale of a slave.

- (4) A person who engages in any conduct with the intention of securing the release of a person from slavery is not guilty of an offence against this section.
- (5) The defendant bears a legal burden of proving the matter mentioned in subsection (4).

270.1 Definition of *slavery*

For the purposes of this Division, *slavery* is the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.

(b) Facilitating movement to or from Australia being reckless as to exploitation

ss 217.2(1B) and (1C):

- (1B) A person (the *first person*) commits an offence of trafficking in persons if:
- (a) the first person organises or facilitates the entry or proposed entry, or the receipt, of another person into Australia; and
 - (b) in organising or facilitating that entry or proposed entry, or that receipt, the first person is reckless as to whether the other person will be exploited, either by the first person or another, after that entry or receipt.

Penalty: Imprisonment for 12 years.

- (1C) A person (the *first person*) commits an offence of trafficking in persons if:
- (a) the first person organises or facilitates the exit or proposed exit of another person from Australia; and
 - (b) in organising or facilitating that exit or proposed exit, the first person is reckless as to whether the other person will be exploited, either by the first person or another, after that exit.

Penalty: Imprisonment for 12 years.

(c) Facilitating movement to or from Australia with deception as to destination conditions

ss 271.2(2) and (2A):

- (2) A person (the *first person*) commits an offence of trafficking in persons if:
- (a) the first person organises or facilitates the entry or proposed entry, or the receipt, of another person into Australia; and

- (b) the first person deceives the other person about the fact that the other person's entry or proposed entry, the other person's receipt or any arrangements for the other person's stay in Australia, will involve the provision by the other person of sexual services or will involve the other person's exploitation or debt bondage or the confiscation of the other person's travel or identity documents.

Penalty: Imprisonment for 12 years.

(2A) A person (the *first person*) commits an offence of trafficking in persons if:

- (a) the first person organises or facilitates the exit or proposed exit of another person from Australia; and
- (b) the first person deceives the other person about the fact that the other person's exit or proposed exit is for purposes that involve the provision by the other person of sexual services outside Australia or will involve the other person's exploitation or debt bondage or the confiscation of the other person's travel or identity documents.

Penalty: Imprisonment for 12 years.

(d) Aggravated Trafficking

s 271.3 Aggravated offence of trafficking in persons

- (1) A person (the *first person*) commits an aggravated offence of trafficking in persons if the first person commits the offence of trafficking in persons in relation to another person (the *victim*) and any of the following applies:
 - (a) the first person commits the offence intending that the victim will be exploited, either by the first person or another:
 - (i) if the offence of trafficking in persons is an offence against subsection 271.2(1), (1B), (2) or (2B)—after entry into Australia; and
 - (ii) if the offence of trafficking in persons is an offence against subsection 271.2(1A), (1C), (2A) or (2C)—after exit from Australia;
 - (b) the first person, in committing the offence, subjects the victim to cruel, inhuman or degrading treatment;
 - (c) the first person, in committing the offence:
 - (i) engages in conduct that gives rise to a danger of death or serious harm to the victim; and
 - (ii) is reckless as to that danger.

Penalty: Imprisonment for 20 years.

- (2) If, on a trial for an offence against this section, the court, or if the trial is before a jury, the jury, is not satisfied that the defendant is guilty of the

aggravated offence, but is satisfied that he or she is guilty of an offence against section 271.2, it may find the defendant not guilty of the aggravated offence but guilty of an offence against that section.

(e) Debt bondage

271.8 Offence of debt bondage

- (1) A person commits an offence of debt bondage if:
 - (a) the person engages in conduct that causes another person to enter into debt bondage; and
 - (b) the person intends to cause the other person to enter into debt bondage.

Penalty: Imprisonment for 12 months.

- (2) In determining, for the purposes of any proceedings for an offence against subsection (1), whether a person (the *first person*) has caused another person (the *second person*) to enter into debt bondage, a court, or if the trial is before a jury, the jury, may have regard to any of the following matters:
 - (a) the economic relationship between the first person and the second person;
 - (b) the terms of any written or oral contract or agreement between the second person and another person (whether or not the first person);
 - (c) the personal circumstances of the second person, including but not limited to:
 - (i) whether the second person is entitled to be in Australia under the *Migration Act 1958*; and
 - (ii) the second person's ability to speak, write and understand English or the language in which the deception or inducement occurred; and
 - (iii) the extent of the second person's social and physical dependence on the first person.
- (3) Subsection (2) does not:
 - (a) prevent the leading of any other evidence in proceedings for an offence against subsection (1); or
 - (b) limit the manner in which evidence may be adduced or the admissibility of evidence.

271.9 Offence of aggravated debt bondage

- (1) A person commits an offence of aggravated debt bondage if the person commits an offence of debt bondage in relation to another person (the *victim*) and the victim is under 18.

Penalty: Imprisonment for 2 years.

- (2) In order to prove an offence of aggravated debt bondage, the prosecution must prove that the defendant intended to commit, or was reckless as to committing, the offence against a person under that age.
- (3) If, on a trial for an offence against this section, the court, or if the trial is before a jury, the jury, is not satisfied that the defendant is guilty of the aggravated offence, but is satisfied that he or she is guilty of an offence against section 271.8, it may find the defendant not guilty of the aggravated offence but guilty of an offence against that section.

(f) Aggravated offence of people smuggling

73.2 Aggravated offence of people smuggling (exploitation etc.)

- (1) A person (the *first person*) is guilty of an offence if the first person commits the offence of people smuggling in relation to another person (the *victim*) and any of the following applies:
 - (a) the first person commits the offence intending that the victim will be exploited after entry into the foreign country (whether by the first person or another);
 - (b) in committing the offence, the first person subjects the victim to cruel, inhuman or degrading treatment;
 - (c) in committing the offence, the first person's conduct:
 - (i) gives rise to a danger of death or serious harm to the victim; and
 - (ii) the first person is reckless as to the danger of death or serious harm to the victim that arises from the conduct.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

- (3) In this section:

forced labour means the condition of a person who provides labour or services (other than sexual services) and who, because of the use of force or threats:

- (a) is not free to cease providing labour or services; or
- (b) is not free to leave the place or area where the person provides labour or services.

sexual servitude has the same meaning as in Division 270.

slavery has the same meaning as in Division 270.

threat means:

- (a) a threat of force; or
- (b) a threat to cause a person's deportation; or

- (c) a threat of any other detrimental action unless there are reasonable grounds for the threat of that action in connection with the provision of labour or services by a person.

73.3 Aggravated offence of people smuggling (at least 5 people)

- (1) A person (the *first person*) is guilty of an offence if:
 - (a) the first person organises or facilitates the entry of a group of at least 5 persons (the *other persons*) into a foreign country (whether or not via Australia); and
 - (b) the entry of at least 5 of the other persons into the foreign country does not comply with the requirements under that country's law for entry into that country; and
 - (c) at least 5 of the other persons whose entry into the foreign country is covered by paragraph (b) are not citizens or permanent residents of the foreign country; and
 - (d) the first person organises or facilitates the entry:
 - (i) having obtained (whether directly or indirectly) a benefit to do so; or
 - (ii) with the intention of obtaining (whether directly or indirectly) a benefit.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

- (2) Absolute liability applies to the paragraph (1)(c) element of the offence.
- (3) If, on a trial for an offence against subsection (1), the trier of fact is not satisfied that the defendant is guilty of that offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence against subsection 73.1(1), the trier of fact may find the defendant not guilty of an offence against subsection (1) but guilty of an offence against subsection 73.1(1), so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

2) **MIGRATION ACT 1958 (CTH)**

Note particularly the aggravated offences.

The following sections were inserted by the *Migration Amendment (Employer Sanctions) Act 2007* (Cth).

s 245AB Allowing an unlawful non-citizen to work

- (1) A person commits an offence if:
 - (a) the person allows, or continues to allow, a person (the **worker**) to work;
and
 - (b) the worker is an unlawful non-citizen; and
 - (c) the person knows that, or is reckless as to whether, the worker is an unlawful non-citizen.
- (2) An offence against subsection (1) is an **aggravated offence** if the worker is being exploited and the person knows of, or is reckless as to, that circumstance.
- (3) An offence against this section is punishable on conviction by whichever of the following applies:
 - (a) in the case of an aggravated offence—imprisonment for 5 years;
 - (b) in any other case—imprisonment for 2 years.

s 245AC Allowing a non-citizen to work in breach of a visa condition

- (1) A person commits an offence if:
 - (a) the person allows, or continues to allow, a person (the **worker**) to work;
and
 - (b) the worker is a non-citizen and the person knows of, or is reckless as to, that circumstance; and
 - (c) the worker holds a visa that is subject to a condition restricting the work that the worker may do in Australia, and the person knows of, or is reckless as to, that circumstance; and
 - (d) the worker is in breach of the condition and the person knows of, or is reckless as to, that circumstance.
- (2) An offence against subsection (1) is an **aggravated offence** if the worker is being exploited and the person knows of, or is reckless as to, that circumstance.
- (3) An offence against this section is punishable on conviction by whichever of the following applies:
 - (a) in the case of an aggravated offence—imprisonment for 5 years;
 - (b) in any other case—imprisonment for 2 years.

s 245AD Referring an unlawful non-citizen for work

- (1) A person commits an offence if:
 - (a) the person operates a service, whether for reward or otherwise, referring one person to another for work; and
 - (b) the person refers a person (the *prospective worker*) to another for work; and
 - (c) at the time of the referral, the prospective worker is an unlawful non-citizen and the person knows of, or is reckless as to, that circumstance.
- (2) An offence against subsection (1) is an *aggravated offence* if:
 - (a) the prospective worker will be exploited in doing the work in relation to which he or she is referred, or in doing any other work for the person to whom he or she is referred; and
 - (b) the person operating the referral service knows of, or is reckless as to, that circumstance.
- (3) An offence against this section is punishable on conviction by whichever of the following applies:
 - (a) in the case of an aggravated offence—imprisonment for 5 years;
 - (b) in any other case—imprisonment for 2 years.

s 245AE Referring a non-citizen for work in breach of a visa condition

- (1) A person commits an offence if:
 - (a) the person operates a service, whether for reward or otherwise, referring one person to another for work; and
 - (b) the person refers a person (the *prospective worker*) to another for work; and
 - (c) at the time of the referral;
 - (i) the prospective worker is a non-citizen and the person knows of, or is reckless as to, that circumstance; and
 - (ii) the prospective worker holds a visa that is subject to a condition restricting the work that the prospective worker may do in Australia, and the person knows of, or is reckless as to, that circumstance; and
 - (iii) the prospective worker will, in doing the work in relation to which he or she was referred, be in breach of the condition and the person knows of, or is reckless as to, that circumstance.
- (2) An offence against subsection (1) is an *aggravated offence* if:
 - (a) the prospective worker will be exploited in doing the work in relation to which he or she is referred, or in doing any other work for the person to whom he or she is referred; and

- (b) the person operating the referral service knows of, or is reckless as to, that circumstance.
- (3) An offence against this section is punishable on conviction by whichever of the following applies:
 - (a) in the case of an aggravated offence—imprisonment for 5 years;
 - (b) in any other case—imprisonment for 2 years.

3) WORKPLACE RELATIONS ACT 1996 (CTH)*

Part 12 – Minimum Entitlements of Employees:

- Division 1: entitlement to meal breaks
- Division 2: entitlement to public holidays;
 - s 615: employer not to prejudice employee for reasonable refusal to work on a public holiday. Penalties in s 616.
- Division 3: equal remuneration for work of equal value
- Division 4: Termination of employment
 - s 659 Employment not to be terminated on certain grounds, including temporary absence from work for illness or injury.
 - Orders available to the courts in relation to employment termination set out in s 665.

***Note:** The *Workplace Relations Act* has now been superseded by the *Fair Work Act 2009* (Cth).

Part 2-2 of the *Fair Work Act 2009* (Cth) ‘The National Employment Standards’ is the equivalent section to Part 12 in the old Act.