

ACCI Response - Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012

1. Introduction

The Australian Chamber of Commerce and Industry (ACCI), its 37 business organisation members, and the 350,000 Australian businesses it represents supports all reasonable steps being taken by the legislature to deter individuals from engaging in criminal conduct particularly where this involves criminally exploitative conduct in relation to vulnerable persons in the community.

ACCI continues to endorse and support the Australian Government's collaborative and consultative approach to formulating appropriate policy responses to eliminating exploitative and illegal arrangements, such as illegal people trafficking and sexual servitude. ACCI has been an important stakeholder on the Attorney-General's National Roundtable on People Trafficking (which commenced in 2008) and prior to this, also involved in the work of the former Government on reducing the incidence of people trafficking, particularly in the sex industry.

ACCI continues to have a legitimate interest in advocating the views on behalf of employers and the business community. On this occasion, ACCI wishes to provide specific and limited feedback on the Government's *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012* (the Bill) and explanatory memorandum (EM) on two new proposed criminal offences. We do not intend to provide feedback on the range of other matters dealt with in the Bill (ie. forced marriage, organ trafficking, harbouring a victim and slavery offence amendments).

ACCI's feedback is concerned with:

- Providing the Committee with background information on the existing legal framework, including Australia's compliance with relevant binding international treaty instruments, in so far as they address new federal criminal offences on servitude and forced labour (and related offences);
- Ensuring, so far as is reasonably practicable, that any new policy measures (in the form of specific amendments to the federal Criminal Code) do not have unintended consequences, or go further than what is necessary to address problems or deficiencies in the existing legal framework.

2. Existing Legal Framework

The existing federal legal framework covers a wide range of civil and criminal offences for exploitative, misleading or deceptive labour arrangements. A number of persons have recently been prosecuted for a range of criminal and civil offences in recent years.¹

Federal Criminal Code

Under the Commonwealth *Criminal Code Act 1995* (the Criminal Code), Chapter 8 headed, “*Offences against humanity and related offences*”, there exists a number of criminal offences, targeting the most serious forms of criminal conduct, including the offences of slavery, sexual servitude, trafficking in persons and children, debt bondage. The Commonwealth Director of Public Prosecution (CDPP) determines whether there is a case to be tried before the courts under relevant prosecution policies and guidelines.²

According to the latest *CDPP Annual Report* (2010-2011) under the chapter, “2.6 *People Trafficking, Slavery and Sexual Servitude*” the CDPP has successfully utilised the existing federal laws to convict a number of individuals for various offences:³

Since the commencement of Divisions 270 and 271 of the *Criminal Code*, 13 people have been convicted of people trafficking related offences. Nine of those defendants were convicted of slavery offences, 3 of sexual servitude offences and 1 of trafficking in persons. As at 30 June 2011, 6 people trafficking matters, involving 7 defendants, were before the courts. Two of those 6 matters were at the appeal stage.

The CDPP has now gained considerable experience in the area of people trafficking, which is a challenging one given the factual situations involved, the need for interpreters and reliance on overseas witnesses. Given the challenges in this area an effective and coordinated whole of government response is required in investigating, prosecuting and supporting victims. The CDPP works closely with government departments in the area of people trafficking and is a member of the Anti-People Trafficking Interdepartmental Committee.

¹ *R v Yogalingham Rasalingam* (District Court of NSW, Judge Puckeridge, 10-11 October 2007); *Fryer v Yoga Tandoori House Pty Ltd* [2008] FMCA 288. Whilst the jury rejected the primary charge under s.271.2(1B) of the Criminal Code, the accused was convicted and sentenced in relation to dishonestly influencing a Commonwealth official under s.135.1(7) of the Criminal Code. In a separate proceeding by the Fair Work Ombudsman, the employer was ordered by the Federal Magistrates’ Court to pay \$18,200 in penalties under the FW Act. This decision indicates that the CDPP withdrew original charges of “*exercising control over a slave and deceiving another person about the fact that their entry and any arrangements for their stay in Australia would involve confiscation of travel or identify documents*” (at [14]).

² <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/>

³ At p.80

Migration Act

There are a range of offences and sanctions under the *Migration Act 1958*. On 21 May 2010, the then responsible Minister (Honourable Senator Evans) appointed independent legal expert Mr Stephen Howells to review the penalties prescribed under the *Migration Act 1958* that face Australian employers who recruit illegal workers. The report of the review was finalised on 2 March 2011, and released on Thursday 21 July 2011.⁴ The Government has announced that it intends to progress with implementing new offences and will commence discussions with stakeholders shortly.

State/Territory Laws

There also exists a range of existing criminal offences at the state and territory level which would also deal with servitude or forced labour situations, depending on the circumstances of the conduct and where the offence is committed. This is made clear, for example, from item 51 of the Bill, which inserts sub-clause (2) and (3) to s.271.12 of the Criminal Code and indicates that the Division is “*not intended to exclude or limit the concurrent operation of any other law of the Commonwealth, or a law of a State or Territory, that makes: (a) an act or omission that is an offence against a provision of this Division; or (b) a similar act or omission; an offence against the law of the Commonwealth, State or Territory*”.

Workplace Relations

Under the industrial relations framework at a federal level, the *Fair Work Act 2009* (FW Act) contains a range of civil penalty offences for breaches of industrial instruments, minimum statutory entitlements and workplace rights. An employer is liable to a possible civil penalty of up to \$33,000 per contravention.

Pursuant to s.343, it is a civil penalty offence for a “*person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person*” to exercise or not exercise a “*workplace right*”. There are similar prohibitions under s.345 against a person knowingly or recklessly making a false or misleading representation about the workplace rights of another person or the exercise or effect of the exercise of a workplace right. The meaning of a “*workplace right*” is found in s.341 of the FW Act and gives protection to persons who are entitled to a workplace instrument or law, or able to make a complaint or inquiry to a person or body having the capacity under a workplace law to seek compliance.

⁴ http://www.immi.gov.au/media/publications/compliance/review-employer-sanctions/pdf/howells_report.pdf

3. International Conventions

Australia has ratified a number of international conventions, including the following specific International Labour Organisation (ILO) Conventions, which are relevant to the Bill and the Committee's inquiry:

- ILO Convention 105 Abolition of Forced Labour, 1957 (7.6.1960);
- ILO Convention 29 Forced Labour, 1930 (2.1.1932);

Australia's longstanding approach to the ratification of ILO Conventions is that two pre-conditions must generally be satisfied:⁵

- The law and practice in all relevant jurisdictions is in compliance with the Convention in question; and
- That all State and Territory governments have formally agreed to ratification (except for those Conventions whose subject matter falls within the jurisdiction of the Commonwealth Government alone).

By implication of the decision of the then Australian Government to ratify the ILO Convention on Forced Labour the "*law and practice in all relevant jurisdictions*" was in compliance with the Convention at the time of ratification.

4. Specific Issues

Explanatory materials refers only to employment arrangements: Page 20 of the EM indicates that the offences of forced labour "*are not intended to apply in circumstances that arise from standard relationships between an employee and an employer*". The EM also provides that "*whether the offence applies in a particular circumstance would be determined by the nature of the relationship between the victim and their 'employer', and not by the type of activity performed, however hard or hazardous, or the legality or illegality of the work under Australian law*". The inclusion of these paragraphs in the EM is important to ensure the intent of the proposed offences as capturing egregious forms of criminal exploitation and not situations which may involve breaches of other laws (ie. industrial, OH&S or migration laws). However, it is not apparent why the reference in the EM is limited to employers and employees and is not explicitly made to other working arrangements that are legally not an employment relationship such as between a principal and an independent contractor which are contracts *for* service as distinct from contracts *of* service. This also pertains to other working arrangements or relationships such as volunteer arrangements (which is neither a contract of service nor a contract for service).

⁵ The *Status of ILO Conventions in Australia 1994*, (Department of Industrial Relations), at p.22.

International Treaty Instruments: It is also not clear from the explanatory materials whether the proposed offences of forced labour and servitude are made in reliance of the external affairs power of the Australian Constitution and if so, which treaty instruments are relied upon.

The proposed definition of forced labour, for example, appears to be substantially different to the existing statutory definition in the Criminal Code and the definition in ILO Forced Labour Convention. The ILO Forced Labour Convention defines forced labour as:

All work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.

Section 73.2(2) of the Criminal Code defines “*forced labour*” (as it is relevant to the offence of people trafficking) as:

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.

The proposed definition of forced labour at 270.6 relevantly provides:

270.6 Definition of forced labour

(1) For the purposes of this Division, forced labour is the condition of a person (the victim) who provides labour or services if, because of the use of coercion, threat or deception, a reasonable person in the position of the victim would not consider himself or herself to be free:

- (a) to cease providing the labour or services; or
- (b) to leave the place or area where the victim provides the labour or services.

(2) Subsection (1) applies whether the coercion, threat or deception is used against the victim or another person.

(3) The victim may be in a condition of forced labour whether or not:

- (a) escape from the condition is practically possible for the victim; or
- (b) the victim has attempted to escape from the condition.

The EM (at p.10) indicates that the statutory definition of “*coercion*” is intended to be a non-exhaustive list capturing both “*physical and non-physical coercive conduct, including the more subtle means by which offenders obtain a victim’s compliance*”:

270.1A Definitions for Division 270

In this Division:

coercion includes coercion by any of the following:

- (a) force;
- (b) duress;
- (c) detention;
- (d) psychological oppression;
- (e) abuse of power;
- (f) taking advantage of a person's vulnerability.

The definition of forced labour in the Bill should be compared to the definition used in the United States:⁶

18 U.S.C. § 1589

Whoever knowingly provides or obtains the labor or services of a person--

(1) by threats of serious harm to, or physical restraint against, that person or another person;

(2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or

(3) by means of the abuse or threatened abuse of law or the legal process,

shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.

The exposure draft version of the Bill which was the subject of prior consultation, included an instructor's note under s. 270.6 as follows:

[Instructors: This provision may need to be revised to ensure the forced labour offences do not extend any further than is permitted under relevant international agreements].

ACCI is unaware as to the legal advice received by the Attorney-General's Department concerning the relevant international agreements relied upon and whether the proposed definitions do not extend any further than is permitted. The Committee should satisfy itself that the proposed offences are appropriately circumscribed to the scope of relevant binding international treaty instruments if they are relied upon to create new forced labour and servitude offences.

⁶ <http://www.justice.gov/crt/about/crm/1581fin.php>

Persons conducting a business: The proposed new servitude and forced labour criminal offences applies in a broad manner. The proposed offences apply to any person (whether they are the employer or a principal) and to a “*person conducting a business*” (and the “*business involves*” forced labour or servitude) and any worker (whether they are a volunteer, employee or independent contractor).

The Bill contains a definition of “*conducting a business*” for the purposes of two separate but related offences of forced labour and servitude as follows:

270.1A Definitions for Division 270

In this Division:

...

conducting a business includes:

- (a) taking any part in the management of the business; and
- (b) exercising control or direction over the business; and
- (c) providing finance for the business.

Under item 12 of the Bill, a person commits a separate offence of forced labour or servitude if: (a) the person conducts any business; and (b) the business involves the servitude or forced labour of another person (or persons).

The offences of servitude or conducting a business involving servitude, both carries with it a penalty for 20 years imprisonment (in the case of an aggravated offence) and for 15 years imprisonment (in any other case). The offences of forced labour or conducting a business involving forced labour carries with it a penalty for 12 years imprisonment (in the case of an aggravated offence) and for 9 years imprisonment (in any other case).

This raises a number of significant policy issues with respect to criminal responsibility and the potential reach of the new criminal offences. As a general principle of criminal responsibility, and in the absence of exceptional reasons, proposed criminal offences which carries the risk of significant terms of imprisonment should be limited to those persons that committed the actual offence (or who were accessories, complicit or otherwise possessed knowledge of the offence). They should not extend to persons who had no actual knowledge (or were reckless) as to the commissioning of the offence. The statutory definition of “*conducting a business*” is extremely broad and even captures persons “*providing finance for the business*”. ACCI is concerned that persons involved in running a business or providing finance to a business may be prosecuted and charged upon the basis of obtaining the provision of goods or services by the criminal conduct of another party, for which it was not directly or indirectly involved in nor had any knowledge of the offence.

It would be helpful if an example of how this would operate could be included in the EM. There may be many situations whereby a bona fide commercial arrangement for the supply of goods or services involves those goods or services unknowingly

obtained through the illicit conduct of another party (for example, a contract entered into for a supplier to provide garments manufactured overseas or in Australia, which involves the supplier engaging workers under illicit circumstances, such as forced labour). Is it intended that the innocent party should be equally liable for the conduct of the offender? To ensure certainty for businesses and persons involved in running businesses (and providing finance to businesses), it would be desirable that the phrase *“the business involves”* is clarified to ensure that only those persons actually involved in the illegal conduct is criminally responsible and not innocent persons operating a business or providing finance to a business that happens to do business with a party that engages in illegal conduct without the innocent parties knowledge or involvement.

Furthermore, given that Part 2.4 of the Criminal Code already extends criminal responsibility to a person that aids, abets, counsels or procures the commission of an offence (under s.11.2), in addition to covering joint commission (under s.11.2A), commission by proxy (under s.11.3), incitement (under s.11.4), conspiracy (under s.11.5) and corporate liability (under Part 2.5), it is unclear why ss.270(2) or 270.6A(2) is necessary.

A final technical point raises a question as to why there is a difference of expression used in the statutory definition of *“conducting a business”* under proposed s.270.1A and the phrase used in the proposed offences in s. 270.5(2) (servitude) and s.270.6A (forced labour) which refers to *“conducts any business”*. It is unclear if this was deliberate by the drafters.

Education and Information: ACCI notes that the Minister’s second reading speech refers to *“law enforcement agencies are increasingly identifying both men and women who have been subjected to exploitation in a range of other industry sectors and workplace environments”* to underpin the creation of a new stand alone offence of forced labour and extending the existing offence of servitude to cover all industry sectors (not just the sex industry). ACCI is unaware of the details of the intelligence which is privy to the Australian Government and law enforcement agencies. However, the EM (at p.15) refers to the *“rise in the number of individuals identified as being exploited in industries other than the sex industry (for example, hospitality)”* and it is therefore *“necessary to recast this definition [of servitude] so it applies more broadly to situations of exploitation in all industries”*. ACCI anticipates that the Australian Government and law enforcement agencies will continue to work with various stakeholders, including ACCI and the existing network of Chambers of Commerce and Industry Associations to ensure that all businesses are aware of the new proposed offences by appropriate education and information awareness campaigns. There may also be a particular need to ensure that information is appropriately targeted towards specific industry sectors and persons from religiously, culturally and linguistically diverse backgrounds.