

---

Ian Love

---

### **Australian Criminal Code – Slavery Offences**

This paper compares the definitions of *slavery*, *servitude* and *forced labour* in the *Criminal Code Act 1995* ('CC').<sup>1</sup> The distinction is important because *slavery* offences have a penalty of 25 years imprisonment,<sup>2</sup> *servitude* offences have 15 years (20 years with aggravation)<sup>3</sup> and *forced labour* offences have 9 years (12 years with aggravation).<sup>4</sup> It is also important to distinguish *forced labour* from poor working conditions, which do not give rise to an offence under the CC.

The relevant amendments to the CC are:

1. *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999*, ('the *Slavery Act*');
2. *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002*, ('the *People Smuggling Act*');
3. *Criminal Code Amendment (Trafficking in Person Offences) Act 2005* ('the *Trafficking Act*'); and
4. *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* ('the *Forced Labour Act*').

Part 1 of the paper contextualizes each of the amendments, part 2 sets up client advisory scenarios, part 3 considers whether the objectives of *the Forced Labour Act* have been achieved. The paper concludes that while *the Forced Labour act* has the potential to achieve it's objectives, it may have the unintended consequence of

---

<sup>1</sup> *Criminal Code Act 1995* s 270.1, 270.4, 270.6.

<sup>2</sup> *Criminal Code Act 1995* s 270.3.

<sup>3</sup> *Criminal Code Act 1995* s 270.5.

<sup>4</sup> *Criminal Code Act 1995* s 270.6A.

Ian Love

---

making a prosecution for *slavery* offences practically and legally more difficult to achieve.

The appendices set out a timeline of amendments and the spectrum of labour conditions that these amendments are seeking to criminalize.

## I BACKGROUND AND ANALYSIS

### *A Background*

Slavery can be traced back to 6800B.C. and as recently as 1641 it was a legally supported practice.<sup>5</sup> Attempts have been made to justify slavery based on notions that it is 'natural that some people are slaves' or that 'slaves are inferior beings' or that it is 'acceptable in this culture' and that 'living in slavery is better than starving to death'.<sup>6</sup> Because of these and other misguided beliefs the abolition of slavery has a long and complex history.

One of the most important events in the history of the abolition of slavery was the passing of *Abolition of the Slave Trade Act 1807* by the British Parliament and the passing of a similar act by the United States Congress the same year. These acts ultimately resulted in the end of the transatlantic African slave trade.<sup>7</sup>

It is important to understand this background because it contextualizes the attitudes and understandings of slavery at the time of the first attempts at abolition, it illustrates that this was a time when the ownership, sale and trade of human beings was a legal activity, which was being made illegal by statute. This is important because it was through this lens that subsequent abolitionist conventions in the 20<sup>th</sup> century were prepared. Two such conventions are the '*International Slavery*

---

<sup>5</sup> Free the Slaves <<http://www.freetheslaves.net/about-slavery/slavery-in-history/>>

<sup>6</sup> BBC - Ethics <<http://www.bbc.co.uk/ethics/slavery/ethics/justifications.shtml>>

<sup>7</sup> The Abolition Project <[http://abolition.e2bn.org/slavery\\_113.html](http://abolition.e2bn.org/slavery_113.html)>

---

Ian Love

---

*Convention*<sup>8</sup> in 1926 and the ‘*Supplementary Convention*’<sup>9</sup> in 1956, these conventions, inter alia, expanded the definition of slavery, although still central to the definition was the concept of ownership of human beings.<sup>10</sup>

### *A Analysis*

#### *1 The Slavery Act - 1999*

The definition of *slavery*, which remains unchanged since its insertion<sup>11</sup> reads:

*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. (my emphasis)

It can be seen from the plain wording of the definition that *ownership* is a central concept of the definition, this is consistent with the definition in the *International Slavery Conventions* which was antecedent to *the Slavery Act*.<sup>12</sup> The challenge with the concept of ownership is that, in Australia, legal ownership of one person over another did not exist and was therefore impossible.<sup>13</sup> This being the case there is an argument that it is impossible to commit an offence for something that does not exist.<sup>14</sup> This issue was explored in *R v Tang* (2008) CLR 1 (‘*Wei Tang*’) which was the first conviction for *slavery* offences.<sup>15</sup> <sup>16</sup> The *Wei Tang* case was important not

---

<sup>8</sup> *International Slavery Convention*, adopted 25 September 1926, entered into force 9 March 1927, 60 L.N.T.S. 253.

<sup>9</sup> *UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, adopted 7 September 1956, entered into force 30 April 1957, 266 UNTS 3.

<sup>10</sup> Corin Morcom and Andreas Schloenhardt, ‘All About Sex?! The Evolution of Trafficking in Persons in International Law’ (Research Paper, The University of Queensland Australia Human Trafficking Working Group, March 2011), 8.

<sup>11</sup> *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* div 270.

<sup>12</sup> Australian Law Reform Commission, *Criminal Admiralty Jurisdiction and Prize*, Report No 48 (1990) [111].

<sup>13</sup> (2008) CLR 1 [25].

<sup>14</sup> (2008) CLR 1 [48].

<sup>15</sup> *Criminal Code Act 1995* s 270.3(1)(a).

<sup>16</sup> Irina Kolodizner, ‘R v Tang: Developing an Australian Anti-Slavery Jurisprudence’ (2009) 31:487 *Sydney Law Review* 487.

Ian Love

---

only because it confirmed the constitutional validity<sup>17</sup> of *the Slavery Act* but because it confirmed that the definition of *slavery* is not confined to situations akin to ‘chattel slavery’.<sup>18</sup> Nevertheless, the concept of *ownership* remains central to the definition of *slavery* in the *CC*.<sup>19</sup>

*The Slavery Act* also inserted the definition and offence of *sexual servitude*, the definition reads:

***sexual servitude*** is the condition of a person who provides sexual services and who, because of the use 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 sexual services.<sup>20</sup>

As can be seen from the plain wording of this definition, the offence only related to *sexual services*, also note that at this time and there was no requirement that the victim be ‘significantly deprived of personal freedom’,<sup>21</sup> which is an element of the current definition.

## 2 *The People Smuggling Act and the Trafficking Act*

These acts implemented Australia’s obligations under the *United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, Palermo, December 2000. The *People Smuggling Act* (2002) introduced the definition of *forced labour* as one of the elements of aggravation for the offence of *people smuggling*.<sup>22</sup> the *Trafficking Act* (2005) also referenced *forced labour* as an element to aggravated *trafficking* offences.<sup>23</sup>

---

<sup>17</sup> (2008) CLR 1 [20].

<sup>18</sup> (2008) CLR 1 [34].

<sup>19</sup> (2008) CLR 1 [27].

<sup>20</sup> *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* s 1 (ref s 270.4).

<sup>21</sup> *Criminal Code Act 1995* s 270.4 (1)(b).

<sup>22</sup> Explanatory Memorandum, Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Bill 2002 7 – 8.

---

Ian Love

---

In summary, at this point<sup>24</sup> the *CC* had a definition of *slavery* with its central tenant being the concept of *ownership*. There was a definition and offence of *sexual servitude* which could apply even if there was no deprivation of personal freedom and there was the definition of *forced labour*, which was used as a aggravation factor in *trafficking* or *smuggling* offences. There was no stand alone *forced labour* offence.<sup>25</sup>

### 3 *The Forced Labour Act - 2013*

#### (a) *Forced Labour*

Since the introduction of *the Trafficking Act* there had been a few successfully prosecuted cases for labour *trafficking* offences.<sup>26</sup> However, without a stand alone offence for *forced labour*, there was concern that extremely abusive labour practices, falling short of slavery, were not, in the absence of *trafficking* captured by the *CC*.<sup>27</sup> There was also a growing awareness of servitude type situations in the labour market which, because they were not sexual in nature, were not an offence under the *CC*.<sup>28</sup>

In 2007, the Australian Government, engaged the Australian Institute of Criminology to conduct research into all aspects of these crimes.<sup>29</sup> As part of that research, Fiona David,<sup>30</sup> produced a comprehensive report on the subject of ‘Labour trafficking’.<sup>31</sup> This report, together with others from a wide range of sources<sup>32</sup> informed the Government’s view on the gaps in the *CC* and how they could be addressed.

---

<sup>23</sup> Explanatory Memorandum, Criminal Code Amendment (Trafficking in Persons Offences) Bill 2005 16.

<sup>24</sup> *Criminal Code Act 1995*, 7 November 2005 taking into account amendments up to Act No. 127 of 2005.

<sup>25</sup> Fiona David, 'Labour Trafficking' (2010) 108 *Australian Institute of Criminology* 49.

<sup>26</sup> Fiona David, 'Labour Trafficking' (2010) 108 *Australian Institute of Criminology* 17–20.

<sup>27</sup> *Ibid* 45–46.

<sup>28</sup> Explanatory Memorandum, Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012 1.

<sup>29</sup> Australian Government, ‘The National Action Plan to Combat Human Trafficking and Slavery 2015-19’.

<sup>30</sup> <<http://fionadavid.com/>>

<sup>31</sup> Fiona David, 'Labour Trafficking' (2010) 108 *Australian Institute of Criminology*.

<sup>32</sup> Australian Human Rights Commission Submission to the Joint Standing Committee of Foreign Affairs, Defence and Trade, Human Rights Sub-Committee, ‘Inquiry into Slavery, Slavery like conditions and People Trafficking’ 5 October 2012.

Ian Love

---

This led to the introduction of the *Forced Labour Act*, which inter alia, established the stand-alone offence of *forced labour*<sup>33</sup> and inserted a new definition,<sup>34</sup> the definition reads:

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

- (a) ~~is not free~~ to cease providing the labour or services; or
- (b) ~~is not free~~ 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.* (my emphasis)<sup>35</sup>

Note that sexual services are no longer a part of the definition, this is important as it reflects the Government's growing awareness of exploitation in industries other than the sex industry.<sup>36</sup>

(b) *Servitude*

---

<sup>33</sup> *Criminal Code Act 1995* s 270.6A.

<sup>34</sup> *Criminal Code Act 1995* s 270.6.

<sup>35</sup> The italicised words highlighted in the definition are additions or changes to the definition previously set out in the *People Smuggling Act*.

<sup>36</sup> Explanatory Memorandum, Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012 15.

---

Ian Love

---

The amendments to the servitude offence were two fold. Firstly, the specificity to sexual service was dropped and secondly the requirement that the ‘victim is significantly deprived of personal freedom in respect of aspects of his or her life other than the provision of the labour or services’<sup>37</sup> was added.

So, the current<sup>38</sup> provisions of the *CC* provide for offences of *slavery*, *servitude* and *forced labour*.

## II CASE SCENARIOS

### *A Case Scenario 1*

An individual from Vietnam (Mr Nguyen) wishes to work and possibly migrate permanently to Australia. He approaches a company called International Jobs Ltd (‘IJL’), which is a labour hire agency in Vietnam specializing in placing people in jobs in Australia.

The employer in Australia pays a fee of \$45,000 to IJL, they arrange a working visa and he soon finds himself in Perth working in a market garden in the suburb of Carabooda. His sponsoring employer in Perth is Perth Fresh Produce (‘PFP’) a company owned by the Tran family. The Tran family, originally from Vietnam, moved to Australia in the 1970’s and are now Australian citizens. PFP is a well known supplier to a number of Perth supermarkets, their trucks can be seen everywhere and their produce is known to be cheap and fresh.

Six months after his arrival in Perth the PFP property in Carabooda is raided by Australian Federal Police (AFP) and it is revealed that the Tran family are part of a organized crime syndicate involved with money laundering, drug trafficking and

---

<sup>37</sup> *Criminal Code Act 1995* s 270.4.

<sup>38</sup> *Criminal Code Act 1995* No 12, 1995, Compilation No. 106, 1 July 2016.

---

Ian Love

---

prostitution. During the raid the AFP seized drugs, cash and a huge number of firearms. They also detained 240 foreign nationals who were working on the property, one of these individuals is Mr Nguyen.

In his interview with the AFP Mr Nguyen advised as follows.

1. Upon his arrival he was collected at the airport by a bus and was taken directly to the Carabooda property, which is situated behind high and secure gates.
2. His passport and other paper work was held by one of the Tran brothers and he was advised that this was an Australian Government requirement and part of the condition for obtaining his visa.
3. He was asked to sign some papers, one of which was an employment contract, but he was not allowed to keep a copy of the papers, they were held with his passport for the same reason.
4. He was accommodated on-site where he shared a house with 30 other people. He described the conditions as awful '30 people living in a house with one toilet, one bathroom – children were bathing in an area around adults that weren't family.'
5. For the first two weeks after his arrival he was not allowed a day off and he received no payment for work.
6. After making enquiries on the third week he was advised that 'payday' was once a month and that the next payday was in a months time.
7. In fact Mr Nguyen never received any payments since the date of his arrival, each time he made an enquiry he was given an excuse. In the end he was abruptly and aggressively told that he had incurred a loan for the employment hire agency (\$45,000) together with food and accommodation expenses and that loan repayments would be deducted from his pay until the loan was repaid.



---

Ian Love

---

8. Mr Nguyen had tried to leave the property once but was blocked by the other staff and was afraid to try again. He has limited English and had heard stories from others in the house of beatings.

The AFP have asked if the above fact pattern is an indication of *slavery*, *servitude* or *forced labour*.

### 1 Advice

#### (a) Slavery

The definition of *slavery* was influenced by *the Slavery Conventions* which define slavery as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.’<sup>39</sup> This definition was developed to support to abolition of *ownership* slavery, where people were treated as items of property that can be bought and sold.<sup>40</sup> However, we have seen with the *Wei Tang* case that the definition in the *CC* is not limited to ‘chattel slavery’.<sup>41</sup>

Gleeson CJ in *Wei Tang* found the following factors should be taken into account when assessing the *condition* of a person relative the right of *ownership*.<sup>42</sup>

1. The level of control of the movement of the individual.
2. The control of the physical environment.
3. The extent of psychological control.
4. The measures taken to prevent or deter escape.
5. The use of force or threat of force or coercion
6. The duration of the situation.

---

<sup>39</sup> Slavery Convention Signed at Geneva on 25 September 1926 Entry into force: 9 March 1927, in accordance with article 12 Art 1 s 1.

<sup>40</sup> (2008) CLR 1 [22].

<sup>41</sup> (2008) CLR 1 [27].

<sup>42</sup> (2008) CLR 1 [28] [35].

---

Ian Love

---

7. The assertion of exclusivity.
8. Whether the individual has been subject to cruel treatment and abuse.
9. The control of sexuality.
10. Whether the individual was subjected to forced labour.

In hypothetical case 1, facts 7 and 8 suggest a degree of control over the movement of Mr Nguyen and this should be further explored. However, based on what we have there are not enough facts to consider if the factors above were an issue for Mr Nguyen, we are therefore not able to properly assess his *condition* and whether the powers attaching the right of *ownership* are being exercised over him.

*(b) Servitude*

The current definition of *servitude* has the important requirement that the victim ‘the victim is significantly deprived of personal freedom’.<sup>43</sup> The Explanatory Memorandum for this element explains that:

This is intended to reflect the degree of difference between the offences of slavery and servitude. To establish slavery it must be proved that the accused exercises a power of ownership over the victim. Servitude falls short of ownership, but occurs when the offender’s domination over the victim through coercion, threat or deception is such that the victim is effectively denied her or his freedom in some fundamental respect.<sup>44</sup>

In hypothetical case 1, there is a possibility that the personal freedoms of Mr Nyugen have been significantly deprived and as such his *condition* (if the other elements (see analysis below)) of the definition are met) could amount to condition of *servitude*.

*(c) Forced Labour*

---

<sup>43</sup> *Criminal Code Act 1995* s 270.4 (12)

<sup>44</sup> Explanatory Memorandum, Crimes Legislation (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012 16.

---

Ian Love

---

The definition of forced labour has the key element that the *condition* of the person must, as a result of *coercion, threat* or *deception*<sup>45</sup> be in the position that they would not consider themselves to be free to cease the labour services or to leave the place they are being provided.<sup>46</sup>

This definition of *forced labour* was influenced by *International Labour Organization Convention No. 29 on Forced or Compulsory Labour* which defined forced or compulsory 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’.<sup>47</sup>

The current definition in the *CC* adopts the notion that labour service can be obtained by more subtle forms of coercion, rather than only through force or threats.<sup>48</sup> The Explanatory Memorandum provides that the term *forced labour* should be interpreted using an objective test as reasonable person in the position of the victim would understand their labour conditions. Specifically they would objectively need to consider whether they are free to either cease providing the labour or services, or to leave the place where they are providing the labour. If they are not free to leave is it because of the use of *coercion, threat* or *deception*. The expanded definition includes the situation where the *coercion, threat* or *deception* could occur against a person who is not the victim, such as a victim’s family or friends. The definition of *forced labour* is intended to be broad enough to apply whether or not physical restraint is used for all, or part of, the period of *forced labour*.<sup>49</sup>

The EM goes on to state that the reasonable person test includes consideration of:

---

<sup>45</sup> *Criminal Code Act 1995* s 270.1A.

<sup>46</sup> *Criminal Code Act 1995* s 270.6.

<sup>47</sup> *Forced Labour Convention*, International Labour Organization, (1930) Convention No. 29 Art 2.1.

<sup>48</sup> Explanatory Memorandum, Crimes Legislation (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012 19.

<sup>49</sup> Explanatory Memorandum, Crimes Legislation (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012 19.

---

Ian Love

---

- the economic relationship between the alleged victim and alleged offender;
- the terms of any contract or agreement between the alleged victim and alleged offender; and
- the personal circumstances of the alleged victim including their lawful presence in Australia, their understanding of the English language and their social and physical dependence on the alleged offender.<sup>50</sup>

The offence of deceptive recruiting for labour services<sup>51</sup> was introduced at the same time as the *forced labour* definition. The Explanatory Memorandum setting out the type of recruitment activities that deceive a victims into entering *forced labour* are additional indicators that could support the identification of a *forced labour* situation, they are:

1. the extent to which the victim will be free to leave the place or area where the victim provides the labour or services;
2. the extent to which the victim will be free to cease providing the labour or services;
3. the extent to which the victim will be free to leave his or her place of residence;
4. if there is or will be a debt owed or claimed to be owed by the victim in connection with the engagement—the quantum, or the existence, of the debt owed or claimed to be owed;
5. the fact that the engagement will involve exploitation or the confiscation of the victim’s travel or identity documents; or
6. if the engagement is to involve the provision of sexual services—that fact, or the nature of the sexual services to be provided (for example, whether those services will require the victim to have unprotected sex).<sup>52</sup>

---

<sup>50</sup> Explanatory Memorandum, Crimes Legislation (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012 19.

<sup>51</sup> *Criminal Code Act 1995* s 270.7.

<sup>52</sup> Explanatory Memorandum, Crimes Legislation (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012 22.

Ian Love

---

The words *coercion*, *threat* or *deception* are used in both the *servitude* and *forced labour* definitions. These words are generally to be given their usual meaning. However, the Explanatory Memorandum makes the following observations.

*Coercion* captures ‘both physical and non-physical coercive conduct including more subtle means by which offenders obtain victims compliance’.<sup>53</sup>

*Threat* includes a threat of coercion and ‘a threat made by any conduct, whether express or implied and whether conditional or unconditional’, note however that it does not apply to a ‘legitimate threat’ such as a threat to terminate employment.<sup>54</sup>

*Deception* has the same meaning as deceive.<sup>55</sup>

Based on facts of hypothetical case 1, there is a good possibility that the labour arrangements of Mr Nyugen would be considered *forced labour*.

### B Case Scenario 2

Mr Panash is an Indian national who is residing in Australia on a student visa, he is studying for his Advanced Masters in IT. His visa allows him to work 20 hours a week and he is a part-time employee at a convenience store, which is part of a large American franchise with extensive operations in Australia. Mr Panash shares the below facts which are based not just on his own experience but also on the experiences of his friends who are working at the same franchise chain.

1. He was asked to do on-the-job training for a week without pay on the promise he would be hired, he was then not hired and was never paid for his weeks work.

---

<sup>53</sup> Ibid 9.

<sup>54</sup> Ibid 12.

<sup>55</sup> Ibid 10.

---

Ian Love

---

2. After challenging his boss on his low (less than half award wages) the franchisee's lawyer sent him a letter threatening to report him to immigration for working more than 20 hours a week, which is in breach of his visa conditions as a student.
3. Mr Panash and his friends were required to work longer hours, shifts of up to 18 hours straight, without breaks. He felt that he was doing the job of two people, having to watch petrol pumps (and if someone drove off without paying for petrol, he footed the bill), serve customers, clean the store and stock shelves in a busy store all on his own.
4. One of Mr Panash's friends still has nightmares about work when the store he was working in was he was robbed twice in the space of 18 hours: a long serrated knife, a black balaclava and drug fuelled eyes. After each robbery his boss yelled at him and said he should have fought the robber instead of letting him steal money from the till.

Mr Panash feels that the way he and his friends have been treated is criminal and he would like the police to bring charges of *forced labour* against the franchisee.

### 1 *Advice*

The current definition of *forced labour*<sup>56</sup> was an expansion on the previous definition it replaced.<sup>57</sup> There have been no published prosecutions under the new definition and the success with prosecutions under the old definition was mixed.<sup>58</sup> The Explanatory Memorandum advises that the purpose is to ensure that the 'broadest range of

---

<sup>56</sup> *Criminal Code Act 1995* s 270.6.

<sup>57</sup> Explanatory Memorandum, Crimes Legislation (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012 18-20.

<sup>58</sup> Fiona David, 'Labour Trafficking' (2010) 108 *Australian Institute of Criminology* 17-20.

Ian Love

---

exploitative behaviour is captured and criminalised'<sup>59</sup> and it is possible that the type of exploitative behaviour set out in hypothetical case 2 is the type of behaviour the *forced labour* offence was designed to capture.

This said, the offence has, in relation to the freedom element of the definition, a 'reasonable person' test and each case would have to be reviewed on its merits. Based on the facts of our case there is a good argument that a reasonable person would not have been in a condition where they considered themselves to not be free to cease providing the service or to leave the place of work.

I concluded that the labour practices of the employer may be exploitative and may be in breach of a number industrial relations acts. However, the above facts would not support a prosecution under the *forced labour* offences.

### III SUMMARY OF ANALYSIS

The Explanatory Memorandum states that the objective *the Forced Labour Act* was, inter alia, to 'ensure that the broadest range of exploitative behaviour is captured and criminalised'<sup>60</sup> however, thus far there have been no reported cases of *forced labour* offences.

The diagram attached as appendix sets out the spectrum of labour practices from decent employment arrangement through to slavery. Based on the indicators set out in this table, there is a reasonably significant difference between poor working conditions and forced labour, the most important of which being the requirement that the person 'would not consider himself or herself to be free'. In hypothetical case 2 above, there was no limit on the freedom to come and go from the work place or to simply stop providing the labour services.

---

<sup>59</sup> Explanatory Memorandum, Crimes Legislation (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012 1.

<sup>60</sup> Ibid 1.

---

Ian Love

---

The differences between *forced labour*, *servitude* and *slavery* are however not so stark. The most important distinctions are the notions of deprivation of ‘personal freedom’<sup>61</sup> in the case of *servitude* and ‘ownership’<sup>62</sup> in the case of *slavery*. In hypothetical case 1 prosecutors appear to have all three charges available to them, however they would most likely seek to prosecute the offence they have the best chance of winning, this would be *forced labour*.

#### IV CONCLUSION

The UK Prime Minister Theresa May has labeled modern day slavery as a ‘barbaric evil’ and ‘...the great human rights issue of our time...’.<sup>63</sup> Recent laws in the UK and the appointment of an Independent Anti-slavery Commissioner<sup>64</sup> have significantly enhanced UK government support for abolition.

In Australia the Government recently released the national action plan.<sup>65</sup> However, based on this research, it appears that the introduction of *forced labour* provision in of the *CC* may have had the unintended consequence of reducing the practical utility of the *slavery* offences as it seems easier to secure a conviction under the lesser charges of *servitude* or *forced labour*.

The subtle distinctions between the phrases ‘would not consider himself or herself to be free’ (*forced labour*), ‘significantly deprived of personal freedom’ (*servitude*) and extended concepts of ‘ownership’ (*slavery*) are legal niceties, which I suspect would be lost on individuals who are subject to any of these practices. In *Wei Tang* the Court noted the importance of not using language that would banalise crimes against

---

<sup>61</sup> *Criminal Code Act 1995* s 270.4 (2).

<sup>62</sup> *Criminal Code Act 1995* s 270.1.

<sup>63</sup> <<http://www.telegraph.co.uk/news/2016/07/30/we-will-lead-the-way-in-defeating-modern-slavery/>>

<sup>64</sup> <<https://www.gov.uk/government/organisations/independent-anti-slavery-commissioner>>

<sup>65</sup> Australian Government, ‘The National Action Plan to Combat Human Trafficking and Slavery 2015-19’.



---

Ian Love

---

humanity, such as slavery.<sup>66</sup> This point is accepted, however, being a high level crime does not mean that it is not an increasingly prevalent crime and it does not help the abolition of *slavery* if there are now lesser, similar, charges that prosecutors may choose to bring against offenders.

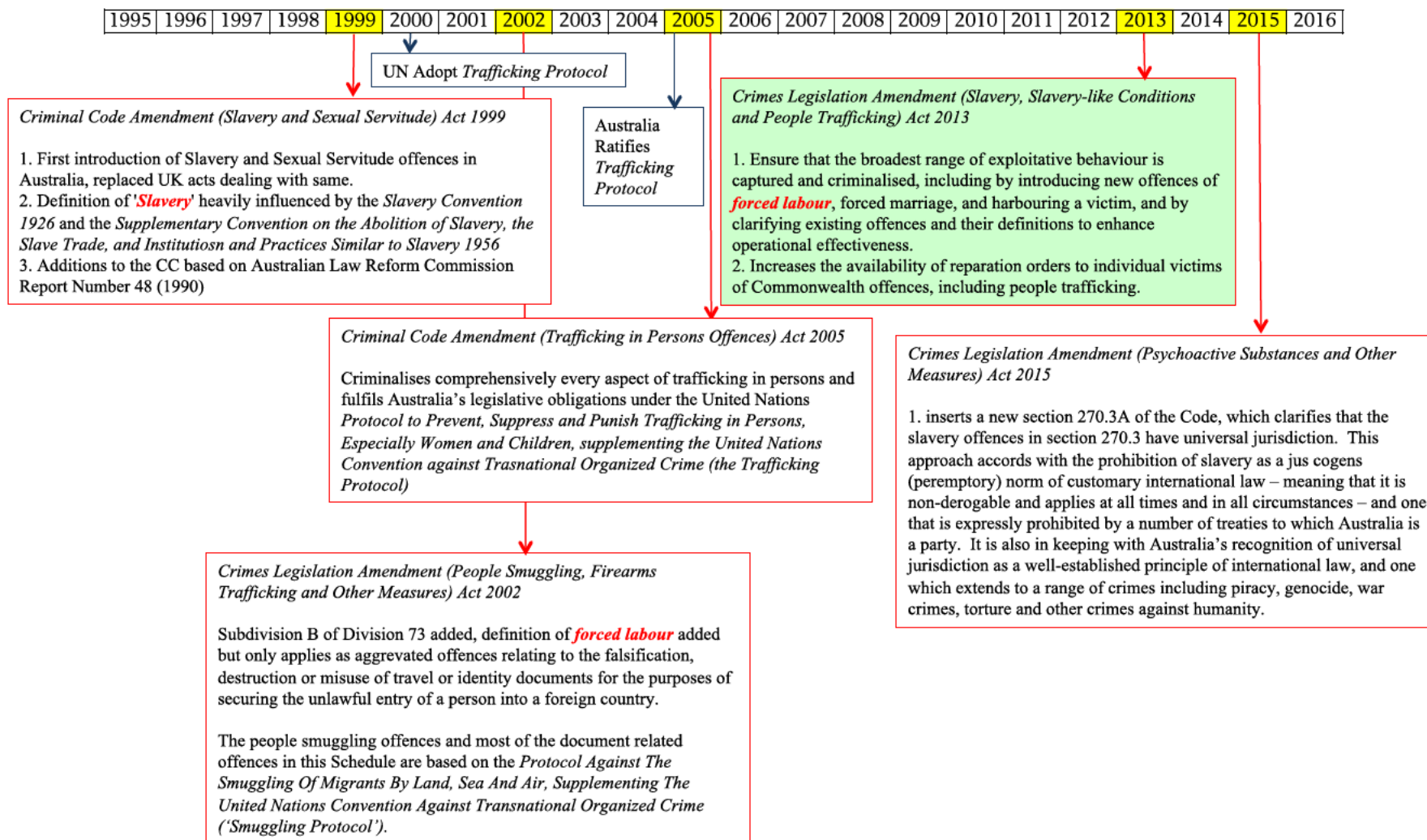
In conclusion, *the Forced Labour Act* may have achieved its intention however one unintended consequence may have been to make it practically, if not legally, more difficult to obtain a conviction for *slavery*.

---

<sup>66</sup> *R v Tang* (2008) CLR 1 [32].

Appendix

Slavery and Forced Labour Related Amendments to the *Criminal Code Act 1995*



## Appendix

The Spectrum of Labour Conditions and *Criminal Code Act 1995* offences

Amendments to the <i>Criminal Code Act 1995</i>	Legal but subject to minimum wages and other such industrial relations laws	<i>Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2012</i>	<i>Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2012</i>	<i>Criminal Code Amendment (Trafficking in Person Offences) Act 2005 + Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002</i>	<i>Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999</i>
Labour Conditions	Extremely Poor Working Conditions	<b>Forced Labour = Offence = 9 years + Aggravation = 12 years</b>	<b>Servitude = Offence = 15 years + Aggravation = 20 years</b>	<b>Human Trafficking or People Smuggling + Forced Labour = Aggravated Offence = 20 years</b>	<b>Slavery = Offence = 25 years</b>
International Definitions		International Labour Organisation Convention No 29 forced labour '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'	N/A		"Slavery" means, as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of <b>ownership</b> are exercised, and 'slave' means a person in such condition or status;
<i>Criminal Code Act 1995</i> Definitions		<p>s 270.6 Definition of forced labour</p> <p>(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 <b>coercion, threat or deception, a reasonable person</b> in the position of the victim would not consider himself or herself to be free:</p> <p>(a) to cease providing the labour or services; or</p> <p>(b) to leave the place or area where the victim provides the labour or services.</p> <p>(2) Subsection (1) applies whether the coercion, threat or deception is used against the victim or another person.</p> <p>(3) The victim may be in a condition of forced labour whether or not:</p> <p>(a) escape from the condition is practically possible for the victim; or</p> <p>(b) the victim has attempted to escape from the condition.</p>	<p>s 270.4 Definition of servitude</p> <p>(1) For the purposes of this Division, servitude is the condition of a person (the victim) who provides labour or services, if, because of the use of coercion, threat or deception:</p> <p>(a) a reasonable person in the position of the victim would not consider himself or herself to be free:</p> <p>(i) to cease providing the labour or services; or</p> <p>(ii) to leave the place or area where the victim provides the labour or services; <b>and</b></p> <p>(b) <b>the victim is significantly deprived of personal freedom in respect of aspects of his or her life other than the provision of the labour or services.</b></p> <p>(2) Subsection (1) applies whether the coercion, threat or deception is used against the victim or another person.</p> <p>(3) The victim may be in a condition of servitude whether or not:</p> <p>(a) escape from the condition is practically possible for the victim; or</p> <p>(b) the victim has attempted to escape from the condition.</p>	<p>s 73.2(3) '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;</p> <p>(a) is not free to cease providing labour or services; or</p> <p>(b) is not free to leave the place or area where the person provides labour or services.'</p> <p><b>REPEALED in 2012 (ref new definition s 270.6)</b></p>	<p>s 270.1 'slavery is the condition of a person over whom any or all of the powers attaching to the right of <b>ownership</b> are exercised, including where such a condition results from a debt or contract made by the person.'</p> <p>270.4 Definition of <b>sexual servitude</b></p> <p>(1) For the purposes of this Division, sexual servitude is the condition of a person who provides sexual services and who, because of the use of force or threats:</p> <p>(a) is not free to cease providing sexual services; or</p> <p>(b) is not free to leave the place or area where the person provides sexual services.</p>
Source		Explanatory Memorandum, <i>Crimes Legislation (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012</i>	Explanatory Memorandum, <i>Crimes Legislation (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012</i>	Fiona David, 'Labour Trafficking' (2010) 108 <i>Australian Institute of Criminology</i> 16.	<i>Wei Tang</i> case per Gleeson CJ para 28
Indicators/Elements of Definition	Low wages	Objective Test, person of same background and same circumstances, matters to consider include:	Objective Test, person of same background and same circumstances, matters to consider include:	Abduction or selling of victim	Control over a persons movements
	Long working hours	The economic relationship between victim and offender	The economic relationship between victim and offender	Confiscation of Documents	Control of physical environment
	Little or no time off for family or personal life	The terms of any contract	The terms of any contract	Isolation, confinement or surveillance	Psychological control
	Unable to leave job due to economic necessity	Personal circumstances of the alleged victim including their lawful presence in Australia and their understanding of English	Personal circumstances of the alleged victim including their lawful presence in Australia and their understanding of English	Threats of denunciation to authorities	Measures taken to prevent or deter escape
	Unequal employment opportunities	Social and physical dependence on the alleged offender	Social and physical dependence on the alleged offender	Threat of violence	Force, threat or force or coercion
	Unsafe work environment		ADDITIONAL CONSIDERATION	Withholding money	Duration the situation
	No employee group representation		The victim is significantly deprived of personal freedom. Servitude fall short of ownership, but occurs when the offender's domination over the victim through coercion, threat or deception is such that the victim is effectively denied his or her freedom in some fundamental respect.		Assertion of exclusivity
Intimidation and bullying in workplace				Subjection to cruel treatment and abuse	
				Control of sexuality	
				Forced Labour	

## BIBLIOGRAPHY

### *A Articles/Books/Reports*

Australian Law Reform Commission, *Criminal Admiralty Jurisdiction and Prize*, Report No 48 (1990)

Corin Morcom and Andreas Schloenhardt, 'All About Sex?! The Evolution of Trafficking in Persons in International Law' (Research Paper, The University of Queensland Australia Human Trafficking Working Group, March 2011),

Irina Kolodizner, 'R v Tang: Developing an Australian Anti-Slavery Jurisprudence' (2009) 31:487 *Sydney Law Review* 487.

Fiona David, 'Labour Trafficking' (2010) 108 *Australian Institute of Criminology* 16.

Australian Government, 'The National Action Plan to Combat Human Trafficking and Slavery 2015-19.

Explanatory Memorandum, Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Bill 2002.

Explanatory Memorandum, Criminal Code Amendment (Trafficking in Persons Offences) Bill 2005.

Australian Human Rights Commission Submission to the Joint Standing Committee of Foreign Affairs, Defence and Trade, Human Rights Sub-Committee, 'Inquiry into Slavery, Slavery like conditions and People Trafficking' 5 October 2012.

### *B Cases*

*The Queen v Tang* (2008) 249 ALR 200.

*DS v R* [2005] VSCA 1999

*R v McIvor and Tanuchit* [2010] NSWDC 310

*R v Sieders & Yotchomchin* [2006] NSWDC 184.

*R v Netthip* [2010] NSWDC 159.

*R v Mantahkhum* SCC 149 [2010].

*R v Kovacs* [2008] QCA 417.

*R v Trivedi* (2011) NSWDC (unreported).

*Kaye v The Queen* [2004] WASCA 227.

---

### *C Legislation*

*Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999*

*Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002*

*Criminal Code Amendment (Trafficking in Person Offences) Act 2005*

*Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2012*

*Criminal Code Act 1995 (Cth)*

### *D Treaties and Supporting Documents*

*United Nations Convention Against Transnational Organized Crime and The Protocols Thereto, Annex II, Protocol to Prevent, suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Text against Transnational Organized Crime.*

*UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted 7 September 1956, entered into force 30 April 1957.*

*International Slavery Convention, adopted 25 September 1926.*

*Forced Labour Convention, International Labour Organization, (1930) Convention No. 29.*

---