

R v Tang: Developing an Australian Anti-Slavery Jurisprudence

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Abstract

In August 2008, the High Court of Australia upheld the convictions of Melbourne brothel owner, Wei Tang, for slavery. In doing so, the High Court effected the first ever criminal convictions of slavery offences under s 270.3(1)(a) of the *Criminal Code Act 1995* (Cth) ('Code'). *R v Tang* ('Tang') has since been dubbed 'the most crucial test of the effectiveness of our criminal laws against ... slavery ever to come before an Australian court'.¹ In light of the untested nature of Australia's slavery laws, the most contentious issue before the Court was the question of the modern definition of slavery. This note undertakes a three part analysis. It will first provide an overview of slavery as a legal concept; second, elucidate the High Court's approach to this contentious issue; and third, discuss the implications of the Court's approach. This note seeks to decipher the contribution made by the Court in *Tang* to anti-slavery jurisprudence in Australia and internationally. Ultimately, it is argued that the Court rightly adopted a broad view of slavery, developing Australian jurisprudence in a direction consistent with international law.

1. A Bird's Eye View of Slavery

Approximately 27 million people globally are held in slavery.² Slavery, according to the United Nations, was the first human rights issue to 'arouse wide international concern'.³ Internationally, slavery is one of the oldest and most widely recognised crimes against humanity — a crime of universal jurisdiction. Its prohibition is a peremptory norm of international law (*jus cogens*) and those who engage in slavery have been dubbed 'enemies of mankind'.⁴ Two international

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1 Nina Vallins, 'Sexual Slavery Laws On Trial in Landmark High Court Appeal' (Press Release, 9 May 2008) Project Respect <http://projectrespect.org.au/files/wei_tang_media_release_2008_final_WEB.pdf> at 16 May 2009.

2 Ibid 239, citing Kevin Bales, 'The Challenge of Measuring Slavery' in *Understanding Global Slavery: A Reader* (2005) 87.

3 United Nations High Commissioner for Human Rights, *Fact Sheet No 14: Contemporary Forms of Slavery* (1991) Office of the High Commissioner for Human Rights <<http://www.ohchr.org/Documents/Publications/FactSheet14en.pdf>> at 16 May 2009.

4 *Tang* (2008) 237 CLR 1, 48 (Kirby J), citing Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (2007) 159. See also Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, 9th ed (1992), vol 1, Pts 2 to 4, §429.

conventions — the *International Convention to Suppress the Slave Trade and Slavery 1926* ('*Slavery Convention*') and the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956* ('*Supplementary Convention*') (to which Australia is a party) — are dedicated specifically to the criminalisation of slavery.⁵

In Australia, slavery has been criminalised since the early 19th century. Prior to 1999, the prohibition on slavery in Australia was effected through various United Kingdom Imperial enactments, known collectively as the 'Imperial Slave Trade Enactments'.⁶ With the enactment of the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth), pursuant to the recommendations of the Australian Law Reform Commission in 1990,⁷ slavery was explicitly recognised as an offence under Australian law — one of a number of criminal offences (including sexual servitude, trafficking and debt bondage) created by Parliament (in 1999 and 2005) as part of the war on human trafficking.⁸ Despite such international and domestic condemnation, slavery-like practices remain a persistent problem.⁹ Although over 1000 women are trafficked to Australia each year to engage in prostitution while being subjected to exploitation and various forms of 'slavery', few of them fit traditional stereotypes of slavery such as being forced into prostitution or being kept under lock and key.¹⁰ This situation begs the question to which *Tang* focused the High Court's attention — what constitutes slavery in the 21st century?

5 See also *Universal Declaration of Human Rights*, GA Res 217A (III), art 4, UN Doc A/810 at 71 (1948); *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, art 8(1) (entered into force 23 March 1976); *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90, art 7(2) (entered into force 1 July 2002) (in relation to the definition of 'enslavement'); *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime*, 15 November 2000, 2237 UNTS 39574, art 3, (entered into force 25 December 2003).

6 These included *An Act for the Abolition of the Slave Trade 1807* (UK), *Slave Trade Act 1824* (UK), *Slave Trade Act 1843* (UK) and *Slave Trade Act 1873* (UK).

7 Australian Law Reform Commission, *Criminal admiralty jurisdiction and prize*, Report No 48 (1990), 72–92.

8 See the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth) and *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth). The amendments to this legislation in 1999 inserted offences relating to slavery, sexual servitude and deceptive recruiting for sexual services into the Code. In 2005, in light of the United Nations' *s and Guidelines on Human Rights and Trafficking*, the offences of trafficking and debt bondage were added to the Code. See United Nations High Commissioner For Human Rights, *Recommended s and Guidelines on Human Rights and Trafficking*, E/2002/68/Add.1 (2002) Office of the High Commissioner for Human Rights <<http://www.ohchr.org/Documents/Press/OHCHR%20Recommended%20Guidelines.pdf>> at 20 May 2009.

9 *Fact Sheet No 14: Contemporary Forms of Slavery*, above n3.

10 Fiona David, *Trafficking of Women for Sexual Purposes: Research and Public Policy Series 95* (2008) 54–55; Vallins, above n1.

2. *Tang — The High Court's Approach to Slavery*

A. *Preliminary Issues and Findings*

This issue was brought to the attention of the High Court as a result of an Australian Federal Police raid on a Melbourne brothel in May 2003. In June 2006, Wei Tang,¹¹ the brothel owner, was convicted in the Victorian County Court of five counts of intentionally possessing and exercising a power of ownership over a slave. She was sentenced to ten years' imprisonment.¹² The charges related to five Thai women recruited to work in the brothel, in accordance with a recruitment agreement which specified that each woman would have to work off a debt of AUD \$45,000 in Australia. Four of the five women were bought by a syndicate in which Tang held a 70% stake. Each woman worked in the brothel six days per week, with their debt being reduced by \$50 (of the \$110 charged) per customer. They had the option to work a seventh 'free' day, when they could retain \$50 per customer for themselves. The women were provided with adequate accommodation and food and were not held under lock and key, though their passports and return air tickets were retained by Tang, they had little money and limited English, they worked long hours and were afforded little freedom to leave the brothel (particularly without supervision). Two of the women paid off their debts in six months — the restrictions upon them were lifted and they remained at the brothel as free agents.

In June 2007, the Court of Appeal of the Supreme Court of Victoria upheld Tang's appeal against the verdict of McInerney J, ordering a re-trial on the basis that the direction given to the jury in relation to the fault element of the offence was incorrect.¹³ The Court held that the direction should have indicated a requirement for the prosecution to prove that Tang knew or believed the powers being exercised by her were powers attaching to ownership (not merely intention to exercise such powers).

The prosecution appealed to the High Court. Tang sought leave to cross appeal against the order for a new trial (rather than acquittal) on three grounds — (i) the constitutionality of the slavery offences under the Code; (ii) the definition and scope of 'slavery' under the Code; and (iii) the reasonableness of the jury's verdicts.¹⁴

11 In addition to Wei Tang, Donoporm Srimonthon, Tang's employee and previous 'victim', who stayed on at the brothel in a managerial capacity, pleaded guilty to two counts of slave trading and three counts of possessing a slave. The brothel manager and driver of the victims, Paul Pick, was originally tried with Wei Tang, but was acquitted on eight charges, while the jury could not decide on a further two. He successfully applied for a *nolle prosequi*. See *R v DS* [2005] VSCA 99; *R v Wei Tang* (2007) 16 VR 454.

12 *R v Wei Tang* [2006] VCC 637 (McInerney J).

13 *R v Wei Tang* (2007) 16 VR 454.

14 For an overview of the facts of the case, see *Tang* [2008] HCA 39 at [6]–[20] (Gleeson CJ); High Court of Australia, 'The Queen v Wei Tang' (Press Release, 28 August 2008).

(i) *The Appeal*

The High Court allowed the appeal by a six to one majority (Kirby J dissenting), overturning the order for a new trial. The Court held that the prosecution did not need to prove what Tang knew and believed in relation to the source of her powers over the women (nor did they need to prove that she knew or believed the women were slaves) — rather, the prosecution needed only to establish Tang’s intent to exercise powers of possession attaching to ownership. The ‘critical powers’ were the power to make each woman an object of purchase, the capacity to use the woman in a substantially unrestricted manner for the duration of their contracts, the power to control and restrict their movements, and the power to use their services without commensurate compensation — which were considered sufficiently established.¹⁵

(ii) *The Cross Appeal*

The High Court unanimously granted Tang special leave to cross-appeal on the first two grounds — the meaning and constitutional validity of s 270.3(1)(a) of the Code — but ultimately dismissed both arguments. It held that Division 270 of the Code was reasonably capable of being considered appropriate and adapted to Australia’s obligations under the *Slavery Convention* (despite its slightly broader wording), and thus fell within the scope of the external affairs power of the Commonwealth under s 51(xxxv) of the Constitution.¹⁶ It also considered the meaning of slavery under the Code, concluding that Tang’s conduct fell within the legal definition of slavery. The High Court unanimously refused special leave on the third ground — the failure of the Court of Appeal to hold the jury’s verdicts to be unreasonable — concluding that there was sufficient evidence to justify the jury’s verdicts. The High Court did not deal with the issue of Tang’s sentence, remitting the question to the Court of Appeal for consideration.¹⁷

B. *The Legislation*

Slavery falls within the scope of Division 270 of the Code, under the broader subheading of Chapter 8 ‘Offences against humanity’. Section 270.2 states that slavery remains unlawful and its abolition is maintained, affirming that slavery does not exist under Australian law and ownership of a human being is impossible. Section 270.3(1)(a) provides that a person who intentionally possesses a slave or exercises over a slave *any or all* of the other *powers attaching to the right of ownership* is guilty of an offence punishable by up to 25 years’ imprisonment. While ‘slave’ is not defined in the Code, s 270.1 defines ‘slavery’ as ‘the condition of a person over whom any or all of the powers attaching to the right of ownership

¹⁵ *Tang* (2008) 237 CLR 1, 25 (Gleeson CJ).

¹⁶ *Ibid* 20–21 (Gleeson CJ). Gleeson CJ noted that the extra words in the definition of slavery under the Code (addition of the phrase ‘including where...’) as compared to the *Slavery Convention*, merely make plain what is implicit in the Convention – that a condition that results from a debt or contract is not, on that account alone, to be excluded from the definition, provided it would otherwise be covered by it.

¹⁷ For a summary of the orders made by the High Court, see *ibid* 26–27 (Gleeson CJ).

are exercised, including where such a condition results from a debt or contract made by the person'. This definition is almost identical to that contained in art 1(1) of the *Slavery Convention*, which states that '[s]lavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'. The legislation prompts two cascading questions — (i) if slavery does not legally exist under Australian law (pursuant to s 270.2), how is it to be recognised; and (ii) what are the indicia of slavery: i.e what is meant by 'possess or exercise any power attaching to the right of ownership'. These two questions reflect the primary difficulty encountered by the High Court — namely, how to recognise and define slavery as a crime under Australian law.

C. *Explaining Slavery — Legal Definition and Operation*

The High Court's unanimous reasoning emphasised three key attributes of the definition of slavery — (a) the distinction between *de jure* and *de facto* slavery; (b) the indicia of slavery; and (c) the role of consent (or its absence). The majority of this analysis was undertaken by Gleeson CJ, with Hayne J providing an alternative analytical approach solely on the question of 'powers attaching to the right of ownership'.¹⁸

Significantly, in the analyses of both Gleeson CJ and Hayne J it was accepted that, in light of the virtually identical definitions of slavery under the Code and *Slavery Convention*, the definition of slavery in Australia is informed by its international law meaning.¹⁹ Thus, the Court's analysis itself reflects and contributes to the definition of slavery at international law.

(i) *The Scope of 'Slavery' — De Jure v De Facto*

Tang's argument that slavery is confined to 'chattel slavery' — a legally recognised capacity to treat a person as an article of property or possession non-existent under Australian law — posed a serious question for the Court: how to address slavery in a system which does not recognise its existence. To resolve the issue, both Gleeson CJ and Hayne J distinguished between slavery as a *status* (*de jure* slavery by virtue of a legal right of ownership where legal systems recognise a right of property in people) — and slavery as a *condition* (*de facto* slavery by virtue of a factual state of affairs evidencing the exercise of the powers attached to the right of ownership).²⁰ According to Gleeson CJ, to limit slavery's scope to its chattel or *de jure* form is inconsistent with the context and purpose of the *Slavery*

18 Gummow, Heydon, Crennan and Kiefel JJ agreed with both Gleeson CJ and Hayne J. Kirby J likewise agreed with Gleeson CJ and Hayne J, dissenting solely on the issue of the fault element of the offence (the basis of the prosecution's appeal).

19 The interpretation of slavery in accordance with its meaning at international law was advocated by the Australian Human Rights and Equal Opportunity Commission (currently the Australian Human Rights Commission) in its application for leave to intervene in the proceedings. See Bret Walker and Reg Graycar (Counsel for the Australian Human Rights Commission ('AHRC')), *Submissions in Support of Application for Leave to Intervene and Submissions on the Appeal* (2008) AHRC, [13] <<http://lawvideolibrary.com/docs/Australian%20HR%20Commission%20Brief.pdf>> at 10 May 2009.

20 *Tang* (2008) 237 CLR 1, 20 (Gleeson CJ); 55–56 (Hayne J).

Convention.²¹ Drawing on the *travaux préparatoires* to the Convention, Gleeson CJ affirmed the application of the Convention to both *de jure* and *de facto* slavery for three reasons: (i) many State parties to the Convention did not recognise slavery as a legal status in 1926; (ii) the Convention sought to effect this situation universally; and (iii) the phrase ‘status or condition’ in the Convention’s definition of slavery itself makes the distinction between *de jure* and *de facto* slavery.²² As the Code imports the term ‘condition’ from the Convention, thereby recognising *de facto* slavery, the Court neatly avoided the issue of domestic recognition of slavery by drawing on international law.

(ii) *Slavery v Exploitation — the Indicia of Slavery*

Having established that the scope of slavery is not confined to a *de jure* or chattel form not recognised in Australia, the next element addressed by the Court was the indicia of slavery — ie, what is the right of ownership, and what powers attach to it? Slavery is considered the pinnacle of exploitation. The distinction between it and other forms of exploitation such as forced labour, peonage, servitude and debt bondage is, according to both Allain’s commentary and the reasoning of Gleeson CJ and Hayne J, a question of degree.²³ Gleeson CJ even noted that it was unnecessary to draw boundaries between these concepts in light of the non-mutually-exclusive operation of the *Slavery Convention* and *Supplementary Convention*²⁴ — rather, the indicia of slavery (as opposed to mere exploitation) lay in the terms of its statutory definition ‘exercise of powers attaching to the right of ownership’.²⁵ On the question of the meaning of this phrase, Gleeson CJ and Hayne J adopted two distinct (though, according to their Honours, not inconsistent) approaches.

For Gleeson CJ, the indicia of slavery could be gleaned from a focus upon the nature and extent of the powers exercised by an accused — ie, by focusing on the enslaver’s conduct.²⁶ Referring to the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Kunarac*,²⁷ Gleeson CJ noted that

21 Ibid 18 (Gleeson CJ).

22 Ibid 16–17 (Gleeson CJ).

23 Jean Allain, ‘Mobilisation of International Law to Address Trafficking and Slavery: Trafficking Women and Children after the End of Slavery’ (Paper presented at the 11th Joint Stanford-University of California Law and Colonialism in Africa Symposium, 19–21 March 2009); Elizabeth Broderick, ‘Slavery in the 21st Century – A Human Rights Challenge’ (Speech presented by the Sex Discrimination Commissioner and Commissioner responsible for Age Discrimination, 14 October 2008), AHRC <http://www.humanrights.gov.au/about/media/speeches/sex_discrim/2008/20081014_slavery.html> at 16 May 2009.

24 *Tang* (2008) 237 CLR 1, 19 (Gleeson CJ).

25 In the words of Gleeson CJ: ‘it is important to recognise that harsh and exploitative conditions of labour do not of themselves amount to slavery ... Powers of control, in the context of an issue of slavery, are powers of the kind and degree that would attach to a right of ownership if such a right were legally possible, not powers of a kind that are no more than an incident of harsh employment, either generally or at a particular time or place’, *ibid* 20.

26 Ibid 23–24 (Gleeson CJ).

27 *Prosecutor v Kunarac, Kovac and Vukovic*, International Criminal Tribunal for the Former Yugoslavia, Case No IT-96–23–T & IT-96–23/1–T, 22 February 2001 (*Kunarac Trial*) and Case No IT-96–23 & IT-96–23/1–A, 12 June 2002 (*Kunarac Appeal*).

factors such as control of movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour, were indicative of slavery.²⁸ In addition, Gleeson CJ, relying on a 1953 Memorandum of the UN Secretary General,²⁹ identified powers attaching to the right of ownership as including: (i) the capacity to make a person an object of purchase; (ii) the capacity to use a person and a person's labour in a substantially unrestricted manner; and (iii) an entitlement to the fruits of the person's labour without compensation commensurate to the value of the labour. Thus, he argued:

[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.³⁰

Thus, according to Gleeson CJ, the law merely identifies factors indicative of slavery. It is the role of the jury to 'inject normative content'³¹ into it and evaluate its presence case by case.

Conversely, Hayne J (after discussing the meaning of 'possession' in the definition of slavery),³² preferred to evaluate the rights attaching to ownership, which he equated with 'dominion',³³ by reference to the victim's freedom of choice. For Hayne J, slavery was best identified by exploring its antithesis — freedom.³⁴ Drawing on United States jurisprudence regarding involuntary servitude under the thirteenth amendment,³⁵ Hayne J emphasised the pertinence (for the practical application of the abstract concept of ownership) of looking at the

28 *Tang* (2008) 237 CLR 1, 18 (Gleeson CJ).

29 United Nations Economic and Social Council, *Slavery, the Slave Trade, and Other Forms of Servitude*, Report of the Secretary-General, UN Doc E/2357 (1953) 28; cited in *ibid* 17–18 (Gleeson CJ). As noted in this report, the six powers attaching to the right of ownership include: (i) the individual of servile status may be made the object of a purchase; (ii) the master may use the individual of servile status, and in particular his capacity to work, in an absolute manner, without any restriction other than that which might be expressly provided by law; (iii) the products of labour of the individual of servile status become the property of the master without any compensation commensurate to the value of the labour; (iv) the ownership of the individual of servile status can be transferred to another person; (v) the servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it; and (vi) the servile status is transmitted *ipso facto* to descendants of the individual having such status.

30 *Tang* (2008) 237 CLR 1, 23–24 (Gleeson CJ).

31 Rachel Harris, 'Modern-day slavery in Australia: *The Queen v Wei Tang*' (Paper presented at the 13th Annual Public Law Weekend, National Museum of Australia, Canberra, 1 November 2008) Australian National University, 6 <http://law.anu.edu.au/CIPL/Conferences&SawerLecture/2008/2008%20PLW/Wei_Tang_Talk_RH.pdf> at 14 May 2009.

32 Hayne J turned to the statements of Brennan J in *He Kaw Teh v The Queen* (1985) 157 CLR 523 ('*He Kaw Teh*') for guidance. See *Tang* (2008) 237 CLR 1, 58 (Hayne J, citing *He Kaw Teh*, 585 (Brennan J)).

33 *Tang* (2008) 237 CLR 1, 56–57 (Hayne J).

34 *Ibid* 58 (Hayne J).

‘slave’ rather than ‘enslaver’ and asking whether and in what respects the alleged ‘slave’ was free.³⁶ Pursuant to this approach, Hayne J found that the transactional quality of the complainants’ situation and their manner of treatment (restrictions on movement, working hours) reflected both possession and the exercise of powers of ‘use’ attached to ownership.³⁷ While this approach has merit, in that it escapes a focus on the ‘lock and key’ aspects of slavery — evaluating ‘effective freedom’ (freedom from a broad, positive perspective),³⁸ Hayne J himself acknowledged both that ‘freedom’, like control under the analysis of Gleeson CJ, is a question of fact and degree; and that the terms of s 270.3(1)(a) are more geared towards a focus on the enslaver (according better with the conceptualisation of Gleeson CJ).

It is worth briefly mentioning that the Court of Appeal’s method of maintaining a high bar of differentiation between exploitation and ‘slavery’ was to impose an additional knowledge requirement into the fault element of slavery as an offence.³⁹ Discrediting this approach, a majority of the High Court held (Kirby J dissenting), that beyond the generally accepted physical (conduct) and fault (intention) elements, no specific level of knowledge (regarding the source of the powers exercised over the complainants by the accused) has to be proven by the prosecution to establish the offence of slavery.⁴⁰ While the dissent of Kirby J fervently supported the approach of the Court of Appeal, criticising the majority for ‘distorting the essential ingredients of serious criminal offences as provided by the Parliament’,⁴¹ Gleeson CJ (and the majority) emphasised that the solution to the issue of distinguishing slavery from exploitation lay in looking at the capacity of the accused to deal with the victims as commodities and not in the need for reflection by an accused upon the source of the powers being exercised.⁴²

35 Specifically, Hayne J discusses *US v Shackney* 333 F 2d 475, 485–486 (1964), *US v Mussry* 726 F 2d 1448, 1453 (1984) and *US v Kozminski* 487 US 931 (1988). See *ibid*, 59–60 (Hayne J).

36 *Ibid* 61 (Hayne J).

37 *Ibid* 62–64 (Hayne J).

38 David, above n 10, 54–55.

39 *R v Wei Tang* (2007) 16 VR 454, 471–472, 482, 487–488.

40 *Tang* (2008) 237 CLR 1, 23 (Gleeson CJ), 54 (Hayne J).

41 *Ibid* 29 (Kirby J). Kirby J did not disagree with the majority’s evaluation of the meaning of slavery – rather, his dissent focused entirely on the issue of the fault elements of slavery as an offence. Kirby J favoured the approach of the Court of Appeal, emphasising that intention to exercise powers of possession or ownership is not sufficient as a fault element for an offence as serious as slavery – an established belief on the part of the accused that it is their right and entitlement to do so is a necessary pre-requisite. The remainder of Kirby J’s analysis focused on justifying his preference for the approach of the Court of Appeal, drawing on traditional canons of construction (dictating that penal statutes depriving individuals of liberty be construed strictly), traditional approaches to intention, the gravity of the crime of slavery at international law (and domestically – in light of the substantial penalty levelled at it), as well as recent changes to the law in relation to debt bondage and sex work for validation. However, this analysis was ultimately to no avail – intent alone, and not knowledge, was the majority’s preference for fault.

42 *Ibid* 23–24 (Gleeson CJ).

(c) *The Role of Consent*

Finally, both Gleeson CJ (albeit briefly) and Hayne J agreed that absence of consent is not a necessary attribute of slavery. However, according to Harris,⁴³ the approaches of Gleeson CJ and Hayne J were ‘not entirely consistent’. While Gleeson CJ, referring to the Appeals Chamber in *Kunarac*, stated with certainty that consent is not necessarily inconsistent with slavery,⁴⁴ Hayne J distinguished between a person freely entering a relationship of slavery and a person being inside such a relationship, emphasising that once inside a slavery relationship, a slave by definition has no freedom of choice. For Hayne J, it was irrelevant whether the women came to Australia voluntarily, as this did not deny the result of the transaction — the subjugation of the women to the ‘dominion’ of their purchasers.⁴⁵ Hayne J’s line of argument implies that genuine consent is, in principle, dichotomous to slavery.

3. *The Implications of the High Court’s Analysis for an Anti-Slavery Jurisprudence*

Though the scope of this note does not permit a full evaluation of the implications of the Court’s analysis, three particular issues are worth highlighting.

First, the Court’s adoption of a broad definition of ‘slavery’, consistent with its meaning at international law, is to be acclaimed. Adopting the recommendations of both Allain and the AHRC (for the most part),⁴⁶ the Court recognised the authoritative nature of the *Slavery Convention* (and the relevance of its *travaux*); acknowledged slavery to be a broad concept extending beyond chattel slavery; offered two possible analytical approaches to ‘slavery’ — one focused on the international jurisprudence of control (ie the enslaver) and the other focused on jurisprudence of freedom of choice (ie the slave); and, by focusing on the terms ‘powers attaching to ownership’, not only acknowledged ownership (in accordance with Allain’s commentary) to be the *sine qua non* of slavery’s definition,⁴⁷ but also, as a result of this focus, enabled the ‘subtle and cruel practices which characterise the slave trade’⁴⁸ such as trafficking, forced prostitution and forced labour, potentially to fall under slavery’s scope.⁴⁹ While the Court could have gone further — for example, by delving into other contentious definitional issues such as the distinction between ‘slavery’ and ‘enslavement’ under the ICC’s Rome Statute,⁵⁰ or by referring to other sources of

43 Harris, above n31, 6.

44 As examples, Gleeson CJ drew attention to societies where slavery was lawful and individuals could sell themselves into slavery. See *Tang* (2008) 237 CLR 1, 21 (Gleeson CJ).

45 *Ibid* 61 (Hayne J).

46 Walker and Graycar, above n19.

47 According to Allain, the pre-eminence of ownership in the definition of slavery is affirmed by the preparatory works of the Convention. See Jean Allain, ‘A Legal Consideration ‘Slavery’ in Light of the Travaux Préparatoires of the 1926 Convention’ (Paper presented at the Conference: Twenty-First Century Slavery: Issues and Responses, Wilberforce Institute for the Study of Slavery and Emancipation, Hull, United Kingdom, 23 November 2006).

48 Broderick, above n23.

international law such as the Special Rapporteur's Report on Contemporary Forms of Slavery 1998, mentioned in the AHRC's submissions as intervener⁵¹ — overall, the Court did a good job of establishing a broad but technically rigorous approach to the definition of slavery. Moreover, though critics⁵² may condemn the Court for preferring a legalistic jurisprudence of slavery to a broad conceptualisation of slavery as a general expression of 'the overall movement to end human exploitation',⁵³ their approach is, in a sense, preferable as it achieves a broad characterisation of slavery without compromising analytical efficacy, thereby contributing to a conclusive determination of the meaning of slavery both domestically and internationally.

Secondly, from the perspective of the criminal law, while the High Court's rejection of the Court of Appeal's addition of specific knowledge as a fault element to slavery as an offence was essential to their broad international law consistent characterisation of slavery, it could backfire. Critics might argue that Kirby J had a valid point when arguing that the majority's approach could not only water down the high threshold historically required for convictions of serious criminal offences, but also render banal slavery crimes by applying them to circumstances that amount to no more than a seriously exploitative employment relationship — for example, clients of the complainants could potentially be guilty of slavery (by using them in the proprietary sense) under the majority's conception.⁵⁴ On the other hand, perhaps this slight incongruence (potentially alleviated by clear interpretation) is a small price to pay to give effect to a pertinent definition of slavery consistent with international law.

Thirdly, Hayne J's focus upon human freedom (of choice) draws attention to the limitations of practical efforts to defend human freedom — that is, the insufficiency of current initiatives for the prevention of trafficking and slavery and protection of its victims.⁵⁵ The first instance decision in *R v Wei Tang*⁵⁶ prompted

49 The Court's focus on ownership also resolved the inconsistency of approaches at international law, as between the decision of the European Court of Human Rights in *Siliadin v France* (2006) 43 EHRR 16 — where exploitation of a Togolese child in France as an unpaid domestic worker for over four years was considered servitude but not slavery — and the Appeals Chamber in the *Kunarac Appeal* in favour of the characterisation of slavery's indicia in the *Kunarac Appeal*. As a result, the practices identified in *Siliadin* will be slavery where indicia of ownership are evidenced.

50 For an analysis, see Jean Allain, 'The Parameters of 'Enslavement' in International Criminal Law' (Paper presented at an International Symposium at the Research Centre for International Criminal Law and International Humanitarian Law, China University of Political Science and Law, 25–26 April 2009), 14–20.

51 Walker and Graycar, above n19, [44].

52 See, for example, the discussion of Professor David Weissbrodt's approach in Allain, above n47, 7.

53 Allain, above n 23, 1.

54 Dr Andreas Schloenhardt, *Case Report: R v Wei Tang* (2009) Human Trafficking Working Group 5 <http://www.law.uq.edu.au/documents/humantrafficking/case-reports/wei_tang.pdf> at 16 May 2009.

55 ABC Radio National, 'Slavery in the 21st century', *The Law Report*, 13 May 2008, <<http://www.abc.net.au/rn/lawreport/stories/2008/2241462.htm#transcript>> at 16 May 2009.

56 *R v Wei Tang* [2006] VCC 637.

the Federal Government to enact laws recognising debt bondage as an offence—a reactive, prosecution focused initiative.⁵⁷ However, in the words of Elizabeth Broderick, successful prosecution ‘can only ever be one component of an effective anti-[slavery] strategy’. The focus, in Harris’ words,⁵⁸ needs to be on both *combating* human trafficking — by being proactive and targeting the conditions that breed slavery and choicelessness (particularly through awareness campaigns) — and, equally, on extending the protection and support to trafficking victims which they deserve (particularly by ensuring that they have access to counselling and visas that are not conditional on their providing assistance to police).⁵⁹ This is slowly becoming a priority.⁶⁰

4. Conclusion

In conclusion, the prohibition on slavery is one of the oldest peremptory norms of international law. Numerous international conventions are directed at its abolition and suppression. In compliance with its international human rights obligations, Australia recognised the prohibition on slavery in division 270 of the Code in 1999. However, until the series of proceedings set in motion by a Federal Police raid on a Melbourne brothel in 2006, the definition of slavery under the Code remained untested. The case of *Tang* provided the High Court with an opportunity to determine the content and boundaries of ‘slavery’ in Australia and set in motion an anti-slavery jurisprudence. In undertaking this task, the Court rose to the occasion, interpreting ‘slavery’ broadly and in a manner consistent with international law. While judicial consideration and imposition of criminal liability are not a complete answer to the problem of slavery and trafficking, *Tang* is a welcome first step for the development of an anti-slavery jurisprudence in Australia and internationally.

57 Victor Violante, ‘Court Reinstates Sex Slave Convictions’ *Canberra Times* (Canberra), 29 Aug 2008.

58 Harris, above n31.

59 Broderick, above n23.

60 See, for example, *The Australian Government’s National Action Plan to Eradicate Trafficking in Persons* (2004); National Roundtable on People Trafficking, *Guidelines for Working with Trafficked People* (2009).

