

Australasian Reflections on Modern Slavery

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Abstract

In early February 2012, a federal judge threw out a law suit brought by PETA claiming that whales were 'enslaved' by SeaWorld (Note 1). While it met a swift and sorry end, the law suit provides an opportunity for reflection upon what constitutes slavery in the modern context. We are familiar with the Roman "Spartacus" slave scenario and the classic American Civil War "Gone with the Wind" slavery scenario – but how comfortably do we connote modern exploitative labour situations, where individuals (human not animal), find themselves with no avenue of escape. The most commonly challenged modern slavery situations are those in brothels: to what extent do modern brothels in Australia cohere with our understandings of slavery? In a recent High Court decision, Justice Michael Kirby took a strongly different view from his fellow judges in that regard. And what are we to make of the PETA lawsuit claiming (unsuccessfully) that orcas in SeaWorld are enslaved to humans to do their unwilling bidding as entertainers? As a logical extension of that claim, ought we not view the doomed horses in the English Grand National as slaves? They also do their unwilling bidding as cash cows, many of them dying in agony as part of the very spectacle. Very many situations that potentially cohere with slavery today will not cohere with our traditional understandings and stereotypes let alone our modern and as yet not fully articulated understandings. This is a debate more familiar in the USA – yet while Australia has not had an entrenched system of human slavery, an emerging jurisprudence points to modern incarnations while also reinforcing arguments about the effective enslavement of many Aboriginal people during the period of assimilation: a period that gave rise to the 'Stolen Generation'. The purpose of this article is to reflect upon this emerging jurisprudence and to suggest that while we are continuing to unlock new ideas about slavery in the modern context – both human and animal – but we are far from developing, historically, strategies for their abolition. The way forward, it is suggested, is to recognize as a first step in the human context, that exploitative modern labour situations may appear akin to slavery but need perhaps more appropriately to be dealt with as modern servitude; and as a second step that jurisprudential understandings of animal enslavement: exemplified by the orcas but also personified in events like the Grand National; may appear on the comparative legal agenda in future decades.

Keywords: slavery, sweatshops, servitude, modern slavery, indigenous slavery, animal enslavement and suffering

1. Introduction

Twenty-first century problems of human trafficking have antecedents in the transatlantic slave trade which began in the fifteenth century, driven by demand for labour in the 'New World'. From the sixteenth to the nineteenth century, millions of African slaves were traded and in our view, slavery in various incarnations still exists in Africa. Ironically, on the other side of the world, a contemporary jurisprudence is emerging on slavery: in Australia. For Australia, a British colony, has not had an entrenched system of slavery yet the emerging jurisprudence insightfully articulates the modern incarnations.

Unauthorised arrivals by boat appear to 'spook' Australia, perhaps harking back to its days of colonial settlement and its very first federal legislative endeavour upon creation of the Commonwealth – to restrict immigration (in 1901). There is often an underpinning of hysteria about the debate, although the current federal (Labor) government rhetoric speaks dispassionately about the need to 'smash the people smugglers' business model.' This refers only to those who arrive to the country by boat. Much of the contemporary hysteria voiced in the

media and online blogs denies the limited numbers of ‘boat people’ and the reality that most ‘illegals’ arrive by air. Yet, despite this being a political football, from time to time serious efforts are made to protect those who are most vulnerable due to the nature of their arrival into the ‘lucky country’. Trafficked women and children are therefore from time to time on the political policy radar. And as concerns about human trafficking have accelerated over the past decade, the link between it and oppressive domestic servitude was recognised back in 1999, when the Australian Federal Government introduced provisions prohibiting slavery, sexual servitude and deceptive recruiting through the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth).

Sufficient time has lapsed to review the impact of the amendment and reflect upon the jurisprudence of modern slavery – usually of vulnerable women – in advanced liberal democracies. We attempt to do so by pivoting our analysis around two recent cases, in both of which such women were held to be working in slave-like conditions. While we do not take issue with the outcomes in these cases, both of which concerned sexual slavery, we consider the broader debate about slavery jurisprudence to take cognisance of the dissenting views of former High Court judge Michael Kirby, in *Tang* (Note 2) (2008). Upon reflection we consider the ways in which the dissenting view sought to steer understandings of slavery in the direction of the incarnation of international law and the diminishing of the status of slavery by its characterization as oppressive work practices in a contemporary environment in an advanced liberal democracy. We then ask if those reflections can accommodate the nuances of a slavery narrative which also shapes the narrative of Australian Aboriginal people as one of enslavement.

2. Background

Slavery is a legislative issue in Australia since the turn of the new century. In their Final Report on Offences Against Humanity (Note 3) in 1998, the Model Criminal Code Officers Committee recommended provisions that prohibit slavery, sexual servitude and deceptive recruiting into the *Criminal Code*. Later changes to the *Criminal Code* include the trafficking, debt bondage and related offences that were inserted through *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth). Although the changes would confront people trafficking in a general sense, the incremental nature prompted criticism that Australia was focusing too closely upon sexual exploitation (Note 4). Subsequently, Australia responded more broadly to labour exploitation with the Inaugural Report of the Anti-People Trafficking Interdepartmental Committee in 2009 (Note 5). While the two most prominent recent cases have concerned exploited women, interestingly, in the course of the parliamentary debates about sexual slavery and servitude law, the situation of two exploited men was raised by the relevant federal Minister, the Hon Tanya Plibersek (Note 6). In 2005 a prosecution was launched, using the incorporated slavery provision of the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth) with five counts of possessing a slave and five counts of exercising a power of ownership of a slave against brothel owner, Ms *Tang*. At first instance, Ms *Tang* was found guilty in the County Court of Victoria of all five charges under the slavery provisions of the Code. She then appealed to the Full Court of the Supreme Court of Victoria where each conviction was overturned. The Department of Public Prosecutions initiated a further appeal to the Full Court of the High Court which reinstated the convictions, although there was a strongly worded dissent by Justice Kirby.

2.1 Constructing Slavery in the Modern Context – International Conventions

The understanding of slavery is burdened by many misconceptions due to popular portrayals such as *Gone with the Wind* or even the verisimilar *Uncle Tom's Cabin*. As such, it is less recognizable in the modern context, and many situations that may qualify as slavery today will not cohere with ‘the traditional stereotype of slavery’ (Note 7). International law sets the background for the provisions in the Commonwealth of Australia *Criminal Code* prohibiting slavery and sexual servitude. Such provisions have their antecedents as early as 1926 in the *International Convention to Suppress the Slave Trade and Slavery*. In particular, Article 2 of this Convention sought ‘to prevent and suppress the slave trade and bring about the complete abolition of slavery in all its forms.’ Article 1 of the 1926 Convention provided that:

- a) Slavery is the status or condition of a person over whom all or any of the powers attaching to the right of ownership are exercised.
- b) The slave trade includes all involved in the capture, acquisition and disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave with a view to being sold or exchanged and, in general, every act of trade or transport in slaves.

The abolition of slavery was reinforced in Supplementary Convention on the Abolition of Slavery of 1956: the Slave Trade and Institutions and Practices Similar to Slavery, Article 7 provided that (for the purposes of this Convention):

- 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 ownership are exercised, and 'slave' means a person in such condition or status;
- b) 'A person of servile status' means a person in the condition or status resulting from any of the institutions or practices mentioned in Article 1 of this Convention;
- c) 'Slave trade' means and includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in slaves by whatever means of conveyance.

Both conventions sought to prevent or abolish slavery and the *de jure* status of slavery. Some scholars have, however, maintained that while these Conventions have been effective in abolishing the actual legal status of slavery *per se*, at least in the way with which we associate it with the stereotypes from *Gone with the Wind* or *Uncle Tom's Cabin*, the more insidious exploitation of women remains through the selling of women into prostitution and other forms of bondage (Note 8). In the contemporary era, sex work victimizes women and widens gender inequality and exploits women irrespective of consent (Note 9). In short, despite arguments about empowerment, female prostitutes lack agency. This is so, we suggest, in both the cases we examine in this article.

Significant United Nations conventions and treaties have been put in place to prevent human trafficking in women. The United Nations adopted a 2002 *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, ratified by Australia in May 2004. It defined 'human trafficking' in Article 3 as:

The recruitment, transportation, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, or fraud or deception or the abuse of power of a position of vulnerability or receiving of payments or benefits to achieve the consent of a person having control over another person for the purposes of exploitation.

In this way, as Simmons and Burn note, 'trafficking and smuggling are separately defined by international instruments' but considerable overlap between the two is inevitable (Note 10). As Dougnon notes:

It is hard today to engage in debate over child trafficking in the poor countries of West Africa without referring to the various United Nations conventions on human rights, and especially the International Labour Organization's Convention 182 on the Worst Forms of Child Labour, adopted June 17, 1999. This convention is one of the new legal instruments intended to eliminate the 'worst forms' of child Labour in the same vein as the ILO's earlier Forced Labour Convention (1930), as well as the UN's Supplementary Convention on the abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956). According to Article 3 of the Convention, the worst forms of child labour are 'all forms of slavery or practices similar to slavery, such as sale and trafficking of children, debt bondage and serfdom and forced or compulsory Labour.' (Note 11)

2.2 Slavery in the Australian Context

Australia provides an unusual, perhaps perplexing perspective given its long constitutional silence on the rights of its Aboriginal people against a background of what is arguably a history of extensive enslavement of Aboriginals lasting well into the twentieth century (Note 12). Nevertheless, some scholars urge caution with that view:

To start a slavery debate might equally lead to misleading and politically counter-productive comparisons between the position of Aboriginal workers and that of African slaves (Note 13).

Mindful of this view, the major legal challenges on the basis of slavery to date in Australia have concerned women – one working in a brothel (*Tang*) and the other in domestic servitude (*Kovacs*). Any consideration of the Australian cases must be aware of the inter-related issues of people trafficking 'similar to slavery', including forced marriage and forced labour (Note 14).

2.3 Feminist Perspectives

A fierce debate amongst feminists exists over the definition of trafficking and slavery. Kathleen Barry argues that no distinction should be drawn between 'free' and 'forced' prostitution whereas others argue that because prostitution is sex work, the focus should be on the protection of victims of forced labour. In the Australian context, Leishmann challenges the approach of Australian men to Asian women to conceptualize the 'commodification' and sale of women into prostitution as being 'fuelled by a lack of women in Australia prepared to do prostitution and radicalized "customer" ideas that Asian women are more compliant and will accept higher levels of violence.' (Note 15)

In this respect, Leishman cites increasingly harsh immigration policies and the difficulties that are associated with low-skilled migrants, an observation that echoes around the globe. She conceptualizes trafficking and the associated prostitution in a broader Australian context of the mandatory detention of asylum-seekers, citing both the original and amended *Immigration Restriction Act 1901* and the *Tampa Affair* (Note 16). Leishman writes 'trafficking can perhaps in some way be seen as the outcomes of repressive and radicalized border regimes' and concludes that 'these policies have made people more susceptible to deception and trafficking.' (Note 17)

Sarah Steele has suggested that trafficked women in Australasia have tended to originate from South Korea, Thailand, China and Sydney (Note 18). A 2004 report by Project Respect, documents that up to 1,000 women are under contract for prostitution at any time in Australia (Note 19). New South Wales police have reported that thousands of Chinese and Thai women are currently being sold to brothel owners to work off debts by having to have sex with up to 800 men before they can work for themselves (Note 20). In another government report it was documented that:

The number of people trafficked into Australia is unknown. Estimates given to a 2004 Parliamentary inquiry into sexual servitude in Australia ranged from 300 to 1000 trafficked annually. The inquiry found that most of the women trafficked into Australia are recruited from South East Asia and China for the sex industry. According to the inquiry report, traffickers facilitate the women's entry to Australia by a range of fraudulent means, including providing visas, false passports and funds. The women are then sent to brothels around the country where their movements are usually restricted. It is not unknown for women to be forced to repay debts of over AUD \$40, 000 (Note 21).

Trafficked people usually enter Australia legally on tourist visas or student work visas and then find themselves in consequent situations of debt, bondage and forced labour (Note 22). Although some women may have previously worked in the sex industry, many have been deceived about the work that awaits them (Note 23). However, the Parliamentary Joint Committee of the Australian Criminal Commission established in 2005 to report on the sex industry in Australia, demonstrates little understanding of these harsh realities:

Many of the trafficked women who are detected by DIMIA [Department of Multicultural and Indigenous Affairs] have voluntarily come to Australia with the intention of working in the sex industry and cannot be considered 'victims of sexual servitude' (Note 24).

The Parliamentary Joint Committee's report turned upon whether trafficked women were the 'witting' or 'unwitting' participants in their own trafficking and subsequent exploitation. The distinction is wholly irrelevant as argued by Lara Fergus of the Institute of Family Studies:

...under modern legal systems of most modern liberal democracies, however, it has never made a difference whether or not the victim initially knew or agreed to perform the labour voluntarily. A person cannot, therefore, consent to debt-bondage, the most common modern form slavery....Nevertheless, many commentators and legislators continue to misunderstand the fact that abusive practices, such as trafficking, make the notion of consent irrelevant, a misunderstanding that seems particularly widespread in discussions of trafficking for sexual exploitation (Note 25).

Despite the emphasis on the 'victimisation' and 'exploitation' of women, an argument exists that resists stereotyping women as victims. Some women may not classify themselves as victims should they consider their situation a trade-off for improving their family's lives (Note 26). Barbara Sullivan, for example, outlines the perception of prostitution as a means of socio-economic advance. She cites early nineteenth century English common law cases where women soliciting for sex were perceived by the courts as 'commonly available' and individuals who were earning a living in order to enhance their socio-economic situations (Note 27). However, in a contemporary context, Sullivan repudiates the notion and acknowledges the 'growing numbers of cases

where prostitutes are raped while working as prostitutes' (Note 28). Similar dilemmas in interpretation are raised by Fougnon in the West African context, where she argues that while:

The ILO estimates that more than ten million adults and children are subject to some form of forced Labour, bonded Labour, or commercial sexual servitude at any given time...[nevertheless]... For demographic and historical reasons there is now way to separate a discussion of the worst forms of child Labour from the history of rural migration patterns (Note 29).

2.4 The Response from the Legislature

The Commonwealth updated in 1999 and 2005 the Australian *Criminal Code* to include new criminal offences, bringing Australia in line with UN Protocol (identified above) covering slavery, sexual servitude, trafficking in children and debt bondage. The amendments were based on work done by the *Model Criminal Code Officers Committee* (MCCOC). As part of the *Model Criminal Code Project*, MCCOC was invited by the Standing Committee of Attorneys-General to enact laws that specifically dealt with slavery and sexual servitude and, in November 1998, published its *Final Report*. The *Report* concluded that the primary reason for the continuing prevalence of women living in sexual servitude and in effect, slavery, was that international and national law focused on the element of absolute *physical* control over women. Subtle and insidious forms of control which rendered women in a condition of *de facto* slavery were ignored. The *Report* states:

The primary reason for these still prevalent manifestations of slavery and related practices is that the basic legal element in international instruments on slavery is the total physical control by one person over another. Whenever the control is less than total, such as when it is partial or limited in time, it is removed from the system of protections developed by these international instruments (Note 30). Subsequent to the publication of the *Report*, the Federal Government amended the *Criminal Code* via the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999*. This amending legislation inserted a new Chapter 8 – *Offences Against Humanity* – into the Commonwealth *Criminal Code*. In particular a new Division 270 was incorporated which was headed 'Slavery, Sexual Servitude and Deceptive Recruiting'. In this respect, s 270.1 inserted a specific definition of 'slavery', defining it as occurring when *ownership powers* are exercised over a particular person. The definition allows for the circumstances in which ownership rights are exercised as a result of a debt or contract made by the enslaved person. Section 270.2 further provides that slavery continues to be unlawful and abolished despite the fact that the Imperial Acts which relate to slavery have been repealed. In this regard, it should be noted that Schedule 2 of the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* has repealed the various Imperial enactments which abolished the *de jure* status of slavery. This provision in s 270.2 was inserted to ensure that slavery is now abolished for *all* purposes – and not just the purposes of the criminal law.

In addition, s 270.3(1) defines the offence of slavery as occurring when a person intentionally possesses or exercises power of ownership over a slave or engages in slave trading irrespective of whether the person engages in that conduct inside or outside Australia. It should be noted that under the federal *Crimes Act 1914* (Cth), a formula is provided to enable a court, where appropriate, to convert a penalty of imprisonment to a pecuniary penalty or to a combination of a pecuniary penalty and a term of imprisonment.

'Slave trading' is defined in s 270.3(2) to include capturing a person in order to make them a slave; purchasing or selling slaves; commercial transactions involving slaves; and directing or financing such activities. In addition, s 270.4 defines the expression 'sexual servitude' and this occurs specifically when a person provides sexual services and, because of force or threats, is not free to cease providing those services. In this respect, 'threat' includes a threat to cause a person's deportation. Moreover, s 270.5 inserts jurisdictional requirements. Two circumstances are identified in which a sexual servitude offence will fall under the legislation. The first is that the conduct constituting the offence is committed to some degree outside Australia and the relevant sexual services are provided to some extent within Australia. The second is that the proscribed conduct occurs to some extent inside Australia and the sexual service occurs to some extent outside Australia.

Section 270.6 prescribes the offence of sexual servitude and sub-section 270.6(1) provides that a person who intentionally or recklessly causes a person to enter or remain in sexual servitude is guilty of an offence. The maximum penalty in the case of an aggravated offence is 19 years imprisonment and in other cases, a maximum penalty is 15 years. Sub-clause 270.6(2) provides that a person who conducts a business that involves sexual servitude and who knows or is reckless about that sexual servitude is guilty of an offence. The expression

‘conducting a business’ encompasses managing, directing, controlling or financing the business. The penalties are the same as those in sub-clause 270.6(1).

Significantly, slavery offences as defined in s 270.3 require an *intention* to commit the offence as part of the requisite mental element. The difficulty here is to determine whether deliberate recklessness — or recklessly engaging in slave trading — will meet the fault element. But in contrast to s 270.3, recklessness would be sufficient to satisfy the fault elements for the sexual servitude offences. Under the *Criminal Code*, s. 270 (4), a person is reckless about a circumstance or result if they are aware of a substantial risk that the circumstance exists or a result will occur and it is unjustifiable to take that risk.

3. Challenges for the Legislation and a Slavery Test Case: *R v Tang* (2008)

The facts of the major test case — concerning brothel owner Ms Tang — were that the five victims or complainants had all worked in Thailand’s sex industry and then consented to work in the sex industry in Australia. Each owed AUD \$45,000 for the arranging of their travel and accommodation. They were required to work six days per week in a brothel in Brunswick Street, Fitzroy (in Melbourne), in order to work off their debts to the brothel owner, Ms Tang, and their Thai ‘owners’ splitting their earnings. It should be noted that these were not ‘boat people’ who often have no documentation: the women arrived by air and the brothel owner was in possession of their passports. The victims or the complainants had, in effect, all worked previously as ‘contract workers.’ In the Court of Appeal of the Supreme Court of Victoria, Chernov JA described the practice as follows:

The organisers in Australia arranged for an appropriate visa to be issued to a [complainant] no doubt on the basis of false information being provided to the immigration authorities. Sometimes that required funds to be deposited temporarily in a bank account in the name of the [complainant] in order to ensure that her visa could be obtained. The woman was then flown to Sydney from Bangkok, ‘escorted’ by one or two people, usually an elderly couple, (so as not to arouse suspicion as to the [complainant’s] real purpose). Generally, once the complainant arrived here she was treated as being ‘owned’ by those who had procured her passage. The complainants would be met at the airport by a representative of the Australian owner, who would pay off the ‘escorts’ and take the [complainants] to an apartment or hotel in Sydney and keep her there until a decision was made as to the brothel at which she was to work (Note 31).

At trial, the co-accused, known as DS, gave evidence including negotiating with people in Thailand who recruited the women. DS would collect the women from the hotel and then contact the primary individual, Ms Wei Tang, who would accept them in her brothel as contract workers. The agreement was to the effect that Tang would take 70 percent of each of the victim women’s takings and the women, 30 percent of the takings. There would also be certain ‘free days’ whereby the complainants would effectively work *pro bono*. The Australian syndicate that purchased the complainants agreed to pay the sum of \$45, 000 which was described by DS as ‘the amount of money we purchased for this woman.’ (Note 32) Each of the five women acknowledged the debt of \$45, 000, \$20, 000 of which was to be paid to the recruiters in Thailand and for each customer serviced, the debt would in turn be reduced by \$50. In effect, then, the women earned nothing in cash whilst under contract but by working on the seventh ‘free’ day each week they would keep the \$50 per customer that would offset the contract debts (Note 33). It was usual that the complainants would work in Tang’s brothel six days per week and they would in effect service up to 900 customers over a period up to ‘four to six months.’ (Note 34) Two of the complainants ultimately worked off their debts and were thereafter paid for prostitution. The complainants lived in premises arranged by Tang whereupon they were lodged and fed and received medical attention. However, on receipt of knowledge of the trafficking of the women to Australia, the Government’s response was to remove the trafficked persons back to Thailand (Note 35). When the case was adjudicated in the County Court of Victoria, Tang was charged under the Commonwealth *Criminal Code* with five offences of potentially possessing a slave and five offences of intentionally exercising over a slave a power attaching to the right of ownership — namely the power to use them and this was considered, indeed, contrary to s 270.3 of the *Criminal Code*. Tang was thus sentenced to jail for ten years for offending the slavery provisions in ss 270.1 to 270.3. The decision was seen to be an important test case for the slavery laws and Tang became the first person in Australia convicted under the provisions. The trial judge was satisfied that the female victims were ‘financially deprived and vulnerable’ and found that they had entered Australia on visas that had been obtained illegally (Note 36). Furthermore, his Honour held that ‘while on contract, the complainant’s passports and return airfares were retained by the respondents’ and this was done so ‘the complainants could not run away.’ (Note 37) The trial judge acknowledged that the complainants ‘were well-provisioned, fed and provided for.’ (Note 38) Despite the fact that ‘complainants were not kept under lock and key’ they were ‘effectively restricted to the premises’ because of fear of visa offences (Note 39). The immigration department was the police. According to the trial judge,

effective control was maintained by way of fear of detection and the women were advised to tell false stories to immigration officials. On 'rare occasions' they ventured out (Note 40). In this respect, the trial judge found that their situation differed 'materially from' other sex workers and this was particularly the case in 'the days and hours they were required to keep.' (Note 41) Whether their 'owners' understood this was bound to lead to an appeal.

3.1 *The Court of Appeal: A Different Approach to the Slavery Provisions*

Consequently, Tang appealed. The Court of Appeal of the Supreme Court of Victoria upheld her submissions and quashed the convictions — thereby ordering a new trial on all counts. It found that the trial judge had misdirected the jury in relation to the term slavery and the Commonwealth Department of Public Prosecutions appealed the decision on two specific bases. The first basis was that the Court of Appeal erred in holding ss 270.1 and 270.3(i)(a) was within the constitutional legislative power of the Commonwealth. The second ground of appeal was that the Court of Appeal erred in finding that s270.3(i)(a) should be confined to instances of 'chattel slavery'. The Court of Appeal considered that the trial judge had erred in instructing the jury and added a requirement of 'specific knowledge as a fault element to slavery as an offence.' (Note 42)

3.2 *The High Court Resolution of the Two Differing Approaches to Slavery*

The matter then travelled onto the High Court of Australia which had then to resolve how best to approach the definition of slavery. As Kilodizner has observed:

...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 (Note 43).

3.3 *The Majority View in Tang*

In a 6:1 judgment (reminiscent of the 8:1 majority in *Dred Scott v Sanford* (Note 44)) the High Court of Australia (with now retired, Justice Michael Kirby, dissenting), ruled that the prosecution had made out the required elements of the offences and did not need further to prove what Mrs Tang subjectively understood or knew to be concerning her rights of 'ownership' over the five complainants. In essence, the Court declared that the prosecution did not need to prove that Tang subjectively knew that she, in effect, 'owned' the women and that they were, indeed, her 'slaves' *per se*. In this respect, the High Court adopted a more 'objective' test by holding that Tang exercised the critical powers to make each woman an object of purchase and had, indeed, the capacity to use the women in a 'substantially unrestricted manner' for the duration of their contracts (Note 45). Significantly, the Court found that Tang had the power to control and restrict the movements of the women and the power to use their services without commensurate compensation — and that these were all important *indicia or characteristics* of slavery. It was thus unnecessary to further demonstrate that Tang subjectively believed that she exercised powers of ownership over the women and that they were, in effect, her slaves. In considering the appeal that was lodged by the Director of Public Prosecutions, the Court first dealt with the twin concepts of 'slave' and 'slavery' for the purposes of the law. It held that the word 'slave' essentially takes its definition from Article 1 of the *International Convention to Suppress the Slave Trade and Slavery* and Article 7 of the 1956 *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*. In this respect, Chief Justice Gleeson with whom the other members of the majority agreed declared that the purpose of the section is 'to prevent forced labour from developing into conditions analogous to slavery.' (Note 46) His Honour emphasised the extent to which slavery as a condition essentially turns upon the exercise of power over a person and, in this respect, the Chief Justice emphasised the extent to which freedom is antithetical to slavery:

The kind of power that deprives a person of freedom to the extent that the person becomes a slave is said to be the exercise of any or all of the powers attaching to the right of ownership (Note 47).

His Honour thus held that:

...the capacity to make a person an object of purchase; the capacity to use a person and a person's labour in an unrestricted manner and entitlement to the fruits of a person's labour without compensation commensurate to the value of the labour (Note 48).

It is important to note here that Chief Justice Gleeson emphasised the objective *characteristics or indicia* of slavery and de-emphasised the requisite subjective 'mental' element in relation to slavery. This distinguished his Honour's reasoning from that of the Court of Appeal. This approach acknowledges the underlying systemic or socio-economic conditions under which trafficked women operate and which, in effect, reduces them to a *de facto* condition of slavery. It also aligns with an approach that emphasises an holistic treatment of sexual

trafficking of women as a human rights issue worthy of a social justice approach. Leishmann argues that the issue of sexual servitude and slavery involves social justice and should be addressed by focusing on *the objective circumstances* and *wider socio-economic context* in which the women are subject to trafficking:

The existence of trafficking in Australia can also be view as a response to Australia's historically hostile migration policies; the difficulty for low-skilled migrants to enter Australia for work; mandatory detention of asylum-seekers and offshore processing zones which have all made it difficult to migrate legally to Australia...' (Note 49)

In overturning the Court of Appeal's decision Chief Justice Gleeson cited the International Criminal Tribunal's decision in *Prosecutor v. Kumarac* (Note 50) where it had been decided that 'slavery' *per se* was not confined to 'chattel slavery' — or control of movement and physical environment — but also extended to more insidious or subtle forms of control including psychological control as well as coercion and threats of force. What was significant in his Honour's judgment was the gradation and progressions to the perpetration of slavery, sexual servitude, forced labour or exploitation. His Honour conceptualised all in terms of a continuum and as matters of degree or extent, holding that the:

...relationship between slavery and servitude, forced labour or debt bondage...some of the institutions and practices covered might also be covered by the Definition in Article 1 (Note 51).

Despite the conceptualisation of a continuum, a difference was ultimately recognised between worker exploitation, on the one hand and slavery *per se*, on the other. In this context, his Honour referred to the European Court of Human Rights decision in *Siliadin v. France* (Note 52) which dismissed a claim by a domestic worker that he was, in effect, being treated as a slave. Chief Justice Gleeson observed in *Tang*:

Although the applicant was, in the instant case, deprived of legal autonomy, the evidence does not suggest that she was held in slavery in the *proper sense*; in other words, that Mr and Mrs B exercised a genuine right of legal ownership over her, reducing her to the status of an object. It is important not to debase the currency of language, or to debase crimes against humanity by giving slavery a meaning that extends beyond the limits set by the text, context and purpose of the 1926 Slavery Convention (Note 53).

A distinction is drawn between slavery and worker exploitation which recognises the dangers of debasing or essentially sanitising the slavery and sexual servitude provisions in the *Criminal Code* through aligning them too closely with worker exploitation and unfair labour conditions. The differing but overlapping nuances are inevitably complex, even confusing. There is an attempt to acknowledge the distinctive elements of the slavery and sexual servitude offences and how they represent oppressive and frequently violent acts towards women and impose severe curtailments on the freedom of women that can in no way be perceived as being similarly to simply worker exploitation or unfair labour practices *per se*. His Honour then went onto emphasise that the provisions in the *Criminal Code* do not refer to essentially the *de jure* status of slavery — since the legal status of slavery has effectively been abolished; rather, they referred to the *de facto* condition of slavery. In this respect, Chief Justice Gleeson, in order to determine precisely whether the complainants were forced into a condition of slavery, emphasised the overriding need to focus on the objective circumstances and conditions or attributes attaching to their employment under *Tang* in Australia, thus:

First, s 270.1 refers to 'condition', not 'status or condition'. The explanation for the difference appears from s 270.2. There is no status of slavery under Australian law. Legal ownership of a person is impossible. Consequently s 270.1, in its application to conduct within Australia, is concerned with *de factos* slavery. In s 270.1, the reference to powers attaching to the right of ownership, which are exercised over a person in a condition described as slavery, is a reference to powers of such a nature and extent that they are attributes of effective (although not legal, for that is impossible) ownership. Secondly, the concluding words of the definition in s 270.1 ('including where such a condition results from a debt or contract made by the person') do not alter the meaning of the preceding words because it is only where 'such a condition' (that is, the condition earlier described in terms of the 1926 Slavery Convention) results that the words of inclusion apply. The words following 'including', therefore, do not extend the operation of the previous words but make it plain that a condition that results from a debt or a contract is not, on that account alone, to be excluded from the definition, provided it would otherwise be covered by it. This is a common drafting technique, and its effect is not to be confused with that of cases where 'including' is used as a term of extension (Note 54).

Whilst not confining the provisions in ss 270.1 to 270.3 to 'chattel slavery' *per se* Chief Justice Gleeson made the (arguably feminist) point that the 'commodification' of the complainants and their effective treatment as chattels to be sold and purchased purely for the purposes of prostitution were influential factors in reaching the conclusion that *Tang* and the co-accused, MS, were in contravention of the above provisions and that the complainants were, in effect, treated as slaves. That commodification was seen as a material factor when a tribunal of fact assesses the circumstances amounting to slavery. The emphasis on the existence of *de facto* as opposed to *de jure* slavery is consistent with Chief Justice Gleeson's emphasis on the objective socio-economic circumstances in which the women were placed. Hence it was considered that *Tang* was guilty of the slavery provisions.

Worthy of note, is the judgment of Chief Justice Gleeson regarding the analysis of the subjective mental element — or *mens rea* — that was required on the part of *Tang* and the co-accused, MS, to constitute the contravening of the provisions in the *Criminal Code*. The mental element became crucial to the overturning or reversal of the Court of Appeal's finding that the two accused persons were not guilty of the slavery offences for which they were convicted by the Trial Judge. Previously, in the Court of Appeal, Justice Eames held that it was a necessary pre-requisite or pre-condition for the accused to be found guilty of the slavery provisions that it be shown that they had a certain state of knowledge or belief vis-à-vis the complainants in that they subjectively believed that they were treating the women as 'chattels' or 'commodities' without intrinsic rights or entitlements and under the control and superintendence of *Tang* and the co-accused (Note 55). Presumably, Eames JA placed significance on *mens rea* in an attempt to distinguish the situation of slavery from that of harsh working conditions.

Chief Justice Gleeson did not share the view that the mental element can be used to distinguish slavery in favour of a more objective test. One had to focus on the extent of the powers that were being exercised over the complainants and not the subjective mind-set of the accused or 'the need for reflection by an accused person on the source of the powers that are being exercised.' (Note 56) So Chief Justice Gleeson held:

How is a jury to distinguish between slavery, on the one hand, and harsh and exploitative conditions of labour, on the other? The answer to that, in a given case, may be found in the nature and extent of the powers exercised over a complainant. In particular, a capacity to deal with a complainant as a commodity, an object of sale and purchase, may be a powerful indication that a case falls on one side of the line. So also may the exercise of powers of control over movement which extend well beyond powers exercised even in the most exploitative of employment circumstances, and absence or extreme inadequacy of payment for services. The answer, however, is not to be found in the need for reflection by an accused person upon the source of the powers that are being exercised. Indeed, it is probably only in a rare case that there would be any evidence of such consideration (Note 57).

In this respect, his Honour held that it was unnecessary for the prosecution to prove that *Tang* and the co-accused knew or believed that the women were slaves 'or even that she knew what a slave was.' Further, his Honour held that whether the powers that are exercised over a person are 'any or all of the powers attaching to the right of ownership', is a question of fact for a jury to decide (Note 58). His Honour held:

In this case, the critical powers the exercise of which was disclosed (or the exercise of which a jury reasonably might find disclosed) by the evidence were the power to make the complainants an object of purchase, the capacity, for the duration of the contracts, to use the complainants and their labour in a substantially unrestricted manner, the power to control and restrict their movements, and the power to use their services without commensurate compensation (Note 59).

His Honour further held that the jury's verdict was not unreasonable and that there was 'cogent' evidence to convict the accused (Note 60). In our view, this approach is essentially more justifiable inasmuch as it views the entire concept of the sexual trafficking of women and their sale into bondage in the context of broader systemic and socio-economic circumstances in which the complainants are disempowered and subject to severe exploitation that enables them to be treated as commodities and in which they, while they may have rights by virtue of residing in Australia, lack capacity to give them effect. What is clear from the literature is that the legal confines of what actually constitutes slavery are far from settled and the way in which other forms of exploitation relate to slavery is highly contested. Gleeson CJ held in *Tang* that slavery and various related concepts such as forced labour and debt bondage were not mutually exclusive concepts and 'those who engage in the traffic in human beings are unlikely to be so obliging as to arrange their practices to conform to some convenient taxonomy.' (Note 61)

3.4 The Dissenting Approach of Justice Michael Kirby in *Tang* - Exploitation and Consent

While Justice Kirby in dissent agreed with most of the reasons of the majority, he differed on the ‘critical issue’ of the mental element concurring with the opinion of Justice Eames JA on the Court of Appeal. In this respect, his Honour upheld the appeal by *Tang* and ordered a retrial ‘free from the legal errors of the second trial.’ (Note 62) In reaching his verdict that a fresh trial should in fact be ordered, Justice Kirby took cognisance of the fact that the complainant women had earlier been employed in the sex industry in their country of origin, Thailand. In this respect, they ‘were not tricked into employment in Australia on a false premise or led to believe that they would be working in tourism, entertainment or other non-sexual activities.’ (Note 63) Hence, his Honour held that the women had consented, in effect, to their trafficking and ‘as such, that would not constitute “slavery” offences under s 270.3(1)(a) of the *Code* if undertaken with appropriate knowledge and consent by an adult person.’ (Note 64) Justice Kirby also noted that each complainant was above the legal age of consent and that the brothel in Melbourne in which they worked as commercial sex workers was not illegal under Victorian law and had a licence, pursuant to the *Prostitution Control Act 1994* (Vic) (Note 65). And further, ‘...the complainants themselves participated in the subterfuge of pretending to visit Australia on a tourist visa.’ (Note 66) In Justice Kirby’s view, it was significant that the complainant women enjoyed a ‘free day’ each week and that each was credited with a notional sum of \$50 per customer in the reduction of their outstanding debt. In this respect, Justice Kirby thought it very pertinent that two of the women who paid off the debts, *continued* to work in the brothel. This was relied upon by his Honour as contradicting a relationship that could be characterised as ‘slavery’ in any meaningful sense of the word.

Most significantly Justice Kirby sought to emphasise a distinction between slavery *per se* and other employment conditions, such as exploitative and oppressive work conditions and other socially unjust and inequitable work relations which (whilst unfair and in some cases illegal) did not amount to slavery *per se*. In this respect, his Honour noted that the central or key factor in facilitating a distinction between exploitative work conditions and slavery rested on the subjective fault element of intention of the accused — or *mens rea* of the accused — here, in agreement with the Court of Appeal:

Given the nature of ‘slavery’, as understood in international law, there is a great need to not over-extend ‘slavery offences’ to apply to activities such as seriously oppressive employment relationships. The approach adopted by the Court of Appeal is more consistent with such an aim. The approach of the majority in this Court is not (Note 67).

With this line of argument, Justice Kirby is seeking to ensure that the gravity of the offence of slavery is preserved while also of the view that to hold otherwise would be to drive slavery underground. The approach is consistent with his adherence to the principles of international law as sources of interpretation. Whereas the opposing view drew a distinction between slavery and exploitative work conditions, this can be determined as Chief Justice Gleeson observed, through taking cognisance of the conditions under which the complainants were working. The debts which they had to work off, their essential treatments as ‘commodities’ in which they were bought and sold, the restrictions imposed on the freedom of their movement, and the close control and superintendence of the women by *Tang* and the co-accused, MS, were all key indicia that the women were, in effect, owned by *Tang* and that they operated in conditions of *de facto* slavery.

The key difference in Justice Kirby’s approach concerns *mens rea*: he sought to import that *Tang* consciously was aware that she “owned” the women and that they were, indeed, her ‘slaves’. Does this, however, incorporate an unnecessary high requisite mental element on *Tang*’s part that she be aware of the legal concept of slavery so as to render her criminally culpable for having slaves in her possession? Is such an approach arguably inconsistent with the 1926 *Slavery Convention* and the 1956 *Supplementary Convention* from which the provisions of the Commonwealth *Criminal Code* are drawn?

From Justice Kirby’s dissent, one may argue that *Tang* was not consciously aware of the fact that she was keeping the women in ‘slavery’ and hence should not be found guilty of the slavery offences. According to his Honour this reasoning was consistent with the need to prove the requisite mental element of ‘intention’ which was required under the provisions of ss 270.1 to 270.3. However, even if it could not be proved that *Tang* had consciously turned her mind to the fact that she was keeping the women in conditions of slavery, if she were aware generally of the conditions in which the women were operating — and this was proved to the satisfaction of Chief Justice Gleeson — then *Tang* was guilty of the slavery provision irrespective of whether she had, in actual fact, turned her mind to the possibility that the women indeed were her slaves. In this respect, in our view, Chief Justice Gleeson’s ‘objective’ test may be preferable to Justice Kirby’s focus on the subjective mental element of *Tang*. Furthermore, in our view, Justice Kirby’s focus on the fact that the complainants already

worked in the sex industry in Thailand and essentially ‘consented’ to being trafficked and sold into prostitution is problematic. However, we recognise that Justice Kirby’s approach appears more consonant with the views of Dougnan in her analysis of the worst forms of child labour and the need to interpret them in light of the history of rural migration patterns. The issue of consent is always difficult in such contexts where desperate people lack agency and simply seek a better life, as is the case with many if not most immigrant and undocumented workers (Note 68). Focusing on the objective evidence, the women were directly trafficked into Australia; effectively treated as ‘commodities’ and finally sold to *Tang* who closely controlled their activities in working in her brothel. From an Australian perspective, this could be regarded as the exercise of ‘ownership’ over the women complainants and being sold into conditions amounting to ‘slavery’. Yet much modern employment is characterised by such levels of ‘ownership’ even if not under lock and key: *Kovacs* makes clear it may be even more so in the cyber age; and this is thus not a historically contingent and familiar use of the word ‘slavery’. Rather, it is one that fits somewhat uncomfortably in the contemporary western employment world, which leads to the question whether the reasoning of Justice Kirby in dissent may have more resonance for the situation of the women, looking more at the ‘sweatshop’ core of their working conditions, their bondage, yet sometime capacity to assert some control, and given they worked in Australia. These issues have been raised only recently in the context of Cambodian garment factories and short-term employment (Note 69).

4. The Contribution of *Tang* to Slavery Jurisprudence in Australia

While on this occasion, on balance, we do not entirely share the dissenting approach of former High Court judge and great dissenter, Michael Kirby (Note 70), we do agree that there is a related need to be reflect upon distinctions between slavery and servitude, given the complex political and social background to situations such as that in *Tang*: in combination the judgments of the High Court draw attention to this broader picture depicted by Dougnon:

Indeed, certain forms of suffering – death in the course of the voyage, illegal detention, forced labour, torture, discrimination, prostitution, criminality, the absence of liberties and legal protections – are at the heart of the discussion on globalisation and migration in Southeast Asia during the period of the ‘economic miracle.’ (Note 71)

The Taney judgment in *Dred Scott* (Note 72) alerts us to the concept of the slave as property. The dissenting view in *Tang* alerts us further to the ever-presence of seriously oppressive employment relations, although as Burn has clarified, the majority of the High Court too, ‘made it absolutely clear that harsh employment conditions are not necessarily slavery.’ (Note 73) The approach in *Tang* has been widely analysed as an ‘expansionary’ one as the women were not required to be under total ‘lock and key’ control in order to prove the offence of slavery – an important contemporary development (Note 74). In a recent analysis of a related case, *McIvor and Tanuchit* (Note 75), Schloenhardt and Lynch note that here the exploitation and abuse of the victims was actually ‘markedly worse’ (Note 76) than in *Tang*, but that *Tang* has attracted much of the scholarly and media comment, due to its contribution to broadening the parameters of slavery to de facto and not just de jure slavery. The authors suggest: ‘As such the case’s contribution to slavery jurisprudence is significant....’ (Note 77) Certainly, two other cases, both analysed by Schloenhardt and colleagues, related to *Tang*, must therefore be considered. The first is *R v Kovacs* (Note 78), a case of domestic servitude, which has been viewed by Schloenhardt and Jolly this way:

Around the world, the fight against trafficking in persons has been a ‘war’ against prostitution for much of the 20th century. Government policy, law enforcement and media coverage of the issue in Australia have been preoccupied with stories about ‘sex slaves’ and the lurid nature of the prostitution industry. Indeed, the relevant case law in Australia tends to support this view of the issue, with the majority of cases involving sexual exploitation in legal and illegal brothels. Other forms of trafficking in persons in Australia remain largely overlooked and have not been addressed systematically by relevant policies, legislation, and enforcement action (Note 79).

By this view there is a need in the contemporary context to accept that courts inevitably struggle when confronted with modern slavery laws – yet cases such as *McIvor and Tanuchit* demonstrate the extent to which ‘slavery is not a crime of the past.’ They suggest that a practical difficulty can be found in the unclear distinction between sexual servitude and slavery. The case in fact might have been a classic (and in their view, ‘more easily made out’) one of sexual servitude but the case that was brought was one of slavery (Note 80). It inevitably prompt some ‘difficulties’ when confronted by the courts. It may be correct that there has been a focus on brothels as the epitome of modern slavery in a country not well versed in its accoutrements. But that may provide a springboard to reflection upon many unresolved issues, including the potential of the renewed

expansionary interpretation of 'slavery' in *Tang*. For example, to what extent will other forms of harsh labour constitute slavery? What is the difference between exploitation and slavery? And as the cover story of *The Christian Science Monitor* asked recently: to what extent should we be concerned that:

'Global human trafficking, what the State Department calls "modern day slavery," sometimes gets overlooked in the outrage about the smaller domestic sex trafficking problem.' (Note 81)

A further and critical question in Australia, therefore, concerns perhaps the clearest example: that of Aboriginal labour; the history of which has been fraught in recent times with conflict and contestation over the historical narrative and in relation to which many would still argue their treatment amounted to being reduced to property while in the modern context they still lack comprehensive property rights, and that which has been recognized – native title – has been bedeviled by demands of an exacting and legally imposed, problem of proof.

5. Aboriginal Labour and the Slavery Debate in Australia

An important contribution to the debate over slavery in Australia is that of Stephen Gray, who has persuasively analysed Aboriginal labour in the Northern Territory as slavery. As Gray points out by way of introduction, to his 2007 article, Indigenous people described their working and living conditions, in evidence to the Senate Standing Committee on Legal and Constitutional Affairs report into Indigenous stolen wages '...in terms evoking the notion of slavery', although the Stolen Wages report itself did not delve into the relevance of the concept of slavery (Note 82). In Gray's view, the with-holding of wages was encased within a general 'protective' legislative intention (Note 83). This protective intent might militate against 'slavery' arguments, although there have been some related arguments in the 'stolen wages' context characterising the with-holding as an incident of slavery (Note 84). Certainly the use of the word 'slavery' in this context is controversial and has been disputed by Jennifer Clarke, who argues that while labour provisions in Aboriginal Protection Acts possessed some of the hallmarks of US slavery codes, 'none reduced Aboriginal Australians to a form of property with no rights the white man was bound to respect.' (Note 85) Justin Malbon, however, is of the view that if one accepts a broad view of the term 'slavery' ('in the way Sepulveda employed the term, influenced by Aristotle' (Note 86)), and not restrict it to the United States era prior to the Civil War, whereby slaves were 'effectively chattels who can be bought and sold' then denial of the 'substantive attributes of citizenship' can mean that the indigenous people of Australia were treated, although not consistently so, as a slave class (Note 87). Part of that enslavement was the assignment of 'a separate legally defined status, which laid the foundations for the bureaucratic machinery for maintaining their enslavement.' (Note 88) However there are vexed political problems with this analysis. As Atwood and others have noted for the term 'genocide' in the Indigenous context, to apply the label of slavery to the past practices concerning Aboriginal workers, could ignite negative passions that have been demonstrated in the challenges to the prevailing historical narrative (Note 89). Prominent (Note 90) Aboriginal scholar and activist Marcia Langton prefers to use the term 'unfree labour' when speaking of such exploitation.

The issue of whether there are no rights the white man is bound to respect is demonstrated by the recent successful attempt by several Indigenous leaders and activists to take *Herald Sun* journalist and prominent blogger, Andrew Bolt, to task under a provision in the *Racial Discrimination Act 1975* (Cth). (Note 91) Judge Bromberg in the Federal Court handed down a judgment scathing of Bolt's journalism and highly sympathetic to the plaintiffs, and it appears that Bolt's employer, the *Herald Sun*, decided against an appeal, perhaps hoping Bolt will become a martyr to free speech (Note 92). The issue of property is equally complex, as while it is no longer the case that Australian Indigenous people are treated as property *per se*, it remains the case that they uniquely may be deprived of property entitlements that other members of society possess. Economic imperatives were much more at work in the complex Australian situation historically, just as they are clearly at work in the cases of *Tang* and *Kovacs*:

'The complexities of racism can be illustrated by the Australian experiences with a particular form of coerced labor, indentured labor from the Pacific Islands, used to produce sugar in Queensland between 1870 and 1900. Racism at first led to the purchase (or, some claim, kidnapping) and importing of contract labor; then, when a generation or so later a white Australia was desired, racism meant keeping the islanders out, forcing the return of those already there, and paying subsidies to white producers of sugar. Here, clearly, racial attitudes persisted, but without leading to an unvarying set of actions over time regarding labor institutions. And in these debates, there were even some estimates introduced of the probable costs to white Australians of the second racist policy, exclusion, because of the higher price of sugar necessarily paid to support production by whites.' (Note 93)

6. Conclusions

As a means of keeping the comparative debate about transatlantic/transpacific slavery alive, we canvass the nature of oppressive work practices in the modern world and entertain the question of whether much Aboriginal employment in Australia last century might also be conceptualised as a form of slavery. Our purpose is to mirror some of the arguments expressed by Lovejoy, '...not limited to a study of the trans-Atlantic slave trade but considers the impact of all forms of slavery on the social, economic, and political development of the continent.' (Note 94) By this view, it is illustrative to consider Australia and transpacific slavery in the context of the transatlantic while emphasising that modern Australian slavery jurisprudence is all about disadvantaged Asian workers, usually women, who are brought to the shores of the 'lucky country'. Their employment conditions are then used to deny them basic entitlements such as maternity leave, sick leave and other attendance benefits. The extent to which such deprivation constitutes slavery is however, as Michael Kirby insisted in *Tang*, problematic. It is the total lack of rights that others must respect that is of the hallmark of slavery. Whether transatlantic or transpacific, the evils of slavery and imperilment of human dignity and life echo – but did the situation in *Tang* truly amount to one of slavery? We commenced with the decision of the US Supreme Court in *Dred Scott v Sanford* and took a contemporary Australian test case as our comparative focus. Both concern the extent to which rights can be brought about by judicial interpretation and demonstrate the historical role of the judiciary in shaping our civil rights. We have sought to use the High Court judgments in the crucial test case in *Tang* as a springboard for consideration of the reach of slavery in the modern context, in an advanced democracy like Australia and beyond.

Nuances exist in the reasoning of all three Court levels in that case, as evidenced in the differences between the approach of the majority in the High Court's judgment and that of the renowned dissenting judge, Michael Kirby, whose contribution to Australian jurisprudence remains to be fully measured and acknowledged. On this particular occasion in contrast to others, we are not convinced of the view that Justice Kirby's approach is to be preferred to that of the majority, with which he was largely in agreement. However, the wider impact of the judgments taken in combination, lies in the need to be alert to the many oppressive work practices that proliferate throughout Australasia, and are also worthy of the law's attention, albeit that while being oppressive, they may not constitute contemporary understandings of slavery, but constitute in particular the taking of advantage of workers who lack the capacity to defend themselves.

Which leads to our final point as to the extensive exploitation through forms of "ownership" of women and child workers, replete throughout Australasia and the wider world: at the narrow level of *Tang* itself, as Chief Justice Gleeson pointed out for the majority, the women who worked for Tang were effectively and objectively 'owned' by Tang. That is seen as the distinguishing feature that translated this particular exploitation into contemporary slavery. In terms of lack of rights, in the sweep of history, such ownership coheres with interpretations of some hallmarks of Aboriginal labour in Australia in the late nineteenth and during the twentieth century (particularly of Aboriginal women and young girls), as slavery if we accept this contemporary approach to slavery. The difficulty is that comparative historical records reveal such different understandings of slavery: is the core of it that the brothel-worker has no autonomy or is that more an accoutrement of modern exploitative work practices? These differing slavery jurisprudences make imperatives to acknowledge, characterise and reflect upon modern slavery only that much greater: but it is also important to remember that slavery is different, by matter of degree, from servitude. It is disentangling the differences in meaning that is so jurisprudentially challenging, but perhaps former High Court judge Michael Kirby has presaged one positive step forward in evaluating modern human servitude: and this central point warrants reiteration by way of conclusion; there is a need to disentangle the legal parameters to slavery, servitude and suffering; both human and animal. *Tang* made a significant contribution, and while it did not succeed at this time, it is worth reflecting that the arguments of PETA about the Sea World orcas - which might be transposed to the suffering of horses in the Grand National - may presage new ways of thinking about slavery over the next few decades, given that contemporary slavery jurisprudence is as yet only in its infancy.

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Notes

Note 1. *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc v. Sea World Parks & Entertainment, Inc.*, 2012 WL 399214.

Note 2. *R v Tang* (2008) 237 CLR 1.

Note 3. Model Criminal Code Officers Committee, *Model Criminal Code – Offences Against Humanity – Slavery* (1998) 31.

Note 4. Frances Simmons and Jennifer Burn, 'Evaluating Australia's response to all forms of trafficking: Towards rights-centred reform' (2010) 84 *Australian Law Journal* 712.

Note 5. Ibid 712.

Note 6. Andreas Schloenhardt and Jarrod Jolly, 'Honeymoon from hell: human trafficking and domestic servitude in Australia' (2010) 32 *Sydney Law Review* 671, 677.

Note 7. Australia, Australian Institute of Criminology, *Trafficking of women for sexual purposes* (Fiona David), Canberra, 2008, 39.

Note 8. Jennifer Burn, 'Combating Human Trafficking' (2005) 29 *Australian Law Journal* 543.

Note 9. Coalition against Trafficking in Women [<http://www.catwinternational.org/>] accessed 5 July 2011.

Note 10. Simmons and Burn, above n 4.

Note 11. Isaie Dougnon, 'Child Trafficking or Labour Migration?: A Historical Perspective from Mali's Dogon Country' (2011) 2(1) *Humanity* 85.

Note 12. Reynolds, H. (1995) *Fate of a Free People: A Radical Re-examination of the Tasmanian Wars* (Ringwood: Penguin, Australia).

Note 13. Stephen Gray, 'The Elephant in the Drawing Room: Slavery and the "Stolen Wages" Debate' (2007) 11(1) *Australian Indigenous Law Review* 30, 31.

Note 14. Simmons and Burn, above n 4.

Note 15. Marianna Leishman, 'Human Trafficking and Sexual Slavery: Australia's Response' (2007) 27 *Australian Feminist Law Journal* 193, 195.

Note 16. *Ruddock v Vadarlis* (2001) FCA 1329.

Note 17. Leishman, above n 15, 196.

Note 18. Sarah Steele, 'Trafficking in People' (2007) 32 *Alternative Law Journal* 18.

Note 19. Project Respect, 'One Victim of Trafficking is One Too Many: Counting the Human Cost of Trafficking', Cases of Trafficking in Australia Documented in Feb/March 2004, 2004.

Note 20. UNESCO Trafficking Statistics: Australian Official Sources, New South Wales Police 1 Jan 2001 - 30 Aug 2002.

Note 21. Australia, Department of Parliamentary Services, *People trafficking: an update on Australia's response* (Janet Phillips) Canberra, August 2008, 3.

Note 22. Parliamentary Joint Committee on the Australian Crime Commission, 'Supplementary Report to the Inquiry into the Trafficking of Women For Sexual Servitude', Parliament of the Commonwealth of Australia, Canberra, August 2005, 2.

Note 23. Steele, above n 18, 19.

Note 24. Parliamentary Joint Committee, above n 22, 5.

Note 25. Australia, Australian Institute of Family Studies, Lara Fergus, *Trafficking in Women for Sexual Exploitation* (Lara Fergus, Australian Centre for the Study of Sexual Assault), Melbourne, June 2005.

Note 26. Ibid 2.

Note 27. Barbara Sullivan, 'Can Women Be Raped?' Paper Presented to the Australasian Political Studies Association Convention, University of Tasmania, Hobart, 29 Sep-1 Oct 2003, 3.

Note 28. Ibid 6.

Note 29. Dougnon, above n 11, 86-87.

Note 30. Model Criminal Code Officers Committee, *Model Criminal Code – Offences Against Humanity – Slavery* (1998) 31 citing M. Cherif Bassiouni, 'Enslavement as an International Crime' (1991) 23 *NYJ Int Law & Politics* 445, 459.

Note 31. *R v Tang* (2008) 237 CLR 1 [7].

Note 32. *Ibid* [8].

Note 33. *R v Tang* (2008) 237 CLR 1 [8] – [9].

Note 34. *Ibid* [14].

Note 35. Chris Ellison, 'Stepping Up the Fight Against Slavery', *The Age*, Melbourne, 27 Oct 2003.

Note 36. *R v Tang* (2008) 237 CLR 1 [15].

Note 37. *Ibid* [16].

Note 38. *Ibid*.

Note 39. *Ibid*.

Note 40. *Ibid*.

Note 41. *Ibid* [19].

Note 42. Irina Kilodizner, '*R v Tang*: Developing an Australian Anti-Slavery Jurisprudence' (2000) 31(3) *Sydney Law Review* 487, 491.

Note 43. *Ibid* 490.

Note 44. 60 U.S. 393 (1857).

Note 45. *R v Tang* (2008) 237 CLR 1 [18].

Note 46. *Ibid* [25].

Note 47. *Ibid*.

Note 48. *Ibid*.

Note 49. Leishman, above n 15, 195.

Note 50. *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Judgment), IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001.

Note 51. *R v Tang* (2008) 237 CLR 1, [28].

Note 52. *Siliadin v. France*, 73316/01, Council of Europe: European Court of Human Rights, 26 July 2005.

Note 53. *R v Tang* (2008) 237 CLR 1 [29].

Note 54. *Ibid* [33].

Note 55. *R v Tang* (2008) 237 CLR 1 [42].

Note 56. *Ibid* [50].

Note 57. *Ibid* [56].

Note 58. *Ibid* [56].

Note 59. *Ibid* [50].

Note 60. *Ibid* [56].

Note 61. *Ibid* [29].

Note 62. *Ibid* [70].

Note 63. *Ibid* [72].

Note 64. *R v Tang* (2008) 237 CLR 1 [72].

Note 65. *Ibid* [78].

Note 66. *Ibid* [79].

Note 67. *Ibid* [117] per Kirby J.

Note 68. Dougnon, above n 11, 88.

Note 69. Report from Yale Human Rights Team Finds Cambodian Garment Factories Use Short-Term Employment Contracts to Exploit Workers (August 3, 2011), 2011 Allard K. Lowenstein International Human Rights Clinic, Yale Law School.

Note 70. As observed in the Prologue to his biography, AJ Brown, *Michael Kirby: Paradoxes and Principles* (The Federation Press, Sydney: 2011). For a personal explanation and resounding defence of his approach to judicial interpretation, see The Honourable Michael Kirby, 'Judicial Activism? A riposte to the counter-reformation' (2004) 24 *Australian Bar Review* 219-234. We have argued elsewhere, in the context of tort law that Michael Kirby's 'communitarian' view of this area of law is to be preferred to the current prevailing High Court orthodoxy of 'personal autonomy'. For an example of such an approach to the law of negligence, see Justice Kirby's judgment in the 'alcohol liability' case of *Cole v South Tweed Heads League Football Club Ltd* (2004) 207 ALR 52; Linton A, 'Commercial liquor liability in Australia : Give me 'two shots' of personal responsibility and a watered down duty of care' (2012) 24(1) *Bond Law Review* 1.

Note 71. Dougnon, above n 11, 91.

Note 72. *Dred Scott v Sanford* 60 U.S. 393 (1857).

Note 73. Schloenhardt and Jolly, above n 6; citing Jennifer Burn, above n 8.

Note 74. Schloenhardt and Jolly, above n 6, 684.

Note 75. [2010] NSWDC 310

Note 76. Andreas Schloenhardt and Laura-Rose Lynch, 'McIvor and Tanuchit: A Truly 'Heinous' Case of Sexual Slavery' (2012) *UNSW Law Journal* 175 at 176

Note 77. Ibid.

Note 78. *R v Kovacs* [2009] 2 Qd R 51.

Note 79. *R v Kovacs* [2009] 2 Qd R 51; as cited in Schloenhardt and Jolly, above n 6.

Note 80. Schloenhardt and Lynch, above n. 76, p. 191

Note 81. Stephanie Hanes, 'Human Trafficking: a misunderstood global scourge' *The Christian Science Monitor*, September 10, 2012 (cover story)

Note 82. Stephen Gray, 'The Elephant in the Drawing Room: Slavery and the Stolen Wages Debate' (2007) 11(1) *Australian Indigenous Law Review* 30.

Note 83. Stephen Gray, 'Holding the Government to Account: The "Stolen Wages" Issue, Fiduciary Duty and Trust Law' (2008) 32(1) *Melbourne University Law Review* 115.

Note 84. Victoria Haskins, '& so we are "Slave Owners"!': Employers and the NSW Aborigines Protection Board Trust Funds' (2005) 88 *Labour History* 147.

Note 85. Clarke, 2009, 86

Note 86. Justin Malbon, 'The Extinguishment of Native Title: The Australian Aborigines as Slaves and Citizens' (2003) 12 *Griffith Law Review* 310, 315.

Note 87. Ibid.

Note 88. Ibid 322. In an excellent analysis of Malbon's argument, Roshan de Silva Wijeyeratne and John Strawson suggest that 'The history of legislation at both Commonwealth and state levels that deals with Aboriginal Australians reveals an anxious dynamic that can never quite situate the Indigenous as full citizens or slaves/quasi-slaves.': see Roshan de Silva Wijeyeratne and John Strawson, 'Tracks and Traces of the Law' (2003) 12 (2) *Griffith Law Review* 157, 161.

Note 89. Bain Attwood, *Telling the Truth About Aboriginal History* (Allen and Unwin, Sydney: 2005) 88.

Note 90. Marcia Langton, *ABC Boyer lecture*, Sunday September 18, 2012, Brisbane, Queensland, Australia.

Note 91. *Eatock v Bolt* [2011] FCA 1103. The Bolt case has provoked considerable comment on free speech. Justice Bromberg in the Federal Court determined that Bolt had both written factually incorrect statements and further omitted relevant facts, when he tackled the identity of the claimants and claimed that they decided to identify as Aboriginal in order to gain benefits available only to Aboriginal people. The offending articles pivoted around the claims of opportunism and besides words penned by Bolt were provocatively titled inter alia, 'It's hip to be black, and had photos of the Aboriginal targets that appeared to make them look 'white'. Justice Bromberg, in an extensively detailed judgment, considered the statements as required under the *Racial Discrimination Act* 1975

(Cth) as reasonably likely to offend, insult, humiliate or intimidate on the basis of race, and further that they had done so in the case of the several claimants. Recently another Aboriginal man, Shane Mortimer, launched another claim under this legislative provision, in relation to a blog comment from former University of Canberra vice-chancellor about attending the 'now obligatory' welcome to country, and suggesting that Mr Mortimer 'looks about as Aboriginal as I do.' Andrew Bolt responded to this development in comments in *The Telegraph* on 13 November 2012 that this provided 'more reason for Abbott to repeal the Race Discrimination Act.'

Note 92. John van Tiggelen, 'Gotcha!' *The Sydney Morning Herald*, November 19, 2012, p.18.

Note 93. Stanley L. Engerman, 'Slavery at Different Times and Places' (2000) 105(2) *American Historical Review*.

Note 94. Paul Lovejoy, *Transformations in Slavery - A History of Slavery in Africa* (Cambridge University Press, New York: 2011).