HUMAN TRAFFICKING WORKING GROUP
Dr Andreas Schloenhardt, TC Beirne School of Law
Dr Melissa Curley, School of Political Studies & International Relations

The University of Queensland
Brisbane Qld 4072; Australia
www.law.uq.edu.au/humantrafficking

CASE REPORT (CRIMINAL)

Case name	***R v Wei Tang***
Plaintiff	The Crown
Defendant	**Name:** Ms Wei Tang **Citizenship:** Unknown
Reported in	**Third appeal (VSCA):** *R v Wei Tang* (2009) 23 VR 332; (2009) 233 FLR 399; [2009] VSCA 182. **Second appeal (HCA):** *R v Tang* (2008) 237 CLR 1; (2008) 249 ALR 200; (2008) 82 ALJR 1334; (2008) 187 A Crim R 252; [2008] HCA 39. **First appeal (VSCA):** *R v Wei Tang* (2007) 16 VR 454; (2007) 212 FLR 145; (2007) 172 A Crim R 224; [2007] VSCA 134; *R v Wei Tang* [2007] VSCA 144 **Sentencing decision (VCC):** *R v Wei Tang* [2006] VCC 637
Primary charge(s)	Possessing a slave: s 270.3(1)(a) *Criminal Code* (Cth) Exercising control over a slave: s 270.3(1)(a) *Criminal Code* (Cth)
Case categorisation	**Act:** Recruitment; transportation; transfer; harbouring; receipt **Means:** Threat or use of force or other forms of coercion; abduction; fraud; deception; abuse of power or a position of vulnerability; giving or receiving payments or benefits to achieve the consent of a person having control over another person **Purpose:** Exploitation of the prostitution of others or other forms of sexual exploitation; slavery or practices similar to slavery **Industry/Sector:** Commercial sexual exploitation **Form:** Transnational
Victim details	**Number of victims:** 5 **Method of entry:** Tourist visa **Gender(s):** Female **Age(s):** Adult **Place, country of origin:** Thailand
Current status (Sept 13, 2011)	Convicted and sentenced (nine years' imprisonment with a non-parole period of five years)
Related cases	*R v DS* (2005) 153 A Crim R 194; 191 FLR 337; [2005] VSCA 99: criminal proceedings against DS, an employee of Wei Tang (see separate case report) *VXAJ v MIMIA* [2006] FMCA 234: immigration case involving one of the victims of Wei Tang (see separate case report)

Facts and Background	
Date(s) of offending	August 2002 - May 2003
Location(s)	Melbourne, Victoria

The case against Melbourne brothel owner Ms Wei Tang ('Ms Tang') was the first jury conviction under Australia's *Criminal Code* (Cth) slavery offences. Ms Tang was accused of having purchased five women from Thailand to work in debt-bondage conditions in a legal brothel called 'Club 417' in Fitzroy. The women had previously worked in the sex industry in Thailand and were aware that they would be working in brothels in Australia. They arrived in Australia separately between August 2002 and May 2003 on validly obtained tourist visas, although it was not disclosed in the visa application that the true purpose was to work. It is unclear how much of the visa application process was understood by the victims.[1] On the flight from Bangkok to Sydney the victim would usually be 'escorted' by an elderly couple, so as to avoid suspicion. On arrival in Australia a representative of an Australian 'owner' would meet the victim and 'escorts'. The representative would pay off the 'escorts' and transport the victim to a hotel where she was kept until a decision was made as to which brothel she was to work at.

Ms Tang owned the licensed brothel 'Club 417' and held a 70 per cent interest in a syndicate which bought four of the five women with the remaining 30 per cent held by a co-accused, Ms DS, who negotiated with recruiters in Thailand, and her associates. Other 'owners' brought the fifth woman to Australia. She worked in another brothel and was subsequently moved to 'Club 417'. When the women testified against Ms Tang, they explained that they had voluntarily entered into agreements with a broker in Thailand, and owed between AUD 40,000 and 45,000 to the owner of these 'contracts'. Ms Tang had purchased these contracts from the Thai recruiter for AUD 20,000. Repayments of this AUD 20,000 formed the basis for the charges of slavery that were brought against Ms Tang and her employee, Ms DS.[2]

The debt owed to Ms Tang had to be repaid by the victims by working in a brothel six days a week over a period of four to six months. This required serving up to 900 clients. Customers at 'Club 417' were charged AUD 110. Ms Tang retained AUD 43 in her capacity as brothel owner plus 70 per cent of the remaining AUD 67 for four of the women and DS and her associates received 30 per cent. In relation to the fifth woman, after Ms Tang took her AUD 43 fee, the other AUD 67 was divided between her owners. The victims were offered to work on their free day and keep the AUD 50 otherwise used to pay the debt.

Whilst the women were not usually under 'lock and key' there were a number of factors that served to prevent them from escaping; they had little money and limited English, their passports were retained, their visas had been obtained illegally, they feared detection by immigration authorities, and they worked long hours.[3] There was no other evidence of physical maltreatment by the accused. It was conceded that two of the five women had indeed repaid their debts, had their passports returned and had voluntarily stayed on to work as paid sex workers.

---

1 *R v Wei Tang* (2007) 16 VR 454 at [5].

2 See further, *R v DS* (2005) 153 A Crim R 194. See separate case report at www.law.uq.edu.au/humantrafficking

3 *R v Tang* (2008) 237 CLR 1 at [15] – [18].

Co-Accused

The present case file focuses on the criminal proceedings against Ms Tang, however it should be noted that two other persons, Ms DS and Mr Paul Pick, were charged in relation to the syndicate that Ms Tang operated.

(i) Ms DS

Ms DS, a Thai national, was an employee of Ms Tang who has been convicted for offences relating to sexual slavery.[4] The initials DS are used to identify the accused due to a suppression order placed on her name, after she gave evidence against her employer. She was herself a previous victim of Ms Tang and had chosen to stay with her trafficker after she had repaid her contract debt. She had worked under similar circumstances in the sex industry in Hong Kong. Ms DS was responsible for supervision of the contract workers at 'Club 417'. She also moved money between Ms Tang and an organiser in Sydney, known as Sam.[5]

Ms DS pleaded guilty to two counts of slave trading (s 270.3(1)(b) *Criminal Code* (Cth)) and three counts of possessing a slave (s 270.3(1)(a)). The conviction for possession of a slave was in respect of Ms DS's work in escorting and supervising three contract workers, whereas the conviction for slave trading was based on her taking possession of the women once they arrived in Australia.[6] Ms DS successfully appealed against her sentence in January 2005 and was resentenced to six years imprisonment, with a non-parole period of two and a half years.[7]

For further information see the separate case file on Ms DS at www.law.uq.edu.au/humantrafficking

(ii) Mr Paul Pick

Mr Paul Pick was the manager of licensed brothel 'Club 417' and also acted as driver of the victims. He was originally tried with Ms Tang (see below) but was acquitted on eight charges, while the jury could not decide on a further two. Mr Pick successfully applied for a nolle prosequi on the remaining two charges.[8]

Summary of Criminal Proceedings Against Ms Tang

In 2006, following a failed trial in 2005, Ms Tang was convicted on five counts of possessing a slave and five counts of using a slave contrary to s 270.3(1)(a) *Criminal Code* (Cth). The Crown case was that, between August 2002 and May 2003, Ms Tang possessed as slaves five women of Thai nationality, who came to Australia pursuant to agreements entered in Thailand for them to work as prostitutes in Australia. Ms Tang

4 *R v DS* (2005) 153 A Crim R 194. See separate case report at www.law.uq.edu.au/humantrafficking.
5 *R v DS* (2005) 153 A Crim R 194 at [7].
6 *R v DS* (2005) 153 A Crim R 194, [8] – [10].
7 See further, *R v DS* (2005) 153 A Crim R 194.
8 *R v Wei Tang* (2007) 16 VR 454 at [17]. A nolle prosequi is an entry made on the record, by which the prosecution declares that it will not proceed against the defendant. Cf. Natasha Robinson, 'Second sex slave jury fails to deliver verdict', *The Australian* (Sydney), 28 May 2005, 8.

was sentenced to a total effective sentence of 10 years' imprisonment with a non-parole period of six years: *R v Wei Tang* [2006] VCC 637. The Court of Appeal quashed the convictions and ordered a retrial: *R v Wei Tang* (2007) 16 VR 454. On the Director of Public Prosecutions' appeal, the High Court set aside the order, reinstated the convictions and remitted the appeal against sentence to the Court of Appeal: *R v Tang* (2008) 237 CLR 1. Ms Tang's cross-appeal in the High Court was also unanimously dismissed: *R v Tang* (2008) 237 CLR 1. The Court of Appeal allowed Ms Tang's appeal against sentence and resentenced her to nine years' imprisonment with a non-parole period of five years: *R v Wei Tang* (2009) 23 VR 332.

First Trial	
Court	Melbourne County Court
Citation	Unreported
Trial judge	Judge McInerney
Important dates	**Trial:** April 12, 2005 – May 27, 2005 **Jury discharged:** May 27, 2005
First charge	**Charge/legislative source:** Five counts of possessing a slave: s 270.3(1)(a) *Criminal Code* (Cth) **Verdict:** Jury unable to reach a verdict
Second charge	**Charge/legislative source:** Five counts of exercising control over a slave: s 270.3(1)(a) *Criminal Code* (Cth) **Verdict:** Jury unable to reach a verdict
Sentence	N/A

The trial of Ms Tang and her co-accused Mr Paul Pick, the manager of the licensed brothel 'Club 417', began on April 12, 2005.[9] Both of the accused were charged with five counts of possessing a slave and five counts of using a slave between August 2002 and May 2003. After a six-week trial the jury were unable to reach a verdict in relation to any of the counts against Ms Tang.[10]

As previously noted, the jury found Mr Pick not guilty of eight of the 10 charges against him but was unable to reach a verdict in relation to the remaining two counts of possession and use of a slave.[11] Judge McInerney accepted the eight verdicts in relation to Mr Pick, who successfully applied for a nolle prosequi in relation to the two remaining charges against him.[12]

---

9 'Sex slavery trial opens in Melbourne', *Australian Broadcasting Corporation News*, 12 April 2005.

10 *R v Wei Tang* (2007) 16 VR 454 at [17].

11 *R v Wei Tang* (2007) 16 VR 454 at [17].

12 *R v Wei Tang* (2007) 16 VR 454 at [17]. A nolle prosequi is an entry made on the record, by which the prosecution declares that it will not proceed against the defendant. Cf. Natasha Robinson, 'Second sex slave jury fails to deliver verdict', *The Australian* (Sydney), 28 May 2005, 8.

First Retrial	
Court	Melbourne County Court
Citation	**Sentencing decision:** *R v Wei Tang* [2006] VCC 637
Trial judge	Judge McInerney
Important dates	**Trial:** ~May 2006 – June 3, 2006 **Sentencing decision:** June 9, 2006
First charge	**Charge/legislative source:** Five counts of possessing a slave: s 270.3(1)(a) *Criminal Code* (Cth) **Verdict:** Guilty
Second charge	**Charge/legislative source:** Five counts of exercising control over a slave: s 270.3(1)(a) *Criminal Code* (Cth) **Verdict:** Guilty
Sentence	10 years imprisonment with a single non-parole period of six years

On June 3, 2006, following an eight week retrial, Ms Tang was convicted on five counts of possessing a slave and five counts of exercising control over a slave contrary to s 270.3 (1)(a) *Criminal Code* (Cth). Judge McInerney sentenced Ms Tang to ten years imprisonment with a single non-parole period of six years.[13] In sentencing Ms Tang, Judge McInerney stated that while the women were not locked up, they were 'effectively restrained by the insidious nature of their contract'.[14] He also took into account her lack of prior convictions and the fact the women were well fed.[15]

First Appeal	
Appeal court	The Court of Appeal of the Supreme Court of Victoria
Citation	**First judgment:** *R v Wei Tang* (2007) 16 VR 454; (2007) 212 FLR 145; (2007) 172 A Crim R 224; [2007] VSCA 134. **Second judgment:** *R v Wei Tang* [2007] VSCA 144
Appeal judge/s	Maxwell P, Buchanan and Eames JJA
Important dates	**First hearing:** March 20, 2007; April 19, 2007 **First judgment:** June 27, 2007 **Second hearing:** June 29, 2007 **Second judgment:** June 29, 2007
Type of appeal	(1) Appeal against conviction and sentence
Appellate decision	(1) Application for leave to appeal granted (2) Appeal against conviction allowed (3) Convictions quashed and sentences set aside (4) Retrial ordered

In 2007 the Court of Appeal of the Supreme Court of Victoria unanimously allowed Ms Tang's appeal against conviction. Ms Tang raised a total of eight grounds of appeal, although one of these was ultimately abandoned during the hearing.[16] Eames JA, with whom Maxwell P and Buchanan JA agreed, allowed the appeal on one ground only; that

13 *R v Wei Tang* [2006] VCC 637.
14 'Australian brothel owner sentenced to 10 years imprisonment in Thai sex slave case', *Associated Press Newswires*, 9 June 2006.
15 'Australian brothel owner sentenced to 10 years imprisonment in Thai sex slave case', *Associated Press Newswires*, 9 June 2006.
16 *R v Wei Tang* (2007) 16 VR 454 at [19].

the trial judge misdirected the jury as to the four elements of the offence of 'slavery'.[17] More specifically, it was held that the trial judge had failed to direct the jury that they had to find that Ms Tang possessed or used the complainants 'with the knowledge, intention, or in the belief that she was dealing with [them] as though [they] were mere property' as distinct from having possessed or used them 'in the knowledge or belief that she was exercising some different right or entitlement to do so, falling short of what would amount to ownership, such as that of an employer, contractor, or manager'.[18]

It should also be noted that arguments made by counsel for Ms Tang that the slavery provisions in the *Criminal Code* (Cth) were unconstitutional were rejected on the basis that they were a valid exercise of the external affairs power in s 51(xxix) of the *Commonwealth Constitution* by virtue of being an implementation of the *1926 International Convention to Suppress the Slave Trade and Slavery*.[19]

Following the decision to allow the appeal, submissions were heard on whether a retrial or acquittal was more appropriate. Eames JA, with whom Maxwell P and Buchanan JA agreed, held that a retrial should be ordered.[20]

Second Appeal	
Appeal court	The High Court of Australia
Citation	*R v Tang* (2008) 237 CLR 1; (2008) 249 ALR 200; (2008) 82 ALJR 1334; (2008) 187 A Crim R 252; [2008] HCA 39.
Appeal judge/s	Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ
Important dates	**Hearing:** May 13-14, 2008 **Judgment:** August 28, 2008
Type of appeal	(1) Crown appeal against order for retrial (2) Defendant application for leave to cross-appeal against order for retrial
Appellate decision	(1) Crown appeal against order for retrial allowed (6:1) (2) Defendant application for leave to cross-appeal allowed on two of three grounds (7:0) (3) Defendant cross-appeal dismissed on both grounds (7:0) (4) Matter remitted to the Court of Appeal of the Supreme Court of Victoria for that Court's consideration of the application for leave to appeal against sentence

The Crown appealed to the High Court from the judgment of the Court of Appeal of the Supreme Court of Victoria by special leave granted by Kirby, Hayne and Crennan JJ. Ms Tang sought special leave to cross-appeal on the grounds that the Court of Appeal had erred: (1) in holding that ss 270.1 and 270.3(1)(a) *Criminal Code* (Cth) were within the legislative power of the Commonwealth; (2) in holding that the offences created by s 270.3(1)(a) *Criminal Code* (Cth) were not confined to situations akin to 'chattel slavery' but extended to the conduct alleged; and (3) in failing to hold that the verdicts were unreasonable or could not be supported having regard to the evidence.

17 *R v Wei Tang* (2007) 16 VR 454.
18 *R v Wei Tang* (2007) 16 VR 454 at [113], [77].
19 *R v Wei Tang* (2007) 16 VR 454 at [21] – [42].
20 *R v Wei Tang* [2007] VSCA 144 at [14].

(i) The Appeal

The High Court allowed the appeal by a six to one majority (Kirby J dissenting) and overturned the order for a new trial. The Court held that the prosecution had made out the required elements of the slavery offences and did not need to prove what Ms Tang knew or believed in relation to the source of her powers over the women. They also did not have to prove that she knew or believed that the women were slaves. It was thus held that the prosecution needed only to establish Ms 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. It was determined that the prosecution had established these 'critical powers'.

(ii) The Cross-Appeal

The High Court unanimously granted Ms Tang special leave to cross-appeal on two grounds — the meaning and constitutional validity of s 270.3(1)(a) *Criminal Code* (Cth). Both arguments were, however, ultimately dismissed. The Court held that Division 270 *Criminal Code* (Cth) was reasonably capable of being considered appropriate and adapted to Australia's obligations under the *1926 Slavery Convention* and thus fell within the scope of the external affairs power of the Commonwealth under s 51(xxxv) of the *Commonwealth Constitution.* It also considered the meaning of slavery under the *Criminal Code* (Cth), concluding that Ms 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.

Because the Court of Appeal allowed the appeal against conviction, it did not deal with Ms Tang's appeal against sentence. This matter was remitted to the Court of Appeal of the Supreme Court of Victoria for that Court's consideration.

Further analysis of the High Court decision can be found in the section below, 'Analysis and Comment'.

Third Appeal	
Appeal court	The Court of Appeal of the Supreme Court of Victoria
Citation	*R v Wei Tang* (2009) 23 VR 332; (2009) 233 FLR 399; [2009] VSCA 182.
Appeal judge/s	Maxwell P, Buchanan and Vincent JJA.
Important dates	**Hearing:** February 5, 2009 **Judgment:** August 17, 2009
Type of appeal	(1) Appeal against sentence
Appellate decision	(1) Appeal against sentence allowed (2) Resentenced to nine years imprisonment with an effective non-parole period of five years

As the Court of Appeal had upheld Ms Tang's initial appeal against conviction, her appeal against sentence was not heard. However, when the appeal against conviction was overturned by the High Court, the appeal against sentence was remitted to the

Victorian Court of Appeal.[21] The matter was heard on February 5, 2009, and a joint-judgment was delivered on August 17, 2009.[22]

The court considered that the effect of sentencing Ms Tang for the offences of both 'possessing' and 'using' a slave was to, in effect, punish her twice for the same conduct, and that to draw a distinction between the two as separate offences would be 'a matter of semantics'.[23] This error of law required the Court of Appeal to exercise the sentencing discretion afresh, taking account of additional mitigating circumstances that had arisen since Ms Tang was first sentenced three years ago.[24] These included the distress suffered by Ms Tang in being subjected to the judicial system for four years, including her being released on bail and subsequently returned to prison when the High Court upheld her conviction,[25] and her continuing ill health, including depression and endometriosis.[26] All other grounds of appeal failed.[27] In exercising the discretion the Court of Appeal sentenced Ms Tang to nine years imprisonment with an effective non-parole period of five years.[28]

Analysis and Comment

The case against Melbourne Ms Tang was significant as the first jury conviction under Australia's *Criminal Code* (Cth) slavery offences and one of very few successful prosecutions of human trafficking in Australia. It was also the first test of Australia's slavery and sexual servitude offences before the High Court, with the relative novelty of the legislation providing grounds for much debate within the judgment.[29]

The basic facts of the case and outcome of the High Court appeal have been detailed above and will not be repeated here. It should be noted, however, that Chief Justice Gleeson penned the leading judgment with Hayne J generally agreeing with his reasons, but providing further analysis on some points. Gummow, Heydon, Crennan and Keifel JJ agreed with the orders and reasons of both Gleeson CJ and Hayne J. Kirby J agreed with the majority on most points but dissented in relation to the proper construction of the fault element of the slavery offences.

The following case note begins by briefly outlining the definition of slavery in the *Criminal Code* (Cth) and the associated slavery offences. There is then an analysis of the major issues to arise in the High Court decision: the constitutionality of the slavery provisions, the argument over how 'slavery' should be defined and recognised in Australian law, and the proper construction of the mental elements of the offence. This case note concludes with a number of comments about the significance and implications of the decision.

---

21 *R v Wei Tang* (2008) 238 CLR 1, 27; Michael Draper, 'Sex Slavery 'Dehumanising': Judge', *Australian Associated Press* (Australia), 5 February 2009.

22 *R v Wei Tang* (2009) 23 VR 332.

23 *R v Wei Tang* (2009) 23 VR 332 at [28], citing *Pearce v The Queen* (1998) 194 CLR 610 at [42].

24 *R v Wei Tang* (2009) 23 VR 332 at [69]

25 *R v Wei Tang* (2009) 23 VR 332 at [70] - [71].

26 *R v Wei Tang* (2009) 23 VR 332 at [72].

27 *R v Wei Tang* (2009) 23 VR 332 at [7].

28 *R v Wei Tang* (2009) 23 VR 332 at [73].

29 A fact noted by Kirby J in *R v Wei Tang* (2008) 238 CLR 1 at [66] and [72].

I. The Slavery Offences

The case against Ms Tang was based on the prosecution's argument that she was involved in possessing and utilising slaves, which is criminalised in s 270.3(1)(a) *Criminal Code* (Cth). The introduction of the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth)[30] ('The Act') represented the first attempt by an Australian Parliament to legislate against slavery and, in a general sense, address the issue of human trafficking. The Act inserted a new Division 270 entitled 'Slavery, sexual servitude and deceptive recruiting' into Chapter 8 ('Crimes against humanity and related offences') of the *Criminal Code* (Cth). Division 270 sets out the offences of slavery (s 270.3), causing another person to remain in sexual servitude (s 270.6), and deceptive recruitment into sexual services (s 270.7).

Prior to the passage of this legislation, slavery and the slave trade were governed by four 19th- century British Imperial Acts[31] which employed 'archaic language and relate to outdated circumstances and institutions that have either changed or long since fallen into disuse'.[32] In 1990, the Australian Law Reform Commission recommended that these 'complex Imperial Acts with their uncertain punishments should be replaced with modern and concise Australian statutory offences.'[33] The slavery offences now contained in the *Criminal Code* (Cth) are based on the recommendations of the Australian Law Reform Commission[34] as supported by the Model Criminal Code Officers Committee (MCCOC).[35]

Sections 270.1–270.3 set out the slavery offences in the *Criminal Code* (Cth). Section 270.1 provides the definition of 'slavery' (see below) and s 270.2 highlights that 'slavery remains unlawful and its abolition is maintained, despite the repeal by the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth) of Imperial Acts relating to slavery'.

Section 270.3 creates offences of possessing a slave or exercising a power of ownership over a slave, engaging in slave trading, entering into a commercial transaction involving a slave and exercising control or direction over, or providing finance for, a commercial transaction involving a slave or an act of slave trading. While there are separate offences to deal with sexual servitude, the slavery offences 'may also apply if the control of the sex worker is so far-reaching that it effectively amounts to a right of ownership over him or her'.[36] These slavery offences are divided into intentional offences (s 270.3(1)) and offences involving recklessness (s 270.3(2)). The maximum term of imprisonment for the slavery offences is 25 years imprisonment.

---

30 No 104 of 1999.

31 See, for example, *Act for the Abolition of the Slave Trade 1807* (UK), 47 Geo III, sess 1, c 36; *Slave Trade Act 1873* (UK), 36 & 37 Vic, c 88.

32 Australia (Cth), *Parliamentary Debates,* House of Representatives, 11 Aug 1999, 8495 (Murray Stone).

33 Australian Law Reform Commission, *Criminal admiralty jurisdiction and prize*, Report No. 48 (1990) 83.

34 Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) 2.

35 Model Criminal Code Officers Committee, *Model Criminal Code — Offences Against Humanity — Slavery*, (1998) 31.

36 Australia (Cth), *Parliamentary Debates,* Senate, 24 Mar 1999, 3076 (Ian Macdonald).

Section 270.1 of the *Criminal Code* (Cth) defines 'slavery' as

> the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.

This definition is modelled on the definition of 'slavery' in the *1926 International Convention to Suppress the Slave Trade and Slavery*[37] (and its 1953 Protocol[38]) and the 1956 *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*,[39] to which Australia is a State Party.[40]

The Explanatory Memorandum states that 'whether a person is a slave for the purposes of this Division is a matter to be determined by the courts on a case by case basis'.[41] The difficulty is that, because slavery does not legally exist in Australia (s 270.2 *Criminal Code*), there are complex questions surrounding how the court recognises an incident of slavery and what sort of indicia are relevant in this process.[42]

II. Constitutionality: De Jure or De Facto Slavery?

A major ground that Ms Tang's challenged her conviction on was that s 270.3 *Criminal Code* (Cth) was not within the legislative power of the Commonwealth Parliament. The definition of 'slave' in s 270.3 draws upon the definition of slavery in s 270.1. Slavery is defined as

> the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.[43]

This definition is based on Article 1 of the *International Convention to Suppress the Slave Trade and Slavery* of 1926.[44] The Commonwealth Parliament added the phrase 'including where such a condition results from a debt or contract made by the person', which was not included in the Convention. Parliament also removed the term 'status' from 'status or condition of a person'.[45] This may be attributable to fact that the 1926 Slavery Convention was made in contemplation of *de jure* slavery, the status of chattel slavery, rather than any *de facto* conditions of slavery. Chattel slavery exists in instances where the slave is the legally recognised property of the owner. This form of slavery was abolished by the imperial acts, and this abolition is maintained under s 270.2. Thus the addition of the 'debt or contract' provision to the definition in s 270.1 is aimed at expanding the scope of the offence in s 270.3 to the more modern forms of slavery such as debt bondage or extremely exploitative contracts, as chattel slavery is legally impossible in Australia (s 270.2). The legality of Ms Tang's conviction was challenged on the basis that this expansion, going beyond the 1926 Slavery Convention

---

37 60 LNTS 253.
38 182 UNTS 51.
39 226 UNTS3.
40 1927 ATS 11, 1949 ATS 19, 1953 ATS 8 1958 ATS 3; cf Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) 18.
41 Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) 19.
42 Irina Kolodizner. 'R v Tang: developing an Australian anti-slavery jurisprudence' (2009) 31(3) *Sydney Law Review* 487, 491.
43 *Criminal Code* (Cth) s 270.1.
44 212 UNTS 17.
45 Article 1 of the 1926 Slavery Convention 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'.

on which the offence is purportedly based, was not within the legislative power of the Commonwealth Parliament under the external affairs power in s51(xxix) of the *Australian Constitution*.

Chief Justice Gleeson considered the phrasing of the definition in s 270.1, noting that the word 'including' is used to clarify that *de facto* slavery arising from a debt or contract falls within the definition of slavery when that debt or contract gives rise to a condition where sufficient powers of ownership are exercised over a person. As such it does not expand the definition, as the condition must be met regardless.[46]

Furthermore, Gleeson CJ held that the phrase 'status or condition' the Convention's definition of slavery itself makes the distinction between *de jure* and *de facto* slavery.[47] Because the *Criminal Code* (Cth) imports the term 'condition' from the Convention, it thereby also recognises *de facto* slavery.[48] Irina Kolodizner notes on this point that in taking this approach 'the Court neatly avoided the issue of domestic recognition of slavery by drawing on international law.'[49]

On the basis of the reasons given by Gleeson CJ, it was unanimously held that the offences were reasonably capable of being considered and 'appropriate and adapted'[50] implementation of Australia's international obligations.[51]

III. The Indicia of Slavery

Having confirmed that *de facto* and *de jure* slavery are recognised in Australia, Gleeson CJ turned to international jurisprudence to determine what various powers, the exercise of which, would be relevant to determining whether a *de facto* condition of slavery existed.[52]

Gleeson relevantly notes:

> It is important not to debase the currency of language, or to banalise 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. In particular it is important to recognise that harsh and exploitative conditions of labour do not of themselves amount to slavery. The term "slave" is sometimes used in a metaphorical sense to describe victims of such conditions, but that sense is not of present relevance. Some of the factors identified as relevant in *Kunarac*, such as control of movement and control of physical environment, involve questions of degree. An employer normally has some degree of control over the movements, or work environment, of an employee. Furthermore, geographical and other circumstances may limit an employee's freedom of movement. 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.[53]

---

46 *R v Wei Tang* (2008) 238 CLR 1 at [33] (per Gleeson CJ).
47 *R v Wei Tang* (2008) 238 CLR 1 at [25] – [27] (per Gleeson CJ).
48 *R v Wei Tang* (2008) 238 CLR 1 at [33] (per Gleeson CJ).
49 Irina Kolodizner. 'R v Tang: developing an Australian anti-slavery jurisprudence' (2009) 31(3) *Sydney Law Review* 487, 492.
50 *Victoria v Cth* (1996) 187 CLR 416, 486–487.
51 *R v Wei Tang* (2008) 238 CLR 1 at [34] (per Gleeson CJ).
52 For further discussion of the international jurisprudence analysed see, Jean Allain. 'R v Tang: Clarifying the Definition of 'Slavery' in International Law' (2009) 10(1) *Melbourne Journal of International Law* 246.
53 *R v Wei Tang* (2008) 238 CLR 1 at [32].

Jean Allain argues that Gleeson CJ was avoiding an extension of the meaning of slavery to more expansive factors such as 'oppression of the individual; deception and abuse of power creating a situation of vulnerability; and cruel treatment or abuse.'[54]

Gleeson CJ further clarified his position by asking how a jury would '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.[55]

His Honour concluded by noting that consent is *not* inconsistent with the concept of slavery and, although it may sometimes be relevant in the circumstances, its absence is not an element of the offence.[56] For Gleeson CJ, it is ultimately for the jury to decide what 'ownership' of a person looks like and what kinds of powers will attach to such a relationship.

Hayne J agreed generally with the reasons of Gleeson J,[57] but also gave extensive consideration to the definition of slavery, and the situations from which it could be inferred. His Honour highlighted the difficulty of understanding the word 'ownership' in the context of the slavery offence, as Australian law does not recognise any right to 'possess' a person.[58] He suggested that in dealing with abstract concepts of 'ownership' and 'possession', some assistance can be obtained by considering the antithesis of slavery and asking 'whether, and in what respects, the person alleged to be a slave was free.'[59] His Honour recognised, however, that the Code ultimately requires a decision about ownership and not the state of mind of the complainant.[60] Rachel Harris notes that Hayne J is slightly inconsistent with Gleeson CJ on this point:

> According to Hayne J […] involuntariness is central to the condition of slavery. Hayne J deals with the additional words by making a distinction between a person 'freely choosing' to *enter into* a relationship amounting to slavery, and *being inside* such a relationship. Once inside a slavery relationship, a slave, by definition, has no freedom of choice. This makes genuine consent and slavery mutually exclusive concepts.[61]

IV. The Fault Element in the Slavery Offences

The final, and most contentious, issue to be considered by the Court was the proper construction of the fault element of the slavery offences. The Victorian Court of Appeal found that defining the relevant mental element for the offence under s 270.3 *Criminal*

---

54 Jean Allain. 'R v Tang: Clarifying the Definition of 'Slavery' in International Law' (2009) 10(1) *Melbourne Journal of International Law* 246, 251.

55 *R v Wei Tang* (2008) 238 CLR 1 at [44].

56 *R v Wei Tang* (2008) 238 CLR 1 at [35].

57 *R v Wei Tang* (2008) 238 CLR 1 at [133].

58 *R v Wei Tang* (2008) 238 CLR 1 at [140].

59 *R v Wei Tang* (2008) 238 CLR 1 at [155].

60 *R v Wei Tang* (2008) 238 CLR 1 at [159].

61 Harris, Rachel. '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, accessed at < http://law.anu.edu.au/cipl/Conferences&SawerLecture/2008/2008%20PLW/Wei_Tang_Talk_RH.pdf?> at 14 September 2011, 7.

Code (Cth), and the subsequent direction given to the jury by the trial judge, was the 'critical issue' in the case.[62] The Court of Appeal found that the trial judge had not directed the jury's consideration sufficiently to the requisite mental element, intention.[63] As a result the Court of Appeal ordered a retrial. The Victorian Attorney-General successfully appealed this finding to the High Court.

Chief Justice Gleeson, with whom all but Kirby J agreed, found that the Court of Appeal erred[64] in requiring the defendant to have an 'appreciation of the character'[65] of her actions. He instead found that '[i]t was not necessary for the prosecution to establish that the respondent had any knowledge or belief concerning the source of the powers exercised over the complainants'.[66]

It was on this point that Kirby J dissented, agreeing with the Court of Appeal that a retrial was the correct course. He considered the structure given to the offence, specifically, that the adverb 'intentionally' was placed in the châpeau of the offence, thus applying to all subsequent clauses. He surmised that

> it is not enough for the accused to 'possess' a slave or to 'exercise' control over a slave 'any of the other powers attaching to the right of ownership'. To be guilty of the offence provided by the Code, the accused must do these things, and all of them, 'intentionally'.[67]

His Honour thus agreed with the Court of Appeal that there must be an intention on the part of the accused to deal with the complainant as a slave, as if they were mere property.[68] He finds support for this premise in that a penal statute which operates to deprive an individual of their liberty is traditionally construed strictly.[69] It must be noted that despite the criticisms of Gleeson CJ and Hayne J, Kirby J does not require the accused to have an appreciation of the source of the powers exercised, but merely an appreciation of the result of exercising those powers, specifically, that it renders the complainant a slave.

In summary, the majority of the High Court favoured a definition that required intention only in relation to the exercise of any the powers attaching to ownership, following the 'common exercise of relating the fault element to the physical elements of the offence'.[70] Justice Kirby disagreed, requiring the prosecution to show that the accused intentionally exercised those powers in relation to a person the accused knew to be a slave.

V. Conclusion

A significant aspect of the decision, as highlighted by a number of commentators, was that it was a thorough assessment of the meaning of 'slavery' in international law and confirmed a definition in Australia that was aligned with it.[71] In particular, Jean Allain

---

62 *R v Wei Tang* (2008) 238 CLR 1 at [38].
63 *R v Wei Tang* (2007) 16 VR 454 at [144].
64 *R v Wei Tang* (2008) 238 CLR 1 at [43].
65 *R v Wei Tang* (2007) 16 VR 454 at [144].
66 *R v Wei Tang* (2008) 238 CLR 1 at [51]
67 *R v Wei Tang* (2008) 238 CLR 1 at [93].
68 *R v Wei Tang* (2008) 238 CLR 1 at [126].
69 *He Kaw Teh v R* (1985) 157 CLR 523, 583.
70 *He Kaw Teh v R* (1985) 157 CLR 523, 568.
71 Irina Kolodizner. 'R v Tang: developing an Australian anti-slavery jurisprudence' (2009) 31(3) *Sydney Law Review* 487, 492; Jean Allain. 'R v Tang: Clarifying the Definition of 'Slavery' in International Law' (2009) 10(1) *Melbourne Journal of International Law* 246; Bronwyn Byrnes. 'Beyond Wei Tang: Do Australia's human trafficking laws fully reflect Australia's

applauds the High Court for concluding that the 1926 Slavery Convention definition included both *de jure* and *de facto* slavery but 'avoided taking on an expansive notion of 'enslavement' as developed in the *Kunarac* case.'[72]

What follows from this landmark decision is that the offence of slavery is a viable option for use against human traffickers, as there is no requirement to prove consideration on the part of the traffickers that they were dealing with the complainant as a slave. It was noted by Chief Justice Gleeson that such evidence would be 'rare'.[73] Bronwyn Byrnes also suggests that the decision means more subtle forms of control and possession, rather than physical threats and force, can be used to establish slavery.[74] This predication has perhaps been confirmed in the subsequent case of *R v Kovacs*,[75] where

> the expanded meaning of 'slavery' accepted by the High Court in *R v Tang* was used to facilitate the — ultimately successful — prosecution of a novel case that involved domestic servitude. The [Kovacs] decision recognises the view in *R v Tang* that there are cases of trafficking and slavery where more subtle forms of coercion are used to prevent the victim from leaving.[76]

However, it could also be argued the decision may have resulted in the watering down of the high threshold historically required for a conviction for serious criminal offences. To the contrary, it has been suggested that '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.'[77]

---

international human rights obligations?**'** (speech delivered at Workshop on Legal and Criminal Justice Responses to Trafficking in Persons in Australia: Obstacles, Opportunities and Best Practice, 9 November 2009).

72 Jean Allain. 'R v Tang: Clarifying the Definition of 'Slavery' in International Law' (2009) 10(1) *Melbourne Journal of International Law* 246, 250.

73 *R v Wei Tang* (2008) 238 CLR 1 at [44].

74 Bronwyn Byrnes. 'Beyond Wei Tang: Do Australia's human trafficking laws fully reflect Australia's international human rights obligations?**'** (speech delivered at Workshop on Legal and Criminal Justice Responses to Trafficking in Persons in Australia: Obstacles, Opportunities and Best Practice, 9 November 2009).

75 *R v Kovacs* [2009] 2 Qd R 51. See separate case report at www.law.uq.edu/humantrafficking

76 Schloenhardt, Andreas & Jarrod Jolly, 'Honeymoon from Hell: Human Trafficking and Domestic Servitude in Australia' (2010) 32(4) *Sydney Law Review* 671, 686.

77 Irina Kolodizner. 'R v Tang: developing an Australian anti-slavery jurisprudence' (2009) 31(3) *Sydney Law Review* 487, 492; Jean Allain. 'R v Tang: Clarifying the Definition of 'Slavery' in International Law' (2009) 10(1) *Melbourne Journal of International Law* 487, 496.

List of references

Official case reports

Third appeal (VSCA): *R v Wei Tang* (2009) 23 VR 332; (2009) 233 FLR 399; [2009] VSCA 182.

Second appeal (HCA): *R v Tang* (2008) 237 CLR 1; (2008) 249 ALR 200; (2008) 82 ALJR 1334; (2008) 187 A Crim R 252; [2008] HCA 39.

First appeal (VSCA): *R v Wei Tang* (2007) 16 VR 454; (2007) 212 FLR 145; (2007) 172 A Crim R 224; [2007] VSCA 134; *R v Wei Tang* [2007] VSCA 144

Sentencing decision: *R v Wei Tang* [2006] VCC 637

Secondary sources

Allain, Jean. 'R v Tang: Clarifying the Definition of 'Slavery' in International Law' (2009) 10(1) *Melbourne Journal of International Law* 246.

Australia, Anti-People Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government Response, 1 May 2009 – 30 June 2010,* Canberra, ACT: Commonwealth of Australia, 2010, 64.

Australia, Anti–People Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government's Response January 2004–April 2009*, Canberra, ACT: Commonwealth of Australia, 2009, 22 – 23, 67 – 68.

Bennett QC, David, and Simon Thorton, *Slavery and the Criminal Code*, Australian Government Solicitor: Litigation Notes No 18, 2008, 1 – 5.

Byrnes, Bronwyn. 'Beyond Wei Tang: Do Australia's human trafficking laws fully reflect Australia's international human rights obligations?**'** (speech delivered at Workshop on Legal and Criminal Justice Responses to Trafficking in Persons in Australia: Obstacles, Opportunities and Best Practice, 9 November 2009), 30.

Carrick, Damien. Interview with Jennifer Burn (ABC – The Law Report, *The Wei Tang Decision*, 2 September 2008).

Commonwealth Director of Public Prosecutions, *Annual Report 2006-07* (2007) 45 – 46.

Commonwealth Director of Public Prosecutions, *Annual Report 2007-08* (2008) 58 – 59.

Commonwealth Director of Public Prosecutions, *Annual Report 2008-09* (2009) 70 – 71.

Debeljak, Julie, et al, *The Legislative Framework for Combating Trafficking in Persons* (2009).

Harris, Rachel. '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, accessed at < http://law.anu.edu.au/cipl/Conferences&SawerLecture/2008/2008%20PLW/Wei_Tang_Talk_RH.pdf?> at 14 September 2011.

Kolodizner, Irina. 'R v Tang: developing an Australian anti-slavery jurisprudence' (2009) 31(3) *Sydney Law Review* 487.

Schloenhardt, Andreas & Jarrod Jolly, 'Honeymoon from Hell: Human Trafficking and Domestic Servitude in Australia' (2010) 32(4) *Sydney Law Review* 671–692.

Schloenhardt, Andreas, Genevieve Beirne and Toby Corsbie, 'Trafficking in Persons in Australia: Myths and Realities' (2009) 10(3) *Global Crime* (Routledge, London) 224, 238 - 239.

Schloenhardt, Andreas, Genevieve Bierne and Toby Corsbie. 'Human Trafficking and Sexual Servitude in Australia' (2009) 32(1) *University of New South Wales Law Journal* 27, 42 – 43.

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