IN THE SUPREME COURT OF VICTORIA
COURT OF APPEAL

Not Restricted

No. 178 of 2006

THE QUEEN

v

WEI TANG

JUDGE:	MAXWELL P, BUCHANAN and EAMES JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	20 March, 19 April 2007
DATE OF SENTENCE:	27 June 2007
CASE MAY BE CITED AS:	R v Wei Tang
MEDIUM NEUTRAL CITATION:	[2007] VSCA 134

Constitutional law (C'th) – Powers of Commonwealth Parliament – External affairs – International Convention to Suppress the Slave Trade and Slavery (1926) – Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956) – Implementation of treaty by legislation regulating conduct in Australia – *Criminal Code Act* 1995, Chapter 8, Offences against Humanity, s 270 – Whether legislation within power – *The Constitution* s 51(xxix).

Criminal law – Conviction – Slavery – Possess a slave – Use a slave – Elements of offences – Direction to jury.

Criminal law – Conduct of trial – Judicial intervention in cross-examination by defence counsel.

Criminal law – Directions – Balance – Comments as to address by defence counsel.
Criminal law – Conviction – Whether verdicts unreasonable and not supported by evidence – Convictions quashed – Proviso – Whether verdicts of acquittal or re-trial appropriate.

APPEARANCES:	Counsel	Solicitors
For the Crown	Ms R E Carlin with Dr S P Donaghue	Director of Public Prosecutions (Commonwealth)

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr S A Shirrefs SC with Ms K L Walker	Slades & Parsons

MAXWELL P:

1 I have had the considerable advantage of reading in draft the reasons for judgment of Eames JA. I agree with his Honour's conclusions and would join in the proposed orders, for the reasons which his Honour gives.

BUCHANAN JA:

2 In my opinion the application for leave to appeal should be granted, the appeal allowed and the convictions quashed and sentences set aside, for the reasons stated by Eames JA.

EAMES JA:

3 The applicant, Wei Tang, was convicted by verdicts of a jury in the County Court on five counts of possessing a slave contrary to s 270.3(1)(a) of the *Criminal Code Act* 1995 (Cth) and on five counts of using a slave contrary to the same provision. The applicant was sentenced to a total effective sentence of 10 years' imprisonment and, pursuant to s 19AB(1) of the *Crimes Act* 1914 (Cth), a single non-parole period of six years was fixed. Application is now made for leave to appeal against both conviction and sentence.

4 We were told that these were the first convictions in Australia, by verdict of a jury, under these provisions of the *Code*. The provisions which are of immediate relevance are to be found in Chapter 8 which deals with "Offences against humanity".

"**270.1 Definition of *slavery***

For the purposes of this Division, ***slavery*** is the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.

270.2 Slavery is unlawful

Slavery remains unlawful and its abolition is maintained, despite the repeal by the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* of Imperial Acts relating to slavery.

270.3 Slavery offences

(1) A person who, whether within or outside Australia, intentionally:

(a) possesses a slave or exercises over a slave any of the other powers attaching to the right of ownership; or

(b) engages in slave trading; or

(c) enters into any commercial transaction involving a slave; or

(d) exercises control or direction over, or provides finance for:

(i) any act of slave trading; or

(ii) any commercial transaction involving a slave;

is guilty of an offence.

Penalty: Imprisonment for 25 years.

5 The Commonwealth Director of Public Prosecutions alleged that, at various times between 10 August 2002 and 31 May 2003, the applicant 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 the sex industry in Australia.[1] Each of the five women voluntarily entered an agreement, through a broker, whereby she incurred a debt of between $40,000 and

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1 On 29 June 2007 counsel for the respondent applied for the first time to the Court of Appeal for suppression of the names of the complainants and a witness in this case. He apologised to the Court for the failure of counsel for the respondent to have made such application earlier, and acknowledged that the offences in this case did not constitute sexual offences. He nonetheless submitted that suppression of the names was appropriate and advised the Court that such an order had been made at trial. That application was not opposed by counsel for the appellant. The Court made an order for suppression, whilst expressing its concern at the lateness of the application.

$45,000[2] which she was required to pay off by having sex with men in Australia. All of the women had previously worked in the sex industry.

6 Under the agreements, they were to have their travel expenses paid and were to be provided with accommodation, food and incidentals while they were in Australia. They travelled on tourist visas that were valid but had been obtained without disclosure that the true purpose for their travel was to work in Australia. Three of the women admitted participating in subterfuge in order to obtain those visas, but the evidence was conflicting as to the extent of knowledge of the women as to the illegality of them working on visas. It seems they were aware that a new visa was to be obtained for them once they were in Australia, and pursuant to which they could work.

7 When they arrived in Australia they were advised that they were to work at a brothel in Fitzroy, known as Club 417, which was owned by the applicant. They were there known as "contract girls", to distinguish them from the other sex workers.

8 The women arrived in Australia at different times between August 2002 and May 2003. Usually the women were met by DS, who took them to meet the applicant and also the manager of the brothel, one Paul Pick. The brothel was licensed pursuant to the *Prostitution Control Act* 1994. The women said that upon their arrival in Melbourne they had little money. DS, or someone else, took their passports and return airline tickets from them upon arrival. The passports and airline tickets were placed in a locker at the brothel so that they could be produced if Immigration Department officials arrived. The prosecution contended that they were retained so that the women could not run away. DS had herself been a contract worker but had paid off her contract and remained in the industry, serving as a recruiter of new sex workers.

9 The women understood that once they had paid off their debt they would have the opportunity to earn money as prostitutes. Two of the women did pay off their debts, after approximately six months. The others were prevented from discharging their debts because

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2 There was some dispute as to whether the evidence disclosed that final sums were known to all of the women in advance of their arrival in Australia.

of intervention by immigration authorities.

10 The Thai recruiters had to be paid a sum of money with respect to each contract worker, generally $20,000. As to four of the women, a percentage of that sum was paid by the applicant and other portions were paid by DS and another person. The applicant paid no sum at all with respect to the fifth woman.

11 The brothel was raided on 31 May 2003. Australian Federal Police also executed search warrants on the home address of the applicant in North Fitzroy. When arrested, the applicant, Pick and DS were each found to have keys to an apartment at 5/14 Rae Street, North Fitzroy. Some of the women had been residing there. Others had resided in Brunswick with a woman named Gaik Kim Ong, known as "Mummy", who was employed as a manager at the brothel. Three or four women slept in each room at "Mummy's house" and were told to remain within the house so as not to be seen by immigration officials. Without the involvement of the women, applications were made on their behalf for protection visas, making false claims of persecution. They were granted bridging visas which permitted them to work.

12 The prosecution contended that the women were controlled as to when and where they worked, and on what shifts. They were required to work long hours, effectively up to seven days a week, and their movements were restricted. Their place of residence was controlled. The women spoke little English and knew no-one in Australia. There was disagreement between counsel on the appeal as to the state of the evidence concerning the workers' freedom of movement outside their places of residence.

13 The brothel charged clients $110 for sex. The fee of $110 was divided as to $43 to the applicant and the balance to the owners of the contract[3] for the particular prostitute. The debt for each of the "contract girls" was reduced at the rate of $50 per client. The women were allowed one free day per week but were permitted to work on that day, too, if they chose

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3 The identity of all of the owners of the contracts was somewhat unclear. Wei Tang paid 70% of the contract price with respect to R, 50% with respect to J, T and S and no portion of the contract price with respect to K. In his directions his Honour named three other persons as having had shares in the contracts.

and could retain any earnings they then made. On those days, the women would generally earn for themselves $50 for each client.

14 When the two women who paid off their debts had achieved that result, the restrictions that had been placed on them were lifted and their passports were returned to them. They were then free to choose their hours of work and they were paid for their prostitution. They were free to live in accommodation of their own choosing.

15 The applicant and a co-accused were committed for trial but DS pleaded guilty to three counts of possessing a slave and two counts of engaging in slave trading contrary to paragraph 270.3(1)(b). She was sentenced to a total effective sentence of nine years' imprisonment with a non-parole period of three years, but a subsequent appeal against sentence succeeded, and she was re-sentenced to a total effective sentence of six years' imprisonment with a minimum period of two years and six months.[4]

16 The applicant and her co-accused, Pick, were tried together in April 2005.

17 Pick was acquitted on eight counts. The jury were unable to agree on two further counts against him, and were not able to agree on any of the counts against the applicant. Pick subsequently applied successfully for a *nolle prosequi*.

18 The applicant was then re-tried separately. She was convicted on all counts, on 3 June 2006, and now applies for leave to appeal those convictions. A count remains outstanding against the applicant of attempting to pervert the course of justice. That has been adjourned for hearing until after the disposition of this application for leave to appeal.

19 The grounds of appeal against conviction are as follows:

> "1. The trial miscarried due to the inherent uncertainty in the meaning of the expression - 'any or all of the powers attaching to the right of ownership' as used in division 270 of the *Criminal Code* (Cth).
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> 2. The learned trial judge erred in his directions to the jury as to the meaning of 'slavery' within division 270 of the *Criminal Code*.
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> In particular His Honour:

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4 *R v DS* (2005) 153 A Crim R 194.

a) failed to direct the jury that the exercise of ‘any or all of the powers attaching to the right of ownership’ were powers being exercised as if a right of ownership was being asserted;

b) erred in providing the jury with a non-exhaustive document entitled ‘powers attaching to the right of ownership’ which

i) listed powers that are not exclusive to the concept of a ‘right of ownership’, and which

ii) permitted the jury to conclude ‘slavery’ by finding that one or other of the powers had been exercised irrespective of whether a right of ownership was being asserted; and which

iii) permitted the jury to determine for itself what ‘powers attaching to the right of ownership’ existed beyond those included in the document;

c) erred in directing the jury that a condition of slavery can operate for a limited period while the person subject to that condition pays off a debt arising from a contract.

3. The trial miscarried as a consequence of the learned trial judge informing the jury that it seemed to him that there was no difference between the purchase of a contract relating to a woman and the purchase of the woman.

4. The trial miscarried as a result of the unbalanced nature of the learned trial judge’s charge which to a substantial part took the form of a response to the address of the applicant’s counsel.

5. The trial miscarried as a result of the learned trial judge’s unwarranted intervention in the cross examination of prosecution witnesses by the applicant’s counsel.

6. The trial miscarried due to the failure of the prosecution to honour an agreement to stand aside all potential jurors who had applied to be excused, thereby forcing the applicant to use one of her challenges to challenge a juror who had applied to be excused.

7. The verdicts are unreasonable or cannot be supported by the evidence.

8. In the circumstances of this case, section 270.1 and 270.3 of the Criminal Code were beyond the legislative power of the Commonwealth.”

20 Ground 6 was abandoned. Ground 8 was added with leave in the course of the hearing of the application for leave to appeal. I deal first with ground 8.

Ground 8: Constitutional validity

21 Despite the fact that this was the second trial of the applicant and that the prosecution was the first occasion on which such offences fell to be decided by a jury, the constitutional validity of the legislation had not been challenged at either trial. At the commencement of the appeal hearing, however, the Court stated a preliminary view that the grounds of appeal raised a question of constitutional interpretation. Neither party submitted to the contrary. The Court directed that notices be given pursuant to s 78B of the *Judiciary Act 1903* (C'th). In response, no Attorney General sought to intervene in these proceedings. Counsel for the Director therefore carried the argument in contending for the validity of the legislation.

22 The slavery provisions were introduced into Chapter 8 of the *Criminal Code Act* 1995 by the *Criminal Code Amendment (Slavery and Sexual Servitude) Act* 1999. Chapter 8 is concerned with crimes against humanity. Counsel for the applicant contends that the provisions are beyond the legislative power of the Commonwealth. Counsel for the Director argued that, on the contrary, there were a number of discrete sources of power for the legislation.

23 The primary contention was that the legislation was supported by the external affairs powers in s 51(xxix) of the *Constitution*, in that it gave effect to Australia's obligations under the 1926 *International Convention to Suppress the Slave Trade and Slavery* ("*the Convention*"). Alternatively, or in addition, it was submitted that the legislation was a valid exercise of the external affairs power because:

> (a) The legislation gave effect to Australia's international obligations under treaties other than the *Convention,*[5] in particular the *1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery* (the *"Supplementary Convention");*

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5 Among other treaties identified as potential sources of power were the *International Convention for the Suppression of the White Slave Trade,* opened for signature 4 May 1910; *International Convention for the Suppression of the Traffic in Women and Children,* opened for signature 30 September 1921, [1922] ATS 10 (entered in force 28 June 1922); *Convention on the Elimination of All Forms of Discrimination against Women,* opened for signature 18 December 1979, [1983] ATS 9 (entered into force 27 August 1983); and the *International Covenant on Civil and Political Rights*¸ opened for signature 16 December 1966, [1980] ATS 23 (entered into force 28 January 1993).

(b) It gave effect to Australia's obligations under customary international law;

(c) It concerned a matter (slavery) that affected Australia's relations with other countries;

(d) It was a law with respect to a matter of international concern (slavery); or

(e) On the facts of this case, there was sufficient connection with matters that were geographically external to Australia, so as to enliven the external affairs power.

24 As will be seen, I have concluded that the legislation is valid by virtue of its being an implementation of the *Convention.* That being so, it becomes unnecessary to consider the alternative bases on which it was contended that the Commonwealth Parliament derived power to pass the legislation.

25 Counsel were in agreement that the test for validity was that stated in *State of Victoria v The Commonwealth,*[6] namely, whether the law in question selects means which are "reasonably capable of being considered appropriate and adapted" to achieving the purpose or object of giving effect to the treaty, so that the law is one upon a subject which is an aspect of external affairs.

26 In the Second Reading Speech, the responsible minister said that the slavery provisions were introduced to give effect to the provisions both of the *Convention* and the *Supplementary Convention*. It is, however, the *Convention,* not the *Supplementary Convention,* that is now relied on, in the first instance, as the foundation of the legislation.

27 The Revised Explanatory Memorandum that accompanied the *Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999* stated that the definition of "slavery" was "modelled" on both the *Convention* and the *Supplementary Convention*:

> "19. 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. However, slavery is more than merely the exploitation of another. It is where the power a person exercises over another effectively amounts to the power a person would exercise over property he or she owns."[7]

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6 (1996) 187 CLR 416, at 486-487 ('*The Industrial Relations Act Case").*

7 Revised Explanatory Memorandum, Criminal Code Amendment (Slavery and

28 The Minister said[8] that, upon the advice contained in report No. 48 of the Australian Law Reform Commission,[9] it had been decided to replace the 19th Century language that related to "outdated circumstances and institutions that have either changed or long since fallen into disuse", and to replace them with "modern and concise" Australian statutory offences in which the elements of the offences were "clear".[10] The Minister repeated that the definition was "based on" the two Conventions, but added: "However, the Bill definitions will be expanded in two important respects".[11] As to the first of those, he said:

> "First, the Bill definition of 'slavery' has been expanded to make it clear that slavery can also arise from a debt or contract. It is not sufficient for the debt or contract to be exploitative or oppressive to qualify. Rather, it must be such as to place a person in a condition whereby a power attaching to a right of ownership is exercised over him or her".[12]

29 Whilst the *Convention* sought the abolition of slavery "in all its forms", the Law Reform Commission had reported that the Convention addressed "slavery in the strict sense" as well as "the related issue of compulsory or forced labour",[13] whereas the *Supplementary Convention* "focuses upon practices similar to slavery rather than slavery itself".[14] The *Supplementary Convention* dealt with "a series of practices similar to slavery, whether included within the 1926 definition of slavery or not".[15] Those practices included debt bondage, serfdom, forced marriage, transfer or inheritance of women, exploitation of children and child labour.

Sexual Servitude) Bill 1999 (Cth), 2.

8 Commonwealth, *Parliamentary Debates*, Senate, 24 March 1999, 3075 (Ian MacDonald, Minister for Regional Services, Territories and Local Government).

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

10 Ian MacDonald, above n 8, 3075-3076.

11 Ibid.

12 Ibid.

13 Australian Law Reform Commission, above n 9, [104].

14 Ibid, [105].

15 Ibid.

30 Counsel for the applicant submitted, first, that the legislation went beyond the scope of the *Convention* in that it purported to treat as slavery conduct which was not within the intended scope of slavery as defined by the *Convention*. The *Convention*, he submitted, was confined to chattel slavery. Insofar as practices akin to slavery, but which were not chattel slavery, were targeted by a treaty, then, he submitted, they were addressed by the *Supplementary Convention.* The federal legislation was said to be empowered by the *Convention*, but it was not, he submitted. Alternatively, if the legislation were to be upheld as giving effect to the *Convention* then, he submitted, the scope of the legislation must be narrowly confined, applying only to a person who was the "owner" of the slave, and who intentionally exercised a power of ownership so as to enslave the victim.

31 I deal with this first argument of counsel for the applicant.

Was the 1926 Convention limited to chattel slavery?

32 Counsel submitted that the definition of "slavery" under the 1926 *Convention* did not apply to exploitative practices which were akin to slavery - such as debt bondage or sexual servitude - which did not require proof of effective "ownership" of the victim. He cited a paper by Jean Allain,[16] published by the Wilberforce Institute for the Study of Slavery and Emancipation, in which the author analysed the preparatory papers[17] ("travaux preparatoires") of the 1926 *Convention.*

33 Allain concluded that there was agreement among States in adopting the *Convention* that slavery did not include conditions of servitude that merely resembled "slavery", but

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16 Jean Allain, 'A Legal Consideration "Slavery" in Light of the *Travaux Preparatoires* of the 1926 Convention' (Paper presented at the Twenty-First Century Slavery: Issues and Responses Conference, Wilberforce Institute for the Study of Slavery and Emancipation, Hull, UK, 23 November 2006).

17 Article 32 of the 1969 *Vienna Convention on the Law of Treaties,* opened for signature 23 May 1969, [1974] ATS 2 (entered into force 27 January 1980) permits reference to such material where the language of a treaty is ambiguous or obscure or where the suggested interpretation produces manifestly absurd or unreasonable meaning. See, too, *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, at 231, 234, 248, 251-2, 294.

applied only to slavery as ownership. He said that the definition of slavery was an intentionally narrow one and "the issue of ownership is the sine qua non of the definition of slavery in law".[18] Allain concluded:

> "That is not to say that forms of servitude, be it forced or bonded labour or serfdom, can not be considered slavery – if issues of ownership can be demonstrated; or be used to hold States responsible for human rights violations. It does, however, mean that such violation of international law would be on the basis of violations of the norm of servitude and not slavery and, for instance, would not entail individual criminal responsibility before the International Criminal Court. If anything, what this paper has sought to show is that the term "slavery" has a very specific connotation in international law; the fact that attempts have been made to expand its ambit must be considered as falling beyond the express wishes and dictates of States, which are, at the end of the day, the entities which determine, interpret and apply international law. We may not like it, but there it is".[19]

34 In its ruling in *Siliadin v France*,[20] the European Court of Human Rights came to the same conclusion, obiter, when considering an alleged breach of the *Convention for the Protection of Human Rights and Fundamental Freedoms*. In that case the victim, when aged 15, had been brought to France from Togo to perform unpaid household duties. Her passport had been taken from her and her original controllers "lent" her to another couple. She worked 15 hour days, 7 days a week, and was not permitted to attend school. The Court observed[21] that the 1926 *Convention* definition corresponded to "the classic meaning of slavery as it was practised for centuries". The Court held that, although the victim was denied personal autonomy, "the evidence does not suggest that she was held in slavery in the proper sense, in other words that [the "employers"] exercised a genuine right of legal ownership over her, thus reducing her to the status of an 'object'".

35 Dr Donoghue, who presented the constitutional argument on behalf of the Director, placed emphasis on the fact that the stated purpose of the *Convention* was "the complete abolition of slavery in <u>all</u> its forms".[22] He noted that the understanding of the definition

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18 Allain, above n 16, 15.

19 Ibid.

20 (2005) VII Eur Court HR, App no 73316/01.

21 Ibid, [122].

22 International Convention to Suppress the Slave Trade and Slavery, opened for

asserted by the Court, obiter, in *Siliadin* differed from that adopted by the Appeals Chamber of the International Tribunal for the Prosecution of Persons for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia since 1991, in the case of *Kunarac, Kovac and Vukovic.*[23] In that case, the Appeal Tribunal held that "the law does not know of a right of ownership in a person"[24] and concluded that the definition deliberately used more guarded language, referring to "a person over whom any or all of the powers attaching to the right of ownership are exercised". The Appeal Tribunal held that "the contemporary forms of slavery" which fell within the definition would be identified by analysis of the evidence for indicia of slavery, including "control of someone's movements, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour"[25].

36 The understanding of the scope of the definition of slavery stated by Jean Allain is at odds with that of David Weissbrodt in his paper commissioned by the Office of the United Nations High Commissioner for Human Rights[26]. Weissbrodt concluded[27] that the definition was intended to include the broader range of practices that had been addressed by the Temporary Slavery Commission of 1924, including debt bondage, serfdom, practices involving restrictions of liberty and personal control analogous to slavery, practices such as acquisition of women and girls in the guise of payment of dowry, and so forth. It was not limited to chattel slavery, but required examination of the degree of restriction and control exercised over the person, rather than concentration on the criterion of ownership.

37 The *Supplementary Convention* stated its aim as being to abolish slavery, the slave trade and "Institutions and Practices similar to slavery ... whether or not they are covered by

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signature 25 September 1926, [1927] ATS 11, art 2(b) (entered into force 9 March 1927).

23 *Prosecutor v Kunarac, Kovac and Vukovic*, Appeals Chamber 12 June 2002.

24 Ibid, [118].

25 Ibid, [119]

26 David Weissbrodt and Antislavery International, *Abolishing Slavery and its Contemporary Forms,* ESC Res 2001/282, UN Doc HR/Pub/02/04 (2002).

27 Ibid, [8]-[12]; [19]- [22].

the definition of slavery contained in Article 1 of" the *Convention*.[28] The *Supplementary Convention* addressed debt bondage, serfdom, denial of the right to refuse marriage by virtue of dowry, child exploitation under the pretence of guardianship, and so forth. Counsel for the applicant submitted that the inclusion of those practices in the *Supplementary Convention* suggested - notwithstanding the "whether or not" disclaimer to the contrary – that they had not been addressed by the *Convention*.

38 In the final analysis, it is unnecessary to resolve the dispute between Allain and Weissbrodt. Dr Donoghue submitted that the plain language of the *Convention* decided the question whether the legislation was valid as an instance of implementation of that treaty, and I agree with that contention. Dr Donoghue highlighted the very close accord between the language of the legislation and that of the treaty which it was said to implement. As I have noted, slavery was defined in Article 1 of the *Convention* as follows:

> "Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised".

39 The definition of slavery in s 270.1 is:

> "For the purposes of this Division, slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, *including where such a condition results from a debt or contract made by the person*" [My emphasis].

40 Mr Shirrefs acknowledged that his argument as to invalidity would have been significantly weakened had the language of the legislation been precisely the same as that used in the *Convention*. He submitted, however, that the additional words, highlighted above, took the definition beyond the intended scope of the definition in the *Convention* so as to introduce concepts that were foreign to the *Convention*. The meaning of those concepts could not be gleaned from the *Convention*, he submitted, thus rendering the legislation beyond its scope.

41 In my opinion, the additional words do not expand the definition but merely make it

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28 *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, opened for signature 7 September 1956, [1958] ATS 3, art 1 (entered into force 6 January 1958).

clear that conduct that the victim agreed to, or contracted to undertake, whether to meet a debt or otherwise are included within the definition. A volunteer slave, in other words, is no less a slave. Once it is accepted that the additional words are words of inclusion, not extension, then it simply cannot be said that the legislation was not reasonably capable of being considered appropriate and adapted to implementing the Convention.

42 It is unnecessary, therefore, to consider whether the legislation may also have been empowered on any of the other bases of validity for which the Director contended.

43 I turn then to the alternative contention advanced by Mr Shirrefs.

Does the legislation proscribe only slave "ownership"

44 If the legislation was within power then, so Mr Shirrefs submitted, it should be confined in its application to cases where the accused was the "owner" of the slave, as opposed to someone else who exercised powers over the person concerned. It was not clear to me that Mr Shirrefs abandoned a contention that the *Convention*, and therefore the legislation, were to be confined to dealing with what would have constituted slave ownership in its historical sense. That contention could not be correct. That which is not permitted in law to be owned does not become owned merely because of an exercise of power, even if the exercise of power over the property might once have constituted ownership in law. That is made clear by s 270.2, which expressly declares that slavery, i.e. actual ownership, remains abolished and unlawful.

45 Assuming, however, that ownership was notional only - in the sense that there was the exercise of power over a person *as though* the person was a slave in the historical sense - then even so, counsel submitted, the legislation was directed only at the person who could be characterised as the notional slave owner, not to other persons who might exploit the person.

46 No written contracts were tendered in the trial. Insofar as the contractual arrangements whereby the women travelled to Australia were relied on by the Crown as evidence of their status as slaves, then only in the case of four of the women had the applicant paid Thai recruiters a sum of money, variously described by witnesses as being to purchase

the women, to purchase their contracts, or to purchase their services.[29] (The Crown sought to rely upon the evidence of witnesses who applied the first description.)

47 The prosecutor accepted, however, that no money was paid by the applicant to acquire rights under a contract with respect to K. Therefore, there could be no contention that the applicant was the effective (or notional) owner of K, Mr Shirrefs submitted. Thus, for that reason alone, the two convictions concerning her ought to be set aside as unsafe and unsatisfactory.

48 Furthermore, he submitted, the purchase of the contracts concerning the four other women could not amount to ownership of the women by the applicant, even notionally, and nothing in the evidence was capable of justifying that description.

49 As I shall discuss more fully later, the ambit of the legislation is not so narrowly confined as Mr Shirrefs contends. The legislation does not require proof of actual ownership of a slave (ownership of a person having been abolished in the 19th century[30]), nor does it require that somebody be identified as taking a role that would have constituted him or her an owner had slavery not been abolished. Neither the definition nor the offence provisions in Chapter 8 speak of the "owner" of a slave, merely of persons exercising one or more of the powers "attaching to the right of ownership". Thus, the concept of ownership remains central to the offences, but by way of identification of powers that attach to the right of ownership. The concept is relevant too when addressing the intention of the person exercising the power(s)[31]. But proof that the offender exercised such powers over another as though he or

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29 I leave open the question whether the subjective description of the contracts given by witnesses provided evidence against the applicant, for any purpose. The applicant, herself, had not admitted that the contracts constituted the "purchase" of the women. See further, pars [149] to [158], below.

30 Four Imperial Slave Trade Acts, combined with a multitude of treaties in the 19th Century, were directed to the abolition of slavery. A useful discussion of the history may be found in Australian Law Reform Commission, above n 9, [72]-[78]; see too the Model Criminal Code Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Report: Chapter 9 Offences Against Humanity – Slavery* (1998), 1-2 ; see too Weissbrodt, above n 26, [5]-[7].

31 See, for example, pars [83]-[84], below.

she was the owner would not thereby constitute him or her as the owner of the person concerned, although it would constitute that person a slave.

50 I reject the contention that the defendant must be shown to have had "ownership", either actual or as good as being the owner, at the relevant time, for an offence to have been committed. The slavery provisions are not confined in their operation to the conduct of persons who would have met the description of slave "owner", had slavery not been abolished. Thus, a person might commit a slavery offence under the Act although the victim had first been rendered into the condition of slavery by another person.

51 The powers attaching to ownership nonetheless remain the critical foundation for an offence against the slavery provisions, as I shall discuss.

Ground 1: Uncertainty in meaning of "slavery".

52 The practice of slavery in its modern form is rightly regarded as a crime against humanity. There can be no doubt that international conventions since 1926 reflect the determination of the international community to abolish it in all its forms.

53 When the slavery and sexual servitude provisions were introduced in 1999, the Second Reading Speech of the responsible minister acknowledged the unique nature of the slavery offences. He said, however, that "It is not sufficient for the debt or contract to be exploitative or oppressive to qualify. Rather, it must be such as to place a person in a condition whereby a power attaching to a right of ownership is exercised over him or her".[32] The minister added:

> "It is important to make the point that although this bill contains separate offences to address the conduct I will refer to shortly as sexual servitude, the slavery offences may also apply *if the control over the sex worker is so far-reaching that it effectively amounts to a right of ownership over him or her*.
>
> The maximum term of imprisonment for the slavery offences is 25 years. In view of the heinousness of the crime involved that penalty is more than justified."[33] [Emphasis added]

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32 Ian MacDonald, above n 8, 3076.

33 Ibid.

54 The concept of ownership was readily understood when applied to the slave trade in the 19th century, but when ownership of slaves was prohibited the continuing relevance of principles concerning ownership produced uncertainty. In his 2002 article, David Weissbrodt analysed the issue as follows:

> "19. Ownership is the common theme existing in all the conventions concerning the abolition of slavery and slavery-like practices. The wording of the Slavery Convention is ambiguous as to whether this concept of control must be absolute in nature in order to be considered a prohibited activity. Arguably, the use of the phrase 'any or all of the powers attaching to the right of ownership' (art. 2) was intended to give a more expansive and comprehensive definition of slavery that would include not just the forms of slavery involved in the African slave trade but also practices of a similar nature and effect.
>
> 20. Traditional slavery was referred to as 'chattel slavery' on the grounds that the owners of such slaves were able to treat them as if they were possessions, like livestock or furniture, and to sell or transfer them to others. Such practices are extremely rare nowadays and the criterion of ownership may obscure some of the other characteristics of slavery associated with the complete control to which a victim of slavery is subjected by another human being, as implied by the Slavery Convention's actual wording, 'any or all of the powers attaching to the right of ownership'.
>
> 21. In the modern context, the circumstances of the enslaved person are crucial to identifying what practices constitute slavery, including: (i) the degree of restriction of the individual's inherent right to freedom of movement; (ii) the degree of control of the individual's personal belongings; and (iii) the existence of informed consent and a full understanding of the nature of the relationship between the parties.
>
> 22. It will become apparent that these elements of control and ownership, often accompanied by the threat of violence, are central to identifying the existence of slavery. The migrant worker whose passport has been confiscated by his or her employer, the child sold into prostitution or the 'comfort woman' forced into sexual slavery – all have the element of choice and control of their lives taken from them, either by circumstance or through direct action, and passed to a third party, either an individual or a State."[34]

55 That is a helpful analysis of the intended scope of the international instruments. The Weissbrodt analysis did not, of course, address the language of this legislation. And it is in the precise terms of the legislation, rather than in secondary sources and materials, that the

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34 Weissbrodt, above n 26, 7.

meaning of the legislation is to be found.[35] As Gleeson CJ, Callinan, Heydon and Crennan JJ held in *Stingel v Clark*:[36]

> "Extrinsic materials may be useful as an aid to deciding the meaning of that language, but the subjective contemplation of the drafters as to the kind of case in which that language would be most likely to be applied is not determinative".

56 In this case the analysis provided by Weissbrodt is not mirrored by the language of the legislation. The interpretation of the language of the provisions themselves is not a simple task.

57 It is clear that the prosecutor conducted the present case against the applicant as though the statutory language followed the description provided by Weissbrodt of the characteristics of the modern forms of slavery.

58 In her final address to the jury in the second trial, Ms Carlin (who had not prosecuted the first trial) posed the question "Have they been treated as if they were simply property?" At another point, the prosecutor invited the jury to consider " . . . how the women were treated as property, and what I mean there is they're not treated as people, like you or me. They're treated as if they're possessions, objects". As I shall discuss, those submissions invited the jury to assess the complainants' situation objectively. Whilst objective analysis is a necessary part of determining what had been intended by the applicant, those submissions did not, in terms, direct the jury to consider the subjective intention of the applicant - her state of mind - when dealing with the complainants. That was a critical element of the offence that had to be established if the applicant was to be convicted.

59 On the "possess a slave" counts, the Crown relied on the degree of control and denial of personal freedom that was exercised over the lives of the women. Even if they were not physically restrained then, Ms Carlin said, their fear of authorities and the isolation caused by their lack of English meant that they were dependent on the "employers" and were easy to control. Counsel submitted that the purchase price paid to the Thai organisers gave the

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35 *Weiss v The Queen* (2005) 224 CLR 300, 312; see also the cases cited at footnote 49 therein.

36 (2006) 80 ALJR 1339, at 1348 [26].

applicant the right to control the women, a control which was unlike even the harshest of employment relationships, and which amounted to treating them as property.

60 In the first trial there was extensive debate as to the elements of the offences, and the meaning to be attributed to the language used in the provisions. I do not underestimate the difficulty of the task facing his Honour and counsel in interpreting the legislation, for which there was no precedent or guiding case law.

61 His Honour was referred to a range of extrinsic materials pursuant to s 15AB(1) of the *Acts Interpretation Act 1901* (Cth), on the basis that the provisions were "ambiguous or obscure". His Honour ruled,[37] however, that there was nothing ambiguous in the language of s 270.3(1)(a) and that the provision should be given "its ordinary and natural meaning". Notwithstanding that conclusion, it is apparent that counsel did have difficulty interpreting the meaning of such words as "possession". The prosecutor in the first trial was unsure whether the meaning was that to be found in the Macquarie Dictionary, *viz*, "to have as property; to have belonging to one", or was to be found in the common law.

62 In his ruling the judge concluded that actual physical possession was not required. He noted the following statements in the Explanatory Memorandum:

> "The focus is on the practical capacity for control rather than a mere geographical nexus. One or more persons may possess another."

63 Those words found their way into the written instruction given to the jury in both trials. Additional words by way of definition were added as a result of unanimous agreement by counsel that his Honour should apply the meaning of "possession" adopted by Dawson J in *He Kaw Teh v The Queen,*[38] citing Lord Diplock in *Director of Public Prosecutions v Brooks*[39] and approved in *R v Maio*.[40]

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37 Ruling 24 March 2005, Transcript of Proceedings, *Wei Tang v The Queen* (County Court, 24 March 2005).

38 (1985) 157 CLR 523, 590-604.

39 [1974] AC 862, at 866.

40 [1989] VR 281.

64 The jury were therefore provided with the following definition, in which the first paragraph contained the precise words used by Lord Diplock, and the second and third paragraphs used the precise words from the Explanatory Memorandum:

> "**Definition of Possession**
>
> In the ordinary use of the word, possession means: one has in one's possession whatever is, to one's knowledge, physically in one's custody or under one's physical control.
>
> The issue to be considered here is the actual capacity for custody and control rather than a mere geographical nexus.
>
> One or more persons may possess another."

65 That definition had been employed in the first trial and was adopted again in the second trial.[41] Notwithstanding that all counsel had agreed to the definition, late in the second trial counsel for the applicant submitted that it was inadequate, because it did not clarify that the control had to be exercised pursuant to a power attaching to ownership, and not pursuant to some other claimed entitlement. He gave the illustration of an oil rig worker whose movements could be strictly controlled by his employer but where such control would not be the exercise of a power attaching to a right of ownership, but a power exercised pursuant to rights as the employer.

66 The difficulty foreshadowed by counsel identified the critical issue which arises as to the elements of the offences created by s 270.3(1)(a). That issue concerns the character of the exercise of power by the accused over the victim.

67 The statutory definition of "slavery" is only satisfied if the person is in "the condition of slavery", which in turn can only be created by someone exercising over the person any or

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41 In the extensive discussions between the judge and counsel at the time of the first trial (Ms Carlin was not counsel in the first trial) counsel agreed to the incorporation of the terms of the Explanatory Memorandum (Transcript of Proceedings, *Wei Tang v The Queen,* 15 March 2005). In the second trial the judge largely adopted the rulings made for the first trial (see Ruling 26 May 2006, Transcript of Proceedings, *Wei Tang v The Queen*, 26 May 2006), although defence counsel had sought unsuccessfully to have an additional requirement added to the definition, i.e., that the control be "exclusive of others, not acting in concert".

all of the powers attaching to the right of ownership. That requires both an identification of what constitutes a right of ownership and what constitutes the powers that "attach to" that right. The fundamental feature of ownership is the claim of absolute right over the property that it gives to the owner as against all others to possess the property, save to the extent that the right to possession is qualified by any law, or by permission given by the owner to another. As A. M. Honore noted, the right to possession - that is, the right to have exclusive physical control of a thing, or such control as the nature of the thing permits - is "the foundation on which the whole superstructure of ownership exists".[42] Professor Honore drew the distinction between "having" a thing and "having a right" to the thing: only the latter is an assertion of a right attaching to ownership, namely, the right to possession.

68 In directing the jurors as to the meaning of "intention", his Honour provided them with a written definition. That definition was taken from s 5.2(1) of the *Criminal Code Act 1995*. His Honour did not provide the jury with the two other paragraphs in s 5.2.[43] The omission of those paragraphs, in my opinion, undoubtedly contributed to the inappropriate narrowness of the directions which the jury received as to the meaning of the word "intentionally" in s 270.3(1). In particular, the omission meant that the jurors were not alerted as to the relevance, when considering the question of intention, of the belief which the accused may have held as to the basis on which she was dealing with each of the complainants.

69 The full terms of s 5.2 of the Code are as follows:

> (1) A person has intention with respect to conduct if he or she means to engage in that conduct.
>
> (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
>
> (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events."

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42 A M Honoré, *Oxford Essays in Jurisprudence*, (1961) 113.

43 At the commencement of the second trial, the judge said as to the definition, which had also been used in the first trial (confined to s 5.2(1)), "All right, so we'll go with that". Neither counsel demurred.

70 I will discuss the element of intention in more detail later.

71 On one view, the terms of the legislation allow for the possibility that the same conduct performed by one person towards another could, simultaneously, constitute both the creation of a slave and the commission of slavery offences under s 270.3(1)(a) in relation to that slave. It may be that it was intended by the legislators that any act whereby a person exercises over another a power attaching to a right of ownership should be regarded both as rendering the other person into the condition of slavery and as constituting a slavery offence. On the other hand, the language of the offences under s 270.3(1)(a) ("possesses a slave" . . ."exercises over a slave") presupposes that the creation of the condition of slavery must precede the commission of the offence upon the slave.

72 What is clear, however, is that in the present case the prosecution was conducted on the basis that the Crown had to prove, first, that the condition of slavery had been created before the offences were committed. Ms Carlin told the jury that:

> "Common to each of the offences is the requirement, the element that the woman possessed or used is a slave. If you are not satisfied beyond reasonable doubt that the particular complainant is a slave, that's the end of the story, you don't have to go on and consider anything else. Your verdict must be not guilty". [44]

73 Secondly, the Crown conducted its case on the basis that it had to prove that the applicant knew that each complainant was a slave when she engaged in conduct constituting the possession or use of the slaves. Thus, after submitting that the condition of slavery had been created by the applicant and others acting jointly (Ms Carlin later described the applicant as being one of the "part-owners",[45] whose actions from the time of the arrival of the women in Australia reduced them to slavery), Ms Carlin told the jury:

> "If you find beyond reasonable doubt that these women were slaves during the period of the counts, and it doesn't have to be for the whole period but during the periods of the counts, then you move on to look at the next elements for each of the offences.
>
> So if I look at the offences that are "intended to possess a slave", well, the accused must have intended, in other words meant to, possess a slave, and

44 Transcript of Proceedings, *Wei Tang v The Queen*, 29 May 2006), 1677

45 Ibid, 1762

that intention must be directed not just at possessing the person but at the fact that the person is a slave. So the accused must have intended to possess a slave, being the particular person we're looking at".[46]

74 As to the other offences the prosecutor said:

> "[T]he accused must have intended, again meant to, use a slave, and again the intention must be directed at not only using the person, but using the slave who is the person. Here it's alleged . . . that the accused [used] them, these slaves, by offering them for sexual services and by deriving income from the use of their bodies, which as I said to you, you might think is the ultimate use of somebody". [47]

75 As I shall later discuss, the learned trial judge directed the jury, consistently with the prosecutor's approach, that for the jury to return a conviction: "So fundamental, of course, is your determination that she is a slave. It is then necessary to go on to look at the other elements [of the offences]"[48]. Again, he directed the jury to ask as to each complainant, "Is she a slave? You cannot possess or use a slave unless you have determined that she is a slave".[49]

76 Thus, for conviction for an offence under s 270.3(1)(a) the Crown accepted that there must, first, have been a slave created and the condition of slavery must have pertained when the conduct constituting the offence of possession or use was committed. The Crown conducted the case on the basis that each woman was put in the condition of slavery not by the actions of anyone in Thailand but by actions of a number of people in Australia connected to the brothel (of whom the applicant was one) together exercising powers attached to the right of ownership, and that the applicant then possessed and used the slave thus created.

77 In my opinion, the approach urged by the Crown, and adopted by his Honour, did not correctly identify the elements of the offences which the Crown had to establish. Given the way the Crown mounted its case, and having regard to the full terms of s 5.2 of the Code, then, in my opinion, in order to constitute the first of the offences under s 270.3(1)(a), namely, "intentionally . . . possessing" a slave, the following matters had to be proved

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46 Ibid, 1679-1680

47 Ibid, 1680

48 Ibid, 30 May 2006 1840; 1844

49 Ibid, 31 May 2006 1875

against Wei Tang (I will employ the neutral descriptor of "worker"):

> First, the worker must have been reduced to the condition that would constitute her a slave, as defined in the Act. The jury must be satisfied that she had had powers exercised over her as though she was mere property, with the result that she had been reduced to the status of mere property, a thing, over whom powers attaching to the right of ownership could be exercised.
>
> Secondly, the accused must have known that the worker had been reduced to a condition where she was no more than property, a thing, over whom persons could exercise powers as though they owned her.
>
> Thirdly, the accused must have intentionally possessed the worker, that is, must have intentionally held her in her custody or under her physical control.[50]
>
> Fourthly, the accused must have possessed the worker in the intentional exercise of what constitutes a power attaching to a right of ownership,[51] namely, the power of possession. For that to be the case the accused must be shown to have regarded the worker as though she was mere property, a thing, thereby intending to deal with her not as a human being who had free will and a right to liberty,[52] but as though she was mere property. However harsh or oppressive her conduct was towards the worker it would not be sufficient for a conviction if, rather than having possessed the worker with the knowledge, intention, or in the belief that she was dealing with her as though she was mere property, the accused possessed her 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.[53]

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50 The word "intentionally" here is given the meaning in s 5.2(1) of the Code. The definition of "possession" used by the judge was in broader terms than I have employed. I accept that possession might be constituted without actual physical custody or control. This trial was conducted on the basis that the broader definition applied and it is unnecessary to resolve whether the additional language employed by his Honour added anything to the terms I have used.

51 It would not be necessary to prove that an offender knew that the power to possess or use property was an incident of the right of ownership; the judge could have directed the jury that as a matter of law those were powers attaching to ownership, but that the critical question for the jury was as to the intention which accompanied such exercise of the power of use or possession of a complainant which they found to have occurred.

52 The offence of enslavement under s 268.10(1) is accompanied by a definition (s.268.10(2)) of the phrase "exercises any or all of the powers attaching to the right of ownership". The definition applies only to that offence, but includes "purchases, sells, lends or barters a person or imposes on a person a similar deprivation of liberty . . ."

53 Here the definitions contained in both s 5.2(2) and s 5.2(3) are relevant and should have been drawn to the attention of the jury, the relevant

78 Both the "use" and "possess" offences are created in the same sentence which comprises s 270.3(1)(a), and it could not have been intended by the legislators that the requirement that there be the intentional exercise of a power attaching to the right of ownership should apply to all such powers save for that of the right to possession of property. Thus, for the offence of exercising the power of "use" of the slave (which was the "other power" relied on for counts 2, 4, 6, 8, 10), each of the above propositions (suitably modified to replace "possess" or "possessed" with "use" or "used") must have been established.

79 His Honour gave the jury the following definition of "use", which was apparently agreed to by counsel:

> **"Use"**
>
> "To take advantage of, manipulate or employ a person in a specified function or capacity."

80 The source of this definition was not disclosed by his Honour. Whilst the definition was apparently agreed to by counsel, it seems to me that it was problematic. In my view, a more appropriate definition would have been that provided in the *Shorter Oxford Dictionary*, as follows:

> "The act of employing a person for any (esp. a profitable) purpose; the fact, state, or condition of being so employed; utilization or employment for or with some aim or purpose, application or conversion to some end".[54]

81 As I earlier noted, the question posed to the jury by the prosecutor - "Have they been treated as if they were simply property?" - invited objective assessment by the jury of the character or effect of the applicant's treatment of the complainants. The critical element with which the fourth proposition is concerned required the jury to make a finding as to the knowledge or belief of the applicant. Of course, since the applicant did not give evidence, the

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"circumstance" " and "result" being that the person was being treated as property. In appropriate cases, where defences of mistake or ignorance of fact were raised, the jury would need to be advised of the terms of s 9.1 of the *Criminal Code*.

54 In the first line I have inserted the word "person" in lieu of the word "thing", which appears in the definition, and, in addition, I would have not included the words which appear in parenthesis in the definition before the word "end", namely, "(esp. good or useful)".

jury were obliged to determine the question raised by the fourth element solely by reference to the evidence that was before them, and inferences that could be drawn from that evidence. Nonetheless, for proof of the offences the critical question was not the one posed by the prosecutor (however useful a guide that may have been towards the right answer) but, rather, that identified in paragraph [77] above, as the fourth element.

82 As I have said,[55] it may well be that offences under the section could be committed by the exercise of a power attaching to a right of ownership notwithstanding that there had not been any previous exercise of such a power. That is not this case, however, and I will not pause to consider whether in such a case the elements of the offence would be identical to those discussed above.

83 It may be seen, therefore, that there are several levels at which proof of knowledge or intention must be established in order to constitute the offence, and that the concept of the exercise of a right of ownership is fundamental at each step.

84 Weissbrodt concentrated attention on the degree of control over a person, as being the indicator of when a person reached the condition of slavery. Lack of control of the 'slave' over her life, and her lack of personal liberty, may well suggest that she is being treated as though she were mere property - as a thing – but more is required to be proved for an offence under s 270.3(1)(a). And much more is required than that the person be shown to have been exploited, abused or humiliated, whether physically, emotionally or financially. To be a slave, the person must be in a state where he or she is dealt with by others as though he or she was mere property – a thing. For the exercise of the power to contravene s 270.3(1)(a) the accused must have knowingly treated the person as though he or she was the accused's property. Only when that state of mind exists is the exercise of power referable to a right of ownership, as the section requires.

Debt bondage and sexual servitude compared

85 It is important that the offence of slavery not be so broadly and loosely interpreted as

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[55] See par [71], above.

to capture instances of exploitation that, however serious, do not constitute slavery within the meaning of the definition and of the terms of s 270.3(1)(a). Having regard to the severity of the penalty for the offence, it would necessitate very clear directions to the jury to ensure that the jury did not substitute for the statutory definition of the offence a more expansive understanding of what constitutes slavery. The restrictive terms of the definition must be understood and applied by the jury, and it may well be that the Crown would not readily satisfy the burden of proof. This is penal legislation and should be strictly construed.[56]

86 The facts on which the prosecution relied in proof of the slavery offences would now readily fall within the discrete offence of debt bondage, under s 271.8 of the Code.[57] That offence did not exist in the Code at the time of the happening of these alleged slavery offences.[58] It may well have been that, had the offence of debt bondage been in existence, the applicant would have been prosecuted on that charge, or at least it would have been on the presentment as an alternative to the slavery offence.

87 "Debt bondage" is defined in the Dictionary of the Code as arising when a person pledges personal services as security for a debt and the debt is manifestly excessive, or the reasonable value of the services provided is not applied in reduction of the debt, or the length and nature of the services are not limited and defined. Arguably, that offence would have been proved on the evidence in this case and, if so, it would have carried a maximum sentence of 12 months' imprisonment. There being no such provision, the applicant was

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56 *Murphy v Farmer* (1988) 165 CLR 19, 28-29; *Fowkes v DPP* [1997] 2 VR 506, 517-8.

57 By way of contrast, the New Zealand legislation concerned with "Slave Dealing" creates an offence of "Dealing in slaves" under s 98(1) of the *Crimes Act 1961 (NZ),* which is constituted by a range of discrete conduct which in each and any instance is sufficient to constitute the offence. "Debt bondage" and "serfdom", as defined, each constitute instances of the offence. "Slavery", however is not defined, which led the Court of Appeal in *R v Decha-Iamsakun* [1993] 1 NZLR 141, to conclude that it was appropriate to apply the Chambers English Dictionary definition of "a person held as property".

58 Division 271, which dealt with "Trafficking in Persons and Debt Bondage", came into effect on 3 August 2005, by Act No 96/2005, the *Criminal Code Amendment (Trafficking in Persons Offences) Act* 2005 (Cth).

charged with slavery offences, which carried a maximum sentence of 25 years. As noted earlier, she received a total effective sentence of ten years' imprisonment with a non parole period of six years, although she had no prior convictions.[59]

88 On the other hand, s 270.6 of the Code, which created the offence of sexual servitude, was in existence when the applicant engaged in the conduct giving rise to the slavery charges. That provision was not utilised by the Crown, no doubt in recognition that a conviction under that section could not have been achieved, having regard to the definition of "sexual servitude" in s 270.4(1). The offence occurs where the offender, by means of force or threats, requires a person to engage in sexual services, so that the person is not free to cease providing the services or is not free to leave the place where the sexual services are being provided. On the face of it, such an offence would seem to involve certain conduct on the part of the offender, concerning the provision of sexual services by the complainant, which would be even more serious than that alleged in the present case. Here there was no suggestion that the five contractors provided sexual services because of force or threats. Whilst there would have been practical impediments to doing so and economic consequences for them were they to do so, Ms Carlin accepted that each of the complainants could have refused to complete the contract she had entered. Had this been a case where threats and force had been applied to the complainants, and had the applicant been charged and convicted of sexual servitude, then the maximum penalty for that offence would have been 15 years' imprisonment.[60]

89 By way of an exception to the direction given in this case, defence counsel submitted that his Honour ought direct the jury as to the difference between the offences of slavery, on the one hand, and other offences, such as debt bondage and sexual servitude, on the other hand. The prosecutor strongly opposed that course. His Honour declined to so direct the

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59 I make that observation only to emphasise the seriousness of the slavery offences. I intend no comment as to whether the sentence imposed was appropriate upon conviction of these offences. The applicant applied for leave to appeal against her sentence, but having regard to the outcome of the conviction appeal it has been unnecessary for the Court to consider that application.

60 Where the victim was not under the age of 18 years: s 270.8, *Criminal Code Act 1995* (Cth).

jury.

90 His Honour may well have been concerned about confusing the jury by discussing the elements of offences which were not on the presentment and which were not capable of being brought against the applicant. Even so, counsel's submission made a reasonable point. The jury had to understand that the offence of slavery was unique among exploitative situations, and in my opinion it would have been helpful for the judge to have made reference to other types of exploitative conduct falling short of slavery, so as to emphasise that which made slavery unique.

91 Ground 1 asserted that the trial miscarried because of the "inherent uncertainty" of the meaning of the phrase "any or all of the powers attaching to the right of ownership". Not surprisingly, the learned trial judge and counsel had considerable difficulty interpreting the language adopted by the legislators in creating these slavery offences. I do not, however, consider that Ground 1, in its terms, has been made out. As I have discussed, a sensible meaning can be assigned to the phrase, so it is not inherently uncertain.

92 Although Ground 1 is not made out, consideration of the arguments advanced on the appeal pursuant to that ground has allowed us to identify and explain the elements of the offences. That analysis, in turn, provides the backdrop for consideration of the complaints made under Ground 2 about the directions which his Honour gave to the jury.

Ground 2: Directions as to slavery offences

93 The learned trial judge had the misfortune to be the first judge in Australia called on to devise directions for these novel offences. Although, as will emerge, I consider that there were deficiencies in the directions given, it is important to recognise the difficulties of the task his Honour faced and the care with which he undertook the task of assisting the jury. I note, too, that in the two trials his Honour was called upon to consider a wide range of submissions, on previously unexplored questions of law. His Honour provided comprehensive and careful rulings on all such issues, the correctness of which, in the great majority of cases, has not been challenged on either side.

94 His Honour provided the jury with a range of written material to supplement his oral directions, including a copy of the statutory definition of "slavery", a note listing the elements of the offences, and definitions of a number of words which appeared in the provisions. In addition, his Honour provided the jury with "decision trees" for each set of counts. His Honour also provided the jury with a document titled "Powers Attaching to the Right of Ownership" which listed the following eight powers:

> "1 To have the exclusive enjoyment of the property.
> 2 To exclude others from the property.
> 3 To destroy or alter property.
> 4 To sell or alienate the property.
> 5 To possess the property.
> 6 To use the property as one dictates.
> 7 To beneficially use the property at one's discretion.
> 8 The power to receive the proceeds of the use of such property."

95 This document was produced by his Honour for the first trial. He said at that time[61] that it was produced from a compilation of material provided by counsel in the course of debate about the charge, and also from definitions taken from various legal texts.[62]

96 At the time of the first trial, there was some debate with defence counsel as to whether only such powers as were relevant to the case (counsel suggested there were two only) should be referred to the jury. His Honour disagreed that the powers should be so confined and said there were any number of powers that might apply to the condition of slavery. At that time there were two accused and his Honour noted that some different powers might be relevant to the case of the then co-accused Mr Pick than were relevant to the applicant. In my view, it might have been appropriate on the re-trial of the applicant for the judge to have confined the discussion of powers to the two identified by counsel as relevant to the case, but no ground of appeal raises any complaint about his Honour's decision in this respect. In any event, it may be that in another case defence counsel might prefer, for forensic reasons, to have the jury

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61 Transcript of Proceedings, *Wei Tang v The Queen* 12 May 2005.

62 The source of the list was not stated by his Honour. In the chapter "Ownership" in the *Oxford Essays in Jurisprudence*, (1961), A M Honoré listed eleven leading incidents of ownership.

address a wider range of powers arising out of ownership. I leave this question open.

97 Having handed the material to the jury, his Honour took the jury through the various definitions and documents.

98 Mr Shirrefs submitted that the directions concentrated on the nature of the power that was exercised and failed to adequately direct the jury as to the knowledge, intention and/or belief that had to accompany the exercise of the power. For reasons which follow, I would uphold this submission.

99 Mr Shirrefs submitted that:

> "His Honour did not direct the jury that the power being exercised must be pursuant to a notional claim of ownership. Rather, he erroneously permitted the jury to reason that the finding of the exercise of a relevant power was determinative of ownership and thus proof of slavery".

His Honour gave the following direction about the definition of "slavery":

> "So to understand that definition and come to a conclusion in regard to it the first natural question would be what are the powers attaching to the right of ownership. I stress here we are not talking about ownership, we are talking about exercise of the powers attached to ownership. Once you established what those powers are the next natural question is, have any and which of such powers been exercised over the individual complainant, during the time indicated, by anyone. So what you are considering is during those time periods, and each of those counts, was the complainant, in this case [K] and the first two, a slave, and we go down to the same question, fundamental first question. And how do you determine that? By looking at the definition first.
>
> Also while you are looking at that definition it is important for you to see that such a condition, pursuant to the statute, can result from a debt or contract made by a person. So that that means that even if a person consents to that condition, consents by way of contract or due to debt, they can still be a slave. You have heard something about happy slaves. It does not matter whether they are happy or not happy, the issue for you is, were they slaves? Irrespective of whether they wanted to be slaves, irrespective of whether after their contract they continued to work in the establishment, irrespective of whether they complained or not. None of those issues are matters for you. They are general circumstances that you would look at in the case to make your determination, but the fundamental issue for you is what was the condition of the person."

100 Using the "powers of ownership" document which he had distributed, his Honour told the jury that they were concerned "to look at the evidence to consider whether there has been

an exercise over any of these complainants of any of the powers attaching to ownership." His Honour said that ownership can be joint and it can be limited. He continued:

> "The essential consideration for you is if there is a limited period of ownership then during that period what powers, if any, attaching to the right of ownership, have been exercised. It does not matter whether it is limited ownership or ownership forever. The point for you is, in regard to these allegations, during a particular time period, if there was ownership of property your consideration is what exercise of the powers attaching to the right of ownership have been exercised.
>
> As I have said to you, the last part of the definition is that the Parliament have decreed that there can be slavery even where the condition of the person results from a debt or contract made by a person."

101 His Honour said as to the definition of slavery:

> "But insofar as that definition is concerned, your determination as to whether any and what powers attaching to the right of ownership have been exercised over a person, to determine whether the condition over a person – that is slavery – has been established, must be a determination unanimously reached by all of you. So that if you do come to a determination that the powers that have been set out there attaching to the right of ownership have been exercised, then it is necessary in regard to each of those powers for you to be unanimously satisfied of those. Because if you were not so you could hardly be satisfied as to the element of slavery."

102 As to the elements of counts 1, 3, 5, 7 and 9, his Honour provided a note to the jury specifying those to be:

> "1 That Wei Tang
>
> 2 At Melbourne
>
> 3 Intentionally
>
> 4 Possessed
>
> 5 A slave, namely [name of person]."

103 As to the elements of counts 2, 4, 6, 8, and 10, his Honour provided a document specifying those to be:

> "1. That Wei Tang
>
> 2 At Melbourne
>
> 3 Intentionally
>
> 4 In respect to a slave, namely [name of person]
>
> 5 Exercised a power attached to the right of ownership, namely the power to use."

104 His Honour also provided the jury with "Decision Trees", helpful documents allowing the jury to progress through the steps required before a verdict of guilty could be entered. In taking exception to the charge, defence counsel criticised the decision trees for what he said was an omission from them.

105 The decision tree for counts 1, 3, 5, 7 and 9 took the jury through the elements of the offence by posing the following questions:

- A: Do you find ... that any and which of the powers attached to the right of ownership were exercised over ... [name of victim]?
- B: do you find ... [name of victim] was a slave?
- C: Do you find ... that Wei Tang intentionally possessed a slave, namely [name of victim]?

106 A similar approach was adopted for counts 2, 4, 6, 8 and 10, but for that count item C asked

- C: Do you find ... that Wei Tang intentionally exercised over a slave, namely [victim] a power attached to the right of ownership, being the power to use?

107 Defence counsel submitted that the decision trees had a significant omission. He submitted that the jury should be told that the intention required under question C both an intention to exercise the power, and, in addition, knowledge held at the time "that you've got it [i.e the power]". His Honour said "Well that's why the issue of knowledge is there. I'll certainly do that". In fact, the issue of "knowledge" was addressed neither in the decision trees nor in the elements documents, but his Honour had handed to the jury written definitions of "intention" and "knowledge" which came from ss 5.2 and 5.3 of the Code.

108 On the following day, his Honour dealt with the questions of knowledge and intention. "Knowledge", as defined in s 5.3 of the Code, is as follows:

> "A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events".

109 As noted earlier, his Honour provided the definition of "Intention" from s 5.2(1) of the

Code[63], as follows:

> "A person has intention with respect to conduct if he or she means to engage in that conduct".

110 On the question whether Wei Tang intentionally possessed a slave, his Honour gave the following direction:

> "The next issue is to determine insofar as the elements are concerned whether Wei Tang intentionally possessed a slave. Well coming to the second page of that tab is the definition of possession. *In the ordinary use of the word, possession means one has in one's possession . . . whatever to one's knowledge, right; mental element. We are talking about, you will see in the elements here there is an element of intentionally possess, that is a mental element. And also in the very definition of possession is another mental element, one's knowledge.*
>
> *So one has in one's possession whatever is to one's knowledge physically in one's custody or under one's physical control. Now the issue to be considered here is the actual capacity for custody and control rather than the mere geographical nexus.* Now what that really means is you do not have to have someone locked up in a room to have control of them and, indeed, take [K]; if, in fact, you find that the owners were as [DS] says: 'Three people in Sydney, or [DS] flitting between Melbourne and Sydney, and John and Sam, if they were, in fact, the owners then you could not have geographical control because they are not here, but you are being asked to consider whether insofar as this definition of possession is concerned the question of actual capacity for custody and control, not that they have actually got them locked up and, of course, one or more persons may possess another." (emphasis added)

111 The highlighted passages do not address the critical question of the intentional exercise of a power attached to the right of ownership.

112 His Honour discussed "possession", then continued:

> "*The question you are considering as to control, and it is to one's knowledge – having knowledge of control – is about a slave.* Not about someone who – if Woewodin[64] when he came back from his holiday did not want to go to Collingwood he would not. He would just stop playing footy, it is up to him. He is the man who decides whether he plays or not, and I doubt when he found that Melbourne were still going to pay his contract and Collingwood were and he was going to get the same money it did not worry him two hoots.

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63 See the discussion at pars [68]-[69] above.

64 Defence counsel had employed an analogy in his address to the jury of a contracted footballer (Woewodin) being sold to another club against his wishes.

> But we are not considering a person in that situation. You are considering here a person having control over a person you have already decided is a slave. And it is necessary, obviously, when you are considering the issue of having a capacity for custody or control, rather than the geographical, to bear in mind that you are considering that issue of possession of a slave. And that is the circumstances that you are considering it in.
>
> Insofar as the two fault elements are concerned, there, the Act itself assists you. If I come firstly to the fault element – this is a technical phrase under the Act, but *when you are considering the definition of possession you see it is to one's knowledge, and if you go over to the next page the Act itself defines knowledge. 5.3 says this . . . 'A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events'. So you will have to consider that definition when you are determining the definition of possession. Did Wei Tang, in each of these instances, possess any of these women, and am I satisfied of that beyond reasonable doubt.*
>
> *Most importantly in regard to that count is that the other – I will take you to the mental elements ultimately – matter that has to be considered is, as part of the elements, is that there must be an intentional possession of a slave. So you have found that there is a slave, to get to this far. You then say, understanding what possession means, has Wei Tang intentionally possessed the slave? To again assist you, if we have a look at the third document under Tab 26, is the definition of the word intention, which is in the Act. An intention says, 'A person has intention with respect of conduct', and you are talking about possessing a slave. '… intention with respect to conduct if he or she means to engage in that conduct'. So that is the definition, and that is what you have got to consider.*
>
> *If you found the person was a slave you have to consider are you satisfied beyond reasonable doubt that Wei Tang not only possessed the slave but that she intended to possess the slave. That is that in regard to that conduct of possessing a slave she meant to engage in that conduct, insofar as it is defined. They are the elements insofar as – coming back to the start of that at Tab 26 – Counts 1, 3, 5, 7 and 9."* (emphasis added)

113 The highlighted passages in the preceding paragraphs do include references to the offender's knowledge and intention. The direction touched on the requirement - one that the prosecutor accepted the Crown had to establish - that the offender have knowledge that the victim had been reduced to the condition of a slave. What is of present concern, however, is the terms of the direction concerning the exercise of power(s) over the slave. Critically, the direction draws no clear distinction between the intent to possess, on the one hand, and the intentional assertion of a right akin to ownership, on the other hand. The direction needed to make clear that, in acting towards the victim in the ways that were said to constitute the offences (i.e. possessed the slave or exercised another power attaching to ownership), Wei

Tang must be proved to have acted with the knowledge that she was dealing with the victim as though she was mere property over whom Wei Tang could exercise the rights an owner would have over property, and not in the belief that she was dealing with the victim on some other basis - as her employer, for example.

114 After dealing with some exceptions to his charge (taken during a break in its delivery), his Honour then recommenced the charge and reminded the jury that the offence for counts 1, 3, 5, 7 and 9 required the intentional possession of a slave. His Honour directed as follows:

> "As I reminded you, this count is the one of intentional possession of a slave. Now, implicit in that is of course you cannot intend to possess a slave unless you know it is a slave, and I suppose the example in regard to that, and a very good example, is Emma. And as I said to you, that the actual people who purchased the contract were John, [DS] and Sam. The count against the accused in regard to Emma is that she possessed Emma, intentionally possessed Emma being a slave. So you would have to be, as part of that intention, satisfied that if that possession in the way that it is defined – you would have to be satisfied of course that she had knowledge that Emma was a slave. So you make the finding of slavery when you come to the question of possession, of course part and parcel of intentional possession. You cannot obviously possess something unless you know – you might possess it, possess something, but you have got to know their status. So that in that case it is a good example."

115 At that point, his Honour has again addressed the requirement of knowledge that the person was in the condition of a slave. He has not yet addressed the question of the knowledge and intention (as to which her state of belief was relevant) which must accompany the accused's exercise of the power of possession or use of the slave.

116 At a later point in his charge,[65] after dealing with a range of other matters, his Honour said:

> "One other matter that I should have mentioned earlier, you will recall that when I was talking about considering this issue of control insofar as it relates to possession, I said to you that once you got to this stage of determining, did Wei Tang intentionally possess a slave, the references and the comparisons to Woewodin and the matters that I referred to you really were not relevant because here *you had to have a mindset where you knew it was a slave*, *and the question is did you then possess the slave*? Therefore there was no comparison." [My emphasis]

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65 Transcript of Proceedings, *Wei Tang v The Queen* 31 May 2006 1912.

117 His Honour then turned to the elements of counts 2, 4, 6, 8 and 10 and posed the question, "Was there an intentional use of the power related to ownership, that is the power to use." This was, with respect, the correct question. But the direction which followed did not identify what the necessary answer had to be if the jury were to convict the applicant. His Honour said:[66]

> "In regard to each of these counts, multiplied by five, there are two mental elements that I have mentioned to you. In each count, there is a requirement for you to be satisfied that either there was an intentional possession or there was an intentional use.
>
> You have the definition from the code as to the meaning of intention. In determining the element of possession, you also have a further mental element, that of knowledge and as I have explained to you, you obviously cannot possess . . .(sic). In regard to all of the counts you cannot possess something unless you know about it and know they are a slave and insofar as those mental elements are concerned, the important matter for you to take into account and consider is what is in the person's mind.
>
> Now it stands to reason that no-one, and certainly not me, can tell you, will give you evidence when you are talking about what is in a person's mind. What was precisely in Wei Tang's mind during these time periods in regard to each of these ten people? …"

118 His Honour then directed the jury as to drawing inferences concerning the state of mind of the applicant and concluded:

> "Consequently, the law allows a person's knowledge, intention or state of mind to be inferred in the way that I have described and that relates in particular to the mental elements in this case. That is, the definition of possession requires knowledge. To possess something obviously *you have got to know there is a slave and both counts require that either there be intentional possession or intentional use of the power associated with ownership being that of 'to use'*. That is, in each instance it must be done intentionally. You are required to consider whether you are satisfied by way of making inferences from the circumstances, because as I said, you do not have any evidence about it, but the director says, look at all the circumstances and in this case you can be satisfied beyond reasonable doubt that the necessary intention or knowledge is there. Whether you are so satisfied in regard to any of those mental elements is totally a matter for you." (emphasis added)

119 Counsel for Wei Tang again took exception to the directions, submitting that the possession or use by the accused had to attach to the right of ownership. He submitted that

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66 Ibid, 1992.

control and possession - which, he said, had been extensively discussed by his Honour - might attach to other rights, such as those arising in an employment context. His Honour said that "It's nothing to do with ownership. Possession is to possess a slave, and you are a slave if the powers attached to the right of ownership have been exercised over you." Counsel repeated that the control which the Crown contended had existed might be a control which derived from powers other than a power attaching to the right of ownership. He submitted, "It can derive from any number of other sources", to which his Honour responded, "It can, but it certainly wouldn't amount to slavery", to which counsel said, "That was the whole point of my address".

120 Counsel submitted to his Honour that he had talked to the jury about control as relevant to the issue of slavery and possession but not with respect to its requirement that it attach to a right of ownership. In my respectful opinion, there was force in that complaint.

121 His Honour then directed the jury concerning defence counsel's submissions that control might be exercised otherwise than as an exercise of a right of ownership, and as to counsel's example of a contract with a footballer:

> "[Counsel] said when you assess this relationship there is control but there is control from the employment situation that they are in, and control from their employer in normal circumstances, that it is not the control that has been put by the prosecution that would relate and finally lead you to determine that this is a slavery situation. That is the way that [counsel] was putting those propositions to you."

122 The charge continued into the third day, when his Honour summarised the evidence and the addresses of counsel. At 10.30 am the jury retired to consider its verdict. At 3.20 pm his Honour returned to the bench to deal with a jury question which was in the following terms:

> "Does the defendant have to have known what the definition of a slave is 'to intentionally possess a slave' as stated in the indictment."

123 In the course of discussion in the absence of the jury his Honour said that the word "intentional" had more than one application, "intention with respect to conduct she means to engage in. So it has within it actual knowledge and actual intent that the person was a slave." Counsel agreed. His Honour said that, whilst the words of the definition of a slave did not

have to be known, "you have to know that in fact this person was a slave". The prosecutor said "I think it just means she has to intend to possess someone she knows over whom any or all of the powers attaching to the power of ownership of that exercise (sic), because that is what a slave is." Defence counsel said "But the question really is, what did Wei Tang have to know?" His Honour responded:

> "Yes, well it's set out in the Act in the very provisions. You can't possess a slave, unless you know the person is a slave. She has to know that the person was a slave".

124 With respect, that observation addressed only the question of knowledge of the condition of slavery, which the Crown accepted had to be established. What the judge omitted to state was that the Crown had to prove intention to exercise power over the slave in the knowledge or belief that the power that was being exercised was one attaching to ownership. That is, the power must have been intentionally exercised as an owner of property would exercise power over that property, acting in the knowledge or belief that the victim could be dealt with as no more than a chattel. It would not suffice for the power to have been exercised by the accused in the belief that she was dealing with the victim as her employee, albeit one in a subservient position and being grossly exploited.

125 When the jury returned his Honour answered their question by saying:

> "The answer to your question is No. The defendant does not have to know what the definition of a slave is. That's a matter that is set out before you and she does not have to know the ins and outs of what it is. However, what the count says is "to intentionally possess a slave". So in order to intentionally possess a slave, she must have – and you will recall that when the definition of possession in the second page of Tab 26 says "In the ordinary use of the word possession means one has in one's possession whatever is to one's knowledge". Right. So the point is one's knowledge. So that you can't have a slave in your possession unless you have knowledge that she is a slave. To do that, you don't have to know the precise definition, but you have to have knowledge that she is a slave from the factual matter".

126 His Honour's explanation continued over a further two pages, and he reiterated, as to the mental element required:

> "Does she mean to possess a slave? Slave, coming back to possession. You can't possess without knowledge that it is a slave. … So that she meant to possess the slave and in possessing the slave she had knowledge that the person was a slave and that's a factual matter and you have to look at the definition of slavery to decide firstly, was this person a slave? If you decide that, you then have to come to the conclusion, "Did she have knowledge that the person was a slave and then did she therefore intend to possess that person who she knew to be a slave?"

127 The judge's answer to the jury did not include, as it needed to, a clear explanation of the critical element of the applicant's state of mind, in accordance with the fourth element, as I have defined it in paragraph [77] above.

128 His Honour said the jury had to look at all the circumstances in deciding the issue of knowledge. He told the jury:

> "Look at all the circumstances that make up the issues that have been put to you in regard to that issue of knowledge and then you go to possession and then – sorry, possession firstly, which includes knowledge and then you go to the issue of intention. It's a matter of looking at all the circumstances to see if you're satisfied beyond reasonable doubt that she intentionally possessed a slave and there is the two mental elements in that that are part of the count itself. The simple answer is no, she doesn't need to know the definition herself, but she has to know she possessed a slave and she intended to possess the slave, all right. She doesn't have to know the fine legal definition, but she has to know that she was a slave. If she did not know that, she can't be guilty …".

Defence counsel took no exception to this direction, although his Honour had still not made the critical point which, in my opinion, had to be made, concerning the intention with which the proscribed act must be accompanied.

129 On the following afternoon, the jury asked a further question, in writing, as follows:

> "To intentionally possess a slave is it necessary for the accused to have knowledge that her actions amount to slavery?
>
> or
>
> Is it sufficient that the accused only have knowledge of the conditions she has imposed (i.e. slavery has not entered her mind) and the law has decided those conditions amount to slavery."

130 It can be seen that the jury were focussing, correctly, on what had to be shown about Wei Tang's knowledge or awareness of the character of her actions. His Honour answered the first part of the question "No". He told the jury that the first question they had to answer was "Was this person a slave?" He added:

> "Was this person a slave, is such that the condition of slavery brought about by the exercise of any and which powers attach (sic) to ownership can be brought about by any person".

131 He told the jury that the condition of being a slave does not have to be produced by the actions of Wei Tang. It could be produced by the actions of any person:

> "But what you have to find beyond reasonable doubt is that the condition brought about by the exercise of one or other of the conditions attached to the right of ownership has in fact occurred. That is, that she is a slave, right, that is number one. You have got to find her a slave."

132 His Honour went on:

> "What she has to be aware of however that there are – sorry – she does not have to be aware of anything; you have to determine, has a condition of slavery come to pass from the circumstances and the evidence before you? That is between most periods are you dealing with a person who has been rendered into the condition of slavery as pursuant to the definition? That is, someone has exercised over that person a right attached to ownership. Now having decided that question, then you then come back to determine the issue of, has Wei Tang, having determined this person is a slave, has Wei Tang intentionally possessed a slave."

133 With respect, this answer failed altogether to address the jury's concern. The jury were not asking about the victim's condition of slavery, as such. Rather, they wanted to know what awareness was required of Wei Tang that her own actions amounted to slavery. As to the second alternative posed by the jury (i.e. whether it was sufficient for the accused merely to have knowledge of the condition she had imposed), his Honour responded with a

very lengthy direction, which I set out in full, together with the additional redirections which were subsequently given.

134 His Honour said:

> " . . . I will go to your second question. 'Is it sufficient that the accused only have knowledge of the condition she has imposed, that is, the word 'slavery' has not entered her mind, and the law has decided those conditions amount to slavery?'
>
> I think the answer to your question is yes, but I will put it this way. Assuming you have found the condition of slavery to exist, in regard to the elements, you must find that Wei Tang intentionally possessed a slave.
>
> That does not mean, as I said to you yesterday, that she has to have in her mind the definition of a slave and be able to say in her mind, I have possessed a slave, because the definition says I possessed a slave. But what she must have knowledge of is that this person's condition is such as meets the definition as defined by law so that, in effect, the answer is, yes, to part of it. She must have knowledge of the condition which amounts to slavery. She does not have … to say to herself we have now got to a condition where I am possessing a slave but she must have knowledge of the condition of the person sufficient to amount in law to slavery and then in addition to that the issue of intention and knowledge as defined again as you will remember. A person has knowledge of the circumstance or a result – we are talking about the condition of the person here, if she is aware that it exists and will exist in the ordinary course of events.

135 His Honour continued:

> "And then the other part of the element is that a person has intention with respect to conduct if she means to engage in that conduct. So you would have to be satisfied beyond reasonable doubt, firstly, as I have said in regard to your first question that the person is in the condition of slavery. Secondly, that insofar as looking at the particular elements, the accused in this case has knowledge that exercised over this slave has been one or other of the conditions attached to ownership which would render this person in law a slave. She does not have to be able to say in her own mind, Ah, that means she is a slave. She has to have knowledge that over this person has been rendered one or other of the conditions attached to the right of ownership which would render the person as defined by the law as a slave. And if that condition is so and she has knowledge of that, she has to intend to possess that person in such condition. *It is not easy, however it is your obligation to understand as best I have defined it for you,*[67] and make your conclusions accordingly but remembering at all times you have to be satisfied beyond reasonable doubt of both of those fundamental elements, or three of those

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67 The words which I have highlighted suggest that at this point some members of the jury must have conveyed the impression that they were having difficulty in following the directions.

fundamental elements. One, that the person is a slave; second, insofar as the first counts are concerned, that the accused, Wei Tang, intentionally possessed a slave, and the possession involves knowledge, and while it does not involve knowledge of the precise legal definition, so that suddenly the till goes – you put into the computer, X, Y, Z, and out it comes and says, ah, I am possessing a slave. What she has to have knowledge of in order to possess a slave, is knowledge of the condition, being a condition of the exercise of one or other of the powers attached to the right of ownership. And if she has knowledge of that condition, and she intends to possess a person who is in that condition, then she can be – then that can amount to possession of a slave.

All right, Mr Foreman, members of the jury? With that exposition, subject to getting further advance from counsel, I will leave you to it and you are not circumscribed, any other questions before 4.30 that is fine, but otherwise we will see you tomorrow morning at some stage, perhaps even in the afternoon." [emphasis added]

136 The jury returned to the jury room at 3.46 pm. In their absence defence counsel took exception to the directions, submitting – once again - that if the jury found that a person was a slave they had to be able to say that the power exercised in relation to that person attached to one of the rights of ownership and did not attach to anything else. His Honour agreed that that was correct and he should tell the jury that. The jury returned at 3.48 pm and his Honour directed again, that:

"There was one matter I did want to put to you, come back to the first point which was essentially your first question, and I said to you that you asked, 'Is it necessary for the accused to have knowledge that her actions amount to slavery?' And I said to you that it is nothing to do with her actions alone, it could be anyone's actions. Your first question is to decide, is the person in a condition of a slavery within this time period from anyone's actions? And you decide that by looking at the definition and asking yourself, is the condition of the person that you are considering, such that there has been the exercise of one or other and that you are unanimous about this, of the powers attaching to the right of ownership?

Now if, for example, you found that there have been exercised over the person some powers attached to some other right, that is the right of employer/employee or the power attached to a contract with a footballer, or something else, then you could not be satisfied that the power being exercised over the person was a power attached to right of ownership. You would have to find those powers as I have detailed for you, that there has been an exercise insofar as finding the person is a slave exercised over that person unanimously, one – it may be more, depending on your finding, but unanimous in regard to each of the powers you found, of a right attached to the – sorry, of a power attached to the right of ownership.

Once you found a person is in that condition, then you go on to consider the elements of the charge against the accused, and those elements are, firstly,

> that she possessed this person. And as I said to you before, she does not have to, in possessing, have knowledge that the person she now clicked over the definition of being a slave, but what she does have to have knowledge of, is that there has been exercised over this person, powers attaching to the right of ownership, which pursuant to the definition make her a slave. Make the person a slave. Once you establish that she has that knowledge, you then go to consider the other element, did she intend to possess a person in that condition, which the law defines as slavery? All right? So it is very important in regard to the first determination as to slavery, that the power that you are unanimous on is a power attaching to the right of ownership and not a power attaching to some other relationship, such as employer/employee, contractual with a footballer would be analogies given, and those powers that emanate from there. All right, thank you."

137 Unfortunately, this direction was almost entirely concerned with the creation of the victim's condition as a slave, not with the awareness of Wei Tang of the character of her own actions or her intention when exercising the power of possessing or using the slaves. The concluding paragraph, too – which stated correctly that the power exercised must not attach to some relationship other than ownership of property - was limited to the creation of the victim's condition of slavery, and the knowledge of Wei Tang that the person was a slave.

138 The jury retired again and counsel again took exception. Again, his Honour agreed that he should redirect the jury, so as to emphasise that if the accused was satisfied the person was in a condition amounting to a total lack of control that she was in that condition by virtue of the exercise of a power attached to the right of ownership by someone.

139 The jury returned to the courtroom and his Honour provided a further, extensive, redirection:

> "I apologise for this, but obviously this comes about from your very intelligent questions and with the assistance of counsel there is another aspect that I must put to you.
>
> Now coming back to your question. No, the actions of Wei Tang do not have to amount to slavery.[68] You analyse the condition of the person and you look at the definition and you say, is this person – and when you are looking at each individual woman – in a condition which has been brought about by the exercise or one or the other of the rights of ownership? And you draw a distinction from such a power which attaches to the rights of ownership, as against a power which may be exercised attached to, as I have just said to

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68 That proposition was incorrect (see pars [71] and [82] above) and was not, in any event, a response to the jury question, which asked whether the accused had to have knowledge that her action amounted to slavery.

> you, a power attached to say the normal employer/employee relationship, or the contract relationship with a footballer, and you make that decision unanimously in regard to any one or other of the powers, have they been exercised? And you have got to be unanimous in regard to each one to determine, is there a condition of slavery.
>
> Then you come to the elements themselves of the count. You have to be satisfied firstly in regard to Wei Tang that insofar as the definition of possession where it includes the mental element of knowledge, that she also, whilst she does not have to, as I said to you, have knowledge of the textbook definition, she must have knowledge of the exercise of a power which amounts to slavery as you have found, which emanates the exercise of a power in accordance with the definition attaching to the right of ownership, and you must be satisfied of that beyond reasonable doubt. If her knowledge was that this person has a power being exercised over them attached to the relationship between employer/employee or attached to a contract for work, but not attaching to the right of ownership, then albeit that she does not have to be satisfied of the straight definition of slavery, she would not have been satisfied – she would not know that a power has been exercised over this person attaching to the right of ownership. Here, if you found, you would have to find beyond reasonable doubt that she did not know this was power being exercised over the person attached to the right of ownership, not to a right emanating from any other relationship. And if she had knowledge of that, and she intended then to possess that person over which such powers are being exercised, then you could find her guilty, but unless you are satisfied beyond reasonable doubt that she had knowledge of the powers being exercised over this person one or other of the powers were attached to the right of ownership as against any other relationship and she intended to exercise that power – she intended to possess that person – then you could find her guilty but you would have to be satisfied beyond reasonable doubt of her knowledge in that position and her intention insofar as possession is concerned. All right? So I had only defined that relationship insofar as looking at the slavery at that stage and I had not taken you down to make sure that beyond reasonable doubt in regard to her knowledge, she was not – you would have to be satisfied beyond reasonable doubt that she was aware that there had been powers attached to the right of ownership exercised over this person, she knew that and she intended to possess that person over which such powers attaching to the right of ownership had been exercised, such power or powers. Thank you."

140 With respect, this passage simply repeated what had been said earlier, dealing only with the character of the exercise of power which created the victim's condition as a slave. It said nothing about the character of the defendant's exercise of the power to possess, or – most importantly – about the knowledge, intention and/or belief that must be shown to have accompanied the conduct constituting the intentional possessing of the slave.

141 The jury retired at 3.58 pm. on 2 June, a Friday evening. When they had left the judge thanked defence counsel for having made clear the point which required re-direction and

counsel, in turn, thanked his Honour for re-directing. No further exception was taken. The jury resumed their deliberations on Saturday, 3 June, and returned guilty verdicts at 2.05 pm that day, without having sought further directions.

142 Jury directions must be comprehensible and avoid over-subtle distinctions.[69] They must provide practical guidance as to the critical issues the jurors must decide.[70] Jurors should be told only so much of the law as is relevant to deciding those questions, and the directions should be concise and clear.[71] The directions must not be over-elaborate or over-complicated.[72]

143 The offences here were novel; the words of the sections which defined the offences were technical and complex; the meaning of the expression "powers attaching to the right of ownership" was somewhat obscure, yet central to the offences. I am not at all surprised that the judge had difficulty directing the jury in response to their questions, but these novel offences each carried a maximum of 25 years' imprisonment and it is clear from their questions that the jury were particularly in need of assistance on the critical questions of intention and knowledge.

144 Notwithstanding his Honour's strenuous efforts, I do not consider that the directions were adequate to enable the jury to decide the issues on which their verdicts depended. Crucially, they were given no direction on what was required to be shown as to Wei Tang's appreciation of the character of her own actions. The repeated, lengthy, attempts to address the jury's legitimate concerns unfortunately tended only to make the picture more confused.

145 With the benefit of hindsight, and the luxuries of time and the provision of comprehensive submissions of counsel on the appeal, I would respectfully suggest that the answers to the jury questions might have been along the following lines.

Q: "Does the defendant have to have known what the definition of a slave is

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69 *Zoneff v The Queen* (2000) 200 CLR 234, 260-261 (Kirby J); *Ahern v The Queen* (1988) 165 CLR 87, 103.

70 *Doggett v The Queen* (2001) 208 CLR 343 at 346 (Gleeson CJ).

71 *Alford v Magee* (1952) 85 CLR 437, 466.

72 *Clayton v R* (2006) 81 ALJR 439, at 444-445 [22]-[29].

‘to intentionally possess a slave’, as stated in the indictment?”

A: No, she does not have to have known the definition of a slave, nor even that there was an offence of slavery in the laws of Australia. Ignorance of the law is no defence.[73]

The Crown has to prove that she did know that in each case the worker had been reduced to a condition in which she was treated as though she was mere property, just a thing, who had no say in how she was treated.

Q: “To intentionally possess a slave is it necessary for the accused to have knowledge that her actions amount to slavery?

Or,

Is it sufficient that the accused only have knowledge of the conditions she has imposed (i.e. slavery has not entered her mind) and the law has decided those conditions amount to slavery?”

A: It is not necessary for the accused to have knowledge that her actions amount to slavery.

For the offence of intentionally possessing a slave, the accused must have known that the complainant had been reduced to a condition where she was no more than property, merely a thing, over which the accused could exercise powers as though she owned the complainant.

Furthermore, the Crown must prove that in exercising the relevant power over a particular complainant (that is, possessing or using the complainant) the accused was treating that complainant as though she was property, as if she owned her, as if she could do with her whatever she chose to do. You must be satisfied that the accused was intentionally exercising a power that an owner would have over property and was doing so with the knowledge or in the belief that the complainant was no more than mere property.

If it is reasonably possible that the accused acted to possess or to use the complainant with the knowledge or in the belief that she was exercising her rights and entitlements as her employer or contractor and not in the belief that the complainant had no rights or free will, but was property, a thing, over whom she could exercise power as though she owned her then, however exploitative and unfair you may think her treatment of the complainant was, it would not constitute the offences of intentionally possessing or using a slave.

146 I conclude that the complaint about the inadequacy of the directions, raised under ground 2, has been made good, and I would uphold this ground.

147 Although that conclusion would be sufficient to dispose of this application for leave to

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73 See s 9.3 of the *Criminal Code 1995* (Cth).

appeal against conviction, there were a range of other grounds on which we heard full argument, and counsel for the applicant submitted that the disposition of those grounds would bear on the question whether (if ground 2 succeeded) a re-trial should be ordered or verdicts of acquittal be entered.

148 I turn then to address the other grounds of appeal.

Ground 3: Purchase of a contract or purchase of a person

149 In his final address counsel for the applicant contended to the jury that in no case was any one of the women possessed as a slave. He submitted to the jury that each woman had freely chosen to enter a contract in Thailand to perform as a prostitute in Australia; that upon their arrival in Australia they were not imprisoned in any way; that each woman had entered the contract with the intention of making a better life for herself, so that upon paying off her debt she could work as a prostitute for substantial income in Australia. Counsel sought to draw a distinction between the owning of a person and the owning of a contract under which a person agreed to perform services.

150 Defence counsel drew an analogy with a football player who was signed to a club but whose contract with the club was capable of being transferred by the club to another club for valuable consideration, without his agreement. Counsel submitted that in those circumstances the person had not been sold; it was his contract that had been sold. The person is not owned, and the relationship is not that of owner and slave in those circumstances, he submitted. Likewise, the relationship between the person running the brothel and the contracted prostitute was a relationship of employer and employee, not a relationship of slave owner and slave.

151 When charging the jury his Honour made what he told the jury was a comment, not a direction, on that submission. His Honour said:

> "It is a matter for you, and indeed in considering the matter, it seems to me that it is somewhat semantic, whether it's the person or whether it's the contract. Whether it is the ownership of a person or the ownership of the person or the contract, the prosecutor has said to you, what has happened here is that they have purchased the person.

> It seems to me, on analysing the definition, either way suffices. What you have got to look at is the condition of a person. What the Commonwealth Parliament have described is that where such a condition results from a debt or contract, and that condition is one over which powers attaching to the right of ownership are exercised, then that is slavery.
>
> Whether that contract is a contract by a person as such, that is, 'I have bought a woman' or whether the arrangement is that you are buying the contract that relates to the woman, it seems to me doesn't make any difference."

152 His Honour noted that the prosecutor contended that "the reality of this case is they have purchased the woman", whereas defence counsel denied that was so, and said that "all they are doing is purchasing the contract".

153 Mr Shirrefs accepted that his Honour was merely intending – correctly – to focus attention on the fact that the definition of slavery required that regard be had to the condition of the person over whom powers of ownership were exercised. He submitted, however, that the language employed by his Honour effectively removed any prospect of an acquittal.

154 Mr Shirrefs submitted that his Honour would have been understood by the jury to say that if the applicant had bought the contracts of employment of the women (and the applicant did not dispute that, in conjunction with others, she had bought the employment contracts from the Thai principals with respect to all but one of the women) then she had "bought" some or all of the women. That, inevitably, would be taken to be an assertion of proprietary rights over them as people, he submitted, thus constituting slavery.

155 It was the prosecution case that the women's movements, working hours, and their rights – including freedom of association and their right to choose where they lived, to come and go freely, and so forth – were so controlled by the applicant as to place them in the condition of slavery. The point his Honour was seeking to make was that, if the jury agreed with the prosecution case, then whether it was pursuant to the terms of a contract that the women had been placed in that situation was of no consequence, as indeed the definition made clear.

156 Defence counsel was perfectly entitled to submit to the jury that the fact that the women voluntarily entered agreements remained a factor to be taken into account in considering whether their condition did amount to slavery.

157 Given the way the case had been conducted over its six weeks, I do not consider that there was any risk that the jury would fail to grasp the point being made by defence counsel, or would conclude from his Honour's comment in the charge that all the prosecution had to prove in order to obtain convictions with respect to offences concerning four of the women was the (admitted) fact that the applicant had purchased their contracts of employment.

158 Ground 3 is not made out.

Ground 4: Unbalanced charge

159 Mr Shirrefs submitted that in his charge to the jury his Honour made comments on the address of defence counsel which disparaged his arguments to such a degree as to constitute the judge "entering the ring". He submitted that the judge supported the prosecution case and that the jury would have taken his Honour's interventions to reflect his view that a conviction should be recorded and that the defence case was without merit.

160 Where complaint is made as to comments by the trial judge in the course of a charge the relevant question is whether those comments amount to the judge having descended into the forensic arena to such an extent as to create a miscarriage of justice: see *R v Mathe.*[74] The mere fact that the words and conduct of the judge demonstrated that he or she had formed a view of the accused and of the strength of the Crown case would not of itself constitute a miscarriage of justice.[75]

161 In *Mule v The Queen*[76] the High Court considered the question of the balance of directions and (referring to a statute but expressing the common law position) held:

> "That provision distinguished between instructions as to the law applicable to the case, which were mandatory, and observations upon the evidence, which were discretionary. The discretion, of course, was to be exercised in accordance with established principles. One of those principles is that observations upon the evidence must be fair and balanced, but a judge is not

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74 [2003] VSCA 165 (Unreported, Batt, Vincent and Eames JJA, 29 October 2003) [73].

75 See *R v Boykovski and Atanasovski* (1991) 58 A Crim R 436, 442-3 (Crockett and Teague JJ with whom Murphy J agreed).

76 (2005) 79 ALJR 1573 at [6].

> prohibited from making an observation which is favourable to one side or the other if it is made clear that it is for the jury, and the jury alone, to decide the facts. Trial judges commonly make observations, sometimes forcefully, about the strength or weakness of particular aspects of the evidence in a case, but they should also make it clear that those observations are not intended to bind the jury, that the jury may or may not agree with them, and that the jurors are the sole judges of all factual issues bearing upon the ultimate verdict."[77]

162 In *RPS v The Queen*,[78] Gaudron ACJ, Gummow, Kirby and Hayne JJ held:

> "But although a trial judge *may* comment on the facts, the judge is not bound to do so except to the extent that the judge's other functions require it. Often, perhaps much more often than not, the safer course for a trial judge will be to make no comment on the facts beyond reminding the jury, in the course of identifying the issues before them, of the arguments of counsel." [79]

163 In *R v Lao*[80] Buchanan JA adopted the test applied in *R v Hulse*[81] by the Full Court of South Australia, where the court intervened on the basis that the comments were so strong that:

> "[T]here is a danger of the jury being overawed by the judge's views, where, even though the jury are told that the decision on the facts is for them, the language of the judge is so forceful that they may be under the impression that there is really nothing for them to decide or that they would be fatuous or disrespectful if they disagreed with the judge's view".[82]

164 The passages in the charge to which Mr Shirrefs directed attention were clearly stated to be comments by his Honour, which the jury were entitled to reject.

165 In one instance the comments were made in response to a contention that the women had come to Australia because they saw the potential for high earnings once they had completed their contract and paid off the debt. His Honour said to the jury that "we are not concerned in this case with potential earnings". He suggested that the submission made was entirely speculative. If the women were to make the suggested post-contract profits then they

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77 Ibid, 1575.

78 (2000) 199 CLR 620.

79 (2000) 199 CLR 620, 637 [42].

80 (2002) 5 VR 129, 138 [30].

81 (1971) 1 SASR 327, 335.

82 Ibid, 335.

not only had to pay off the contract, in the first place, but they could not remain here unless they obtained a valid visa, he observed.

166 As to the contention by counsel, by way of analogy, that the women were in no different position to a law student who ran up a HECS debt in the anticipation of future profits, his Honour said to the jury that "With great respect to [counsel] there is really no analogy whatsoever, as he said to you, to a law student or a person who is purchasing a business." Likewise, his Honour dismissed the suggestion that the women's situation was like a person buying goodwill. His Honour said "Now it is only a comment of mine, but you might take the view that neither of those analogies are of any assistance to you in determining what was the condition here."

167 I would not, myself, have made the comments which the judge made. As I said in *R v Ivanovic,*[83] it has long been the practice in this State for judges to eschew comment, and that ought be the norm.[84] The arguments advanced by counsel in this case do not seem to me to have been likely to mislead the jury and did not require a response by the trial judge. However, after carefully considering the comments I have concluded that they fell short of conveying to the jury that the judge had a personal antipathy to defence counsel or that he had concluded that the defence was without merit.

168 In the present case, his Honour praised the quality of the addresses of both counsel and, on many occasions during the course of the charge, commented favourably on submissions made by defence counsel. In the final analysis, the question whether comments made by a judge were so unbalanced as to produce a miscarriage of justice must be a question of impression. In my view, the comments made in this case fall far short of the conduct described in recent cases such as *R v Lao,*[85] *R v Mathe,*[86] *R v Ivanovic,*[87] or *R v Soldo*.[88]

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83 [2005] VSCA 238 (Unreported, Eames, Nettle JJA and Hollingworth AJA, 27 September 2005).

84 Ibid, [36]

85 (2002) 5 VR 129, 138.

86 [2003] VSCA 165 (Unreported, Batt, Vincent and Eames JJA, 29 October 2003) [73].

87 [2005] VSCA 238 (Unreported, Eames, Nettle JJA and Hollingworth AJA, 27

169 Ground 4 does not succeed.

Ground 5: Judicial intervention during cross-examination

170 Mr Shirrefs conceded that a trial judge is entitled – and, indeed, in some circumstances has a duty – to intervene when questioning of a witness is unduly lengthy or otherwise inappropriate. But in this case, he submitted, the interruptions to cross-examination of the five women and the restrictions placed on counsel were so great as not only to prevent counsel putting the defence case as he wished but to suggest to the jury that the defence was without merit.

171 Mr Shirrefs referred us to a number of passages in the trial transcript. He submitted that, whilst some of the exchanges in those passages might seem innocuous, it was important to take all of the passages together and also to consider them together with comments made in the judge's charge. I have read all of the passages to which reference was made, and many more besides, and I have read the whole of the charge. Many of the passages do seem, in themselves, to be entirely innocuous. When asked to identify the most serious of the interruptions, Mr Shirrefs referred to two incidents.

172 The first incident occurred during cross-examination[89] of S on the morning of the third day of her evidence. Cross examination had commenced late on the previous day. The witness had said she was confused by questions, and at one point his Honour said that counsel had put five or six propositions to the witness then asked if they were all untrue. Counsel then put a proposition which the judge suggested the witness would have to be "asinine" to accept. The judge said the witness was being asked about events three years before she came to Australia.

173 After this exchange counsel said he wanted to raise a matter in the absence of the jury. The judge declined to remove the jury. In the presence of the jury, counsel then complained

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September 2005) [33]-[36].

88 [2005] VSCA 136 (Unreported, Callaway, Eames and Nettle JJA, 27 May 2005) [78]-[86].

89 Transcript of Proceedings, *Wei Tang v The Queen*, 1 May 2006, 486-491.

that he was being denied the ability to put his client's defence by virtue of the judge's interference. The judge said he had intervened because counsel was "going around and around" and he did not know how "the poor witness" could follow him. The judge said it was unfair to ask questions which were unintelligible. The judge then sent the jury out and the exchange continued.

174 The judge said it was quite clear to him that the questions were not being understood, but counsel disagreed, and complained that the judge was "making excuses" for the witness in front of the jury. His Honour said counsel's cross-examination on documents was jumping from one statement of the witness to another, and from one date to another.

175 When the jury returned, the judge commenced by observing that there had been an angry exchange with counsel. He asked the jury to accept that it was just "part and parcel of a trial" and they ought not take an adverse view about counsel because it had occurred. He said it did not reflect adversely on counsel.

176 After the first incident counsel went on to ask the questions that he had wanted to ask of the witness. They were asked – clearly, this time – without interruption.

177 The second incident occurred during the cross-examination of K. It began shortly after the judge had said to counsel that he put a question based on a proposition the witness had not agreed to. Counsel agreed that was so. When cross-examination continued, the judge asked counsel why he was challenging the witness about a proposition to which she had earlier agreed. Counsel said he was putting the proposition again. The judge said he saw no point to that, since the witness had responded as counsel desired. Soon after, the judge said, "You've had far enough time to be talking about this statement", and directed counsel to move to another topic. In front of the jury, counsel said that he was being prohibited from putting questions which were important to his client's defence.

178 As to the second incident the judge would have known that when he intervened the witness had so far been cross-examined by counsel only as to the first of three signed statements that she had made. She had also conducted four taped interviews, and had given evidence at committal and at the first trial. His Honour might have reasonably been

concerned at the probable length of the proposed cross-examination. In the course of her evidence the witness had already conceded that she had told lies to the authorities when questioned on a number of topics. As his Honour appropriately observed to counsel (in the absence of the jury), it seemed hardly necessary to require the witness to confirm every individual lie in each statement.

179 Notwithstanding counsel's complaint to the judge that he had more to ask, he subsequently conceded that he had almost finished the cross-examination on that statement when the exchange with his Honour had occurred. Thereafter, he continued cross-examination, and his Honour did not deny him the opportunity to ask whatever questions he wished. Mr Shirrefs agreed that the transcript disclosed that defence counsel had not therefore been stopped from putting the defence case, either with respect to that statement or any other.

180 Once again, after the second exchange had occurred, the judge took the opportunity to address the jury and to warn them not to be concerned about the exchange nor to think adversely about counsel because of its occurrence.

181 It is unnecessary to spend any time on the balance of the passages about which complaint was made. In my view, none of the passages to which we were referred suggests that the jury would have been diverted from their task or that defence counsel had been stopped in the proper conduct of the defence or that the trial miscarried in any way.

182 The fact that this was a re-trial, with the same judge and defence counsel, is significant, in my opinion, in understanding the judge's interventions. The judge was well aware of the issues in the case, and he was in an unusually good position to assess whether cross examination as to credit, on particular topics, was being unnecessarily prolonged. The judge would also have been very conscious of the difficulties for the jury – and for the relatively uneducated witnesses – of lengthy cross-examination as to documents – conducted through interpreters – for purposes of establishing prior inconsistent statements. Given that, for the most part, the witnesses would have quite readily admitted that their statements to authorities and to others had been replete with numerous lies, it was not unreasonable for the

judge to encourage counsel to reduce the tedium of the cross-examination process.

183 Mr Shirrefs submitted that the judge's interventions during cross-examination by defence counsel were invariably made without any objection having been taken to the question by the prosecutor. In some circumstances that fact might heighten the risk of the jury concluding that the judge was dismissive of the defence case and had "entered the ring" in favour of the prosecution. A trial judge must not enter the contest between the two adversaries; the judge is there to ensure fairness and propriety, and whilst instructing the jury as to the relevant law must leave the decision-making to them. As Barwick CJ held in *Ratten v The Queen,*[90] which witnesses will be called to give evidence and what questions will be asked is a matter for the parties.[91] It is not an unrestricted right, however. As the Chief Justice noted, the judge has an overriding obligation to decide questions of admissibility and fairness, and to apply the rules of evidence. I would add that, whilst applying the above principles, the judge also carries responsibility for ensuring that the valuable resources of the criminal justice system are not inappropriately dissipated.

184 In this case, the bulk of the interventions arose from the judge's concern that the questions were unclear or were, at times, unduly prolonged as to peripheral topics. On occasions, defence counsel conceded that confusion might have been caused by his question. On other occasions an objective observer would agree with the judge that the questions were indeed confusing, or unduly prolonged, even if counsel thought otherwise.

185 On one occasion, possibly two, the remarks of the judge might well have betrayed impatience, even sarcasm, in dealing with the proposition that counsel had been putting to the witness, either as to its intelligibility or its usefulness. Whilst judges must strive at all times to avoid rudeness or any impression of impatience, or of favouring counsel on one side over the other, trial judges are chosen from the ranks of mere mortals; sainthood is the preserve of a much higher jurisdiction. Trials do not become unjust because judges occasionally become impatient with cross-examinations. A trial judge has to consider many competing interests in the course of a lengthy trial, as this was. The requirement of a fair trial for the accused was

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90 (1974) 131 CLR 510, 517.

91 Ibid, 517.

paramount, but that was not inconsistent with requiring that the trial not be unduly prolonged by repetitive and/or confusing cross-examination.

186 It is to be borne in mind that the cross-examination was being conducted with the aid of an interpreter. As is apparent from the transcript, in many instances the interpreter or the witness expressed confusion or difficulty with the questions. His Honour, in my view, was perfectly entitled to intervene as he did in each of the instances to which we were referred.

187 Mr Shirrefs relied on *R v Lars & Ors*.[92] The critical question, as Wood, Mathews and Badgery-Parker JJ held, is whether the exchanges between the judge and counsel were so serious and prejudicial in their effect that they "would almost certainly have had the effect of denigrating the defence cases in the minds of the jury".[93] In *Lars,* the Court held that the jury would have perceived that the judge entertained an adverse view of the defence, and added:

> "In summary it is our view that by the time the jury retired, the atmosphere of the trial had become tainted in a manner adverse to each accused by reason of the manner in which the judge and Mr O'Loughlin sparred, and by reason of the excess of intervention by the judge in the examination and cross-examination of witnesses to the extent that it cannot be asserted with any confidence at all that the trial was fair. We are of the view, therefore that the convictions of both should be quashed."[94]

188 The exchanges between counsel and the judge in this case were very minor in comparison with those described in *R v Weiss.*[95] Moreover, the judge took the approach of remedying the effect of the heated exchange in a manner similar to that suggested to be appropriate by Callaway JA in *Weiss*.[96] The relevant question, as Callaway JA observed, is whether –

> "[T]here is such a risk that the jury were distracted from their task either by the exchanges to which I have referred or by the judge's interventions, that we should conclude that the trial miscarried."[97]

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92 (1994) 73 A Crim R 91.

93 At 142.

94 Ibid.

95 (2004) 145 A Crim R 478.

96 Ibid, 497.

97 Ibid.

189 In this case, too, I am not persuaded that there is a real risk that the jury were prevented from giving proper consideration to the evidence or that on any other basis there was a miscarriage of justice.

Ground 7: Verdicts unreasonable and not supported by the evidence

190 In *R v Huynh*[98] Coldrey AJA, with whom Callaway and Redlich JJA agreed, adopted my summary of the relevant principles to be found in *M v The Queen*[99] and *Weiss v The Queen*,[100] which I stated in *R v CHS*,[101] as follows:

> "In assessing whether a guilty verdict was unsafe (or, more appropriately, was unreasonable and cannot be supported by the evidence) the appeal court must make its own assessment of the evidence – making allowance for the limitations of not having seen the witnesses – and determine whether in its opinion the accused was proved beyond reasonable doubt to have been guilty of the offence on which the jury convicted him. It is an objective task, to assess whether on the whole of the evidence on the count the court is satisfied that no substantial miscarriage of justice has actually occurred".[102]

191 There was a voluminous body of evidence in this case. We have been assisted by the efforts of counsel and their instructors in preparing comprehensive documents identifying the factual issues on which there was dispute. Counsel agree that much of the evidence was not contested, but there were significant disputes nonetheless. Perhaps the most important was the contention that the women who were housed in Flat 5 had been locked in the flat when they were not working, a deadlock having been activated by their controllers, to which they did not have a key. Not all of the women gave evidence to that effect and the reliability of the evidence of the two who did was challenged in cross-examination.

192 It is significant that when he sentenced the applicant, the trial judge rejected the evidence of the two women in this respect and expressly found that the women were not kept under lock and key. He did, however, find that at the two places where they were housed

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98 (2006) 165 A Crim R 586, 595-596.

99 (1994) 181 CLR 487, 493

100 (2005) 224 CLR 300. 316-317.

101 (2006) 159 A Crim R 560.

102 Ibid, 587 (Warren CJ and Ormiston JA, agreeing).

they were "effectively restricted" to the apartments and only left on rare occasions, with consent and supervision. It may be presumed that the jury came to a similar conclusion in convicting the applicant, but, even so, such a finding would not necessarily have been inconsistent with verdicts of acquittal had the directions given to them been accurate as to the law.

193 Ms Carlin pointed to the demands placed on the women as to the numbers of clients they must service,[103] together with their lack of payment, the days and hours they were required to work, and other factors, as demonstrating that their situation was different to that of other sex workers who, however exploited they may have been, were not slaves.

194 It is unnecessary to set out in detail the evidence in the case. It is sufficient to observe that in my opinion it was capable of sustaining a conviction, when the law was correctly applied to that evidence, and when full weight is given to the credibility of the witnesses called by the Crown, as it must be presumed the jury gave to their evidence.[104] For that reason, the complaint that the verdicts were unreasonable and could not be supported by the evidence can not be sustained.

Conclusions and Orders

195 Although I have concluded that the verdict was not unsafe and unsatisfactory that merely means that it was capable of supporting convictions for the offences when the correct legal principles were applied to the facts. The task which the appellate court must undertake when considering the application of the proviso to s 568(1) of the *Crimes Act 1958* is essentially the same as that required to be undertaken when considering a ground contending that a verdict is unreasonable and unsupported by the

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103 As many as 800 to 900 clients, depending on the quantum of the debt and whether the debt was reduced by a cash payment, as occurred in the case of one complainant.

104 As noted *Weiss v The Queen* (2005) 224 CLR 300, 316-317, the fact that the jury returned a guilty verdict can not be discarded from the appellate court's assessment of the whole of the evidence when considering the proviso, and held, at 316 [41], the task of assessment is the same when considering an "unreasonable/cannot be supported" ground.

evidence.[105] But rejection of such a ground does not determine the question whether, upon some other ground being upheld, the proviso ought be applied.

196 For the proviso to be applied the Court must itself be satisfied, on the whole of the evidence, that the accused was proved beyond reasonable doubt to be guilty of the offences on which she was convicted.[106] In my opinion, even if the correct principles of law were applied to the assessment of that material, this Court could not be satisfied beyond reasonable doubt of the guilt of the applicant. As was recognised by the High Court in *Weiss v The Queen,*[107] there are cases where the natural limitations of relying on the written record and exhibits, rather than having had the benefit of seeing the witnesses, will be so great that the court is unable to reach the degree of satisfaction required for application of the proviso.[108] This would be one such case. As was accepted in *Weiss*, it could not be said that no substantial miscarriage of justice had actually occurred unless the Court of Appeal was persuaded, beyond reasonable doubt, of the guilt of the applicant, upon review of the record.[109] A review of the record, without the advantage of observing the witnesses, would not allow me to be satisfied that no substantial miscarriage of justice actually occurred and that would be sufficient reason for me not to apply the proviso.

197 Furthermore, and as an alternative or additional reason for not applying the proviso, the Court in *Weiss* left open the question whether the errors in or omissions from a judge's charge might be so serious a breach of the presuppositions of the trial as to deny the application of the proviso.[110] Whilst recognising that the majority judgment of the High Court in *Darkan v The Queen*[111] allowed a broad application of the proviso,[112] in my opinion

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105 See *R v Weiss (No.2)* (2006) 164 A Crim R 454, 473 [107]-[108].

106 *Weiss v The Queen*, (2005) 224 CLR 300, 317.

107 (2005) 224 CLR 300.

108 Ibid, 316.

109 Ibid, 317.

110 *Weiss*, at 317 [46]

111 *Darkan v The Queen* (2006) 80 ALJR 1250, 1269 [94] (Gleeson, C.J, Gummow, Heydon and Crennan JJ) and at 1276/7 [139]-[146] (Kirby J, contra).

112 Ibid, 1269 (Gleeson CJ, Gummow, Heydon and Crennan JJ) and at 1276-1277 (Kirby, J, contra).

the omissions in this case went to such a fundamental element of the offences that the Court could not conclude that the error in the directions would have had no significance in determining the outcome of the trial.[113] In my opinion, the errors ought be regarded as going to the root of the proceedings.[114]

198 Mr Shirrefs submitted that if we allowed the appeal we ought not order a re-trial and instead should enter verdicts of acquittal. Counsel sought the opportunity to address further argument on that question once the outcome of the appeal was known and the reasons for decision of the Court had been considered.

199 The conclusion that the evidence was capable of supporting the convictions strongly points to the conclusion that the appropriate order is that there be a re-trial, but it will be necessary to give counsel the opportunity to be further heard on that question before final orders are pronounced.

200 In my opinion, therefore, the appropriate orders would be that the application for leave to appeal be granted, the appeal be treated as being heard instanter and be allowed, the convictions be quashed and sentences be set aside. As to the further disposition of the case, I would await further submissions.

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113 *Weiss v The Queen* (2005) 224 CLR 300, 317.

114 *Wilde v The Queen* (1988) 164 CLR 365, 373; cf *Darkan v The Queen* (2006) 80 ALJR 1250, 1269, (Gleeson CJ, Gummow, Heydon and Crennan JJ, applying the proviso), and at 1276-1277 (Kirby J, contra). See, too, *R v AJS* (2005) 12 VR 563, 569-570 and *Libke v The Queen* [2007] HCA 30, (Unreported, Gleeson CJ, Kirby, Hayne, Callinan and Hayne JJ, 20 June 2007) at [41]-[52] (Kirby and Callinan JJ, in dissent).