McIVOR AND TANUCHIT: A TRULY 'HEINOUS' CASE OF SEXUAL SLAVERY

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I INTRODUCTION

The proceedings against Mr Trevor McIvor and Ms Kanakporn Tanuchit are among the very small number of reported cases of trafficking in persons in Australia.[1] It also marks the first convictions for slavery offences in New South Wales. In June 2006, five Thai women were discovered in a secret room in the basement of a licensed brothel owned by Mr McIvor and Ms Tanuchit.[2] In December 2010, the pair was convicted of five counts of possessing a slave and five counts of exercising over a slave powers attaching to the right of ownership, contrary to section 270.3(1)(a) of the *Criminal Code Act 1995* (Cth) schedule 1 ('*Criminal Code*'). When questioned about the crime, the Crown Prosecutor for the case, Mr Bruce Levet, described the actions of the couple as 'heinous'.[3]

With the introduction of the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth) the Australian Government sought to 'modernise Australia's laws on slavery and slave trading to make them more relevant to prevailing circumstances.'[4] Prior to the introduction of this Act, slavery was a criminal offence in Australia by virtue of the *Slave Trade Act 1824* (Imp) 5 Geo 4. The 1999 amendment introduced laws criminalising slavery, sexual servitude, and deceptive recruitment for sexual services. The illegality of slavery, now defined in section 270.1 of the *Criminal Code*, presents a number of unique

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1 *McIvor and Anor v The Queen* (2009) 247 FLR 363; *R v McIvor and Tanuchit* [2010] NSWDC 310. The proceedings against Mr McIvor and Ms Tanuchit are referred to collectively as *McIvor and Tanuchit* unless otherwise specified.

2 *McIvor and Tanuchit* [2010] NSWDC 310 [2], [12].

3 Kim Arlington, 'Sex slave family Trevor McIvor, Kanakporn Tanuchit "psycho", victim says', *The Daily Telegraph* (online), 14 July 2008 <http://www.dailytelegraph.com.au/news/sydney-nsw/sex-slave-family-psycho-victim-says/story-e6freuzi-1111116909771>.

4 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 August 1999, 8514 (Sharman Stone).

definitional problems and there have been several cases that sought to clarify the definition of slavery in Australian law.

The most notable of these cases is that of *R v Tang* which in 2008 became the first trafficking in persons case to be heard by the High Court of Australia.[5] *McIvor and Tanuchit* is the first case which directly applies the findings of the High Court. The *Tang* case attempted to distinguish between slavery and harsh employment conditions.[6] Its main contribution was to broaden the parameters of slavery to include de facto slavery (conditional slavery) as opposed to de jure slavery (status slavery). As such the case's contribution to slavery jurisprudence is significant and has been widely discussed. Prior to the decision in *Tang*, the meaning of slavery and the parameters of the offence under Australian law were untested. The High Court carefully examined the purpose and scope of the offence and when their judgment was handed down in 2008, a great deal of guidance and interpretation was provided.

The exploitation and abuse of the victims was markedly worse in the *McIvor and Tanuchit* case compared to the actions of Ms Tang. But despite the exceptionally heinous nature of the crime and the intricate questions of law involved, the *McIvor and Tanuchit* case has attracted little media attention or academic debate. This article fills this gap by exploring the facts of *McIvor and Tanuchit* and comparing this case to other instances of trafficking in persons in Australia. The article highlights weaknesses of the existing slavery and sexual servitude laws in Australia and discusses amendments recently proposed by the Australian Government.

II FACTS

Mr McIvor and his wife Ms Tanuchit owned and operated a brothel known as 'Marilyn's', located in Fairfield in Sydney's west.[7] Their criminal activity involved the enslavement and imprisonment of five Thai women. The pair's criminal activity began on 11 July 2004 when they collected the first victim from Sydney airport, and ended on 2 June 2006 when their brothel was searched by officers from the Australian Federal Police ('AFP') and the Department of Immigration and Citizenship ('DIAC'). This search took place after one of the victims, Yoko,[8] contacted the Thai consulate in Sydney. The charges laid against the Mr McIvor and Ms Tanuchit relate to their conduct towards the victims once

5 *R v Tang* (2008) 237 CLR 1 ('*Tang*').

6 Frances Simmons and Jennifer Burn, 'Evaluating Australia's Response to All Forms of Trafficking: Towards Rights-Centred Reform' (2010) 84 *Australian Law Journal* 712, 723.

7 *McIvor and Tanuchit* [2010] NSWDC 310 [2]; Les Kennedy, 'Women held in secret room under brothel, court told', *The Sydney Morning Herald* (Sydney), 9 August 2006, 11.

8 Throughout the proceedings the five female victims were given the pseudonyms Sophie, Jasmin, Susie, Yoko, and Mickey.

they arrived in Australia. During sentencing Williams DCJ remarked: 'Had Yoko not acted as she did I have no doubt that the offending would have continued.'[9]

The following paragraphs examine the profile, background, activities, and experiences of the two offenders and their victims. The case is representative of other cases of trafficking in persons for the purpose of commercial sexual exploitation in Australia. Because details of such cases are not widely known and not readily available to most readers, the article outlines the personal circumstances of each person in some detail.

A The Offenders

District Court Judge Williams, who presided over the second trial of the defendants, concluded that Mr McIvor and Ms Tanuchit were equal joint offenders. They would 'purchase' one woman at a time who would be provided by contacts in Thailand, who arranged visas, travel documentation, and tickets. The methods used to ensure the women gained entry into Australia, such as the information provided to Australian authorities to support visa applications, was evidently fraudulent. However, the only direct evidence of the defendant's involvement in the organisation and recruitment of the women was with regards to the victim Susie who came to Australia accompanied by Ms Tanuchit's sister and other family members. Mr McIvor later provided support for her visa application.[10]

1 *Trevor McIvor*

Mr McIvor – who insisted his victims refer to him as 'Papa' – was born in Australia in 1948 and until 2004 had a relatively minor criminal history.[11] He had worked in clubs and hotels for a period of time before becoming involved in the management and operation of legal brothels.[12] Together with Ms Tanuchit, he had two children and Mr McIvor, 21 years older than his wife, also had a child from a previous relationship. A stocky man, the limited media coverage of the case painted him as a ruthless, money-hungry criminal who showed no remorse for his actions in exploiting the women for sexual services or empathy for his victims.[13] It appears that his only regret concerned the small role he played in forging documents for one of the victims.[14] A witness and former employee of 'Marilyn's' recounted that Mr McIvor was quite particular about the appearance of the Thai women he brought to Australia to work as sex slaves in his brothel. He was quoted saying 'I've paid fucking $45,000; why can't they look decent.'[15]

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9 *McIvor and Tanuchit* [2010] NSWDC 310 [12].

10 Ibid [8].

11 Ibid [38]; Heath Gilmore, 'Illegally brought here so all "could make money"', *The Sydney Morning Herald* (online), 6 July 2008 <http://www.smh.com.au/news/national/illegally-brought-here-so-all-could-make-money/2008/07/05/1214951110449.html>.

12 *McIvor and Tanuchit* [2010] NSWDC 310 [38].

13 Ibid [31], [41]; Gilmore, above n 11.

14 Ibid 310 [8].

15 Gilmore, above n 11.

2 *Kanakporn Tanuchit*

Ms Tanuchit was born in Thailand in 1966 and immigrated to Australia in 1995 where she married Mr McIvor and subsequently became an Australian citizen. The couple's two children were born in 1998 and 2001.[16] After her arrest, during psychological treatment whilst in prison, Ms Tanuchit communicated that her background and migration to Australia was similar to the victims she later mistreated. She also left her family behind when she immigrated.[17] The victims' accounts suggest that Ms Tanuchit was the foremost abuser of the two joint offenders.[18] She was the one who confiscated their belongings, made threats against their lives and families, and physically and verbally assaulted the women. Additionally, she showed little empathy for the victims and, when interviewed by a psychologist, placed some blame for her incarceration on the victims.[19]

B Victims

During sentencing, Williams DCJ noted that although distinctions can be drawn between the facts relating to the victims, there is also marked similarity between each. The background and facts relating to each victim will be outlined here separately to demonstrate the varying degrees of severity of their treatment.

The actual price 'paid' by Mr McIvor and Ms Tanuchit for each victim cannot be determined because the couple was not cooperative in providing details to the authorities and their victims were not aware of the amount. However, money transferred to Thailand after the women arrived in Australia suggest it was somewhere between $12 500 and $15 000 for each woman. On arrival, each of the women were informed by the offenders that they had accrued a debt of between $35 000 and $45 000 and that they were required to work in the brothel until that debt was repaid.[20] One of the victims was told about the debt while still in Thailand, the rest were only made aware once they arrived in Sydney.

All of the women were prevented from leaving Australia and escaping the control of the offenders before their debt was repaid by confiscating their passports and keeping them locked either in a room under the brothel or at the couple's private residence.[21] If they had brought their mobile phone from Thailand, it was confiscated; a pin code was placed on the landline.[22] They were only allowed out of either premises while under the care of Mr McIvor, Ms Tanuchit, or a trusted employee.[23]

Most of the women commenced work in the brothel immediately after storing their belongings at the couple's residence. They usually had to work for sixteen

16 *McIvor and Tanuchit* [2010] NSWDC 310 [41].
17 Ibid [42].
18 Ibid [16], [19]–[20], [22], [26], [28].
19 Ibid [43].
20 Ibid [8].
21 Ibid.
22 Anti-People Trafficking Interdepartmental Committee, Parliament of Australia, *Trafficking in Persons: The Australian Government's Response January 2004 – April 2009* (2009) 70.
23 *McIvor and Tanuchit* [2010] NSWDC 310 [8].

hours a day. The victims were told they had to work six days with the option to work on the seventh day and receive payment, although minimal, if they chose to do so.[24] However, no extra payment was ever made. Moreover, all of the women were made to insert a sponge into their vaginas so they were able to work during their menstruation. Several victims reported that they had difficulty removing the sponge and had to seek assistance to do so.[25]

All five women made depositions to the courts so they did not have to give evidence at trial. In order to preserve anonymity, pseudonyms were used throughout the course of the trials, appeals and sentencing by the names they used during their respective periods of sexual servitude with the offenders.

1 *Sophie*

The first victim, referred to as Sophie, was told when she was recruited in Thailand for sex work that she would have a debt of $17 000 to repay. Sophie arrived in Sydney on 11 July 2004 in the company of a female minder known as Chut.[26] She was initially taken by her minder to a Sydney hotel from where she was later collected by Mr McIvor and Ms Tanuchit and taken to their home. Prior to starting work at the Fairfield brothel she had not engaged in any sex work. Record books kept by Mr McIvor show that between the date of her arrival and her release on 27 December 2004 Sophie saw 894 clients.[27]

In December 2004, Sophie suffered a serious womb infection. She was taken to see a medical professional who insisted that she rest for one week. However, Sophie was only allowed one day off and she was required to work despite complaining that she was suffering from severe pain. On a separate occasion she experienced a vaginal tear which caused further pain. She was not taken to see a doctor but instead Ms Tanuchit gave her a cream to apply to her wound and she was not permitted any time off.[28]

Sophie attested that she felt it was too dangerous for her to attempt to escape because verbal threats were made against her. Ms Tanuchit told the victim that one girl had escaped and that if that girl was found she would hire someone to assault her. She also warned the Sophie that if she ran away the police or immigration would catch her.[29]

2 *Jasmin*

The second and oldest of the victims, referred to as Jasmin, had never worked in the sex industry before arriving in Australia. She was told during the recruitment process in Thailand that the work in Australia would involve sexual activities. Jasmin was informed that she would accrue a debt but that she would be able to pay it off within three months. On 19 May 2005, she arrived in

24 Ibid.
25 Ibid [15], [19].
26 Ibid [14].
27 Ibid [16].
28 Ibid [15]–[16].
29 Ibid [17].

Australia under the care of a minder known to her as 'John' who initially accommodated her in a hotel where she was later met by Ms Tanuchit. After a short discussion, her passport was confiscated and Mr McIvor collected his wife and Jasmin from the hotel and they returned to the offenders' home. She lived at their home until late November 2005 until she was told she would reside at the brothel.[30]

Jasmin remained at the brothel until 13 April 2006. During that time she saw 1165 clients to pay off her original debt but also an additional amount for medical expenses, food, and advances of money sent to her family in Thailand. The reason she was able to service such a large number of clients was because she was forced to perform sex work every day and was not allowed to refuse customers even if she was exhausted or in pain.[31]

Jasmin was often ridiculed by Ms Tanuchit because of her age and appearance.[32] She was told she was unable to attract men because she was too dark, fat, and had saggy breasts. At one point, she was required to take her clothes off and be examined by Ms Tanuchit. During her work, she was exposed to sexually transmitted diseases ('STDs') as she was forced to perform oral sex without a condom and was given incorrect instructions on how to check for STDs. The offenders told Jasmin that she had to perform such acts because she had no other 'selling points'.

As a form of intimidation, Ms Tanuchit told Jasmin that if she spoke about her situation to customers the Immigration Department would send her back to Thailand. Jasmin was told that not only would her family be harmed but they would also be told that she was working in the sex industry.[33]

3 *Susie*

The third victim, referred to as Susie, was recruited in Thailand by Ms Tanuchit's sister, Ms Pa Phen, and she was made aware that her work in Australia would involve sexual conduct although Susie had never engaged in sex work before. She arrived in Australia on 15 March 2006 with Ms Phen and her family under the ruse of attending an engagement function for Mr McIvor and Ms Tanuchit. She stayed at the brothel until authorities searched the brothel on 2 June 2006.[34]

Susie gave evidence at trial that she was forced to service violent clients and that the sex work was often painful. Details of the severity of the violent treatment she endured were not reported in the judgment. Susie was not allowed to refuse any customers or take any days off. She worked every single day and was required to work even when sick. On one particular occasion she was so ill that she required assistance to apply her make-up. She gave evidence that at times the only food she was allowed to have was instant noodles. She also noted

30 Ibid [18]–[19].
31 Ibid [19], [21].
32 Ibid [19]–[20].
33 Ibid [22].
34 Ibid [8], [23].

that she was often verbally abused by Ms Tanuchit. Threats were made to ensure that she would not try to escape. Susie was told of Mr McIvor's alleged influence in Australia and of Ms Phen's connections to the Thai police. She was threatened that if she attempted to notify Thai authorities her family would be harmed.[35]

4 *Yoko*

Victim number four, referred to as Yoko, was recruited in Thailand by an undisclosed contact of Ms Tanuchit and Mr McIvor. She was told she would be performing massage work and that sex work was optional. Yoko made it clear when giving evidence that she had not engaged in any sex work previously, nor did she have any intention of carrying out such work when arriving in Australia. Ms Tanuchit was made aware that Yoko was hired on the basis that she wanted to do only massage work. However, Yoko was told that massage work paid considerably less and that it would therefore take her much longer to repay her debt. Thus, she felt as though she was given no choice but to engage in sex work.[36]

Accompanied by a minder, Yoko arrived in Australia on 16 May 2006 and was met at the airport by the offenders. Her passport, mobile phone, and $1500 in cash which was given to her by the Thai recruiter were confiscated upon arrival. During her one month stay at the brothel, the offender's debt books note that she serviced 41 clients and repaid $2125 of her $45 000 debt.[37]

Yoko was accommodated at the couple's home and was transported to and from the brothel each day. She was reprimanded if she refused to perform oral sex without a condom. As mentioned earlier, it was Yoko who managed to alert the Thai consulate.

5 *Mickey*

Mickey, the fifth victim – and the last to arrive in Australia – is the only victim who had previously worked in the sex industry. Prior to her arrival in Sydney she had engaged in sex work in Bahrain, but later returned to Thailand. She was recruited in Thailand to come to the defendants' brothel to perform both sex and massage work. On 19 May 2006, Mickey arrived unaccompanied at Sydney airport. She was taken directly to the brothel to commence sex work. Her debt was set at $45 000.[38]

Mickey was forced to work every day and was not permitted to refuse clients even after being physically assaulted and injured by one client. She was prohibited from refusing to perform any type of sexual act. During the relatively short period she worked at the brothel before authorities found her she serviced 72 clients and repaid $3770 of her debt.[39]

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35 Ibid [26].
36 Ibid [27]–[28].
37 Ibid.
38 Ibid [29]–[30].
39 Ibid [30]–[31].

Mickey was not permitted to leave the premises and also gave evidence that all she had to eat was instant noodles. She was threatened and did not attempt to escape because she believed she would not be successful and was fearful that if she was captured she would be harmed.[40]

II LEGAL PROCEEDINGS

A First Trial

Mr McIvor and Ms Tanuchit were first tried together before the District Court of New South Wales in 2007 by Taylor DCJ. During this trial the defendants were still married and were represented jointly. The couple employed separate representation after the conclusion of the first trial.[41]

The defence argued that the five women were not exploited nor were they slaves, claiming that they were free to come and go as they pleased. It was also suggested by the defence that all of the women had actually worked in the sex industry before and that they were lying to court.[42] They did not deny that the women entered the country illegally but insisted that they were brought here voluntarily so they and the offenders could make money.[43] Mr McIvor gave evidence at the trial;[44] Ms Tanuchit did not.

Both defendants were found guilty by a jury for five counts of intentionally possessing a slave and five counts of intentionally exercising over a slave powers attaching to the right of ownership, contrary to section 270.3(1)(a) of the *Criminal Code*.

Directly relevant to the first trial was the decision of the Court of Appeal of the Supreme Court of Victoria in *R v Tang* [2007] VSCA 134.[45] This decision was, however, later overturned by the High Court in relevant respects at which time the first trial of Mr McIvor and Ms Tanuchit had already been concluded.[46] In submissions to Taylor DCJ, the Crown flagged that an appeal had been lodged against the decision in *Tang* [2007] VSCA 134, but that his Honour was bound to follow that authority for the time being.[47] The Crown indicated that it intended to challenge the directions with respect to the fault element of section 270.3 given in the principal judgment in the Victorian Court of Appeal by Eames JA, but that his Honour should proceed on the basis that it represented the law.[48] Accordingly, Taylor DCJ followed the interpretation of the fault element of intention in section 270.3(1)(a) almost to the letter.

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40 Ibid [31].
41 Ibid [5].
42 Ibid [34].
43 Gilmore, above n 11.
44 *McIvor and Tanuchit* [2010] NSWDC 310 [5].
45 *R v McIvor and Tanuchit* [2008] NSWDC 185 [47]–[49].
46 See *Tang* (2008) 237 CLR 1.
47 *McIvor and Anor v The Queen* (2009) 247 FLR 363, 367 [18].
48 Ibid.

On 15 November 2007 Mr McIvor was sentenced to twelve years imprisonment with a non-parole period of seven and a half years. Ms Tanuchit was sentenced to eleven years imprisonment with a non-parole period of seven years.

B Appeal

After the High Court's decision in *Tang* was handed down on 28 August 2008, Mr McIvor and Ms Tanuchit appealed to the New South Wales Court of Criminal Appeal on three grounds which all turned on the trial judge's directions to the jury: (1) the direction on the fault element; (2) the direction on the indicia of slavery; and (3) the confusing nature of directions.[49]

The Crown opposed leave on all grounds, but the appellants were successful on the first ground of appeal. The appeal was heard by Spigelman CJ, McClellan CJ at Common Law and Grove J on 18 September 2009. Chief Justice Spigelman delivered the leading judgment on 28 October 2009, with which his fellow judges agreed. They upheld the appeal, quashing the original conviction. In their judgment their Honours discussed the first and second ground of appeal in great depth even though the second ground was ultimately rejected. It was noted that the third ground, involving the alleged confusing nature of a particular metaphor used in the Crown submissions and adopted in the judicial directions, was not likely to arise at the second trial and as a result was not discussed any further.[50] The following sections explore each appeal ground individually.

1 *Ground One: Direction on the Fault Element of the Offence*

Counsel for the appellants argued that 'the trial judge misdirected the jury by failing to adequately direct them as to the meaning of the requisite element, "intention" and how it was to be applied to the facts of the case'.[51]

Ms Tanuchit and Mr McIvor were charged with a slavery offence. The *Criminal Code* defines slavery in section 270.1 as: 'the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.' This definition is drawn from Article 1 of the *Convention to Suppress the Slave Trade and Slavery*[52] of 1926 but differs in two important ways.

First, the *1926 Slavery Convention* speaks of the status (de jure) or condition (de facto) of slavery whereas the definition in section 270.1 mentions only the condition of slavery. This limitation is explained by the fact that the status of slavery, so-called chattel slavery, is not legally recognised in Australian law.

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49 Ibid 370.

50 Ibid 365.

51 Ibid.

52 Opened for signature 25 September 1926, 60 LNTS 253 (entered into force 9 March 1927) ('*1926 Slavery Convention*'); see also, Jean Allain, 'R v Tang: Clarifying the Definition of Slavery in International Law' (2009) 10 *Melbourne Journal of International Law* 246, 249–50.

Chattel slavery exists in instances where the slave is the legally recognised property of the owner. This form of slavery was abolished by British Imperial Acts and is maintained under section 270.2 of the *Criminal Code*: 'Slavery remains unlawful and its abolition is maintained'.

Second, the definition in section 270.1 of the *Criminal Code* adds the clause 'including where such a condition results from a debt or contract made by the person' which does not exist in the *1926 Slavery Convention*. This addition of the 'debt or contract' provision to the definition in section 270.1 is aimed at expanding the scope of the offence in section 270.3 to more modern forms of slavery such as debt bondage or extremely exploitative contracts,[53] like those imposed by Mr McIvor and Ms Tanuchit on their victims.

The offence with which the couple was charged, section 270.3(1)(a), reads: 'A person who, whether within or outside Australia, intentionally … possesses a slave or exercises over a slave any of the other powers attaching to the right of ownership … is guilty of an offence.' The physical elements of this offence require proof either of the possession of a slave or of exercising over a slave powers attaching to the right of ownership. The fault element for this physical element is intention. The meaning of intention in this context was one of the contentious issues in the *McIvor and Tanuchit* case.

The *Criminal Code* differentiates between three types of physical element: conduct, result of conduct, and circumstance in which conduct, or a result of conduct, occurs.[54] Section 5.2 of the *Criminal Code* sets out three ways of defining intention which depend on the type of physical element the intention refers to. Under section 5.2(1) a person has intention with respect to conduct if he or she means to engage in that conduct. Under section 5.2(2) a person has intention with respect to a circumstance if he or she believes that the circumstance exists or will exist. Under section 5.2(3) a person has intention with respect to a result if he or she means to bring the result about or is aware that it will occur in the ordinary course of events.

It follows that for the physical element of possessing a slave or excising over a slave powers attaching to the right of ownership in section 270.3(1)(a), which is a conduct element, it must be shown that the accused had intention with regard to the conduct of possessing or exercising in the sense that he or she meant to engage in that conduct or, put simply, acted with purpose. The definitions of intention for the result and circumstance elements are of no relevance for this offence. It appears that on this point, Taylor DCJ erred in his jury directions in the first trial of Mr McIvor and Ms Tanuchit.

On appeal, Spigelman CJ noted that the jury was correctly directed that intention was the relevant fault element. However, they were told that it could be established by proving intention with regard to any of the three definitions in section 5.2. The jury was not directed specifically to the meaning of intention in

53 Revised Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) [20].

54 *Criminal Code* s 4.1(1).

relation to conduct elements. His reference to all three subsections of section 5.2 of the *Criminal Code* was taken directly from the jury directions given by Eames JA of the Victorian Court of Appeal in *Tang*[55] which were later rejected by the High Court.[56] Accordingly, the NSW Court of Criminal Appeal in the *McIvor and Tanuchit* case rejected the directions given by Taylor DCJ, noting that they were 'confusing'.[57]

The second point pertaining to the interpretation of the fault elements of section 270.3 relates the appellants' knowledge of the character of their actions. At the first trial Taylor DCJ – again following the Victorian Court of Appeal's decision in *Tang* – identified an additional knowledge requirement to ensure a high bar of differentiation between mere exploitation and actual slavery. He directed the jury that '[f]or 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, a mere thing, over which the accused could exercise power as though he or she owned the complainant'.[58]

Later, in *Tang*, the majority of the High Court rejected this approach and held that besides the physical element of conduct and the corresponding fault element of intention, no additional element of knowledge had to be proven to establish liability under section 270.3(1)(a). The Court held that there was no requirement to show that an accused knew the source of the powers exercised over the victims.[59] Chief Justice Gleeson, along with the majority of High Court judges, found that the Victorian Court of Appeal erred in requiring the defendant to have an 'appreciation of the character' of her actions.[60] He stressed that 'the solution to the issue of distinguishing slavery from exploitation lay in looking at the capacity of the accused to deal with the victims as commodities and not in the need for reflection by an accused upon the source of the powers being exercised.'[61] Justice Kirby, however, ardently supported the approach of the Victorian Court of Appeal, criticising his colleagues for 'distorting the essential ingredients of serious criminal offences as provided by the Parliament'.[62]

Chief Justice Spigelman in *McIvor and Tanuchit* followed the High Court's decision, noting that District Court Judge Taylor's direction to the jury on the additional knowledge requirement was incorrect. This error, in combination with his incorrect instructions relating to the meaning of intention amounted to a significant miscarriage of justice.[63]

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55 (2007) 16 VR 454, 471–2, 478–88.
56 *Tang* (2008) 237 CLR 1, 23–6.
57 *McIvor and Anor v The Queen* (2009) 247 FLR 363, 369–70.
58 Ibid 369.
59 Irina Kolodizner, '*R v Tang*: Developing an Australian Anti-Slavery Jurisprudence' (2009) 31 *Sydney Law Review* 487, 494.
60 *Tang* (2008) 237 CLR 1, 23 (Gleeson CJ), referring to *R v Tang* (2007) 16 VR 454, 487.
61 Kolodizner, above n 59.
62 *Tang* (2008) 237 CLR 1, 29; Kolodizner, above n 59.
63 *McIvor and Anor v The Queen* (2009) 247 FLR 363, 370.

2 *Ground Two: Indicia of Slavery*

The offence of slavery is not fulfilled simply by performing an individual act, but, as seen in the facts of *McIvor and Tanuchit*, involves a course of conduct of a number of acts over an extended period.

At the initial trial of Mr McIvor and Ms Tanuchit, the Crown outlined a list of nine circumstances which they characterised as 'indicia of slavery'. These indicia included the facts that the victims:

(i) lived and worked in locked premises operated by the appellants after they arrived in Australia;

(ii) did not have keys to the premises and were not permitted by the appellants to leave the premises unaccompanied;

(iii) did not speak English;

(iv) did not know anyone outside the brothel;

(v) were housed, cooked for and fed by the appellants;

(vi) were constantly put to work by the appellants;

(vii) were controlled by the appellants in all aspects of their lives including where they went, where they ate, where they slept and with whom they associated;

(viii) had a fear of immigration authorities fostered in their minds by the appellants; and

(ix) were instructed by the appellants to hide in the event that authorities attended the brothel premises.[64]

On appeal, Spigelman CJ made it clear that he believed labelling these nine factors as indicia was misleading, noting that 'with the possible exception of (vii) the indicia are not capable of constituting slavery on their own, as distinct from being one of the range of circumstances which are relevant to determining the physical element of the offence under section 270.3(1)(a) of the Code.'[65]

The crux of the defence counsel's submissions regarding the second ground of appeal was that the trial judge's explanations failed to direct the jurors' minds to the extent to which each of the indicia could properly be said to demonstrate the relevant condition of slavery and the failure to acknowledge any relevance as to the circumstances in which these indicia were produced. At the initial trial, after giving directions with respect to the elements of the offence, Taylor DCJ referred to the 'indicia of slavery' as 'essential ingredients of the offence'.[66] However, in a later statement Taylor DCJ said 'you do not have to be satisfied about all of the indicia with respect to one complainant 'you only need to be

64 Ibid 364–5. This list shares many similarities with a list submitted by the Human Rights and Equal Opportunity Commission (HREOC) during the hearing of the *Tang* case before the High Court: HREOC, 'Submissions in Support of Application for Leave to Intervene and Submissions on the Appeal', Submission in *R v Tang*, M5/2008, 5 May 2008, 15. This list is also reproduced in Allain, above n 52, 250.

65 *McIvor and Anor v The Queen* (2009) 247 FLR 363, 365.

66 Ibid 370.

satisfied about one. That is because the indicia is simply the identified example of the condition the Crown says is slavery.'[67] After retiring, the jury asked: 'Do all of the indicia have to be satisfied for any charge to be proved?' The Crown submitted that the answer was 'no' and counsel for the appellants concurred.[68] His Honour then attempted to clarify:

> The answer to that is no. You have to be satisfied beyond reasonable doubt as to each of the elements of the particular charge that you are considering … If you are satisfied beyond reasonable doubt as to one or more of the indicia it is open to you, and I emphasise the word open … to conclude that a condition of slavery existed.[69]

The Court of Appeal held that it was likely the jury's question was prompted by his Honour's initial characterisation of the indicia as elements or essential ingredients and that despite clearing this up in later directions, the question was indicative of possible confusion as to how to apply these indicia.[70] The court also commented on the nature of the indicia themselves, noting that some were clearly established and uncontested facts, while others were inferences drawn from a body of evidence. This, the Court of Appeal concluded, was also capable of confusing the jury.[71]

Despite these observations, the second ground of appeal was rejected as the Court of Appeal noted that counsel for the appellants did not seek correction of the directions during the initial trial and indeed supported District Court Judge Taylor's response.[72] Yet, the jury was clearly directed that they had to be satisfied beyond reasonable doubt of the elements of the offence and the need to establish that a condition of slavery existed. The Court of Appeal was satisfied that District Court Judge Taylor's later attempts to clarify were able to clear any confusion so that the jury did not act under a belief that one of the indicia alone would be sufficient.[73]

C New Trial and Sentencing

On 3 May 2010, the retrial began in the District Court of New South Wales under Williams DCJ. The defendants were again tried together but were represented separately. Neither Mr McIvor nor Ms Tanuchit gave evidence at this trial. Nevertheless, they maintained their innocence. The trial ran for twelve weeks. After two days of deliberations, the jury returned its verdict on 30 July 2010. The defendants were again found guilty of five counts of intentionally possessing a slave and five counts of exercising over a slave powers attaching to the right of ownership, under section 270.3(1)(a) of the *Criminal Code*. Mr

67 Ibid 371.
68 Ibid.
69 Ibid 371–2.
70 Ibid 372.
71 Ibid.
72 Ibid 372–3.
73 *McIvor and Anor v The Queen* (2009) 247 FLR 363, 372–373.

McIvor and Ms Tanuchit's final sentences were handed down by Williams DCJ on 17 November 2010.

In sentencing the two defendants, his Honour compared the facts to those in *Tang* noting the striking similarities between the two cases.[74] Ms Tang, however, was only sentenced to ten years imprisonment. The major factual differences between the two cases were that all of the victims in *Tang* had previously worked in the sex industry, they all agreed to come to Australia to do sex work, they were not locked up until their contract debt was repaid, and they were all provided with adequate food, medical attention and a residence.[75] District Court Judge Williams noted that the actions of Ms Tanuchit and Mr McIvor amounted to a substantial aggravation compared to those of Ms Tang.[76]

District Court Judge Williams noted that the issue of double punishment arose on appeal in *Tang*, for what was essentially the same conduct as that engaged in by Ms Tanuchit and Mr McIvor.[77] Section 270.3(1)(a) pairs together the offences of possession and exercising over a slave powers attaching to the right of ownership. Possession and exercising appear to be part of the same offence. Yet these two types of conduct appear to be separable as Mr McIvor and Ms Tanuchit, as well as Ms Tang, were charged separately with five counts of possessing and five counts of exercising over a person powers attaching to the right of ownership (which has been equated with using a slave).

In the case of *Pearce v The Queen*[78] the High Court discussed double punishment in these circumstances, stating that:

> Often […] boundaries will be drawn in a way that means that defences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts … A Judge sentencing an offender for more than one offence must fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, as well of course, questions of totality.[79]

In a similar fashion, the Victorian Court of Appeal in *Tang* held that:

> Approaching the question as a matter of commonsense, not as a matter of semantics, we have no doubt that the offences of possessing a slave and using a slave overlap when committed in relation to the same person. Put simply, there can be no use unless there is possession, and use is itself is an illustration of possession.[80]

District Court Judge Williams adopted these arguments by recognising that although it was difficult to envision a situation where a person would be charged with possession of a slave alone, the possibility does exist.[81] He held that possession of a slave was less serious than the use in the circumstances of offending. In *McIvor and Tanuchit*, although the use was an expression of the

74 *McIvor and Tanuchit* [2010] NSWDC 310 [45].
75 Ibid; *Tang* (2008) 237 CLR 1, 12–15.
76 *McIvor and Tanuchit* [2010] NSWDC 310 [45].
77 Ibid [47].
78 (1998) 194 CLR 610.
79 Ibid 623–624 quoted in *McIvor and Tanuchit* [2010] NSWDC 310 (17 December 2010) [46].
80 *Tang* (2009) 23 VR 332, 338 quoted in *McIvor and Tanuchit* [2010] NSWDC 310 [47].
81 *McIvor and Tanuchit* [2010] NSWDC 310 [48].

defendants' possession, the use element appropriately exemplified the victims' enslavement. His Honour found that the sentences for the charges relating to possession punished other manifestations of the couple's control over the victims. Accordingly, he noted that the sentence must distinguish between the relative seriousness of the individual offences, taking into account the element of double punishment inherent in the possession and use offence, or the substantial variances in duration of the individual victim's period and conditions of slavery.[82]

His Honour sentenced both Ms Tanuchit and Mr McIvor to twelve years imprisonment. Mr McIvor received a non-parole period of seven and a half years and Ms Tanuchit of seven years. The slightly shorter non-parole period of Ms Tanuchit was considered necessary giving regard to the original sentence of Taylor DCJ. Both defendants were sentenced more harshly for the use of slaves than they were for possessing slaves. For example, with regards to the victim Mickey, Ms Tanuchit and Mr McIvor were each sentenced to four years imprisonment for using her as a slave, and to three years imprisonment for intentionally possessing her as a slave.[83]

The length of the sentences in relation to each victim differed depending on the length of time each victim was enslaved and the level of exploitation. In relation to Susie, for instance, who was enslaved for two and half months, the offenders received a sentence of six years whereas in relation to Jasmin the sentence for using her as a slave was set at ten years imprisonment. Also influencing the sentencing were the prior experiences of the victims.[84] To that end, for using the victim Mickey as a slave, the defendants were sentenced to three year imprisonment given the victims prior involvement in the sex industry. In relation to the victim Yoko, who was with the defendants for less than a month, the sentence was set at four years imprisonment as she explicitly refused to engage in sex work.

These considerations raise some concerns about discounting the exploitation of victims who have previously worked in the sex industry. To some extent, District Court Judge Williams' sentencing remarks insinuate that Mickey could be expected to service a greater number of clients in the brothel than Yoko, given that Mickey had prior sex work experience. In actual fact, Mickey did service a greater number of clients over a shorter period of time than Yoko, but this in no way reduces the level of exploitation and trauma either victim experienced. District Court Judge Williams also failed to consider the causes and circumstances of Mickey's prior sex work experience in Bahrain, for example, whether she was trafficked or otherwise exploited, harmed, or threatened at that time.[85]

These sentencing considerations in *McIvor and Tanuchit* also touch on the wider issue of victim consent in the context of trafficking in person, which has

82 Ibid [62].
83 Ibid [65].
84 Ibid [71].
85 Ibid [29].

arisen in a number of trials. In *Tang*, Gleeson J, with whom the majority of the High Court agreed, held that consent is not inconsistent with slavery, and that absence of consent is not an element of the offence. He argued that 'consent may be factually relevant in a given case, although it may be necessary to make a closer examination of the circumstances and extent of the consent relied upon'.[86] While this statement was made in the context of how a tribunal of fact should come to establish the offence, it may be possible to infer that the issue of consent can also be considered in sentencing offenders. Williams DCJ appears to endorse this position on the relevance of consent when he determined the sentence in relation to each victim in *McIvor and Tanuchit*. He set a higher penalty for the offences committed against Yoko, who was coerced into coming to work in the brothel under false pretences. District Court Judge Williams concluded that her lack of consent 'must have been an additional source of distress to her'.[87]

III REFLECTIONS

Cases such as *McIvor and Tanuchit* show that slavery is not a crime of the past. But the difficulties courts have experienced when applying the modern slavery laws in such cases suggests that the current laws may be too complex and, at times, inadequate.

There are a variety of offences in Divisions 270 and 271 of the *Criminal Code* under which offenders who engage in trafficking in persons may be charged. The differences between these offences are often subtle and not always clear. The following sections outline and analyse the existing legislative framework, relevant case law, and highlight some of the amendments recently proposed by the Australian Government.

A Sexual Servitude Offences, Division 270

The offence of slavery with which Mr McIvor and Ms Tanuchit were charged is part of a set of offences relating to slavery and sexual servitude in Division 270 of the *Criminal Code* which, as mentioned previously, was added in 1999.[88] Contemporary concepts of trafficking in persons were not well understood at the time these offences were conceived and the primary goal of the 1999 amendments was to integrate British Imperial Acts pertaining to slavery into domestic Australian law.

One of the difficulties in the practical application of Division 270 offences is the distinction between slavery, which is defined in section 270.1, and sexual servitude. Sexual servitude is defined in section 270.4 as 'the condition of a person who provides sexual services and who, because of the use of force or

86 *Tang* (2008) 237 CLR 1, 21.
87 *McIvor and Tanuchit* [2010] NSWDC 310 [28].
88 Revised Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) [2].

threats (a) is not free to cease providing sexual services; or (b) is not free to leave the place or area where the person provides sexual services.' Prima facie, the facts of *McIvor and Tanuchit* seem to fit the definition of section 270.4: Mr McIvor and Ms Tanuchit prohibited the women from ceasing to provide sexual services or leave the brothel in which they worked. But as in a number of other cases, the charges used against the couple involved slavery and not sexual servitude which appears to be more easily made out.

The difference between the slavery and sexual servitude offences is explained in the Explanatory Memorandum to the Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth):

> To establish slavery it must be shown that the accused exercises a power of ownership over the victim. Servitude falls short of ownership but the domination over the victim is such as to effectively deny her or his freedom in some fundamental respects. In relation to the sexual servitude offences in the [*Criminal Code*] it is only if the victim's freedom is denied in respect of one of the two matters listed in this subclause that an offence is committed. Whether a person is 'not free' in relation to the matters specified in the definition will be determined on the facts of each case and in the context of the mischief the legislation is directed against; namely, sexual 'servitude'. The fact that a person may suffer a penalty under the terms of a typical employment contract would not of itself amount to being 'not free'. It is only if the force or threats effectively denies the person her or his freedom in relation to the two specified matters that sexual servitude can be made out. In borderline cases, where there is doubt about whether a person is 'not free' in relation to the matters listed in the definition, it is expected that the courts will resolve the matter in favour of the defendant.[89]

The precise reasons why slavery offences rather than sexual servitude offences were used in *McIvor and Tanuchit* are not known, though it is likely that slavery was seen as a more severe form of exploitation which reflects the seriousness of the offenders' conduct more adequately. This is also reflected in the higher penalty of 25 years imprisonment the *Criminal Code* provides for the slavery offence in section 270.3. Sexual servitude under section 270.6, by contrast, attracts a maximum penalty of fifteen years.

In this case, the victims' freedom and most basic human rights were denied in very many respects; the exploitation the five women experienced was far more severe than the mere inability to freely cease providing sexual service or leave the brothel. Mr McIvor and Ms Tanuchit controlled the women's lives in every aspect, they were forced to work unceasingly, were subjected to cruel and humiliating treatment, received no wage, had no control over their clientele, no access to medical treatment or reprieve for rest and leisure. Seen this way, the facts of *McIvor and Tanuchit*, may serve as a good example of contemporary forms of slavery which, as noted in the Explanatory Memorandum to the Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) '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.'[90]

89 Ibid [44]–[45].

90 Ibid [19].

The facts of this case, including a locked residence and place of work, inability to speak English, no acquaintances, friends or family outside the brothel, shelter and food provided by the enslavers, constant work, control by the offenders, and fear of authority fostered by the enslavers may indeed serve as indicia of the condition of slavery. The exercise of power attaching to the right of ownership is not a single, discrete act and thus such indicia of slavery are useful to determine whether the accused intended to purport to exercise a power attaching to the right of ownership. That type of power was clearly and intentionally exercised by Mr McIvor and Ms Tanuchit.

B Trafficking in Persons Offences, Division 271

The *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth) inserted Division 271 'Trafficking in persons and debt bondage' into the *Criminal Code*.[91] This Division contains a suite of both international and domestic trafficking in persons offences,[92] as well as the offence of debt bondage.[93]

Division 271 is the effective ratification of the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, *Supplementing the United Nations Convention against Transnational Organised Crime.*[94] The offences in Division 271 are also a response to the 2004 parliamentary *Inquiry into the Trafficking of Women for Sexual Servitude* which noted that the offences in Division 270 were effective but that a speedy review of the law and legislative amendments was required.[95] The Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 (Cth) was drafted to address these inadequacies. When the Bill was introduced into the House of Representatives, then Attorney-General Mr Philip Ruddock summarised the purpose of the offences now contained in Division 271:

> The offences ensure all aspects of trafficking in persons are criminalised in Australia – from the use of deception to recruit a trafficking victim, through to the transportation of a victim to or from Australia by the use of threats, force or deception, through to the receipt and exploitation of the victim.[96]

91 See generally, Bernadette McSherry, 'Trafficking in Persons: A Critical Analysis of the New Criminal Code Offences' (2007) 18 *Current Issues in Criminal Justice* 385.

92 *Criminal Code* ss 271.2–271.7.

93 Ibid ss 271.8, 271.9.

94 Opened for signature 15 December 2000, 2237 UNTS 319 (entered into force 25 December 2000) ('*Trafficking in Persons Protocol*').

95 Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the Trafficking of Women for Sexual Servitude* (2004) x.

96 Commonwealth, *Parliamentary Debates,* House of Representatives, 21 June 2005, 31 (Philip Ruddock, Attorney General).

Division 271 creates

> specific offences where the trafficker transports the victim into or out of Australia by using force, threats or deception. It also creates new trafficking offences that do not specify a means of trafficking but require the perpetrator to be reckless as to whether the victim will be exploited.[97]

Australia's offences relating to trafficking in persons are separated between those that concern transnational trafficking (sections 271.2, 271.3) and those that concern domestic trafficking (sections 271.5, 271.6). Both the transnational and domestic offences are almost identical in their structure and elements. For both sets of offences there are four different scenarios which, if proved, amount to the commission of a trafficking in persons offence. The first scenario is relevant when there has been a use of force or threats to gain compliance.[98] The second scenario deals with recklessness as to whether the other person will be exploited.[99] The third scenario covers situations where there has been deception as to the provision by the other person of sexual services, or exploitation, or debt bondage or the confiscation of travel or identity documents.[100] The fourth scenario is relevant when there has been deception relating to the nature and extent of sexual services to be provided or the existence or quantum of debt owed.[101]

Separate offences also exist for transnational and domestic trafficking in children (s 271.4 and section 271.6 respectively). Offences relating to debt bondage are set out in sections 271.8 and 271.9 of the *Criminal Code*. A draft of the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012, released by the Minister for Home Affairs on 23 November 2011, proposes certain amendments to the offences under Division 271 which are explored later in this article.

Reflections on the existing case law, including *McIvor and Tanuchit*, reveal an uneasy relationship between the offences in Divisions 270 and 271 of the *Criminal Code*. There appears to be considerable overlap between the two sets offences and it is not always clear why prosecutors have tended to use offences relating to slavery and sexual servitude to prosecute persons involved in trafficking in persons in Australia. To date, there are only a very small number of cases in which Division 271 offences were considered, including only two prosecutions that were followed by convictions.[102]

As Ms Tanuchit and Mr McIvor had some involvement in the recruitment and bringing of the victims to Australia, the question arises why they were not charged for trafficking in persons under Division 271. This is most evident in relation to the victim Susie who was recruited in Thailand by Ms Tanuchit's

97 Ibid 30.
98 *Criminal Code* ss 271.2(1), 271.2(1A), 271.5(1).
99 Ibid ss 271.2(1B), 271.2(1C), 271.5(2).
100 Ibid ss 271.2(2), 271.2(2A), 271.5(2A).
101 Ibid ss 271.2(2B), 271.2(2C), 271.5(2B).
102 *R v Dobie* (2009) 236 FLR 455; and the (yet unreported) case involving Mr D Trivedi (2011). See Anti-People Trafficking Interdepartmental Committee,Trafficking in Persons, above n 22, 16.

sister who also accompanied her to Australia and then handed her over to the defendants. Their involvement in the transportation of the other four victims, their visa applications, and other aspects of the victims' journey to Australia is less clear and Ms Tanuchit and Mr McIvor refused to provide any information about the recruitment of the victims and any agents or other participants who may have aided the couple in Thailand.[103] For these reasons it appears that the Crown may have felt it had insufficient evidence to establish liability under Division 271 offences beyond reasonable doubt. Furthermore, the available case law and academic literature suggests that liability for trafficking in persons under Division 271 of the *Criminal Code* may be reserved to those who organise and facilitate the entry of another person into Australia for the purpose of exploitation while Division 270 captures offenders like Ms Tanuchit and Mr McIvor who are directly involved in the exploitation of the victims in Australia.[104]

C Slavery and Sexual Servitude: The Case Law

The case of *McIvor and Tanuchit* is one of a relatively small number of reported cases of trafficking in persons in Australia. Since the introduction of slavery and sexual servitude offences into the *Criminal Code* in 1999 there have been less than a dozen prosecutions under Division 270, with several cases being dismissed and some appealed. The facts of these cases, especially insofar as they involve the commercial sexual exploitation of foreign women, often follow a similar pattern and the methods of coercion and intimidation used by Ms Tanuchtit and Mr McIvor as well as the experiences of the five victims share many similarities with a number of other recent cases. There is also a significant similarity in the ways in which prosecutors and courts applied relevant laws and interpreted the evidence before them. The following paragraphs explore some of these cases.

Earlier parts of this article already touched on the case against Melbourne brothel owner Ms Tang which resulted in the first jury conviction under Australia's slavery offences. Ms Tang was accused of having purchased five women from Thailand to work in debt-bondage conditions in a legal brothel called Club 417 in Fitzroy, Victoria.[105] In 2008, her case came before the High Court which upheld the convictions of slavery offences under section 270.3(1)(a) and, as outlined earlier, clarified the modern definition of slavery.[106]

Ms DS, one of the associates of Ms Tang, was tried separately and pleaded guilty to two counts of slave trading and three counts of possessing a slave contrary to sections 270.3(1)(b) and 270.3(1)(a) respectively.[107] Ms DS was previously trafficked by Ms Tang and elected to stay on as an employee after her

103 *McIvor and Tanuchit* [2010] NSWDC 310 [35].
104 See Andreas Schloenhardt and Joseph O'Shea, 'Reflections on R v Dobie' (2010) 34 *Criminal Law Journal* 400, 407–8.
105 *Tang* (2007) 16 VR 454, 457.
106 *Tang* (2008) 237 CLR 1.
107 *R v DS* (2005) 191 FLR 337.

debt had been repaid.[108] This case involved a straightforward application of the slavery jurisprudence established in *Tang* and applied in *McIvor and Tanuchit*.

The Queensland case involving Mr Zoltan and Mrs Melita Kovacs changed the focus of trafficking in persons in Australia which, up until this case, had centred exclusively on trafficking into situations of commercial sexual exploitation, that is, prostitution.[109] *R v Kovacs* involves the trafficking of a Filipina woman who was forced to work for a married couple as a domestic servant in their remote Queensland home and takeaway store.[110] The outcome of the appeal in this case signifies an important expansion to the definition of slavery.[111] This case is the first case of trafficking for domestic servitude to be prosecuted under slavery laws in Australia. In such cases, a multitude of different factors can combine effectively to enslave a person, despite the victim's apparent physical ability to leave or report the situation. In particular, remote locations clearly create and foster a sense of hopelessness for those trafficked for the purpose of domestic servitude. 'What worsens this situation', note Andreas Schloenhardt and Jarrod Jolly, 'is that the domestic servitude may not be overtly obvious to others given that the victim may have certain illusory freedoms and yet still feel isolated and unable to leave.'[112]

The case most similar to that of *McIvor and Tanuchit* is that of Sydney brothel owners Mr Johan Sieders and Ms Somsri Yotchomchin which resulted in the first conviction for sexual servitude offences under section 270.6 of the *Criminal Code*. On 21 July 2006, in the District Court of New South Wales, a jury found Mr Sieders and Ms Yotchomchin guilty of knowingly conducting a business involving the sexual servitude of other persons.[113] The Crown alleged that the pair was involved in a transnational operation through which young Thai women were brought into Australia and put to work in the defendants' brothels in Sydney. The women were required to service clients until they had generated sufficient money to pay the defendants a debt of approximately $45 000 each.[114] The women were discovered by the police after one of the victims, with the help of a client, contacted immigration officials. The judgments delivered by Bennett DCJ in the District Court and by Campbell JA in the Court of Appeal elucidate and give substance to the elements of the sexual servitude offences.[115] Furthermore, their Honours eschewed defence counsel arguments which labelled the victims as voluntary sex workers, illegal migrants, and 'canny business

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

109 See further, Andreas Schloenhardt and Jarrod Jolly, 'Honeymoon from Hell: Human Trafficking and Domestic Servitude in Australia' (2010) 32 *Sydney Law Review* 671.

110 *R v Kovacs* [2007] QCA 143

111 *R v Kovacs* [2009] 2 Qd R 51.

112 Schloenhardt and Jolly, above n 109, 686.

113 *R v Johan Sieders and Somsri Yotchomchin* [2006] NSWDC 184 [5]–[7].

114 Ibid [17].

115 *Sieders v R; Somsri v R* (2008) 72 NSWLR 417, 423–7.

women'.[116] The judgments exhibit an early understanding of the characteristics of trafficking in persons and the circumstances in which this crime occurs.

The exploitation of the willingness of the victims to engage in sex work was also discussed in *DPP (Cth) v Ho and Anor*.[117] In this case, two of the accused were each found guilty of ten counts of slavery offences, including intentionally possessing a slave under section 270.3(1)(a). It is reported that their debts were set at between $81 000 and $94 000 and that the victims had to perform between 650 and 750 sex acts each under their one year debt contract which began in 2004. The sentencing judgment condemned the offenders for their role 'in a sophisticated, well-planned and executed scheme to bring Thai women to Australia and profit from their willingness to work for minimal reward in the sex industry'.[118] In his assessment of the culpability of the offenders, Cummins J of the Victorian Supreme Court emphasised that the voluntariness of each victim stemmed from the financial desperation of their families, which was then exploited by the offenders.[119]

Among four or five trafficking cases currently awaiting trial is that of Ms Watcharaporn Nantahkhum and Mr Robert Phillip Dick who were arrested on 14 October 2009. It is alleged that between June 2007 and June 2008 Ms Nantahkhum brought women to Australia to work in the sex industry in Canberra.[120] In November 2009, she appeared in the ACT Magistrates Court facing charges including, inter alia, possessing a slave and debt bondage, under sections 270.3(1)(a), 271.8. She was granted bail on 19 December 2009 and, exactly one year later, appeared before the ACT Supreme Court where she pleaded not guilty on all counts. Her trial has been set for March 2012. Mr Dick has been charged in connection to the same matter. It is reported that he aided Ms Nantahkhum in keeping sex slaves in an unlicensed brothel. He has also been accused of and charged with rape of one of the young victims. He has pleaded not guilty in relation to all counts and was granted bail under strict reporting conditions.[121] In light of the experiences of the *McIvor and Tanuchit* case and its interpretation of the slavery offence it will be interesting to see how this case will apply the existing case law and further advance jurisprudence in this field.

D The Expanding Nature of Slavery

An examination of the available case law shows that the slavery offence in section 270.3 of the *Criminal Code* has been used in a diverse range of situations. It thus seems that the concept of slavery as defined in section 270.1 is expanding

116 Fiona David, *Trafficking of Women for Sexual Purposes*, Research and Public Policy Series No 95, Australian Institute of Criminology (2008) 52.

117 [2009] VSC 437.

118 Ibid [26].

119 Ibid [31].

120 'Woman to face court in Canberra for trafficking people', *State News Services* (online), 18 November 2009 <http://www.highbeam.com/doc/1G1-216011867.html>.

121 Noel Towell, 'Court told of bonded sex slaves in Braddon flat; Man denies rape, helping run Brothels', *The Canberra Times* (Canberra), 17 April 2010, 4.

and its legal parameters have become the subject of complex debate. Adding to this complexity is the uncertain distinction between the terms slavery and servitude in both domestic and international contexts and the difference between these terms and the wider notion of trafficking in persons.

In the case of *Tang* Gleeson CJ remarked that:

> It is important not to debase the currency of language, or to banalise crimes against humanity, by giving slavery a meaning that extends beyond the limits set by the text, context, and purpose of the 1926 Slavery Convention. In particular it is important to recognise that harsh and exploitative conditions of labour do not of themselves amount to slavery.[122]

There seems to be some consensus in judicial and academic circles that the term slavery should be reserved for the most severe, most heinous forms of degradation of and dominance over another person, while the term servitude covers situations of lesser severity and more subtle forms of control or coercion.[123] Anne Gallagher, for instance, notes that in the context of the *International Covenant for Civil and Political and Rights*[124] 'the term "servitude" is generally understood as separate from and broader than slavery referring to "all conceivable forms of dominance and degradation of human beings by human beings."'[125]

The separation between the two terms is, however, far from settled. For example, Jean Allain notes that forms of servitude 'can slip into slavery, if a condition of ownership emerges'.[126] He later wrote that '[t]he very expansive notion of slavery … cannot persist in the 21st century, as the prohibition of slavery comes up against the countervailing right of the accused to know the charges against them.'[127]

Other authors tend to advocate an expansionist approach to defining slavery. James Hathaway, for instance, is a proponent of a broader legal concept of slavery that encompasses 'any form of dealing with human beings leading to the forced exploitation of their labour' including 'the exercise of any or all of the powers attaching to the right of ownership over a person.'[128] He further argues that the fight against modern slavery cannot be won if governments 'frame the

122 *Tang* (2008) 237 CLR 1, 20.

123 Schloenhardt and Jolly, above n 109, 690.

124 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

125 Anne T Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (2009) 49 *Virginia Journal of International* Law 789, 803. See also Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) 179–89; Schloenhardt and Jolly, above n 109, 689.

126 Jean Allain, 'A Legal Consideration "Slavery" in Light of the *Travaux Préparatoires* of the 1926 Convention' (Paper presented at the Conference on Twenty-First Century Slavery: Issues and Responses, Wilberforce Institute for the Study of Slavery and Emancipation, Hull, 23 November 2006), 1.

127 Allain, above n 52, 256, with reference to Suzanne Miers, *Slavery in the Twentieth Century* (Rowman Altanira, 2003) 453.

128 James C Hathaway, 'The Human Rights Quagmire of "Human Trafficking"' (2008) 49 *Virginia Journal of International Law* 1, 9.

effort by reference to an arguably anachronistic term traditionally understood to respond to only a small part of a much larger issue'.[129]

It is beyond the scope of this article to conclusively resolve this debate which stems from and impacts upon the interpretation of a great range of international treaties and domestic laws. Moreover, in the case of *McIvor and Tanuchit*, the elements of slavery were easily made out. As such, the heinousness of this case may serve as an example of the level of criminality which will meet higher thresholds of the slavery definition in Australia. In other cases, the boundaries of slavery and servitude remain less certain, though Gleeson CJ also notes that it may be

> unnecessary and unhelpful for the resolution of the issues … to seek to draw boundaries between slavery and cognate concepts such as servitude, peonage, forced labour, or debt bondage … the various concepts are not mutually exclusive. Those who engage in the traffic in human beings are unlikely to be so obliging as to arrange their practices to conform to some convenient taxonomy.[130]

E Reform Proposals

In response to mounting calls for a separate offence pertaining to servitude and new provisions relating to labour trafficking and forced marriage, on 23 November 2011 the Australian Government presented the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 to 'ensure the broadest range of exploitative behaviour is captured and criminalised'.[131] It is expected that this Bill will pass with no or only minor changes in 2012. Relevantly, the Bill proposes the introduction of a definition of servitude and of new servitude offences in Division 270, Subdivision C of the *Criminal Code*, entitled 'Slavery-like offences'.

Proposed section 270.4(1) defines servitude as

> the condition of a person (the victim) who provides labour or services, if, because of the use of coercion, threat or deception:
>
> (a) a reasonable person in the position of the victim would not consider himself or herself to be free:
>
> (i) to cease providing the labour or services; or
>
> (ii) to leave the place or area where the victim provides the labour or services; and
>
> (b) the victim is significantly deprived of personal freedom in respect of aspects of his or her life other than the provision of the labour or services.

This definition applies regardless 'whether the coercion, threat or deception is used against the victim or another person': section 270.4(2). Furthermore, section 270.4(3) recognises that:

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129 Ibid 8.

130 *Tang* (2008) 237 CLR 1, 19.

131 Brendan O'Connor, Minister for Home Affairs, Minister for Justice, Chris Bowen, Minister for Immigration and Citizenship and Kate Ellis, Minister of the Status of Women, 'Slavery-like Offences to become Crimes' (Joint Media Release, 23 November 2011) <http://pandora.nla.gov.au/pan/122803/20111212-1530/www.ministerhomeaffairs.gov.au/Mediareleases/Pages/2011/Fourth%20Quarter/23-November-2011---Slavery-like-offences-to-become-crimes.html>.

> The victim may be in a condition of servitude whether or not
> (a) escape from the condition is practically possible for the victim; or
> (b) the victim has attempted to escape from the condition.

Under proposed section 270.5(1) it becomes an offence to cause a person to enter or remain in servitude. Proposed section 270.5(2) makes it an offence to conduct a business involving servitude. These offences attract a penalty of fifteen years imprisonment or twenty years in aggravated cases. An offence is aggravated if the victim is under the age of 18, if the offender subjects the victim to cruel, inhuman or degrading treatment, or if the offender 'engages in conduct that gives rise to a danger of death or serious harm to the victim': section 270.8(1).

The introduction of this offence addresses some of the problems pertaining to the current distinction between slavery and sexual servitude, which have been discussed elsewhere in this paper. The new servitude definition extends beyond sexual servitude to other forms of forced labour and exploitation. The proposed offence in section 270.5 and the aggravations in proposed section 270.8 go some way in settling the contentious distinction between slavery and servitude, drawing, inter alia, on the deliberations in *McIvor and Tanuchit*. If and when passed by Parliament, the proposed amendments rectify some of the concerns over Australia's response to trafficking in persons as expressed in judicial decisions and academic literature. It is, however, premature to predict whether the proposed changes will have lasting impact on the prevention and suppression of this crime.

IV CONCLUSION

McIvor and Tanuchit is indeed a truly heinous example of trafficking in persons in Australia. With intent, Mr McIvor and Ms Tanuchit exploited five women at every opportunity, imprisoned them in a foreign country, whose language they did not speak and required them to work unceasingly in an industry where there is no filtration of the clientele. They had no regard to the women's freedom of choice or their wellbeing, and denied them any individual and unsupervised activities to reprieve from the stresses of their daily lives. Their actions were 'absolutely demeaning to the human condition'.[132]

The case shows judicial support for the High Court's decision in *Tang*, most significantly with regards to the judicial directions on the fault element of the offence of slavery in section 270.3. With *McIvor and Tanuchit* the NSW Court of Criminal Appeal has sent a strong message about the need for clear direction on the matter of intent.

The trial judge's remarks show that there was confusion over the significance of the indicia of slavery. However, the Court of Criminal Appeal's close scrutiny of the elements of the offence has resolved some of the uncertainty. It is now

132 *McIvor and Tanuchit* [2010] NSWDC 310 [63].

clear that the recognition of some indicia of slavery may aid in the determination of the condition of slavery. The exercise of power attaching to the right of ownership is not a single, discrete act and so the jury must look to the facts supporting the exercise of power to determine whether the accused purported to exercise a power attaching to the right of ownership.

Recent law reform proposals confirm the view that slavery should be the ultimate and most severe offence in Division 270 of the *Criminal Code*, reserved for truly horrendous crimes that fulfil the full slavery criteria, like those committed by Mr McIvor and Ms Tanuchit. The proposed definition of servitude and the corresponding offences in proposed section 270.5 are important steps to address the confusion about the sexual servitude offences and, in turn, may alleviate concerns over the ever-expanding interpretation of slavery in domestic and international law.

What remains to be seen is whether law reform and policy announcements will have any immediate or long-term effect on the prevention, deterrence, and suppression of trafficking in persons in Australia. As this article goes to print, several new cases involving instances of slavery, servitude, and trafficking are being investigated and prosecuted in Australia, including the first known cases of domestic child trafficking[133] and trafficking in persons for the purpose of organ removal.[134] These cases create new challenges for investigators, prosecutors, and the judiciary alike and will put the current and proposed criminal offences to new tests.

133 Jared Owens, 'Child held for eight years as sex slave', *The Australian*, (Canberra) 18 November 2011, 5.

134 Yuko Narushima, 'Police investigate first case of organ trafficking', *The Sydney Morning Herald* (Sydney), 28 July 2011, 6. See further, Andreas Schloenhardt and Samantha Garbutt, 'Trafficking in Persons for the Purpose of Organ Removal: International law and Australian Practice' (2012) 36 *Criminal Law Journal* (forthcoming).