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Legislative changes to capture the broadest range of exploitative behaviour

In response to a range of issues limiting the successful prosecution of slavery and trafficking matters, the Australian Government amended its anti-slavery legislation in 2013 to “ensure Australia’s law enforcement authorities are well equipped to investigate and prosecute human trafficking and slavery, and that trafficked people are afforded appropriate support and protection when engaging with the criminal justice system.”¹ The Explanatory Memorandum of the amending Act stated:

The purpose of the Bill is to ensure that the broadest range of exploitative behaviour is captured and criminalised, including by introducing new offences of forced labour, forced marriage, and harbouring a victim, and by clarifying existing offences and their definitions to enhance operational effectiveness.

Since the introduction of the existing offences set out in Divisions 270 and 271 of the Criminal Code, the Commonwealth has prosecuted a range of people trafficking and slavery offences involving exploitation in diverse industry sectors. However, investigations have revealed that people trafficking syndicates are changing their mode of operation to avoid detection, and if detected, to make elements of the offence harder to prove to the standard that satisfies the court and a jury. In addition to this shift in mode of operation, Australian authorities have identified a diversification of the industries into which victims are trafficked, such as the hospitality industry.

Investigations ... have revealed that the exploitation of many victims in Australia does not involve abduction, violence or physical restraint. Rather, offenders often use subtle, non-physical means to obtain a victim’s compliance, such as psychological oppression, the abuse of power or taking advantage of a person’s vulnerability. In these circumstances, it has proved challenging to convince juries that the offender’s conduct constitutes the offence. The new definition of coercion is intended to be a non-exhaustive list capturing both physical and non-physical coercive conduct, including the more subtle means by which offenders obtain a victim’s compliance.”²

The Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013 (hereafter ‘Slavery Act’) made several important changes, including introducing new offences of ‘forced marriage’ and ‘harbouring a victim’, and standalone offences of ‘forced labour’ and ‘organ trafficking’. It repealed offences that once applied only to sexual forms of exploitation—‘sexual servitude’ and ‘deceptive recruiting for sexual services’— and replaced them with the broader offences of ‘servitude’ and ‘deceptive recruiting for labour or services’. It also broadened existing definitions in the Code, such as ‘exploitation’, ‘forced labour’, ‘threat’ and ‘coercion’ to capture more subtle forms of pressure, including psychological oppression, the abuse of power, or taking advantage of a person’s vulnerability.

Despite these changes, however, only three individuals have been convicted since 2013. One of these involved the second successful conviction of the ‘trafficking in children’ offence (s271.4) and the other two involved the new servitude offence (s270.5(1)), although it is noted that the defendants received light sentences (2 ½ and 3 years respectively) where the offence carries penalties of 15-20 years. Additionally, both were released on good behaviour and deported after 18 months’ time served.³

¹ Commonwealth of Australia. (2013) Fifth Report of the Interdepartmental Committee on Trafficking and Slavery.

² CRIMES LEGISLATION AMENDMENT (SLAVERY, SLAVERY-LIKE CONDITIONS AND PEOPLE TRAFFICKING) BILL 2012. EXPLANATORY MEMORANDUM, p9.

³ See <http://www.brisbanetimes.com.au/queensland/slave-house-pair-to-be-deported-to-taiwan-20170208-gu88bj.html>. Accessed on 9/5/2017.

In the absence of case law that would help to clarify the 2013 legislative changes, it is unclear what tools or methods investigators use to assess whether a case rises to the threshold of forced labour or one of the other slavery offences. Noting the extensive evidence of exploitation of individuals on temporary work visas—from international students, to backpackers, to skilled and seasonal workers—it also remains unclear how Fair Work inspectors recognise when a case crosses the line between civil and criminal matters. This question of where the line is between labour exploitation and forced labour is critical to the development of an appropriate response, particularly because there have been a number of cases recently with indicators of trafficking and slavery that appear to have been treated as civil or immigration matters as this brief will discuss.

Understanding forced labour: Power, control and vulnerability

To understand and formulate an appropriate response to forced labour, the Government must first understand the elements of power, control and vulnerability. ‘Forced labour’ is defined in subsection 270.6(1) of the Criminal Code as:

“The condition of a person (the victim) who provides labour or services if, because of the use of coercion, threat or deception, a reasonable person in the position of the victim would not consider himself or herself to be free to cease providing labour or services; or to leave the place or area where he or she (the victim) provides labour or services.”

‘Coercion’ and ‘threat’ are defined in section 270.1A of the Criminal Code. Coercion includes any of the following: force; duress; detention; psychological oppression; abuse of power; or taking advantage of a person’s vulnerability. Threat is defined as: a threat of coercion; or a threat to cause a person’s deportation or removal from Australia; or a threat of any other detrimental action, unless there are reasonable grounds for the threat of that action in connection with the provision of labour or services by a person. Threat includes a threat made by any conduct, whether express or implied and whether conditional or unconditional.

This definition is well crafted because it requires the “trier of fact” to consider a situation from the perspective of the victim, not their own. Known as the “reasonable person test”, the court must consider objectively whether a reasonable person of the same background as the victim, in the same circumstances and with the same relationship with the employer would feel free to cease providing services and/or leave the workplace. Despite this new and well-crafted offence, it remains entirely unclear how investigators and other authorities, such as immigration compliance officers, apply this test when assessing cases for elements of forced labour.

Consent and Penalty

Australia’s definition is consistent with the definition of ‘forced labour’ in the International Labour Organisation (ILO) Forced Labour Convention, 1930 (c29), which reads:

“All work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”

The ILO explains that forced labour refers to situations in which persons are coerced to work through the

use of violence or intimidation, or by more subtle means such as accumulated debt, retention of identity papers or threats of denunciation to immigration authorities. In other words, forced labour typically includes two elements: ***invalid consent***, where a person has not willingly and knowingly agreed to the work and conditions of work; and ***menace of penalty***, where a person faces repercussions for stopping work or providing services. (NB. Consent is not a defense for forced labour. As such, only a penalty or threat of penalty is required to constitute an offence.)

In contrast, forced labour *does not* involve low wages or poor working conditions, nor does it cover situations of “pure economic necessity” or lack of employment opportunities. That said, a situation can rise to the threshold of a forced labour offence when recruiters and employers collude to create and then take advantage of this vulnerability. Unlike situations where a person accepts substandard work because of poor economic conditions, a worker who has no alternatives as a result of purposeful collusion to create vulnerability is altogether different. The following case studies, which have been adapted from the ILO’s Special Action Programme on Forced Labour, help to clarify where a situation amounts to forced labour:

Dimitri

Dimitri lives in a village with his family and is poor. A man comes to the village promising decent, well-paid work at a construction site in Australia. Dimitri agrees and borrows money from his extended family to pay for his transportation costs.

When Dimitri starts working for his new employer, who is unaware of the promises the recruiter made, he discovers his pay is a fraction of what he was promised. However, he decides to remain as it is more than he can earn back home. He works long hours and develops respiratory and back problems. After a year, he returns home and repays the money he borrowed. He has a little left over which he decides to save.

Lee

I saw an advertisement for a catering job abroad. The recruiter promised good wages, food and housing. Once I arrived, the recruiter and my new employer pretended to know nothing about my agreement and said I had to work as a sex worker at a club. At first I refused, but I owed money back home and had no money for a ticket home and no other options. They told me I could be deported if I didn’t do what they wanted.

In Dimitri’s case, while the actual conditions of his work were not what he initially agreed to, there was no connection between his employer and the recruiter, and thus, no collusion to place him in a situation where he felt he had no choice but to comply. There was also no penalty for leaving or refusing to do the work. Applying the elements of *invalid consent* (to nature and conditions of work) and *menace of penalty* (what is perceived will happen as a consequence of quitting the work), Dimitri did not provide valid consent as he was deceived about his work; but there was no penalty for leaving the work.

In contrast, Lee was manipulated by a recruiter and an employer into a situation where she could not refuse. In other words, they created her vulnerability and then sought to take advantage of it. She was deceived about the nature and conditions of the work and was threatened implicitly with the possibility of deportation. Thus, Lee had neither valid consent nor freedom to leave because her employer caused her financial vulnerability and then implicitly threatened her if she did not comply.

The 2013 legislative changes were crafted to capture this kind of situation. As a result of section 270.10, when determining if a victim has been coerced, threatened or deceived, the court may consider:

- (a) the economic relationship between the alleged victim and the alleged offender;
- (b) the terms of any written or oral contract or agreement between the alleged victim and offender;
- (c) the personal circumstances of the alleged victim, including but not limited to:
 - i. whether he or she is entitled to be in Australia under the Migration Act 1958; and
 - ii. his or her ability to speak, write and understand English or another language; and
 - iii. the extent of his or her social and physical dependence on the alleged offender.

Despite these changes, cases that exhibit similar elements to Lee's story are often treated as civil matters, as the following case study shows:

In March 2016, the Fair Work Ombudsman took action in the Brisbane Federal Circuit Court against the recruitment agency, Maroochy Sunshine, for grossly underpaying 22 Seasonal Worker Program fruit pickers from Vanuatu.⁴ It was alleged that the owner of two labour hire firms, who according to subsequent media reports had cultivated a network of farmers in need of labourers, went to Vanuatu to promote the Seasonal Worker Program and recruit workers. The court found that the owner, Mr. Emmanuel Bani, had recruited the workers under false promises and owed the workers nearly \$78,000 for seven weeks of work in 2014. In breach of the contract, Maroochy only provided sporadic periods of work; half of the workers were paid a total of \$1100 (between \$50 and \$150 each) by some of the farmers they worked for. The other half of the workers never received a wage for their work. Annual entitlements were underpaid and a Notice to Produce employment documents was ignored by Bani.⁵

Mr. Bani failed to appear in Court and was found guilty of violating employment laws by default. The court then adjourned the matter to later decide on the penalty to impose on Mr. Bani and his company.⁶ In March 2017, the Federal Circuit Court Justice Michael Jarratt ordered Bani and his firm pay the workers almost \$80,000 in outstanding wages, and issued a \$227,300 fine to Bani. Justice Jarratt struggled to imagine a "more egregious" case of worker exploitation, stating "This case concerns the serious exploitation of vulnerable foreign workers lured to Australia by false promises ... Employees were at times deprived of the appropriate basic living standards expected in Australia." One worker described how he and another man worked for months to save up the \$1500 recruitment fee to ensure Bani sponsored them, in addition to airfares and other expenses. He also described times where the only food he had was the tomatoes he was picking.

The court heard that when the workers questioned their conditions, Bani threatened to report them to the police and have them deported. According to Acting Fair Work Ombudsman, Michael Campbell, "the workers spent much of their time in remote and isolated transient accommodation, sometimes sleeping in a bus on the side of the road or on chairs in a bedroom." Media reports suggested workers may remain under threat even after returning to Vanuatu.⁷ Reports also indicated that one of Bani's companies is still running a website which "spruiks its ability to supply contract farm labour at 'minimum costs, maximum rewards.'"

⁴ S. Locke, ABC Rural, 'Government Crackdown on Seasonal Worker Exploitation', 9 February 2016, http://www.abc.net.au/?WT.z_navMenu=abcNavLogo&WT.z_srcSite=local&WT.z_link=ABC%20Home.

⁵ D. Sparkes, ABC Rural, 'Labour-Hire Company Faces Court over Allegations of Exploiting Pacific Island Workers in 416 Visa Program', 14 January 2016, <http://www.abc.net.au/news/2016-01-13/labor-hire-company-faces-allegations-of-416-visa-breaches/7086100>.

⁶ R. Narayan, 'Queensland Labour-Hire Company Maroochi Sunshine Ripped Off Vanuatu Workers, Court Finds', 15 March 2016, <http://www.loopvanuatu.com/content/queensland-labour-hire-company-maroochy-sunshine-ripped-vanuatu-workers-court-finds>. Accessed 019/04/2017

⁷ <http://www.smh.com.au/national/investigations/slavery-claims-as-seasonal-workers-from-vanuatu-paid-nothing-for-months-work-20170327-gv7k99.html>. Accessed 019/04/2017

This case demonstrates the element of invalid consent, as the workers did not knowingly and willingly agree to the work and living conditions provided by Mr. Bani. It also demonstrates how an employer/recruiter facilitates and takes advantage of vulnerability of those working for him or her. Thirdly, it demonstrates how a penalty may be imposed, including loss of wages and denunciation to authorities. A final point is that even if this case doesn't meet the threshold of 'forced labour', there are other offences within the anti-slavery repertoire that may be brought to further deter this kind of behaviour. 'Deceptive recruiting for labour or services' carries a penalty of 7-9 years and is defined in s270.7 as:

Intentionally induc[ing] another person to enter into an engagement to provide labour or services, where the other person is deceived about:

- the extent to which the person will be free to leave, or to cease providing labour or services;
- the quantum or existence of a debt owed or claimed to be owed;
- **the fact the engagement will involve exploitation or the confiscation of travel or identity documents;** or,
- if the engagement is to involve the provision of sexual services, that fact, or the nature of sexual services to be provided.

To date, there have been no convictions of the 'deceptive recruiting' offence.

Myths and Misconceptions

Assessing the slavery offences, particularly 'forced labour', is complex and requires a deep appreciation for how a person in the victim's position perceives their own ability to refuse and leave their situation. It requires the ability to look beyond one's own bias and attitudes about migrants, temporary workers, and human behaviour. Unfortunately, anecdotal evidence suggests some investigative authorities and regulators cling to historical notions of slavery, including that physical restraint and explicit threats are required to constitute an offence. Additionally, The Salvation Army is aware of situations where authorities accused complainants of making up their story just to get a visa, even though the situation was reported to police months before any immigration issues arose.

These attitudes are mirrored in a UK study of the law enforcement response to trafficking, which explained:

In one case an exploited domestic worker left her employer and wanted to report the abuse to the police, and "although she had a completely legitimate visa, etc., the police officer's response was ... "she's moved employers now and therefore she ought to be deported because the visa is no longer valid" which was an incorrect application of the law ... but the response of the officer was to look at the immigration issues.⁸

In discussing common misconceptions about trafficking, the report stated:

In the absence of mandatory training on how to identify trafficking...the police, like other CJS (criminal justice system) actors, may be subject to prejudices that may influence what they perceive to be trafficking. Common myths surrounding trafficking include: trafficking predominantly involves illegal

⁸ Annonson, R. (2013) In the dock: Examining the U.K.'s criminal justice response to trafficking, p45. Anti-slavery International for the Anti-Trafficking Monitoring Group. http://www.antislavery.org/wp-content/uploads/2017/01/in_the_dock_final.pdf. Accessed 10/5/2017.

migrants, foreign women and girls for the purposes of sexual exploitation; victims are confined to the place of abuse; genuine victims are forcibly brought to the UK and will always ask for assistance; trafficking is analogous with smuggling; those who knew what work they were going to do, agreed to come and were “only” deceived about the conditions cannot be trafficked against their will because they should have “known better”. Responding inappropriately to such situations may result in further exploitation or harm and have consequences for sustaining successful prosecutions.

First, it is absolutely essential to understand that physical restraint and explicit threats are not required for a situation to amount to forced labour.⁹ Indeed, these were key issues which the 2013 legislative changes sought to address. Threats need not be direct and it is common for traffickers to “make examples” of some workers to keep others in line.

Penalties can include imposition of worse terms and conditions of work; exclusion from future employment (as has been seen in the Seasonal Worker Program where employers have threatened workers with blocking them from future work if they refuse conditions or join a trade union¹⁰); deprivation of food, shelter or other necessities¹¹; religious or supernatural retaliation¹²; exclusion from community and social life; and shaming them to their families and communities.

Second, it is essential to understand what motivates a person to tolerate exploitative conduct—fear; desperation; the hope of a better life (which is often based on false promises); ignorance of rights; and/or belief that it will not be in their interest to report their situation to authorities—are all factors that drive people to remain in often deplorable conditions. The assumption that providing people information on their rights will enable them to leave exploitation is simply unfounded. And whilst increasing pecuniary penalties is an important and necessary step forward, employers will continue to exploit workers if the perceived risk of getting caught remains low as illustrated by the case of the 7-Eleven store owner continuing to require cash-back from workers even after extensive scrutiny of the franchise through a parliamentary inquiry and media reports.¹³

Finally, it is essential to understand the complex tactics traffickers use to create and sustain vulnerability.

⁹ As a result of subsection 270.6(3), a person may be in a condition of forced labour whether or not escape from the condition is practically possible for the victim, or whether or not the victim has attempted to escape. The definition of forced labour is intended to be broad enough to apply whether or not physical restraint is used for all, or part of, the period of forced labour.

¹⁰ In a recent case, a group of workers signed affidavits alleging that their employer, labour hire firm MADEC, which is Australia's largest user of the Seasonal Workers Program, had pressured workers to quit the National Union of Workers. If they did not, they would be denied future employment, and workers from Vanuatu would not be recruited via the Seasonal Workers Program. <http://www.smh.com.au/business/seasonal-workers-warned-if-they-join-a-union-theyll-get-no-work-20170309-guuigv.html>. Accessed 24/04/2017.

¹¹ In another recent case, workers had nothing to eat but the fruit they were picking and slept in a bus on the side of the road. <http://www.smh.com.au/national/investigations/slavery-claims-as-seasonal-workers-from-vanuatu-paid-nothing-for-months-work-20170327-gv7k99.html>. Accessed 24/04/2017.

¹² The well-known US case is that of Maria Suarez, who was sold at 16 years of age for \$200 to a Mexican witch doctor, who used rape and threats of black magic to enslave her for five years. “Fearful and superstitious, Suarez, a legal permanent resident with six years of formal schooling, told no one about the abuse.” <http://www.sfgate.com/news/article/Parolee-s-first-taste-of-freedom-Onetime-teen-2773126.php>. Accessed 24/04/2017.

¹³ <http://www.abc.net.au/news/2016-11-21/covert-video-captures-711-workers-being-forced-to-pay-back-wage/8033808>. Accessed on 10/5/2017.

A particularly useful and common tactic is called “collusion control”¹⁴, where a person is deceived, coerced or forced into unlawfulness as a means to maintain them in exploitation. This is typically coupled with “threat of denunciation to authorities”, which is one of the ILO’s 11 key indicators of forced labour and is one of the most effective tactics to keep people in exploitative conditions.¹⁵ The following case studies illustrate this:

Taskforce Cadena operations continue to raid properties in a crackdown on illegal work and visa fraud. Three cases reported in August 2016, October 2016 and February 2017 are examples of cases involving unlawful Malaysian workers working in the horticultural industry. Reports describe indicators of forced labour or other slavery-related crimes, including non- or under-payment of wages, poor living conditions either provided by the employer or at the work site, and irregular immigration status of workers. Speaking confidentially to a local newspaper, one government official close to the investigation in Woolgoolga NSW expressed his frustration with the exploitative conduct of labour hire syndicates. The official said the dishonest treatment towards workers goes beyond pay conditions. “We often see these workers crammed into homes, sometimes with 20 people living in one house, They're made to pay \$100 each per week in rent, so the owner is collecting \$2000 on a house that should be worth maybe \$400 a week.”

Images provided by Border Force investigators showed a single Woolgoolga garage set up as a bedroom for at least seven people. The official said workers are often charged from \$6 per day for transport to the farm which, in addition to rent, leaves little money left for other expenses.

Research conducted by The Salvation Army revealed a cohort of Malaysian workers who pay \$3000 for what they think is a work visa. Upon arriving however, they discover they have been working illegally, which may be used as leverage to prevent them from reporting their circumstances to authorities. There is no available information on how authorities screen groups of workers to identify those who may be unlawful through force, fraud or coercion. Legislation passed in 2015 creating penalties for paying for a visa outcome may only stand to further isolate workers in severe exploitation who now face not only removal and loss of wages, but financial penalties as well.

Thus, whilst many workers may have agreed to working for low wages and may consciously work in breach of their visa conditions, when an employer exerts their power to leverage a workers’ unlawful status to keep them in exploitative work, a much more serious crime is committed. It is incumbent on us to ask whether current border control policies regarding unlawful workers are serving anti-trafficking interests and whether the current paradigm is functioning to support exploited people and encourage them to report unlawful conduct, including trafficking and slavery, to authorities.

¹⁴ United Nations Office on Drugs and Crime (UNODC) and United Nations Global Initiative to Fight Human Trafficking (UN.GIFT). (2009). *Anti-human trafficking manual for criminal justice practitioners*. Module 4.

¹⁵ The ILO Indicators of Forced Labour are: Abuse of vulnerability; Deception; Restriction of movement; Isolation; Physical and sexual violence; Intimidation and threats; Retention of identity documents; Withholding of wages; Debt bondage; Abusive working and living conditions; and Excessive overtime. http://www.ilo.org/global/topics/forced-labour/publications/WCMS_203832/lang--en/index.htm Accessed 1/4/2017.

Conclusion & Recommendations

Prosecuting slavery and trafficking crimes is difficult in any country and internationally, the overall rate of prosecution remains low. However, the number of convictions and identified victims in Australia—with robust legal protections for victims and resources to uphold those protections—is simply unacceptable.

We must identify and remove the barriers to identifying and assisting more victims and commit adequate financial resources, guidance and tools to enable law enforcement to hold offenders accountable under the law.

The Committee should inquire about what guidance is provided, how often and in what format to federal police and any other relevant law enforcement body to appropriate assess for elements of ‘forced labour’, ‘deceptive recruiting for labour or services’ and other slavery offences.

The Committee should seek specific information as to how police apply the “reasonable person test” when assessing the elements of a case and what processes are in place to evaluate whether police are doing this correctly.

Finally, the Committee should inquire about training, operational guidance, policies and protocols for immigration compliance operations, including those of Taskforce Cadena, as they pertain to the identification of potential trafficking scenarios and management of potential victims of trafficking and slavery.