IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No M5 of 2008

BETWEEN

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS
Appellant

and

WEI TANG
Respondent

SUBMISSIONS IN SUPPORT OF APPLICATION FOR LEAVE TO INTERVENE AND SUBMISSIONS ON THE APPEAL

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

PART I: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

1 On 17 April 2008 the Human Rights and Equal Opportunity Commission ("**HREOC**") filed a summons seeking leave to intervene in these proceedings. The summons was supported by an affidavit of the Human Rights Commissioner, Graeme Gordon Innes, affirmed on 16 April 2008.

2 HREOC seeks leave to intervene in the appeal and make written and oral submissions about:

(a) The scope of Australia's international obligations concerning the prohibition of all forms of slavery and the content of these international obligations;[1] and

(b) The interpretation and application of s270.1 and s270.3(1)(a) of the *Criminal Code Act 1995* (Cth) ("**the Code**") raised by this appeal and the relevance of Australia's international obligations in resolving the issues of statutory interpretation that arise in this appeal.[2]

3 Section 11(1)(o) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ("**HREOC Act**") gives HREOC the statutory function of intervening, subject to

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[1] Grounds 1 and 2 of the Notice of Cross Appeal filed on 14th January 2008; 2AB 385.
[2] Ground 1 of the Notice of Appeal filed on 4th January 2008 (2AB 381); Grounds 1 and 2 of the Notice of Cross Appeal filed 14th January 2008 (2AB 385).

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obtaining the leave of the court and any conditions the court imposes, in proceedings that involve "human rights" issues.[3]

4 Section 270.1 and s270.3(1)(a) of the Code give effect to Australia's international obligations to protect the fundamental human right to be free from slavery by prohibiting the practice of slavery.[4] The content of Australia's international obligations will therefore be relevant in determining the meaning of these provisions.[5] This is consistent with the principle that "a statute of the Commonwealth or of a State is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law".[6]

10 5 The definition of slavery in s270.1 of the Code, and the content of what must be proved to establish the offences in s270.3(1)(a), are matters of public importance that may affect the rights of persons other than the parties who are before the Court.[7]

6 The special expertise that HREOC has obtained through the performance of its statutory functions[8] means that HREOC is in a unique position to provide submissions that "assist the Court in a way in which the Court would not otherwise have been assisted" in reaching a correct determination.[9] Paragraph 8 of the affidavit of Graeme Gordon Innes affirmed on 16 April 2008 sets out examples of HREOC's work concerning contemporary manifestations of slavery and practices akin to slavery.

7 Having regard to its statutory functions and the fundamental nature of the right to be
20 free from slavery, HREOC submits it has:

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[3] For the purposes of Part II Division 2 of the HREOC Act, the expression "human rights" is defined in s3(1) to mean, relevantly, the rights and freedoms recognised in the *International Covenant on Civil and Political Rights* ("**ICCPR**"): Opened for signature 16 December 1966, [1980] ATS 23 (entered into force 23 March 1976). Australia ratified the ICCPR on 13 August 1980.

[4] The right to be free from slavery is recognised as a peremptory norm of international law: see the authorities cited in note19; see also article 8(1) of the ICCPR and article 4(1) of the *Universal Declaration of Human Rights* ("**UDHR**"). Australia is also obliged to take action to abolish slavery to give effect to its obligations as a signatory to the 1926 *International Convention to Suppress the Slave Trade and Slavery,* and the 1956 *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery.*

[5] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 264-265 (Brennan J); *Gerhardy v Brown* (1985) 159 CLR 70, 124 (Brennan J); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 230-231 (Brennan CJ), 239-240 (Dawson J), 250-251 (McHugh J), 294 (Gummow J); *Qantas Airways Limited v Christie* (1998) 193 CLR 280, 303 (McHugh J), 332-3 (Kirby J).

[6] *Kartinyeri v Commonwealth* (***"Kartinyeri"***) (1998) 195 CLR 337, 384 (Gummow and Hayne JJ).

[7] *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 534.

[8] The intervention function provided under s 11(1)(o) of the HREOC Act is part of a suite of statutory functions set out in s 11 which recognise HREOC's special role in providing guidance on the interpretation and application of human rights as defined by s3 of the HREOC Act.

[9] *Levy v State of Victoria* (1997) 189 CLR 579, 603-604 (Brennan CJ).

(a) a legitimate concern in making submissions in relation to the human rights issues raised by this appeal;[10] and

(b) an interest in the subject of the litigation greater than a mere desire to have the law declared in particular terms.[11]

8 No practical considerations justify denying HREOC leave to intervene because:

(a) HREOC's submissions are limited to points of legal principle;

(b) the parties and the Court have received adequate notice of HREOC's intention to seek leave to appear as an intervener and of its written submissions;

(c) HREOC has taken care to focus its submissions so as to avoid repeating matters adequately canvassed by the parties; and

(d) HREOC's involvement will not significantly lengthen proceedings.

9 For these reasons, HREOC seeks an order that it be granted leave to appear as intervener and make written and oral submissions subject to any conditions imposed by the Court.

PART II: SUMMARY OF SUBMISSIONS TO BE MADE IF HREOC IS GRANTED LEAVE TO INTERVENE

10 If granted leave to intervene, HREOC will submit that:

(a) The meaning of slavery in s270.1 and s270.3(1)(a) of the Code should be given the meaning it has in the international treaties to which those sections give effect.

(b) Australia's international treaty obligations to prohibit all forms of slavery, properly interpreted in accordance with the *Vienna Convention on the Law of Treaties* 1969 ("**the *Vienna Convention***"),[12] extend beyond prohibiting chattel slavery[13] to proscribing contemporary forms of slavery that involve the exercise of "any or all of the powers attaching to the right of ownership".

(c) The expression "any or all of the powers attaching to the right of ownership" should be given a meaning that is consistent with contemporary international jurisprudence.

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[10] *Australian Railways Union v Victorian Railways Commission* (1930) 44 CLR 319, 331 (Dixon J).
[11] *Kruger v Commonwealth of Australia* (1996) 3 Leg Rep 14 (Brennan CJ).
[12] Opened for signature 10th May 1969, [1974] ATS 2 (entered into force 27th January 1980), and ratified by Australia on 13th June 1974.
[13] The Model Criminal Code Officers Committee noted (citing *Smith v Gould* (1706) 2 Salk 666; 91 ER 567) that "a chattel slave was like any other piece of property except the owner was not allowed to destroy it": Report of the Model Criminal Code Officers Committee (MCCOC) Standing Committee of Attorneys-General, *Chapter 9, Offences Against Humanity: Slavery* ("**the MCCOC Report**"), 1998, 1. See also Australian Law Reform Commission, Report No. 48, (1990), *Criminal Admiralty Jurisdiction and Prize*, 86 [111, footnote 79].

(d) The Court of Appeal took an unduly narrow approach to the meaning of the term slavery which does not adequately reflect the correct characterisation of the condition of slavery at international law.

(e) It is possible to identify the elements of the offence of slavery in a way that ensures clarity and consistency with Australia's international human rights obligations.

(f) In determining whether the actions of the accused amount to the "exercise of any or all of the powers attaching to the right of ownership", the indicia of the conditions of slavery identified by international law will assist in drawing a distinction between a power which attaches to the right of ownership and a power which attaches to some other relationship.

PART III: THE MEANING OF SLAVERY IN DIVISION 270 OF THE CRIMINAL CODE

11 Section 270.1 and s270.3 implement Australia's international treaty obligations under the *International Convention to Suppress the Slave Trade and Slavery* 1926 ("**the Convention**")[14] and the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery* 1956 ("**the Supplementary Convention**").[15]

12 In addition to Australia's international treaty obligations under the Convention and the Supplementary Convention, Division 270 of the *Code* also gives effect to Australia's obligations under Article 8(1) of the ICCPR[16] and the international customary law[17]

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[14] Opened for signature 25th September 1926, [1927] ATS 11 (entered into force 18th June 1927). Australia ratified the Convention on 18th June 1927 and the 1953 *Protocol amending the Convention to Suppress the Slave Trade and Slavery of 25 September 1926* on 9 December 1953. The amending Protocol transferred the functions of the League of Nations to the United Nations. It did not change the substantive provisions of the Convention.

[15] Opened for signature 7th September 1956, [1958] ATS 3 (entered into force 6th January 1958). Australia ratified the Supplementary Convention on 6th January 1958.

[16] Australia ratified the ICCPR on 13 August 1980.

[17] On international customary law, see *Polyukhovich v The Commonwealth of Australia* (1991) 172 CLR 501, 559-560 (Brennan J), 667 (Toohey J); and see generally Ian Brownlie, *Principles of Public International Law*, 6th edition, Oxford University Press, 4-12.

prohibition on slavery.[18] This prohibition is well-established and considered to be binding *erga omnes*.[19]

13 HREOC submits that because s270.1 and s270.3(1)(a) of the Code impact on the protection of a fundamental human right and give effect to international treaty obligations to prohibit the violation of this right, these provisions should be interpreted:

(a) In accordance with the general principle of statutory interpretation that "a statute of the Commonwealth or of a State is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law".[20] Where there is ambiguity, the Court should "favour a construction …which accords with the obligations of Australia under an international treaty".[21]

(b) In accordance with the specific principle of statutory interpretation set out by Brennan J in *Applicant A v Minister for Immigration and Multicultural Affairs*[22] that:

> If a statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law, the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty. To give it that meaning, the rules applicable to the interpretation of treaties must be applied to the transposed text and the rules generally applicable to the interpretation of domestic statutes give way.[23]

14 The application of the first principle to s270.1 and s270.3(1)(a) means that, where possible and, subject to the correct application of Chapter 2 of the Code to s270.3(1)(a),[24] these provisions should be interpreted consistently with Australia's international obligations as they exist at the time the interpretive question arises.

15 The application of the second principle means that because the definition of slavery in s270.1 takes its statutory language from the terms of the Convention and the Supplementary

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[18] Considered recently by the United Nations, Security Council, International Criminal Tribunal for the former Yugoslavia ("**ICTY**") in *Prosecutor v Kunarac, Kovac and Vukovic*, ICTY, IT-96-23-T-II & IT-96-23/1-T-II, 22 February 2001 (Trial Chamber) ("**the *Kunarac Trial***"), [515] – [543], aff'd IT-96-23-A & IT-96-23/1-A, 12 June 2002 (Appeal Chamber) ("**the *Kunarac Appeal***"), [106] – [124]. For a discussion of this decision, see Valerie Oosterveld, "Sexual Slavery and the International Criminal Court: Advancing International Law" (2004) 25 *Michigan Journal of International Law* 605, 647-650.

[19] *Barcelona Traction, Light and Power Co, Ltd (Belgium v Spain) (Second Phase) Judgment of 5 February 1971*, ICJ Rep 1970, p 32 [33-34]. See also *Restatement (Third) of the Foreign Relations Law of the United States*, § 702 (1987) and Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* Volume 1 (9th ed, 1992), 5.

[20] *Kartinyeri*, 384 (Gummow and Hayne JJ).

[21] *Chu Kheng Lim v Minster for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).

[22] (1997) 190 CLR 225.

[23] Ibid, 230-231 (Brennan J).

[24] HREOC does not make submissions on the correct interpretation and application of Chapter 2 of the Code.

Convention, s270.1 should (unless there is a clear contrary intention in the statute) be given the same meaning that it has in those treaties. This meaning should be derived by applying the accepted principles of treaty interpretation.

16 The definition in s270.1 is the same as the definitions of slavery in the Convention and the Supplementary Convention except for the removal of the reference to the "status of slavery" and the addition of the words "including where such a condition results from a debt or contract made by the person". For the reasons set out below, HREOC submits that the additional words "including where such a condition results from a debt or contract made by the person" make clear what is implicit in the Convention and the Supplementary Convention, which is that slavery can also arise from a debt or contract where that debt or contract involves one person exercising over another person any or all of the powers attaching to the right of ownership.[25]

PART IV: THE CONTENT OF AUSTRALIA'S INTERNATIONAL OBLIGATIONS WITH RESPECT TO SLAVERY

A. THE INTERPRETATION OF TREATIES

17 In determining the content of Australia's international obligations under the Convention and the Supplementary Convention, the Court should interpret these treaties "in a more liberal manner than that ordinarily adopted by a court construing exclusively domestic legislation"[26] and "technical principles of common law construction are to be disregarded in construing the text".[27]

18 Adopting this "liberal approach" to treaty interpretation means that the Court should give treaties a broad, contextual interpretation "unconstrained by technical rules of [domestic] law, or by [domestic] legal precedent, but on broad principles of general acceptation."[28]

19 These principles of general acceptation are enshrined in Article 31 and 32 of the *Vienna Convention*.[29] These articles provide:

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[25] That this was the view taken by the Parliament when the slavery provisions were included in the Code is clear from the extrinsic materials: see *Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999*, Second Reading Speech, *Senate Hansard,* 24 March 1999, 3075, 3076 ("**the second reading speech**"); *Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999,* Revised Explanatory Memorandum, [18]-[20] ("**the explanatory memorandum**"); see also the MCCOC Report, 7.

[26] *Morrison v Peacock* (2002) 210 CLR 274, 279 [16] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

[27] *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 240 (Dawson J).

[28] *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* ("***Buchanan v Babco***")[1978] AC 141, 152 (Lord Wilberforce), cited with approval in *The Shipping Corporation of India Ltd v Gamlen Chemical Co. (A/Asia) Pty Ltd* (1980) 147 CLR 142, 159 (Mason and Wilson JJ), *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 240 (Dawson J), *Pilkington (Australia) Ltd v Minister of State for Justice and Customs* (2002) 127 FCR 92, 100 [26].

Article 31 General Rule of Interpretation

(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

(2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

(3) There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

(4) A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary rule of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

20 Australian courts have accepted that the *Vienna Convention* codifies the international customary law of treaty interpretation[30] and have held that it applies to the interpretation of treaties by Australian courts.[31]

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[29] The Court of Appeal of England and Wales has held that the "broad and generally acceptable principles" referred to in *Buchanan v Babco* "are undoubtedly enshrined in Articles 31 and 32" of the *Vienna Convention*: see *CMA CGM SA. v Classica Shipping Co Ltd* [2004] EWCA Civ 114, [2004] 1 All ER (Comm) 865, [10] (Longmore LJ, Neuberger and Waller LJJ agreeing); see also *Pilkington (Australia) Ltd v Minister of State for Justice and Customs* (2002) 127 FCR 92, 100-101 [27].

[30] See *Tasmania v Commonwealth* (1983) 158 CLR 1, 93 (Gibbs CJ, referring to *Fothergill v Monarch Airlines Ltd* [1981] AC 25); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 277 footnote 189 (Gummow J referring with approval to *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338).

[31] *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 251-252 (McHugh J), *Minister of Foreign Affairs and Trade v Magno* (1992) 37 FCR 298, 305 (Gummow J).

21 The interpretation of a treaty should be a "holistic exercise"[32] and "may require a consideration of both the text and the object and purpose of the treaty in order to ascertain its true meaning".[33] The object of the Convention and the Supplementary Convention is to bring about the complete abolition of slavery in all its forms.

22 The right to be free from slavery is a non-derogable right.[34] Therefore, the interpretive approach taken should be one that advances, rather than limits, the protection of that right.[35]

23 Treaties should not be "interpreted in a vacuum"[36] and article 31 of the *Vienna Convention* requires consideration of a number of sources that will influence the interpretation of a treaty.

24 By virtue of article 31(3)(a), subsequent agreements between parties regarding the interpretation of the treaty are to be taken into account. In the present case, the Court should take account of the Supplementary Convention in interpreting the meaning of the Convention.

25 The meaning of slavery in the Convention and the Supplementary Convention should also reflect the jurisprudence of international tribunals, especially where these tribunals have specifically considered the meaning of the terms "any or all of the powers attaching to the right of ownership". This is consistent with article 31(3)(c) of the *Vienna Convention*, which provides that the interpretation of treaty provisions shall take into account "any relevant rules of international law", especially accepted norms of customary international law.[37]

26 The "evolution and development of international law may exercise a decisive influence on the meaning to be given to expressions incorporated in a treaty".[38] As the International Court of Justice explained in the *South West Africa Case,*[39] some concepts, such as that of a "sacred trust" are by definition evolutionary:

> That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its

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[32] *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230 (Brennan CJ agreeing with McHugh J), 240 (Dawson J), 251-56 (McHugh J), 277 (Gummow J agreeing with McHugh). See also *Pilkington (Australia) Ltd v Minister of State for Justice and Customs* (2002) 127 FCR 92, 100 [26].

[33] *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230 (Brennan CJ).

[34] Article 4(2) of the ICCPR provides Article 8(1) (the right to be free from slavery) is a non-derogable right.

[35] See *IW v City of Perth* (1997) 191 CLR 1, 22-23 (Dawson and Gaudron JJ), and see also the approach in *Saadi v United Kingdom* App No 13229/03 [2008] ECHR 80, [62].

[36] *Al-Adsani v The United Kingdom* App No 35763/97 [2001 ECHR 761, [55]. This approach to the interpretation of treaties was cited with approval by Lord Bingham of Cornhill in *A & Ors v Secretary of State for the Home Department* [2006] 2 AC 221, [29] and in *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58, [36].

[37] United Nations International Law Commission Report, A/61/10, 2006, chp. XII, 407, 415.

[38] Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties,* 2nd ed, Manchester University Press, 1984, 139 and see generally 139-140; see also United Nations International Law Commission Report, A/61/10, 2006, chp. XII, 407, 415.

[39] *Legal Consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) not withstanding Security Council Resolution 276 (Advisory Opinion)* [1971] ICJ Rep 56.

> interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied with the framework of the entire legal system prevailing at the time of interpretation.[40]

27 Similarly, the prohibition against slavery has evolved over time and continues to evolve so that it now extends to a range of more contemporary practices. Jurisprudence of international tribunals, such as the International Criminal Tribunal for the Former Yugoslavia ("**ICTY**"), which has considered the meaning of slavery and, in particular the indicia of the conditions that result from the exercise over a person of "any or all of the powers attaching to the right of ownership," will assist in ascertaining the meaning of slavery in the Convention and the Supplementary Convention.[20]

28 The Full Federal Court in Australia and the Supreme Court of Canada have both relied on the jurisprudence of international tribunals, including the ICTY, in determining the content of international customary law for the purpose of interpreting statutory references to crimes against humanity.[41] This approach has been taken in circumstances where the developments in customary international law have occurred after the conclusion of the treaties the subject of the statutes under consideration. As the Full Federal Court recognised, "the rules of international law are dynamic … ."[42] In *Mugesera v Canada*, the Supreme Court of Canada noted:

> Genocide is a crime originating in international law. International law is thus called upon to play a crucial role as an aid in interpreting domestic law, particularly as regards the elements of the crime of incitement to genocide. Section 318(1) of the Criminal Code incorporates, almost word for word, the definition of genocide found in art. II of the Genocide Convention …
>
> In addition to treaty obligations, the legal principles underlying the Genocide Convention are recognized as part of customary international law … The importance of interpreting domestic law in a manner that accords with the principles of customary international law and with Canada's treaty obligations was emphasized in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 69-71. In this context, international sources like the recent jurisprudence of international criminal courts are highly relevant to the analysis.[43]

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[40] Ibid, [53]. See also United Nations International Law Commission Report, A/61/10, 2006, chp. XII,407 [251].
[41] See *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* ("***SRYYY***") (2005) 147 FCR 1; *Mugesera v Canada (Minister of Citizenship and Immigration)* ("***Mugesera***") [2005] 2 SCR 100.
[42] *SRYYY*, [31], referring to *New South Wales v The Commonwealth* (1975) 135 CLR 337, 466 (Mason J); see also United Nations International Law Commission Report, A/61/10, 2006, chp. XII, 415.
[43] *Mugesera*, [82].

29 In accordance with Article 32 of the *Vienna Convention,* the Court can also have regard to preparatory work in relation to conventions,[44] either to confirm the meaning of the provisions of the treaty or to help establish the meaning of an ambiguous provision.

B. THE MEANING OF SLAVERY AT INTERNATIONAL LAW

30 The interpretive approach outlined above means that, in determining the meaning of the term slavery within the context of contemporary international law, a court should consider not only the forms of conduct that had already been practised in 1926 and were within the contemplation of the drafters of the Convention. It should also consider forms of conduct that had not been anticipated in 1926, so long as those latter forms of conduct share the essential characteristics of the conduct that was the subject of condemnation by the international community.

31 This approach is consistent with the provisions of the Convention and the Supplementary Convention and accords with their objects, namely to prohibit slavery in all its forms. Article 1(1) of the Convention provides that,

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

32 This definition does not confine the concept of slavery to the exercise of the right of ownership. Instead, the Convention employs the broader formulation of "any or all of the powers attaching to the right of ownership" which recognises that the exercise of any one of these powers by one person over another is inherently irreconcilable with the freedom of the person who is subject to the power. In this way, slavery is defined with sufficient flexibility to enable States to give effect to Article 2(b) which requires states "to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms."

33 A recognition that the definition of slavery in the Convention is capable of extending beyond "situations akin to chattel slavery"[45] accords with the provisions of the Supplementary Convention.[46] In addition to Article 7(a) of the Supplementary Convention, which provides that the meaning of slavery is defined in the Convention, article 1 of the Supplementary Convention defines four servile statuses (debt bondage, serfdom, servile marriage and child servitude) and requires States Parties to take all practicable and necessary legislative and other measures to bring about

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[44] *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* (1998) 196 CLR 161, 186 [70]-[71] McHugh J; *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528, 550 [80] and the authorities cited therein.

[45] See Respondent's Notice of Cross Appeal, 2AB 385.

[46] Article 31(3)(a) of the *Vienna Convention.*

> progressively and as soon as possible the complete abolition or abandonment of [these practices], where they still exist and **whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention** signed at Geneva on 25 September 1926: (emphasis added).

34 The words "whether or not they are covered by the definition of slavery" indicate that it is possible for practices such as debt bondage to also constitute slavery if the practice in question involves the exercise of a power attaching to a right of ownership over a person.

35 An analysis of the *travaux préparatoires* ("**Travaux**") confirms that the definition of slavery in the Convention and the Supplementary Convention is capable of extending beyond chattel slavery to encompass contemporary forms of slavery and to capture a range of
10 situations where a power attaching to the right of ownership is exercised over a person.[47]

36 Significantly neither the Convention nor the Supplementary Convention defines slavery directly by use of the concept "the right of ownership". Instead, as Allain has observed, Article 1(1) of the Convention:

> does not speak of a 'right of ownership' of one over another, but the 'powers' attached to such a right of ownership. The *travaux préparatoires* of the 1926 League of Nations also establish what is *not* slavery, by indicating that States were unwilling to accept that conditions analogous to slavery (re: 'domestic slavery and similar conditions') were to be subsumed in the definition found in Article 1, where there were no powers attached to the right of ownership present.[48]

20 **37** Therefore, contrary to the submissions of the Respondent at [13]–[15] and consistent with the *Travaux,* the definition of slavery in the Convention and the Supplementary Convention is capable of capturing instances of debt bondage in circumstances where there is also the exercise of a power attaching to the right of ownership. As Allain has observed, "to exercise the right of ownership over an individual is fundamentally different than exercising powers attached to the right of ownership".[49]

C. THE INDICIA OF SLAVERY: CHARACTERISATION OF "THE EXERCISE OF ALL OR ANY OF THE POWERS OF OWNERSHIP"

38 The *Travaux* of the Convention do not precisely identify the content of "any or all of the powers attaching to the rights of ownership".[50] An analysis of the *Travaux* suggests that

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[47] Jean Allain, *The Slavery Conventions: The Travaux Preparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention,* Martin Nihjhoff Publishers, Boston, 2008, 9, 59-60, 67-68.
[48] Ibid, 9.
[49] Jean Allain, 'The Definition of Slavery in General International Law and the Crime of Enslavement within the Rome Statute', *Guest Lecture Series of the Office of the Prosecutor of the International Criminal Court,* The Hague, 26 April 2007, [45].
[50] But cf United Nations, Economic and Social Council, *Slavery, the Slave Trade, and other forms of Servitude* (Report of the Secretary-General), UN Doc E/2357, 27 January 1953, 28 as cited in Jean Allain, *The Slavery Conventions: The Travaux Preparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention,* Martin Nihjhoff Publishers, Boston, 2008, 496-497 where the UN Secretary-General attempted to characterise the powers attaching to the right of ownership. See also Renee Colette Redman, "The League of Nations and the Right to be Free from Enslavement: The First Human Right to be Recognized as

the words "condition or status of slavery" distinguish between *de jure* slavery (where a person's *status* at law is as a slave) and *de facto* slavery (where, as a matter of fact, the person is in the *condition* of a slave).[51] In the contemporary Australian context, a person cannot have the status of a slave at law. As the ICTY stated "... the law does not know of a 'right of ownership over a person'".[52]

39 The most authoritative consideration of the meaning of the words "any or all of the powers attaching to the right of ownership" is the decision of the ICTY in *Kunarac*.[53] In this case, the ICTY was called upon to determine whether certain acts of the three accused constituted enslavement "as a crime against humanity and, in particular, the customary international law content of this offence" at the time of the Indictment in 1992.[54] In its consideration of the charges, the ICTY commenced by noting that enslavement was not defined in the *Statute of the International Tribunal for the Former Yugoslavia*[55] and it was therefore necessary to "look to various sources that deal with the same or similar subject matter, including international humanitarian law and human rights law".[56] After referring to the Convention, the ICTY noted that the "customary international law status ... is evinced by the almost universal acceptance of that Convention and the central role that the definition of slavery ... has come to play in subsequent international developments in this field".[57] The ICTY then noted that the Supplementary Convention "augments" the Convention.[58]

40 The Trial Chamber concluded that, at the time of the indictment, enslavement as a crime against humanity in customary international law consisted of "the exercise of any or all

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Customary International Law" (1994) 70 *Chicago-Kent Law Review* 759. For some more contemporary discussions of the content of the prohibition on slavery, see M Cherif Bassiouni, "Enslavement as an International Crime" (1991) 23 *New York University Journal of International Law and Policy* 445; Kevin Bales and Peter T Robbins "'No One Shall Be Held in Slavery or Servitude': A Critical Analysis of International Slavery Agreements and Concepts of Slavery" (2001) 2 *Human Rights Review* 18 (Jan 2001); Valerie Oosterveld, "Sexual Slavery and the International Criminal Court: Advancing International Law" (2004) 25 *Michigan Journal of International Law* 605; A Yasmine Rassam, "International Law And Contemporary Forms Of Slavery: An Economic And Social Rights-Based Approach" (2005) 23 *Penn St International Law Review* 809.

[51] Jean Allain, 'The Definition of Slavery in General International Law and the Crime of Enslavement within the Rome Statute', *Guest Lecture Series of the Office of the Prosecutor of the International Criminal Court*, The Hague, 26 April 2007, [20].

[52] *Kunarac Appeal*, [118].

[53] *Kunarac Appeal; Kunarac Trial.* The expertise and authority of the decisions of the ICTY in respect of international customary law was emphasised by the Supreme Court of Canada in *Mugesera*, [126].

[54] *Kunarac Trial*, [515].

[55] Adopted by the United Nations Security Council on 25 May 1993 by Resolution 827. Article 5 of the Statute of the ICTY includes 'enslavement' among the list of crimes against humanity over which the ICTY has jurisdiction.

[56] *Kunarac Trial*, [518].

[57] *Kunarac Trial*, [520]

[58] *Kunarac Trial*, [520].

of the powers attaching to the right of ownership over a person".[59] The Trial Chamber held that the *actus reus* of the violation is the exercise of any or all of the powers attaching to the right of ownership over a person. The *mens rea* of the violation consists in the intentional exercise of such powers.[60] This view was expressly approved by the Appeals Chamber of the ICTY which stated:

> [T]he Appeals Chamber concurs with the Trial Chamber that the required mens rea consists of the intentional exercise of a power attaching to the right of ownership.[61]

41 Contrary to the Respondent's submissions at [26], the Appeals Chamber also accepted that the concept of slavery had evolved beyond chattel slavery:

> the chief thesis of the Trial Chamber that the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as "chattel slavery", has evolved to encompass various contemporary forms of slavery, **which are also based on the exercise of any of or all of the powers attaching to the right of ownership.** In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with "chattel slavery," but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of "chattel slavery" but the difference is one of degree. The Appeals Chamber considers that, at the time relevant to the alleged crimes, these contemporary forms of slavery formed part of enslavement as a crime against humanity under customary international law.[62]

42 The Appeals Chamber also stated:

> ... the law does not know of a 'right of ownership over a person'. Article 1(1) of the 1926 Slavery Convention speaks more guardedly 'of a person over whom any or all of the powers attaching to the right of ownership are exercised.' That language is to be preferred. ... [T]he question whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement identified by the Trial Chamber. These factors include the "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour". Consequently, it is not possible exhaustively to enumerate all of the contemporary forms of slavery which are comprehended in the expansion of the original idea; this Judgement is limited to the case in hand.[63]

43 HREOC submits that the characterisation of slavery by the ICTY should be preferred to that of the European Court of Human Rights in *Siliadin v France* ("**Siliadin**").[64] Siliadin wrongly imposes a requirement that the applicant show that "a genuine right of legal

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[59] *Kunarac Trial,* [539]
[60] *Kunarac Trial*, [540].
[61] *Kunarac Appeal,* [122] (footnotes omitted).
[62] *Kunarac Appeal*, [117] (footnotes omitted and emphasis added).
[63] *Kunarac Appeal*[118]-[119].
[64] *Siliadin v France* App.no 73316/01, 26 July 2005 [2005] ECHR 545.

ownership"[65] was exercised over her and that she was "reduced to the status of an object",[66] instead of only requiring the applicant to demonstrate that any or all of the powers attaching to a right of ownership were exercised over her.[67] As Allain has observed, this is a "truly narrow interpretation of the provisions of Article 1(a) of the 1926 Convention [which] does not reflect a consideration of the *travaux préparatoires*".[68]

44 The approach adopted by the ICTY is consistent with the contemporary understanding of slavery. In a 1998 report to the UN Commission on Human Rights, the Special Rapporteur on Contemporary Forms of Slavery[69] described some of those indicia (after referring to the Convention definition) as follows:

> [W]hile slavery requires the treatment of a person as chattel, the fact that a person was not bought, sold or traded does not in any way defeat a claim of slavery. Implicit in the definition of slavery are notions concerning limitations on autonomy, freedom of movement and power to decide matters relating to one's sexual activity. The mere ability to extricate oneself at substantial risk of personal harm from a condition of slavery should not be interpreted as nullifying a claim of slavery.[70]

45 The Office of the UN High Commissioner for Human Rights has also examined contemporary forms of slavery.[71]

> Arguably, the use of the phrase 'any or all of the powers attaching to the right of ownership' [in the 1926 Convention] ... was intended to give a more expansive and comprehensive definition of slavery that would include not just the forms of slavery involved in the African slave trade but also practices of a similar nature and effect.
>
> ...
>
> In the modern context, the circumstances of the enslaved person are crucial to identifying what practices constitute slavery, including: (i) the degree of restriction of the individual's inherent right to freedom of movement; (ii) the degree of control of the individual's personal belongings; and (iii) the existence of informed consent and a full understanding of the nature of the relationship between the parties.
>
> ... [t]hese elements of control and ownership, often accompanied by the threat of violence, are central to identifying the existence of slavery. ...[72]

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[65] *Siliadin* [122].
[66] *Ibid.*
[67] See also Jean Allain, "The Definition of Slavery in General International Law and the Crime of Enslavement within the Rome Statute", *Guest Lecture Series of the Office of the Prosecutor of the International Criminal Court,* the Hague, 26 April 2007, [36]-[38].
[68] Ibid, [37].
[69] *Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict*, Final report submitted by Gay J McDougall, Special Rapporteur, E/CN.4/Sub.2/1998/13 (1998) ("**Contemporary Forms of Slavery**").
[70] *Contemporary Forms of Slavery,* [28]-[29] (citations omitted).
[71] United Nations High Commissioner for Human Rights, *Abolishing Slavery and its Contemporary Forms*, (authors David Weissbrodt and Anti-Slavery International), HR/PUB/02/4, 2003 ("**Abolishing Slavery**").
[72] *Abolishing Slavery*, [19], [21]-[22].

46 Drawing from these various discussions (including the jurisprudence of the ICTY),[73] it is possible to identify a (non-exhaustive) list of the factors that might indicate that a power attaching to a right of ownership has been exercised as follows:

(a) The partial or total destruction of the juridical personality of the victim.[74]

(b) Some restriction or control of an individual's autonomy, freedom of choice or freedom of movement.[75]

(c) The control of matters relating to an individual's sexual activity.[76]

(d) The psychological control or oppression of individual.[77]

(e) The control or partial control of an individual's personal belongings.[78]

(f) The measures taken to prevent or deter a person from escape.[79]

(h) The absence of informed consent or the fact that consent has been rendered irrelevant by the use of force or coercion, the use of deception or false promises or the abuse of power in the context of the relationship where the individual over whom the power is exercised is in a position of vulnerability.[80]

(i) The threat or use of force or other forms of coercion.[81]

(j) The use of, or the fear of the use of, violence including, for example, the cruel treatment or abuse of an individual.[82]

(k) The quality of the relationship between the accused and the person over whom the powers are exercised, including any abuse of power, the person's vulnerability, the person's socio-economic situation and the duration of the relationship.[83]

(m) The exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship, sex, prostitution and human trafficking.[84]

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[73] Note that Australia has also become a signatory to the *Statute of the International Criminal Court* ("**The Rome Statute**"), which proscribes 'enslavement and sexual slavery' and declares them to be crimes against humanity and war crimes. Article 7(2)(c) defines 'Enslavement' as 'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children. Australia ratified the Rome Statute on 1st July 2002 (and see also *International Criminal Court Act 2002* (Cth) and the *International Criminal Court (Consequential Amendments) Act 2002* (Cth)).

[74] *Kunarac Appeal,* [117].

[75] *Kunarac Appeal* [119], *Kunarac Trial* [542]-[543]; *Contemporary Forms of Slavery,* [28]-[29]; *Abolishing Slavery*, [19], [21]-[22].

[76] *Kunarac Appeal* [119]; *Kunarac Trial* [543]; *Contemporary Forms of Slavery,* [28]-[29].

[77] *Kunarac Appeal* [119]; *Kunarac Trial* [543].

[78] *Kunarac Appeal* [119]; *Kunarac Trial* [542]-[543], *Abolishing Slavery* [22].

[79] *Kunarac Appeal,* [119]; *Kunarac Trial* [543]; *Abolishing Slavery*, [19], [21]-[22].

[80] *Kunarac Appeal*, [120], *Abolishing Slavery,* [21].

[81] *Kunarac Appeal*, [119].

[82] *Kunarac Trial*, [542]-[543].

[83] *Kunarac Appeal*, [121]; *Kunarac Trial*, [542].

47 Ultimately, the question of whether the actions of the accused amount to slavery will be a question of fact and degree and will need to be evaluated on a case by case basis.[85] Consideration of the factors identified above will allow for a determination of whether a person has been reduced to a condition of slavery through the exercise of any or all of the powers attaching to the right of ownership, as distinct from the exercise of some other power, such as the legitimate rights of an employer.

PART V: THE ELEMENTS OF THE OFFENCE OF SLAVERY IN THE CRIMINAL CODE

A. THE INTERPRETIVE APPROACH

48 Sections 270.1 and s270.3(1)(a) give effect to Australia's international human rights treaty obligations. In the absence of a clear contrary legislative intention, they should therefore be interpreted so as to accord with their purpose of responding effectively to the gross violation of human rights and dignity that slavery represents. This approach is consistent with the principle that in "construing legislation designed to protect basic human rights and dignity, courts 'have a special responsibility to take account of and give effect to [its] purpose'".[86]

49 Interpreting the meaning of slavery in the *Code* consistently with the content of Australia's international treaty obligations requires that the meaning not be frozen in time.

50 To the extent that there is any controversy about whether the proscription of slavery by the Convention and the Supplementary Convention extended beyond chattel slavery, the Explanatory Memorandum to the *Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999* makes it clear that the definition of slavery in s270.1 of the Code was intended to reflect the international community's desire to mandate international action against a range of practices more extensive than chattel slavery.[87]

51 HREOC outlines below an approach that articulates the substantive content of the offence by reference to Australia's international obligations in relation to slavery. Significantly, the adoption of such an approach would not lead to any lack of clarity in

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[84] *Kunarac Appeal,* [119]. *Kunarac Trial,* [542].

[85] *Kunarac Appeal,* [119]. The Appeal Chamber noted "it is not possible to exhaustively enumerate all of the contemporary forms of slavery which are expanded in the original idea".

[86] *IW v City of Perth* (1997) 191 CLR 1, 22-23 (Dawson and Gaudron JJ), referring to *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359, (Mason CJ and Gaudron J; Deane J agreeing). See also *Acts Interpretation Act 1901* (Cth), s15AA.

[87] Explanatory Memorandum, [18] – [19]; Second Reading Speech, 3076; MCCOC Report, 7; see also *Acts Interpretation Act 1901* (Cth), s15AB;

defining the content of the relevant offence. [88] Indeed HREOC submits it would have the opposite effect. The ICCPR guarantees the right to a fair trial (Article 14). It is a fundamental principle of law, consistent with the right to a fair trial, that an accused person is entitled to know with sufficient precision the charge against him or her.

B. THE APPROACH OF THE COURT BELOW

52 HREOC submits that the Court of Appeal erred in its identification of the elements of the offence of slavery in s270.3(1)(a), particularly by its reference to the need to find that the victim was "reduced to the status of mere property". The Court set out the elements of the offence of possession as follows:

> First, the worker must have been reduced to the condition that would constitute her a slave, as defined in the Act. The jury must be satisfied that she had had powers exercised over her as though she was mere property, with the result that she had been reduced to the status of mere property, a thing, over whom powers attaching to the right of ownership could be exercised.
> Secondly, the accused must have known that the worker had been reduced to a condition where she was no more than property, a thing, over whom persons could exercise powers as though they owned her.
> Thirdly, the accused must have intentionally possessed the worker, that is, must have intentionally held her in her custody or under her physical control.
> Fourthly, the accused must have possessed the worker in the intentional exercise of what constitutes a power attaching to a right of ownership, namely, the power of possession. For that to be the case the accused must be shown to have regarded the worker as though she was mere property, a thing, thereby intending to deal with her not as a human being who had free will and a right to liberty, but as though she was mere property. However harsh or oppressive her conduct was towards the worker it would not be sufficient for a conviction if, rather than having possessed the worker with the knowledge, intention, or in the belief that she was dealing with her as though she was mere property, the accused possessed her in the knowledge or belief that she was exercising some different right or entitlement to do so, falling short of what would amount to ownership, such as that of an employer, contractor, or manager. [89]

53 HREOC submits that the Court of Appeal took an unduly narrow approach to the meaning of the term slavery, an approach bound to the historical notion of chattel slavery rather than the contemporary understanding of slavery in international law. This is evident from the Court of Appeal's references to the terms "mere property", "a thing", "no more than property"[90] which do not appear in s270.1 and s270.3 of the Criminal Code. This usage departs from the statutory definition, and thus does not ask the relevant question which is "did the accused person exercise over the victim any of the powers attaching to the right of ownership"?

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[88] One of the (unsuccessful) grounds of appeal in the court below was that the trial miscarried due to the inherent uncertainty in the meaning of the expression "any or all of the powers attaching to the right of ownership": see 2AB 260.
[89] *R v Tang* (2007) 16 VR 454 (***"R v Tang"***) [77]; 2AB 326 (footnotes omitted).
[90] *R v Tang*, [77]; 2AB 326. See also [84], [113], [145]; 2AB 328-329, 338-339, 350.

54 In particular, the expression "reduced to the status of mere property" appears to require that a victim have all the powers attaching to the right of ownership exercised over him or her. This is contrary to the wording of the statute and contrary to the understanding of slavery in international law.[91]

55 As discussed above at [46], the focus of the offence of slavery in international law (most clearly evidenced in the ICTY's decisions in *Kunarac*) is on the same elements as appear in the definition in s270.1, ie, the exercise of any or all of the powers of ownership. In every case, it will ultimately be a question of fact and degree as to whether the acts the subject of the prosecution can be so characterised.

56 This appears to have been recognised elsewhere in the reasoning of Eames JA:

> The legislation does not require proof of actual ownership of a slave (ownership of a person having been abolished in the 19th century), nor does it require that somebody be identified as taking a role that would have constituted him or her an owner had slavery not been abolished. Neither the definition nor the offence provisions in Chapter 8 speak of the "owner" of a slave, merely of persons exercising one or more of the powers "attaching to the right of ownership". Thus, the concept of ownership remains central to the offences, but by way of identification of powers that attach to the right of ownership.[92]

57 This paragraph more closely reflects the proper interpretation of slavery for which HREOC contends. This is not, however, reflected in the central passage of the Court's judgment concerning the elements of the offences, cited above.

58 Similarly, HREOC submits that Eames JA erred in the suggested answers to the jury questions (at [145]) in which his Honour stated that the Crown must prove that the victim "had no say in how she was treated" and "had no rights or free will". This appears to require a total destruction of the "juridical personality" of a victim, in conflict with the recognition in international law that a partial destruction may be sufficient to result in a person being a slave.

C. HREOC'S VIEW OF THE PROPER APPROACH TO THE OFFENCES

59 HREOC contends that the submissions of the appellant to this Court correctly identify the two central matters to be proven (see [24]-[27] of the Appellant's submissions):

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[91] Note that Australia has also become a signatory to the *Statute of the International Criminal Court* ("**The Rome Statute**"),which proscribes 'enslavement and sexual slavery' and declares them to be crimes against humanity and war crimes. Article 7(2)(c) defines 'Enslavement' as 'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children. Australia ratified the Rome Statute on 1 July 2002 (and see also *International Criminal Court Act 2002* (Cth) and the *International Criminal Court (Consequential Amendments) Act 2002* (Cth)).

[92] *R v Tang* [49]; 2AB 317.

1. That the Accused exercised over the Victim a power attaching to a right of ownership.

2. That the Accused intended to exercise over the Victim a power attaching to a right of ownership.

60 Determining whether an exercise of power is the exercise of a power attaching to the right of ownership will be a matter of fact and degree in each case. A jury should consider a range of factors that will assist it to determine the quality of the power(s) exercised over a person.

61 To ensure consistency with the international human rights obligations to which the *Code* seeks to give effect, those factors should reflect the understanding of slavery at international law and will include, depending on the circumstances of the particular case, those set out at [46] of these submissions.

62 Taking this approach will achieve clarity in the definition of the offence while ensuring that contemporary forms of slavery are effectively proscribed consistently with Australia's international human rights obligations.

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