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Fiona David

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Foreword

In 2007, the Australian Government provided $26.3m over four years to extend and expand the government's strategy to combat people trafficking, enabling the relevant agencies to expand investigations and prosecutions into emerging areas of exploitation. Since July 2007, the Australian Institute of Criminology (AIC) has been conducting research into the trafficking of persons in the Asia-Pacific region in order to contribute to the evidence base underpinning efforts to combat people trafficking across a range of industries.

While the body of literature on trafficking for the purpose of sexual exploitation has grown steadily, much less is known about trafficking where the exploitation occurs outside the sex industry. This report examines what is known about labour trafficking in Australia, based on incidences of reported crimes, but also by drawing on information about unreported crime. As such, it provides an assessment about the known or likely incidence of trafficking in persons that can occur in the agricultural, cleaning, hospitality, construction and manufacturing industries, or in less formal sectors such as domestic work and home-help.

To date, the number of labour trafficking cases investigated or prosecuted in Australia is small, however, there are reasons to suggest that the numbers of reported cases understate the size and complexity of Australia's labour trafficking problem. Given that the anti-trafficking laws are relatively new and responses are still being adjusted to target trafficking in contexts other than the sex industry, it is perhaps not surprising that this research has identified that people are generally not aware that anti-trafficking laws can be applied just as readily to a situation involving the exploitation of a male industrial cleaner, for example, as they could to a woman brought to Australia for the purpose of sex slavery.

Building the knowledge base about labour trafficking is part of larger efforts directed at the prevention of trafficking. Crime prevention is, among other things, premised on understanding the opportunities for offending, the likely risk of offending and factors that impact on vulnerability. This report considers those factors, drawing on information about reported and what appeared to be unreported instances of labour trafficking, along with information about the broader context where opportunities for offending and individual vulnerability may coincide.

The broader context within which opportunities for offending and risks for victimisation appear to be present are also considered. In particular, it is worth noting the role of intermediaries in facilitating access to what might be described as 'risky' migration pathways, involving payment of exorbitant fees to brokers and agents overseas, and the role of diasporas as both a source of protection and as a site of potential exploitation.

Adam Tomison
Director

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Acronyms

AFP	Australian Federal Police
AIC	Australian Institute of Criminology
AMIEU WA	Australasian Meat Industry Employees Union, Western Australia
AMWU	Australian Manufacturing Workers Union
ANAO	Australian National Audit Office
ASCO	Australian Standard Classification of Occupations
AWU	Australian Workers Union
CDPP	Commonwealth Director of Public Prosecutions
CFMEU	Construction, Forestry, Mining and Energy Union
DIAC	Department of Immigration and Citizenship
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
GRI	Global Reporting Initiative
ICCPR	International Covenant on Civil and Political Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
ILO	International Labour Organization
ITUC	International Trade Union Confederation
ITWF	International Transport Workers Federation
LHMU	Liquor, Hospitality and Miscellaneous Workers Union
MOU	memorandum of understanding
MSL	minimum salary level
NGO	non-government organisation
PNG	Papua New Guinea
PSWPS	Pacific Seasonal Worker Pilot Scheme
OfW	Office for Women
OHS	occupational health and safety
OWO	Office of the Workplace Ombudsman
OWS	Office of Workplace Services
UN	United Nations
UNITE	Union of Fast Food and Convenience Store Workers

Executive summary

The Australian Institute of Criminology (AIC) is in the third year of a four year program of research on trafficking in persons. The overarching objective of the research program is to contribute to the effectiveness of the Australian and international response to this issue. The issue of trafficking into the commercial sex industry has, until relatively recently, been a focus of policy and research in Australia and in other countries. The challenges involved in understanding and responding to different forms of trafficking in persons, specifically where the exploitation takes place in industries other than the commercial sex industry, remains relatively unexplored.

In 2008, the AIC commissioned research entitled *Labour Trafficking in the Australian Context: Understanding the State of Existing Knowledge and Responses, and Identifying Future Research Priorities*. Through a combination of a review of relevant literature, available quantitative data, in-depth case analysis and interviews with key informants, the research sought to understand:

- the state of existing knowledge with regard to labour trafficking in Australia, including what is known about trends and issues regarding labour trafficking;
- the state of existing responses to labour trafficking (government and non-government);
- stakeholder perceptions of likely risks for labour trafficking, along with possible points of intervention; and
- key gaps in knowledge on this issue, as part of framing research priorities for the future.

This report presents the findings of the research. During this research project, policy and programs were being developed in regard to a number of relevant matters, including aspects of the anti-trafficking response and also a major reform of temporary skilled labour migration and the industrial relations system. Where possible, preliminary information compiled through the research was provided to inform such reforms. While the report is accurate at the time of writing, it should be noted that a number of issues considered in this report are subject to review and change.

Key issues discussed in the report

What is labour trafficking?

This report is divided into four sections. The first section looks at the concept of labour trafficking itself. It examines where the term labour trafficking comes from and what it means. There is currently no accepted definition of labour trafficking. However, the term is widely used to refer to those forms of 'trafficking in persons' defined in Article 3 of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (UN Trafficking Protocol; UN 2003c), where the exploitation occurs in contexts other than the sex industry. While there are many different views on the meaning of exploitation, in this context, exploitation includes *sexual exploitation, forced labour, slavery and like practices* and *servitude*. Each of these terms has an established meaning which is defined, to varying levels of specificity, in international and Australian jurisprudence.

It is noted that critical debate remains about the validity of drawing a distinction between sex trafficking and labour trafficking. However, this research proceeded on the basis that the focus of enquiry was intended to be those forms of 'trafficking in persons' that occur in contexts other than the sex industry. This reflects a pragmatic need

to build more information about the known or likely incidence of trafficking in persons that occurs in contexts beyond the sex industry, whether this occurs in the agricultural, cleaning, hospitality, construction and manufacturing industries, or in less formal sectors such as domestic work and home-help.

Information about labour trafficking from Australian Government sources

The second section of this report includes an examination of the information that is available about known or suspected incidences of labour trafficking detected by, or brought to the attention of, the Australian Government's whole of government response to labour trafficking. This includes aggregate information about the numbers of Australian Federal Police (AFP) investigations and clients on the federally-funded victim support program provided by the Australian Government Office for Women (OfW; part of the Department of Families, Housing, Community Services and Indigenous Affairs). This also includes more detailed information about the small number of 'labour trafficking' prosecutions that have been managed by the Commonwealth Director of Public Prosecutions (CDPP). Finally, the Office of the Workplace Ombudsman (OWO; now the Fair Work Ombudsman) provided information about the types of more serious or extreme forms of exploitative work practices involving temporary migrant workers that have been detected by workplace inspectors. Each of the agencies noted have also commented on possible risk factors that might contribute to the potential for trafficking, along with their perceptions of the factors that might impede reporting and detection of these cases.

Information from the community sector and other relevant agencies

The third section of this report looks at the range of information that is available about known or suspected instances of labour trafficking detected or brought to the attention of organisations outside of the Australian Government's 'whole of government' response. The information presented in this section is complex and sometimes incomplete or inconclusive. Nonetheless, it provides valuable insights into experiences that might remain otherwise relatively unknown to the federal agencies working on labour trafficking.

Key themes that emerge from an analysis of this information include the following:

- There have been instances of what might be described as labour trafficking that have been handled by individuals, agencies or organisations outside of the Australian Government's 'whole of government' response. These instances involved the exploitation of domestic workers and workers in the construction, manufacturing, agricultural and hospitality industries. Some of these cases were never reported to the AFP, although some of these cases were reported and may already be captured by AFP aggregate statistics. For other cases, it is unknown whether they were ever reported to the AFP. In many instances, remedies were pursued (and achieved) with the assistance of a range of agencies, primarily through industrial or civil mechanisms.
- Unions, church organisations, community organisations and people within ethnic community networks see far greater numbers of cases that involve 'unlawful conduct' (industrial breaches or criminal conduct) against migrant workers in Australia than they do the more extreme cases of labour trafficking. The following groups were noted by participants as being potentially vulnerable (and in some instances, had actually been subjected) to unlawful conduct of varying degrees of extremity:
  - workers at the lower end of the Australian Standard Classification of Occupations (ASCO) skill scale on *457 visas* (also known as Temporary Business (Long Stay)—Standard Business Sponsorship [Subclass 457] visa) from developing countries and their spouses (known as *secondary visa holders*);
  - workers on various visa categories, in particular industries such as industrial cleaning, meat works, hospitality, construction, manufacturing, agriculture;
  - domestic workers;
  - people on bridging visas or who otherwise do not have a lawful entitlement to work in Australia; and
  - in some instances, recent permanent migrants.

In many instances, these cases present 'indicators of trafficking', such as confiscation of passports by their 'employers' or agents, use of sexual or physical violence and what might broadly be described as abuse of vulnerability that flows from having limited

work options and a debt or family obligation. However, it is frequently unclear whether the coercion is sufficiently extreme such that these cases could be properly described as instances of labour trafficking. What is clear is that there is a very large 'grey area' of unlawful conduct against migrant workers which is a potential breeding ground for abusive and exploitative practices, some of which are sufficiently extreme that they should properly be described as labour trafficking (or other forms of criminal conduct).

- A focus on labour trafficking should not be allowed to obscure the potential for sexual violence to be part of a larger package of exploitation and abuse of migrant workers. Interview participants gave examples of domestic and agricultural workers who were physically and economically mistreated, as well as being sexually assaulted. Examples were also given of foreign women who married Australian men and who were then effectively put to work both to earn money and to provide sexual services. This raises questions about the relationship between various forms of 'exploitation', such as *forced labour* and *sexual exploitation*, and also about intersections between *labour trafficking* and trafficking for the purpose of *servile marriage*. These examples also highlight the reality that individual cases might raise issues not only under federal anti-trafficking laws but also under state and territory criminal laws (which cover issues such as rape and assault).
- There are a variety of factors that can contribute to vulnerability such as age, cultural dislocation, family obligation, debt, physical isolation, linguistic or cultural isolation and a lack of knowledge about what is considered 'normal' in a particular context. However, two particularly significant factors that were noted frequently by participants included:
  - *agents' fees and associated debt*—typically, an agent located overseas will charge large fees in the home country to facilitate access to a visa (legally or illegally) or to assist in linking a potential migrant with a job. Frequently, these fees appear to be approached as an 'investment' by migrants who may go into significant debt to pay these fees. This then renders them more willing (often through lack of choice) to accept substandard conditions in order to retain the opportunity of earning Australian wages, paying off their debt and eventually earning money for themselves. The charging of fees by recruitment agents to prospective employees is illegal in all Australian states and territories. However, for both legal and practical reasons, it is unlikely that these laws could ever be effectively applied against agents and recruiters located overseas. Very few mechanisms are in place to monitor practices that occur overseas. Where the entry into, or stay in, Australia of a migrant has been sourced by a third party for profit, through breach of immigration or other laws, this raises the issue of additional forms of criminality such as *smuggling of migrants*; and
  - *permanent residency*—it was noted that for many migrant workers, the ultimate goal may not be the short-term goal of wages, but the longer-term goal of getting permanent residency. This can be misused by unscrupulous employers in Australia who hold out the 'carrot' of eventual sponsorship for permanent residency, in return for acceptance of substandard or even exploitative working conditions. In some cases, it is very clear that employers have promised their employees that they will eventually sponsor their application for permanent residence in circumstances where it is very clear that the employer never had any genuine intention of doing so.
- In terms of what would assist in reducing vulnerability, a number of participants expressed concern that the exploitation of migrant workers is a readily repeatable scenario. On one side of the equation, victims are unwilling (or are rendered practically unable) to report their experiences. On the other side of the equation, offenders have both a motivation (generally a profit or other 'personal gain' motive) and the opportunity to take advantage of individual vulnerability. It is arguable that this makes the practice of exploiting migrant workers in some senses both a low-risk and a high-profit activity.

In terms of research priorities, it was noted that there are critical gaps in information. There are certain industries and communities that are heavily organised and information about these sectors is relatively high quality and available. For example, Filipino workers in Australia can access support and assistance both through the Philippine Labour Attaché at the Embassy of the Philippines and from Migranté (a community organisation that assists Filipino migrant workers). As a result, the information

about the experiences of Filipino workers in Australia is of high quality and relatively available. It is also likely that problems in this community will be detected. However, there are some industry sectors that are largely 'out of sight' (eg domestic workers, undocumented agricultural workers, deck hands on fishing, or other privately owned, vessels) and there are some communities that appear to have less social infrastructure in place for migrant workers. For example, the Chinese and Indian communities were mentioned during stakeholder interviews as being significant populations of migrant workers whose situation is relatively unknown to many service providers. Information about these populations was less readily available.

Best practices and responses to labour trafficking

The fourth section of this report looks at responses to labour trafficking. The nature of Australia's existing response to trafficking in persons has been refined in recent years. However, there is an interest in exploring what other options could be considered beyond what is already in place. For example, the Australian Government has indicated that 'trafficking for labour exploitation' will be a policy focus in 2009–10 (Anti-People Trafficking Interdepartmental Committee 2009: 47). At the time of writing, a number of non-government organisations (NGOs) were developing projects with a particular focus on labour trafficking. Drawing on the international literature, this section looks at the range of options that are being recommended or suggested internationally, including ensuring that laws criminalise the end 'exploitative' purpose of trafficking in persons (such as *forced labour*) along with the more complex process itself; increasing the range of conduct that could be considered potentially criminal; developing more integrated links with organised labour, industrial mechanisms and employer groups; and ensuring that non-government, community-based support services are available to temporary migrant workers. However, given that labour trafficking is still, both internationally and in Australia, an emerging issue with inter-connections with the regulation of labour and migration more broadly, there is considerable scope for more in-depth research on the issue of responding to this complex problem.

Conclusion

The precise size of the labour trafficking problem in Australia remains unknown. The number of cases reported to the federal agencies involved in the whole of government response to trafficking in persons is very small. However, this research confirms that there have been instances of unreported and/or perhaps unrecognised labour trafficking. This suggests not only the existence of under-reporting, but a lack of awareness among a wide variety of 'front line' agencies and service providers that certain exploitative practices in a work context are in fact criminal under Australian law. In addition, the cases of unreported or unrecognised labour trafficking exist in an environment that includes significant numbers of cases involving unlawful conduct perpetrated against migrant workers in Australia, including underpayment or non-payment, sexual harassment, deception or fraud about working conditions and about sponsorship for permanent residency. Some of these cases presented one or two features that are widely considered to be indicators of trafficking (eg retention of passports, withholding of wages and the exercise of control over living and working conditions) suggesting they may have warranted further investigation from a criminal justice perspective, in those instances where the cases were reported. However, it is likely that many of these cases simply would not have met all of the constituent elements of the United Nations' (UN) definition of trafficking in persons. Nonetheless, the areas of life and work where this unlawful conduct occurs are potential breeding grounds for more serious forms of exploitation. As such, a focus on unlawful conduct against migrant workers in these sectors can be considered a legitimate response to concerns about more serious forms of exploitation, including labour trafficking.

As noted in the research, vulnerability to exploitation may not result from a single factor; it can reflect multiple individual characteristics, a situation and/or a relationship. As such, the detection of labour trafficking remains a complex task which ideally will be supported by training, tools (such as indicators that aid familiarity with, and reduce ambiguity in, complex legal frameworks) and processes of cross-referral between relevant agencies.

The research highlighted the important role of intermediaries such as agents and recruiters, not only in the labour migration process, but also once individuals are here working in Australia. The link between debt and vulnerability was consistent across all forms of migration and visa categories. While not a specific focus of this research, the research suggests a logical overlap between the processes of trafficking in persons and the processes of smuggling migrants (ie the procurement of the illegal entry or residence of another person for profit). Detailed information on the nature of these intersections, or on the nature and level of organisation of intermediaries, was not sought in this research process. However, these are issues that could usefully be examined in future.

The research highlighted the relevance of employers having a (real or perceived) capacity to hold out the prize of permanent residency as a method of control. This was significant again in various visa categories and actively used in a fraudulent way in several documented instances. Finally, concerns were also raised about the very real difficulty of responding to situations in which both the employer and the employee are essentially complicit in exploitative situations.

Unfortunately, the most serious cases may remain hidden and the exploitative conduct is readily repeatable. The incentives for exploitation are high (eg reduced wages, increased profits). The capacity of individuals to complain is limited by the very factors that make them vulnerable to exploitation in the first place (eg limited language ability, limited knowledge of rights or capacity to access rights, tenuous migration situations, family obligation etc). In this sense, the exploitation of migrant workers—and possibly even the most serious forms of exploitation such as forced labour and slavery—could arguably be characterised as low-risk, high-profit activities. This suggests the importance of focusing not only on the most extreme cases of exploitation, but also on the more numerous, readily detectable cases that are perhaps precursors to more extreme conduct, or that perhaps contribute to the creation of an environment that tolerates exploitation.

The issue of services for temporary migrant workers is connected to detection and responses to instances of labour trafficking. In theory, assistance is available to all migrant workers—whether temporary or permanent and even those who have worked illegally—to pursue claims against exploitative employers. In theory, these workers can also seek a range of services such as health and social support services. However, there are numerous structural difficulties that prevent people seeking or accessing help or assistance. In several instances discussed in this research, individuals only sought help once the situation had deteriorated to such an extent that they literally could not remain in that situation either because of serious injury or fear about their personal safety. There would appear to be a need to undertake further research into the issue of how to make access to Australian services a meaningful reality for temporary migrant workers, so that relevant support and assistance can be provided at a much earlier stage.

Finally, while Australia already has a number of measures in place as part of its commitment to respond to trafficking in persons, both through government and non-government agencies, it is vital that responses to trafficking in persons continue to evolve as information emerges about modus operandi, victimisation and gaps in responses. The current research process confirms the ingenuity of unscrupulous employers in coming up with a variety of ways that they can effectively control and manipulate a person in order to take advantage of their unpaid services, in ways that are powerfully coercive yet difficult to prove. The effective regulation of these situations is complex and will likely require an approach that seeks to address a gradation of exploitative practices, grounded not only in the criminal law (with its higher burden of proof) but also within labour law frameworks. While trafficking in persons is within the remit of the Australian Government, the reality is that many front line agencies, including state and territory police, and in some jurisdictions, labour inspectors and unions, operate primarily within a state/territory and local regulatory framework. It is vital that these agencies have an awareness of the relevance of the federal anti-trafficking response to their daily work and that federal agencies are aware of the potential for cooperation with relevant state and territory agencies.

Introducing the research

Research context

The Australian Government implemented a whole of government strategy to eradicate trafficking in persons in late 2003. In addition to ongoing initiatives, the government committed $20m to a package of new measures. As part of the 2007–08 budget, an enhanced package of measures was announced, with funding of approximately $38.3m. Funding has been directed to a range of initiatives, including research into national and regional trafficking activities by the AIC (Anti-People Trafficking Interdepartmental Committee 2009).

Research objectives

Internationally, the issue of trafficking in persons has been addressed primarily as an issue involving the trafficking of women and children for the purposes of sexual exploitation (GAATW 2007; OSCE 2008). Increasingly, attention is being directed to the other forms of trafficking in persons, including what is commonly termed *labour trafficking*, or *trafficking for the purposes of labour exploitation*. As the policy focus shifts, it is important for research to help build the information base upon which sound policy can be built.

In 2008, the AIC commissioned a research project on *Labour Trafficking in the Australian Context: Understanding the State of Existing Knowledge and Identifying Future Research Priorities*. The project sought to understand:

- the state of existing knowledge with regard to labour trafficking in Australia;
- the state of existing responses to labour trafficking;
- stakeholder perceptions of likely risks and opportunities for labour trafficking, along with possible points of intervention; and
- key gaps in knowledge on this issue, as part of framing research priorities for the future.

This report presents the findings from this research.

Research methodology

The research sought to answer these questions through a combination of literature and document reviews, case analysis, analysis of available quantitative data and interviews. Key activities in the research process included:

- literature and document reviews:

  - a review of relevant literature, including the small body of existing research and commentary on labour trafficking in Australia, but also the much larger body of research on related issues such as the exploitation of workers in the 457 visa category and student visas, outworkers, the agricultural sector, international students and the situation of migrant workers in Australia generally;
  - a review of court reports and court transcripts where these were available, for the small number (n=2) of (non-sex industry) labour trafficking cases prosecuted by the CDPP under the Criminal Code (Divisions 270 and 271);
  - a media search to identify instances of alleged forced labour or slavery of migrant workers which have been documented by the media. These media reports were used as the starting point for locating court reports or individuals/organisations involved in these cases in order to follow up and gather more detailed information about these cases so as to make a preliminary assessment of whether or not they involved unreported or unrecognised instances of trafficking in persons. Where possible, court reports were reviewed to ascertain relevance to the study.
- interviews with:
  - representatives of the government agencies that investigate and prosecute these cases (AFP and CDPP) and the government agency responsible for funding support services to complainants in these cases (OfW);
  - representatives from NGOs that provide support to victims of trafficking outside of the parameters of the government's victim support service;
  - representatives from a sample of unions that represent the sectors of the workforce that are noted in media reports and other commentary about labour trafficking or exploitation of migrant workers; and
  - a small number of individuals that have some experience providing direct support to migrant workers in the informal sector, either through community organisations or through informal community networks.

The informed consent of all participants was obtained prior to participating in an interview. Participants were provided with information about the research and were asked (prior to the interviews being conducted) if they understood the purpose of the research, what would be involved in the interviews, anticipated length of interview and that responses would be confidential and whether or not they consented to participate. Participants were also advised that they could withdraw from the interview process at any time or choose not to answer particular questions if they did not wish to.

Interviews were facilitated through a question guide, which was prepared for each participant in advance to help prompt and guide discussion. Participants were also provided with a two page document entitled *What is labour trafficking?* This proved a useful tool for identification of relevant case material. Interviews were recorded and transcripts were provided to participants for verification purposes.

The research was conducted at the time of the change in service providers under the OfW contract for victim support services. Due to this timing, and on the advice of OfW, an interview was not sought with either the outgoing or the incoming service provider.

Wherever possible, supplementary information about individual cases that were discussed was sought to help verify accuracy of the information that had been shared. For example, if a relevant media article was located, more detailed information was then sought from direct review of court transcripts and interviews with persons involved in the particular case where possible. The research commenced in October 2008 and was completed in June 2009 (although some information obtained during the course of this period needed to be updated as part of final editing).

Issues arising in the research process

Internationally, there has been limited research on the issue of labour trafficking. Australia is no different, with only a handful of studies specifically focusing on this issue (eg see Cullen & McSherry 2009; GAATW 2007; Segrave 2009). These studies

provide an important entry point to this issue, however, as noted in each of these studies, there is clearly much more work that can be done. The present report is intended to build on the research that has been undertaken already, while also pointing the way towards some of the many gaps in information and knowledge.

In direct contrast to the small quantity of literature on labour trafficking, there is a vast body of literature on related issues. These include the economic, political and social implications of migration and migrant workers, the experience of exploitation by so-called *457 workers*, the (positive and negative) implications for migrants of employment within ethnic enclave communities, reform of occupational health and safety (OHS) laws, and the feminisation of migrant labour to name just a few issues. In the time available, every effort was made to scan this literature and to focus in more depth where there was direct relevance. However, as this literature was generally conceptualised without any reference to the trafficking in persons framework, it proved generally difficult to take this information and to conclusively ascertain its direct relevance to understanding the size and scope of labour trafficking.

The known incidences of labour trafficking in Australia are very small. This stands in contrast to a much larger grey area of unlawful conduct against migrant workers. Interviews conducted for this research project suggest that vulnerability can result from a large variety of complex factors and that the opportunities for exploiting this vulnerability are profound. Within the confines of the present research project, it was possible to get a broad sense of some of the major issues. However, it was not possible to examine each of the many issues that were raised in any depth. There remains a great need for further, more in-depth research to explore the specifics of individual and systematic vulnerability to exploitation, their specific links to trafficking and the most effective strategies to reduce opportunities and incentives, and increase risks, for such offending.

At the time of this research project, policy and programs were being developed on a number of relevant matters, including aspects of the anti-trafficking response and also a major reform of temporary skilled labour migration and the industrial relations system. Where possible, preliminary information compiled through the research was fed into these processes. While the report is accurate at the time of writing, it should be noted that a number of issues considered in the report are evolving and changing rapidly.

Key concepts: What is labour trafficking?

In any research project, one of the first tasks typically involves defining precisely what it is that is being studied. In the present project, this task was complicated by the fact that internationally and in Australia, there is no widely accepted definition of what is meant by the term *labour trafficking*, either in law or in policy. Given the existence of considerable confusion about the precise parameters of this term, this section looks in some depth at what is meant by labour trafficking, both generally and for the specific purpose of this research project.

The starting point: What is trafficking in persons?

There is an internationally agreed definition of *trafficking in persons*, found in Article 3 of the UN Trafficking Protocol (UN 2000c). As defined in the Protocol, *trafficking in persons* is a process that requires three elements:

- an *action* by the trafficker, in the form of recruitment, transportation, transfer, harbouring or receipt of persons; and
- the action must be undertaken by one of the following *means*—force or threat of force, other forms of coercion, abduction, fraud, deception, abuse of power, abuse of a position of vulnerability, giving or receiving payments to achieve the consent of a person having control over another person; and
- the action must be undertaken for the *purpose* of 'exploitation', a concept which includes 'at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs' (UN 2000c: Article 3).

Where the trafficking involves children (under 18 years), only two elements are required—the *action*, which must be for the *purpose of exploitation*.

In legal terms, the crime of trafficking in persons is distinct from the related crime of smuggling of migrants. Internationally, the concept of *smuggling of migrants* is defined as:

- the *procurement*, for *profit*; of the *illegal entry* (or *illegal residence*) of a person into a country, of which the person is not a national or permanent resident.

Key terminology with regard to smuggling of migrants is found in the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Crime, Articles 3(a) and 6 (UN 2000b).

It is important to understand the basic differences (and potential overlaps) between trafficking in persons and smuggling of migrants. In legal terms, whereas the crime of trafficking in persons as defined in the UN Trafficking Protocol necessarily entails the offender having the requisite intention to exploit the trafficked person, this is not one of the elements of smuggling of migrants in the UN Smuggling Protocol. For example, where a prospective migrant simply pays a third party to assist them to illegally enter a country and that is the end of the transaction, the third party has engaged in smuggling (procuring/illegal entry/for profit). In this example, there is no element of exploitation (in the sense of slavery, forced labour, servitude, debt bondage or other exploitation), so the elements of the crime of trafficking in persons are not met. However, it is also important to understand that in reality, the distinctions between smuggling and trafficking are often subtle and these categories can and do overlap. For example, some trafficked persons might start their journey by agreeing to be smuggled into another country, but then find themselves deceived or coerced into an exploitative situation later in the process. In this example, the person has been both smuggled and trafficked. In another example, a smuggler might enter into a transaction with a prospective migrant intending to simply procure that person's illegal entry for profit—but at some point in the process, an opportunity to exploit that person for profit arises and if the smuggler takes this opportunity, the situation may become one of trafficking in persons.

Is there a concept of labour trafficking in Australian law or practice?

Key criminal provisions on trafficking in persons are contained in Divisions 270 and 271 of the *Criminal Code* (Cth). In these Divisions, there are a range of offences such as slavery and various forms of trafficking in persons for a range of exploitative purposes, including sexual exploitation and forced labour. While these laws undoubtedly cover trafficking into any industry context, there is no distinct offence of labour trafficking. Under Australian law, slavery is defined to include the exercise of the right of ownership over another person; a situation that could potentially apply in any industry context. Forced labour is defined by reference to the presence of force or threats (s 73.2(3) *Criminal Code* (Cth)).

As a matter of legal drafting, the offences in the Criminal Code do not mirror, or align precisely with, the three elements of trafficking from the UN Trafficking Protocol (McSherry 2007; McSherry & Kneebone 2008). For example, McSherry (2007) has noted that a major difference between the offences in Divisions 270 and 271 of the Criminal Code and the UN Trafficking Protocol is that the three elements of trafficking, as defined in the Protocol (the *action*, *means* and *purpose*) are not found in every offence:

> For example, ss 271.2(1) and (1A) criminalise conduct associated with moving persons with the use of force or threats, but without including the third element of the purpose being for exploitation. Similarly ss 271.2(1B) and (1C) criminalise conduct associated with moving persons together with recklessness to exploitation, but without the element of coercion or deceptive means (McSherry 2007: 390).

This is potentially significant from a data collection purpose, as it means there may be some differences between what constitutes criminal conduct under Australian law and what is defined as trafficking in persons as a concept in the UN Trafficking Protocol.

In practice, the term labour trafficking tends to be used fairly loosely to distinguish between those forms of trafficking in persons that involve exploitation of labour, as distinct from exploitation of prostitution. For example, in 2008, a meeting of Australian Government and NGOs working on anti-trafficking referred to the need to increase the focus on labour trafficking (Anti-People Trafficking Interdepartmental Committee 2009). While the term is not defined, it is clear from the context of the meeting that the term is intended to refer to those forms of trafficking in persons that take places in contexts other than the commercial sex industry.

While the distinction between trafficking for sex and trafficking for labour is perhaps convenient, it is a difficult distinction to maintain in practice. There are some who argue that sex work is a form of labour,

particularly when the industry is either legal or decriminalised and workers pay tax to the state. To add further complication, there are various forms of completely non-sexual labour, such as domestic work, that appear, at least internationally, to experience high rates of sexual assault or sexual harassment in the workplace (eg see GAATW 2007). From a pragmatic perspective, it is generally possible to draw a distinction between cases by the industry where the exploitation was perpetrated. This approach is reflected in the data collection practices of the Australian Government agencies involved in the anti-trafficking response, several of which record data by industry of exploitation.

Towards a clearer understanding of (non-sex industry) labour trafficking

While debates about terminology are important, they should not be permitted to lead to inaction. The purpose of this research project is to shed light on instances of trafficking in persons that have occurred in industry sectors that have been relatively neglected—agriculture, construction, cleaning and so on. With this objective in mind, in this report, all references to the expression *labour trafficking* should be understood to refer to situations involving trafficking in persons (as defined in the UN Trafficking Protocol) and where the exploitation has occurred in contexts other than the commercial sex industry. This includes, for example, the forced, coerced or deceptive recruitment of migrant workers for the purpose of exploitation through forced labour, slavery, slavery-like practices or servitude, in any number of industries, such as industrial cleaning, domestic work, hospitality, construction, agriculture or fishing (see further AIC 2009a). This report does not address the issue of trafficking for the purposes of organ removal.

The decision to use the terminology of labour trafficking in this way does not reflect a political view on the issue of whether or not sex work constitutes a form of labour. Rather, this reflects an acknowledgement that the issue of trafficking for the purposes of exploitation in the sex industry has already been heavily researched. There is a well-documented need to shift the focus from trafficking into the sex industry, to trafficking into other contexts. This research is intended to contribute to this shift in focus.

Understanding the constituent elements of labour trafficking

As defined in the UN Trafficking Protocol, *exploitation* is one of the key elements of the trafficking process. Exploitation is defined to include several overlapping, but potentially different kinds of conduct including:

- sexual exploitation;
- forced labour or services;
- slavery;
- practices similar to slavery;
- servitude; and
- organ removal.

For present purposes, the concepts of *forced labour or services*, *slavery*, *practices similar to slavery* and *servitude* are arguably the most relevant. These concepts are not defined in the UN Trafficking Protocol. However, they have been used in other international legal instruments. Accordingly, when seeking to understand the parameters of labour trafficking, it is useful to look at how key terms such as *forced labour*, *slavery* and *servitude* have been defined elsewhere.

Forced labour or services

The terminology of *forced labour* or *services* derives from the *International Labour Organization (ILO) Convention concerning Forced or Compulsory Labour* (ILO Convention no. 29) (Convention on Forced Labour), ratified by Australia in 1932 (ILO 1930). The language of forced labour also appears in Article 8 of the *International Covenant on Civil and Political Rights* (ICCPR: UN 1966), which Australia ratified in 1980. With this historical perspective in mind, trafficking for the purposes of forced labour or services can be understood as those forms of trafficking where the intended exploitation involves:

- work or service that is exacted under menace of penalty; and
- this work or service is undertaken involuntarily.

According to the ILO, forced labour or services is not the same as situations merely involving low wages or poor working conditions, or lack of choice due to economic necessity. It represents a severe violation of human rights, and restriction of freedom (International Labour Office 2005).

According to the ILO, key characteristics of forced labour include:

- *Physical violence, including sexual violence* as indicated by signs of maltreatment such as bruises, workers exhibiting anxiety or mental confusion, traces of, or demonstrated, violence.
- *Restrictions on freedom of movement* as indicated by the worker being locked up in the workplace or forced to sleep on site, presence of physical evidence of restraint such as barbed wire or armed guards.
- *Threats* as indicated by the worker making incoherent or 'coached' statements, workers reporting threats, workers demonstrating anxious behaviour, workers being in an irregular situation and in fear of denunciation to the authorities.
- *Debt and other forms of bondage* as indicated by payment of unreasonably high recruitment and transportation fees which are deducted from salary, payment of excessive fees for accommodation, food or work tools that are deducted from salary, evidence of loans or advances that make it impossible for the worker to leave the employer, or work permits that bind the worker to specific employers.
- *Withholding of wages or no payment of wages* as indicated by absence of regular work contracts, illegal wage deductions, discrepancy between wages paid in comparison to statutory requirements, systems in place that limit ability of workers to access their wages, deception regarding amount of wages to be paid, irregular payment of wages or payments made in kind.
- *Retention of identity documents* as indicated by workers not having access to their identity documents and/or documents being held by the employer or supervisor (Andrees 2008).

In 2009, the United Nations Office of Drugs and Crime released a *Model Law on Trafficking in Persons*, intended to assist state parties wanting to implement the Protocol. The commentary to the Model Law notes that forced labour can occur, even when a person has accepted an offer of work voluntarily. The Model Law notes that:

> Legislatures and law enforcement have to take into account that the seemingly 'voluntary offer' of a worker/victim may have been manipulated or was not based on an informed decision. Also, the initial recruitment can be voluntary and the coercive mechanisms to keep a person in an exploitative situation may come into play later. Where (migrant) workers were induced by deceit, false promises, the retention of travel or identity documents or use of force to remain at the disposal of the employer, the ILO supervisory bodies noted a violation of the Convention. This means that also in cases where an employment relationship was originally the result of a freely concluded agreement, the worker's right to free choice of employment remains inalienable, that is, a restriction on leaving a job, even when the worker freely agreed to enter into it, can be considered forced labour (UNODC 2009: 15).

A recent review of national jurisprudence around the world on the issue of forced labour undertaken by ILO notes there are a number of points of difference in how this term is defined at the national level. For example, some domestic courts have sought to break this definition down into constituent elements (work or service, exacted by menace of penalty, not offered voluntarily), providing jurisprudence on the meaning of each element. However, other domestic courts have sought to fashion their own tests for determining whether labour is forced. There is considerable difference in jurisprudence across the world on issues such as whether extreme economic coercion is sufficient to justify a finding of forced labour. There are also questions around whether or not a worker's testimony or subjective belief that their work is involuntary is sufficient for a finding of forced labour, or if there should instead be an objective component to this analysis (International Labour Office 2009). These are difficult issues and it is likely that jurisprudence on the meaning of each of these elements will continue to evolve.

There also remains controversy over the issue of whether or not the provision of commercial sexual services constitutes a form of labour. On the one hand, the ILO has argued that it is the nature of the relationship between a person and their employer that defines forced labour—not the nature of the work and not whether it is illegal or not. Accordingly, a person who is forced to provide commercial sexual services can be described as a victim of forced labour (International Labour Office 2005). It follows that if a trafficking situation involves forced labour in the sex industry, this could potentially be described as labour trafficking. On the other hand, it has also been argued that sex work (or prostitution) is a form of exploitation of women that is inherently violent, such that it should be not be considered a form of 'work' (eg see Raymond 2004). In this view, trafficking that takes place in the context of the commercial sex industry will always constitute a form of sexual exploitation which, by definition, cannot constitute a form of labour. Given the specific exclusion of trafficking into the sex industry from this research project, this debate is noted only for completeness.

Slavery

The term *slavery* has a long legal history. In several treaties, one of the defining features of slavery is the exercise of any or all of the powers attaching to the right of ownership of a person (eg CoE 2003; League of Nations 1926; UN 1998). The concept of *exercising powers attaching to the right of ownership* can be difficult to apply, given that in many countries it is not possible to legally own a person. However, it is possible to act as if you own a person. For example, while it is not possible for drug dealers to lawfully own a shipment of heroin, they are still able to exercise any or all of the powers of ownership attaching to the drugs, such as the capacity to buy, sell, possess and use the drugs (Allain 2009; see also Gallagher 2008).

While there is still some debate about the exact indicia of slavery, international jurisprudence suggests that facts to be taken into account when deciding if a person has been enslaved include the following:

- control over a person's movements;
- control of physical environment;
- psychological control;
- measures taken to prevent or deter escape;
- force, threat of force or coercion;
- duration of the situation;
- assertion of exclusivity;
- subjection to cruel treatment and abuse;
- control of sexuality; and
- forced labour (Allain 2007).

Slavery-like practices: Debt-bondage, servile marriage and serfdom

In the 1950s, the international community elaborated a new international legal instrument that sought to address certain institutions and practices that are 'similar to slavery' (Gallagher 2009: 801). The concept of practices similar to slavery has been defined to include debt bondage, serfdom, servile marriage and the exploitation of children, concepts that may be relevant to labour trafficking (UN 1957). In the Supplementary Slavery Convention, these terms are defined as follows:

- *Debt bondage* is a condition that arises when a person pledges to repay a debt using their personal services, in circumstances where the value of those services as reasonably assessed is not applied towards reducing that debt, or the debt or the length and nature of those services are not reasonably limited and defined.
- *Servile forms of marriage* includes institutions or practices whereby a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or a woman on the death of her husband is liable to be inherited by another person.
- *Serfdom* is a condition of a tenant who is by law, custom or other agreement bound to live and labour on land belonging to another person and to render services to that person, whether for reward or not, in circumstances where they are not free to change their status.

- The *exploitation of children* includes any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour (UN 1957: Article 1).

Servitude

In the Supplementary Slavery Convention, a person of *servile status* includes a person who is a victim of debt bondage, serfdom, or the institutions of servile marriage or child exploitation, described in that Convention (UN 1957: Article 7(b)). The concept of *servitude* is also found in international human rights instruments, namely the ICCPR (UN 1966) and the Universal Declaration of Human Rights (UN 1948). According to Gallagher, *servitude* is generally understood as being separate from and broader than slavery. Gallagher cites leading commentators, who draw the distinction between slavery and servitude as follows:

> Slavery indicates that the person concerned is wholly in the legal ownership of another person, while servitude concerns less far reaching forms of restraint and refers, for instance, to the total of the labour conditions and/or the obligations to work or to render services from which the person in question cannot escape and which he cannot change (van Dijk & van Hoof cited in Gallagher 2009).

In a decision on the meaning of the term *servitude* in 2005, the European Court of Human Rights noted the relevance of the concept of *coercion*, defining *servitude* as:

> A obligation to provide one's services that is imposed by the use of coercion, and is to be linked to the concept of slavery (*Siliadin v France* (2006) 43 EHRR 16, 287).

Applying these concepts in practice

While definitions provide some assistance in clarifying the meaning of these key terms, they nonetheless remain difficult to apply in practice. In 2005, the Director General of the ILO wrote that:

> [t]he more the ILO has expanded its research, analysis and awareness-raising on forced labour concerns in different regions of the world, the more it has had to face up to some basic facts. There is a broad spectrum of working conditions and practices, ranging from extreme exploitation including forced labour at one end, to decent work and the full application of labour standards at the other. Within that part of the spectrum in which forced labour conditions may be found, the line dividing forced labour in the strict legal sense of the term from extremely poor working conditions can at times be very difficult to distinguish (ILO 2005: 8).

Given the likely difficulties in applying these concepts to real world situations, it is perhaps helpful to consider some examples of situations where the courts have held that situations were sufficiently severe such as to constitute slavery, forced labour or servitude. The following are leading examples where international courts and tribunals have considered the meaning of the terms such as slavery, forced labour and servitude in the context of international legal obligations.

Siliadin: Forced labour and servitude of a 15 year old domestic worker

The language of slavery, forced labour and servitude is used in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR; CoE 2003). In 2005, the European Court of Human Rights considered the meaning of these terms and the issue of whether they could be applied to the particular situation of a Togolese national, Ms Siwa-Akofa Siliadin. The Court's consideration of these issues provides some important judicial guidance on the meaning of these terms in the context of international legal obligations.

In *Siliadin v France* (2006) 43 EHRR 16, 287, the applicant was 15 years old when she arrived in France in 1994 with a French national of Togolese origin, Mrs D. According to an arrangement made with Ms Siliadin's father, Mrs D was supposed to regularise the applicant's immigration status and arrange for her education, while the applicant did the housework for long enough to pay off the cost of the plane ticket. Instead, Mrs D confiscated the

applicant's passport and she became an unpaid servant, first in the household of Mrs D and then in the household of her friend, Mrs B. At one point, the applicant left the household and went to work in other paid employment. However, on the advice of her uncle, she returned to the household of Mrs B where she continued to provide unpaid domestic labour. This situation continued until the applicant disclosed her situation to a neighbour in 1998, some four years after her arrival in France (see *Siliadin v France*: 292–293).

The European Court of Human Rights considered that the situation was sufficient to amount to forced labour under the ECHR (*Siliadin v France*: 319). Applying the definition of forced labour from the Convention on Forced Labour, the court noted that although the applicant was not threatened by a 'penalty', she was in an equivalent situation as a result of the perceived seriousness of the threat. She was an adolescent girl in a foreign country, unlawfully present and in fear of arrest. Her employers nurtured this fear and lead her to believe that her status would be regularised. The court considered that it could not seriously be argued that the applicant performed this work of her own free will; she was not given any choice (*Siliadin v France*: 319).

The European Court of Human Rights also considered the issue of whether the situation amounted to slavery or servitude. The court considered that her 'employers' had not exercised a genuine right of ownership over her, thus reducing her to the status of an object (*Siliadin v France*: 319). Accordingly, the Court held that while Ms Siliadin had been deprived of her personal autonomy, she had not been held in slavery. However, the Court did consider that the situation amounted to servitude' (*Siliadin v France*: 320). The Court noted that servitude can be regarded as an obligation to provide one's services under coercion, which is linked to the concept of slavery. The Court also noted that under Article 1d of the Supplementary Slavery Convention (UN 1957), France was obliged to abolish institutions and practices similar to slavery, including any institution or practice whereby the child or young person is delivered by their parents or guardian, for reward or not, with a view to the exploitation of the child or young person or of his labour (*Siliadin v France*: 323).

With regard to the finding of servitude, the court noted that in this case, the applicant had been forced to work almost 15 hours a day, seven days a week. Brought to France by relatives of her father, she had not chosen to work for her employers. As a minor, she had no resources and was vulnerable and isolated. She had no means of subsistence other than in the home of her 'employers' where she shared the children's bedroom. She was entirely at her 'employers' mercy, as her papers had been confiscated and she had been promised her immigration status would be regularised, which never occurred. In addition, the applicant feared arrest by the police and was not permitted to leave the house, except to take the children to their classes and various activities. The court considered that the applicant had no freedom of movement and no free time. As she had not been sent to school, despite promises to her father, the applicant had no hope that her situation might improve and was completely depending on her 'employers' (*Siliadin v France*: 320).

It has been argued that the ECHR's consideration of the meaning of slavery is particularly narrow and outdated, as it sought to understand slavery in the traditional sense of *chattel slavery*—that is, where a person actually demonstrates a genuine right of ownership. It has been argued that this interpretation is at odds with the evolution of the term slavery in international law, which arguably has a focus on 'the *exercise of powers attaching* to the right of ownership', rather than to the exercise of the right of ownership itself (Allain 2007: 18).

Kunarac: Slavery involving sex crimes against women and girls in the Bosnian conflict

In the trial of Kunarac and his co-accused (*Prosecutor v Dragoljub Kunarac Radomir Kovac, and Zoran Vukovic* IT-96-23 & 23/1 [2001] ICTY 2 (22 February 2001)) (*Prosecutor v Kunarac, Kovac & Vukovic*), the International Criminal Tribunal for the former Yugoslavia (ICTY) had to consider the issue of what amounted to slavery, under Article 5 of the Statute of the ICTY (UN 2009). In this case, there was evidence that the accused, who were all soldiers in the Bosnian Serb Army, had subjected a particular community of women and girls to extended periods of sexual violence, during which time they were raped by the accused, and/or taken

to locations where they would be raped by others and where the accused engaged in acts such as loaning, trading and selling the women to others. The periods of time involved in the violence ranged from days to months at a time.

The ICTY considered that the concept of *enslavement* in customary international law consisted of the 'exercise of any or all of the powers attaching to the right of ownership over a person' (*Prosecutor v Kunarac, Kovac & Vukovic*: 192). It considered that the mental element necessary for this crime was satisfied if these powers were exercised intentionally. In determining whether enslavement had been established, the ICTY noted that:

> Under this definition, indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; 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.
>
> With respect to forced or compulsory labour or service…not all labour or service by protected persons, including civilians in armed conflict, is prohibited—strict conditions are, however, set for such labour or service. The 'acquisition' or 'disposal' of someone for monetary or other compensation is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone. The duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved; however, its importance in any given case will depend on the existence of other indications of enslavement. Detaining or keeping someone in captivity, without more, would, depending on the circumstances of the case, usually not constitute enslavement (*Prosecutor v Kunarac, Kovac & Vukovic* : 193–194).

The ICTY found that, in this case, there was ample evidence that the women and girls had been raped, enslaved and treated as the personal property of two of the co-accused (Mr Kunarac and Mr Kovac). Among other things, the accused were convicted of rape and enslavement as crimes against humanity (Askin 2004).

Australian High Court and slavery: Wei Tang

The High Court has provided judicial guidance on the meaning of *slavery* in the *Criminal Code* (Cth) in its ruling *R v Tang* (2008) 237 CLR 1 (*R v Tang*). As noted above, labour trafficking can arguably include situations where a person is trafficked for the purpose of exploitation, where the exploitation involves slavery or slave-like conditions.

The accused in this case was Ms Tang, the owner of a licensed brothel in Melbourne. In 2003, she had been arrested and charged for slavery offences allegedly committed against five women, all of whom were Thai nationals. Each of these women had come to Australia voluntarily, with the intention of working in the sex industry. At trial, the prosecution presented evidence that Ms Tang and her associates had 'purchased' each of these women for a fee of $20,000, with Ms Tang taking a 70 percent share in the purchase. Each of the women were considered to be contract workers, who had agreed to repay a debt of around $45,000, which was owed to the syndicate involving Ms Tang. For each client that the women serviced, $50 of the $110 service price would be applied to their debt and the remainder would go to the syndicate. In other words, the debt could be repaid after the woman had serviced around 900 customers, during which time she effectively earned very little money to keep for herself. It was agreed that the women would have one free day per week where they could keep the $50, with the remainder going to the syndicate. However, to get the benefit of this free day, the women effectively had to work seven days per week.

In the High Court, Chief Justice Gleeson described the situation as follows:

> In summary, then, while under contract, each complainant was to work in the respondent's brothel in Melbourne six days per week, serving

> up to 900 customers over a period of four to six months. The complainants earned nothing in cash while under contract except that, by working on the seventh, 'free', day each week, they could keep the $50 per customer that would, during the rest of the week, go to offset their contract debts (*R v Tang*: 14).

According to the trial judge, there was sufficient evidence that the women were financially deprived and vulnerable upon arriving in Australia (as they had entered on visas that were illegally obtained) and their ability to continue paying off their contracts depended on their ability to avoid detection by immigration authorities. According to the trial judge, the women were not literally 'kept under lock and key', however, as a result of the totality of their circumstances, they were 'effectively restrained' to the premises (*R v Tang*: 14). Their passports were held by Ms Tang, they had to work long hours, they were afraid of being detected by immigration authorities and they had been told not to leave the premises without the respondent. There was also evidence at the trial that once women came closer to paying off their debt, their working and living conditions became more relaxed and their passports and tickets were returned (*R v Tang*: 15).

On appeal to the High Court, one of the key issues to be determined was the meaning of the term *slavery* under the Criminal Code and the application of the slavery offences in the Code to this particular set of circumstances. According to s 270.1 of the Code:

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

According to s 270.3 of the Code, it is an offence to intentionally possess a slave or exercise over a slave any of the powers attaching to the right of ownership.

Chief Justice Gleeson noted that the definition of slavery in the Criminal Code was derived from the Slavery Convention (League of Nations 1926). The definition of slavery used in that treaty is also reflected in the Rome Statute of the International Criminal Court (*R v Tang*). Accordingly, international jurisprudence on the meaning of slavery in these documents, including court cases such as the Kunarac and Siliadin case, are relevant to understanding the meaning of slavery in the Criminal Code (*R v Tang*).

Gleeson noted that evidence of a presence or absence of consent is not necessarily decisive of whether the situation amounts to slavery. He noted that:

> In some societies where slavery was lawful, a person could sell himself into slavery. Peonage could be voluntary as well as involuntary, the difference affecting the origin, but not the character, of the servitude. 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, but absence of consent is not a necessary element of the offence (*R v Tang*: 21).

He argued that, for the purpose of s 270.3(1)(a) of the Code, the key factor was whether or not the individual was being treated as a commodity, 'as an object of sale and purchase' (*R v Tang*: 21). If this factor exists, then this would be a material factor for a tribunal of fact trying to assess the circumstances of a particular case and it may involve the exercise of a power attaching to the right of ownership (*R v Tang*).

Chief Justice Gleeson noted the difficult problem of how to distinguish between slavery on the one hand, and 'harsh and exploitative conditions of labour' on the other (*R v Tang*: 23–24). Gleeson argued that the answer to that, in any given case, must be found in the nature and extent of the powers exercised over a complainant:

> In particular, a capacity to deal with a complainant as a commodity, an object of sale and purchase, may be a powerful indication that a case falls on one side of the line. So also may the exercise of powers of control over movement which extend well beyond powers exercised even in the most exploitative of employment circumstances, and absence or extreme inadequacy of payment for services (*R v Tang*: 24).

Gleeson further noted that just as consent to the situation is not decisive, the presence or absence of a contractual arrangement is also not decisive. He noted that according to the terms of the legislation, it was apparent that the condition of slavery could result from a contractual arrangement (*R v Tang*: 24).

According to Gleeson, the offence of slavery in the Criminal Code has two elements:

- a physical element, which is the *conduct* of possessing a slave or using a slave; and
- a fault element, which is the *intention* to do the conduct.

With regard to this second element, there is no need to show that the defendant knew or believed that the women were, in fact, slaves. Rather, it is only necessary to show that the defendant had knowledge or belief about the facts relevant to possessing or using the women, or knowledge or belief about the facts which determined the existence of the condition described in s 270(3)(1) (ie the condition which results from the exercise of certain powers; *R v Tang*). According to Gleeson:

> In this case, the critical powers the exercise of which was disclosed (or the exercise of which a jury reasonably might find disclosed) by the evidence were the power to make the complainants an object of purchase, the capacity, for the duration of their contracts, to use the complainants and their labour in a substantially unrestricted manner, the power to control and restrict their movements, and the power to use their services without commensurate compensation (*R v Tang*: 25).

In other words, it would be enough if the prosecution could prove that the defendant knew or believed that certain facts existed which allowed her to buy or sell the complainants, to use their labour at her will, to restrict their movements and to use their services without proper compensation.

Justices Heydon, Crennan and Kiefal agreed with Chief Justice Gleeson. Justice Hayne agreed with Chief Justice Gleeson's reasoning, however, he also expanded on the meaning of the word slavery. Justice Hayne noted that under the Code, *slavery* is the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. He asked, what are the 'powers attaching to the right of ownership'? How are they to be identified when the Code is applied? (*R v Tang*: 56) He reasoned that ownership should be understood as conveying the ordinary English meaning that is *dominion over* the subject matter:

> That is, it must be read as identifying a form of relationship between a person (the owner) and the subject matter (another person) that is to be both described and identified by the powers that the owner has over that other (*R v Tang*: 56).

The key issue is not whether the 'owner' has any legal rights over the 'slave'. Rather, the key issue is what powers has the alleged offender exercised over the person who is alleged to be a slave. According to Hayne, the offender's conduct might fall within the conduct proscribed by the Code if it suggests the 'complete subjection of that other person to the will of the first' (*R v Tang*: 57).

In August 2008, by a six to one majority, the High Court overturned the order of the Victorian Court of Appeal, effectively reinstating Tang's slavery conviction. The High Court remitted her appeal against sentence to the Court of Appeal, who reduced her sentence from 10 years (with 6 to serve) to nine years (with 5 to serve; Anti-People Trafficking Interdepartmental Committee 2009: 68; *R v Wei Tang* [2009] VSCA 182 (17 August 2009)).

Summary

There is no distinct legal concept of *labour trafficking*, either in the UN Trafficking Protocol or in Australian law. Nonetheless, at this point in time, the terminology of *labour trafficking* tends to be used to describe those forms of *trafficking in persons*, as defined in the UN Trafficking Protocol, in which the exploitation takes place in a context other than the sex industry. The use of the term *labour trafficking* in this way raises long-standing debates, particularly the issue of whether sex work/prostitution can ever legitimately be accommodated within a labour framework. These are complex and important debates. However, they have been hotly debated for many years and cannot be resolved by this research project.

This research project uses the term *labour trafficking* to describe situations involving trafficking in persons, as this term is defined in the UN Trafficking Protocol, and where the exploitation has occurred in contexts other than the commercial sex industry. This reflects a pragmatic rather than a political choice. On this interpretation, labour trafficking for present purposes includes any situation that meets all of the following criteria:

- an individual or individuals have been recruited, transported, transferred, harboured or received (the *action*); and
- this action was undertaken through the use of force or threat of force, other forms of coercion, abduction, fraud, deception, abuse of power, abuse of a position of vulnerability, or the giving or receiving of payments to achieve the consent of a person having control over another person (the *means*); and
- these *actions* and *means* were undertaken for the purpose of exploiting the individual or individuals, either through sexual exploitation, forced labour, slavery, slavery-like practices or servitude (the *purpose*) in any number of industries other than the sex industry, such as industrial cleaning, domestic work, hospitality, construction, agriculture or fishing.

Towards a better picture of the size and nature of labour trafficking in Australia

Information about known or suspected incidences of labour trafficking provided by government sources

This section examines the information that is available about known or suspected incidences of labour trafficking detected or brought to the attention of the Australian authorities' whole of government response to labour trafficking. This includes information about the cases that have been considered through federal criminal justice mechanisms, with the AFP as the central point of entry to that system. This section also includes information from several interviews with the OWO (now the Fair Work Ombudsman) and also Commissioner Barbara Deegan, an industrial relations expert who conducted a review of the 457 visa category (a temporary visa for skilled workers with sponsorship from an employer), about their observations on the experience of migrant workers and more extreme forms of exploitation. Each of the agencies and individuals noted have also commented on possible risk factors that might contribute to the potential for trafficking, along with their perceptions of the factors that might impede reporting and detection of these cases.

However, it is important to be cautious in using and interpreting the information in this section. As with any crime type, it is important to understand that information from government sources can only ever present part of what is likely to be a much more complex picture of the actual size and shape of labour trafficking in the Australian community. Most crimes are under-reported or under-detected to a certain degree, but this is particularly true of certain 'crimes against the person'. For example, it is estimated that only 36 percent of female victims of physical assault and 19 percent of female victims of sexual assault in Australia ever report the incident to the police (Phillips & Park 2006). Like these crime types, labour trafficking can involve severe psychological abuse within a relationship (between an employer and an employee) and manipulation of feelings of shame and powerlessness. It is reasonable to expect that for these reasons alone, many people would be unwilling to report experiences of labour trafficking.

Research has not been undertaken to ascertain the likely levels of under-reporting of any form of trafficking in persons, including labour trafficking, in the Australian community. However, it is very clear that there are *many* significant barriers to reporting this crime. Several of these barriers are identified by government participants (see below) and also in the subsequent section. It is also likely that there is

limited awareness within the Australian community and also among service providers that the exploitative conduct that could be described as labour trafficking is, in fact, something that can be reported to the police and acted upon. Given these factors, it is important to be very clear that while the information provided in this section provides some insights into the nature of labour trafficking in Australia (in so far as these cases have been reported), it provides very limited insight into the actual incidence of labour trafficking in the community.

Key federal agencies

In Australia, the AFP has responsibility for investigating the crimes of slavery, trafficking in persons and the other offences found in Divisions 270 and 271 of the *Criminal Code* (Cth). As federal crimes, the prosecution of these offences is the responsibility of the CDPP. The OfW provides funding for a victim support service, currently delivered by the Red Cross (see further Anti-People Trafficking Interdepartmental Committee 2009). As such, the AFP, CDPP and OfW are all key sources of information about government interactions with suspected or confirmed cases of labour trafficking.

The Department of Immigration and Citizenship (DIAC) does not have a formal role in relation to investigating or responding to trafficking offences. However, DIAC plays an important role in referring suspected cases of trafficking in persons to the AFP, as well as a support role in relation to the issue of visas. Given DIAC's functions in relation to compliance with the *Migration Act 1958* (Cth), and the location of its officers in key posts overseas, its compliance staff may come into contact with trafficked persons or trafficking situations as part of their work. Accordingly, DIAC has formal training for staff on detecting and referring trafficking instances to the AFP and a formal procedure through which this is undertaken. DIAC records statistics on the numbers and nature of referrals that it makes to the AFP under this protocol.

As a crime involving 'work', instances of labour trafficking will almost inevitably involve breaches of related laws, including those which give effect to minimum labour standards. At the federal level, labour standards were (at the time of writing) primarily regulated by the *Workplace Relations Act 1996* (Cth). The Office of the Workplace Ombudsman was the Commonwealth body responsible for compliance with this law (since 1 January 2010, labour standards are primarily regulated by the *Fair Work Act 2009* (Cth), which replaced the *Workplace Relations Act 1996* (Cth)). The Workplace Ombudsman (now Fair Work Ombudsman) was a statutory appointee who was assisted by around 400 workplace inspectors operating from 26 offices nationwide. While the Workplace Ombudsman did not have a statutory mandate that specifically addresses the issue of labour trafficking, as a matter of practicality, its inspectors potentially had access to information about a wide variety of workplaces. As such, the Workplace Ombudsman was a source of information on this issue.

Information about investigations from the Australian Federal Police

As at 30 June 2009, the AFP had undertaken more than 270 investigations and assessments for offences under Divisions 270 and 271 of the Criminal Code (ie slavery, sexual servitude and deceptive recruiting; trafficking in persons and debt bondage). Approximately 20 percent of these investigations and assessments have involved alleged exploitation in contexts other than the sex industry. The non-sex industry investigations and assessments have included referrals in relation to domestic work, the agricultural sector and hospitality. According to the AFP, as the numbers of investigations and assessments are so small, it is too early to suggest that they are seeing trends in any particular sector, or in any particular migrant community (AFP personal communication 2008).

Factors that impact on detection and referrals to Australian Federal Police

In interviews with the AFP, it was noted that the crime of labour trafficking can be difficult to detect and investigate. The individuals who are affected are not willing to come forward for a range of reasons, many of which reflect the crime type itself—they have been threatened, forced or coerced. Also, there is perhaps little incentive to report this crime due to fear of deportation. If they assist police, people fear there will be consequences such as losing their job

or their visa and/or other retaliation from their employers/traffickers (AFP personal communication 2008).

It was noted that while the investigation of labour trafficking is, in many senses, similar to the investigation of sex trafficking, there are also some differences. This can reflect, for example, the geographic location or nature of some industries. For example, agricultural work takes place primarily in rural areas, where migrant workers may not have support from NGOs, or there may not be a community sector that is engaged and available to provide support. Furthermore, agricultural workers may be a moving population—from crop to crop according to season (AFP personal communication 2008).

The AFP noted that these factors underscore the importance of community awareness of labour trafficking and the need to engage with a wide range of stakeholders on this issue. While the AFP can undertake internally-generated investigations, the primary source of information is the community and other agencies. Accordingly, the AFP is looking at ways to raise community awareness to ensure that members of the community know that certain conduct is in fact criminal and they know to whom this conduct should be reported. Similarly, the AFP is looking at ways to raise the awareness of this crime type with all agencies concerned such as Australian Government agencies, but also state and territory agencies and the community sector (AFP personal communication 2008).

Information about prosecutions from the Commonwealth Department of Public Prosecutions

As at 30 June 2009, the CDPP had received two briefs of evidence that could be described as labour trafficking, in the sense that they involved sectors other than the sex industry. These included:

- the alleged exploitation of a male Indian chef on a 457 visa. The defendant in this case was acquitted on the trafficking charge but convicted for a charge relating to falsification of documents (Rasalingam case, discussed below); and
- the exploitation of a female Filipino domestic worker in a situation involving fraudulent marriage and sexual assault. The defendants in this case, a husband and wife were convicted for slavery offences (Kovacs case, discussed below). However, on appeal, their convictions were overturned and a retrial was ordered.

The CDPP also received a brief of evidence for another case that was pursued, but not on the basis of a trafficking in persons charge. In this case, the evidence showed that the defendant planned to financially benefit from the unlawful entry of seven Solomon Islanders into Australia on tourist visas. The defendant had gone to the Solomon Islands to recruit experienced free divers to fish for crayfish from his boat, at a rate of pay less than he would ordinarily pay Australian workers. The defendant gave false information about the Islanders' intention to work and related details as to their residence. The defendant pleaded guilty to one charge under s 233(1)(a) of the *Migration Act 1958* and four charges under s 234(1)(b) of the *Migration Act 1958* (CDPP personal communication 2008).

The CDPP noted that it is difficult to locate precisely how many cases of labour trafficking they have been involved with, as even cases that may display indications of labour trafficking can be prosecuted under a range of criminal provisions. The CDPP records data about cases by 'provision of the Criminal Code'. There is no separate offence of labour trafficking in the Code, so it can be difficult to locate if there have been other cases that could be described as labour trafficking, in circumstances where these cases have been prosecuted, for example, under the *Migration Act 1958*, the *Workplace Relations Act 1996* or state and territory legislation (CDPP personal communication 2008).

Overview of two federal prosecutions

Since the introduction of the relevant federal offences, a total of three defendants have been charged and prosecuted for offences involving either trafficking in persons or slavery in circumstances where the alleged exploitation took place in a sector other than the sex industry. These cases are outlined below.

Rasalingam

In 2007, a restaurant owner was prosecuted in New South Wales under s 271.2(1B) of the *Criminal Code* (Cth) for allegedly trafficking a male Indian chef for exploitation in his restaurants (transcript of proceedings *R v Yogalingam Rasalingam* District Court of New South Wales, Judge Puckeridge, 9 October–2 November 2007). Under the Criminal Code, *exploitation* is defined to include *forced labour*, a term that is itself defined as:

> ...the condition of a person who provides labour or services (other than sexual services) and who, because of the use of force or threats:
>
> (a) is not free to cease providing labour or services; or
>
> (b) is not free to leave the place or area where the person provides labour or services (s 73.2(3) Criminal Code).

In this case, one of the key issues was whether or not the element of forced labour had been made out. The Crown case was that the accused had implicitly threatened the complainant with deportation should he leave his employment. Key evidence included the testimony of the complainant. It was his understanding that he had to stay and work for four years, on the basis that some money would be sent to his father and the complainant would get permanent residency at the end of four years. He said the accused had told him the story of another person who had left their employer and who had then been sent home (transcript of proceedings *R v Yogalingam Rasalingam* (District Court of New South Wales, Judge Puckeridge, 10–11 October 2007)) (*R v Yogalingam Rasalingam*).

The defence case argued that there was insufficient evidence to support a finding that a threat had been made or implied. The defence characterised the situation as more one where the complainant had a concern that he might have to go back to India should he change employers. The defence noted that this concern arguably arises simply as a matter of Australian law (*R v Yogalingam Rasalingam* 19 October 2007).

The judge ruled that there was sufficient evidence to go to the jury. However, the jury returned a verdict that acquitted the accused on the trafficking in persons charge. The jury did convict the accused on a lesser charge relating to misleading a Commonwealth official in the immigration process, under s 135 (1)(7) of the Code (*R v Yogalingam Rasalingam* 2 November 2007).

The Rasalingam case was separately pursued by the (then) Office of Workplace Services (OWS). The OWS became aware of the complaints made against Mr Rasalingam following a referral from the Business Monitoring Unit at DIAC. The OWS investigation revealed that the business owned by Mr Rasalingam, Yoga Tandoori House, had failed to pay the complainant in accordance with the relevant awards. The complainant alleged that Mr Rasalingam had told him he would not be paid for one year, as Mr Rasalingam had paid for his flights from India. Mr Rasalingam alleged he was distracted during the complainant's employment by his mother's death in India. He noted that the complainant was provided with food, accommodation and would have been subsequently paid.

On 13 March 2008, Federal Magistrate Cameron handed down his decision, finding 10 breaches of the relevant award. Yoga Tandoori Pty Ltd was ordered to pay $18,200 in penalties into Commonwealth revenue; a 35 percent discount having been applied to the initial amount of $28,000 in recognition of Mr Rasalingam's cooperation with authorities. The penalty took into account Mr Rasalingam's lack of contrition, the need for specific and general deterrence, the fact that the entirety of the complainant's pay and entitlements had been deliberately withheld and that although not a slave, the complainant was at a considerable disadvantage in his dealings with Mr Rasalingam (Workplace Ombudsman personal communication 19 January 2009: see also *Fryer v Yoga Tandoori House Pty Ltd* [2008] FMCA 288).

Kovacs and Kovacs

In November 2007, Zoltan and Melita Kovacs, a married couple, were tried before a jury in the Supreme Court of Queensland for offences relating to organising a sham marriage under the *Migration Act 1958* (Cth) and slavery under the Criminal Code (transcript of proceedings *The Queen v Zoltan John Kovacs and Melita Kovacs* (Supreme Court of Queensland, Criminal Jurisdiction, Justice Cullinane 26 November–6 December 2007)) (*The Queen v*

Kovacs and Kovacs). The charges related to the alleged mistreatment of a young woman from the Philippines. The Crown case was that Mr and Mrs Kovacs had arranged and paid for a male friend to travel to the Philippines in order to marry and bring back a Filipino woman, with the intention that she would work in their shop and their home for some time. It was alleged that once in Australia, the young woman was both sexually assaulted by Mr Kovacs and effectively enslaved by Mr and Mrs Kovacs through a combination of unpaid labour, continuing sexual assaults, verbal threats and abuse, exploitation of her situation of vulnerability, control over her movement and confiscation of her passport.

At trial, the young woman gave evidence that while she was in Weipa, she had tried to escape the situation, seeking the assistance of a woman she worked with at the shop. However, Mr and Mrs Kovacs located her shortly after she left their house, confiscated her passport and returned her to the family home. The young woman also gave evidence that, while in theory she had access to a pay phone at the shop, the only person she knew who owned a telephone was her aunt back in the Philippines—the very person who had suggested she work for Mrs Kovacs. According to her evidence, the young woman remained in that situation until she managed to escape again, with the assistance of another worker in the shop and Mr Kovac's estranged daughter.

Mr and Mrs Kovacs, both of whom pleaded not guilty to all charges, declined to give evidence or call witnesses in their defence (transcript of proceedings *The Queen v Zoltan John Kovacs and Melita Kovacs* (Supreme Court of Queensland, Criminal Jurisdiction, Justice Cullinane, 3 December 2007)). Accordingly, the defence case was made out through cross-examination of Crown witnesses. Through cross-examination, the defence sought to present the young woman as, among other things, a willing sex worker who had consented to have sex with Mr Kovacs in exchange for money, while also being housed and fed in the family home. The defence sought to present Mr and Mrs Kovacs as very hard working people, noting that other guests and family members were expected to help out in the family home and business. The defence argued that if the young woman had really been being exploited, she could have sought assistance from the police station, post office or other official services, either in Weipa or Napranum (a small Aboriginal community outside of Weipa, where the Kovacs shop was located) (*The Queen v Kovacs and Kovacs* 28 November 2007).

Mr and Mrs Kovacs were found guilty on all counts by the jury. In sentencing, Justice Cullinane noted that Mr and Mrs Kovacs took very active steps

> to obtain the labours of a young woman to work for you for extensive hours in the shop and in the domestic tasks associated with the home and care of the children (*The Queen v Kovacs and Kovacs* 6 December 2007: 3–4).

The complainant:

> …worked for something like 18 hours some days, 12 hours in the shop and a number of hours, five or six hours then of an evening, without any real recompense at all. In fact, the family in the Philippines received a small amount and she received little more than a pittance (*The Queen v Kovacs and Kovacs* 6 December 2007: 4).

While the complainant was not physically restrained from leaving this situation, her ability to leave was constrained by a combination of factors such as family pressures, the removal of her passport and her situation in Australia. Justice Cullinane noted that the complainant was under considerable pressure from her family to take this opportunity, such as it was (transcript of proceedings *The Queen v Zoltan John Kovacs and Melita Kovacs*, (Supreme Court of Queensland, Criminal Jurisdiction, Justice Cullinane, 6 December 2007)). For example, evidence was given at the trial that prior to coming to Australia, the young woman had lived in a one room tin shack in the slums of Manila, with no running water, electricity or telephone. She shared these living quarters with eight other family members, including her son. In her evidence, the young woman stated that even though she didn't want to come to Australia, her dying mother had pleaded with her to take this opportunity (*The Queen v Kovacs and Kovacs* 27 November 2007).

Justice Cullinane noted that the young woman was a foreigner living in Weipa, who was being 'constantly subjected to abuse and complaints' by

the only people she knew, Mr and Mrs Kovacs (*The Queen v Kovacs and Kovacs* 6 December 2007: 5). His Honour noted that:

> She had no money. She had no-one in this country to turn to, who she knew, in any significant way. She had no vehicle, nor could she drive, if I understand the evidence correctly, and she was thus, in a very real sense, dependent upon the two of you (transcript of proceedings *The Queen v Zoltan John Kovacs and Melita Kovacs* Supreme Court of Queensland, Criminal Jurisdiction, Townsville, Justice Cullinane, 6 December 2007: 3).

In sentencing, Justice Cullinane noted that Mr and Mrs Kovacs were both equally implicated in these offences. However, Mr Kovacs received a heavier sentence, because he had also sexually abused the complainant. According to Justice Cullinane:

> When [the complainant] came to Australia, she was under the impression that she was to fly to Weipa. In fact, you met her and on the very first day that she was here, you, on her account, raped her. This was almost an act of contempt to impress upon her or to mark the dependent state that she was in and your exploitation of that. Her evidence of you giving her small amounts of money after the various acts of sexual intercourse suggest also a form of contemptuous behaviour to her (*The Queen v Kovacs and Kovacs* 6 December 2007: 5–6).

Zoltan and Melita Kovacs were sentenced to a maximum of eight and four years imprisonment respectively (*The Queen v Kovacs and Kovacs* 6 December 2007).

Mr and Mrs Kovacs appealed their convictions on various grounds and their appeal succeeded on grounds principally relating to the judge's directions to the jury on certain evidential matters. In December 2008, the Queensland Court of Appeal overturned their convictions and a retrial was ordered (*R v Kovacs* [2008] QCA 417). The retrial had not yet occurred at time of publication.

Information about clients of the victim support program provided by the Office for Women

As the program manager for the Australian Government's victim support program, the OfW has collected information about clients on the program since its inception in May 2004 (services were provided by Centrelink, between January and May 2004). In the time period, 1 May 2004 to 31 March 2009, the program has provided support to a total of 128 clients. This includes 113 clients (all female) who were exploited in the sex industry and 15 clients (male and female) who were exploited in agriculture, domestic work, hospitality and construction.

The OfW does not differentiate between sex trafficking and labour trafficking. Rather, like the AFP and DIAC, statistics are kept by industry of exploitation. According to a representative of OfW interviewed for this research project, the composition of the program appears to be changing, as increasing numbers of non-sex industry locations are made. In the four plus years of operation of the program prior to the 2008 financial year, there had been a total of three non-sex industry clients on the program. In the financial year, 2008–09 (up to 31 March 2009), this number increased by an additional 12 non-sex industry clients. While it does appear that the program composition is changing, it is also apparent that as the numbers of non-sex industry clients are still very small, the location of a group of individuals in a single site of exploitation has the potential to distort the figures (OfW personal communication 2009).

While noting that the numbers are still very small, the representative for OfW noted several issues regarding the demographics of the program's client groups. In terms of gender:

- All of the males on the program have been located in sectors outside of the sex industry (construction, hospitality, agriculture).
- Both male and females have been detected in agriculture.

- The domestic workers who have been detected are all female.
- The workers in construction and hospitality are all male.
- All of the clients detected in the commercial sex industry are female (OfW personal communication 2 April 2009).

In terms of nationality:

- The clients on the program who have been detected in agriculture, domestic work, hospitality and construction have originated from a range of countries, namely India, Indonesia, Malaysia, Macedonia and the Philippines (OfW personal communication 2009).

The representative from OfW noted that a number of changes have been made to the program, following criticism from government and community partners (eg see ANAO 2009; Burns, Simmons & Costello 2006; David 2008; McSherry & Kneebone 2008). In an audit conducted by the Australian National Audit Office (ANAO) in 2009, auditors found that while the program's documentation provided a basic outline of services and requirements, there were a number of weaknesses in the contract and associated documents. In response to the initial audit findings, the OfW informed the ANAO of improvements to the contract documentation including a revised contract, updated Program Guidelines, a Communication and Operation Protocol, Standard Operating Procedures and Service Standards (ANAO 2009).

The representative from OfW also noted that they are anticipating the trend of non-sex industry detections to continue as awareness and focus on this issue continues. This has implications for the program, both in terms of numbers of clients and gender. For example, it was discussed that international and local experience suggests that where an agricultural or manufacturing workplace is raided, the numbers of workers who are picked up by the police, and who then need to be supported, can be quite large. Thus, a raid on a meat works might result in groups of 30 or more people. In contrast, the experience of the OfW program to date suggests that where a situation of exploitation is located in the sex industry, the numbers of clients that come to the program as a result are more in the order of one or two per workplace. From the perspective of the changing gender composition of the program, the representative from OfW noted that they consider it is important that the current service provider, Red Cross, has access to a wide network of support workers, reflecting a mix of gender and age groups (OfW personal communication 2009).

Information about instances of workplace exploitation involving migrant workers provided by the Office of the Workplace Ombudsman

At the time this research was conducted, the Workplace Ombudsman was the Commonwealth body responsible for compliance with the *Workplace Relations Act 1996* (Cth). However, Australia's workplace relations system changed from 1 July 2009, when the *Fair Work Act 2009* came into effect. From this point onwards, the Fair Work Ombudsman is the relevant authority.

As a relative newcomer to the Australian Government's inter-departmental anti-trafficking committee, the precise role of the Fair Work Ombudsman (previously the Workplace Ombudsman) in relation to trafficking in persons is still being defined. Nonetheless, it is clear that given the agency's role in monitoring labour standards, its inspectors may (and indeed have) come into contact with situations that could be described as labour trafficking. For example, in 2008, the Workplace Ombudsman pursued a case against Yoga Tandoori House Pty Ltd for industrial breaches (*Fryer v Yoga Tandoori House Pty Ltd* [2008] FMCA 288: see AIC 2009b). This case was separately investigated by the AFP and prosecuted by the CDPP.

In an interview with representatives from the Workplace Ombudsman, it was noted that people do not come to the Workplace Ombudsman with complaints of labour trafficking. Their inspectors are investigating complaints made under the *Workplace Relations Act 1996* (Cth), primarily time and wage matters. However, in the course of looking into these issues, inspectors may be exposed to indicators of criminal conduct. For example, this might include tax fraud or other illegality, such as assaults or threats. Given the specific legislative remit of the Workplace Ombudsman, where an inspector is exposed to conduct that appears to fall under the remit of

another Commonwealth or state agency, these issues will be referred to that agency.

Representatives from the Workplace Ombudsman noted that, in their experience, there have been a small number of cases (fewer than 5) that have 'rung alarm bells' from the perspective of possible labour trafficking (Workplace Ombudsman personal communication 15 Sept 2008, 19 Jan 2009). Several of the cases discussed were still under investigation or before the courts, so it is not possible to repeat the specific circumstances. However, the cases raised in interviews have several common features:

- The employers involved were engaging migrant workers either (lawfully or improperly) on s 457 visas, or other temporary stay visa categories, in industries including hospitality, manufacturing and agriculture.
- The employers appeared to have an inappropriate level of control over the employees. For example, the employees lived on or near the work premises, in accommodation owned or rented by the employer. The employees appeared fearful about leaving their work or home premises.
- The employees had wanted to leave the workplace but had allegedly been threatened in some way (eg repercussions against family at home, being reported to the authorities, violence or threats of violence).
- It appears that the employees had not come to Australia for a mix of 'work and life'. Instead, it appears they had come for work only. Once in Australia, they appear to have worked excessive hours in poor conditions (Workplace Ombudsman personal communications 15 Sept 2008, 19 Jan 2009).

One specific case of concern that was discussed was the case of Aprint. This case was also discussed in the Cullen and McSherry article *Without Sex* noted above, where it was argued that this case could have been conceptualised as a slavery case (Cullen & McSherry 2009). Information about the Aprint case was provided by the Office of the Workplace Ombudsman and is contained in Box 1.

Representatives from the OWO noted that when inspectors came across cases that suggested illegal conduct (whether this is tax fraud or other criminal conduct), these cases were typically reported to the appropriate authorities, including the police. It was also noted that inspectors will seek to enforce minimum labour standards irrespective of a person's immigration status, or their lawful entitlement to work.

Agency representatives identified a number of factors that may impact on the likelihood of cases of criminality (whether tax fraud or another crime, such as labour trafficking) being exposed to their inspectors. First, the (then) OWO operates on a voluntary compliance model. If employers agree to rectify an alleged breach at an early stage, there is no cause for a further investigation of this matter. This might mitigate against, for example, further interviews or site visits, which might reveal other hidden forms of illegality in the workplace. Second, inspectors are primarily trained to investigate breaches of the *Workplace Relations Act 1996*. Their focus is on recovering unpaid wages. As a corollary to this, Inspectors are operating within a clearly defined legislative framework, which at present does not specifically refer to trafficking in persons or other criminal conduct (Workplace Ombudsman personal communication 19 Jan 2009).

Representatives noted several other systemic factors that may impact on the likelihood that inspectors would detect situations of criminality (whether tax fraud or other criminal conduct, such as labour trafficking). For example:

- It is generally difficult to investigate situations where the parties do not have English language skills. For example, in the Aprint case, inspectors met individual workers in a car outside of their work premises and held discussions, and ultimately took statements through an interpreter. This adds considerable time and complexity to investigations.
- Australian services are typically accessible to people who have grown up with the Australian system and who speak English as a first language. However, it is not clear that Australian services are readily accessible to migrant workers who are unfamiliar with our system. It was suggested that considerable resources would be needed to ensure that all Australian services become accessible, in a meaningful way, to migrant workers.

Box 1: Aprint (Aust) Pty Ltd

In August 2006, the Workplace Ombudsman commenced an investigation to determine if four employees of Aprint (Aust) Pty Ltd had received their minimum terms and conditions of employment. The employees were subclass 457 visa holders and were sponsored to work as printers. All were Chinese nationals.

The four Chinese workers were sponsored to work in Australia after a long recruitment process in China, involving competency tests, medical assessments and travel (as some of the men originated from provincial areas).

The Workplace Ombudsman's investigation found that, upon arrival in Australia, the men spent the first few weeks of their employment living and working on the Aprint premises. They slept in a confined office together on mattresses. Basic toilet facilities were available, however, no shower or other facilities were provided. The workers washed either at a basin in the workplace or at the local swimming pool. When off-site accommodation was arranged for the workers, it was a rented share house owned by the employer, within 300 metres of the workplace. Living so close to the work premises essentially made the men feel as though they were constantly on call for duties.

Working conditions for the men were substantially different to that of other workers, particularly with regard to the number of hours worked. Also, the men had deductions for medical expenses, rent and immigration costs made without consent from their wages, often leaving them with around $200 net per week for between 40 and 50 hours work.

After an investigation and an analysis of the evidence, the Workplace Ombudsman determined that there had been underpayments of $93,667.66 in respect of the employees. The contraventions occurred over a 12 month period and were part of a planned strategy on the part of the Director, Mr Tu Chuan Yu, and Aprint to bring the employees into Australia and impose conditions upon them which demanded long hours and limited life outside work.

Proceedings were commenced by the Workplace Ombudsman in the Federal Magistrates' Court against Aprint and Mr Tu.

On 10 July 2007, Aprint was placed into liquidation. The Workplace Ombudsman's proceedings were stayed against Aprint by operation of the Corporation Act 2001. However, the Workplace Ombudsman persisted with the claim as against Mr Tu.

The Workplace Ombudsman negotiated an Agreed Statement of Facts with Mr Tu, whereby he admitted the alleged contraventions. As a result of the filing of the Agreed Statement of Facts, the matter proceeded on the issue of penalty only. The Federal Magistrates' Court ordered Mr Tu to pay total penalties of $9,240, from a maximum $26,400. The $93,667.66 in underpayments was provided to the workers within a matter of weeks of the breaches having been determined by the Workplace Ombudsman.

(Information provided by the Workplace Ombudsman, 12 February 2009).

- The complications of accessing services and linguistic barriers become even more acute if people are working in remote geographical areas and/or have returned overseas. It was noted that once an employee has returned home, an investigation, at least from a Workplace Relations perspective, is nearly impossible.
- There are evidential difficulties in proving breaches. While employers are obliged to keep time and wage records, they do not always do this. If employers are acting illegally against their staff, there is every chance they are also not keeping proper records. Without records, it is difficult to quantify and prove number of work hours or money owing.
- People who are working illegally in Australia, in the sense that they do not have an appropriate visa, are still covered by the protections in the *Workplace Relations Act 1996* (Cth). However, it is unlikely that they would come forward for Workplace Ombudsman assistance, as they would be at risk of deportation.
- Inspectors hear rumours or allegations about practices of concern in particular industries or sectors. However, it is very difficult to investigate or prove these allegations if neither the would-be complainant nor the employer is complaining. Inspectors can try to interview or make contact with people in these sectors. However, if employees do not want to complain and employers are falsifying or not keeping records, it is very difficult to build a case.

- Third parties, such as migration agents and recruitment companies, appear to play an influential intermediary role for migrant workers. For example, it is known that in some cases, workers have paid a deposit bond or similar back in the country of origin. This bond may be forfeited if the worker 'causes trouble'. Similarly, workers may have agreed, prior to coming to Australia, to pay back the cost of their recruitment and travel through their wages, with all payments going through an offshore bank account. This not only impacts on the capacity and willingness of individuals to complain, it also has implications for the complexity of investigations. Workplace inspectors, for example, do not have the legislative remit or capacity to monitor financial or other transactions that occur offshore (Workplace Ombudsman personal communication 19 Jan 2009).

Finally, it was noted that the cases coming to the attention of the Workplace Ombudsman are probably not the workers at the very bottom of the market:

We are only catching the people who feel empowered enough to come to the Workplace Ombudsman and say they haven't been treated fairly at work. There is possibly another group who are even more vulnerable, who wouldn't come to the Workplace Ombudsman for help. They are relying on their employer, or they don't speak English, or there are cultural problems as well. So the people we are catching are possibly the 'second' most vulnerable group. That is concerning (Workplace Ombudsman personal communication 19 Jan 2009).

Information about known or suspected incidences of labour trafficking provided by non-Australian Government sources

This section looks at the range of information that is available about known or suspected instances of labour trafficking detected or brought to the attention of organisations outside of the Australian Government's whole of government response. The information presented in this section is necessarily disparate and sometimes incomplete or inconclusive. Nonetheless, it provides valuable insights into experiences that might remain otherwise relatively unknown to the federal agencies working on labour trafficking.

About the research process

It is well known that information from administrative sources about the incidence of crime only ever captures part of a much larger picture. A substantial proportion of crime will always remain unreported. This is probably exacerbated in the case of the crime of labour trafficking. As the laws are relatively new and there have been only a small number of prosecutions, there is likely to be limited awareness that this conduct is in fact criminal. In addition, there are multiple barriers to reporting this crime that reflect the nature of the crime type itself; it involves exploitation of people in situations of vulnerability, who have limited recourse to mainstream services or support networks. Finally, it has been argued that there are structural features that have resulted in an institutional focus on sex trafficking to the detriment of a focus on labour trafficking (eg see Cullen & McSherry 2009; Segrave 2009). This may have contributed to low levels of recognised instances of labour trafficking.

One of the purposes of this project was to try to look beyond the range of information that is held by Australian Government agencies involved in the anti-trafficking response. This was to determine what, if any, relevant information was already held by a wider group of organisations either working directly on trafficking issues, or on related issues such as providing support to migrant workers in Australia. The research process involved:

- A review of relevant literature, including the small body of existing research and commentary on labour trafficking in Australia but also the much larger body of research on related issues such as the exploitation of workers on the 457 visa category and student visas, outworkers, the agricultural sector, international students and the situation of migrant workers in Australia generally.

- A media search to identify instances of alleged forced labour or slavery of migrant workers that have been documented by the media. These media reports were used as the starting point for locating court reports or individuals/organisations involved in these cases, in order to gather enough information about these cases to make a preliminary assessment of whether or not they involved unreported or unrecognised instances of trafficking in persons. Where possible, court reports were reviewed to ascertain relevance to the study.
- Interviews with representatives from civil society organisations that provide support to victims of trafficking outside of the parameters of the government's victim support service, representatives from a sample of unions that represent sectors of the workforce that appear in media reports and other commentary about labour trafficking or exploitation of migrant workers and interviews with a small number of individuals that have some experience providing direct support to workers in the informal sector.

Interviews were facilitated through a question guide, which was, in most cases, provided to each participant in advance to help prompt and guide discussion. Interviews were recorded and transcripts were provided to participants for verification purposes. Wherever possible, supplementary information about individual cases discussed was sought to help verify accuracy of the information that had been shared. For example, where a participant discussed a particular case that they had worked on, they were asked to provide open source material about the case such as documents that had been tendered in open court and relevant media articles. This allowed the researcher to look at individual cases against the UN definition of trafficking in persons and also against agreed indicators of labour trafficking, such as those recommended for use by the ILO (see Appendix B).

This research process focused primarily on the situation of what might be broadly described as transnational migrants. This potentially covers a range of situations, captured by categories such as *visa holders*, *migrants* and also *recent arrivals*. This is not to suggest that there are not issues of risk relating to other categories of individuals who might be Australian citizens. For example, in this research process, several participants mentioned the particular vulnerability of people with a disability and also from an Aboriginal or Torres Strait Islander background. However, these issues were not the focus of this particular research project.

The research process resulted in a wealth of information about known or suspected instances of exploitation (variously described) of migrant workers, which varied considerably in their extremity. While numerous cases raised potential indicators of trafficking (see Appendix B), it was frequently difficult to clearly categorise whether or not a case would have potentially crossed the line so as to be considered an instance of labour trafficking. Nonetheless, there were enough common features in all of the instances that were discussed to suggest several key themes of relevance to understanding the broader landscape that is relevant to locating and understanding the risks for labour trafficking.

Understanding the size and key characteristics of the migrant worker population

The following statistics give some indication of the size and diversity of the group of people who might be described either as migrant workers or perhaps as international migrants who work in Australia:

- As at 30 June 2009, there were 77,330 primary 457 visa holders in Australia (DIAC 2009b).
- As of 31 December 2008, there were 289,806 student visa holders present in Australia (DIAC 2009a) with permission to work up to 20 hours per week during semester and unlimited hours outside of semester. These figures exclude New Zealand citizens.
- As of 31 December 2008, there were 108,268 working holiday-maker visa holders present in Australia (DIAC 2009a) with permission to work for up to four months out of 12 months.
- In 2007–08, approximately 150 individuals were granted visas to work as domestic staff of diplomats, consular officials and certain senior executives (DIAC 2009c).

In addition to these migrants who have permission to work in Australia, there are an unknown number of foreign nationals who are working illegally in Australia. As at 30 June 2008, the DIAC estimated that 48,456 people were in Australia unlawfully (DIAC 2008). It is likely that a significant proportion of these people are engaged in paid work. In summary, this means that there are approximately 500,000 people in Australia at any one time who could potentially be classed as temporary migrant workers.

There is considerable diversity among the enormous group of people that could be characterised perhaps as migrant workers or transnational migrants who happen to work in Australia. A number of participants in the current research pointed out that the chief executive officers of several large Australian companies are migrant workers who were brought to Australia on 457 visas or other visa arrangements (eg a former CEO of Telstra, a large telecommunications corporation based in Australia). However, there is no suggestion that this group of highly skilled, highly sought after professionals are at risk of exploitation. Their situation is clearly very different from the situation of individuals who may be seeking to come to Australia from a developing country, where work options are limited or the available wages are very low and where there are no safety nets such as unemployment benefits. Such individuals also arrive in circumstances where they may have limited English, limited marketable skills, limited options for wage employment once they are in Australia and high debts or financial obligations. It is this sub-group of the larger migrant worker population who are considered to be most at risk of exploitation.

Clearly, even within this sub-group of what might be described 'vulnerable' migrant workers, there is nonetheless considerable scope for diversity. Many specific case examples were provided by participants in this research process. However, the following are perhaps indicative of the range of situations and experiences that have been known to occur within this particular sub-group of arguably more vulnerable migrant workers:

- Skilled butchers or slaughtermen (both recognised trades and recognised 'skills in demand') from southeast Asia and east Asia who are in fact working in unskilled positions such as packers in abattoirs. Some are in Australia on 457 visas and some are on working holiday visas. Those on 457 visas want to remain in Australia working as they hope this will provide a path to permanent residency (AMIEU branch personal communication 2009).
- Domestic workers who work in family homes in a variety of situations including being unpaid and (fraudulently) promised permanent residency, or who are paid but have their pay unilaterally reduced over time, or who are being paid essentially 'national' wages to reflect what they might be paid in their home country. They may also be subjected to threats of reporting to the authorities (if 'illegal') or visa cancellation (eg if they are here on executive domestic worker or diplomatic domestic worker visas), restrictions on movement, substandard living conditions and in some instances, humiliation and physical or sexual violence (Migranté WA personal communication 2009; Salvation Army personal communication 2009; Unions WA personal communication 2009 and case analysis from court reports).
- International students (primarily undergraduates) either from the university or vocational training sectors who compete for low-paid, cash-in-hand labour at local markets. Where there may be more than one group of students competing for the work, this leads to undercutting of prices to secure the work (Nyland & Forbes-Mewett personal communication 2009).
- International students who work as industrial cleaners and who are being exposed to sexual harassment by their supervisor but will not complain because of concern about their visa situation (JobWatch personal communication 20 Jan 2009; see also *Appendix C: JobWatch case studies*).
- Workers on 457 visas who have a recognised skill in demand, such as stonemasons or nurses, but who are put to work against their will in unskilled positions such as picking rocks from farming properties or industrial cleaning (Migranté WA personal communication 2009; Unions WA personal communication 2009).
- Individuals from southeast Asia on tourist visas who have paid significant sums of money for the opportunity to enter Australia and work illegally in

the agricultural sector, who may experience severe under-payment, very poor living conditions (eg animal sheds) and in some instances, sexual violence (Australian Workers Union et al. personal communication 2009).

Understanding the spectrum of unlawful conduct perpetrated against migrant workers

It was apparent from interviews about the specific topic of labour trafficking that this extreme crime type exists within a much broader spectrum of experience. This spectrum is perhaps best described as a range of unlawful conduct, which includes industrial breaches, OHS breaches, unlawful discrimination and criminal offences perpetrated against certain migrant workers in Australia. Participants gave many examples of this sort of bad treatment or perhaps abuse of vulnerability. However, one community legal centre, JobWatch, was able to provide a set of case studies drawn from their legal practice that provide an insight into the wide range of unlawful conduct that might be perpetrated against a range of migrant workers.

In January 2009, in response to a request for information for the purposes of this research project, staff at JobWatch undertook a search of its database, using terms such as *visa*, *backpackers*, *illegal immigrants/migrants/workers* and *international students* in order to identify case studies for the present research. There were approximately 311 client records located on the database that fell into those categories for the period 1 May 1999 until 31 December 2008. The majority of these were calls from 457 visa holders, in professional positions with high levels of English proficiency. However, some of the callers were on other visa categories; fewer than 10 percent were backpackers, fewer than 10 percent were international students and the remainder were on a variety of other visa categories (JobWatch personal communication 2009).

In an interview conducted for the purposes of this research, the Executive Director of JobWatch noted that, in one sense, the total number of client records they identified through this search was low (n=311) in relation to the total number of records in their database (n=126,019). However, she noted that:

> Just because the number is relatively low, you cannot then minimise these calls—it is still an area of concern. There are so many structural factors that impact on visa holders or illegal workers seeking help. Basically, what this number says to us is 'even with limited knowledge and limited access, we are still getting the calls'. So this number of 311 [records] raises more alarm bells than the opposite (Z Bytheway personal communication 2009).

From the 311 client records that were identified, JobWatch extracted more detailed information about 19 case studies involving workers on a range of visa categories, which help to illustrate both the vulnerability and exploitation of visa holders and those who are working in Australia illegally (see Appendix C). The case studies reflect the experience of people in a range of migration situations—on working holiday visas, student visas, on 457 visas and working illegally. The individuals concerned were employed in a range of situations—as domestic workers, in restaurants or bars, in temples, in sales, in fruit picking and agriculture, industrial cleaning and as labourers. With the information available in the case studies, it is very difficult to make any sort of determination as to whether or not individuals may have been subjected to slavery, trafficking in persons or some other crime under the *Criminal Code* (Cth). However, what is very clear is that the individuals concerned were vulnerable as a result of a combination of factors and this vulnerability was abused by their employers for their own gain.

In an interview conducted for the purposes of this research, the Executive Director of JobWatch noted that in her organisation's experience, the higher the degree of vulnerability and the lower the bargaining power, the greater the unlawful activity by employers. She noted that unlawful activity is not limited to one type of conduct. It can include unlawful discrimination, breaches of OHS standards, assault, non-payment, underpayment and so on. She also noted that vulnerability or lack of bargaining power is not necessarily the result of a single factor:

> Vulnerability or a lack of bargaining power can result from many factors—language issues, visa status and any number of other factors. The more you stack up, the less bargaining position people have. It arises really, where anyone is beholden

(eg visa holders, low income workers). It arises in all of the situations where bargaining position is eroded—the higher the degree of vulnerability and the lesser the bargaining position, the worse people will be treated (Z Bytheway personal communication 2009).

Known instances of unreported labour trafficking

While many services might inadvertently interact with victims of trafficking, there are a relatively small number of services that have a specific focus on trafficking in Australia. Accordingly, there are only a small number of services in Australia that have the capacity to categorically confirm whether or not they have provided support or assistance to victims of labour trafficking. One of the organisations that is in a position to confirm this is The Salvation Army's Safe House for Trafficked Women.

The Safe House was established in 2007 in Sydney as part of an existing homeless women's service and can support 10 women at a time. The specialised staff comprise a supervisor (program manager), a senior support worker and a support worker. All staff at the service can screen referrals using an intake form that reflects the definition of trafficking in persons found in the UN Trafficking Protocol. The supervisor makes final decisions about service eligibility in consultation with staff. Because of trauma, poor physical health and other factors such as injury, some referrals must be assessed over multiple sessions. In these cases, staff can temporarily accommodate referrals in the larger women's crisis service until they are stable enough to complete the assessment process. Those who are not eligible for the Safe House are often eligible for other Salvation Army services or referred to other agencies for assistance. In terms of the residential component of the program, clients are eligible for support if they have been subjected to human trafficking, slavery and/or slavery like practices such as debt bondage and they are female, unaccompanied by children, homeless and in need of assistance. The program also provides non-residential support. This aspect of the program is open to both men and women who have been subjected to human trafficking, slavery and/or slavery like practices, who are in need of assistance (J Stanger, The Salvation Army personal communication 13 Mar 2009, 23 Feb 2010).

The Safe House commenced service provision in January 2008 and is entirely funded by The Salvation Army. Between January 2008 and June 2009, the service received 61 referrals (55 female and 6 male), 58 of which were assessed for human trafficking, slavery and/or slavery like practices (3 were unable to be assessed). Thirty-seven of this group of 58 individuals were assessed as being eligible for the service. The age of referrals ranged from 16 to 56 years.

Of the 37 individuals who were assessed as being eligible for the service, 20 of this group had had contact with the AFP and/or DIAC. Eleven of the 20 who had had contact with the AFP and/or DIAC participated in the federally-funded People Trafficking Support program. Only one referral moved forward to the point of participation in a criminal justice proceeding for trafficking in persons/a trafficking-related offence. This means that in essence, 17 out of a total 37 clients of this program had elected not to report their experience to the AFP. A significant number of residents chose (successfully) to seek permanent residency through other immigration provisions, rather than make a formal statement to the AFP. Some residents engaged with local law enforcement regarding offences under state laws (J Stanger, The Salvation Army personal communication 13 Mar 2009, 23 Feb 2010).

The program manager interviewed for this project noted that of these 37 clients, most have been exploited in contexts other than the commercial sex industry. Clients have experienced exploitation in industries including agriculture, hospitality, retail, massage, domestic work, provision of sexual services to individuals, commercial sex work and health care. Some of the individuals within this group had been trafficked to other countries before Australia and some had been trafficked through marriage. Regardless of the type of exploitation, the majority of female clients were subjected to some form of sexual violence (J Stanger, The Salvation Army personal communication 13 Mar 2009, 23 February 2010).

In terms of sources of referrals, the program manager noted that from her perspective, local police, ethnic community groups and union

organisers have an incredibly important role to play in identifying and responding appropriately to people who have been trafficked. They serve as a front-line response to a range of issues in local communities. Some clients at the Safe House had been given incorrect information and referrals, or simply refused assistance when they came into contact with these organisations. It is the program manager's experience that these organisations lack basic knowledge about trafficking in persons, the Commonwealth offences and the support available to trafficked persons. The program manager noted that several local unions have provided substantial support to people whose experiences in Australia reflect the definition in the UN Trafficking Protocol. However, their response strategies have relied on traditional, organised labour models, again, due to the lack of awareness of the Commonwealth anti-trafficking framework (J Stanger, The Salvation Army personal communication 13 Mar 2009, 23 Feb 2010).

Categories or sectors within the larger migrant population where there is a perceived risk of severe exploitation, up to and including labour trafficking

As there are only a small number of services in Australia that work directly with trafficked persons, information was sought about perceptions of risk from agencies, services and individuals that work with relevant populations, without necessarily having a specific focus or mandate on trafficking in persons. This included representatives from unions who work with industries that have been previously implicated as a source or risk and other organisations that work with migrant workers. Given time constraints, it was not possible to make contact with every organisation in Australia that has a role in supporting or providing services to relevant populations. For example, there was not time during the course of this study to make contact with the full spectrum of Legal Aid offices, or community legal centres and other services that work directly with refugee and other migrant populations.

Despite these limitations, information compiled during this research process did highlight the potential vulnerability of certain industries or forms of work, and also certain groups of visa holders. Where possible, detailed information was sought about the known or suspected instances of exploitation within these categories of concern, to try to assist in understanding the nature of vulnerability but also the nature of the exploitation. It can be very difficult to clearly categorise these cases as either 457 visa holders or a particular industry, as some cases cross over into multiple categories. However, an examination of these cases provides some insights into the nature of vulnerability, the nature of opportunity for exploitation and barriers to detection of these cases.

Construction industry

In the research process, participants referred to several very serious instances of exploitation involving workers in the construction industry. Most of these instances appeared to involve workers on 457 visas, a specific issue discussed further below. However, several involved workers in different situations—for example, young people from the Cook Islands who had New Zealand passports, so had no requirement to obtain a visa to live and work in Australia. Some of the issues arising in these cases include:

- vulnerability due to age, cultural disorientation or physical isolation;
- use of physical force to maintain control in situations that could probably equally be described as domestic or intra-familial violence;
- the potential for workplace safety issues to cross over into criminal conduct such as assault and slavery;
- use of physical barriers to maintain control; and
- use of threats against the worker and their family (who are known to recruiters back in the workers home country) to maintain control.

A selection of these cases is noted in Boxes 2, 3, 4 and 5.

Box 2: Case study one

In 2006, the Construction, Forestry, Mining and Energy Union (CFMEU) was notified by one of its delegates about the situation of Samuel Kautai, a young man from the Cook Islands. Samuel, along with another four young men, all of about 17–18 years of age, had been living and working for Manuel Purauto (also referred to by the family name of *Purito* and *Puruto* in legal proceedings). The delegate had heard through the community that Samuel had been beaten and had not been paid. Samuel had run away from Mr Purauto, while the group had been on 'holiday' in the Central Coast of New South Wales (CFMEU NSW personal communication 2009).

Samuel and the other young men had been recruited by Mr Purauto's brother, a man who lived in the Cook Islands. Samuel, who was 17 years old at the time, initially heard about the job opportunity through a family member who was related to Mr Purauto. Samuel went to talk to Mr Purauto's brother about the opportunity. Samuel Kautai recalls being told by the brother that he would be paid wages, however he would not get any wages for the first three weeks but after that he would get paid the full amount and that Mr Purauto would send money back to his family in the Cook Islands. Samuel was also told that Mr Purauto was a good man who would not touch him (Affidavit of Samuel Kautai, submitted in *Samuel Kautai v Manuel Puruto, Leisl Puruto and Freliesma Guttering Pty Ltd* No. CIM 106709 of 2006).

After working for Mr Purauto for a period of approximately 18 months, in which he was physically abused, Samuel was left with permanent blindness in one eye and brain damage. During this time, he, along with the other young men, had lived in Mr Purauto's house. His passport had been taken by Mr Puruto 'Manual Puruto still has my passport. I have not asked him for it as I am too afraid to confront him' (Affadavit of Sam Kautai, 1 November 2006, submitted in *Samuel Kautai v Manuel Puruto, Leisl Puruto and Freliesma Guttering Pty Ltd* No. CIM 106709 of 2006).

He worked long hours, usually arriving on job sites at 5.30 am, starting work at 6 am and then returning home at about 8 or 9 pm at night, and he worked six days a week (Sunday to Friday). He and the other young men were not properly fed. According to his affidavit, Samuel was sometimes given breakfast, sometimes got a break during the day, but mostly he worked all day without a break or a meal. At night, they were generally fed bread and noodles. They were fed a good meal on the weekends. Samuel also noted that:

> We were only provided with lunch on days when Manuel Puruto was satisfied with our work. If Manuel Puruto was not satisfied with our progress he would get very angry. I often saw him become very aggressive to the other workers. On several occasions, I suffered injuries from being physically abused and hit by Manual Puruto and a complaint has been made to the police which is currently before the criminal courts (Affidavit of Samuel Kautai, submitted in *Samuel Kautai v Manuel Puruto, Leisl Puruto and Freliesma Guttering Pty Ltd* No. CIM 106709 of 2006).

Samuel and the other young men occasionally resorted to asking for food from other workers on construction sites (CFMEU NSW personal communication 2009).

Samuel and the other young men were not paid properly but were instead occasionally paid small amounts of money; never more than $50 a month (Affidavit of Samuel Kautai, submitted in *Samuel Kautai v Manuel Puruto, Leisl Puruto and Freliesma Guttering Pty Ltd* No. CIM 106709 of 2006).

At one point, Samuel fell off a three story roof and critically hurt his back. Mr Purauto sent him home to lie in a bath of ice and complained when he was not healing quickly enough to come back to work. Mr Purauto did not take Samuel to hospital or seek any other medical care (CFMEU NSW personal communication 2009).

This case was pursued by the CFMEU under industrial mechanisms and by the NSW Police Force under state criminal law. The case was referred by a local NGO to the AFP. The outcomes of the case are as follows:

Industrial proceedings—in 2007, the CFMEU represented Sam Kautai and one of the other young men, Ngatokorima Pierrot Kainuku, in the Chief Industrial Magistrates Court in New South Wales. The Magistrate decided in favour of the applicants and ordered Mr Purauto pay $136,018 to Sam Kautai and $66,049 to Ngatokorima Pierrot Kainuku.

State criminal proceedings—Mr Purauto was charged and convicted of maliciously inflicting grievous bodily harm, under NSW legislation. The Magistrates' court ordered Mr Purauto to provide back pay to his employees, including $136,000 to Samuel Kautai. The Magistrate said this case was sufficiently serious that it should have been prosecuted in the District Court as they can sentence up to seven years—but that the Magistrate was bound by the decision of the NSW Director of Public Prosecutions on this. Accordingly, he imposed the maximum sentence possible in Magistrates Court (2 years). In sentencing, Magistrate noted Mr Purauto was 'deliberately and calculatedly violent and abusive' to his workers and he hit Mr Kautai, 'knowing that he was a subservient young man who would not dream of defending himself or complaining'.

Box 3: Case study two

A further two young people, one male and one female, were again recruited through the brother of Manual Purauto to work in Australia with another one of Mr Purauto's relatives, Carey (Gary) Metcalfe. These young people were also subjected to very harsh treatment. The female worked both as a domestic worker in the home and in the guttering business. While this particular employer was not as violent as Perauto, he did use threats of handing the young people over to Perauto for punishment as a form of control. These young people were assisted by the CFMEU. They participated in various proceedings in support of the first group of young men and also took their own proceedings. Their cases were the subject of confidential settlements (CFMEU NSW personal communication 2009).

Box 4: Case study three

A group of seven Indian stonemasons were recruited by a temple committee in approximately 1999 to work on a temple in regional New South Wales. The men were brought to Australia on 457 visas and lived on the work site in two shipping containers, where the only ventilation was the door. The men bathed with the hose on the construction site. The construction site had a fence all the way around it with barbed wire on top. The gates were permanently locked. At various points, they sought permission to have the key to the locked gate so they could leave the site but this was denied. They were taken out once a month for about half a day under the direct supervision of a person from the temple. Their passports had been confiscated and they were threatened if they complained (CFMEU NSW personal communication 2009).

The men had been promised decent wages but were, in fact, paid approximately $10–15 per week. They generally worked seven days a week. They were only taken to a doctor very occasionally when they were very ill, otherwise they just had to suffer through bouts of illness. The CFMEU ran a lengthy case against the temple. This resulted in a negotiated settlement (CFMEU NSW personal communication 2009).

Box 5: Case study four

A Filipino carpenter was recruited to work with a stonemasonry company. Once on the job site, he was required to do manual labour, such as lift heavy slabs of rock and other odd jobs. He lived in accommodation provided by the employer. After lifting some heavy stones, he nearly injured himself. He asked about his working conditions and was shown a bullet by his employer, who threatened him, told him he owed money to the recruiter and to the company and that the recruiter in the Philippines has a direct line to his family.

He made contact with a volunteer from Migranté who assisted him to make contact with a union. He was very scared. The community organisation and the union were able to assist him to find a place to live but not another job. While he was trying to sort out his situation, his family in the Philippines was visited by an associate of the recruiter who threatened them should they not be able to encourage him to return to his employer (Migranté WA personal communication 2009; Unions WA personal communication 2009).

Exploitation of 457 visa holders

Several of the construction industry cases (eg see Box 5) involve 457 visa holders. A number of other cases and issues raised during the current research process also involved 457 visa holders. The link between potential for exploitation of 457 visa holders and labour trafficking is certainly not new. In a report published in 2007, Elaine Pearson and GAATW argued that several cases of extreme exploitation of 457 visa holders that had been identified by the unions could and should have been investigated as potential labour trafficking cases (see GAATW 2007).

More recently, in 2009, Cullen and McSherry (2009) drew attention to the potential to conceptualise the situation of the Aprint case (see Box 1), a case involving industrial breaches against 457 visa holders as a criminal offence such as slavery or trafficking in persons. Indeed, one of the two labour trafficking prosecutions pursued by the federal criminal justice authorities involved a 457 visa holder (see the Rasalingam case involving the alleged trafficking of a young Indian chef).

During the course of the current research process, the government completed a major review of the

457 visa category (discussed further below). As noted in that review, the bulk of the problems within the 457 visa category have been encountered in relation to the ASCO 4–7 category, that is, a range of semi-skilled occupations including cooks, chefs, nurses, welders, metal fabricators, stonemasons, construction workers and meat workers. This was certainly reflected in the instances of exploitation that were discussed by participants in this study, several of which are noted below.

Nurses

Various instances of exploitation of nurses have been documented, both in the press and also through industrial proceedings (eg see *Armstrong v Health Care Recruiting Australia Pty Ltd* [2008] FMCA 1050; McKenzie 2007). One particularly extreme instance was noted in the course of this research that potentially appears to meet the criteria of trafficking in persons. This case involved a group of approximately 10 nurses who had been recruited in the Philippines to work in Australia. They understood they would work as nurses. Once in Australia, they were confined to a house and were forced to work as unpaid cleaners in Victoria. The group received assistance from volunteers working for a community organisation, Migranté (Migranté personal communication 2009).

Chefs and cooks

Various participants in the current research noted the widely-publicised exploitation of a group of eight Filipino chefs in Canberra (cases that were also noted by Pearson in the 2007 GAATW study: see GAATW 2007). In an interview with the former Liquor, Hospitality and Miscellaneous Workers Union (LHMU) organiser who worked closely with this group of Filipino chefs for around two years, he noted that, in his view, the chefs had been sold by their employer to other restaurants. It was noted that:

> [The restaurant owner/employer] had gone around to a lot of employers and said 'I've got these cheap cooks. You can either buy one or rent one. 'He sold them—that is the way you have to describe it—or rented them out—and the price ranged from $8,000 to $12,000 (Bibo personal communication 2009).

The restaurant owner/employer was paid $8,000 by one restaurant and $12,000 by a second restaurant for the chefs. The restaurants then paid the workers at reduced rates, some of which went to the restaurant owner/employer. In interview, the definition of slavery articulated in the Wei Tang case was discussed, including the focus on features such as the buying and selling people and the practice of exercising unusually high levels of control over people. In terms of whether or not this amounted to an instance of slavery, the organiser stated in interview 'that is how they were treated, that is how they felt, that is how I and others perceived it, that is the way it was' (Bibo personal communication 2009). The situation of the Filipino chefs was brought to the attention of DIAC and state (NSW) police. Some of the chefs obtained financial redress through the small claims court and also through the ACT Human Rights Office. Several restaurants were later investigated and prosecuted by the (then) Workplace Ombudsman. Significant fines were imposed but these were not paid to the individual chefs involved (Bibo personal communication 2009).

It appears that the exploitation of the Filipino chefs in Canberra was not an isolated instance. For example, another participant from the LHMU in Victoria noted the situation of an Indian chef, Baskar Kannanudaiyar, who alleged he had been made to work 13 hour days, six days a week with no breaks, while also having to prepare meals in his employer's home. Mr Kannanudaiyar had paid his employer $10,000 for the opportunity to come to Australia and work on a 457 visa. He was initially paid on a weekly basis, however, payment stopped in about May 2006. After this situation continued for six months, Mr Kannanudaiyar asked his employer for back pay. His employer allegedly threatened him with death, boasting he knew people who would attack his family back in India and pushed him into the hot tandoor oven. When the LHMU officer first found him, he was literally sitting in the gutter crying, covered in burns and bruises (LHMU Victoria personal communication 2009; see also Bachelard 2007; Crawford 2007). The LHMU assisted Mr Kannanudaiyar to make contact with the (now defunct) Office of the Victorian Workplace Rights Advocate. The outcome of this case is unknown.

A review of a reasonably small sample of Migration Review Tribunal decisions suggests that these examples of serious mistreatment of chefs are not isolated instances (eg see the case of Mr Z, reported in 071636603 [2008] MRTA 33 (21 January 2008)). In the case of Mr Z, to secure sponsorship on a 457 visa, Mr Z had allegedly paid a total sum of $33,000 to his Mildura-based employer in Australia, who then terminated his sponsorship after six weeks when he complained about unpaid wages. In a record of interview with the DIAC, the applicant, Mr Z, made the following statement about his working conditions:

> The environment there was dark, I had a feeling of horror working there…My employer kept scalding me and bullying me. I would prefer to die.

When asked if a workbook was kept or payslips were given, the applicant stated 'there were no workbook, no official record, but there were video cameras'.

The applicant noted that he started work at 8 am or 9 am and finished at 10 pm or 11 pm. He said the employer threatened to have his visa taken away. The tribunal noted that after the interview, the department had provided the applicant and his family with emergency contact information, as they were clearly distressed and did not have the resources to deal with the situation (071636603 [2008] MRTA 33 (21 January 2008)). According to the information discussed by the tribunal, the case was investigated by the OWS for breaches of the *Workplace Relations Act 1996* (Cth) (071636603 [2008] MRTA 33 (21 January 2008)). It is not known if this matter was also referred to the police for consideration of criminal charges.

Other similar examples can be found in MRT decisions. See for example:

- Surinder Singh [2002] MRTA 5982 (15 October 2002, paragraph 33); and
- Dinesh Singh Panwar [2002] MRTA 5981 (15 October 2002, paragraph 32).

Other relevant case studies involving various serious instances of exploitation of Indian cooks and chefs were also documented in the submission of Dr Amanda Wise and Dr Selvaraj Velayutham, provided to the Joint Standing Committee on Migration's inquiry into eligibility requirements and monitoring, enforcement and reporting arrangements for temporary business visas in May 2007 (Wise & Velayutham 2007).

Meat industry

In addition to hospitality, a significant number of 457 visa holders are employed as slaughtermen or butchers in the Australian meat industry. Several participants described the meat industry as an industry where there is significant potential for the full spectrum of exploitation (Kinnaird personal communication 2009; Migranté personal communication 2009; Unions WA personal communication 2009). A representative from the Australasian Meat Industry Employees Union, Western Australia (AMIEU WA) noted that the nature of the industry itself lends itself to exploitation; it is a labour intensive industry that is generally low technology and relatively low profit industry. The industry struggles to attract staff, with a high proportion of workers in the industry having low levels of education and literacy. It was also noted that abattoirs are one of the few industries that provide employment opportunities for people with criminal histories and enables people from the shop floor to progress into management (AMIEU WA personal communication 2009).

With labour shortages increasingly affecting the industry, employers have been drawing on workers from overseas. In an interview with a representative from the AMIEU WA, this was described as being a 'profoundly rich territory for exploitation' both because of the nature of the industry itself, but also because the migrants that are being employed are people who are coming from very poor countries—Nigeria, the Philippines, China, Korea—and they would have been on very low salaries even in their own countries. The people who are employed have very little or no understanding of industrial conditions, so in that sense, very little in the way of coercion is required to get them to ignore safety or other standards. However, even as they gain a better understanding of industrial conditions over time, they are unwilling try to enforce these. It was noted that:

> …the constant threat of withdrawal of sponsorship keeps them in line. The employer only has to say, 'if you don't like it, there are plenty who will take your place and we'll withdraw your sponsorship' (AMIEU WA personal communication 2009).

Other techniques of control were noted. One particular abattoir that was recently sanctioned for underpaying 457 visa holders was described as 'a very oppressive place'; it was surrounded by fencing, there were security cameras in rooms for no apparent reason and once workers went inside, they had to get a foreman to let them out. It was noted that these kinds of security or surveillance measures were not in place in any other abattoirs (AMIEU WA personal communication 2009).

The issue of the potential for exploitation of spouses was also raised in the context of the meat industry (AMIEU WA personal communication 2009; Kinnaird personal communication 2009; Unions WA personal communication 2009). For example, as many primary visa holders and their spouses are employed at the same abbatoirs, unscrupulous employers who wanted to punish or control the primary visa holders (generally the husbands) for some perceived infringement, can seek to do this through requiring their spouses (generally the wives) to do very dirty and demeaning work (such as cleaning up the manure in the areas where the animals are slaughtered). An example was given of a company that had described this practice in an internal company memo.

Another participant noted situations involving underpayment and coercion of spouses of 457 visa holders in Queensland. In summary, the employer told the employees that they would employ their wives, but for a very low rate of pay. The arrangement was if the visa holder kept quiet about this, then both he and his wife would have work and eventually be sponsored for permanent residency. It was noted that 'if permanent residency is the main prize, the temptation to accept this situation is very strong' (Kinnaird personal communication 2009).

It is not clear if any of the specific examples that were given would cross the line into criminal conduct. However, it was noted that:

> What this demonstrates is the wretchedness, the powerlessness, the power relationship with an employer who can exercise that level of control, where employees will do things they would rather not do, they will put themselves in jeopardy, they will not claim statutory entitlements, because if they do and it costs their employer money, they fear for their continued sponsorship.
>
> It demonstrates their vulnerability. If you wanted to sexually exploit someone, you could. If you wanted to physically intimidate someone, you could. If you wanted to use people for illegal activities, you could (AMIEU WA personal communication 2009).

Similarly, another participant noted:

> In terms of the forced labour aspect, if I have to put money on where you'd find it in the 457 program, then I'd have a look at the spouse situation at the low end of the skills market, with workers who have come from very low wage countries (Kinnaird personal communication 2009).

Manufacturing

The Aprint case, involving a number of Chinese printers on 457 visas, has already been mentioned (see discussion in *Information about known or suspected incidences of labour trafficking provided by government sources*). Other situations involving allegations of various exploitative practices against welders and other manufacturing workers were raised in the course of this research. This included the example of Philippine welders who were simply put on a plane home, without having any opportunity to seek recovery of wages or pursue alternative employment. A number of detailed case studies were documented by the Australian Manufacturing Workers Union (AMWU) in its submission to the Deegan review (AMWU 2008), including the following case study.

Case study

Dartbridge Welding recruited approximately 40 welders from the Philippines. The welders were charged a $3,000 recruitment fee and interest on this debt. On arrival in Australia, they were taken to a bank where they were presented with direct debit authorities to sign to give the employer and the recruitment company the right to directly debit money from their bank accounts. The welders were placed in houses, two to a room, for which the employer collected $1,400 per house per week from the workers. Dartbridge directly employed a small number of these workers, with the rest placed with a host employer. The welders were paid the minimum legislated salary but after the direct debits were taken out, their salary was less than $27,000. The workers were subjected to a great deal of verbal abuse and threatening behaviour by the owner of Dartbridge. Following contact with the AMWU, the welders joined the union. Three of the most outspoken

welders were dismissed and others were threatened with dismissal and deportation (AMWU 2008).

It is not suggested that the Dartbridge case is necessarily an instance of labour trafficking. However, this is an example of the complex intersection of debt, unlawful deductions and threats about loss of visa and deportation in the manufacturing sector.

In summary, participants in the current research process noted a number of factors in the 457 visa program that they considered contributed to individual vulnerability to exploitation on the one hand and the creation of opportunities to abuse that vulnerability on the other. Relevant factors included the following:

- The apparently common practice of paying substantial fees to overseas recruiters and agents. This results in the migrants arriving in Australia having already incurred a significant debt. This then has to be worked off before the migrant can start earning money for themselves. The practical result is that the migrant is under considerable financial pressure and has limited funds available to them during their initial period of work. This seriously limits their capacity to exercise choice over things like choice of staying or leaving a particular employer, or ability to obtain independent accommodation.
- Several participants mentioned the practice of some agents requiring payment of a bond back in the home country. One participant suggested that these bonds can be used as a form of control as they are not repaid if the migrant causes trouble.
- The capacity of employers to make (veiled or explicit) threats regarding loss of employment (and subsequent loss of visa and loss of sponsorship) as a method to maintain control.
- The capacity of employers to make (sometimes fraudulent) promises of sponsoring an employee for permanent residency as a method of maintaining control for extended periods of time. Individual migrants have a much higher chance of securing permanent residency if they are sponsored by an employer, than if they pursue permanent residency without a sponsor.
- The creation of several cottage industries around the 457 visa category, such as 'fixers' who will, for a fee, help a 457 visa holder find a new sponsor (again resulting in further debt).
- The constellation of factors tied up in migrants originating from countries with relatively low wages, limited English, being in a situation of limited social support and with high financial and other pressures.
- The practice of 'revolving' wages where wages are paid and then recouped by the employer for over-priced accommodation, transportation and other living expenses.
- The difference between availability of rights in theory and the capacity to access rights.
- The potential vulnerability of secondary visa holders (generally spouses but also children) of the primary 457 visa holders. Unscrupulous employers have been known to expect the secondary visa holders to work for little or no pay as part of the package of sponsorship.

The Deegan review

At the time of this research process, the 457 visa category was subject to a major review by Commissioner Barbara Deegan, an industrial relations expert. As part of this Visa Subclass 457 Integrity Review, three issue papers were released along with a final report in October 2008 (Deegan 2008a). Deegan's (2008b) third issue paper, published prior to her final report, discusses aspects of the visa framework that appear to provide opportunities for exploitation of employees. Deegan's consultations noted the particular vulnerability of those employed in the lower skill groups, that is, occupations defined as being within the ASCO 4–7 group (cooks, chefs, trades, manufacturing etc). Consultations suggested that the measures that were in place to protect those working within the more highly skilled labour force of ASCO 1–3 groups (which includes professionals and senior executives) were not sufficient to protect those working in the lower ASCO major groups.

The following were noted by Deegan as the main features of the 457 visa framework that provide the opportunity for exploiting this group of overseas workers:

- the use of the minimum salary level (MSL);
- the role of agents;
- the 457 visa as a gateway to permanent residency;
- the potential of 'bonding' employee to employer;
- gaps in regulating employer's compliance to their obligations;

- the vulnerabilities of secondary 457 visa holders (ie family members of primary visa holder);
- the complexity of the relevant legislation; and
- the lack of available support and information to visa holders.

Employers are required to pay the 457 visa holders they are sponsoring at least the MSL, unless workplace law or a negotiated agreement requires them to pay a higher salary. Statistics show that industry workers were paid, on average, well above the MSL, thus for all ASCO groups other than those in ASCOs 8–9, the standard MSLs at the time (2000–07) were well below average salaries (Deegan 2008b). As 457 visa holders are not provided with the same government services as Australian citizens or permanent residents, it was suggested that 457 visa holders be paid at a premium market rate to compensate for this discrepancy.

Deegan (2008b) cited the role of offshore 'agents' as a major integrity concern as they are outside the Commonwealth legislation regulations. Concerns were also raised that some migration agents provide misleading information to employers about their obligations to their sponsored employees, leading employers to believe that the system provides an opportunity for them to acquire a 'bonded' workforce and that employers are within their rights to recover the costs of bringing a worker over from the visa holder's wages (Deegan 2008b). Stakeholders also provided examples of migration agents who told employers that the subclass 457 visa is only valid for 12 months, with the agents then charging employer and employee fees of up to $10,000 to 'renew' the visa.

In 2007–08, over 20,000 457 visa holders (both primary and secondary) were granted permanent visas. Because this process is made easier with the sponsorship of an employer (Deegan 2008a), there are concerns that visa holders would thus be more inclined to tolerate and endure exploitative work and living conditions when they have permanent residency as a long-term goal. Deegan (2008a) notes that this puts visa holders in an incredibly vulnerable position; they cannot risk complaining about their experience of exploitation if it would mean they could potentially lose their job and potentially lose their opportunity to permanent residency. In her final report, Deegan noted that:

> Many Subclass 457 visa holders are potentially vulnerable to exploitation as a consequence of their temporary status. This is particularly so in relation to those who may have aspirations toward permanent residency (Deegan 2008a: 23).

Deegan concluded that because of these structural factors, such as the barriers to reporting,

> …the incidences of exploitation involving Subclass 457 visa holders that are brought to the attention of the authorities are a very small part of the overall problem (Deegan 2008a: 24).

There are concerns that the condition restricting visa holders to work for only one employer dangerously limits their mobility. This requirement may be perceived as bonding the employee to employer (Deegan 2008b). The review also noted the misperception of some employers and employees that a sponsor has the power to cancel a visa. Although they have the right to withdraw their sponsorship, the visa holder is able to retain their visa status if another sponsorship is acquired (Deegan 2008b). These false perceptions clearly contribute to visa holders' hesitation in reporting cases of labour exploitation and sponsors' misperceptions of their rights over employers. It was also uncovered during the review that arrangements to ensure compliance with the sponsor's obligations to the visa holder are ill-defined (Deegan 2008b). Infringements of these obligations result in mainly administrative sanctions and are rarely enforced.

Although secondary visa holders have unrestricted work rights, it was noted that secondary visa holders are subject to the same risk factors of exploitation as the primary visa holder, particularly dependent children who turn 18 years of age while on their subclass 457 visa. Deegan notes in her review:

> During consultations, claims have also been made that children of primary visa holders who have left school have been persuaded to work under irregular and exploitative conditions for employers who have claimed [that actually paying correct wages] would jeopardise that person's status as a dependent of the primary visa holder and their right to remain in Australia (Deegan 2008b: 29).

Stakeholders also described incidences where 457 visa holders sign contracts offshore that breach Commonwealth legislation (eg bar union membership) and raised concerns that services that are generally available to permanent residents are not available to temporary visa holders.

The Deegan review and insights into vulnerability to labour trafficking

The Deegan review focused on understanding and responding to the exploitation aspects of the 457 visa caseload. This is a broader category of behaviour than exploitation as it is defined in the UN Trafficking Protocol. Nonetheless, the Deegan review provides valuable insights into the broad spectrum of experience within which examples of trafficking for the purposes of labour exploitation might be found. On a personal level, Ms Deegan accessed comprehensive records from key government agencies and held numerous discussions with unions and advocates around Australia. As such, she has considerable insight into not only the aggregate situation of 457 visa holders, but also individual cases that were brought to her attention.

In an interview with Ms Deegan after the review was completed, she stated that, in her view, all of the cases she identified in her inquiry were better described as labour exploitation rather than labour trafficking. She made this assessment on the basis that the migrants in question had come voluntarily to Australia to work. However, once in Australia, they then found themselves subjected to various illegal practices such as unlawful salary deductions, under-payment and breach of OHS conditions. While these practices were exploitative, they were not of sufficient extremity to constitute, for example, forced labour or slavery. She noted that the people in question appeared to have a capacity to change their circumstances, by leaving (or being assisted to leave) their situation. However, she also noted that a number of cases were brought to her attention where it had been found that employers of 457 visa holders had retained the passports of visa holders, allegedly for safe keeping. Ms Deegan noted that this was clearly a concern given the restriction it potentially imposes on visa holders (B Deegan personal communication 1 Aug 2008, 11 Dec 2008).

Ms Deegan emphasised that while the cases she identified were better described as labour exploitation, this did not mean labour trafficking was not taking place. It simply meant she did not encounter cases that could be properly described as labour trafficking. She noted that in her review she only examined the situation of workers on 457 visas and she also noted how difficult it was for her to make contact with visa holders who were being exploited. By implication, it would be even more difficult to make contact with migrant workers who had been trafficked into forced labour or slave-like conditions. She said that, in her experience, the only visa holders who were prepared to discuss exploitative situations were those who were accessed through existing relationships of trust, or in situations where the visa holder had already left the position and found a new employer, with better conditions and a level of security. Concern about loss of livelihood and fear of deportation were critical concerns for visa holders. Ms Deegan noted that these concerns have to be understood alongside other concerns, such as the desire of many visa holders to obtain the assistance of their employer to access permanent residency. These factors, along with language and cultural barriers, all constituted significant disincentives to disclosing (let alone reporting) exploitative situations. These disincentives also exist alongside other factors, such as the distrust, fear or wariness that many visa holders may have of government officials (B Deegan personal communication 1 Aug 2008, 11 Dec 2008).

At a conference in 2009, Ms Deegan further commented that the situations she encountered through the review could certainly have descended into trafficking-like situations, had the government not taken active steps in 2008 and 2009 to combat this problem.

Reforms post-Deegan review

The reforms that were developed by the government through 2008 that were implemented throughout 2009 include the following:

- the indexation of the MSL for all new and existing 457 visa holders by 4.1 percent on 1 July 2009;
- the implementation of a market-based minimum salary for all new and existing 457 holders from mid-September 2009;
- increasing the existing minimum language requirement from 4.5 IELTS to 5 IELTS for 457 applicants in trade occupations and chefs (this change was effective as of 14 April 2009 for those with a nominated occupation in the ASCO Major Groups 4–7 or chefs and head chefs);

- progressively introducing formal skills assessment from 1 July 2009 for 457 visa applicants from high-risk immigration countries in trade occupations and chefs;
- introducing a requirement that employers seeking access to the 457 visa program have a strong record of, or demonstrated commitment to, employing local labour and non-discriminatory practices (as of 1 April 2009 employers have to attest in writing that they will fulfil these requirements);
- the development of training benchmarks to clarify the existing requirement of employers to demonstrate a commitment to training local labour; and
- the extension of the labour agreement pathway to all ASCO 5–7 occupations (as of 15 May 2009, ASCO Major Groups 5–7 are no longer able to be nominated under the subclass 457 standard business sponsorship; if employers want to sponsor an overseas employer in an ASCO 5–7 occupation, they will have to seek a labour agreement).

Further information about these changes can be found on the DIAC website.

457 reforms and their relevance to preventing possible labour trafficking

The removal of certain lower-skilled occupations from the skills-in-demand list, namely, construction and hospitality workers, is significant from the perspective of anti-trafficking, as these are two sectors where labour trafficking cases have been detected. Nonetheless, it is notable that the government reforms have not yet addressed several other significant issues raised by the Deegan review as follows:

- The requirement that employees have a sponsor. The extension of the timeframe within which employees can find a new sponsor is significant as this gives employees a better chance of leaving one job and finding another employer that will both employ and sponsor them. However, it remains to be seen if this will be enough to completely remove the bonded element of this program in practice. It is already known, for example, that there are individuals within Australia who will, for a fee, help 457 visa holders find a new sponsor. The going rate is currently around $5,000. This suggests the creation of a new (grey or black) market for assistance to visa holders.
- The path to permanent residency, which remains a tool that can be used by unscrupulous employers to manipulate vulnerable workers into accepting exploitative conditions. Deegan (2008b) suggested that a greater weight be given to the time worked by the visa holder for any Australian employer in the process of applying for permanent residency, rather than the current emphasis on the nomination of the employer. As discussed in the following section, unscrupulous employers have been known to use the 'carrot' of permanent residency as a way of manipulating and controlling vulnerable employees.
- That the government provide services to 457 visa holders (a levy on employers is the suggested source of money) and that regional concessions for 457 visas be removed. Together, these recommendations are relevant from an anti-trafficking perspective to the extent that regional concessions result in employers being permitted to recruit what might be considered fairly vulnerable groups of low-skilled workers, such as meat workers from developing countries, in rural or regional areas that have few services and limited social networks for supporting migrant workers.
- That employers be prohibited from obtaining money from a visa holder as a consequence of the visa holder being employed and be prohibited from making any deduction from the wages of the visa holder for payment to any agent. This is significant from an anti-trafficking perspective as the charging of agent's fees and debts were identified in interviews as a factor contributing to individual vulnerability to exploitation (discussed in the following section).
- That high-risk groups of 457 visa holders be identified and inducted on arrival; and that information be given directly to the visa holder rather than through a migration agent or other third party. This is again significant from an anti-trafficking perspective as it may help provide vulnerable employees with additional sources of support and resources.

Domestic workers

There are relatively small numbers of domestic workers in Australia employed either as staff of diplomats or senior executives. There are specific visa categories that facilitate the lawful entry and employment of domestic workers in these situations. An unknown number of individuals are also likely to be in Australia working illegally as domestic workers. However, the apparently small numbers of domestic workers that might be in Australia at any one time, their situation appeared to feature disproportionately in the instances of more severe forms of workplace exploitation that were discussed in this research process, suggesting this is an area of concern.

The exploitation of domestic workers, including through extreme forms of criminal conduct such as slavery or labour trafficking, is known to the Australian authorities. The Kovacs case, discussed earlier, is an example of a case that was prosecuted under the Criminal Code. An NGO working directly with victims of trafficking also reported providing assistance to a number of domestic workers who met that service's criteria for entry into the program, which included that the person was a victim of slavery or trafficking in persons. This included domestic workers from several different parts of the world and not just southeast Asia (J Stanger personal communication 2009).

In addition to the cases that have come to the attention of service providers who assist trafficked persons, there have also been other examples that have been pursued through industrial relations mechanisms (eg see Box 6, Masri v Nenny Santoso and anor [2004] NSWIRComm 108).

In 2005, JobWatch and Victorian Legal Aid assisted a Filipino domestic worker, Jean Adoval, to seek an order against her employer, a diplomat ('Abused and exploited—and now to be deported' *The Age* 9 March 2005). This case continued for several years, with JobWatch continuing to pursue the case and eventually securing a resolution, after four years of advocacy.

It is likely that many of these cases remain either unreported or perhaps unresolved. For example, in 2007, it was reported in the media that a Bangladeshi man had initiated legal proceedings against the United Arab Emirates in the Federal Court, claiming he was not paid during his six months work in Canberra for the Ambassador. According to a media report, the applicant's lawyer was to argue that her client had worked an average 13 hours every weekday between March and September 2005, but was paid a total of $500—less than one week's pay. Allegedly, when the applicant complained to his employer about not having been paid, he was threatened with deportation. According to the Federal Court registry, the case was filed with the Federal Court in February 2007 but discontinued in August 2007 (*Nuruddin Bhola Meah v United Arab Emirates*, Federal Court of Australia, New South Wales Court Registry, filing date 13 February 2007, discontinued/withdrawn on 24 August 2007; see also Marcus 2007).

In summary, the research suggests that there are a number of features of the situation of domestic workers in Australia that merit further consideration in terms of their capacity to contribute to vulnerability:

- Gaps in coverage of domestic workers by industrial legislation. For example, Unions WA gave the example of a domestic worker (employed by a senior executive) who was unable to seek recovery of wages or other entitlements through legal avenues, as WA labour laws do not apply to domestic workers.
- The practical difficulties of ensuring proper treatment of domestic workers when there are issues of diplomatic status. As several of the case studies noted above suggest, diplomatic status can be, and is in practice, used as a way of avoiding industrial obligations. This means domestic workers in diplomatic households have no source of redress, except perhaps through informal pressure.
- Domestic workers typically have very limited social and other support networks, as they live and work in the family household and are frequently dependent on their employer for all of their accommodation, food and transportation. As demonstrated by several of the case studies noted above, this puts them in a particularly dependent and vulnerable situation.

Box 6 *Masri v Nenny Santoso and anor* [2004] NSWIRComm 108

In 2004, a young Indonesian woman, Ms Masri, who worked as a domestic worker in the house of an Indonesian-Australian family, successfully sued her employers under the *Industrial Relations Act 1996* (NSW). According to her evidence, the applicant was approached by an acquaintance about working in Australia for the respondent as a domestic worker. There was no discussion of payment but Ms Masri understood she would be paid around $250 per month, on the basis of what she had been told by others. The respondent arranged for Ms Masri to move to Australia, including arranging false documentation, a false sponsor and traveller's cheques for her. Ms Masri travelled with the respondent to Australia. The Commission notes that:

> From her arrival in Australia on 11 June 1995, the applicant was unaware that she was an illegal immigrant. The applicant arrived in Australia escorted by the first respondent who, soon after arriving, took possession of the applicant's passport, travellers cheques and identification documents (transcript of proceedings, *Masri v Nenny Santoso and anor*, Industrial Relations Commission of NSW 28 April 2004).

According to Ms Masri, she lived and worked in the respondent's home from 13 June 1995 to 2 August 1999. This involved working approximately 17 hours per day. During the four year period, she was paid approximately $2,200 and a payment of approximately $2,000 was made to her family in Indonesia. At no time was she paid a regular wage. It was also alleged that the applicant was not permitted to leave the house other than for the purposes of shopping or cleaning the respondent's office in another suburb. The applicant's evidence was corroborated by the evidence of a neighbouring family, who attested to the fact they saw her mowing lawns, preparing food and waiting on visitors (while not actively participating in functions but waiting in the kitchen) and undertaking other tasks at the beck and call of the family.

The respondents asserted that the applicant was brought to Australia merely as a favour to the driver of an Indonesian relative; it was never to be paid employment and any work performed was performed voluntarily. According to the respondents, assisting the applicant to come to Australia was to do no more than give her an opportunity to learn English, establish herself here and possibly marry an Australian man.

The Commission found in favour of the applicant, noting that on the evidence:

> …the applicant clearly had no money, had no friends or relatives in Australia and was effectively trapped in the relationship with the respondents. The relevant circumstances of this case were that the applicant came to Australia from a third world country and from a background of poverty, where she worked as a maid or servant, she was relatively young and uneducated and she was clearly brought illegally into Australia by the respondents, principally the first respondent. Once in Australia, she was told by the first respondent, the one person she trusted, not to speak to anyone about the work she was doing for the respondents and had promises held out to her for the payment of money in return for doing work in the house. While it could be understood how the applicant felt trapped in this arrangement and why she felt she could do little about it for four years, she ultimately did leave the home of the respondents. Even at that point, she was young, uneducated, in a strange country, knowing few people and she was in no real position to complain to anybody about her circumstances prior to leaving the respondent's home (transcript of proceedings, *Masri v Nenny Santoso and anor*, Industrial Relations Commission of NSW 28 April 2004).

The Commission decided that the arrangement entered into constituted an unfair contract that should be voided, with the exception of the obligation to pay wages. The Commission ordered that the respondent's pay Masri $95,000 in unpaid wages along with interest and costs.

Agricultural sector

The situation of agricultural workers was raised by several participants during this research as a site of possible (and actual) exploitation. It is thought that significant proportions of the workforce in agricultural areas are working illegally. This, in itself, has the capacity to create a situation of vulnerability, as individuals have limited work options and pay can be withheld in order to secure ongoing compliance. However, establishing accurate estimates on the number of illegal workers in the agriculture and horticulture industry is notoriously difficult due to the nature of the seasonal work. The evidence, largely anecdotal, that does exist indicates that workers from southeast Asia, China and the Pacific Islands comprise a large role in this undocumented workforce (Ball, Beacroft and Lindley forthcoming).

While there is certainly no suggestion that instances of extreme exploitation are widespread or normal in this industry, some participants did raise at least two

(and possibly 3) discrete cases that involved quite large groups of (illegal) workers who were very seriously exploited. These instances involved allegations of under-payment, substandard housing (such as animal shelters), management of groups of workers by gang-masters who contract directly with producers as needed, the use of threats and intimidation, and actual violence including sexual assault (AWU personal communication 2009).

Participants raised several features about agricultural work that are relevant to understanding both vulnerability to exploitation and opportunities for abuse of that vulnerability. These include the following:

- Workers coming into the sector include people who cannot access a visa category to work in Australia, so they are coming into Australia on tourist visas. They are paying substantial fees to organisers overseas to assist them both secure a visa and to make connection with an employer in Australia. This fee does not necessarily guarantee work. Once in Australia, they may be charged more fees at the airport, before being taken to work sites.
- Agricultural properties tend to be very large and can be physically isolated. It can be very difficult, even for union organisers, to know what is happening on particular properties.
- In one jurisdiction, there were suggestions that 'training visas' were being misused, with trainee viticulturists being used to pick grapes (despite having understood they would get proper training).
- In Western Australia, the head of Unions WA noted that he had very limited information about working conditions in the agricultural sector in Western Australia. He expressed concern that as Western Australia is so big, and some of the rural areas are so remote, it is very difficult to have sufficient union coverage to ensure good information about working conditions. He considered this is as a significant gap in their information (Unions WA personal communication 2009).

During the period of this research project, the government announced the Pacific Seasonal Worker Pilot Scheme (PSWPS), which facilitates the movement of temporary workers from Tonga, Vanuatu, Kiribati and Papua New Guinea (PNG) to work in the horticulture industry. A memorandum of understanding (MOU) signed between the governments of these countries (with the exception of PNG, who are expected to join the program in 2010) established the terms of agreement between Australia and the respective governments (DEEWR 2010). Three labour companies have been chosen by the Australian Government to recruit and supply workers. These companies, Tree Minders Pty Ltd, Summit Personnel and All Recruiting Services act as the employers for the workers in recruiting them to individual farms in the Griffith and Swan Hill-Robinvale regions.

All participants interviewed for this research suggested that the PSWPS was a step forward, as it involved moving at least some of the (previously undocumented) agricultural workers out of the shadows that are associated with illegality and hopefully towards better working conditions. Several participants also noted the important role that unions and government organisations were having in monitoring working conditions. One participant even commented that the Pacific guest workers will be among some of the most heavily watched and protected group of workers in Australia.

International students

The situation of international students was raised by some participants in the research process. It was not suggested by any participant that international students had been subjected to situations that could be described as labour trafficking. However, the particular vulnerability of international students to exploitation (broadly described) was considered worthy of note and concern.

As previously mentioned, the total figures of international student visas holders is in the order of approximately 300,000 people at any one point in time. While traditionally, international students have come to Australia from other developed countries such as the United Kingdom or the United States, international students are increasingly coming to Australia from developing countries, primarily China and India. This group of students may be under more financial pressure once in Australia if they have limited non-wage support.

In 2005, Nyland et al. (2009) undertook research

which included semi-structured conversations with 200 international higher-education students drawn from nine universities, representing the geographic, urban-rural and status diversity that characterises Australia's higher education sector. The research confirmed a number of findings:

- A large proportion of international students are under significant financial pressure, as they have inadequate non-wage support.
- A significantly higher proportion of international students engage in paid work than has been previously estimated. A third of interviewees revealed paid employment was their main source of income while 57 percent indicated they were employed at the time of the interview.
- International student workers frequently need to undertake employment in occupations that rank low in terms of employment stratification. As a group, they are concentrated at the bottom of the employment market.
- The work that international students can obtain is poorly paid, even if minimum wage standards are being observed. However, it would appear that, in any event, many students are being paid well below the minimum wage.
- Ethnic networks appeared to play a significant role in the employment relationship. These networks facilitate the employment of international students (which itself is a positive factor) but also create an environment that is 'ripe for exploitation' (Nyland et al. 2009: 12).

The research of Nyland et al. (2009) lends weight to the concerns that have been raised about exploitation of international student workers by advocacy groups such as the Union of Fast Food and Convenience Store Workers (UNITE) and various media articles. In a submission to a 2008 Victorian Government inquiry, UNITE made the following points:

- Many international students need to work to meet their financial obligations to the university.
- They are concentrated in certain industries such as night-time taxi work, convenience stores and restaurants.
- They are subject to a 20 hour visa restriction. They risk loss of their visa if they report exploitation and in the process of this have to disclose having worked unlawfully. This makes international students vulnerable to exploitation by unscrupulous employers.

In summary:

UNITE argues that the 20 hour work restriction, coupled with a lack of avenues for students to come forward to complain about breaches of workplace rights, has created a thriving black market in which gross underpayment of wages, fraud by employers, bullying and intimidation of international student workers thrives (Main nd: np).

The report of the Overseas Student Education Experience Taskforce (Victoria) has described the situation as follows:

> …it would appear that there is a significant number of overseas students who are currently working in excess of the allowed 20 hours per week during semester. There are many reasons for this, including the need to earn more money than is possible in 20 hours in order to meet the cost of living here. The consequence is often that the overseas students are at risk of workplace exploitation as they fear they will be reported to the immigration authorities and then deported if they seek to enforce their rights (OSEET 2008: 12).

The 20 hour work limit is not the only factor that can contribute to vulnerability. It is likely that many people seek and apply for a student visa as it is a relatively well-worn path to permanent residency. For many students, a course of study and references from work experience undertaken during their studies can form an important part of their application for permanent residency. It has been alleged that this can be misused by employers who hold out a promise of a reference in exchange for long stints of unpaid 'work experience' or similar practices. It has also been alleged that there are inappropriate connections between the different sectors who are supposed to provide assistance, with (for example) single individuals or entities acting as recruiters for small private training colleges, while also employing students in their small businesses and purporting to provide references and assistance with visas. For example, in a submission to the Victorian Overseas Student Education Experience Taskforce, Empower noted being aware of cases in which private training institutes have recruited students only to have them work for very low or no pay in their small businesses (Deegan 2008a).

In her report on 457 visas, Deegan noted the example of a recent case in the Victorian Magistrates Court, where a Melbourne-based training provider was fined $40,000 over its failure to pay eight Chinese students correct rates of pay, shift allowances, casual loading and penalty rates and for making unlawful deductions from employee's pay. The students were on Occupational Training Visas (Subclass 442).

In its submission to the Deegan review, the Workplace Ombudsman expressed concern that international students may be 'becoming a new group of vulnerable workers open to exploitation by unscrupulous employers' (Deegan 2008b: 89). In 2008, the Workplace Ombudsman published a fact sheet on the rights of international students who work (Workplace Ombudsman 2008).

It is not clear from the existing information whether any of these situations would constitute situations of labour trafficking. At the very least, it seems relevant to note that it appears that some international students are being exploited through lower rates of pay, in poor working conditions, in situations where their migration status or aspirations towards permanent residency can be used to manipulate them. The existence of connections between the recruitment of students both for employment in small businesses and in private training colleges is also concerning.

In August 2009, the government announced that Former Liberal MP Bruce Baird will head a government review into Australia's international education sector, covering issues including student welfare.

Maritime/seafarers

There is some evidence internationally to suggest that individuals have been subjected to labour trafficking on international ships and smaller fishing vessels. For example, there are documented examples in southeast Asia of young men having been subjected to forced labour on fishing vessels (eg see UNIAP 2009). At an early stage of this research, the CDPP had also mentioned the case involving the prosecution of a man in Queensland for *Migration Act 1958* (Cth) offences, relating to bringing free divers from the Solomon Islands. With this background in mind, information was sought during the process of this research about the situation of seafarers coming into and out of Australian ports and also about workers on fishing vessels.

The relevant union for international seafarers is the International Transport Workers Federation (ITWF). In interview, it was noted that approximately 300,000 seafarers are coming into and out of Australia each year. The vast majority are originally from developing countries. In terms of checking on the welfare of seafarers, this primarily falls to the ITWF. Customs officers do passport and visa checks for all foreign seafarers coming into port and the Australian Maritime Safety Authority can go onboard ships and check a very basic list of issues around safety, such as ensuring there is a fire extinguisher and life boats on board—but this does not cover seafarers' welfare or work conditions.

In interview, it was noted that the majority of shipping companies treat their crews with dignity and respect, and observe their rights. Nonetheless, shipping is one of the few industries left in the world where it possible to truly control the full range of working and living conditions of employees, including access to food and water. It was noted that:

> Starvations wouldn't happen anywhere else or in any other industry. But when you've got someone on a ship for a long time, you can starve them and take away water rights—and make them work 12 hours, 14 hours every day for 9 months and threaten their families. If you are at sea, just the threat of someone going around to visit your wife who is home alone is horrible, that is psychological torture (ITWF personal communication 2009).

The sorts of abuses that were discussed in this interview were certainly serious, involving incidences such as non-payment of wages for extended periods of time, assault and water rationing. The following SMS text message, received by the ITWF organiser on his mobile phone on the day of he was interviewed for this research process, was given as a fairly typical example:

> We want to tell you about our situation here. We have no salary onboard for almost 7 months. Every day water rationed even when we are in d'port. We have no rest even on Sundays when the captain has us working. Even on holidays have to work because have guaranteed overtime. This captain tells us send him home, already sent two

> crew home… (SMS received by ITWF organiser March 2009, provided in ITWF personal communication 2009).

However, it was unclear whether or not it would be appropriate to describe these instances as examples of labour trafficking, or perhaps of forced labour. In interview, it was noted that:

> These guys go to work on a contract, then all these other corrupt mechanisms kick in. Everybody knows these mechanisms exist. Whether this is forced labour, I don't know. I have never defined it as forced labour in the press—as they are people trying to earn a living and send money home. Sometimes they are supporting whole villages. They are forced not to complain, forced and threatened not to make any trouble and most of the time forced not to talk to unions—ship owners put things in contracts, such as if you talk to the ITWF, or if the ITWF gives you money, you must give it back as soon as the ITWF is off the ship—so there is a high level of intimidation. Whether that is forced labour, it isn't my call (ITWF personal communication 2009).

According to the ITWF, while most shipping companies do treat their crews with respect, the 'flag of convenience' system, where ship owners get to effectively purchase a chosen country of nationality (and the applicable legal system), does create a system that allows unscrupulous manning agents, shipping companies and others to exploit individual workers. It was also noted that if a foreign-flagged vessel comes into Australian waters, the seafarers on board are largely outside of any protection of Australian law, including industrial relations laws (ITWF personal communication 2009).

The seafarers represented by the ITWF are working in quite a different industry to those who are working on smaller fishing vessels, for example, deckhands working on crayfish boats or diving for pearls in Western Australia. Within the period of this research, almost no information was available about these groups, at least not from the participants interviewed for this process. One participant mentioned that people working in these sectors are, to the extent they are organised at all, under the remit of the Australian Workers Union. There are migrant workers known to have been working at various points in time in the pearling industry in Broome. However, their conditions of work were unknown to participants in this process. It was noted that the lack of information about working conditions in this sector is a gap in information (Unions WA personal communication 2009).

Community networks

Two themes emerged from the research related to the significance of ethnic community networks:

- There was considerable support for the importance of ensuring that community-based (non-government) networks were in place to provide a source of information, referral and help to individual migrant workers in need of assistance. From this perspective, relevant language and cultural skills, and networks were considered vital. With so many barriers to reporting, including a fear of authority, various participants noted the importance of migrant workers having access to independent members of their own ethnic or linguistic communities, either volunteers or paid staff, who can assist people to exit their exploitative situations and to work out next steps, including linking in with broader service providers. Examples given in the course of the current research included:
  - detention centre visitors with relevant language skills;
  - small community-based organisations such as Migranté who rely on volunteers drawn from within the Filipino community; and
  - several unions, such as the CFMEU and the LHMU, who have made a point of ensuring they have union delegates with language and cultural backgrounds which reflect the language and cultural mix of the unions' membership.
- However, numerous examples of what might be termed co-ethnic exploitation were also mentioned and concern was expressed that ethnic communities can be a site of exploitation. Ethnic links were certainly relevant to the recruitment and employment of individuals for a number of the case studies noted above. This resonates with concerns raised by Wise and Velayutham (2007) in relation to the co-ethnic exploitation of Indian blue-collar workers by other employers, managers and/or agents of co-ethnic background leading the exploitative practice.

In summary, ethnic communities and their related networks were seen in some instances as invaluable sources of community-based, culturally appropriate

support and assistance. However, it cannot be naively assumed that people from a similar cultural background will always be a source of positive support and assistance. All perspectives support the importance of outreach and networking with relevant migrant communities in Australia on these issues.

It was noted by several different participants that some ethnic communities with large migrant worker populations appear to have fairly strong, well-developed networks. For example, the Filipino community has Migranté, a community organisation with a network of volunteers who provide support to migrant workers in Australia. In addition, the Philippine Embassy has a Labour Attache, who is specifically tasked with assisting Filipino migrant workers in Australia. In comparison, some communities appear to have less well-developed community networks (and if they do exist, were largely unknown to the service providers and organisations that participated in this process). It was suggested by some participants that information about the situation of Indian migrant workers was unknown to them, despite the large size of this group in the community. In contrast, it was noted that the Sudanese community in Western Australia is well-organised, communal and very supportive of each other. This allows people to problem solve issues with a level of community support (Unions WA, personal communication 2009).

Participants also noted the challenges of funding for community-based organisations and in particular, the lack of funding available for provision of services to temporary workers. In Australia, there are a large number of organisations that are well connected in their own communities. Some of these organisations are relatively small and local; others are quite large with statewide, or even national, reach. Many of these organisations have access to funding for the provision of resettlement services. However, typically, this funding is restricted to the provision of services to permanent migrants (an issue discussed by Spinks 2009). This effectively excludes the provision of services to migrant workers—such as 457 visa holders, student visa holders, bridging visa holders and so on. As a result, there is a very large group of people in Australia who are either not getting access to services, or who are getting very ad hoc services depending on the availability of volunteer networks or philanthropic services in their local community (Uniting Care WA et al. personal communication 2009).

The issue of lack of service provision for temporary workers is considered to be particularly profound in certain regional and rural areas. For example, several service providers noted a seemingly high incidence of family breakdown, along with high levels of family violence, among the migrant worker community in the northwest of Western Australia, along with a corresponding dearth of support services (Unions WA personal communication 2009; Uniting Care WA personal communication 2009). While not directly relevant to labour trafficking, it was noted that situations where there are a profound lack of social services have the practical result that people are exceptionally vulnerable on many levels, for example, because they are without safe accommodation or independent financial support.

This is not to say that temporary migrant workers (and their families) are being turned away by the organisations that they approach. It is more the case that they are getting help from individuals and organisations that are providing support on their own time and using their already scarce resources to assist people in times of need.

There are also likely to be gaps in the industry sectors that are being serviced. While some sectors, such as out-workers, have been supported to develop organisations such as Fair Wear, this is not the case in all sectors. For example, there does not appear to be a comparable organisation that has a focus on responding to the exploitation of domestic workers in Australia.

Summary

There have been instances of unreported, or perhaps unrecognised, labour trafficking. There are much larger numbers of cases involving unlawful conduct, some of which present indicators of trafficking but probably would not be defined as trafficking. Nonetheless, the areas of life and work where this unlawful conduct occurs are potential breeding grounds for more serious forms of exploitation. As such, a focus on unlawful conduct against migrant workers in these sectors can be considered a legitimate response to concern about more serious forms of exploitation, including labour trafficking.

It is important to recognise that generally, vulnerability is not a single factor; it reflects multiple

individual characteristics, a situation and a relationship. In the cases that were discussed in the current research, workers appear to be particularly vulnerable to exploitation due to a combination of factors such as:

- their migration situation and concern (real or imagined) about deportation or return, which would undermine their larger migration aspirations (eg to finish a course of study or to achieve permanent residency);
- their physical and/or linguistic isolation from the broader community;
- the impact of contractual obligations such as the payment of bonds back in their home countries;
- the existence of family or community ties back in their home countries; and
- financial pressures, which could not readily be discharged if the person returned to work in their country of origin, if wages in that country are far lower than in Australia.

The research highlighted the important role of intermediaries such as agents and recruiters, not only in the labour migration process but also once individuals are here working in Australia. The link between debt and vulnerability was consistent across all forms of migration and visa categories. There appear to be stratifications in the fees that are charged, perhaps reflecting location or industry. Singapore and Malaysia were frequently mentioned as key hubs of recruitment activity, irrespective of the national origin of the worker.

The research also highlighted the relevance of employers having a (real or perceived) capacity to hold out the prize of permanent residency as a method of control. This was significant again in various visa categories and actively used in a fraudulent way in several documented instances. Finally, concerns were also raised about the very real difficulty of responding to situations in which both the employer and the employee are essentially complicit in exploitative situations.

Unfortunately, the most serious cases may remain hidden and the course of exploitative conduct is readily repeatable. The incentives for exploitation are high (eg reduced wages, increased profits) and the capacity of individuals to complain is limited by the very factors that make them vulnerable to exploitation in the first place (limited language ability, limited knowledge of rights or capacity to access rights, tenuous migration situations, family obligation and so on). In this sense, the exploitation of migrant workers—and possibly even the most serious forms of exploitation such as forced labour and slavery—could arguably be characterised as low-risk, high-profit activities. This suggests the importance of focusing not only on the most extreme cases of exploitation, but also on the more numerous, readily detectable cases that are perhaps precursors to more extreme conduct, or that perhaps contribute to the creation of an environment that tolerates exploitation.

The issue of services for temporary migrant workers is connected to detection and responses to instances of labour trafficking. In theory, assistance is available to all migrant workers—whether temporary or permanent and even those who have worked illegally—to pursue claims against exploitative employers. In theory, these workers can also seek a range of services such as health and social support services. However, there are numerous structural difficulties that prevent people seeking or accessing help or assistance. In several instances discussed in this research, individuals only sought help once the situation had deteriorated to such an extent that they literally could not remain in that situation either because of serious injury or fear about their personal safety. There would appear to be a need to undertake further research into the issue of how to make access to Australian services a meaningful reality for temporary migrant workers, so that relevant support and assistance can be provided at a much earlier stage.

Responding to the problem

Australia already has a number of measures in place as part of its commitment to respond to trafficking in persons, both through government mechanisms (see further ANAO 2009; Anti-People Trafficking Interdepartmental Committee 2009) and through NGOs (see further Australian Human Rights Commission 2009). Nonetheless, it is recognised within the Australian anti-trafficking community that more needs to be done to respond to labour trafficking (eg see Anti-People Trafficking Interdepartmental Committee 2009; Cullen & McSherry 2009).

The purpose of this section is to provide some ideas for potential responses to the issues raised in the previous sections. The ideas in this section are structured around consideration of the following:

- increasing the risks associated with committing labour trafficking and associated crimes;
- reducing the opportunity for committing labour trafficking and associated crimes; and
- addressing the vulnerability of individual migrant workers.

This section draws on responses to labour trafficking that are either in place in other countries, or that are recommended by international organisations such as the ILO. It includes a number of ideas that have been suggested by other researchers and organisations working in Australia. This set of ideas is not comprehensive, however, given the current focus on this issue, it is hoped that these ideas will lead to discussion and further creative thought about potential responses to labour trafficking.

Ensuring criminal laws are clear, simple and relevant

Various commentators have noted that Australian anti-trafficking laws are complex, requiring proof of several different elements of the crime, several of which are poorly defined (eg see GAATW 2007; Gallagher 2009; McSherry 2007; McSherry & Kneebone 2008). Questions have been raised as to the extent to which Australia's anti-trafficking laws give effect to Australia's obligations under the UN Trafficking Protocol (eg see ASP 2009). Most recently, Gallagher (2009: 6) has described Australia's anti-trafficking laws as 'incomplete, confusing and overly complicated'. In 2009, the Anti-Slavery Project called for a review of Australia's anti-trafficking laws, with the objective of identifying how they could better reflect the scope of Australia's obligations under the UN Trafficking Protocol and other relevant international instruments (ASP 2009).

A lack of clarity in legal frameworks is concerning, as it can contribute to confusion among front-line

stakeholders, such as investigators and labour inspectors, about the indicators of labour trafficking and lead to inaction. In this research process, many participants, including those who worked daily on trafficking in persons issues, were uncertain as to where or how to draw the line between bad work and criminal conduct such as labour trafficking, suggesting a certain lack of clarity in the legal framework. There was also a noticeable lack of awareness among almost all participants, with the exception of those who worked daily on trafficking in persons issues, that the legal concept of 'trafficking in persons' could be applied to contexts other than the sex industry. This suggests a lack of awareness about the laws.

Focus on forced labour, servitude and other forms of labour-related forms of exploitation

In 2007, Pearson (cited in GAATW 2007) suggested that Australian laws could usefully include an offence of outright forced labour and exploitation, so that the laws focus primarily on the outcome of the trafficking process, rather than the process itself. Pearson argued that laws that focus on the outcome might be an easier tool for investigators and prosecutors to use than the existing laws which require proof of various elements, including movement (Pearson cited in GAATW 2007). As there are already laws in Australia criminalising several of the exploitative purposes as defined in the UN Trafficking Protocol, consideration of this approach would require a focus on laws criminalising *forced labour*, *servitude* and potentially also *servile marriage* and *exploitation of children* (both slave-like practices) as separate offences (ASP 2009).

From the literature, it appears that several developed countries have legislation criminalising not only the process of trafficking in persons, but also the end exploitative purpose. For example, the United States has laws that criminalise involuntary servitude and forced labour (see Box 7). Unlike anti-trafficking laws, there is no need to prove the involvement of the accused in any aspect of the movement of the person. This may be significant for several reasons. First, unlike evidence of the movement phase which will necessarily be located across international borders, evidence of the forced labour will generally be in the country of destination, which is also the country that will be prosecuting the offence. In other words, the elements of proof will all be located within the jurisdiction of the prosecuting authority, thereby minimising the need to collect evidence from overseas. Second, many migrants have complex migration trajectories, involving a combination of independent and facilitated movement, first coming into contact with the person involved in their exploitation at some late point in their movement (possibly even after arrival in the country of destination). In these instances, it can be very difficult, or impossible, to prove that the person who engaged in the exploitation had the necessary intention to exploit that person during the movement phase. A focus on the outcome (exploitation) removes the need to prove elements of intention in the movement phase.

A focus on exploitation that occurs without movement across international borders is required by the UN Trafficking Protocol. The Protocol requires criminalisation of exploitation achieved through of variety of actions including *transportation* and *transfer* (which suggest some element of physical

Box 7

United States Code, Title 18, Part 1, Chapter 77, section 1589:

Forced labour

Whoever knowingly provides or obtains the labour or services of a person—

(1) by threats of serious harm to, or physical restraint against, that person or another person;

(2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labour or services, that person or another person would suffer serious harm or physical restraint; or

(3) by means of the abuse or threatened abuse of law or the legal process, shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.

movement, either domestic or international) but also *recruitment*, *harbouring* and *receipt*, all of which will can occur without *any* movement across either international or internal borders.

Under US law, the concept of *serious harm* is subjectively defined—that is, the harm that is threatened is 'serious' if it is serious to the person in question and if it led to the decision of the trafficked person not to run away (OSCE 2008).

Israel has also criminalised forced labour as a stand-alone offence in its criminal code, in addition to other offences such as *trafficking in human beings for the purpose of slavery or forced labour*. The stand-alone offence of labour trafficking is defined as follows:

> Anyone who unlawfully forces a person to work, by using force or other means of pressure or by threat of one of these, or by consent elicited by means of fraud, whether or not for consideration, shall be liable to…imprisonment (State of Israel 2009: 4).

The crime is intended to cover situations of less severe exploitation than that which is addressed by the slavery or trafficking offences, which have higher maximum sentences (State of Israel 2009).

Under Australian law, forced labour is defined in the *Criminal Code* (Cth) for the purpose of (among other things) the trafficking in persons offences in Division 271. However, there is no stand-alone offence of forced labour itself. Rather, the elements of the relevant trafficking in persons offences include the suspect having organised or facilitated the entry/exit or receipt of the person into/out of Australia *and* the suspect having deceived the victim about the fact that their entry/exit or receipt or any arrangements for the other person's stay in Australia will involve either exploitation (defined to include forced labour) or debt bondage or the confiscation of the person's travel or identity documents (see further ss 271.2 of the *Criminal Code* (Cth)).

Also, the definition of forced labour used in the Criminal Code is perhaps narrower than the definitions referred to in other national laws above. As defined in the Criminal Code:

> Forced labour means the condition of a person who provides labour or services (other than sexual services) and who, *because of the use of force or threats*;
>
> (a) is not free to cease providing labour or services; or
>
> (b) is not free to leave the place or area where the person provides labour or services (*emphasis added*: s 73.2(3)).

In contrast, the examples from Israel and the United States refer to labour obtained through force and threats but also labour obtained through other means of pressure, consent elicited by means of fraud (see Israel example above), by means of any scheme, plan or pattern intended to cause the person to believe that, if the person did not perform such labour or services, that person or another person would suffer serious harm of physical restraint and by means of the abuse or threatened abuse of law or the legal process (see US example above).

These additional concepts may be significant in the Australian context, given that the current research has highlighted the ingenuity of employers in coming up with a variety of ways that they can effectively control and manipulate a person in order to take advantage of their unpaid services, even without the need to use any overt demonstration of force or to make any overt threat.

Expand criminal laws to cover a lower threshold of exploitation, such as abuse of vulnerability for gain

As noted in the research, instances of exploitation vary widely in nature and severity, ranging from simple time and wage matters, right through to very clear-cut cases of slavery. However, it appears that in Australia, by far the largest number of cases of exploitation (broadly defined) fall somewhere short of slavery or trafficking in persons. This raises the policy question as to whether Australian criminal laws are intervening at the right point on the spectrum of exploitative behaviour. It is arguable that, to be relevant, Australia's laws need to focus

not only on the extreme forms of slavery and forced labour, but also on the more prevalent lesser forms of exploitative behaviour that nonetheless have serious consequences for the people affected. These lesser forms of exploitative behaviour are arguably precursors to more serious criminal conduct and they contribute to the creation of an environment that tolerates various forms of exploitation.

With these arguments in mind, it is relevant to note that some regions and countries have introduced laws that seek to criminalise a lower threshold of exploitative conduct than that which is required by the UN Trafficking Protocol, involving what could broadly be described as the abuse of a situation of vulnerability of a migrant for profit or other personal gain. Some of these laws have been developed to respond to the particular situation of exploiting smuggled migrants, or to give effect to obligations to prohibit inhuman and degrading treatment. However, the principles are nonetheless potentially relevant to the labour trafficking context.

Belgian law criminalises:

- 'smuggling with the use of threats, violence or abuse of the vulnerable or precarious position of a foreigner' (Dormaels, Moens & Praet 2004: 83) and;
- various related offences, such as the law targeting 'sleep merchants', that is, people who take advantage of the precarious migration situation of illegal migrants to make over-inflated profits from substandard accommodation (see Box 8).

Austrian law criminalises *exploitation of aliens*, which involves *making use of an alien's special state of dependence* with the intention to generate an income (see Box 9).

French law criminalises trafficking in persons. However, it also covers various forms of exploitation that are considered to be less severe than the

Box 8

Abuse of the particular vulnerability of others by selling, renting or providing goods in order to make an abnormal profit

Article 433 decries: Any person who abuses, either directly or through an intermediary, the particularly vulnerable position of a person because of his illegal or precarious administrative situation or his precarious social situation, by selling, renting or providing, with the intent to make an abnormal profit, personal property, a part thereof, real property, a room or another space given in article 479 of the Penal Code in conditions incompatible with human dignity, such that the person has no other real and acceptable choice than to submit to this abuse, shall be punished by imprisonment of six months to three years and a fine of 500 euros to 25,000 euros. The fine shall be applied as many times as there are victims.

This offence is punishable by imprisonment of one to five years, along with a fine of 1,000 euros. The penalty is increased in certain circumstances, such as where the activity is 'habitual', or the activity is undertaken by a criminal organisation.

Source: Penal Code, Belgium

Box 9

Austrian law criminalises *exploitation of aliens*:

Article 116. (1) Any person who, with intent to generate a regular income for himself or a third person by making use of an alien's special state of dependence, exploits such alien who is unlawfully resident in the federal territory, does not hold a work permit or is otherwise in a special state of dependence shall be sentenced by the court to a term of imprisonment of up to three years.

(2) Any person who, through such offence, puts an alien in distress or exploits a larger number of aliens shall be sentenced to a term of imprisonment of six months up to five years.

(3) Where the offence results in the death of an alien, the offender shall be sentenced to a term of imprisonment of one year up to 10 years.

Source: Aliens Police Act 2005 [Austria]

exploitation required for trafficking in persons. For example, the Criminal Code of the French Republic includes the following provisions:

> Article 225–13
>
> Obtaining the performance of unpaid services or of services against which a payment is made which clearly bears no relation to the importance of the work performed by abusing a person's vulnerability or situation of dependence is punished by two years' imprisonment and a fine of €75,000.
>
> Article 225–14
>
> Subjecting a person to working or living conditions incompatible with human dignity, by abusing a person's vulnerability or situation of dependence, is punished by two years' imprisonment and a fine of €75,000 (*Legislation Online* http://www.legislationline.org/documents/section/criminal-codes: np)

These offences were used as the legal basis to prosecute domestic servitude cases before a new offence of trafficking was introduced. However, these broader offences are still applied by judges to prosecute forced labour cases, instead of using the new specific offence of human trafficking. Case laws on these provisions of the Penal Code provide guidance on the different levels of gravity required by each of these offences (Georgina Vaz Cabral personal communication August 2009).

Israel also has laws which criminalise *abuse of vulnerable populations*, which attracts a much lighter penalty than the core crimes of trafficking in persons, forced labour and slavery (State of Israel 2009).

These laws perhaps reflect a larger trend toward focusing on a broader spectrum of exploitative practices against migrant workers, beyond the most extreme instances of forced labour, slavery or trafficking in persons for these purposes. For example, in the European context, a recent Directive from the European Parliament and the Council of the European Union provides for sanctions against employers of illegally-staying, third-country nationals (broadly speaking, this refers to migrants who have entered/and or are staying in a country in breach of immigration laws; EP & CEU 2009). This Directive requires member states to introduce a range of measures designed to tackle both demand but also exploitative practices that are less severe than trafficking. Member states are required to make it an offence to employ illegally-staying, third-country nationals and this is to be considered a more serious offence when accompanied by particularly exploitative working conditions or the work of a victim of trafficking. The term *particularly exploitative working conditions* is defined to include:

> working conditions, including those resulting from gender based or other discrimination, where there is a striking disproportion compared with the terms of employment of legally employed workers which, for example, affects workers' health or safety and which offends human dignity (EP & CEU 2009: Articles 2 and 9).

The Directive requires countries to establish a number of mechanisms intended to address not only the practice of employing illegal workers, but also the economic exploitation of these workers. For example, employers are required to pay any outstanding remuneration to illegally-employed, third-country nationals. As issues of proving the amount of remuneration owing can often arise (a fact noted in this research process by the Workplace Ombudsman), this is addressed by a reversal of the burden of proof, whereby employers are presumed to have employed the third-country national for a minimum of three months duration, for wages as specified in applicable awards or agreements (EP & CEU 2009: Article 6).

The issue of sub-contracting is also addressed, as the contractor of which the employer is a direct sub-contractor can be held liable to payment of sanctions and back-pay (Article 8 of the Directive). The Directive also requires the establishment of a complaints mechanism whereby third-country nationals can lodge complaints directly or through designated third parties such as trade unions. When providing assistance to lodge complaints, these third parties are protected from possible sanction for facilitating unauthorised residence (EP & CEU 2009: Article 13). To supplement the complaints mechanism, member states are free to grant residence permits of limited duration, linked to the length of relevant national proceedings, to third-country nationals who have been subjected to particularly exploitative working conditions or who were illegally employed minors and who cooperate

in criminal proceedings against the employer (EP & CEU 2009: Article 13(4)).

Given the newness of the Directive (and the lack of implementing legislation in most European member states to date), it is too early to make any assessment of what sort of impact these initiatives may have either on combating illegal employment (the direct focus of the Directive) or addressing exploitative employment practices (the indirect focus of the Directive).

Given the complexity of prosecuting 'trafficking in persons' as an entire process, there may also be merit in considering criminalising certain key elements of the trafficking in persons modus operandi. For example, Kelly (2007: 88) notes the particular relevance of criminalising the simple acts of 'confiscation of travel and identity documents' and 'withholding of earnings'. These two suggestions would appear particularly relevant in the Australian context, where both of these elements are part of the modus operandi not only of labour trafficking but also lesser forms of unlawful conduct.

Ensuring intermediaries (agents, brokers) are effectively regulated and monitored

Intermediaries such as agents and recruiters play an important role, not only in the labour migration process but also in the placement (and retention) of individuals once they are here working in Australia. The accrual of debt for agents' fees is implicated as being a significant factor in individual vulnerability and the creation of opportunities for exploitation. It is therefore important to consider what can be done to ameliorate the role of charging of fees for services both in Australia and overseas.

Australia's system of regulation of employment agents and recruiters depends on a complex set of federal, state and territory laws, including consumer protection and fair trading laws, but also employment agent legislation in several jurisdictions. At the federal level, it is a crime to deceptively recruit a person, but only in relation to sexual services (Criminal Code s 270.7). There is no equivalent provision in the Criminal Code with regard to deceptively recruiting a person for non-sexual services.

At the federal level, it is an offence for a corporation to engage in misleading conduct in relation to employment (see further s 75AZE of the *Trade Practices Act 1974* (Cth)). All states and territories have enacted complementary legislation that applies to non-corporate entities involved in providing employment services, under fair trading or consumer protection legislation (see *Fair Trading Act 1987* (NSW) s 46, *Fair Trading Act 1999* (Vic) s 13, *Fair Trading Act 1989* (Qld) s 41, *Fair Trading Act 1987* (WA) s 14; *Fair Trading Act 1990* (Tas) s 18, *Fair Trading Act 1992* (ACT) s 16; *Consumer Affairs and Fair Trading Act* (NT) s 46). These laws all prohibit the practice of charging potential job seekers for the right to apply for or seek work. However, the question is whether the network of regulation established by these regimes is sufficiently robust to deter practices that are highly profitable and endemic. The following are relevant considerations:

- It is unclear which of these legislative regimes actually apply to agents and recruiters who are located offshore.
- Even if some of these legislative regimes do potentially apply to agents and recruiters offshore, it is unclear whether state and territory regulators have the capacity to actually monitor or enforce laws insofar as they apply to agents and recruiters offshore.
- There are also considerable differences in penalty regimes across the jurisdictions. For example, in Western Australia, the penalty for breaches of the regulatory regime ranges from $200–500 (see further *Employment Agents Act 1976* (WA)). This hardly constitutes a business risk compared with the profit that can be made from charging substantial recruitment fees. In contrast, in the Australian Capital Territory, it is an offence of strict liability to ask for, or to accept a benefit from, a person seeking a job service, an offence that attracts a fine of $5,000 for an individual, or $25,000 for a corporation (*Employment Agents Act 2003* (ACT) s 96).
- There is also considerable discrepancy as to whether these regimes apply across the board to modern employment relationships, such as labour hire arrangements, agents, subcontracting and independent contracting. These are likely to be particularly relevant to certain industries such as

construction, industrial cleaning, domestic work and taxi driving. Some regimes appear limited to employment situations, whereas others are much broader, potentially encompassing practices such as subcontracting.

- Finally, it is questionable whether any of these regimes would be accessible to migrant workers, particularly those who are in Australia on a temporary basis.

Given the transnational nature of many of the transactions involved, it may be that the regulation of offshore recruiters is a role that is more within the capacity of federal agencies. If so, it may be possible to develop a range of mechanisms that would foster the development of a market for more scrupulous overseas employment agents and recruiters, along with more effective monitoring mechanisms. Several examples that might provide ideas for the future were given in this research process including the following:

- In 2007, the Australian Government entered into an MOU with the government of China which created a framework of regulation for recruitment companies involved in bringing skilled workers from China to Australia. Under the scheme, Chinese recruitment companies who agree to be bound by the ethical framework are listed on the DIAC and Ministry of Commerce of the People's Republic of China websites as identified recruitment agents. One of the requirements is that these recruitment agents are not permitted to charge the worker any fee for their services. If individuals are charged fees, this can be reported in Australia to DIAC, who will then report it to the Chinese authorities. Any recruitment company that is found to have breached the ethical framework will be removed from the websites and may be subject to further penalties under Chinese law (identified recruitment agents for Chinese skilled workers are identified on the DIAC website). While noting the limits of such a scheme, this arrangement was noted by one participant as a possible model that could be usefully applied with other large labour exporting countries such as India and South Korea (Kinnaird personal communication 2009).
- The development of a voluntary registration scheme for overseas agents, whereby agents could register with the Australian Government and voluntarily submit to compliance mechanisms. In return, the details of complying agencies could be widely circulated to prospective visa holders (Kinnaird personal communication 2009). This is a model that will be tested in relation to the student market (eg see 'Colleges will be required to post agent list' *Financial Review* 10 Aug 2009).
- The Philippines Embassy in Australia takes an active role in monitoring illegal recruitment that originates from the Philippines. For example, if a situation is discovered in Australia involving the practice of agents charging illegal fees in the Philippines, this can be reported back to the authorities in the Philippines and prosecuted (Philippine Embassy personal communication 2009). This is reported to have happened in at least one case involving illegal recruitment of Filipino chefs to Australia (Samaritan Accommodation personal communication 2009).

Build awareness and coalitions between criminal justice agencies, labour inspectors, unions and employers

The specific crime of labour trafficking occurs in a much larger grey area of unlawful conduct against migrant workers that includes unlawful discrimination, industrial breaches and various forms of criminal conduct. This grey area is actively policed by a range of organisations, including several government organisations, such as the labour and OHS inspection agencies, but also including a range of NGOs, particularly the unions. As a result, individuals from these organisations—labour inspectors, OHS inspectors and union delegates—may (and indeed have) potentially come into contact with people who are in slavery-like or trafficking situations. When an individual inspector encounters a potential situation of labour trafficking, it is vital that they recognise what it is that they are seeing and know what action to take. With this in mind, key strategies that can be considered include:

- awareness-raising about the basics of labour trafficking;
- training on indicators of trafficking;
- the development of processes of referral; and
- the development of networks across a range of agencies.

Measures that are aimed at improving awareness of labour trafficking and linkages across criminal justice agencies, labour inspectors, unions and employers, will greatly increase the size of the surveillance mechanisms that are brought to bear on employers that might otherwise feel free to engage in exploitative practices. Increased awareness will also lead to more appropriate referrals and the provision of services to people in need of support and assistance.

As noted by the Anti-Slavery Project in the Australian context, while labour trafficking is a federal crime, many of the agencies potentially involved as first responders are state- and territory-based agencies. This includes OHS inspectors, some labour inspectors and state and territory police. The Anti-Slavery Project has recommended increasing the role of the state and territory representation on key anti-trafficking policy coordination mechanisms, such as the National Roundtable on People Trafficking, for this reason (ASP 2009).

Furthermore, as noted by the ILO, even though individual criminal responsibility is part of the evolving picture of forced labour today, it is important to remember that the criminal law is a blunt instrument and that criminal courts are only one route to accessing justice (ILO 2009). It is important that individuals have access to a range of mechanisms, including labour law and anti-discrimination mechanisms. Again as noted by the ILO (2009), different courts will have different remedial powers; some may be able to award back pay, compensation, or a criminal penalty. The capacity of labour inspectors, OHS mechanisms, unions and criminal justice agencies to provide potentially different remedies may be significant, given that individual migrant workers are likely to have complex, diverse needs (Segrave 2009).

Internationally, a number of countries have taken steps to ensure that labour inspectors are an integral part of anti-trafficking mechanisms. For example, Belgium considers that it has four pillars to its anti-trafficking response (administration, labour law, criminal code and victim support) and significantly, one of these four pillars is labour law (Dormaels, Moens & Praet 2004: 78, 81–82).

Specific mechanisms for key sectors

The ILO has developed materials for organisations, including labour inspection agencies, unions and employers, on the key elements of a response to labour trafficking. Recommendations of the ILO are summarised below.

Labour inspectors

Key elements necessary to ensure labour inspectors can play their role in responding to forced labour and labour trafficking include:

- Ensuring arrangements are in place to facilitate cooperation and coordination among concerned parties, including labour inspectors, the police and other concerned agencies. This should include:
  - processes of referral between labour inspectors and the police; and
  - a level of clarity around roles and responsibilities, including where the work of labour inspectors ends and the role of the police and other authorities begins (Andrees 2008).
- Operational guidelines for labour inspectors, which should include indicators to help them decide whether a particular situation will fall under forced labour/trafficking or not (Andrees 2008).
- A regime of enforcement, prosecution and penalties that covers the spectrum of labour law violations and the criminal law.
- Arrangements to ensure cooperation between labour inspectors and workers and employers organisations. These should be embedded in mechanisms of social dialogue through which labour inspectors and social partners can share information and take corrective action if necessary (Andrees 2008).
- Arrangements to ensure cooperation between labour inspectors and civil society. This is particularly important as NGOs and other civil society organisations may play an important role

in economic sectors that are not covered by trade unions, or that are difficult for labour inspectors and the police to access (Andrees 2008). This might include domestic workers, or workers from particular migrant communities.

- Measures to ensure the safety of labour inspectors, including clear, deterrent sanctions for those who obstruct the work of labour inspectors (Andrees 2008).
- Ensuring there are a sufficient number of labour inspectors, with appropriate training and support, to monitor the working conditions not only in the formal economy, but also in the informal economy, including in the agricultural sector, small- and medium-sized businesses, domestic work and other services (Andrees 2008).
- Ensuring that labour inspectors focus primarily on responding to abusive working conditions, even in situations where a worker has violated immigration law. This will help to redress the situation where workers who have violated immigration law have no incentive to report abuse as they potentially face a triple penalty—loss of job, no enforcement of their rights arising from the work relationship and threat of deportation. Equally, there may be little incentive for employers not to abuse illegal workers, if the penalties are low or rarely enforced against them (Andrees 2008).

The ILO recommends that these measures should be complemented by other mechanisms such as:

- education, literacy and awareness-raising programs for workers in the informal economy;
- development of micro-credit schemes or other income-generating schemes for released forced labourers and their families;
- promotion of the right to organise for workers, particularly for domestic workers associations, or special organisations of agricultural workers;
- development of social security measures targeted particularly at workers in the informal economy; and
- hotlines to receive information (Andrees 2008).

Trade unions

According to the ILO and the International Trade Union Confederation (ITUC), trade unions have an important complementary role to play in combating labour trafficking. This includes ensuring governments fulfil their obligations to give effect to their international commitments and defending all workers whose rights have been violated (ILO 2008). ITUC is working with the ILO Special Action Programme to Combat Forced Labour to build a Global Trade Union Alliance to Combat Forced Labour and Trafficking—a process that was formally initiated in April 2007. In December 2007, the ITUC General Council endorsed a plan of action for future trade union activities in the areas of forced labour and trafficking. This includes a list of action points, which all affiliates are urged to integrate into their work programmes, as appropriate to their national circumstances:

- promote the ratification and effective implementation of certain ILO Conventions, namely:
  - Convention on Forced Labour Convention 1930 (no 29);
  - Abolition of Forced Labour Convention 1957 (no 105);
  - Labour Inspection Convention 1947 (no 81);
  - Labour Inspection (Agriculture) Convention 1969 (no 129);
  - Private Employment Agencies Convention, 1997 (no 181);
  - Migration For Employment Convention (Revised) 1949 (no 97); and
  - Migrant Workers (Supplementary Provisions) Convention 1975 (no 143).
- raise awareness on forced labour and trafficking aimed at trade union members and officials, and the wider public;
- address forced labour and trafficking issues in bipartite and tripartite negotiations and agreements;
- promote political and material support within trade union organisations for the development of policies against forced labour;
- monitor employment agencies as well as companies, including their supply chains, to detect and combat forced labour and trafficking practices;
- identify, document and publicly expose forced labour issues and cases;

- develop bilateral, sectoral or regional trade union cooperation agreements and appropriate alliances or coalitions with civil society organisations having recognised expertise and experience in relevant areas;
- cooperate with labour inspection services, law enforcement and other relevant national, regional or international authorities or interagency working groups;
- provide outreach and direct support to informal, unprotected and migrant workers at risk, to address their specific situation and needs, including through their integration into trade union ranks;
- ensure that proper attention is paid to all aspects of racism and discrimination, including its gender dimension; and
- work closely with Global Union Federations to target sectors where forced labour and trafficking are most likely to occur (ITUC 2007).

It is significant that the ITUC is recommending that unions provide assistance to migrant workers and workers in the informal sector. In some contexts, this will require a departure from the traditional union approach of providing services only to members and in some cases only to legal (or documented) workers. In some countries, unions have traditionally only provided assistance to nationals or permanent residents. The ITUC has noted the limits of this approach:

> Even if most victims of forced labour are not unionised yet, these workers definitely need to be represented and assisted by and integrated in the trade union movement. It is a challenge, as many of them are migrant workers, some of them in illegal situations (residence or employment) and some of them are performing temporary or seasonal work. As they suffer from coercion and violence from their employer, they may be afraid to complain, even to trade unions. These workers are the most vulnerable and out of reach, and therefore need protection and assistance from unions (ITUC 2008: 44)

In the Australian context, it is not known how many unions provide assistance and support beyond their membership. In the current research, several unions (eg the CFMEU and LHMU) noted having provided several years of intensive case support to individuals in need who were not union members. However, it is understood that some unions have different policies on this issue. For example, the Australian Workers Union, which represents agricultural workers, will act as a point of referral for non-members (including illegal workers). However, it will not provide services to non-members. This reflects union rules on the restriction of services to members and also union policy on opposition to illegal work (AWU personal communication 2009).

Employers and business

The ILO has produced a handbook for employers and businesses on combating forced labour (ILO 2008). It recommends that employers and business undertake several key steps toward combating forced labour, including:

- ensuring management has a clear understanding of trafficking and forced labour, and how it might present a business risk to the company;
- undertaking an assessment or social audit to determine if forced labour exists in the enterprise or supply chain and which aspects of the business might be most at risk;
- developing a company policy on trafficking and forced labour. For example, this might take the form of a code of conduct with regard to labour standards that governs the conduct of the enterprise itself, but also all suppliers in the supply chain;
- undertaking an assessment or audit of how compliant the company is with the stated policy;
- providing training to managers, supervisors and workers on trafficking and forced labour; and
- communicating key activities around trafficking and forced labour to external stakeholders as part of social reporting. According to the ILO, the Global Reporting Initiative (GRI) is a multi-stakeholder initiative that helps companies with social reporting:

  On forced labour, the GRI advises companies to provide 'concise disclosure', suggesting that they:

  – indicate which operations are identified as having a significant risk for incidents of forced labour; and

– comment on the measures they have taken to eliminate such abuses (ILO 2008).

The handbook notes that there are certain business practices that may need to be closely monitored, including:

- *use of prison labour*—the handbook provides detailed information about the steps that employers and businesses that engage prison labour should undertake, to ensure the labour is not forced; and
- *recruit workers, especially migrant workers, through agents and intermediaries*—for example, the handbook notes that if employers use private agents, they should ensure that these agents operate with high ethical standards and not charge fees to workers. This can be separately verified by talking to new employees about their experiences with their recruitment through the agency (ILO 2008).

Addressing vulnerability: The role of community based services and networks in supporting temporary migrant workers

There are a small number of specific anti-trafficking support services in Australia (see Australian Human Rights Commission 2009). These services provide an invaluable focal point for networking and advocacy around anti-trafficking issues. While the size of the labour trafficking problem in Australia remains unknown, the breadth of experiences raised in this research process underscores the importance of continuing to build strong links between the small number of anti-trafficking organisations and the much broader range of organisations in the community that work on related issues, such as migrant resource centres, community legal centres that work with refugees or on domestic violence issues and with faith-based organisations. The specific anti-trafficking support services also have an important role to play in raising awareness about labour trafficking and about referral pathways within the anti-trafficking framework.

As noted in the research, there is a dearth of services for temporary migrant workers. This has implications, not only for prevention and detection of labour trafficking but also for many other social welfare issues, such as responding to health and domestic violence issues. With these considerations in mind, it would be timely to consult with existing migrant community networks and organisations to ascertain where they see the gaps in service provision and whether they think there are ways they believe they could be supported, either to develop or to strengthen existing support networks, with the objective of ensuring that there is a community-based support option available for temporary migrant workers in Australia. There are various forms that such a response might take. Wise and Velayutham (2007) suggested that funding should be provided to facilitate employment of part-time support workers in ethnic community organisations in each state and territory for key ethnic groups identified as having problems with 457 visa holders. There are likely to be other strategies that could be developed, according to the realities of existing services, local context and need.

Creating safe pathways for labour migration

The Pacific Guest Worker Program is, among other things, an experiment in the creation of safe pathways for guest workers wanting to work temporarily in Australia's agricultural sector. While this is a large, heavily-funded scheme, there are likely to be many small, locally-relevant projects and programs that could be developed to create safe pathways to work for relatively vulnerable groups of migrants. For example, a participant in the current research project discussed a small, local project that involved matching local employers with recent arrivals from the Horn of Africa, who needed work and were having trouble overcoming discriminatory attitudes in the community (LHMU Victoria personal communication 2009). This created a pathway into paid work for a number of the program's graduates. According to the LHMU, this project was not very complex or resource intensive—'it just needed someone to get the ball rolling' (LHMU Victoria personal communication 2009). These kinds of 'safe work' programs are likely to be particularly relevant in certain industries, such as industrial cleaning and possibly also security work, which tend to employ large numbers of recent arrivals. However, they may also be relevant in certain contexts that employ large numbers of working holiday-makers such as the meat industry and the agricultural sector.

In addition, it might also be possible to develop similar safe pathways for temporary migrants who need to change employers. As noted in the present research, vulnerability to exploitation can be aggravated by difficulties in sourcing an alternative employer and an alternative visa sponsor. There are unscrupulous intermediaries who will, for a fee, assist 457 visa holders find a new employer and sponsor, further adding to the debt that individuals have and their vulnerability.

Wise and Velayutham (2007) suggested establishing an on-line database of job opportunities for 457 visa holders that would help to match prospective employers and job seekers. They noted that:

> This would undermine the market for unethical recruiting agents here and overseas. It would also assist 457 workers to secure a new employer should their current employ prematurely cease or they find themselves in a situation of exploitation (Wise & Velayutham 2007: 2).

This is a constructive suggestion and there are likely to be a range of other options that could be developed in order to provide safe (and free) pathways for temporary migrant workers who need to locate alternative employers. In interviews for this project, it was apparent that a number of unions already provide very direct job placement assistance to temporary migrant workers who are in need of assistance to locate safe alternative employment. This is typically achieved through union staff going through their personal and professional networks. While these efforts are commendable, the service that is being provided is unfunded and ad hoc. There would appear to be the need for a more durable solution given the large numbers of temporary migrant workers in Australia at any point in time.

Conclusion and next steps

The precise size of the labour trafficking problem in Australia remains unknown. The number of cases reported to federal agencies involved in the whole of government response to trafficking in persons is small. However, this research has confirmed that there have been instances of unreported, or perhaps unrecognised, labour trafficking. This suggests not only the existence of under-reporting, but a lack of awareness among a wide variety of front-line agencies and service providers that certain exploitative practices in a work context are in fact criminal under Australian law. In addition, the cases of unreported or unrecognised labour trafficking exist in an environment that includes significant numbers of cases involving unlawful conduct perpetrated against migrant workers in Australia, including under-payment or non-payment, sexual harassment, deception or fraud about working conditions and sponsorship for permanent residency. Some of these cases present one or two features that are widely considered to be indicators of trafficking (eg retention of passports, withholding of wages and the exercise of control over living and working conditions) suggesting they may have warranted further investigation from a criminal justice perspective. However, it is likely that many of these cases simply would not have met all of the constituent elements of the UN definition of trafficking in persons. Nonetheless, the areas of life and work where this unlawful conduct occurs are potential breeding grounds for more serious forms of exploitation. As such, a focus on unlawful conduct against migrant workers in these sectors can be considered a legitimate response to concern about more serious forms of exploitation, including labour trafficking.

As noted in the research, vulnerability to exploitation may not result from a single factor; it can reflect multiple individual characteristics, a situation or a relationship. As such, the detection of labour trafficking remains a complex task, which needs to be supported by the development of operational tools that aid identification, training in the use of these tools and standard operating procedures for processes of cross-referrals between relevant agencies. In the Australian context, many front-line agencies, including state and territory police and in some jurisdictions, labour inspectors and unions, operate primarily within a state or territory regulatory framework. It is vital to ensure that these agencies have a basic awareness of the relevance of the federal anti-trafficking response to their daily work.

The research highlighted the important role of intermediaries such as agents and recruiters, not only in the labour migration process, but also once individuals are here working in Australia. The link between debt and vulnerability was consistent

across all forms of migration and visa categories. While not a specific focus of this research, the research suggests a logical overlap between the processes of trafficking in persons and the processes of smuggling of migrants (ie the procurement of the illegal entry or residence of another person, for profit). Detailed information on the nature of these intersections, or on the nature and level of organisation of intermediaries, was not sought in this research process. However, these are issues that could usefully be examined in future.

The research highlighted the relevance of employers having a (real or perceived) capacity to hold out the prize of permanent residency as a method of control. This was significant again in various visa categories and actively used in a fraudulent way in several documented instances. Finally, concerns were also raised about the very real difficulty of responding to situations in which both the employer and the employee are essentially complicit in exploitative situations.

Unfortunately, the most serious cases may remain hidden and the course of exploitative conduct is readily repeatable. The incentives for exploitation are high (reduced wages, increased profits). The capacity of individuals to complain is limited by the very factors that make them vulnerable to exploitation in the first place (limited language ability, limited knowledge of rights or capacity to access rights, tenuous migration situations, family obligation and so on). In this sense, the exploitation of migrant workers—and possibly even the most serious forms of exploitation such as forced labour and slavery—could arguably be characterised as low-risk, high-profit activities. This suggests the importance of focusing not only on the most extreme cases of exploitation, but also on the more numerous, readily detectable cases that are perhaps precursors to more extreme conduct, or that perhaps contribute to the creation of an environment that tolerates exploitation.

The issue of services for temporary migrant workers is connected to detection and responses to instances of labour trafficking. In theory, assistance is available to all migrant workers—whether temporary or permanent and even those who have worked illegally—to pursue claims against exploitative employers. In theory, these workers can also seek a range of services such as health and social support services. However, there are numerous structural difficulties that prevent people seeking or accessing help or assistance. In several instances discussed in this research, individuals only sought help once the situation had deteriorated to such an extent that they literally could not remain in that situation either because of serious injury or fear about their personal safety. There would appear to be a need to undertake further research into the issue of how to make access to Australian services a meaningful reality for temporary migrant workers, so that relevant support and assistance can be provided at a much earlier stage.

Finally, while Australia already has a number of criminal laws in place to respond to trafficking in persons, it is inevitable that these will need to be amended and updated as information emerges about the modus operandi of offenders, the realities of victimisation, the experience of investigations and prosecutions and gaps in responses. The current research suggests that employers will continue to demonstrate ingenuity in inventing ways that are powerfully coercive yet difficult to prove, to effectively control and manipulate migrant workers in order to take advantage of their unpaid services. There is no doubt that the effective regulation of these forms of conduct is very difficult. However, the experience in Australia and overseas suggests that the following are critical considerations:

- ensuring the anti-trafficking response is grounded not only in the criminal law (with its higher burden of proof) but also within labour law frameworks;
- ensuring that laws target a range or gradation of exploitative practices (in addition to extreme conduct, such as slavery or forced labour); and
- ensuring that laws appropriately target and punish precursor practices, such as confiscation of passports and identity documents, withholding of wages and deceptive recruitment.

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Appendixes

Appendix A: Interview list

Name	Organisation	Location	Date
Cyndy Connolle, Community Coordinator	Liquor Hospitality Miscellaneous Workers Union	Melbourne	20 January 2009
Lyndal Ryan, ACT Secretary	Liquor Hospitality Miscellaneous Workers Union	Canberra	18 February 2009
Murray Furlong, Executive Adviser, National Office—External Affairs Branch. **Tom O'Shea, Director, Policy and Projects**	Workplace Ombudsman	Melbourne	19 January 2009
Tom O'Shea, Director, Parliamentary Affairs	Workplace Ombudsman	Melbourne	15 September 2008
Alison Tate, International Officer	Australian Council of Trade Unions	Melbourne	15 September 2008, 7 February 2009
Jennifer Cullen, Federal Agent	Australian Federal Police	Canberra	4 December 2008
Elizabeth Thompson	Fair Wear	Melbourne	15 September 2008
Barbara Deegan	Special Adviser, 457 Review	Canberra	1 August 2008, 11 December 2008
Lisa Charlton **Rachael Anderson**	Commonwealth Director of Public Prosecutions	Sydney	22 October 2008
Professor Chris Nyland, Dr Helen Forbes-Mewett, Danny Ong	Monash University		20 January 2009
Zana Bytheway	Executive Director, JobWatch	Melbourne	20 January 2009
David Bibo	Formerly Organiser, Hospitality, LHMU	Canberra	2 March 2009
Dean Sommers	Maritime Union of Australia/International Transport Workers' Federation	Sydney	6 March 2009
Jenny Stanger	The Salvation Army	Sydney	13 March 2009
Sister Margaret Ng	Sisters of St Joseph, Josephite Counter-Trafficking Project	Sydney	13 March 2009
Megan Leahy	Office for Women	Canberra	2 April 2009
Alex Go	Third Secretary, Philippine Embassy	Canberra	12 May 2009
Keryn McWhinney	Senior Wage Claims Officer CFMEU NSW Branch, Construction & General Division	Sydney	14 May 2009
Andrew Casey, National Communications Coordinator **Cait O'Connor, National Special Projects Officer, The Australian Workers' Union**	Australian Workers Union	Sydney	14 May 2009

Name	Organisation	Location	Date
Jody Betzien	Australian Manufacturing Workers Union	Phone conversations; exchange of documents via email	October 2008 and May 2009
Ani Beth Desierto	Migranté Perth	Perth	12 June 2009
Dave Robinson	Secretary, Unions WA	Perth	10 June 2009
Graeme Haynes	Branch Secretary, Australasian Meat Industry Employees Union WA Branch	Perth	11 June 2009
Rosemary Hudson Millar	Uniting Church	Perth	12 June 2009
Kate Spiers	Principal Investigations Officer Queensland Workplace Rights Office	Phone conversation	21 May 2009
Bob Kinnaird	Independent consultant	Phone interview	29 May 2009
Sharon Watts	DIAC	Canberra	1 July 2009
Ted Murphy	National Tertiary Education Union	Phone conversation	8 January 2009

Appendix B: Operational indicators of labour trafficking recommended for use by the ILO

Indicators of trafficking of children for sexual exploitation

Indicators of deceptive recruitment

Strong indicator

Deceived about the nature of the job or location

Medium indicators

Deceived about access to education opportunities

Deceived about conditions of prostitution

Deceived about content or legality of work contract

Deceived about family reunification

Deceived about housing and living conditions

Deceived about legal documentation or obtaining legal migration status

Deceived about travel and recruitment conditions

Deceived about wages/earnings

Deceived through promises of marriage or adoption

Indicators of coercive recruitment

Strong indicators

Abduction, forced marriage, forced adoption or selling of victim

Debt bondage

Isolation, confinement or surveillance

Threats of violence against victim

Violence on victims

Medium indicators

Confiscation of documents

Threats of denunciation to authorities

Threats to inform family, community or public

Violence on family (threats or effective)

Withholding of money

Indicators of recruitment by abuse of vulnerability

Medium indicators

Abuse of cultural/religious beliefs

Abuse of difficult family situation

Abuse of illegal status

Abuse of lack of education (language)

Abuse of lack of information

Control of exploiters

Difficulties in the past

Difficulty to organise the travel

Economic reasons

False information about law, attitude of authorities

False information about successful migration

Family situation

General context

Personal situation

Psychological and emotional dependency

Relationship with authorities/legal status

Indicators of exploitation

Strong indicators

Hazardous work

Medium indicators

Bad living conditions
Excessive working days or hours
Low or no salary
No respect of labour laws or contract signed
No social protection (contract, social insurance etc)
Very bad working conditions
Wage manipulation

Indicators of coercion at destination

Strong indicators

Confiscation of documents
Debt bondage
Forced into illicit/criminal activities
Forced tasks or clients
Isolation, confinement or surveillance
Threats of violence against victim
Under strong influence
Violence on victims

Medium indicators

Forced to act against peers
Forced to lie to authorities, family etc
Threat of denunciation to authorities
Threat to impose even worse working conditions
Threats to inform family, community or public
Violence on family (threats or effective)
Withholding of wages

Indicators of abuse of vulnerability at destination

Strong indicators

Dependency on exploiters

Medium indicators

Difficulties in the past
Difficulty to live in an unknown area
Economic reasons
Family situation
Personal characteristics
Relationship with authorities/legal status

Indicators of trafficking of children for labour exploitation

Indicators of deceptive recruitment

Strong indicator

Deceived about access to education opportunities
Deceived about the nature of the job, location or employer

Medium indicators

Deceived about conditions of work
Deceived about content or legality of work contract
Deceived about family reunification
Deceived about housing and living conditions
Deceived about legal documentation or obtaining legal migration status
Deceived about travel and recruitment conditions
Deceived about wages/earnings
Deceived through promises of marriage or adoption

Indicators of coercive recruitment

Strong indicators

Abduction, forced marriage, forced adoption or selling of victim
Debt bondage
Threats of violence against victim
Violence on victims

Medium indicators

Confiscation of documents
Isolation, confinement or surveillance
Threats of denunciation to authorities
Threats to inform family, community or public
Violence on family (threats or effective)
Withholding of money

Indicators of recruitment by abuse of vulnerability

Medium indicators

Abuse of cultural/religious beliefs
Abuse of difficult family situation
Abuse of illegal status
Abuse of lack of education (language)
Abuse of lack of information
Control of exploiters
Difficulties in the past
Difficulty to organise the travel
Economic reasons
False information about successful migration
Family situation
General context
Personal situation
Psychological and emotional dependency
Relationship with authorities/legal status

Indicators of exploitation

Strong indicators

Excessive working days or hours

Medium indicators

Bad living conditions
Hazardous work
Low or no salary
No access to education
No respect of labour laws or contract signed
Very bad working conditions
Wage manipulation

Indicators of coercion at destination

Strong indicators

Confiscation of documents
Debt bondage
Forced into illicit/criminal activities
Forced tasks or clients
Isolation, confinement or surveillance
Threats of violence against victim
Under strong influence
Violence on victims

Medium indicators

Forced to act against peers
Forced to lie to authorities, family etc
Threat of denunciation to authorities
Threat to impose even worse working conditions
Threats to inform family, community or public
Violence on family (threats or effective)
Withholding of wages

Indicators of abuse of vulnerability at destination

Medium indicators

Dependency on exploiters
Difficulties in the past
Difficulty to live in an unknown area
Economic reasons
Family situation
Personal characteristics
Relationship with authorities/legal status

Indicators of trafficking of adults for sexual exploitation

Indicators of deceptive recruitment

Strong indicator

Deceived about the nature of the job or location

Medium indicators

Deceived about conditions of prostitution
Deceived about content or legality of work contract
Deceived about family reunification
Deceived about housing and living conditions
Deceived about legal documentation or obtaining legal migration status
Deceived about travel and recruitment conditions

Deceived about wages/earnings

Deceived through promises of marriage or adoption

Weak indicators

Deceived about access to education opportunities

Indicators of coercive recruitment

Strong indicators

Abduction, forced marriage, forced adoption or selling of victim

Debt bondage

Threats of violence against victim

Violence on victims

Medium indicators

Confiscation of documents

Isolation, confinement or surveillance

Threats of denunciation to authorities

Threats to inform family, community or public

Violence on family (threats or effective)

Withholding of money

Indicators of recruitment by abuse of vulnerability

Medium indicators

Abuse of difficult family situation

Abuse of illegal status

Abuse of lack of education (language)

Abuse of lack of information

Control of exploiters

Difficulties in the past

Difficulty to organise the travel

Economic reasons

False information about law, attitude of authorities

False information about successful migration

Family situation

General context

Personal situation

Psychological and emotional dependency

Relationship with authorities/legal status

Weak indicators

Abuse of cultural/religious beliefs

Indicators of exploitation

Medium indicators

Bad living conditions

Excessive working days or hours

Hazardous work

Low or no salary

No respect of labour laws or contract signed

No social protection (contract, social insurance etc)

Very bad working conditions

Wage manipulation

Indicators of coercion at destination

Strong indicators

Confiscation of documents

Debt bondage

Forced tasks or clients

Isolation, confinement or surveillance

Threats of violence against victim

Violence on victims

Medium indicators

Forced into illicit/criminal activities

Forced to act against peers

Forced to lie to authorities, family etc

Threat of denunciation to authorities

Threat to impose even worse working conditions

Threats to inform family, community or public

Under strong influence

Violence on family (threats or effective)

Withholding of wages

Indicators of abuse of vulnerability at destination

Medium indicators

Dependency on exploiters

Difficulty to live in an unknown area

Economic reasons

Family situation

Personal characteristics

Relationship with authorities/legal status

Weak indicators

Difficulties in the past

Indicators of trafficking of adults for labour exploitation

Indicators of deceptive recruitment

Strong indicator

Deceived about the nature of the job, location or employer

Medium indicators

Deceived about conditions of work

Deceived about content or legality of work contract

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Deceived about housing and living conditions

Deceived about legal documentation or obtaining legal migration status

Deceived about travel and recruitment conditions

Deceived about wages/earnings

Deceived through promises of marriage or adoption

Weak indicator

Deceived about access to education opportunities

Indicators of coercive recruitment

Strong indicators

Violence on victims

Medium indicators

Abduction, forced marriage, forced adoption or selling of victim

Confiscation of documents

Debt bondage

Isolation, confinement or surveillance

Threats of denunciation to authorities

Threats of violence against victim

Threats to inform family, community or public

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False information about law, attitude of authorities

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Family situation

General context

Personal situation

Psychological and emotional dependency

Relationship with authorities/legal status

Weak indicators

Abuse of cultural/religious beliefs

General context

Difficulties in the past

Difficulty to organise the travel

Indicators of exploitation

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Excessive working days or hours

Medium indicators

Bad living conditions

Hazardous work

Low or no salary

No respect of labour laws or contract signed

No social protection (contract, social insurance etc)

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Weak indicator

No access to education

Indicators of coercion at destination

Strong indicators

Confiscation of documents

Debt bondage

Isolation, confinement or surveillance

Violence on victims

Medium indicators

Forced into illicit/criminal activities

Forced tasks or clients

Forced to act against peers

Forced to lie to authorities, family etc

Threat of denunciation to authorities

Threat to impose even worse working conditions

Threats of violence against victim

Under strong influence

Violence on family (threats or effective)

Withholding of wages

Weak indicators

Threats to inform family, community or public

Indicators of abuse of vulnerability at destination

Medium indicators

Dependency on exploiters

Difficulty to live in an unknown area

Economic reasons

Family situation

Relationship with authorities/legal status

Weak indicators

Difficulties in the past

Personal characteristics

Source: ILO 2009

Labour trafficking: JobWatch

Document provided by JobWatch, 20 January 2009 and edited for clarity.

JobWatch telephone service database

JobWatch operates a telephone information and referral service in Victoria and takes 22,000 calls each year. It maintains database records of callers which identifies key characteristics of its callers and trends in workplace relations. The information collected about callers includes personal and demographic details such as name, address, gender, sex, age and country of birth and also includes employment and workplace characteristics such as industry in which caller is employed, employment status, occupational group, length of employment, job title, size of company and the industrial instrument the worker is covered by. Qualitative data including details and description of the enquiry and information provided to the caller is also collected.

The details and description of the enquiry is based on the information provided by the caller to the JobWatch worker and what the worker subsequently enters on the database system. Hence, there is considerable variability in the level of detail and scope of the qualitative data collected. In addition, JobWatch does not follow up callers and matters unless the caller is referred to JobWatch's legal practice and is taken onboard as a client. In those situations, further information about the client (caller) and matter is kept on a hard copy file opened by the legal practice and not on the JobWatch database.

Statistical analysis of database records

The JobWatch database does not contain a distinct category for 'visa holders', however, a search of the database using terms such as *visa*, *backpackers*, *illegal immigrants/migrants/workers* and *international students* was undertaken. There were approximately 311 client records located on the database that fell into those categories for the period 1 May 1999 (the

Appendix C: JobWatch case studies

date the current JobWatch database began) until 31 December 2008. This represents a very small number of enquiries, given that JobWatch's database records for the same period totalled 126,019.

Why so few enquiries?

There are a variety of reasons that JobWatch receives few enquiries from visa holders or illegal workers. They include:

- lack of awareness of the existence of JobWatch and what JobWatch does;
- nature of the telephone service means those with little English proficiency will experience difficulty in trying to access the service;
- mistrust of authorities and organisations for cultural reasons—authorities or organisations in some callers country of origin were not independent (ie corrupt, in the pocket of the government);
- fear of repercussions—being reported to DIAC and deported from Australia—if they question their working conditions and/or seek assistance about their employment rights and entitlements. Employers are in a very advantageous bargaining position as they can revoke sponsorship in the case of 457 visa holders or report visa holders to DIAC if they have breached their visa requirements such as international students working more than 20 hours during the semester.

Other organisations and government authorities such as Workplace Ombudsman, Equal Opportunity and Human Rights Commissions, are also likely to experience a lack of calls and for similar reasons.

Content and case study analysis

An analysis of *visa* or *illegal* database records revealed that:

- the majority of callers were people on 457 visas;
- of those callers on 457 visas, a high proportion were professionals such as engineers, IT consultants, recruitment consultants and from English speaking countries or who have high English proficiency;
- fewer than 10 percent of callers were backpackers;
- fewer than 10 percent of callers were international students;
- a number of callers were family, friends, fellow employees, concerned members of the community/public calling on behalf of another person. There were also representatives from organisations that the caller went to for assistance such as citizens advice bureaus, migrant resource centres, community legal centres, ethnic or cultural associations;
- other visa categories represented among callers were those on bridging visas, working holiday visas, temporary resident visas, temporary protection visas, business visas, doctors and nurses visas, professional and other skilled visas, sponsored training visas and spouse visas;
- countries that callers originated from included the United Kingdom, Ireland, Austria, Germany, Sweden, France, Malaysia, India, Sri Lanka, China, Greece, Peru, Bangladesh, North and South Korea, Japan, Iran, Burma, Zimbabwe, South Africa, America, Canada, Poland, Philippines, Egypt, Portugal, Thailand, Fiji, Finland, Netherlands, Nigeria and New Zealand;

- type of enquiries from callers included under-payment of wages, non-payment of wages and other entitlements, excessive hours of work, queries about meal breaks, failure to provide payslips, breach of and unfair contracts, cash in hand, redundancy, termination, harassment and bullying, liability for costs such as fares, medical insurance, accommodation and visa; and
- callers were employed in a wide range of industries. These included accommodation, cafes and restaurants; cultural and recreational services; construction; communication services; agriculture, forestry and fishing; education; personal and other services; retail; health and community services; manufacturing and wholesale trade.

Case study analysis

As previously outlined in the background section, the qualitative data from the JobWatch database was variable, however, there were some enquiries from JobWatch's database records that possibly fit within the definition of labour trafficking as found in the UN Trafficking Protocol. JobWatch database records also clearly indicated that even if those three elements that make up the definition of trafficking are not present, there is exploitation of visa holders occurring and exploitation of those who are working in Australia illegally.

The three elements that make up the definition of trafficking are:

- an action by the trafficker, in the form of recruitment, transportation, transfer, harbouring or receipts of persons; and
- the action must be undertaken by one of the following means—force or threat of force, other forms of coercion, abduction, fraud, deception, abuse of power, abuse of a position of vulnerability, giving or receiving payments to achieve the consent of a person having control over another person (eg a parent); and
- the action must be for the purposes of exploitation (ie forced labour or services, slavery or practice similar to slavery, servitude).

Outlined below are examples of enquiries that could broadly fit within labour trafficking as well as some of the exploitative practices that have come through JobWatch's telephone service.

Labour trafficking

Case study 1

Von's friend, Karin, is a housekeeper and nanny who has been in Australia for 18 months working for an American couple. She is from the Philippines and has a four year visa with two more years to run. Karin works six days a week from 7 am to 10 pm and has a 7 pm curfew on her day off. She is paid $800 per month and is given accommodation in the couple's house. Karin has never received sick leave, annual leave or superannuation. She had an argument with her employers over the weekend and they have terminated her employment. They have told her that they have booked her on a flight back to the Philippines and are keeping Karin's passport and bank account details.

Case study 2

Tamara's friend, Indira, is on a contract visa from Sri Lanka and is working for a Greek diplomat. Indira has been there for 18 months and is treated like a slave, for example, she is not paid for working Saturdays. She was told by her employer '[w]e are big people here, I will send you straight back to Sri Lanka if you don't do what we want you to do'. Around two months ago, Indira informed her employer that she wanted to leave on 30 May and they said they would arrange a ticket home for her. The employer told her she couldn't go on 30 May, but a couple of days later. They put a document in front of her and asked her to sign it; she could not read what she was signing and when she asked if she could have a copy to read the employer told her she could not. Indira was getting a salary of $1,500 per month, but when she went to the Australian High Commission in Sri Lanka she was told it should have been $1,700 a month.

Case study 3

Rosy had been working as domestic help for the Lebanese consul official in Lebanon, Greece and Australia. She came to Australia on an 426 visa and ended up running away over 12 months ago because of the bad treatment she was experiencing. Rosy often had to work until 2 am and was paid US$200 when she was meant to be getting AU$1,970. She is awaiting a Migration Review hearing to see whether she can remain in Australia.

Case study 4

Murray is trying to help out a few Japanese people he knows who are on holiday visas and who he thinks are being exploited. They work at a Japanese restaurant/hotel and are only able to work for three months. The employer intimidates them and tells the workers they cannot leave before the three months or until they find a replacement. The employees are on call 24 hours a day—expected to serve customers until 2 am. The board and lodgings that are provided are in poor condition and inadequate meals are provided (they get leftovers). Murray estimates that one of his friends who left the workplace was underpaid $6,000 over the three months she worked there.

Exploitative practices

Case study 5

Sunil is a priest at a temple and three priests from India were brought out to work at the temple. The priests are not given any proper living conditions; they are living in a caravan on an industrial zone and do not have proper bedrooms. The temple where they work is also in a terrible condition. Sunil thinks the priests may be on working visas but he is not sure. He wants to know what he can do to help them.

Case study 6

Ron's friends are workers at a Hindu temple. They are all new immigrants who have residency papers or working visas. They are being severely underpaid and are reluctant to complain about it.

Case study 7

Melinda has been working in sales as an independent contractor for over three months. She has not been paid for the work she has done—she estimates she is owed $10,000 by her employer. Other employees have not been paid their wages. Melinda said the company also employs Sri Lankan immigrants on training visas and pays them a wage of $40 a week.

Backpackers

Case study 8

Gino worked as a sales representative for a communications company on a permanent full-time basis, doing door-to-door sales. He resigned after nine months in the job and his employer has refused to pay him his last wages and annual leave. Gino says the company does this all the time to employees. The company also employs backpackers and makes them sign contracts that state they agree to be an independent contractor. The contract also specifies that when they leave they will not be paid for 90 days and after the 90 days, the employee has to notify the company that they are entitled to the money. Many backpackers leave the country without their money as they cannot wait for that amount of time. In one instance, a backpacker was relying on his final two weeks wages (commission) to pay for his trip back to the United Kingdom.

Case study 9

Malik put an advertisement on an internet site looking for work and he got a response from a backpacker's hostel in Mildura. They sent him an email saying they had work for him there. When Malik got there, he was driven to various farms/wineries to do work—at one place, the work involved him cutting vines and at another place he was planting vines. He was not paid a wage but on a 'per item' basis and was paid at the end of the day; although, in a least one instance, the employer was to pay them at the hostel and if they weren't there leave the money with the hostel. Malik wasn't paid for two days work and at one farm, he was only paid $50 for nine hours work while other people were only paid $25 for a whole day's work. He tried to give them his tax file number but they told him it was only cash-in-hand work. Malik has tried to resolve the matter with the hostel—they have said they'll give him the money but they still haven't.

Case study 10

William, who is on a disability pension, worked on a casual part-time basis as a waiter at a pizza and

pasta restaurant. He was horrified at the employer's workplace practices and conditions. The restaurant mainly employed backpackers who were paid very low rates of pay, that is, three to five dollars per hour and no tax. The employer verbally abuses all the staff and is a bully.

International students

Case study 11

Jasmine is a student officer at a university campus. She was ringing on behalf of a student, Rama. This is at least the third student she has seen recently who has experienced, or is experiencing, problems with a particular employer—a car washing business. The university has advised students not to work there but some students continue to do so.

The students are underpaid, or not paid at all and the employer threatens and intimidates them. In the case of Rama the employer has forced him to work shifts which overlap with his studies and has also not paid him. The employer threatens to report Rama to DIAC, stating that he has a friend who works there who will get Rama deported.

Jasmine states that even though the students have current visas and are allowed to work, they are afraid of the employer's threats.

Case study 12

Singh, an international student from India, worked as a regular and systematic casual labourer for a large company. He has worked an average of 30 hours per week for the past 12 months. He stopped working in his job a few weeks ago and is owed wages. The employer told Singh that if he kept asking for his wages he would kill him and he threatened to have him deported. Singh said there were 50 employees who were owed many thousands of dollars in underpayment; in his case he is owed more than $10,000. He has also received a letter from a person claiming to be a solicitor acting for his ex-employer who has claimed that Singh has breached the terms of a restraint of trade clause. The letter demands payment of $50,000 within seven days from the date of letter for loss flowing from the breach. Singh has never signed or seen any written contract. He has called the police about the threats to kill him and they advised him to stay inside and lock the doors and windows, and if the ex-employer turns up at the house to call them immediately. Singh said his ex-employer told him and other employees that if they had an Australian Business Number they did not have to worry about the 20 hour per week limit of their visa conditions.

Case study 13

Martin worked as a cook at a restaurant and was terminated by his employer following a dispute. He said the employer hires people on student visas and even though they are only allowed to work up to 20 hours a week, they are working more and not being paid.

Illegal workers and other visa holders

Case study 14

Kim rang about a client, Nazan, who was on a bridging visa and had been working as a cleaner. A restriction was imposed on the visa that prevented her working, however, this did not previously apply. Nazan's employer is refusing to pay her for the time she worked on the basis that she had no right to perform the work.

Case study 15

Kathy's husband Kiro works for a Japanese wholesale import company in the sales area. He and the other workers are being paid below the award, are not paid sick leave and their annual leave is deducted if it is not used. Kiro and the other workers there—who are on work visas—will not lodge a complaint with the Workplace Ombudsman as they do not want to rock the boat.

Case study 16

Petra worked for a month as a cleaner on a permanent part-time basis and during that time, the night supervisor verbally abused and sexually assaulted her. She sprayed detergent on the employer after he approached her with his penis out and asked her to come to the toilet with him. People at Petra's workplace mentioned that he does this to a lot of women and a number of overseas students work there and have not reported the assaults due to visa concerns.

Case study 17

Don has been working as a tractor driver and using Round Up and spray seed without protective gear and spraying in an open cab tractor. The law says spraying must be in a closed cab tractor if the driver is not wearing protective gear. Don has suffered nose bleeds (typical reaction) and headaches. There are also serious potential health consequences; internal organs are attacked and shut down resulting in liver and kidney failure. Don has informed Workcover and the local member of parliament who have done nothing. Many of the workers are illegal immigrants who are too afraid to stand up for themselves.

Case study 18

Matthew has been working on a casual part-time basis as a bartender for over six months. He is on a six month work visa which has expired, so for the last three weeks has been off the books. The employer has now said they are not going to paying him for those three weeks. The bar has other illegal workers employed there.

Case study 19

Jody's husband, Salik, is from India and is employed as a chef at a restaurant. The employer outsources to India for staff and therefore, staff are employed on work visas. The employer is taking advantage of this and exploiting the staff. Salik was severely beaten by the employer who also threatened to break Salik's arms and legs because of a complaint that came into the restaurant. Jody tried to call up the employer to calm things down and suggested her husband take some annual leave which the employer refused. She and her husband are in the process of applying for a spouse visa.

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Since July 2007, the Australian Institute of Criminology has been conducting research into the trafficking of persons in the Asia–Pacific region in order to contribute to the evidence base underpinning efforts to combat people trafficking across a range of industries. This report examines what is known about labour trafficking, based on incidences of reported crimes, but also by drawing on information about unreported crime. As such, it provides an assessment about the known or likely incidence of trafficking in persons.

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