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It gives us great pleasure to provide this submission on behalf of RMIT University's Business and Human Rights Centre and the University of Liverpool Management School (ULMS), UK. This international collaboration allows us to assemble international comparisons of evidence about the effectiveness of modern slavery and human rights due diligence legislation, and of what influences business behaviour. We organise our submission around a selection of the questions posed in the review.

In support of the arguments forwarded below, we draw on evidence from our own empirical research, other academic evidential sources, and finally, with specific relevance to the administrative implementation of an Independent Anti-Slavery Commissioner role, we present insights from an exclusive interview with Dame Sara Thornton, the former UK Anti-Slavery Commissioner. We are indebted to the co-authors of the various publications we have drawn on extensively in this submission, and to Dame Sara Thornton for her time and generosity in sharing her experience as Commissioner. We acknowledge, also, the contribution of Alexandra Williams Woods, who conducted research for this submission.

Please do not hesitate to contact Shelley Marshall at Shelley.Marshall@rmit.edu.au for further comment or clarification.

With regards

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Impact of the Modern Slavery Act

2. Is the 'transparency framework' approach of the Modern Slavery Act an effective strategy for confronting and addressing modern slavery threats, including the drivers for modern slavery?

Transparency limitations relating to inadequate supply chain mapping

Overview: Transparency strategies are widely considered by empirical research to have been ineffective in meeting policy objectives. Weaknesses in supply chain mapping mean that the foundational element for meaningful analysis and disclosure of risk, is absent. Companies should be required to maintain (auditable) evidence that supply chain mapping has been undertaken and to describe the processes and extent in the structural description section of statements.

Analysis of principles and application in Australia: In the context of Transparency in Supply Chains (TISC), it is imperative that businesses are transparent about where they source high risk goods and services, even in cases where there are large numbers of entities in their supply chain.[1] Companies reporting in Australia and overseas are tending to report in general terms: for example, on the main countries from which services or goods are supplied. While this year, nearly all companies successfully identified themselves (97%), over one quarter (29%, compared with 40%) failed to describe their structure, operations and supply chains.[2]

Large enterprises currently are not dedicating sufficient effort to mapping their supply chains and therefore are unable, adequately to identify and address incidences of modern slavery.[3] Research at the University of Liverpool suggest that poor quality modern slavery statements are not limited by disclosure strategies, but by weak discovery processes. See response to section 13 for further detail.

Companies should be required to make diligent efforts to trace the entirety of the supply chain where the risk of human rights abuse is greatest. For instance, in the diamond industry, it is imperative that companies trace their supply chains to mines rather than to wholesale retailers. Where the job of tracing the supply chain is considerable, companies are advised to select the highest risk aspects of their inputs and trace those first. In recognition of the differences between industries, subsidiary regulations, or agreements between social partners, might be made regarding the required level of transparency in specific industries.

If companies' supply chain maps are available for scrutiny by third parties, this will enable more detailed scrutiny and validation by NGOs, investment stakeholders and public sector procurement agencies. Third-party NGOs and other researchers will be in a better position

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1 See also Jeffery Vogt, Ruwan Subasinghe and Paapa Danquah, "A Missed Opportunity to Improve Workers' Rights in Global Supply Chains," *Opinio Juris*, March 18, 2022, http://opiniojuris.org/2022/03/18/a-missed-opportunity-to-improve-workers-rights-in-global-supply-chains/.

2 Freya Dinshaw, Professor Justine Nolan, Christina Hill, Amy Sinclair, Shelley Marshall, Fiona McGaughey, Martijn Boersma, Vikram Bhakoo, Jasper Goss, Peter Keegan, Broken Promises: Two years of corporate reporting under Australia's Modern Slavery Act, November 2022, https://www.hrlc.org.au/reports/broken-promises. (Referred to herein as *Broken Promises* (2022)).

3 Pinnington, B., Benstead, A., & Meehan, J. (2022). Transparency in Supply Chains (TiSC) Assessing and improving the quality of modern slavery statements. *Journal of Business Ethics, In Press* doi:https://doi.org/10.1007/s10551-022-05037-w

to validate claims about the sources of goods and services, or to link organisations in the country of production with those in the country in which the reporting entity is domiciled.

Recommendations: Companies should be required to maintain (auditable) evidence that mapping of high-risk supply chains has been undertaken. The extent of supply chains mapped, the process used, and relevance to structural elements of the entity should be reported as part of the structural description provided in annual statements. Companies should be encouraged to make supply chain maps available for third-party analysis on request.

Independent analysis allows stakeholders to make informed decisions

Overview: In order to undertake informed decision making, stakeholders need access to independent analyses of the content of modern slavery statements to evaluate their quality. Transparency strategies are linked to reputational risks and decision making by informed stakeholders, including customers and investors.

Analysis of principles and application in Australia: Whilst the Australian statement repository improves access to statements, the lack of standards and analyses of the quality of modern slavery statements, makes it difficult for stakeholders to make informed choices. Technical compliance assessments provide no indication of the depth and quality of a statement as an indicator of substantive action.

In the absence of such compliance data, the burden falls on civil society organisations (CSOs) and academic bodies. A UK Modern Slavery Policy and Evidence Centre (MSPEC) report[4] that evaluated the effectiveness of Section 54 statutory supply chain regulation, found that placing the 'monitoring burden' on civil society was ineffective. While many civil society organisations and academics have engaged deeply with the MSA in Australia since its enactment, they have done so largely on a pro bono basis with minimal resourcing. For example, in order to develop the *Broken Promises* report, experts from nine civil society, academic and church groups worked together for a period of 18 months to undertake the required research, with a group of approximately 20 reviewers conducting over 330 reviews of statements (resulting in an estimated 700 hours of review, plus validation and analysis). Even with dedicated government funding, this level of support from civil society is wholly unsustainable year on year. It is also an inefficient way in which to drive compliance with the MSA (given only a small proportion of statements have been subject to rigorous review), and places a significant burden on under-resourced organisations to undertake work that should properly be carried out by a regulator. More research is also needed to establish the effect of statements may have on consumer buying choice.[5]

Currently, without a detailed understanding of the issues, stakeholders have no 'yard stick' to assess the effectiveness of the measures being described. The MSPEC report concludes that state-based monitoring would be the best way to provide meaningful accountability.[6]

[4] https://modernslaverypec.org/assets/downloads/TISC-effectiveness-report-summary.pdf

[5] https://www.business-humanrights.org/en/from-us/briefings/uk-modern-slavery-act-missed-opportunities-and-urgent-lessons/

[6] https://modernslaverypec.org/assets/downloads/TISC-effectiveness-report-summary.pdf

Independent peer-reviewed analyses of statement quality undertaken by non-commercial third-parties, summarised through a rating system (such as a 'traffic light' indicator) would help to inform stakeholder decision making. The government function responsibility for modern slavery, or an Independent Anti-Slavery Commissioner would be well-placed to commission and regulate a system of statement evaluation, subject to suitable funding.

Recommendation: A system of independent evaluation of statement quality should be established to increase reputational pressure through informed stakeholder decisions.

4. Should the Modern Slavery Act spell out more explicitly the due diligence steps required of entities to identify and address modern slavery risks?

Overview: Due Diligence is one of the least understood elements of modern slavery reporting regimes, despite its importance and the increasing attention being paid to the topic by legislators internationally. The Modern Slavery Act should place a duty on entities to respect human rights and establish due diligence as a standard of conduct through which this is to be achieved.

International comparison and analysis of principles: Simply requiring entities to fulfil certain procedural due diligence requirements without holding them to account for the quality of due diligence undertaken is insufficient and inadequate. *A company's Human Rights Due Diligence (HRDD) must be directed towards, and evaluated against, a clear and objective standard or outcome.*[7]

Examples of the standards that might be required can be found due diligence laws across a range of areas of civil and criminal law in multiple jurisdictions.[8] The gold standard in relation to human rights due diligence is to be found in the Draft EU Directive.[9] It requires companies to bring actual adverse impacts to an end (Article 8) and that such positive duties be clearly and unequivocally stated in HRDD legislation.

Human rights due diligence is currently poorly understood and executed by reporting entities in Australia. 33% of companies (compared with 41% last year) did not include information on actions taken they had taken to assess and address these risks. Two in five companies (40%, compared with 49%) did not describe how they assess the effectiveness of its actions and one in five (22%, compared with 40%) failed to describe internal company consultation processes. This suggests that far more need to occur to ensure that efforts to conduct human rights due diligence are effective.

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[7] See further Ingrid Landau, "Human Rights Due Diligence and the Risk of Cosmetic Compliance," *Melbourne Journal of International Law* 20, no. 1 (July 2019): 221-247.

8 See gen Olivier de Schutter et al, *Human Rights Due Diligence: the Role of States* (2012), https://en.frankbold.org/sites/default/files/publikace/human_rights_due_diligence-the_role_of_states.pdf.

[9] *Commission Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, at 42, para. 54, COM (2022) 71 final (Feb. 23, 2022), https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF, herein referred to as the EU Draft Directive or the Proposal for an EU HRDD Directive.

Perhaps most significantly, the *Broken Promises* (2022) report finds a distinct lack of action on examining or altering an entity's own purchasing practices in order to address modern slavery risks such as downward cost pressures, unrealistic timeframes and order cancellations. Just 1 in 5 companies (20%, up from 19%) have responsible purchasing practices, with over half of those companies from the garment sector, demonstrating a continuing lack of progress on addressing modern slavery through one's own operations from across the other high-risk sectors.

However, further data collected by the authors of this submission shows a gap between what is reported in MSA disclosures, and the actions undertaken by reporting entities.[10] One reason for this may be that the personnel who are responsible for drafting reports are different from those who are responsible for ensuring that procurement is conducted in a way that combats modern slavery.

Evidence for the need for further guidance about due diligence and appropriate actions to combat modern slavery comes from the Australian University sector. Interviews conducted with procurement personnel in Australian Universities showed that there is no standardised method of ensuring that compliance with labour standards is checked and verified. Further, the methods described were relatively recently implemented. They were embryonic and untested processes.[11] A survey of a broader number of procurement personnel indicated that they had regular (at least quarterly) meeting with contractors to check and verify compliance with labour standards (close to 80%). Internal desk-based audit and statutory declarations were the second most used compliance checks (both 37%). Survey respondents felt consultation with a united workers union was the least preferable way to verify cleaning and/or security contractors' compliance with labour standards (5%), yet the academic literature shows this to be one of the most effective ways to verify and improve labour standards.

Those who report under the Modern Slavery Act (as duty holders) should be unable to contract out of their general responsibility to respect human rights in their own operations and supply chains. Such safeguards are not unfamiliar to business: they are found, for example, in health and safety laws in various jurisdictions including Australia.[12] To clarify, such a clause would not prevent entities from 'cascading' responsibilities in a supply chain but make clear that any contractual term purporting to transfer responsibility from the original entity covered under the law to another is void.

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[10] Shelley Marshall and Jeenat Jabbar, Evaluating University Efforts to Combat Modern Slavery and Labour Abuses in Supply Chains, July 2022, RMIT Business and Human Rights Centre: https://www.rmit.edu.au/content/dam/rmit/au/en/research/networks-centres-groups/bhright/evaluating-university-efforts-to-combat-modern-slavery-and-labour-abuses-in-supply-chains.pdf; Carla Chan Unger, Ema Moolchand and Shelley Marshall, Evaluating the Quality of Modern Slavery Reporting in the Australian University Sector July 2022, RMIT Business and Human Rights Centre: https://www.rmit.edu.au/content/dam/rmit/au/en/research/networks-centres-groups/bhright/evaluation-modern-slavery-report.pdf

[11] Evaluating University Efforts to Combat Modern Slavery and Labour Abuses in Supply Chains, 2022.

12 Safe Work Australia, *Model Work Health and Safety Bill 2022* s 272 (Austl.).

It is important that safeguards be put in place to ensure entities do not unreasonably shift compliance costs to business partners (e.g., by imposing a requirement on contracting entities to pay for audits) as this may only increase cost pressures on suppliers and result in further exploitation of workers. We note that the proposed EU Directive anticipates this problem associated with 'contractual cascading' in the context of companies taking appropriate measures to prevent or minimise adverse human rights impacts, and to bring actual adverse impacts to an end (see Articles 7(2)-(4) and 8(3)-(6)). Where relevant contractual assurances are obtained from, or a contract is entered into, with an SME, the terms used shall be fair, reasonable and non-discriminatory. It further requires that where measures to verify compliance are carried out in relation to SMEs, the company shall bear the cost of the independent third-party verification.

Recommendation. The Modern Slavery Act should place a duty on entities to respect human rights and establish due diligence as a standard of conduct through which this is to be achieved.

Modern Slavery Act reporting requirements

6. Is AU$100m consolidated annual revenue an appropriate threshold to determine which entities are required to submit an annual statement under the Modern Slavery Act? Does the Act impose an appropriate revenue test for ascertaining the $100m threshold?

Overview: We propose that in relation to modern slavery in international operations and supply chains, the 'large company' $100m threshold, holds. However, for 'in country' modern slavery, a different approach should be taken. We advise the development of a 'high risk' category.

International comparison and analysis of principles: The United Nations Guiding Principles on Business and Human Rights (UNGPs) recognise that all business entities have a responsibility to respect human rights. They further clarify that the extent and complexity of the due diligence measures businesses undertake should be proportional to their size, industrial sector, operational context, ownership, and structure, and above all to the severity of their human rights impacts.[13] However the vast majority of HRDD laws adopted to date are limited in their application to very large entities.[14] The proposed EU Directive, for example, is limited in its application to very large companies (determined by way of employee and turnover thresholds) and to a sub-set of smaller companies operating in high-risk sectors, including apparel, agriculture and extractives.[15] Excluding smaller entities from the requirement to undertake HRDD is inconsistent with UN and OECD standards, and fails to recognise that severe forms of labour exploitation and workers' rights violations are not limited to companies above a defined threshold. Consistent with the UNGPs, the Modern Slavery Act should, in principle, recognise that all entities have a responsibility to respect human rights and combat modern slavery, irrespective of size or sector.

Application in Australia: given the failure of most companies required to submit statements under both the UK and Australian Modern Slavery Act to comply with requirements for reporting, we note that it may be beyond the capacity of companies that fall below the current thresholds to comply with the reporting requirements. There may therefore be little value in lowering the threshold for reporting.

An alternative approach to the universal application of the Australian Modern Slavery Act is to require reporting by companies operating in high-risk industries in Australia. High risk industries within Australia include horticulture, cleaning and meat processing, and other industries where a high proportion of workers are migrant workers on short stay visas.

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[13] John Ruggie (Special Representative of the Secretary-General of the UN), *United Nation Guiding Principles on Business and Human Rights (UNGPs)*, at 14, Principle 14, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

[14] See Esmira Hackenberg, Olivia Dean and Shelley Marshall (2021) Human Rights Due Diligence – a global perspective, in *A Guide to Human Rights Due Diligence*, American Bar Association Publication, Forthcoming, for a comparison of laws from around the world.

[15] See also Jeffery Vogt, Ruwan Subasinghe and Paapa Danquah, "A Missed Opportunity to Improve Workers' Rights in Global Supply Chains," *Opinio Juris*, March 18, 2022, http://opiniojuris.org/2022/03/18/a-missed-opportunity-to-improve-workers-rights-in-global-supply-chains/.

Current mechanisms to address severe exploitation in those industries include Labour Hire Licensing Act in two states of Australia, deeds of undertaking by the Fair Work Ombudsman with major supermarket chains, and the *Fair Work Amendment (Protecting Vulnerable Workers) Act* 2017, an Act to amend the Fair Work Act 2009. Neither place an obligation on companies to report on their efforts to combat modern slavery. Further, both concern specific business arrangements: labour hire arrangements and franchising, and do not capture all businesses that operate in high-risk industries.

*Sectoral and Framework/Multilateral Agreement*s are key tools for addressing human rights breaches in supply chains. A useful international model is the sectoral agreements that can be formed under the Netherlands' Child Labour Due Diligence Act. The law encourages companies to participate in International Responsible Business Conduct (IRBC) agreements. Sectoral roundtables are set up by the Dutch government to multistakeholder agreements promoting international responsible business in each sector.[16]

A further example is the UK Construction Protocol that was formed 2017 as a joint sectoral agreement aimed at eradicating slavery by sharing intelligence, protecting workers, and raising awareness.[17] There are around 147 signatories to the Protocol: 61 construction and engineering companies, 41 service and materials suppliers, 21 labor providers, 7 public agencies and bodies, 6 industry associations and accreditation bodies, 6 anti-trafficking organizations, and 5 companies from other sectors. According to interviews undertaken by one of the authors of this report, the fact that a regulatory body – the Gangmasters and Labor Abuse Authority - is involved contributed significantly to the large number of industry signatories.

Such sectoral bodies include representatives of the state, trade unions, employers' organizations and civil society organizations. Sectoral bodies should be responsible, firstly, for creating a framework for consultation regarding human rights due diligence, as well as regulatory forces that impact human rights conditions including changes in migration programs, labour migration quotas and desired policy on labour migration. They should then be charged with developing industry standards and agreements.

Application in Australia: Models for such a role for a Modern Slavery regulator include the Australian Competition and Consumer Commissioner. The ACCC is empowered with creating industry codes of conduct. According to the ACCC's website: **https://www.accc.gov.au/business/industry-codes**

- Codes of conduct provide a set of rules or minimum standards for an industry. They cover the relationship between industry participants and with their customers.
- Some codes of conduct are mandatory – that is, the industry must follow them. Others are voluntary, only applying to those who sign up.

[16] For a further discussion of this idea, see Olivia Dean and Shelley Marshall, Business and Human Rights Law in Australia, in *Contemporary Perspectives on Human Rights Law in Australia*, Edition 2, eds Paula Gerber, Melissa Castan**,** Thomson Reuters, Sydney, 2022**.**

[17] See the Construction Protocol's website, Construction Protocol, https://www.gla.gov.uk/i-am-a/i-use-workers/construction-protocol/, accessed 22 July 2022.

- The ACCC regulates codes of conduct that are prescribed as regulations under the *Competition and Consumer Act 2010*. Other codes are led by industry and not enforced by the ACCC.

Recommendations: The minister with administrative responsibility for the Act should, in consultation with the Independent Anti-Slavery Commissioner (if appointed), should have the power to lower the reporting threshold for high-risk sectors, such as horticulture.
A shorter 'template' report should be available for SMEs required to report under this discretionary provision.

The terms of reference for an IASC (or alternative) function should include responsibility, in high-risk sectors, for liaison with sectoral bodies (such as trade associations) to identify industry specific risks and to establish specific best-practices to address those risks.

7. Should the Modern Slavery Act require annual submission of a modern slavery statement? Does the Act contain appropriate rules for ascertaining the annual reporting timeline for entities?

Overview: Fixed periods for all reporting entities' modern slavery statements, and fixed (latest) dates for submission of statements will provide important improvements in inter-firm comparability of data, easier detection and evaluation of reporting non-compliance, and considerable improvements in the potential to evaluate the effects of changes in law and guidance on overall statement quality.

International comparison: Ahead of publication of the draft bill for the revision of the UK Modern Slavery Act, 2015, the Home Office indicated the UK Government's intention to introduce a single reporting deadline of September 30th and to align the reporting period with the UK tax year (1 April – 31st March).[18] This response also indicated a substantial proportion of practitioners favour alignment of dates. In the absence of fixed reporting periods, researcher samples of statements taken at any point in time, are up to 12 months past their publication time making inter-entity comparisons on quality and content more difficult. Analysis of the effects of legislation updates, or updates to reporting guidance, have to be delayed until all entities within a sample of interest have completed implementation and reporting cycles. Reporting alignment will also enable easier analysis of the effects of sector-specific initiatives and easier evaluation of inter-sector variations.

Fixed reporting deadlines will also enable the scheduling and reporting of statutory reporting compliance checks, by administrators and NGOs, and will enable non-compliant entities to be identified and targeted collectively.

Application in Australia: The tax year provides a convenient period, common to all entities, to which all modern slavery statements may be aligned. Tax years vary in different jurisdictions, so internationally, submission dates may not be aligned, but this is of relatively minor importance compared with the benefits of aligning statement submission timing, and reporting periods, for all Australian entities. The UK's reasoning for selecting the end of

[18] UK Home Office Transparency in supply chains consultation: Government Response. September 22, 2020. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919937/Government_response_to_transparency_in_supply_chains_consultation_21_09_20.pdf

September provides a generous period of 6 months for completion and submission of a statement. A shorter submission period in Australia would ensure that the filing date was well ahead of the end of the calendar year.

Recommendation: There should be fixed annual reporting periods and fixed annual submission dates for modern slavery statements. The reporting period should be aligned to the Australian tax year. Statutory publication requirements should all be met by a fixed date. We suggest that this date should be 3 months after the end of the reporting period (September 30th).

9. Is further clarification required of the phrase 'operations and supply chains', either in the Modern Slavery Act or in administrative guidelines?

Overview. Supply chains are notoriously complex in large enterprises and the term itself is often used vaguely and imprecisely. Modern slavery legislation and associated guidance are too vague in defining even minimally acceptable levels of investigation and action, such that in many cases, little meaningful action is being undertaken. Despite the complexities, it is important that a principle is established, obliging reporting entities to undertake a 'reasonable' level of supply chain analysis of modern slavery risk.

Principles and analysis: There are several theoretical and practical issues relating to the term 'supply chain' that may be impacting companies' modern slavery risk and remediation practices. The extent and complexity of supply chains varies considerably even between companies in the same sector, and certainly between sectors. Multi-business corporations (see section 13) also may have supply chains relating to many different sectors.

In such complex and varying contexts, policy maker reticence to be overly-prescriptive in defining the nature and extent of supply chain management of modern slavery risks, is understandable. However the lack of action on supply chain mapping for many entities, constrains their ability to undertake any meaningful action to identify and address modern slavery in their supply chains (see section 2).

There are many related issues, firstly, with terminology. 'Supply chains' infers a linear set of links that are rarely, if ever, experienced in practice and definitions therefore should recognise 'supply networks'. Furthermore, inconsistencies in managers' responses to a recent supply chain questionnaire in the UK also suggests that managers may be using the term to refer to different structural configurations, and/or referring only to their immediate (tier-1) supply base[19]. The term may also deflect practitioners from considering their company's position in their customers' supply chains. Some industries (such as Australian cotton producers[20]) have potential to impact customer behaviour as well supplier behaviour. Peer relationships, and cross-sector collaborative bodies, such as trade associations may also have a role in facilitating knowledge sharing of supply chain risks.

Secondly, reporting entities, which may have 10s of thousands of direct suppliers, struggle to understand which suppliers' chains should be mapped and how this data should be

[19] University of Liverpool and University of Nottingham, Rights Lab report for Modern Slavery Policy and Evidence Centre https://modernslaverypec.org/research-projects/challenges-in-supply-chain-management-posed-by-covid-19

[20] Boersma, M., Josserand, E., Kaine, S., & Payne, A. (2022). Making sense of downstream labour risk in global value chains: The case of the Australian cotton industry. Journal of Industrial Relations

maintained. For suppliers, which may be reporting entities themselves, supply chain mapping needs to be focused on specific product sets, and specific services, so that maps are constrained to relevant suppliers only (rather than encompassing all tier-1 suppliers).

Reporting entities need guidance that clarifies the nature and extent of supply chains, guidance of expectations of 'reasonable' efforts to map and assess supply chains, guidance on dealing with requests from customers for supply chain maps as well as guidance on building product/service specific maps. The definition of reasonable efforts is likely to be contentious, and may need to be constrained, initially at least, to companies primary value chains (what they make/deliver) rather than secondary value chains (what they use).

Recommendations: (In conjunction with section 2) There should be a statutory obligation for reporting entities to undertake 'reasonable endeavours' to map supply chains relating to their own products and services (primary value chains). Reasonable endeavours should be linked to high-risk and high-volume products and services as a minimum.

11. Should more be done to harmonise reporting requirements under the Australian Modern Slavery Act with reporting requirements in other jurisdictions, such as the United Kingdom? How should harmonisation be progressed?

Overview: Harmonisation is required in relation to the *scope* of the Modern Slavery Act and the *duties* it imposes.[21]

International comparison: Globally, Australia lags behind a growing number of jurisdictions which have adopted or proposed more robust legislation to tackle modern slavery and other adverse human rights impacts through mandatory human rights due diligence. Laws have already been adopted in France, the Netherlands, Norway and Germany, with a draft Directive under consideration in the EU.[22] Further laws are under active consideration in Austria, Belgium, New Zealand and Canada. The MSA is also inconsistent with the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises.

Recognising that business entities may impact all internationally recognised human rights, the UNGPs make clear that the responsibility of business to respect human rights requires businesses to respect at a minimum those rights and principles set out in the International Bill of Human Rights and the ILO's Declaration on Fundamental Principles and Rights at Work. The UNGPs stress that businesses should consider additional standards defined in international treaties for the protection of the rights of particularly vulnerable groups or individuals such as indigenous people or migrants where relevant.[23] The Australian and UK

[21] Evidence for this section is drawn from Marshall, S et al, *Mandatory Human Rights Due Diligence: Risks and Opportunities for Workers and Unions*, RMIT University Business and Human Rights Centre, TraffLab ERC, and Labour, Equality and Human Rights (LEAH) research group, Monash Business School (2022).

[22] EU sustainability due diligence directive, including human rights. Feb, 2022. https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en

[23] John Ruggie (Special Representative of the Secretary-General of the UN), *United Nation Guiding Principles on Business and Human Rights (UNGPs)*, at 13, Principle 12, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

Modern Slavery Acts, as well as the Californian Supply Chain Transparency Act are the most restrictive as they are concerned exclusively with conduct that constitutes 'modern slavery'. The draft EU Directive, covers a far broader range of human rights, but still departs from the UNGPs' all-encompassing approach by listing specific articles and provisions of international conventions and agreements that it covers. Many commentators therefore recommend the adoption of an inclusive and all-encompassing approach regarding the coverage of human rights.[24]

Recommendation: We recommend that the scope of the Modern Slavery Act be expanded to cover universal human rights. We note that the draft EU directive covers both human rights and carbon emissions, and that requires companies to bring actual adverse impacts to an end (Article 8). We recommend that further investigation occur into how this could likewise occur in Australia.

13. Should other reporting features of the Modern Slavery Act be revised – such as the provisions relating to joint statements, or voluntary reporting?

Overview: Multi-National Corporations (MNCs) with multi-divisional business structures are highly unlikely to undertake detailed, meaningful supply chain analysis at a group level.

International comparison and analysis of principles: There is little or no evidence of meaningful supply chain mapping being undertaken by companies. Those few companies that do make claims in their statements, typically heavily qualify the extent of mapping being undertaken.[25] Many MNCs have an extensive number of suppliers, many of which are structurally complex. These factors hitherto have been used as justifications for inaction. The greater the structural breadth of an organisation being reported, the more onerous this task will appear.[26]

The most detailed studies of annual statements have been undertaken in the UK and very few report any real depth. At the University of Liverpool we analysed the content of 190 statements in depth utilising an Ethical Trading Initiative (ETI) framework that defines quality criteria that companies can use as a basis for continuous improvement. We reported

[24] UN High Commissioner for Human Rights, OHCHR Feedback on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence, (May 13, 2022), ; European Coalition for Corporate Justice, European Commission's proposal for a directive on Corporate Sustainability Due Diligence: A comprehensive analysis, April 2022: https://corporatejustice.org/wp-content/uploads/2022/04/ECCJ-analysis-CSDDD-proposal-2022.pdf https://www.ohchr.org/sites/default/files/2022-05/eu-csddd-feedback-ohchr_0.pdf; European Coalition for Corporate Justice, *European Commission's proposal for a directive on Corporate Sustainability Due Diligence: A comprehensive analysis*, (Brussels: ECCJ, 2022), https://corporatejustice.org/wp-content/uploads/2022/04/ECCJ-analysis-CSDDD-proposal-2022.pdf.

[25] Pinnington, B., Benstead, A., & Meehan, J. (2022). Transparency in Supply Chains (TiSC) Assessing and improving the quality of modern slavery statements. *Journal of Business Ethics, In Press* doi:https://doi.org/10.1007/s10551-022-05037-w

[26] Meehan, J., & Pinnington, B. D. (2021). Modern slavery in supply chains: insights through strategic ambiguity. International Journal of Operations & Production Management, 41(2), 77-101. doi:https://doi.org/10.1108/IJOPM-05-2020-0292

on 95 of these cases in a recent paper[27] which showed a poor engagement with supply chain mapping, upon which risk assessments, audits and other practices ultimately depend. Even amongst companies that followed the guidance structure (which is very similar to the structure required by the Australian MSA), few made any claims of detailed supply chain analyses. These findings are similar to those of our recently released *Broken Promises* (2022) report concerning the second year of Australian reporting under the MSA.

Such analyses require detailed operations and supply chain knowledge and data systems access at a business unit level to be effective and of substance. Companies are more likely to pursue this level of detail where business units (including but not limited to separate companies within a group) are required to file their own reports under the Act. We recognise that this will complicate the definition of reporting entity.

Recommendations:
The definition of reporting entity in the Act should be extended to require separate statements to be provided for different trading groups within very large or multi-national enterprises.

The accommodation in Section 14 of the Act, for joint reporting should be removed.

[27] Pinnington, B., Benstead, A., & Meehan, J. (2022). Transparency in Supply Chains (TiSC) Assessing and improving the quality of modern slavery statements. *Journal of Business Ethics, In Press* doi:https://doi.org/10.1007/s10551-022-05037-w

Enforcement of the Modern Slavery Act reporting obligations

16. Should the Modern Slavery Act contain additional enforcement measures – such as the publication of regulatory standards for modern slavery reporting?

Overview: Proactive and meaningful stakeholder engagement occupies a central and crucial place in human rights due diligence.[28] The most effective additional enforcement mechanism would entail enforceable rights to consultation for stakeholders.[29]

Detail and international comparison: To be meaningful and effective, obligations to consult with workers and their representatives must be made explicit and enforceable. Workers have the most relevant knowledge regarding violations of their rights and the effective ways to prevent them. To uncover adequate information regarding systemic human and labour rights breaches throughout the supply chain, companies must undertake independent, robust and rigorous social auditing that engages on a regular basis with workers at the lowest tiers of the supply chain, unions and other informed NGOs. Workers must also be provided with processes and mechanisms to enable them to report on conditions they face so that companies can assess and make changes to their practices.[30] Workers and their representative organisations must also be provided with avenues through which to challenge the adequacy of company HRDD efforts.

The MSA should require companies to have effective grievance mechanisms in place, both as a means of identifying labour rights abuses taking place in their supply chains and to ensure victim/survivors have access to remedy.[31] The requirements concerning entity-based grievance mechanisms must be drafted to ensure that they do not simply result in 'more process' with no meaningful outcomes.[32] The EU Draft Directive states that 'Companies should establish a procedure for dealing with those complaints and inform workers, trade unions and other workers' representatives, where relevant, about such processes'.[33] In keeping with Australia's robust industrial relations system, it is our view that workers

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[28] The OHCHR defines stakeholder engagement in this context as "an ongoing process of interaction and dialogue between an enterprise and its potentially affected stakeholders that enables the enterprise to hear, understand and respond to their interests and concerns, including through collaborative approaches: OHCHR, *The Corporate Responsibility to Respect: An Interpretive Guide*, 8 (Geneva: Publishing service United Nation, 2012).

[29] Evidence for this section is drawn the *Mandatory Human Rights Due Diligence: Risks and Opportunities for Workers and Unions* (2022) report.

30 "What is Worker-Driven Social Responsibility?" *WSR Network*, April 26, 2017, https://wsr-network.org/wp-content/uploads/2017/10/What_is_WSR_web.pdf.

31 For a trade union perspective on workplace grievance mechanisms in HRDD, see International Trade Union Confederation, *Towards Mandatory Due Diligence in Global Supply Chains*, (2020), https://www.ituc-csi.org/towards_mandatory_due_diligence.

32 Jeffery Vogt, Ruwan Subasinghe and Paapa Danquah, "A Missed Opportunity to Improve Workers' Rights in Global Supply Chains," *Opinio Juris*, March 18, 2022, http://opiniojuris.org/2022/03/18/a-missed-opportunity-to-improve-workers-rights-in-global-supply-chains/.

[33] *Commission Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, at 39, para. 42, COM (2022) 71 final (Feb. 23, 2022). https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF.

organisations should be involved in designing these mechanisms, and in determining the location of outposts of such mechanisms, the languages that information is provided in and the procedures for accepting and determining complaints. Companies should be required to disclose data to demonstrate if and where workers in the chain bring grievances and what the company has done to address the grievances.

A civil remedy should be linked to this consultation method, with this element of human rights due diligence acting as a possible defence to claims of breaches of the MSA, as we describe further under 17, directly below.

Recommendation: The MSA should ensure meaningful consultation with stakeholders and their involvement in remediation.

17. Should the Modern Slavery Act impose civil penalties or sanctions for failure to comply with the reporting requirements? If so, when should a penalty or sanction apply?

Company appetite for sanctions

Overview. Recent research indicates that managers do expect stronger penalties and whilst the financial impact of penalties will be low, penalties will increase reputational impact on entities as well as signalling an increasing policy commitment.

International evidence and applicability to Australia. A recent study by the University of Liverpool[34] of companies' reactions to the UK MSA is amongst the first to gather primary qualitative data from managers. The data included both explicit expectations that stronger penalties are expected, as well as implicit expectations indicated through analogies with UK health and safety legislation, a regime renown for the strength of penalties, including director penalties. The accompanying narrative suggests that more substantial action on modern slavery on supply chains will result, but currently only once legislation becomes tougher.

Penalties relating to current statutory requirements are unlikely to drive significant improvements in companies' performance directly, because requirements are limited to submission technicalities rather than content quality. However, the imposition of technical compliance penalties will ensure that more companies' submissions are available for stakeholder and third-party scrutiny, and will signal strengthening commitment to the act that may encourage leading ethical companies to invest further in their supply chain analyses.[35]

On the assumption that statutory penalties will be modest, relative to companies' turnover, the impact of penalties will be reputational rather than financial. A more substantial impact is possible with Government suppliers where conformance can be linked to gating criteria for supplier tenders.

[34] Pinnington & Meehan (forthcoming). *Learning to See Modern Slavery in Supply Chains Through Paradoxical Sensemaking*

[35] Pinnington, B., Benstead, A., & Meehan, J. (2022). Transparency in Supply Chains (TiSC) Assessing and improving the quality of modern slavery statements. *Journal of Business Ethics, In Press* doi:https://doi.org/10.1007/s10551-022-05037-w

Recommendation. Statutory penalties (fines) for non-conformance with reporting requirements should be levied to increase reputational pressure on entities.

Complaints mechanism

Overview: The evidence suggests that the availability of civil remedies alone does not result in the making of complaints, and the presence of state-based mechanisms with the power to investigate and issue sanctions and remedies is required.[36] This complaints mechanism might sit within the Independent Anti-Slavery Commissioner or be a separate body.[37]

International comparison and details:
Thus far, very few claims have been brought against companies in jurisdictions where such claims are possible, eg, under the French Corporate Duty of Vigilance Law, and no significant sanctions have been applied to corporations under its provisions for breaches of workers' human rights. Arguably, a key reason for this is that the burden to prove corporate responsibility is placed on the shoulders of civil society plaintiffs and private entities that often lack resources and do not have sufficient access to information to substantiate their claims. It is imperative, then, that a state authority be empowered to investigate breaches of human rights, request information from corporations and suppliers, and impose administrative sanctions, including pecuniary sanctions.

We propose that the types of remediation provided by state-based complaints mechanisms should include both compensation for workers, and agreements for further preventative action to address the causes of harms to workers. The example of the Bangladesh Accord provides one such model.

Considerable steps are required to make complaints mechanisms accessible to victim/survivors. Complaints mechanisms have both to protect workers from possible retaliation and to ensure they broadly represent worker experience.[38] Labour laws should be drawn on to design an anti-retaliation standard. More importantly, however, effective enforcement typically requires some form of institutional representation for workers. Collective representation through independent unions or workers councils with effective power could provide workers with protection from retaliation. Workers' collective organization, irrespective of precise form, if governed by democratic norms of representation, accountability and worker agency, also enable workers to bring complaints. Legislation

[36] Miller-Dawkins, M., Macdonald, K. and Marshall, S. Beyond Effectiveness Criteria: The possibilities and limits of transnational non-judicial redress mechanisms, Corporate Accountability Research, 2016, https://corporateaccountabilityresearch.net/njm-report-i-beyond-the-uns-effectiveness-criteria.

[37] Evidence for this section is drawn the *Mandatory Human Rights Due Diligence: Risks and Opportunities for Workers and Unions* (2022) report.

[38] International Trade Union Confederation, *Towards Mandatory Due Diligence in Global Supply Chains*, (2020), https://www.ituc-csi.org/towards_mandatory_due_diligence ; Re:Structure Lab, *Forced Labour Evidence Brief: Due Diligence and Transparency Legislation* (Sheffield: Sheffield, Stanford, and Yale Universities, 2021) at https://static1.squarespace.com/static/6055c0601c885456ba8c962a/t/61d71e46967f033bb694f6e5/1641487943126/ReStructureLab_DueDiligence_April2021_AW.pdf.

should thus ensure companies respect workers' rights to freedom of association and collective bargaining throughout the supply chain.[39]

Recommendation: A compliance and complaints mechanism should be created to monitor and enforce the MSA.

Civil Penalties

Overview: the creation of clear causes of action—under tort and contract law—for workers and consumers against those responsible for human rights breaches, and by significant state sanctions for violations is recommended to enforce the positive duty to combat modern slavery.[40]

International comparison and detail:
We encourage the development of civil sanctions that are accessible to workers and proportionate to the severity of breaches. The proposed EU Directive states that in 'order to ensure effective enforcement of national measures implementing this Directive, Member States should provide for dissuasive, proportionate and effective sanctions for infringements of those measures'.[41]

We argue that the burden of proof should be shared between the plaintiff or claimant and the defendant for claims of liability for breaches of human rights. The burden of proving fault is in some instances 'relaxed' or even 'mitigated' through the acceptance of a reversal of that burden of proof. There are many instances in which a plaintiff/complainant is required to establish a prima facie case of harm and then the burden shifts to the respondent/defendant. This reversal of the burden of proof is common in torts law, especially in cases of liability based on fault, as well as in employment law where it is understood that workers have limited access to information in relation employers. It is also common in particularly grave criminal offenses,[42] and, as noted above, in employment law.[43] Under anti-discrimination law in both Canada and the EU, the complainant must establish a prima facie case of discrimination, and then the burden shifts to the respondent to establish either that discrimination did not occur or

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[39] Re:Structure Lab, *Forced Labour Evidence Brief: Labour Share and Value Distribution* (Sheffield: Sheffield, Stanford, and Yale Universities, 2021) at https://static1.squarespace.com/static/6055c0601c885456ba8c962a/t/61d5d81de83cf8390ca5a915/1641404446025/ReStructureLab_LabourShareandValueDistribution_December2021.pdf.

[40] Evidence for this section is drawn the *Mandatory Human Rights Due Diligence: Risks and Opportunities for Workers and Unions* (2022) report.

41 *Commission Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, at 42, para. 54, COM (2022) 71 final (Feb. 23, 2022), https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF.

[42] For example, the defendant bears a legal burden in relation to a number of defences to sexual offences against children outside Australia. The *Criminal Code Act 1995*, s 272.9(5) (Austl) imposes a legal burden on a defendant to prove that they did not intend to derive gratification from a child being present during sexual activity.

[43] *Fair Work Act 2009* s 361 (Austl.) contains a provision which reverses the traditional burden of proof in civil cases, by placing the effective onus of disproving an allegation of a breach of the general protections provisions of the Act (adverse action) upon the entity or person alleged to have breached them.

that there is a defence.[44] To establish a prima facie case of discrimination, complainants must adduce facts that are adequate and sufficient to raise a suspicion of discrimination. This lower evidentiary threshold for the complainant and subsequent shift in burden of proof to the respondent is justified on the ground that the respondent, and not the complainant, has access to the requisite information and that requiring the complainant to establish discrimination on a balance of probabilities would be too high of a legal hurdle to address discriminatory practice. In this way, the burden is shared between the parties.

This sharing of the burden is appropriate for a broader range of human rights claims in cases where the complainant lacks access to information or where a pattern of systematic violations has been established.[45] Such a provision is justified because both the nature of the breaches of human rights, and the vulnerability of those who suffer human rights breaches, makes it very difficult to establish responsibility. In most cases it will be more practical for the defendant to prove this fact than for the claimant to disprove it, in light of the complexity of supply chain relations. The responsible minister should provide clear guidance as to what type of evidence is required by claimants to lodge a claim.

In a doctrine of responsibility, contribution to a breach of human rights can only be rebutted by evidence of effective action to stop the breach. This is in keeping with the Draft EU law to some extent where it states 'The company should not be liable if it carried out specific due diligence measures. However, it should not be exonerated from liability through implementing such measures in case it was unreasonable to expect that the action actually taken, including as regards verifying compliance, would be adequate to prevent, mitigate, bring to an end or minimise the adverse impact.'[46] The fact that the defendant has a human rights due diligence plan or processes in place should not be sufficient to discharge the entity's general duty to respect human rights. However, evidence that such a plan ought to have been effective, and that adequate consultation and remediation efforts occurred, will count towards the defence.

The creation of civil remedies must address some of the legal hurdles that have long rendered transnational labour litigation ineffective. The difficulties created by requiring workers to bring action against companies in the territory where the harm occurred are well known; domestic laws are often too lax, local companies (subsidiaries or suppliers) are often unable to compensate the victims, and, most importantly, the role of agents higher up in the global value chain who exert power over those agents down the value chain is ignored. To date, there is not a single case decided, from beginning to end, on its merits, that holds a lead firm

44 Moore v British Columbia (Education), 2012 SCC 61, [2012] 3 S.C.R 360 (Can.); Julie Rengelheim, "The Burden of Proof in Antidiscrimination Proceedings. A Focus on Belgium, France and Ireland," *European Equality Law Review*, no. 2 (September, 2019): 49-64, Available at SSRN: https://ssrn.com/abstract=3498346.

45 Christopher M. Roberts, "Reversing the Burden of Proof Before Human Rights Bodies", *The International Journal of Human Rights* 25, no. 10 (June, 2022): 1682-1703.

46 *Commission Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, at 42, para. 57, COM (2022) 71 final (Feb. 23, 2022), https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF.

headquartered in the Global North responsible for the labour rights violations committed by its suppliers and subsidiaries located in the Global South.[47]

Three organizing concepts of private international law – competence (jurisdiction), comity and convenience – bear little resemblance to the geographies of production and exploitation.[48] Rules, ranging from such mundane ones as limitation periods to substantive formulations of tort doctrines, differ across legal systems. These principles of private international law are structured in ways that offer advantages to lead firms within the supply chain. Since global supply chains span multiple legal systems, conflict-of-law rules give dominant firms substantial leeway in picking and choosing among the legal rules of different jurisdictions.[49] Moreover, courts tend to defer to contractual (choice of law) clauses specifying which jurisdiction's rules should govern disputes arising under the contract, a choice that typically favours the party with the most power to set the terms of the contract.

The transnational aspect of litigation brought by workers for harms suffered as a result of their employment in globally supply chains is often sufficient to dismiss a case the case and this result is not a mere coincidence. Lead firms' choice of where to source production often rests, inter alia, on the legal system and its benefits to the lead firm. For this reason, states devise legal rules and processes that accommodate the interests of the lead firms to attract their business. Thus, the effect of respecting comity is to distance the dispute to places where the interests of the host state and the transnational corporation coincide.

To be truly effective, mandatory due diligence legislation must be accompanied by a robust liability regime, with an adequate limitation period, and strong enforcement measures that ensure accountability for failure to perform due diligence, as well as to provide access to justice and remedy for victims of human and labour rights abuses. It is critical that victims be provided with access to effective remedies in the state in which the lead firm is domiciled. Collective redress mechanisms, such as class actions, should be available to the claimants. Courts in home states of lead firms should have jurisdiction over legal actions under this law, regardless of whether related proceedings against an entity's subsidiary, supplier or subcontractor are brought in the courts of a third state. A foreign ruling against the liability of a subsidiary, supplier or subcontractor should not prevent home country courts from determining the liability of an entity for the same harm.

We also propose that it ought to be possible to bring joint claims against responsible entities. This might include "big suppliers" who may have "hidden power" in global supply chains.[50] It may also include monitoring bodies who inaccurately certify workplaces free of human

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Nicolas Bueno and Claire Bright, "Implementing Human Rights Due Diligence Through Corporate Civil Liability," *International and Comparative Law Quarterly* 69, no. 4 (2020): 789-818; Alejandro García Esteban and Christopher Patz, *Suing Goliath* (Brussels: European Coalition for Corporate Justice, 2021. (corporatejustice.org/publications/suing-goliath/).

[48] Upendra Baxi, "Some Newly Emergent Geographies of Injustice: Boundaries and Borders in International Law," *Indiana Journal of Global Legal Studies* 23, no. 1 (2016): 15-38.

[49] Katharina Pistor, "The Code of Capital: How the Law Creates Wealth and Inequality – Core Themes," *Accounting, Economics, and Law: A Convivium* 11, no. 1 (2021): 1-7, 5-6. https://doi.org/10.1515/ael-2020-0102.

50 Trang (Mae) Nguyen, "Hidden power in global supply chains," *Harvard International Law Journal* (Forthcoming 2022) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3878596.

rights breaches. The method found in the Australian Textile Clothing and Footwear (TCF) outworker provisions of the labour code is one technique.[51] Other examples include Law No 20 123 in Chile – which establishes vicariously liability for "recipient companies" for the obligations of contract workers. The Californian 'brother's keeper' law makes liable for labour code violations anyone who enters 'into a contract or agreement for labor or services' . . . ' where the contract agreement does not include sufficient funds to allow the contractor to comply with all applicable local, state and federal laws or regulations governing the labor or services to be provided'.[52] The same is true under Israeli law, where service purchasers are liable for workers' rights violations down the labour supply chain in certain sectors if they did not put in place contractual and institutional measures to prevent them and did not act when informed about the violations.[53] In several Canadian provinces, client firms have been made jointly and severally liable with recruitment agencies for illegal recruitment fees paid by migrant workers.[54] Moreover, in the province of Ontario, where several actors have caused harm, they are jointly and severally liable to the injured party for the harm caused.[55] These examples show that joint and vicarious liability can be achieved by various means.

More broadly, the expansion that has occurred in the area of torts in a number of jurisdictions points to an increasing willingness of courts to recognise a duty of care where a third party wrongfully harms another person, even absent a special relationship.[56] Under the principle of "enabling torts" an actor who "sets the stage" for a third party's bad acts with a foreseeable expectation that another person will suffer harm is responsible alongside the primary wrongdoer if that harm in fact occurs.[57]

We propose that in addition to remediation, findings of liability also result in corporations committing to specific changes or outcomes in their human rights due diligence. We note in this respect that the French Corporate Duty of Vigilance Law has been criticized for not requiring corporations to include a commitment to specific changes or outcomes in their due diligence plan. The Australian Fair Work Ombudsman's practice of creating Deeds of Enforceable Undertaking here provides a good example.[58]

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[51] *Fair Work Act 2009* (Austl.).
[52] California Labor Code, § 2810(a).

53 The Act to Enhanced Enforcement of the Labor Law, 2011, SH 2326 62-79 (Isr); See also Guy Davidov, "Compliance with and Enforcement of Labour Laws: An Overview and Some Timely Challenges," *Soziales Recht*, (June 2021): 111-127.

54 Fay Faraday, *Profiting from the Precarious: How Recruitment practices exploit migrant workers* (Toronto: George Cedric Metcalf Charitable Foundation, 2014) at https://metcalffoundation.com/wp-content/uploads/2014/04/Profiting-from-the-Precarious.pdf.
55 Negligence Act, R.S.O. 1990, c. N. 1, s.1. The defendant who fully satisfies the judgment has the right of contribution from the other liable parties based on the extent of reasonability for the plaintiff's loss.
[56] For examples from the US, see Kenneth S Abraham, *The Forms and Functions of Tort Law*, 4th ed (New York, N.Y.: Foundation Press: Thomson Reuters, 2012); Robert L. Rabin, "Enabling Torts," *DePaul Law Review* 49, no. 2 (Winter 2000): 435-454.
[57] Robert L. Rabin, "Enabling Torts," *DePaul Law Review* 49, no. 2 (Winter 2000): 435-454.

[58] Fair Work Ombudsman, Commonwealth of Australia: https://www.fairwork.gov.au/about-us/compliance-and-enforcement/enforceable-undertakings.

Recommendations: the creation of clear causes of action against those responsible for human rights breaches should be created to enforce the positive duty to combat modern slavery and/or human rights breaches. This should include clear guidance regarding the sharing of the burden of proof; a doctrine of responsibility with contribution to a breach of human rights only being rebutted by evidence of effective action to stop the breach; measures to overcome barriers to the transnational scope of claims; a range of remedies to include enforceable undertakings.

Public sector reporting requirements under the Modern Slavery Act

18. Should any alteration be made to the Modern Slavery Act as regards its application to Australian Government agencies?

Transparency-based approaches, such as the Modern Slavery Act rely on the effects of asymmetric power, with influential supply chain heads driving behavioural changes up their supply chains.[59] Government agencies, including centralised procurement agencies, are amongst the most powerful and influential actors and are in a strong position to drive improvement in supply chain transparency through the tiers of their supply chains.[60] Including government functions within the reporting requirements of the Act will promote best-practice in these agencies and enable strong leadership to be demonstrated.

The UK MSA has not yet been updated, but with an expectation that government agencies will come under the reporting requirements, in March 2020, the UK Government became the first to publish its own statement[61], with Government departmental statements being issued from 2021 onwards. This 29 page statement intends to lead by example and encourage more extensive private-sector submissions. Aligning the Australian MSA with emerging practice in the UK may be expected to have synergistic impacts on multi-national enterprises supplying the public sector.

Recommendation: All Australian Government agencies should have a statutory obligation to file an annual modern slavery statement.

19. Does the annual Commonwealth Modern Slavery Statement set an appropriately high reporting standard?

Overview: Evidence from international studies of modern slavery reporting suggests that companies' responses are largely symbolic and lack substantial content.[62] Statement guidance exists for Californian TISC reports, UK MSA Section 54 TISC reports, and the annual Commonwealth of Australia modern slavery statement. In each case, the guidance is optional and is not graded such that evidence of continuous improvement cannot easily be established.[63]

[59] Gualandris, J., Longoni, A., Luzzini, D., & Pagell, M. (2021). The association between supply chain structure and transparency: A large-scale empirical study. Journal of Operations Management, 67(7), 803-827.

[60] https://www.crowncommercial.gov.uk/buy-and-supply/making-responsible-decisions/modern-slavery/

[61] UK Government Modern Slavery Statement, 2020. Available from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875800/UK_Government_Modern_Slavery_Statement.pdf

[62] Pinnington, B., Benstead, A., & Meehan, J. (2022). Transparency in Supply Chains (TiSC) Assessing and improving the quality of modern slavery statements. Journal of Business Ethics, In Press doi:https://doi.org/10.1007/s10551-022-05037-w

[63] https://www.gov.uk/government/publications/transparency-in-supply-chains-a-practical-guide/transparency-in-supply-chains-a-practical-guide; https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf.

International evidence and applicability to Australia. A wide range of studies of modern slavery statements have concluded that companies' responses are symbolic rather than substantive.[64] This echoes findings elsewhere is sustainability reporting.[65]

The Ethical Trading Initiative (ETI) framework was used by Pinnington et al (2022) to undertake detailed assessments of statement quality. This framework defines criteria at three levels of performance and thereby distinguishes between basic, good and best-practice quality, for each of the six reporting sections of the UK MSA. The framework provides an interpretation of the UK MSA Section 54 guidance to help ETI members (and others) to help to stimulate continuous improvement.

This approach is ready adaptable to the Australian MSA context. Further, the approach should be embodied within official guidance to the Act such that NGOs, Universities and industry associations wishing to evaluate and benchmark companies' improving performance over time, have access to common standard for grading performance.

Recommendations:

The MSA should mandate achievement of at least a basic standard of quality, as defined by official guidance to the Act

The basic standard should be achieved for all reporting sections defined by the Act

Official guidance to the Act should be extended to distinguish between basic, good and best-practice levels of quality, for each reporting section

Official guidance quality level definitions should be subject to periodic (e.g. 3-yearly) revision to refine and extend the definitions of basic, good and best-practice reporting

[64] See for example, Broken Promises (2022) and Evaluating the Quality of Modern Slavery Reporting in the Australian University Sector (2022).

[65] Huq, F. A., & Stevenson, M. (2020). Implementing socially sustainable practices in challenging institutional contexts: building theory from seven developing country supplier cases. *Journal of Business Ethics, 161*(2), 415-442

Administration and Compliance Monitoring of the Modern Slavery Act

23. What role should an Anti-Slavery Commissioner play in administering and enforcing the reporting requirements in the Modern Slavery Act? What functions and powers should the Commissioner have for that role?

We would like to submit additional comments regarding the establishment and administration of the role of an Independent Anti-Slavery Commissioner. (We have not included justification for an IASC role in the assumption that this has been largely well-established elsewhere and the need accepted).

We draw substantially on experience from the UK, including an *exclusive interview*[66] *with Dame Sara Thornton DBE QPM*, the previous UK commissioner, as well as publicly available sources such as the UK independent parliamentary review of the MSA, 2015. Points are structured around topics that Dame Sara considered to be key to the successful operation of the commissioner role.

IASC Independence

The most important success factor, emphasised by the outgoing UK IASC (Dame Sara Thornton), is ensuring the genuine independence of the commissioner and their staff. The function needs to be, and be seen to be, independent of politics, business and advocacy. Independence is affected by appointment responsibilities and processes, rights to data access, resourcing, reporting controls and powers to investigate. In particular, the function needs to remain independent of government departments that have substantial responsibilities that relate to trafficking, modern slavery, victim support, prevention (including the role of business). See section 24 recommendation.

IASC access to data

The UK experience suggests that a 'duty to cooperate' on government departments is only partially effective in enabling an IASC to gather information. Data gathering was inhibited in several respects. The duty to cooperate did not extend to the Home Office, arguably the most important government department. During her tenure, the previous IASC found Home Office data so difficult to access that recourse was made to alternative legislation (Freedom of Information Act). Mostly, other departments did respond, but often took an unduly long time, or issued sanitised, bland responses lacking full transparency. There is also no statutory obligation for businesses to respond to requests for information, but most did. It was evident that the difficulty that the former commissioner had in accessing relevant data was partly due to the failure of the Home Office to collect relevant data relating to modern slavery. Where there are flaws in government data gathering, which is impeding the development of a useful evidence base, an IASC with adequate powers could play a key role in identifying and addressing this.

Recommendations: There should be a statutory 'duty to cooperate' which applies to all government departments. There should be a statutory 'duty to cooperate' which applies to all

[66] Interview conducted Sept 6th, 2022 specifically to provide additional evidence to this review

reporting entities. 'Duty to cooperate' should be discharged with reasonable endeavours and within a reasonable period of time.

IASC commissioning of research

Where data is not readily available or needs substantial interpretation to inform evidence-decision making, an IASC should be able to commission research, either directly or through a funding body. In either case, research funding should be available to ensure that an adequate evidence base is established upon which reports and recommendation can be based. As an indication of scale only, in the UK the Modern Slavery Policy and Evidence Centre (MSPEC) was established in 2020 with an initial 3-year budget of £10M budget[67]. The issue in this case is that the PEC is a non-statutory, transient body. Research commissioning is a responsibility of the UK IASC, but no budget is allocated.

Recommendation: An annually negotiated research budget should be accessible to an IASC with a research commissioning responsibility.

IASC scope

The scope of the IASC role needs to consider functional, geographic and organisational factors as a minimum.

Geographic: Experience relating to the first UK IASC appointment period, captured by the 3-year parliamentary review,[68] suggested that IASC should focus on the performance of UK institutions and engage only exceptionally, extra-nationally. In particular, recommendations seemed geared to limiting overseas engagements by the commissioner. Formal clarification on geographic scope is still needed in the UK, but *should* include the right to investigate the performance of government departments, businesses reporting under Section 54, and other UK based institutions in relation to their performance globally. The UK IASC, for instance, did investigate government departments' actions in PPE procurement during the Covid-19 pandemic. The same issues apply to an Australian IASC.

Recommendation: Geographic scope should be defined in the role specification.

IASC reports

Annual reports and reports on specific topics of interest, are some of the most important outputs from the commissioner's office in ensuring transparency, and scrutiny on the effectiveness of the Act. For independence to exist, reports-in-full should be made available to the receiving bodies (such as an all-party parliamentary committee).

The UK experience illustrates reporting-line issues that compromise independence. Reports are first circulated to the Home Office *for review and redaction*. The IASC had to fight the

[67] MSPEC announced, 2019 https://www.gov.uk/government/news/government-to-launch-new-modern-slavery-research-centre and launched in September, 2020 with an international vitual conference: https://modernslaverypec.org/latest/official-opening-of-the-modern-slavery-pec

[68] Home Office (2019) *Independent Review of the Modern Slavery Act 2015: Final Report*, p. 32. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803554/Independent_review_of_the_Modern_Slavery_Act_-_final_report__print_.pdf

case for sections to be re-instated which further delayed issue. In the UK the justification for Home Office review and redaction is 'national security'. While this is an important consideration, it is evident that this has been used to redact politically sensitive content.

Recommendation: To preserve the independence of the IASC, reports should not be subject review or redaction by any government department. The IASC office should retain responsibility for seeking relevant departmental advice on any matters potentially relating to national security, but should retain editorial control of reports.

IASC resourcing

The budget for the UK IASC function remained unchanged over 7 years, impeding effectiveness. The commissioner largely worked around the issue and drew on personal contacts to bolster available staff sufficiently. The IASC in the UK is supported by a small number of staff (seven approximately) located in London. The outgoing UK commissioner observed that the Home Office "were stunningly unresponsive about resources".

Recommendation: The appointing body should be able to recommend suitable resourcing levels, to Government.

IASC actions relating to reporting entities and reporting effectiveness

Overview. In section 2, we outline the issue facing stakeholders such as investors and customers, who are unable to make informed decisions on reporting entities effectiveness in combating modern slavery in supply chains without a standards-based third-party evaluation. The IASC would be well positioned to be given the responsibility for commissioning such a function and recommending a suitable funding model.

Recommendation: The IASC should be responsible for overseeing the design and commissioning of a system of modern slavery statement assessment, and for recommending a suitable (public or private) funding model.

24. Responsibility within government for administering the Modern Slavery Act?

Overview. Administration of the Modern Slavery Act needs to be considered as a multi-agency effort with overall responsibility allocated to an agency that does not face conflicting objectives. Additionally, the full independence of an IASC needs to be ensured with statutory protections (see Section 23).

International comparison and applicability to Australia: Implementation of the UK modern slavery act is undertaken by a dedicated unit within the Home Office which is also responsible for policing, the border force[69], and the IASC office (see section 23). Modern slavery in supply chains is a global phenomenon and there is a danger that co-location of the

[69] https://www.gov.uk/government/organisations/border-force

administration of the modern slavery act with a border agency could lead to conflation of modern slavery with trafficking and immigration – considerably narrowing and constraining the act as a consequence.

Recommendation: Administration of the modern slavery act should be de-coupled from the Australian Border Force and conducted through the Attorney General's Department.