

Submission to the Senate Standing Committees on Legal and Constitutional Affairs

on the

Modern Slavery Amendment (Australian Anti- Slavery Commissioner) Bill 2023

Associate Professor Martijn Boersma,
Director, Human Trafficking and Modern Slavery
Program, University of Notre Dame Australia

Professor Shelley Marshall
College of Business and Law, RMIT University

Associate Professor Fiona McGaughey,
Law School, University of Western Australia

Professor Justine Nolan,
Director, Australian Human Rights Institute,
UNSW Sydney

Contents

1. Introduction.....	3
2. Lessons from Comparative Jurisdictions	3
3. Recommendations on the Functions of the Commissioner.....	6
a) Promote compliance	6
b) Support business engagement and implementation	6
c) Support victims of modern slavery	7
d) Commission and support research	7
e) Responsibility within government to administer the MSA.....	8
e) Power to investigate.....	8
4. Conclusion	9

1. Introduction

We welcome the Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023 (‘the Bill’). The Office of the Anti-Slavery Commissioner (‘ASC Office’) will play a critical role in facilitating the effective implementation of the *Modern Slavery Act 2018 (Cth)* (‘MSA’). While the MSA was widely hailed as a critical first step by Australia towards tackling modern slavery, four years into its operation with over 8,000 statements filed, our research has found that the legislation has so far failed to transform business practices and has not yet made a tangible difference to the lives of workers in Australia and in the supply chains of Australian businesses.¹ Our findings were reinforced by the 2023 independent review of the MSA which acknowledged widespread views that ‘there is no hard evidence that the Modern Slavery Act in its early years has yet caused meaningful change for people living in conditions of modern slavery’.²

It is important then that the ASC Office is established with relevant and well-resourced functions to ensure its success. We suggest that the development of the ASC Office can be meaningfully informed by the Paris Principles.³ Although these were developed for National Human Rights Institutions (‘NHRIs’) globally, we see sufficient similarities between the role of the ASC Office and NHRIs. In brief, drawing on the Paris Principles we suggest the ASC Office should have:

- **Independence from government**, set out in legislation;
- **Adequate powers**, so that the Office can initiate inquiries and investigations (on its own initiative or upon receipt of a complaint), gather the evidence and documents they need, consult with NGOs and State institutions and publicise their reports, findings, and recommendations;
- **Adequate resources**, so that the Office has the funding, staffing, infrastructure, and institutional capacity to perform its functions and discharge its responsibilities;
- **Cooperative work**, recognising that effective human rights work requires collaboration with other State institutions, NGOs, and civil society groups; and
- **Responsibility to administer the MSA**, including by working collaboratively with government agencies to administer, monitor, and support compliance with the MSA reporting requirements including, but not limited to the provision of guidance and education materials and the administration of, or recommendations as to the administration of, penalties and other administrative action.

2. Lessons from Comparative Jurisdictions

¹ Freya Dinshaw, Justine Nolan, Christina Hill, Amy Sinclair, Shelley Marshall, Fiona McGaughey, Martijn Boersma, Vikram Bhakoo, Jasper Goss and Peter Keegan, *Broken Promises: Two years of corporate reporting under Australia’s Modern Slavery Act* (Report, 1 November 2022) (‘*Broken Promises*’); Amy Sinclair and Freya Dinshaw, *Paper Promises? Evaluating the early impact of Australia’s Modern Slavery Act* (Human Rights Law Centre Report, 2022) (‘*Paper Promises*’).

² Australian Government, *Report of the statutory review of the Modern Slavery Act 2018 (Cth) The first three years* (Report by John McMillan, 2023) 33 (‘*Review Report*’) 8.

³ *Principles relating to the Status of National Institutions (The Paris Principles)*, GA Res 48/134, UN Doc A/RES/48/134 (20 December 1993).

There are key lessons to be learned from the UK in terms of its experience in the establishment and operation of the ASC Office. An independent review of the UK *Modern Slavery Act 2015*, found that the UK Anti-Slavery Commissioner ‘plays a significant role in shining a spotlight on the scale and nature of modern slavery as well as driving the UK’s response to the crime’.⁴ However, it was also noted that the role’s independence is ‘constrained by Government influence, potentially compromising the credibility and transparency of the post’.⁵ The review made a number of recommendations related to the Commissioner role, several of which we see as relevant to the Australian context and have summarised here:⁶

- The Government must respect the Commissioner’s statutory independence;
- The Commissioner should have sufficient access to Government data to be able to carry out the duty of scrutiny;
- The appointment process should be transparent and independent with proper oversight mechanisms;
- The Commissioner’s budget should be agreed on a multi-year basis, providing certainty for the Commissioner to determine a strategic multi-year work plan. The budget should be sufficient to ensure the Commissioner has adequate funds to fulfil his/her functions effectively; and
- A statutory board should be introduced to advise the Commissioner, chaired by a person of stature, to be drawn from outside the Government. The Board and its chair should be independently appointed in consultation with the Commissioner and drawn from many sections of society.

Further to these recommendations, we note that the Bill to establish the ASC Office does currently provide for independence of the Commissioner (s 20 J) and access to Government data (s 20W), both of which are important. However, there is no provision for a Board and we reiterate that it is critical that the Office is adequately resourced. It should also be noted that the UK’s MSA has significant limitations and lacks enforcement mechanisms,⁷ and as such, we do not rely solely on the UK model in developing our recommendations.

Several other jurisdictions have introduced broadly similar legislation that gives the relevant regulator more powers and substantial resources. For example, the German *Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains*,⁸ has strong regulation through the ‘Federal Office for Economic Affairs and Export Control’ which can receive and assess company reports, adopt necessary measures to detect, end and prevent violations of the law and may summon people, request information and enter business premises. They may either do so *ex officio* or upon request by persons with

⁴ Frank Field, Maria Miller, Baroness Butler-Sloss, ‘Independent review of the modern slavery act 2015: final report’ (2019 House of Lords) 13 (‘*UK MSA Independent Review*’).

⁵ Ibid.

⁶ Ibid, 22-23.

⁷ See, eg, Fiona McGaughey, Hinrich Voss, Holly Cullen, Matthew Davis, ‘Corporate responses to tackling modern slavery: a comparative analysis of Australia, France and the United Kingdom’ (2021) 7(2) *Business and Human Rights Journal* 249.

⁸ *Gesetz über die unternehmerischen “Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten* [Corporate Due Diligence Obligations for The Prevention of Human Rights Violations in Supply Chains Act] (Germany) July 2021, BGBl I, 2021, 2959 (‘*German Act*’).

a substantiated claim that their rights have been, or are at imminent risk of being, violated by a company as a result of not fulfilling its obligations under the law. The regulator can impose administrative fines of up to €500,000 or up to two per cent of the annual turnover of very large companies.⁹ The Act also includes a public procurement debarment regime (for up to three years),¹⁰ and we note there is some precedent for this type of approach in Australia, as non-compliance with the MSA can result in debarment from public procurement in Western Australia under the *Public Procurement Act 2020 (WA)*.¹¹

Another example is the Norwegian *Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions (Transparency Act)*.¹² Under this law, the National Consumer Authority may impose fines for breaches of the Act. Penalties include fines, prohibitions, injunctions, and enforcement or infringement penalties. The amount of the penalty includes consideration of the severity, scope, and effects of the infringement. Repeat violations of the duty, as prescribed in the Act, to provide information on HRDD risks can result in infringement penalties. The size of the penalty is at the discretion of the National Consumer Authority, depending on the severity, scope, and effects of the infringement.¹³

The United States' (US) government's *Uyghur Forced Labor Prevention Act (UFLPA)* provides a presumption that goods imported from Xinjiang Uyghur Autonomous Region of the People's Republic of China or by an entity on the UFLPA Entity List are prohibited from the US. This law provides clear direction on due diligence, and it is supported by government investment in resources to assist companies in supply chain management.¹⁴ In the 2023 budget the US committed \$89,756,000 USD to funding the UFLPA for supporting enforcement of the prohibition on the importation of goods into the US.¹⁵

A key challenge in the Australian context is that the proposed ASC Office's key role is to support compliance with the MSA. However, in its current state, the legislation is ineffective and the recommendations from the independent review which would strengthen the MSA have not yet been addressed. We argue that in addition to introducing the role of ASC, stronger enforcement mechanisms should also be introduced at this stage.

⁹ Ibid.

¹⁰ Ibid.

¹¹ See Fiona McGaughey et al, 'Public Procurement for Protecting Human Rights' (2022) 47(2) *Alternative Law Journal* 143, 143, 145-6.

¹² *Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven)* [Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act)] (Norway) July 2022 ('*Norwegian Act*').

¹³ *Norwegian Act* (n 12) s 8, 9, 11.

¹⁴ For example, using tools such as: US Department of State, List of Goods Produced by Child Labor or Forced Labor (2022) <https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2021/2022-TVPPRA-List-of-Goods-v3.pdf>.

¹⁵ Department of Homeland Security Appropriations Bill, 2023, (July 1, 2022) <<https://www.congress.gov/congressional-report/117th-congress/house-report/396/1>> (accessed 17 Jan 2024).

3. Recommendations on the Functions of the Commissioner

Here we address key functions of the ASC Office in the current Bill that must be strengthened for the MSA and the new Commissioner to be effective.

a) Promote compliance

Section 20C(1)(a) of the Act notes the role of the ASC Office is to promote compliance with the Act. However, this should also include reference to enforcement. Currently enforcement is a critical missing element of the framework and should be prioritised to improve the effectiveness of the MSA. Provisions need to be added to provide enforcement powers (including recommendations on the imposition of penalties), complaint referral, investigatory powers, the ability to issue guidance, and monitoring powers. Analysis of the early years of the operation of the MSA has shown that companies are failing to comply with the mandatory reporting requirements and are failing to identify or disclose obvious risks of modern slavery.¹⁶ This compliance function is critical but provisions must be added so that the ASC Office has the function of promoting and enforcing compliance.

Recommendation: Amend Section 20C(1)(a) so that the function of the ASC Office is to ‘promote compliance and enforcement with this Act’.

b) Support business engagement and implementation

Sections 20C(1)(b) and (c) stipulate that a role of the Commissioner is to support business engagement and collaboration. The ASC Office could provide tools and resources for businesses to identify and mitigate the risk of modern slavery in their supply chains. The ASC Office could develop guidelines and best practices for organisations to follow, ensuring they comply with the MSA. In the UK, it was noted in the independent review of the MSA that a critical function of the Commissioner is to ‘raise awareness and promote cooperation between sectors and interest groups’.¹⁷ The UK experience illustrates reporting-line issues can compromise independence as reports are first circulated to the Home Office for review and redaction. By acting as a bridge between different sectors, the ASC Office can facilitate the sharing of best practices and promote joint initiatives. Public 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 and the Annual Report should be presented to Parliament to reinforce the independence of the ASC Office.

Recommendation: In addition, to preserve the independence of the ASC Office, reports should not be subject to review or redaction by any government department and S20Y(1) should note the presentation of the Annual Report to Parliament. In addition, amend S20C(1)(b) to incorporate a reference to support ‘reporting entities to undertake human rights due diligence’.

¹⁶ *Broken Promises* n 1; *Paper Promises* n 1.

¹⁷ *UK MSA Independent Review* n 4, 13.

c) Support victims of modern slavery

Section 20C(1)(d)-(e) focus on the provision of support for victims of modern slavery. The ASC Office has a critical function in providing accessible information about resources and services can help victim-survivors understand their rights and the support available to them. Models for this function can be seen in the services provided by the US National Human Trafficking Hotline. Engagement with victim-survivors can lead to more effective policies and support services. Public awareness campaigns and educational programs is key.

A gap in the current Bill with regard to victim-survivors is access to remedy. Section 20D states that the Commissioner would have regard to international obligations; however, to meet our international obligations in this area, access to remedy is critical. The United Nations Guiding Principles on Business and Human Rights ('UNGPs') adopted in 2011,¹⁸ are based on three pillars – protect, respect and remedy. Ensuring that the ASC Office can support victim-survivors to access remedy is essential and adequate access to remedy has been established as a gap in the implementation of the MSA.¹⁹ The establishment of a *National Compensation Scheme for Survivors of Modern Slavery*,²⁰ could sit within the remit of the ASC Office and support access to remedy.

Recommendations:

- Supporting access to remedy for victim-survivors should be included in the functions of the Commissioner,
- Establishment of a *National Compensation for Survivors of Modern Slavery* should be included in the functions of the Commissioner.

d) Commission and support research

Section 20C(1)(g) and (h) reference the important role research plays in understanding the scope and nature of modern slavery. The ASC Office should be able to commission research, either directly or through a funding body. Regular reports and data dissemination can help track progress and inform the public and policymakers. Research funding should be available to ensure that an adequate evidence base is established upon which reports and recommendation can be based. An example is the annual Trafficking in Persons

¹⁸ Ibid.

¹⁹ Shelly Marshall, Vikram Bhakoo, Andrew Kach, Fiona McGaughey, Martijn Boersma, Justine Nolan, Amy Sinclair, 'Australia's Modern Slavery Act: Is it Fit for Purpose?' (Report, 2023).

²⁰ 'Justice for All: Establishing a National Compensation Scheme for Survivors of Modern Slavery', *Anti-Slavery Australia* (Webpage, 7 July 2022) <<https://antislavery.org.au/justice-for-all/>>.

Report²¹ by the U.S. Department of State and and List of Products Produced by Forced or Indentured Child Labor²² and the US Department of State’s Responsible Sourcing Tool.²³

Recommendation: An annually negotiated research budget should be accessible to the ASC Office with a research commissioning responsibility.

e) Responsibility within government to administer the MSA

The functions set out in Sections 20(1)C (i)-(m) are all essential to ensure the effectiveness of the MSA and for the ASC Office to act as a central point of contact for the various government agencies and law enforcement agencies in tackling modern slavery.²⁴ By consulting with various levels of government, the ASC Office can ensure a coordinated approach to policy and enforcement.

An example of such consultation is seen in the partnerships formed by the EU Anti-Trafficking Coordinator. Collaboration with NGOs, academia, and international organisations can enhance efforts to combat modern slavery. The ASC Office should play a key role in advising on effective policies and legislation. The ability of the ASC Office to gather data from Commonwealth, State and Territory governments, agencies, bodies, and office holders on matters relating to modern slavery is critical. The UK experience suggests that a ‘duty to cooperate’ on government departments is only partially effective in enabling information gathering. Data gathering was inhibited in several respects. For example, the duty to cooperate did not extend to the Home Office, arguably the most important government department, and research indicates that other departments did respond but often took an unduly long time, or issued sanitised, bland responses lacking full transparency. The ASC Office needs to have adequate powers to compel information sharing.

Recommendation: That S20W should include a statutory ‘duty to cooperate’ which applies to all government departments. ‘Duty to cooperate’ should be discharged with reasonable endeavours and within a reasonable period of time.

e) Power to investigate

Section 20C(2) currently states that ‘To avoid doubt, the Commissioner may not investigate, or resolve complaints concerning, individual instances or suspected instances of modern slavery.’ The proposed limitation on investigating or resolving individual complaints will significantly limit the effectiveness of

²¹ US Department of State, ‘2023 Annual Trafficking in Persons Report’, <<https://www.state.gov/reports/2023-trafficking-in-persons-report/>>.

²² US Bureau of International Labor Affairs, ‘List of Products Produced by Forced or Indentured Child Labor’ <<https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-products>>.

²³ Verité and the US Department of State, ‘Responsible Sourcing Tool’ <<https://www.responsiblesourcingtool.org/>>.

²⁴ These agencies and entities include: the Department of Home Affairs and Australian Border Force, the Australian Federal Police, the Department of Foreign Affairs and Trade, the Attorney General’s Office (international law), the Ambassador for People Smuggling and Human Trafficking, the Australian National Contact Point (AusNCP) for the OECD Guidelines, the Fair Work Ombudsman, the Australian Human Rights Commission and others.

the ASC Office. Above, we noted that regulators in other jurisdictions do have investigative powers. The ASC Office should have the ability to conduct investigations on its own initiative or upon receipt of a complaint relating to non-compliance with the MSA or suspected instances of modern slavery, similar to the ACCC's investigation powers. There would also be merit in giving the ASC Office broader investigatory power to conduct appropriate investigations, similar to the Australian Human Rights Commission (AHRC). The eSafety Commissioner is a comparative model with the power to investigate, enforce, handle complaints, and provide guidance. The eSafety office effectively manages a balance between 'prevention' through research and education, 'protection' through regulatory schemes, complaints and investigations and 'proactive and systemic change'²⁵ by supporting industry to improve user safety standards and strengthening our impact across borders. Other relevant models include the Information Commissioner, Fair Work Ombudsman, and Federal Safety Commissioner.

The ASC Office could, for example, focus on industry investigations in high-risk sectors. It is well established that the current criminal justice system has not been effective in tackling modern slavery. There are various obstacles in the investigation and prosecution processes, as well as in the pursuit of convictions for offences related to human trafficking and slavery.²⁶ From 2004 to June 30, 2019, there were only 24 convictions, despite 462 victims being referred to the Australian Government's Support for Trafficked People Program. This suggests a significant attrition rate of cases within the criminal justice system. The ASC Office may play a supporting role (for example in commissioning research) to assist in uncovering the specific obstacles that impede police and prosecutors in their efforts to ultimately secure convictions for these crimes, and therefore potentially reduce the number of cases that do not make it through the criminal justice process, from the point of police referral to the final court decision.

Recommendation: Rather than prohibit all forms of investigation, clarify that 20C(2) prohibits the Commissioner from undertaking *criminal* investigations of suspected modern slavery.

Amend 20C(1)(h): to **investigate**, analyse, interpret and disseminate information relating to modern slavery.

4. Conclusion

The role of the Anti-Slavery Commissioner and their office is critical to improving the efficacy of the MSA and ensuring that Australia will continue to play a leadership role in addressing modern slavery. To achieve this, it is important to safeguard the independence of the Office, ensure it is adequately resourced as appropriate to set it up for success, and empower it with the powers to not only promote but also protect human rights. The establishment of this Office is key to strengthening the current responses to the MSA. To drive meaningful change, reporting entities must be supported to adopt more responsible business and human rights practices (including the integration of human rights due diligence) throughout their operations

²⁵ eSafety Regulatory Posture and Regulatory Priorities November 2021-22 (2021)

<[https://www.esafety.gov.au/sites/default/files/2022-](https://www.esafety.gov.au/sites/default/files/2022-03/Regulatory%20Posture%20and%20Regulatory%20Priorities.pdf)

03/Regulatory%20Posture%20and%20Regulatory%20Priorities.pdf> (accessed 16 Jan 2024).

²⁶ *Trends and Issues in Crime and Criminal Justice* (Australian Institute of Criminology report No 640, November 2021).



and supply chains. To achieve this the ASC Office must be both an educator and an enforcer and this Bill should be amended to reflect these dual functions.