

Modern Slavery Act 2018 (Cth) Review

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Contents

Summary of Recommendations	4
Impact of the Modern Slavery Act	5
Issues Paper Q1. Has the Modern Slavery Act had a positive impact in the first three years?	5
Issues Paper Q2. 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?	5
Issues Paper Q3. Should the Modern Slavery Act be extended to require additional modern slavery reporting by entities on exposure to specified issues of concern? If so, what form should that reporting obligation take?	6
Issues Paper Q4. Should the Modern Slavery Act spell out more explicitly the due diligence steps required of entities to identify and address modern slavery risks?	7
Issues Paper Q5. Has the Modern Slavery Act been adequately supported and promoted by government, business and civil society?	10
Modern Slavery Act reporting requirements	11
Issues Paper Q6. 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?	11
Issues Paper Q 10. Are the mandatory reporting criteria in the Modern Slavery Act appropriate – both substantively and in how they are framed?	12
Issues Paper Q11. 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?	13
Enforcement of the Modern Slavery Act reporting obligations	13
Issues Paper Q14. Has there been an adequate – or inadequate – business compliance ethic as regards the Modern Slavery Act reporting requirements?	13
Issues Paper Q16. Should the Modern Slavery Act contain additional enforcement measures – such as the publication of regulatory standards for modern slavery reporting?	14
Issues Paper Q17. 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?	17
Issues Paper Q18. Should any alteration be made to the Modern Slavery Act as regards its application to Australian Government agencies?	21
Modern Slavery Statements Register	21
Issues Paper Q21. Does the Register provide a valuable service?	21

Issues Paper Q22. Could improvements be made to the Register to facilitate accessibility, searchability and transparency?21

Administration and Compliance Monitoring of the Modern Slavery Act22

Issues Paper Q23. 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?22

Issues Paper Q25. Is a further statutory review (or reviews) of the Modern Slavery Act desirable? If so, when? And by whom?23

Other issues23

Issues Paper Q27. Is there any other issue falling within the Terms of Reference for this review that you would like to raise?23

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Summary of Recommendations

1. Amend the MSA to require reporting entities to undertake **human rights due diligence** to identify, prevent and address modern slavery risks in their operations and supply chains.
2. **Introduce financial penalties** and other consequences for noncompliance with reporting obligations.
3. Expand the mandatory reporting criteria in s16(1) to require **reporting of identified incidents** of modern slavery
4. Ensure appropriate oversight and enforcement of the MSA, including through the appointment of an **independent Anti-Slavery Commissioner**.
5. **Ban imported goods** produced with forced labour as a complementary measure to strengthen the MSA.

Impact of the Modern Slavery Act

Issues Paper Q1. Has the Modern Slavery Act had a positive impact in the first three years?

The *Modern Slavery Act 2018* (Cth) (**MSA**) was widely hailed as a critical first step by Australia towards tackling the global problem of modern slavery, with the government proclaiming that it would transform the way businesses respond to modern slavery by prompting a business-led 'race to the top'.¹ It's 'transformation' impact remains unclear, but the MSA has increased awareness and made reporting entities and their suppliers more conscious of modern slavery risks, and some have taken steps to better identify and mitigate them. This is evidenced by over 4,600 statements that are now accessible on the Modern Slavery Registry, many of them referencing training for staff and suppliers to educate and raise awareness about modern slavery risks, development of policies and codes of conduct, amended contract terms and conditions, and various other actions. This is a positive development. Yet the extent to which the legislation is transforming business practices or making a tangible difference to the lives of exploited workers remains uncertain.² Rather, we see the MSA as a useful first step towards a more robust regulatory regime, as discussed below.

Issues Paper Q2. 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?

The transparency framework of the MSA asserts that reporting entities will produce and report information about their management of modern slavery risks, which the market, consumers and other actors can evaluate and respond to. An equally important assumption is that the reporting obligations will stimulate internal processes, such as human rights due diligence (which is included but not mandated in the MSA), so that modern slavery risks become a 'serious integral part' of corporate decision-making.³ Our research and broader scholarship question the level of confidence we can have that a reporting requirement alone can trigger a fulsome internal response by the reporting entity that incorporates due diligence activities, which not only yield quality information for external audiences to act upon but also effectively transform business practices.⁴ The limitations of this approach have been well established with regard to the Australian MSA,⁵ and the similar provision in Section 54 of the UK MSA which came into force

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2018, 6754 (Alexander Hawke, Assistant Minister for Home Affairs).

² Amy Sinclair and Freya Dinshaw, *Paper Promises? Evaluating the early impact of Australia's Modern Slavery Act* (Human Rights Law Centre Report, 2022); 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).

³ Jolyon Ford and Justine Nolan, 'Regulating Transparency on Human Rights and Modern Slavery in Corporate Supply Chains: the Discrepancy between Human Rights Due Diligence and the Social Audit' (2020) 26(1) *Australian Journal of Human Rights* 27; Marcia Narine, 'Disclosing Disclosure's Defects: Corporate Responsibility for Human Rights Impact' (2015) 47(1) *Columbia Human Rights Law Review* 84; Radu Mares, 'Corporate Transparency Laws: A Hollow Victory?' (2018) 36(3) *Netherlands Quarterly of Human Rights* 189.

⁴ *Paper Promises* n 2; *Broken Promises* n 2; Narine n 3; Mares n 3.

⁵ Hannah Harris and Justine Nolan, 'Outsourcing the Enforcement of Modern Slavery: Overcoming the Limitations of a Market-Based Disclosure Model' (2022) 64 (2) *Journal of Industrial Relations* 223.

earlier (2015) and as such provides a more robust evidence base for the limitations of relying solely on disclosure to change business practices.⁶

More broadly, transparency frameworks as governance tools are not new and for at least two decades their efficacy record has been questioned, particularly in social and environmental reporting.⁷ The assumption that reporting entities will ‘internalise the regulatory objective’⁸ (or pursue a ‘race to the top’) is questionable, since both scholarship and experience raise doubts about whether MSA-style procedural reporting can generate real internal organisational learning and change. Our 2022 report, *Broken Promises*,⁹ shows that only one in three of the companies we examined demonstrated taking some form of effective action in response to the MSA reporting requirements. Ultimately, the MSA does not require *action*, simply the publishing of a *report*.

What is clear is that there is no one mechanism which alone will drive transformational change and a range of regulatory measures are required. This ‘smart regulatory mix’ was well examined in the Australian Law Commission’s 2020 report on *Corporate Criminal Responsibility*¹⁰ which made high-level recommendations for a smart regulatory mix. This is also the approach recommended in the UN *Guiding Principles on Business and Human Rights*, the primary international law instrument of relevance here.¹¹ It aligns with well-established regulatory principles set out by Braithwaite in his responsive regulation model, whereby a range of measures support effective regulation and the capability to escalate to tough enforcement enables regulation to better support collaborative capacity building.¹² Beyond the MSA transparency model, there are a range of other regulatory levers which could operate in concert with the Act (such as import bans, procurement debarment regimes, and other measures we recommend elsewhere in this submission, (see Q16 and Q27).

Issues Paper Q3. Should the Modern Slavery Act be extended to require additional modern slavery reporting by entities on exposure to specified issues of concern? If so, what form should that reporting obligation take?

There is a need for more comprehensive reporting and transparency around the incidence of modern slavery in reporting entities’ operations and supply chains. We recommend the inclusion of an additional reporting criterion in s16(1) of the MSA to require reporting entities to **describe**

⁶ Virginia Mantouvalou, ‘The UK Modern Slavery Act 2015 Three Years On’ (2018) 81(6) *Modern Law Review* 1017; *Independent Review of the Modern Slavery Act 2015: Final Report* (Report, May 2019, updated December 2021) <<https://www.gov.uk/government/publications/independent-review-of-the-modern-slavery-act-final-report/independent-review-of-the-modern-slavery-act-final-report-accessible-version#volume-ii-transparency-in-supply-chains-section-54-of-the-act>>.

⁷ Samuel A DiPiazza and Robert G. Eccles, *Building Public Trust: The Future of Corporate Reporting* (John Wiley & Sons, 2002); Karin Buhmann, ‘Neglecting the Proactive Aspect of Due Diligence? A Critical Appraisal of the EU’s Non-Financial Reporting Directive as a Pillar One Avenue for Promoting Pillar Two Action’ (2018) 3(1) *Business and Human Rights Journal* 23.

⁸ Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002).

⁹ *Broken Promises* n 2; see page 20 for what constitutes effective action which includes human rights due diligence.

¹⁰ Australian Law Reform Commission, *Corporate Criminal Responsibility* (Report No 136, April 2020).

¹¹ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, (December 2011) <www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf>.

¹² John Braithwaite, ‘The Essence of Responsive Regulation’ (2011) 44 *University of British Columbia Law Review* 475.

and quantify any incidents of modern slavery that they have identified in their operations and supply chains. The inclusion of a mandatory reporting requirement to report actual incidents will improve our understanding of the frequency with which modern slavery is identified in reporting entities' operations and supply chains.

Reporting entities must be supported to move from a 'nothing to see here' approach to a more transparent model of modern slavery reporting. Further, it needs to be understood that underreporting of incidents can be problematic rather than positive. Given the prevalence of modern slavery (now estimated at nearly 50 million people globally), a lack of reporting of incidents may indicate either poor processes to uncover the issue or cover ups by the reporting entity and/or their suppliers. Here, we can draw on increased reporting in other corporate areas which led to improvements. For example, in the area of patient safety, increased incident reporting rates from acute hospitals were seen to increase with time as a result of a national reporting system and were positively correlated with independently defined measures of safety culture, higher reporting rates being associated with a more positive safety culture.¹³

To evaluate the effectiveness of regulatory mechanisms that aim to prevent, reduce, and mitigate modern slavery, we need to obtain better data on the incidence of modern slavery.

Issues Paper Q4. Should the Modern Slavery Act spell out more explicitly the due diligence steps required of entities to identify and address modern slavery risks?

Modern slavery exists on a continuum of human rights abuses.¹⁴ Over time, recognising their indivisible and interconnected nature, Australia should follow the approach taken in several European jurisdictions to require reporting entities to undertake due diligence to identify, prevent, and address human rights harms more generally in their operations and supply chains. There is a growing global trend towards requiring companies to undertake human rights due diligence. **We argue that the MSA must be amended to require reporting entities to undertake human rights due diligence to identify, prevent, and address modern slavery risks in their operations and supply chains. In addition, the MSA should be amended to include a specific duty to prevent modern slavery. Companies would have to show reasonable and appropriate due diligence as a defence to legal liability.**

As outlined above, reporting in and of itself, even if properly enforced, is unlikely to result in the transformative changes to corporate practices needed to eliminate modern slavery. The MSA is one of a growing number of national or regional regulatory regimes that seek to address human rights abuses in supply chains. These regimes currently fall broadly into three categories: disclosure or transparency-based regimes; due diligence compliance regimes; and trade bans. Australia's MSA is a disclosure-based regime, not requiring action but rather the publication of a report. It lacks a holistic enforcement framework. Disclosure-based regulation has attracted questions as to whether it will ever be truly effective in reducing modern slavery¹⁵ and

¹³ A Hutchinson et al, 'Trends in Healthcare Incident Reporting and Relationship to Safety and Quality Data in Acute Hospitals: Results from the National Reporting and Learning System' (2009) 18(1) *Quality and Safety in Health Care* 5.

¹⁴ Martijn Boersma and Justine Nolan, 'Modern Slavery and the Employment Relationship: Exploring the Continuum of Exploitation' (2022) 64(2) *Journal of Industrial Relations* 165.

¹⁵ Katherine Leanne Christ, Kathyayini Kathy Rao and Roger Leonard Bradford Burritt, 'Accounting for Modern Slavery: An Analysis of Australian Listed Company Disclosures' (2019) 32(3) *Accounting, Auditing and Accountability Journal* 836.

Australia's law is out of step with more recent regional and national legislative initiatives addressing human rights issues in supply chains.

Defining human rights due diligence

Human rights due diligence would oblige reporting entities to identify, prevent and mitigate modern slavery practices, and address harms where these arise. A due diligence approach is consistent with Australia's obligations under *the Protocol to the Forced Labour Convention*, ratified by Australia in 2022. This requires states to take effective measures to prevent and eliminate forced labour including by supporting due diligence by public and private actors.¹⁶

The proposed due diligence requirements should be consistent with the widely accepted standards contained in the *UN Guiding Principles on Business and Human Rights* and the *OECD Guidelines for Multinational Enterprises*.¹⁷ Human rights due diligence is a process, or rather a 'bundle of interrelated processes',¹⁸ through which businesses can identify, prevent, mitigate and account for their actual and potential adverse human rights impacts. Due diligence can be both a sword and shield as it allows stakeholders to hold companies to account for a lack of action to effectively address modern slavery, but also provides companies with a roadmap and defence to liability for modern slavery where they have to take reasonable steps to conduct due diligence.

Guiding Principle 17 of the *UN Guiding Principles on Business and Human Rights* provides an explanation of what due diligence means in this context:

The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

- (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
- (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

Consideration should be given to ensure that due diligence is mandated in a manner that provides clarity around its scope and includes an appropriate enforcement framework to engender compliance. Shining a light on abusive practices is a useful but insufficient step in addressing the problem. Human rights due diligence must be a holistic and ongoing process that extends well beyond workplace audits. The development of legal frameworks that provide clarity on the requisite obligations is key to increasing their effectiveness. Human rights due diligence when implemented must focus on outcomes not just process, and it is essential that business accepts it as a mechanism that demands a change in decision-making and substantive compliance with human rights standards, rather than symbolic compliance. The laws mandating due diligence should both incentivise business to implement it effectively and provide for accountability if they do not. To have a chance of being effective, human rights due

¹⁶ *Protocol of 2014 to the Forced Labour Convention, 1930* (entered into force 9 November 2016).

¹⁷ UN OHCHR n 11; Organisation for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011).

¹⁸ UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Corporate human rights due diligence—emerging practices, challenges and ways forward*, UN Doc A/73/163 (16 July 2018) para 10.

diligence must also include rights holders as principal participants in the process and mandate their consultation, either directly or through appropriate representatives. The involvement of rights holders in the process is key to ensuring both the effective identification and potential remediation of modern slavery risks.

Global and local examples

Due diligence laws to prevent modern slavery, child labour and human rights abuses in corporate supply chains have recently been established in France, Germany, the Netherlands, Switzerland, and Norway and are under active consideration in several other jurisdictions including Canada and New Zealand (see Q11).

In addition to their emerging global adoption, the effectiveness of due diligence systems has also been demonstrated in the Australian context to tackle illegal logging. The *Illegal Logging Prohibition Act 2012 (Cth)* incorporates due diligence requirements that obligate the importers and processors of timber into Australia to initiate verification and certification processes aimed at ensuring imported timber has not been illegally logged. If an importer or processor intentionally, knowingly, or recklessly imports or processes illegally logged timber, they could face significant penalties, including up to five years imprisonment and/or heavy fines; however, the criminal penalties do not apply to noncompliance with the due diligence requirements. The regulations attached to the Act provide clear guidance on what constitutes compliance with due diligence requirements. The *Illegal Logging Prohibition Amendment Regulation 2012* provides that: step 1 is information gathering (the importer must obtain as much of the prescribed information as is reasonably practicable); step 2 is an option process that involves assessing and identifying risk against a prescribed timber legality framework (section 11) or a country-specific guideline (once they are prescribed); step 3 is risk assessment (section 13); and step 4 is risk mitigation (section 14), which should be adequate and proportionate to the identified risk. Illegally logged timber is defined broadly in the *Illegal Logging Prohibition Act 2012 (Cth)* as timber 'harvested in contravention of laws in force in the place (whether or not in Australia) where the timber was harvested' (section 7).

The *Illegal Logging Prohibition Act 2012* has seen high compliance amongst reporting entities with a due diligence system. In 2019-20, the self-declared compliance rate was 80% (82% in 2018-19) and due diligence assessments of importers found that compliance rates rose from around 10% in 2017, during the soft start period, to around 75% in 2019-20.¹⁹ This is a widespread regulatory tool – in 2019-20, the number of regulated entities was estimated at 20,000.²⁰ This is compared with only an estimated annual 3,000 reporting entities under the MSA. An earlier review of the *Illegal Logging Prohibition Act 2012* by KPMG found regulated entities were changing their purchasing practices as a result of the Act to reduce the risk of exposure to illegal logging in their supply chains. Of the 65 entities interviewed, seven had changed suppliers and one had stopped importing a particular product.²¹

Also of relevance is the recent 'Respect at Work' bill²² which places a positive duty on companies to take 'all reasonable and proportionate measures' to eliminate sex discrimination

¹⁹ Department of Agriculture, Water and the Environment, *Annual Report 2019-2020* (Report, 2020) 40.

²⁰ Department of Agriculture, Water and the Environment, *Sunset Review of the Illegal Logging Prohibition Regulation 2012: consultation paper* (2021) 10.

²¹ KPMG, *Independent Review of the impact of the illegal logging regulations on small business* (Report, 28 March 2015) 4.

²² *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (Cth).

and sexual harassment. Like human rights due diligence as set out in the UN Guiding Principles on Business and Human Rights, fulfilling the duty will require different approaches and vary according to the size, nature and circumstances of the business or undertaking, and available resources.

In summary, the MSA should more explicitly spell out the requisite due diligence steps, but also establish an enforceable legal obligation for reporting entities to undertake due diligence and provide for enforcement of this measure through civil liability provisions. It should also include a defence from liability where entities can demonstrate that they have taken reasonable steps to comply with their legal obligations.

Issues Paper Q5. Has the Modern Slavery Act been adequately supported and promoted by government, business and civil society?

Currently, the MSA is primarily supported by a small but capable and committed team in the Modern Slavery Business Engagement Unit ('MSBEU'). However, this team lacks the resources to provide adequate guidance, education and monitoring of compliance with the law. With current resources, it is not possible for the MSBEU to be effective in supporting the implementation of the MSA or ensuring that companies comply with reporting requirements. The need for more resources, support and education is significant and has been identified as a real necessity for reporting entities.²³ Businesses require this support not only for their own staff but also for engagement with their suppliers.²⁴

While many academics and civil society organisations have engaged deeply with the MSA since its enactment, they have done so largely on a pro bono basis with minimal resourcing. For example, to develop the *Paper 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 some dedicated government funding that this project was fortunate to receive, 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.

It is an often overlooked fact that civil society is typically not funded to undertake the type of work associated with monitoring compliance with the MSA. In fact, recent research has found that not-for-profit organisations across Australia are, in general, not funded for the actual cost of what they do.²⁵ Yet, it is well-established that engagement with civil society can strengthen companies' responses to modern slavery,²⁶ and government guidance on the MSA makes

23 Fiona McGaughey, 'Behind the Scenes: Reporting under Australia's Modern Slavery Act' (2021) 27(1) *Australian Journal of Human Rights* 20.

24 Ibid.

25 Sam Thorp, 'Paying What it Takes to Create Impact' (24 March 2022) *Social Ventures Australia Quarterly* <<https://www.socialventures.com.au/sva-quarterly/paying-what-it-takes-to-create-impact/>>.

26 César Rodríguez-Garavito, 'Introduction: A Dialogue Across Divides in the Business and Human Rights Field' in C. Rodríguez-Garavito (ed) *Business and Human Rights: Beyond the End of the Beginning* (Cambridge 2017).

several recommendations on engaging with civil society to tackle modern slavery.²⁷ The *National Action Plan to Combat Modern Slavery 2020-2025* also contains a commitment to ensuring that ‘the voices of victims and survivors, particularly women and children, inform our responses to modern slavery’.²⁸ Engaging with victim-survivors of modern slavery can make an important contribution to the design, implementation, monitoring and evaluation of Australia’s response to modern slavery.²⁹ We reiterate recommendations made by Simmons and Burn to establish a statutory Survivor Advisory Council, support grants project funding for victim-survivor led organisations and ensure that the current review of the MSA is informed by the voices of survivors.³⁰ Civil society does have a role to play – not in enforcing the MSA, but in providing independent expertise and grassroots connections – but it must be funded to do so.

Modern Slavery Act reporting requirements

Issues Paper Q6. 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?

The MSA has a higher threshold than some comparable legislation, for example the UK MSA has a threshold of £36 million which is approximately AUD\$61 million per annum. Lowering the reporting threshold would require more companies to address the risk of modern slavery in their operations and supply chains but given the lack of compliance we already see among larger entities, smaller companies with less resources may struggle to comply in a meaningful way without more supports in place for reporting entities. Prior to any potential threshold changes, it is necessary to first to take steps to ensure the quality of reporting against the mandatory criteria improves which may involve increased education and guidance and stronger compliance measures (see Q10, Q16 and Q17).

Overall, we suggest that while the turnover thresholds may indicate the size of the business and its ability to undertake risk assessment and comply with the requirements of the MSA, they do not tell us anything about the *risks* inherent in the nature of the business. In terms of effectiveness, we argue that for a law that is primarily risk focused, it is valid to prioritise businesses in higher risk sectors - if there is to be any differentiation or threshold approach used in the future. The proposed EU Sustainability Directive model is:

- Group 1: all EU limited liability companies of substantial size and economic power (with 500+ employees and EUR 150 million+ in net turnover worldwide).
- Group 2: Other limited liability companies operating in defined high impact sectors, which do not meet both Group 1 thresholds, but have more than 250 employees; and a net turnover of EUR 40 million worldwide and more. For these companies, rules will

²⁷ Modern Slavery Business Engagement Unit, Australian Government, *Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities* (2019).

²⁸ Commonwealth, *National Action Plan to Combat Modern Slavery 2020-25* (Action Plan, 9 December 2020) 21.

²⁹ Frances Simmons and Jennifer Burn, *Beyond Storytelling: Towards Survivor-Informed Responses to Modern Slavery*, University of Technology Sydney (Report, September 2022).

³⁰ Ibid 46.

start to apply 2 years later than for group 1.³¹

Another risk-based model is that proposed in New Zealand, which is considering a staggered approach to company responsibility: all organisations would be required to act if they become aware of modern slavery or worker exploitation, whereas medium-sized and large organisations would need to disclose the steps they are taking, and large organisations would also have to undertake due diligence.³²

Issues Paper Q 10. Are the mandatory reporting criteria in the Modern Slavery Act appropriate – both substantively and in how they are framed?

We reiterate the importance of compliance with existing requirements. In 2022 the Australian government reported that the compliance rating based on their review of modern slavery statements had increased from 59% to 72% from year one to year two. However, our research finds a lower compliance rate - of the companies analysed 66% did not address all mandatory reporting requirements.³³ Many companies are still submitting reports that fail to address the basic 'mandatory' reporting criteria. Other research reports which have analysed corporate reporting under the MSA have reached similar conclusions about the quality of statements published. Walk Free's 2022 review of 50 garment company statements, across the UK and Australia, found that 77% of statements failed to meet minimum reporting requirements.³⁴ A report by the Australian Council of Superannuation Industries and Pillar Two found that over 60% of ASX200 statements failed to identify any general modern slavery risk areas relating to company operations.³⁵ The first step in reform is to ensure that reporting entities adequately report against the mandatory criteria in s16 of the MSA. Government, civil society, and academics all invest significant time in analysing modern slavery statements, including identifying whether mandatory criteria have been met. However, this data could easily be made mandatory through use of a portal or online form, which would prevent the uploading of a modern slavery statement if those basic criteria have not been met. Analysis of statements can then move beyond basic compliance and focus on more complex analysis of the content and quality of statements, identifying trends, sectors, regions, and other rich data.³⁶

³¹ European Commission, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, 23 February 2022, COM/2022/71 final.

³² New Zealand Government, Ministry of Business, Innovation and Employment, *A Legislative Response to Modern Slavery and Worker Exploitation: Towards freedom, fairness and dignity in operations and supply chains* (Discussion Document, 8 April 2022) 45.

³³ *Broken Promises* n 2.

³⁴ Walk Free Foundation, *Beyond Compliance in the Garment Industry: Assessing UK and Australian Modern Slavery Act statements produced by the garment industry and its investors* (Report, 2022) 7.

³⁵ Australian Council of Superannuation Investors (ACSI) and Pillar Two, *Moving from Paper to Practice: ASX200 Reporting under Australia's Modern Slavery Act* (Report, July 2021) 6 and 11. Also see Walk Free Foundation, *Beyond Compliance in the Garment Industry* (n 31); International Justice Mission Australia, *Spot Fires in Supply Chains* (Report, April 2022).

³⁶ McGaughey n 23.

Issues Paper Q11. 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?

Harmonisation is preferable but by aligning upward towards jurisdictions with stronger laws (rather than downward towards what is currently the weakest law, the UK Modern Slavery Act). We particularly note the relatively recent introduction of various forms of human rights due diligence (HRDD) laws in France, the Netherlands, Norway, and Germany. Certainly, Australia is increasingly out of step in this area - the human rights due diligence legislative trend is not limited to the European context, with similar laws under consideration in Canada, Colombia, Kenya, and New Zealand.

The most significant development is the proposed *EU Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*. This may be amended but looks set to be adopted in some form and as such will have a significant impact globally as it would apply to 27 EU member States and could apply to non-EU companies operating in those States. It would set a new regional standard by establishing a corporate sustainability due diligence duty to address negative human rights and environmental impacts. Australian suppliers to the EU will be expected to comply and in 2021, Australia had goods exports to the EU of \$14.4 billion, and services exports of \$4.7 billion.³⁷

Of note is the current New Zealand consultation on modern slavery legislation. The New Zealand government has reported that most submissions received supported due diligence requirements.³⁸ If a due diligence law is introduced by one of our closest neighbours and our fifth largest trading partner, this would be significant for Australia. It has been posited that the move to mandated human rights due diligence for Australia is inevitable and a 'natural evolution'.³⁹

Enforcement of the Modern Slavery Act reporting obligations

Issues Paper Q14. Has there been an adequate – or inadequate – business compliance ethic as regards the Modern Slavery Act reporting requirements?

Research shows that many companies are submitting reports that fail to address even the basic 'mandatory' reporting criteria. For reporting to be a useful tool in helping to combat modern slavery, the Government must, at a minimum, ensure that companies submit complete and accurate reports. In our recent report, *Broken Promises*, we identified seven statements from a group of 102 companies that were missing from the Modern Slavery Register at the time of our review, meaning that at least seven entities (or 6% of our selected sample) failed to submit a

³⁷ Australian Government Department of Foreign Affairs and Trade, *Trade and Investment Fact Sheet: European Union, 2021* <<https://www.dfat.gov.au/sites/default/files/eu-cef.pdf>>.

³⁸ New Zealand Government, Ministry of Business, Innovation and Employment, *Consultation on Legislation to Address Modern Slavery and Worker Exploitation: Summary of Feedback* (September 2022) 15.

³⁹ Gabrielle Holly, 'Webinar: From Modern Slavery to Human Rights Due Diligence' (UWA Public Policy Institute, November 2022) <<https://www.youtube.com/watch?v=DpeGie7NnLw>>.

report that was compliant with statutory reporting requirements, or simply failed to submit a report at all (in breach of statutory reporting requirements under the MSA).

Discerning compliance with the MSA is difficult. No regulator has been appointed to monitor the statutory reporting obligations of reporting entities. There is no public list of reporting entities which are required to report. There is no public information about companies which have failed to report. Instead, compliance with the MSA currently relies on ad hoc market forces to monitor disclosure efforts. Reliance on market forces alone is an insufficient and unsustainable mechanism to engender compliance with the law. Missing statements send a signal that compliance is not being taken seriously. We propose that companies that fail to report or submit reports which fail to address the mandatory reporting criteria, or provide false or misleading information, should face consequences such as financial penalties, being listed on the MSA Register as a non-compliant entity, and/or being prohibited from public tenders (see responses to Q16 and Q17 below). Penalties can vary depending on the severity and frequency of non-compliance.

Issues Paper Q16. Should the Modern Slavery Act contain additional enforcement measures – such as the publication of regulatory standards for modern slavery reporting?

Effective enforcement measures should consider both positive (support) and negative (sanctions) mechanisms. For example, publicly releasing information about (non-)compliance ('naming and shaming') can serve as an incentive for reporting entities to do more to meet the MSA requirements. Likewise, providing greater clarity around reporting and due diligence requirements, along with incentivising public procurement tenders to stipulate modern slavery compliance are positive measures to encourage improved responses. Braithwaite's well-proven model of responsive regulation, including his responsive regulatory pyramid (see Q 17) acknowledges the importance of support as well as sanctions.⁴⁰

⁴⁰ Braithwaite n 12, 482.

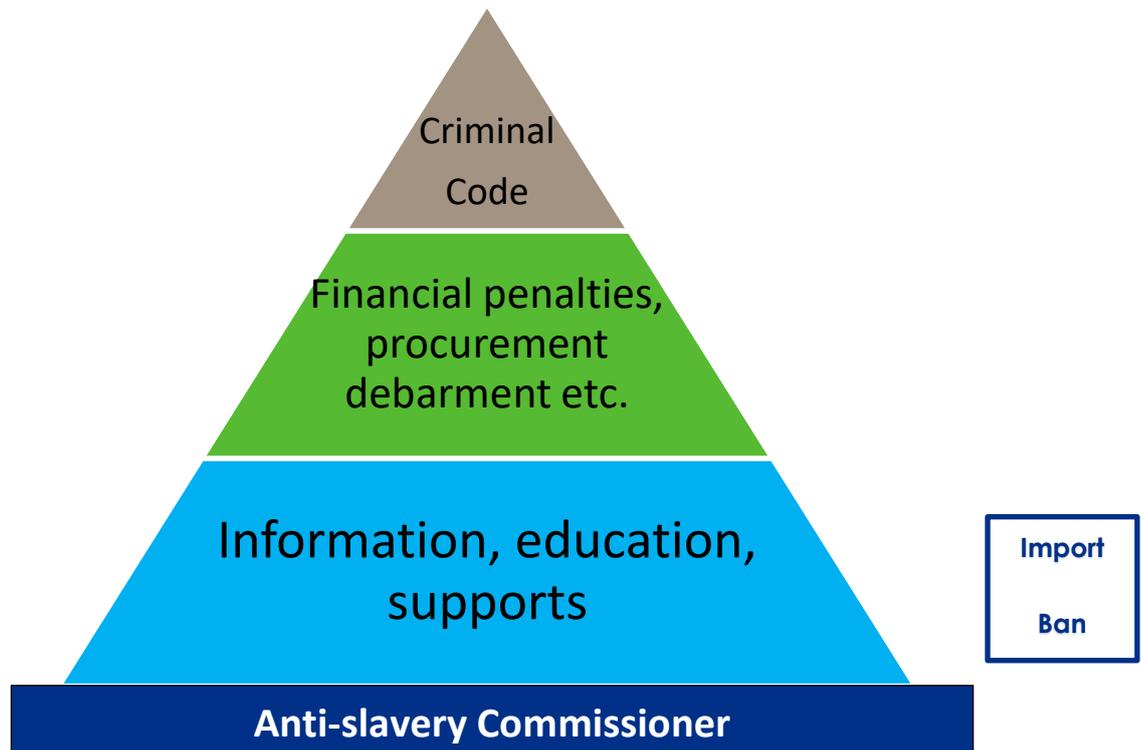


Figure 1: Pyramid of supports and sanctions - drawing on Braithwaite's work.

a. Publication of regulations clarifying modern slavery reporting and human rights due diligence standards

As noted above (see responses to Q4 and Q10) ensuring improved compliance with the mandatory reporting requirements is essential and this may be enhanced by issuing regular and more fulsome clarification and guidance on the reporting requirements. If a requirement to conduct human rights due diligence was incorporated into the MSA, then it would be useful to review the framework of the *Illegal Logging Prohibition Act 2012 (Cth)*, which incorporates due diligence requirements that obligate the importers and processors of timber into Australia to initiate verification and certification processes aimed at ensuring the imported timber has not been illegally logged.⁴¹ The regulations attached to the Act provide guidance as to what constitutes compliance with the due diligence requirements; similar guidance would be useful for providing clearer instruction on current modern slavery reporting requirements and in developing human rights due diligence standards for modern slavery (see response to Q4).

b. Listing companies as non-compliant on the MSA register

Entities that fail to submit a report within the stipulated reporting period should be listed on the Modern Slavery Registry as non-compliant. This is a simple yet effective mechanism to provide greater transparency on compliance with the MSA.

A stronger version of 'naming and shaming' was established in Brazil in 2004 when the government launched a so-called 'dirty list' which is a public register of companies found by government inspectors to have forced labour in their supply chains.⁴² Companies named on the list are monitored for two years and are also subject to fines. The dirty list is reinforced by a

⁴¹ Ryan J Turner, 'Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier' (2016) 17(1) *Melbourne Journal of International Law* 188.

⁴² Government of Brazil, Ministry of Labour and Employment, *Decree No. 540/2004*.

further governmental decree (*Decree No. 1 150*) which recommends that financial bodies refrain from granting financial assistance to those companies who are on the list. At the same time, the Brazilian government dedicated resources to increasing its labour inspection teams. In addition, a multi-stakeholder group (including the International Labour Organization and several non-governmental organisations) established a *National Pact for the Eradication of Slave Labour* whereby companies could voluntarily and publicly pledge to reduce modern slavery by ‘cutting commercial ties with businesses that have made use of slave labour, incorporating contractual clauses...implementing mechanisms to track products and providing in-house training for employees and trading partners’.⁴³

While the Brazilian approach was taken to ‘move the market’ in the face of inaction, our suggestion for Australia is to encourage companies to report modern slavery incidents (Q3) and simply publish the name of entities that fail to publish a report as required by law. What is clear is that an effective approach must use a combination of public and private regulatory mechanisms to reduce modern slavery and that government must make a significant resource commitment for such strategies to have a chance of success.

c. Ban from public procurement tenders

Public procurement is increasingly recognised as a site for improved human rights protection by States, accounting for a significant share of the global economy and nearly 30 per cent of government expenditure across OECD countries.⁴⁴ For the MSA, non-compliant reporting entities could be prohibited from participating in public tenders. The Australian Law Reform Commission Review into Corporate Criminal Responsibility recommended that ‘[t]he Australian Government, together with state and territory governments, should develop a national debarment regime’.⁴⁵ There are two relevant examples that could inform developments here: *Workplace Gender Equality (WGE) Act (Cth) 2012* and the *Procurement Act 2020 (WA)*.⁴⁶ In the first example, under the *Workplace Gender Equality (WGE) Act 2012*, any organisation that is considered a ‘relevant employer’ i.e., non-public sector employers with 100 or more employees, must submit a report to the Workplace Gender Equality Agency. Prior to making a submission in response to an approach to market, organisations must determine whether they are covered under the WGE Act. If the potential supplier is covered under the WGE Act, a letter of compliance (available from Workplace Gender Equality Agency) that certifies that a relevant employer is compliant with the WGE Act must be provided.⁴⁷ A similar arrangement could be introduced for the MSA.

The second example is WA’s new procurement regime in the *Procurement Act 2020 (WA)*, aimed at strengthening integrity in government procurement, enabling coordinated government procurement strategy and providing ‘a legislative scheme that is responsive to changing

⁴³ Ethos Institute, Social Observatory Institute, International Labour Organization and Repórter Brasil, *National Pact for the Eradication of Slave Labour*, 2005 <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---ilo-washington/documents/genericdocument/wcms_189835.pdf>; Ashley Feasley, ‘Deploying Disclosure Laws to Eliminate Forced Labour: Supply chain transparency efforts of Brazil and the United States of America’ (2015) 5 *Anti Trafficking Review* 1.

⁴⁴ Olga Martin-Ortega and Claire Methven O’Brien (eds), *Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer* (Edward Elgar, 2019).

⁴⁵ Australian Law Reform Commission n 10, recommendation 15.

⁴⁶ See Fiona McGaughey et al, ‘Public Procurement for Protecting Human Rights’ (2022) 47(2) *Alternative Law Journal* 143.

⁴⁷ Australian Government, Department of the Prime Minister and Cabinet, *Workplace Gender Equality Procurement Principles and User Guide* (2013).

community expectations'.⁴⁸ The new procurement framework includes a debarment regime, whose purported objective is to protect the integrity of the procurement system and to minimise the State's risk of procuring from a Supplier who engages in unlawful or unethical behaviour to the detriment of the State'. Part 7 of the Procurement Act allows for debarment or termination of contracts with suppliers and requires the maintenance of a public register of debarred suppliers.⁴⁹ It provides for debarment of suppliers who engage in such conduct for a period of up to five years, decided on a case-by-case basis. Causes for debarment fall into Category A which includes criminal offences and civil actions such as bribery and corruption, and fraud; and Category B conduct such as use of unfair contract terms and non-compliance with occupational health and safety legislation. Category A causes for debarment are more serious infractions and can attract a debarment of up to five years, whereas Category B attracts up to a two-year debarment.

The WA regime is not specific to modern slavery or human rights but rather broader ethical behaviour. However, it includes potential debarment for non-compliance with the *Modern Slavery Act 2018 (Cth)* in Category B. Category B also includes 'Non-compliance with gender non-discrimination legislation and equality reporting requirements' and lists the *Equal Opportunity Act 1984 (WA)*, the *Workplace Gender Equality Act 2012 (Cth)*, the *Disability Discrimination Act 1992 (Cth)*, the *Racial Discrimination Act 1975 (Cth)* and the *Sex Discrimination Act 1984 (Cth)*. As we state above, modern slavery exists on a continuum of human rights abuses and so the inclusion of anti-discrimination and equality laws in the WA procurement regime provides more comprehensive protections that could also have implications for modern slavery and related exploitation.

Issues Paper Q17. 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?

Penalties should be introduced as part of a suite of measures designed to improve compliance. This includes financial penalties for non-compliance with reporting requirements and affirming the responsibility of the principal governing body to ensure compliant reporting. Penalties will increase reputational impact on entities as well as signalling an increasing policy commitment to addressing modern slavery.

Drawing on Braithwaite's responsive regulation, we argue that a range of measures are required to support effective regulation and that by having the capability to escalate to tough enforcement, much regulation can be about collaborative capacity building.⁵⁰ This has been recommended within the modern slavery and human rights due diligence area. For example, Landau argues that a range of actors must come together to advocate for self-regulatory processes located within a broader framework of accountability, supported by substantive and procedural rights, but also with a committed Regulator.⁵¹ As yet, the MSA lacks the sanctions for non-compliance with the Act that are required for effective regulation - as per the pyramid in

⁴⁸ *Procurement Act 2020 (WA)* s 3.

⁴⁹ *Procurement (Debarment of Suppliers) Regulations 2021 (WA)* reg 21.

⁵⁰ *Ibid.*

⁵¹ Ingrid Landau, 'Human Rights Due Diligence and the Risk of Cosmetic Compliance' (2019) 20(1) *Melbourne Journal of International Law* 1.

Figure 1. We outline three possible sanction mechanisms that could be used in conjunction with the suggestions offered above (Q16).

a. Financial penalties

Civil penalties should be applied for non-compliance with the MSA through failing to submit a statement or submitting a false and misleading statement. To be effective, fines should have a deterrent effect but should not be unduly punitive for more minor breaches. We argue that a graduated penalties framework can be used – with more serious breaches attracting more significant fines, with repeat offending attracting higher fines (the Dutch model, discussed below), and with higher fines for larger entities as a percentage of their annual turnover (the German model, discussed below).

The Dutch Child Labour Law has a compelling graduated penalties framework, which includes an initial (relatively small) fine but more serious penalties for future non-compliance, including criminal sanctions.⁵² This model fits well with Braithwaite's pyramid whereby the weakest sanctions are used first and the most severe reserved for more serious breaches. If a company fails to produce a statement (or does so inadequately), to carry out an investigation or to set up an action plan, the regulator may first impose a minor fine of €4,100; however, repetition within five years is an economic offence under the Economic Offences Act and carries criminal penalties such as up to four years of imprisonment, community service, or a fine of up to €83,000.⁵³ The German *Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains* also provides for fines. 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.⁵⁴ Again, this is a model of differentiated penalties - here based on turnover rather than 'repeat offending'. Also, each of these models have regulators who can monitor compliance and enforce the law. This point is discussed further under Q23 on an anti-slavery commissioner.

In the Australian context, graduated penalties have been used to differentiate conduct that warrants criminal sanctions from that which warrants only fines. Under the *Illegal Logging Prohibition Act 2012* (Cth), if an importer or processor intentionally, knowingly, or recklessly imports or processes illegally logged timber, they could face significant penalties, including up to five years imprisonment and/or heavy fines; however, the criminal penalties do not apply to non-compliance with the due diligence requirements.⁵⁵

Designing a penalties framework can also be usefully informed by civil penalties under Australian Consumer Law ('ACL') and in particular, the so-called 'French factors' identified by French J in *Trade Practices Commission v CSR*.⁵⁶ In brief, relevant French factors are: the size of the company; the deliberateness of the contravention and the period over which it extended; whether the contravener has a corporate culture conducive to compliance with the law as

⁵² Anneloes Hoff, 'Dutch Child Labour Due Diligence Law: A Step towards Mandatory Human Rights Due Diligence' *Oxford Human Rights Hub* (Blog Post, 10 June 2019).

⁵³ *Ibid.*

⁵⁴ Markus Krajewski, Kristel Tonstad and Franziska Wohltmann, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?' (2021) 6 (3) *Business and Human Rights Journal* 550.

⁵⁵ *Illegal Logging Prohibition Act 2012* (Cth) ss 8, 15, 18; *Illegal Logging Prohibition Regulation 2012* (Cth) ss 10-16, 19-25.

⁵⁶ *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076, 52, 152-52, 153 (French J).

evidenced by educational programmes;⁵⁷ whether the contravener has shown a disposition to cooperate with the authorities; whether the contravener has engaged in similar conduct in the past (the Dutch model in our proposal); the financial position of the contravener (the German model in our proposal); and whether the conduct was systematic, deliberate or covert.⁵⁸

b. Responsibility of the principal governing body

The MSA dictates that each annual statement must be approved by the principal governing body of the reporting entity and signed by a responsible member of the reporting entity. This is to ensure that senior management are accountable for the (lack of) actions their entity takes to assess and address modern slavery risks. 'Principal governing body' means the body or group of members of the entity that are responsible for the governance of the entity. For example, the principal governing body of a company is the board of directors. The high non-compliance figures mentioned in the *Paper Promises* and *Broken Promises* reports illustrate that many principal governing bodies have signed off on a modern slavery statement that does not meet the substantive requirements under the MSA. While this may be the result of ignorance rather than ill-intent, there are grounds on which to suggest that the principal governing bodies need to be held responsible for signing off on non-compliant modern slavery statements. Section 206F of the Corporations Act grants the Australian Securities and Investments Commission (ASIC) the power to disqualify a person from being a director of a company for up to five years.⁵⁹ It is worth considering whether directors that repeatedly sign off on non-compliant statements should be disqualified from being a director, given that they have failed to provide appropriate oversight.

c. Paths to seek remedy: some options

A recognised gap in the MSA has been the option for those harmed as a result of the practices of corporations to seek remedy. The Act does require reporting on remedy (section 16(1)(d)), but it is well established that this is an area of poor performance and more than a little confusion for reporting entities.⁶⁰ Remedy is an essential component of the business and human rights agenda and a cornerstone of the UNGPs' 'Protect, Respect, Remedy' framework, which states (at 25): 'Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of nonrepetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.' This is an area that requires both legislative provisions and strong support for reporting entities.

There are a range of options available to provide remedy. Using Braithwaite's model, one option is for reporting entities to deal with complaints in the first instance before escalating if not addressed. Under the Dutch Child Labour law, any natural or legal person whose interests have been affected by the actions or inactions of a company bound by the Act, can file a complaint

⁵⁷ In the case of the MSA, we could look to evidence of human rights due diligence in this factor.

⁵⁸ See Jeannie Marie Paterson and Elise Bant, 'Intuitive Synthesis and Fidelity to Purpose? Judicial Interpretation of the Discretionary Power to Award Civil Penalties under the Australian Consumer Law' in Prue Vines and M Scott Donald (eds) *Statutory Interpretation in Private Law* (The Federation Press, 2019) 154, 161. They also discuss that in *ACCC V Woolworths*, Edelman J identified further factors including whether the contraventions were associated with making a profit. This might also be a useful consideration in an MSA penalties framework.

⁵⁹ *Corporations Act 2001* (Cth) s 206F.

⁶⁰ McGaughey n 23.

with the regulator but only after the company itself has dealt with the complaint, or if the company has not responded to the complaint within six months.⁶¹

The German Act is enforced by 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.⁶² It may either do so *ex officio* or upon request by persons with 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 French Droit de Vigilance contains obligations for remedy and has associated enforcement mechanisms. The first case tested under the law is against oil company Total, where the plaintiffs argue that the vigilance plan published by Total is inadequate because it does not reference its Ugandan project. The court may consider options including: financial penalties; review of the vigilance plan; acknowledgement of the impact of its oil activities on local communities and the environment; and an order to take urgent action to prevent further human rights violations or environmental damage.⁶³

In addition to penalties for non-compliance with more substantive obligations, techniques such as enforceable undertakings or deferred prosecution agreements may prove useful in engendering compliance. Parallels can be drawn from initiatives employed in anti-corruption and bribery legislation. For example, the *UK Bribery Act* interacts with the *Crimes and Courts Act 2013* to enable negotiation of Deferred Prosecution Agreements between regulators and legal persons accused of bribery.⁶⁴ A Deferred Prosecution Agreement in the UK context involves “an agreement reached between a prosecutor and an organization which could be prosecuted, under the supervision of a judge”.⁶⁵ The US has been utilising Deferred Prosecution Agreements to address corporate misconduct (including foreign bribery) for some time.⁶⁶ Deferred Prosecution Agreements can be used to require companies to adjust their policies and practices and allow for monitoring and evaluation by third party monitors, which means this approach enhances the possibility of meaningful organizational change, a technique that could be used solo or in conjunction with the more punitive and deterrence-based rationale of a criminal penalty for certain activities.⁶⁷

⁶¹ Hoff n 52.

⁶² Krajewski n 54.

⁶³ Business and Human Rights Resource Centre, 'Total Lawsuit (re Failure to Respect French Duty of Vigilance Law in Operations in Uganda)' (Latest News, 23 October 2019) < <https://www.business-humanrights.org/en/latest-news/total-lawsuit-re-failure-to-respect-french-duty-of-vigilance-law-in-operations-in-uganda/>>.

⁶⁴ See Federico Mazzacupa, *Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements in the UK and US Systems of Criminal Justice*, JCL 249 (2014).

⁶⁵ Deferred Prosecution Agreements, UK SERIOUS FRAUD OFFICE (Guidance Policy 2019), <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>.

⁶⁶ David Hess and Cristie Ford, Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem, 41 *Cornell International Law Journal* 307 (2008).

⁶⁷ Hess and Ford n71, see also Sydney Fields, *Statutory Tools for Enhancing Multinational Corporation Compliance with Anti-Bribery Laws: Recommended Changes to Australia's Foreign Bribery Offense*, 49 *George Washington International Law Review* 411 (2006).

Issues Paper Q18. Should any alteration be made to the Modern Slavery Act as regards its application to Australian Government agencies?

See Q. 17 c) regarding government procurement debarment regimes.

Modern Slavery Statements Register

Issues Paper Q21. Does the Register provide a valuable service?

The Register provides a valuable service, as it is pertinent that the annual modern slavery statements are publicly accessible. It has supported research in this area and is used by reporting entities seeking to benchmark against other companies.

Issues Paper Q22. Could improvements be made to the Register to facilitate accessibility, searchability and transparency?

A key challenge with the current regime – not specific to the register *per se* - is that there appears to be no clear tracking of which entities are required to report. This calls into question a) how the regulator can possibly oversee compliance and b) how the register can offer adequate transparency to civil society, academics, investors, and other interested parties. As discussed above, for our *Broken Promises* project there were seven statements missing from entities which had previously reported - and no clear way to confirm the reason they were missing (e.g. they could have fallen under the threshold, been taken over, failed to report, delayed reporting etc).

This points to the underlying flaws of the MSA – the lack of adequate oversight, lack of enforcement mechanisms and lack of penalties. For the initial drafting of the MSA, the use of penalties for non-compliance was expressly rejected. Instead, there is reliance on potential market sanctions by consumers, civil society, investors and others as indicated in the Second Reading Speech: ‘Businesses that fail to take action will be penalised by the market and consumers and severely tarnish their reputations.’⁶⁸ Yet in many other areas of corporate conduct we see Australian regulators’ strong powers and commitments to enforcement. For example, at ASIC’s annual forum recently, the ASIC Deputy Chair stated: ‘First, ASIC remains deeply committed to enforcement. Second, ASIC has a broad enforcement toolkit, and we are committed to using the full suite of those powers. Third, ASIC has identified and is working through a suite of investigations in response to these priorities, which you will see evidence of in the next 12 months or so.’ This is in stark contrast to the light touch regulation in the area of modern slavery where an under-resourced civil society sector is expected to ‘enforce’ the MSA through naming and shaming. The expectation that consumers might monitor compliance with the MSA is unrealistic – the typical consumer would not know where to access modern slavery information on a given business, and even if they did locate the repository, the information provided is not in any way meaningful to them. The MSA requires a broad framework of accountability, with a committed regulator.⁶⁹

With regard to the register, more could also be done to present the data in the Register ‘at a glance’. While the register does show the number of entities covered by statements, the number

⁶⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2018, 6755 (Alexander Hawke, Assistant Minister for Home Affairs).

⁶⁹ Landau n 51.

of statements that were lodged, et cetera, it provides little insight into the overall quality and content of the statements. Again, the Workplace Gender Equality Agency (WGEA) may be looked to for inspiration. The WGEA data explorer portal provides a bird's eye view and more detail when data are broken down into industry segments.⁷⁰ While it is acknowledged that data reported to the WGEA are more easily quantifiable, providing an at a glance overview of data contained in MSA reporting statements can assist consumers, investors, businesses, and government in better exercising their accountability function.

Administration and Compliance Monitoring of the Modern Slavery Act

Issues Paper Q23. 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?

An Anti-Slavery Commissioner is essential to ensure the effectiveness of the MSA and to act as a central point of contact for the various government agencies and law enforcement agencies in tackling modern slavery.⁷¹

In line with our proposed 'supports and sanctions' model, it is important that the Commissioner has a dual role as both 'educator' and 'enforcer'. This is a common model; see for example the work of the Australian Human Rights Commission (AHRC)⁷² which can investigate and conciliate complaints, raise awareness through education and training, events and discussion, media outreach etc., undertake research and inquiries, produce guidelines for employers, and provide training and resources to assist organisations in embedding and supporting diversity and inclusion, and collaborate with regional partners including international education and training programs for other human rights institutions in the Asia Pacific region. The work of the Anti-Slavery Commissioner could incorporate similar functions – hearing complaints against businesses regarding modern slavery; awareness raising, education, guidelines and resources; research and inquiries into significant and systemic issues; and international collaboration. The ability to receive complaints would ensure a pathway to remedy (see Q17). We note that each of the EU due diligence laws introduced in the past few years has a strong regulator with enforcement powers – essential for the successful implementation of the laws.⁷³

The independent review of the UK MSA found the Anti-Slavery Commissioner to be an important position: 'He has played a significant role in shining a spotlight on the scale and nature of modern slavery and in driving progress in the UK response to this abhorrent crime. He identified many issues which required attention, some urgent. According to his own testimony, working relations with Ministers were often productive, and he produced a number of confidential reports and recommendations directly commissioned by the then Home Secretary,

70 Australian Government, Workplace Gender Equality Agency, *WGEA Data Explorer* (Web Page) <<https://data.wgea.gov.au/home>>.

71 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.

72 *Australian Human Rights Commission* (Web Page) <<https://humanrights.gov.au/about>>.

73 See for example Krajewski et al n54.

upon which action was taken quickly.⁷⁴ However, the review noted the importance of independence for the Commissioner and for an adequate budget for their functions.⁷⁵ We have proposed a broader mandate for the Australian Commissioner than the UK (or NSW) model; however, we note the importance of these recommendations from the UK with regard to independence and adequate budget. We suggest that the development of the Australian Anti-Slavery Commissioner role can be meaningfully informed by the Paris Principles.⁷⁶ Although these were developed for National Human Rights Institutions ('NHRIs') globally, we see sufficient similarities between the Commissioner and NHRIs.

In brief, drawing on these principles we suggest the office of the Anti-Slavery Commissioner should have:

- **Independence** from government;
- **Enforcement powers**, to work 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;
- **Complaint handling powers**, to have the ability to receive and investigate complaints;
- **Investigatory powers**, to initiate inquiries and investigations, on its own initiative or upon receipt of a complaint; and
- **Adequate resources**, to have sufficient funding, staffing, infrastructure and institutional capacity to perform its functions and discharge its responsibilities including the ability to commission research.

Issues Paper Q25. Is a further statutory review (or reviews) of the Modern Slavery Act desirable? If so, when? And by whom?

Yes, a further review after three years is recommended to ensure progress and assess the impacts of any changes introduced. The review should be independent. If the review process does not result in a short term recommendation for human rights due diligence changes then we suggest a review in two year to keep pace with global developments.

Other issues

Issues Paper Q27. Is there any other issue falling within the Terms of Reference for this review that you would like to raise?

- a. **Import Ban:** The Government should ban imported goods produced by modern slavery, modelled on the US *Tariff Act*. An import ban, if backed by targeted interventions, has the potential to lead to improved conditions for exploited workers overseas and would encourage business to undertake effective due diligence over their supply chain, and to focus on salient risks. A forced labour import ban, established through amendments to the *Customs Act 1901* (Cth), should be introduced as an additional complementary

⁷⁴ *Independent Review of the Modern Slavery Act* n 6.

⁷⁵ *Ibid.*

⁷⁶ *Principles relating to the Status of National Institutions (The Paris Principles)*, GA Res 48/134, UN Doc A/RES/48/134 (20 December 1993).

measure to enhance the effectiveness of the MSA in driving corporate action on modern slavery.

- b. **Supporting ongoing evaluation of the effectiveness of the MSA:** The establishment of a well-resourced Anti-Slavery Commissioner office will be a critical step in improving the impact of the MSA. However, government support should also be earmarked for innovative and objective evaluative assessments of the MSA by third parties to inform the government and industry about gaps in compliance and enforcement and develop best practice guidance to ensure Australia is adopting leading policies and practices to tackle modern slavery (see Q 5).
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