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 **NORTON ROSE FULBRIGHT**

Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade

Inquiry into establishing a Modern Slavery Act in Australia

28 April 2017



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Executive summary

Norton Rose Fulbright welcomes the Joint Standing Committee's Inquiry into establishing a Modern Slavery Act in Australia (**Inquiry**).

Modern slavery is abhorrent. It has no place in a civilized, decent and just society. It is the individual and collective responsibility of governments, business, civil society and other stakeholders globally to tackle it. We support legislation that encourages everyone to work together to tackle modern slavery, raises awareness of the issues surrounding modern slavery and encourages greater transparency and accountability where this will help in eradicating modern slavery.

Since the United Kingdom Parliament passed the *Modern Slavery Act 2015 (MSA UK)*, we have worked, and continue to work, with a significant number of businesses to ensure compliance with the MSA UK, especially with respect to the reporting requirements in section 54.

In this submission, we address each of the Terms of Reference and provide our recommendations, where appropriate, on the introduction of a Modern Slavery Act in Australia, based on our experience of working with the MSA UK.

In summary, we consider that:

- Modern slavery is best tackled by global co-operation between government, business and civil society.
- It is not the responsibility of any single government, organisation, business or industry to tackle modern slavery on its own - collaboration is essential.
- We support the introduction of a mandatory reporting requirement in Australia as part of efforts by the Australian Commonwealth Government and business to tackle modern slavery.
- So far as possible, this reporting requirement should align with existing regimes in other jurisdictions, such as the UK, so that businesses can publish one statement to meet the requirements of multiple jurisdictions.
- The MSA UK provides a good, workable reporting model for consideration by the Committee, in particular in requiring reporting by commercial organisations, on an annual basis, with sign off by senior management, of the steps taken by the organisation in the previous year to eradicate modern slavery from its own business and its supply chains.
- In common with regimes in other jurisdictions, a threshold should be adopted to limit the reporting requirement to larger commercial organisations supplying goods or services.
- If the Australian Government is willing to introduce a reporting requirement for commercial organisations, then it should also legislate at the same time with respect to government agencies and public sector bodies engaged in public procurement processes.
- We recommend that an Independent Anti-Slavery Commissioner be established to receive statements required under an Australian Modern Slavery Act and to report annually to the Commonwealth Parliament on the Commissioner's findings with respect to the reporting being provided under the Act.
- If an Australian Modern Slavery Act is enacted, we recommend that its effectiveness be reviewed within 2 years of any reporting obligations becoming operational.

Our submission gives examples of international best practice employed by governments and businesses to prevent modern slavery in domestic and global supply chains, primarily by reference to our experience of working with businesses in the context of the MSA UK.

In addition, Norton Rose Fulbright in conjunction with the British Institute of International Comparative Law (**BIICL**), has recently investigated best practice for human rights due diligence.¹ Our study comprised academic research, an anonymous survey of businesses and interviews with business representatives globally. Our findings touch upon issues of law, principle and practice in the area of human rights due diligence, which encompasses modern slavery.

Australia is located in a region with high rates of modern slavery. Even though the incidence of modern slavery within Australia may appear to be relatively low statistically compared to some other jurisdictions, there can be no doubt that Australia has a meaningful and pro-active leadership role to play in combating human rights abuses globally.

At the same time, Australia cannot afford to be complacent about domestic levels of modern slavery. If recent experience teaches us anything, it is that available data likely underestimates the full extent of modern slavery, both at home and overseas. It is probably correct to say there are more incidents of modern slavery globally now than there have ever been.

We look forward to working with the Committee going forward and are, of course, at the Committee's disposal should it have any queries.

Yours faithfully

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¹ Norton Rose Fulbright *Exploring Human Rights Due Diligence* <<http://human-rights-due-diligence.nortonrosefulbright.online/>>. See also Abigail McGregor and Jacob Smit 'Risk management: Human rights due diligence in corporate global supply chains' (2017) 69(1) *Governance Directions* 16 <<http://search.informit.com.au/documentSummary;dn=625768150960985;res=IELAPA>> and Robert McCorquodale et al. 'Human Rights due diligence in law and practice: good practices and challenges for business enterprises' (2016) *Business and Human Rights Journal* ISSN 2057-0201.

Summary of Recommendations

1. Australia should introduce a statutory modern slavery reporting requirement in similar terms to section 54 of the MSA UK that requires reporting bodies to report annually on the steps they have taken in the previous financial year to eradicate modern slavery and human trafficking in their business and supply chains.
2. Careful consideration should be given to ensuring that the reporting can align with the MSA UK and other laws that have similar reporting obligations.
3. If reporting requirements are to be created for commercial organisations, we recommend that they are also created for government agencies and public bodies involved in public procurement of goods and services.
4. We do not consider it necessary at this stage to impose other express requirements on organisations, such as to establish CSR plans or carry out due diligence, as has been done in some other jurisdictions.
5. The Australian Commonwealth Government should establish a federal compensation fund to assist survivors of modern slavery.
6. Consider making the right to compensation available. Ensure that a survivor's access to compensation is not linked to a conviction of a perpetrator of modern slavery.
7. Consider amending Bridging Visa F to allow survivors of modern slavery to remain in Australia with enough time to make and finalise applications for compensation. This could include an increase from 45 to a 90 days visa period.
8. Consider the establishment of a committee similar to the US Advisory Council to allow survivors of slavery crimes to be a part of the fight against modern slavery.
9. The reporting requirement should apply to all commercial organisations that meet certain threshold requirements.
10. The Committee should carefully consider and consult on what thresholds to apply, having regard to the types and levels of thresholds applied in other jurisdictions and what is likely to work effectively in Australia.
11. Subject to meeting the threshold requirements, the reporting requirement should apply to all organisations that carry on business in or from Australia (and should not require a place of business in Australia).
12. The reporting requirement should require that the senior management of the organisation approve the statement and that a director, or equivalent officer, sign the statement.
13. The reporting requirement should require that the statement (or a link to the statement) be included in a prominent place on the home page of the organisation's website.
14. The legislation should provide for the creation of a central repository of statements and reporting bodies should be required to lodge their statements with the central repository.
15. An Independent Anti-Slavery Commissioner should be appointed to receive all statements, manage the central repository and report annually to the Commonwealth Parliament on the reporting provided by organisations.
16. We do not consider that the reporting requirement need be prescriptive about the matters to be addressed by organisations in their statements, although it would be appropriate and helpful for indications to be given as to what matters organisations may include in their statements, by way of setting expectations.
17. The Australian Commonwealth Government should publish detailed guidance to assist companies to report effectively.
18. The legislation should not include fines or other penalties for non-compliance with the reporting requirement.

19. We recommend that the effectiveness of any reporting requirement be reviewed within 2 years of the reporting obligations becoming operational.

Response to the Terms of Reference

1. The nature and extent of modern slavery (including slavery, forced labour and wage exploitation, involuntary servitude, debt bondage, human trafficking, forced marriage and other slavery-like exploitation) both in Australia and globally

Overview

- 1 The Explanatory Notes to the MSA UK describe “Modern Slavery” as a brutal form of organised crime in which people are treated as commodities and exploited for criminal gain.² Whilst the true extent of modern slavery globally is unknown,³ modern slavery, and particularly human trafficking, is an international problem.⁴
- 2 Modern slavery takes a number of forms but is generally defined by the 1926 *International Convention to Suppress the Slave Trade and Slavery (Slavery Convention)*. Article 1 of the Slavery Convention states that:
“Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”⁵
- 3 We have attempted to summarise the various types of modern slavery using the categories below:
 - (1) forced labour and wage exploitation;
 - (2) debt bondage;
 - (3) human trafficking; and
 - (4) forced marriage including trafficking for marriage and other slavery-like exploitation such as forced begging, orphanage tourism, forced recruitment for armed forces, sale or exploitation of children and descent-based slavery.
- 4 This summary seeks to draw together relevant secondary sources for the Committee. Although it is high level, we consider that it provides useful background. We acknowledge this is a broad topic and this summary is not intended to be exhaustive.
- 5 According to the Walk Free Foundation’s Global Slavery Index, the Asia Pacific region (our region) has by far the most people estimated to be enslaved at 30,435,300 people. Australian business needs to be viewed as part of this region first and then globally. When viewed in this context, the risk that there is modern slavery in the supply chains of Australian businesses is significant.
- 6 Globally it is acknowledged that accurate data on slavery and slavery practices is difficult to obtain due to the clandestine nature of the crimes and low detection rates.⁶ Where statistical analysis is available and provided below it can therefore be taken as indicative only.

² Explanatory Notes, *Modern Slavery Act 2015* (UK), ch 30, 1.

³ Explanatory Notes, *Modern Slavery Act 2015* (UK), ch 30, 1.

⁴ Explanatory Notes, *Modern Slavery Act 2015* (UK), ch 30, 1.

⁵ *International Convention to Suppress the Slave Trade and Slavery*, opened for signature 25 September 1926, Australian Treaty Series 1927 No 11 (entered into force 18 June 1927) art 1, cited in Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of the Commonwealth of Australia, *Trading Lives: Modern Day Human Trafficking* (2013) 3.

⁶ See The Walk Free Foundation, *How did we develop our methodology* (2016) The Global Slavery Index website <<http://www.globalslaveryindex.org/methodology/>>.

Modern slavery and its extent globally

- 7 As of 2016 it was estimated that there were a total of 45.8 million people in modern slavery globally.⁷ 58% of those living in slavery are in India, China, Pakistan, Bangladesh and Uzbekistan.⁸ It is estimated that 18.3 million people are in some form of modern slavery in India.⁹ This is approximately five and a half times more than China where the number sits at approximately 3.4 million people.
- 8 The prevalence of modern slavery is reported as being highest in North Korea, Uzbekistan and Cambodia.¹⁰ However, when considered in absolute terms, the countries with the highest numbers of enslaved people are in India, China, Pakistan, Bangladesh, Uzbekistan, North Korea, Russia, Nigeria, the Democratic Republic of the Congo and Indonesia.¹¹
- 9 The prevalence of modern slavery is reported as being lowest in Ireland, New Zealand, Luxembourg, the United States, Germany, France, UK, Spain, Canada, Australia, Belgium, Sweden, Austria, Switzerland, Denmark and Norway.¹² However, when considered in absolute terms, the countries with the lowest numbers of enslaved people are Norway, Ireland, New Zealand, Barbados, Iceland and Luxembourg.¹³

Modern slavery: Forced labour

- 10 Slavery-like practices and forced labour are defined in two separate international conventions:
 - (1) the *1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery* (**Supplementary Slavery Convention**); and
 - (2) the *1930 Convention concerning Forced or Compulsory Labour* (**Forced Labour Convention**).¹⁴
- 11 Forced or compulsory labour is defined as: “all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily”.¹⁵
- 12 The International Labour Organisation (ILO) conservatively estimates that as at 2012, 20.9 million people were victims of forced labour globally.¹⁶ Women and girls represent the

⁷ The Walk Free Foundation, *The Global Slavery Index 2016* (2016) The Global Slavery Index, 4 <<http://www.globallslaveryindex.org/>>.

⁸ The Walk Free Foundation, *The Global Slavery Index 2016* (2016) The Global Slavery Index, 4 <<http://www.globallslaveryindex.org/>>.

⁹ The Walk Free Foundation, *The Global Slavery Index 2016* (2016) The Global Slavery Index, 8 <<http://www.globallslaveryindex.org/>>.

¹⁰ The Walk Free Foundation, *The Global Slavery Index 2016* (2016) The Global Slavery Index, 8 <<http://www.globallslaveryindex.org/>>.

¹¹ The Walk Free Foundation, *The Global Slavery Index 2016* (2016) The Global Slavery Index, 8 <<http://www.globallslaveryindex.org/>>.

¹² The Walk Free Foundation, *The Global Slavery Index 2016* (2016) The Global Slavery Index, 29 <<http://www.globallslaveryindex.org/>>.

¹³ The Walk Free Foundation, *The Global Slavery Index 2016* (2016) The Global Slavery Index, 31 <<http://www.globallslaveryindex.org/>>.

¹⁴ *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, opened for signature 7 September 1956 (entered into force 30 April 1957) and *Convention concerning Forced or Compulsory Labour* (No 29), opened for signature 28 June 1930 (entered into force 1 May 1932), cited in Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of the Commonwealth of Australia, *Trading Lives: Modern Day Human Trafficking* (2013) 1, 4

¹⁵ *Convention concerning Forced or Compulsory Labour*, opened for signature 28 June 1930 (entered into force 1 May 1932), art 2(1).

¹⁶ International Labour Organisation, *ILO 2012 Global estimate of forced labour Executive Summary* (5 March 2017) 1

<http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_181953.pdf>.

greatest share of the total – 11.4 million, as compared to 9.5 million men and boys.¹⁷ There are 15.4 million adult victims compared with 5.5 million child victims.¹⁸

- 13 As at 2014, the ILO reported that the Asia-Pacific region accounts for by far the largest number of forced labourers – almost 12 million of the global total – whereas countries of Central, South-Eastern and Eastern Europe (**non-EU**) and the Commonwealth of Independent States (**CIS**) have the highest prevalence rate with 4.2 victims per 1,000 inhabitants.¹⁹
- 14 It is estimated that the total profits obtained from the use of forced labour in the private economy worldwide amount to US\$150 billion per year. A majority of the profits are generated in Asia, with two-thirds in this region originating from forced sexual exploitation.²⁰

Modern Slavery: Debt bondage

- 15 The Supplementary Slavery Convention states that debt bondage constitutes a practice similar to slavery.²¹ Debt bondage is defined as:
“... the status or conditions arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined”.²²
- 16 Debt bondage is reported to be one of the most prevalent forms of modern slavery in all regions of the world despite being banned under international law and in most domestic jurisdictions.²³
- 17 Bonded labourers are frequently reported to live in situations of poverty that are sustained through generations. They often do not own any assets and lack access to land, education, health care and/or decent work opportunities.²⁴
- 18 Bonded labourers commonly belong to minority groups vulnerable to discrimination, such as certain racial groups, women, indigenous people, people of a “lower” caste and migrant workers. The discrimination faced by bonded labourers comes in some cases not only from society at large but also from other members of the same minority groups.²⁵

¹⁷ International Labour Organisation, *ILO 2012 Global estimate of forced labour Executive Summary* (5 March 2017) 1

http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_181953.pdf.

¹⁸ International Labour Organisation, *ILO 2012 Global estimate of forced labour Executive Summary* (5 March 2017) 1

http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_181953.pdf.

¹⁹ International Labour Organisation, *ILO 2012 Global estimate of forced labour Executive Summary* (5 March 2017) 2

http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_181953.pdf.

²⁰ International Labour Organisation, *ILO 2012 Global estimate of forced labour Executive Summary* (5 March 2017) 2

http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_181953.pdf.

²¹ *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, opened for signature 7 September 1956 (entered into force 6 January 1958) art 1, cited in Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of the Commonwealth of Australia, *Trading Lives: Modern Day Human Trafficking* (2013) 3.

²² *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, opened for signature 7 September 1956 (entered into force 6 January 1958) art 1, cited in Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of the Commonwealth of Australia, *Trading Lives: Modern Day Human Trafficking* (2013) 3.

²³ Urmila Bhoola, Special Rapporteur, *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences*, 33rd sess, UN doc A/HRC/33/46 (4 July 2016).

²⁴ Urmila Bhoola, Special Rapporteur, *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences*, 33rd sess, UN doc A/HRC/33/46 (4 July 2016) 15, para 39.

²⁵ Urmila Bhoola, Special Rapporteur, *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences*, 33rd sess, UN doc A/HRC/33/46 (4 July 2016) 15 [41].

- 19 Migrant workers are also often vulnerable to exploitation because of barriers they face in accessing the protections provided to nationals of the country to which they have migrated and because of generalised social hostility towards foreigners.²⁶

Modern Slavery: Human trafficking

- 20 'Trafficking in persons' is defined as:

"The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".²⁷

- 21 According to the United Nations, traffickers and their victims often come from the same place, speak the same language or have the same ethnic background. Such commonalities help traffickers generate trust to carry out the trafficking crime.²⁸
- 22 Trafficking for sexual exploitation and for forced labour are the most prominently detected forms of human trafficking, but trafficking victims can also be exploited in many other ways. Victims are trafficked to be used as beggars, for forced or sham marriages, benefit fraud, production of pornography or for organ removal.²⁹

Modern Slavery: Forced marriage

- 23 Forced marriage or servile forms of marriage are defined by the Supplementary Slavery Convention as:

"Any situation or practice whereby:

- A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
- The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
- A woman on the death of her husband is liable to be inherited by another person."³⁰

- 24 Further, "child marriage" is a marriage in which at least one of the parties is a child. According to the Convention on the Rights of the Child, a child is "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".³¹

²⁶ Urmila Bhoola, Special Rapporteur, *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences*, 33rd sess, UN doc A/HRC/33/46 (4 July 2016) 15 [43].

²⁷ *Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the united nations convention against transnational organized crime* (15 November 2000), art 3 (definition of 'Trafficking in Persons'), cited in United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons 2016* (United Nations publication) 14.

²⁸ United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons 2016* (United Nations publication) 7.

²⁹ United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons 2016* (United Nations publication) 8.

³⁰ *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, opened for signature 7 September 1956 (entered into force 6 January 1958) art 1, cited in Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of the Commonwealth of Australia, *Trading Lives: Modern Day Human Trafficking* (2013) 5.

- 25 “Early marriage” is often used interchangeably with “child marriage” and refers to marriages involving a person aged below 18 in countries where the age of majority is attained earlier or upon marriage.³²
- 26 According to UNICEF, as of 16 August 2016, there are 14.2 million girls globally who are forced to marry before the age of 18 every year.³³ 13% of girls in developing countries are forced to marry before the age of 15.³⁴
- 27 Recent statistics reported by UNICEF state that each year, 46.4% of girls in South Asia, 66% of girls in Bangladesh, 37% of girls in sub-Sahara Africa, 75% of girls in Niger, 10.4% of girls in Kyrgyzstan and 7.3% of girls in Kazakhstan under the age of 18 are forced to marry.

The extent of Modern Slavery in Australia

- 28 In contrast to the UK, Australia has had criminal prohibitions on slavery since 1999 as part of the Commonwealth Criminal Code. In an Australian context, the term ‘modern slavery’ encompasses the crimes defined in sections 270 and 271 of the *Criminal Code Act 1995* (Cth) being: slavery,³⁵ servitude,³⁶ forced labour,³⁷ forced marriage,³⁸ debt bondage³⁹ and trafficking in persons.⁴⁰ The Australian Institute of Criminology reports that between 2004 and 2012, there were 346 investigations and prosecutions by the Australian Federal Police of suspected cases of human trafficking, slavery and slave-like practices such as sexual servitude and forced labour. Forty-six individuals were referred by police for investigation for prosecution under the Criminal Code, with 15 people convicted.⁴¹ A sample of case law reflecting the prosecutions for slavery within Australia are in Annexure A.
- 29 The Joint Standing Committee on Foreign Affairs, Defence and Trade found that, traditionally, Australia has been a destination country for human trafficking and slavery, with victims (generally from Thailand, Korea and Malaysia) being exploited in the sex industry. Recent trends now indicate instances of these crimes involving the domestic services, hospitality, agricultural, manufacturing and construction industries.⁴² According to the Inter-departmental Committee on Human Trafficking and Slavery, in 2014-15, 71% of investigations conducted by the Australian Federal Police related to forms of exploitation not involving the sex industry.⁴³

³¹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 1, cited in United Nations High Commissioner for Human Rights, *Preventing and eliminating child, early and forced marriage*, 26th sess, UN doc A/HRC/26/22 (2 April 2014) 3 [4].

³² United Nations High Commissioner for Human Rights, *Preventing and eliminating child, early and forced marriage*, 26th sess, UN doc A/HRC/26/22 (2 April 2014) 3 [5].

³³ United Nations Population Fund, *Marrying Too Young: End Child Marriage* (2012) 45.

³⁴ United Nations Children's Fund (UNICEF), *Child marriage is a violation of human rights, but is all too common* (26 April 2017) UNICEF Data: Monitoring the Situation of Children and Women <<https://data.unicef.org/topic/child-protection/child-marriage/#>>.

³⁵ *Criminal Code Act 1995* (Cth), s 270.1.

³⁶ *Criminal Code Act 1995* (Cth), s 270.4.

³⁷ *Criminal Code Act 1995* (Cth), s 270.6.

³⁸ *Criminal Code Act 1995* (Cth), s 270.7A.

³⁹ *Criminal Code Act 1995* (Cth), s 271.8.

⁴⁰ *Criminal Code Act 1995* (Cth), s 271.

⁴¹ Simmons, Frances, Brynn O'Brien, Fiona David and Laura Beacroft, 'Human trafficking and slavery offenders in Australia' *Trends & Issues in crime and criminal justice* (Report No 464, Australian Institute of Criminology, November 2013) 5.

⁴² Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of the Commonwealth of Australia, *Trading Lives: Modern Day Human Trafficking* (2013), 25.

⁴³ Interdepartmental Committee on Human Trafficking and Slavery, Seventh Report, *Trafficking in Persons: the Australian Government Response*, 1 July 2014 – 30 June 2015, 1.

2. The prevalence of modern slavery in the domestic and global supply chains of companies, businesses and organisations operating in Australia

Overview

- 30 There is no doubt that many Australian businesses have slavery in their supply chains. It is difficult, however, to report reliably on the incidence of modern slavery in the supply chains of businesses operating in Australia.
- 31 The prevalence of modern slavery in supply chains will undoubtedly differ substantially at both business and industry level. For example, in its 2015 report on the Australian fashion industry, Baptist World Aid Australia found that “91% of companies still don’t know where their cotton comes from, and 75% don’t know the source of all their fabrics and inputs”.⁴⁴ Given businesses in the fashion industry seldom understand the participants in their supply chain; it is unlikely that they are going to be able to report in relation to the prevalence of modern slavery in those same supply chains. By comparison, the extractives sector has, for some time, engaged with the human rights impacts of their operations and supply chains.

Modern slavery and forced labour in global supply chains

- 32 The United States Department of Labour reports that goods such as artificial flowers, coal, footwear, garments, fish and electronics are being produced by forced labour in China, Thailand, Malaysia and Indonesia.⁴⁵ Key goods produced by forced labour in other regions include sugar cane, coffee, cotton, bricks, gold, coal, tobacco, garments, carpets, fish and textiles.⁴⁶ These are all industries in which businesses that operate in Australia participate.
- 33 As noted in figure 1 (below) it is clear that significant trade occurs between Australia and many of the countries reported to have a high incidence of modern slavery. According to the Department of Foreign Affairs and Trade, Australia counts China, Singapore, Malaysia, Thailand and Korea, amongst its top fifteen trading partners.⁴⁷ Again, this makes it likely that there are goods acquired in Australia, whether it be for immediate use or for the purpose of manufacture or the supply of further goods or services, which have been produced, in part, by individuals who are enslaved.

⁴⁴ Gerson Nimbalker, Jasmin Mawson and Claire Cremen, Baptist World Aid Australia, *The Truth Behind the Barcode: Australian Fashion Report 2015*, 16 April 2015, 2.

⁴⁵ United States Department of Labour, Bureau of International Labour Affairs, *List of Goods Produced by Child Labour or Forced Labour* (2016) 30-1.

⁴⁶ United States Department of Labour, Bureau of International Labour Affairs, *List of Goods Produced by Child Labour or Forced Labour* (2016) 34.

⁴⁷ Australian Government Department of Foreign Affairs and Trade, *Australia’s trade in goods and services 2015* (26 April 2017) Australia’s trade in goods and services <<http://dfat.gov.au/about-us/publications/trade-investment/australias-trade-in-goods-and-services/Pages/australias-trade-in-goods-and-services-2014-15.aspx>>.

Figure 1. Australia's trade in goods and services by top 15 partners (A\$ million)

						% growth	
Rank	2013	2014	2015	% share of total	2014 to 2015	5 year trend	
Australia's top two-way trading partners ⁴⁸							
1	China	142,977	145,472	149,778	22.4	3	7.4
2	United States	55,569	60,596	70,195	10.5	15.8	5.9
3	Japan	71,006	70,149	64,950	9.7	-7.4	-0.6
4	Republic of Korea	32,654	35,216	36,073	5.4	2.4	3.4
5	Singapore	27,036	29,544	25,683	3.8	-13.1	3.1
6	New Zealand	21,745	23,508	24,021	3.6	2.2	2.7
7	United Kingdom	20,508	21,109	23,210	3.5	10	-1.3
8	Thailand	19,552	18,968	20,767	3.1	9.5	1.1
9	India	15,281	15,762	19,826	3	25.8	-4.4
10	Malaysia	18,253	20,697	19,165	2.9	-7.4	5.6
11	Germany	17,148	17,486	18,570	2.8	6.2	3.5
12	Hong Kong (SAR of China)	16,241	15,683	15,489	2.3	-1.2	17.9
13	Indonesia	14,740	15,696	15,064	2.3	-4	2.9
14	Taiwan	12,318	12,673	12,462	1.9	-1.7	-1

⁴⁸ Australian Government Department of Foreign Affairs and Trade, *Australia's trade in goods and services 2015* (26 April 2017) Australia's trade in goods and services <<http://dfat.gov.au/about-us/publications/trade-investment/australias-trade-in-goods-and-services/Pages/australias-trade-in-goods-and-services-2014-15.aspx>>.

						% growth	
15	Vietnam	7,789	10,039	10,065	1.5	0.3	11.7
Total all countries	644,599	662,253	668,459	100	0.9	3.3	

Modern slavery in domestic supply chains within Australia

- 34 There have been instances of labour trafficking and slavery-like practices detected within various industries within Australia, most prominently involving migrant workers. While the number of reported cases of human trafficking and slavery-type practices in Australia has been relatively low, research has reported that there are many instances which remain unreported and unrecognised.⁴⁹
- 35 Historically, the majority of labour trafficking and slavery matters investigated in Australia have involved the commercial sex industry. However, more recently, instances of labour trafficking and slavery-like practices have been reported in the domestic service, construction, manufacturing, agriculture and hospitality industries.⁵⁰ Migrant workers on temporary visas were reported as being particularly at risk.⁵¹ Businesses that have these industries in their domestic supply chains will be at higher risk of modern slavery in those domestic supply chains.

⁴⁹ Fiona David, 'Labour Trafficking' (AIC Reports - Research and Public Policy Series 108, Australian Institute of Criminology, 2010), xii.

⁵⁰ Fiona David, 'Labour Trafficking' (AIC Reports - Research and Public Policy Series 108, Australian Institute of Criminology, 2010), 29-45.

⁵¹ Fiona David, 'Labour Trafficking' (AIC Reports - Research and Public Policy Series 108, Australian Institute of Criminology, 2010), x.

3. International best practice employed by governments, companies, businesses and organisations to prevent modern slavery in domestic and global supply chains, with a view to strengthening Australian legislation

Overview

- 36 There is some divergence in how businesses and governments seek to prevent modern slavery.
- 37 In this section of our submission, we describe some of the different institutional regimes that have been put in place or proposed in order to prevent modern slavery.
- 38 In summary, they are:
- (1) the imposition by government on businesses of reporting obligations (mainly aimed at promoting transparency and accountability);
 - (2) obligations on business to implement Corporate Social Responsibility programs;
 - (3) government blacklisting of businesses from public tenders where such businesses have been involved in human rights breaches; and
 - (4) obligations on businesses to undertake human rights due diligence and publish risk prevention plans.
- 39 We recommend that the Committee consider how an Australian Modern Slavery Act will intersect with the obligations of Australian businesses in other jurisdictions. For example, multinational businesses are or may become subject to laws regarding human rights and modern slavery in various other jurisdictions, some of which we consider below. To avoid adding additional unnecessary burden to business, which could be counterproductive to Australia's and others' efforts to understand the steps being taken by business to tackle modern slavery, we recommend that, so far as possible, reporting obligations in an Australian Modern Slavery Act be consistent with the reporting obligations in other jurisdictions. This does not mean that the laws need to be identical, but reporting organisations ought to be able to meet the reporting requirements in multiple jurisdictions with a single statement, and this is likely to lead to more coherent and manageable reporting.

Reporting Obligations

- 40 A significant number of laws that seek to prevent modern slavery require businesses to report on the steps that they have taken to prevent human rights impacts. Examples include:
- (1) **EU Directive on Non-Financial Reporting 2014/95/EU Articles 19a & 29a:** Certain EU headquartered entities need to report on issues including their human rights and diversity impacts.
 - (2) **UK Modern Slavery Act 2015:** certain commercial organisations are required to publish annual statements, signed off by senior management, reporting the steps they have taken to eradicate slavery and human trafficking in their operations and supply chains over the previous year.⁵² A summary of the requirements of that Act is provided in Annexure B.

⁵² *Modern Slavery Act 2015 (UK)* s 54.

- (3) **UK Companies Act 2006 Section 414C(7)(b):** Directors of listed companies must prepare statements which include information on human rights. Although there is no requirement to report on due diligence steps per se, a proper consideration of policy effectiveness would necessarily require due diligence.⁵³
- (4) **California Transparency in Supply Chains Act 2010, SB-657 (California Act):** In California the Supply Chain Act requires any business with global revenues greater than USD100 million to disclose information about their efforts to remove slavery and human trafficking from their tangible goods' supply chains. The Act's effectiveness relies upon the disclosures' ability to educate consumers to purchase responsibly sourced goods. Relying on broader community social conscience and flow through rewards for companies that responsibly source their goods, the Act empowers the State Attorney General to compel those non-compliant companies to meet their reporting obligations. There are no penalty provisions.

- 41 Each of these laws incorporates a threshold for businesses that are required to comply. The relevant thresholds in the UK and California are, respectively, companies exceeding a total turnover of GBP36 million, and companies exceeding USD100 million in annual worldwide gross receipts. In France, the number of employees is the criterion for determining whether a company is required to publish a due diligence plan.
- 42 Careful analysis will be required; including wider stakeholder engagement, to determine what would be an appropriate threshold for an Australian Modern Slavery Act. In any event, businesses that do not meet the threshold should still be encouraged to voluntarily publish a transparency statement.

Corporate Social Responsibility (CSR)

- 43 Some jurisdictions have mandated that companies undertake "corporate social responsibility" (CSR). This involves a variety of reporting, risk analysis and commitments to a wide variety of areas in which a company can have an adverse impact, including in relation to the environment, human rights and ethical business dealings. Some examples from around the world include voluntary programs, such as the Dutch CSR agreements, and other mandatory CSR obligations.
 - (1) **Voluntary international CSR agreements or covenants:** The Dutch Government has negotiated voluntary agreements with industries in an effort to prevent human trafficking and modern slavery.⁵⁴ Examples include:
 - (a) **The covenant of the textile / garment sector with the government, labour unions and NGOs:** participating companies are obliged to map the risks in their supply chains and draw up improvement plans with concrete goals for a period of 3 to 5 years. In these plans, they must pay attention to child labour and forced labour.
 - (b) **The covenant of the Dutch Banking Association with the government, labour unions and NGOs:** the covenant sets out the role banks can play in preventing and addressing human rights related risks. This also includes risks related to labour rights such as forced and bonded labour.

- 44 Other examples of jurisdictions mandating that a company establish a CSR plan include:

⁵³ Norton Rose Fulbright, *The Foundations of Human Rights Due Diligence* <http://human-rights-due-diligence.nortonrosefulbright.com/publications/the-foundations-of-human-rights-due-diligence#_ftn38>.

⁵⁴ The Dutch Government Ministries of Security and Justice and Social Affairs and Employment, *Voluntary international CSR agreements or covenants (the Netherlands)* Teamwork against trafficking for labour exploitation <<https://www.teamwork-against-trafficking-for-labour-exploitation.nl/examples/voluntary-international-csr-agreements-covenants-netherlands>>.

- (1) In **Brazil** every financial institution must adopt a CSR policy, and incorporate a social management system.⁵⁵
- (2) In **Denmark**⁵⁶ and **Norway**,⁵⁷ CSR reporting is statutorily required, including about the steps the company is taking to integrate human rights into their operations, procedures used and an assessment of the achievements.
- (3) In **Argentina**, certain companies are required to report annually on sustainability.⁵⁸
- (4) In **India**, the 2013 Company Act not only requires CSR reporting, companies with a certain profit level are obliged to spend at least 2% of their profits on community development projects.⁵⁹

Government Procurement

- 45 Many governments have adopted procurement policies that prohibit the government dealing with suppliers that have engaged in modern slavery.
- 46 The following sets out some examples of the approaches taken in other jurisdictions with respect to public procurement.
 - (1) The **EU Public Procurement Directive 2014/24/EU Article 57** permits certain businesses to be **excluded from tenders** and procurement opportunities where they, or any individuals within their management, have been convicted in connection to child labour or human trafficking offences. This means that a company that provides services to a government agency ought to put due diligence measures in place to manage the risk of blacklisting.
 - (2) In the USA, amendments to **Federal Acquisition Regulation implementing Executive Order 13627** ("Strengthening Protections Against Trafficking in Persons in Federal Contracts") and Title XVII of the National Defense Authorization Act for Fiscal Year 2013 ("Ending Trafficking in Government Contracting"): impose obligations on contractors relating to human trafficking, the breach of which could lead to a state contractor being **debarred**.
 - (3) Amendments are proposed to the **Modern Slavery Act 2015 (UK)** to include a requirement for public bodies to include a yearly statement on slavery and human trafficking.⁶⁰ Amendments are also proposed to change the *Public Contracts Regulations 2015* so that public contracting authorities would be prevented from using

⁵⁵ CMN Resolution No. 4327, of April 25, 2014 cited in Norton Rose Fulbright, *The Foundations of Human Rights Due Diligence* <http://human-rights-due-diligence.nortonrosefulbright.online/publications/the-foundations-of-human-rights-due-diligence#_ftn38>.

⁵⁶ Årsregnskabsloven [Financial Statements Act] (Denmark), Act no. 1403, 27 December 2008, para 99a cited in Norton Rose Fulbright, *The Foundations of Human Rights Due Diligence* <http://human-rights-due-diligence.nortonrosefulbright.online/publications/the-foundations-of-human-rights-due-diligence#_ftn38>.

⁵⁷ Lov om endringer i regnskapsloven og enkelte andre lover [Law on the amendments in the Accounting Act and several other laws] (Norway), LOV-2013-04-19-15, I 2013 hefte 6 s 992, 2013-0288 (19 April 2013), § 3-3c cited in Norton Rose Fulbright *The Foundations of Human Rights Due Diligence* <http://human-rights-due-diligence.nortonrosefulbright.online/publications/the-foundations-of-human-rights-due-diligence#_ftn38>.

⁵⁸ Law 2594 (2008) cited in Norton Rose Fulbright, *The Foundations of Human Rights Due Diligence* <http://human-rights-due-diligence.nortonrosefulbright.online/publications/the-foundations-of-human-rights-due-diligence#_ftn38>.

⁵⁹ *Companies Act 2013* (India) ss 134, 135 cited in Norton Rose Fulbright, *The Foundations of Human Rights Due Diligence* <http://human-rights-due-diligence.nortonrosefulbright.online/publications/the-foundations-of-human-rights-due-diligence#_ftn38>.

⁶⁰ The Modern Slavery (Transparency in Supply Chains) Bill 2016 (HL). See also Samuel White "Modern Slavery (Transparency in Supply Chains) Bill [HL] (HL Bill 6 of 2016–17)" *House of Lords Research Briefing* 2016/0035 (4 July 2016) <<http://researchbriefings.files.parliament.uk/documents/LIF-2016-0035/LIF-2016-0035.pdf>>.

an economic operator that has not produced a slavery and human trafficking statement.

Human Rights Due Diligence and slavery prevention plans

- 47 Human Rights Due Diligence is a concept that lies at the core of the United Nations Guiding Principles for Business and Human Rights which were unanimously endorsed by the United Nations Human Rights Council in 2011. In essence human rights due diligence requires businesses to review their operations and supply chains for actual or potential impacts upon human rights. Having undertaken that assessment, businesses are expected to take steps to prevent those impacts for occurring and to routinely review the effectiveness of the steps taken to achieve this objective. This is known as exercising human rights due diligence.
- 48 This due diligence process by business is a key element of best practice in relation to the prevention of modern slavery. Reflecting this, in some jurisdictions such as France and the Netherlands, businesses may be required to exercise due diligence to prevent human rights impacts. Examples include:
- (1) The Dutch **Child Labour Due Diligence Bill (*Wet Zorgplicht Kinderarbeid*)**. The Bill is not yet law in the **Netherlands**. It was passed by the House of Representatives on 27 February 2017. The Bill sets out a requirement for companies to certify that they have taken steps to prevent child labour. The Bill provides that any person or organisation can file a complaint with the public authorities if they have persuasive evidence that a company has been involved in the use of child labour. If a complaint is made, and the company's policy is found to have been ineffective in preventing child labour, the company can be subject to an administrative fine. Directors of companies that are fined more than once can be prosecuted.⁶¹ As currently drafted, this Bill applies to all companies established in the Netherlands that sell goods and services physically in the Netherlands, and online. Subject to being passed in the Senate, the Bill is expected to come into force on or after 1 January 2020.
 - (2) In **France**, the "**Corporate Due Diligence Law**"⁶² requires companies to put in place a due diligence plan which considers the company's impact on human rights in areas such as the company's environment, health and safety and ethical business practices (anti-bribery and corruption). The law applies to:
 - (i) a French company with 5,000 or more employees in France; or
 - (ii) a French company with 10,000 or more employees globally including its direct and indirect subsidiaries wherever situated (i.e. the headcount assessment should include all employees of all subsidiaries).

A failure to put in place a due diligence plan can lead to fines of up to EUR10 million.⁶³

Pursuant to Article 1 of the Corporate Due Diligence Law, the "vigilance plan" (or due diligence plan) and the report of its effective implementation must be published and

⁶¹ Eerste Kamer de Staten-Generaal, *Initiatiefvoorstel-Van Laar Wet zorgplicht kinderarbeid* 34.506

<https://www.eerstekamer.nl/wetsvoorstel/34506_initiatiefvoorstel_van_laar>.

⁶² *La loi du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* [the law of 27 March 2017 relating to the obligation of due diligence on parent companies and subcontractors] (France) JO, 28 March 2017 <<https://www.legifrance.gouv.fr/eli/loi/2017/3/27/ECFX1509096L/jo/texte/fr>>.

⁶³ See further: Laure Joncour, *A new duty of care for the most significant companies in France* (March 2017) <<http://www.nortonrosefulbright.com/knowledge/publications/147606/a-new-duty-of-care-for-the-most-significant-companies-in-france>>.

included in the management report of the board of directors and available to the annual general meeting of shareholders.

Importantly, this law specifies that the due diligence plan must be implemented “*in an effective manner*”. The French Government’s observations on the law dated 28 March 2017 indicated that this implementation goes beyond just producing a paper plan and requires ‘sincere implementation’.

The French Government’s observations mean that the due diligence plan should be drawn up as early as 2017. Companies that are subject to the law will therefore have to draw up and include the plan in their management reports for the financial year ending 31 December 2017, which will be presented at the companies’ 2018 annual general meeting (l’assemblée générale).

Further, companies will need to report on how the plan has been implemented in practice (note that the text refers to “effective implementation” which appears to indicate that the report will need to involve an assessment of the measures put in place), but this obligation will only commence in 2019 for companies whose accounting year ends on 31 December.

The law states that a Government Decree (practical guidance) may be published. This will provide more detail as to the elements of the due diligence plan and how they should be applied in practice. Such guidance is welcomed by French businesses.

- (3) Eight EU Member State Parliaments⁶⁴ launched the [Green Card Initiative](#) calling for the EU Commission to initiate a legislative procedure to enhance corporate respect for human rights and the environment.⁶⁵

49 The MSA UK does not contain an express requirement for companies to undertake due diligence, or put in place a plan to prevent slavery from occurring. The MSA UK only requires a company to report on the steps it has taken (if any) to eradicate modern slavery in its business and supply chains.

50 However, subsection 54(5) of the MSA UK (and Part 5 ‘*Slavery and human trafficking in supply chains: guidance for businesses*’ of the accompanying Practical Guidance) sets out six main areas that may be covered in a transparency statement. So the statement may contain information about:

- a. the organisation’s structure, its business and its supply chains;*
- b. its policies in relation to slavery and human trafficking;*
- c. its due diligence processes in relation to slavery and human trafficking in its business and supply chains;*
- d. the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;*
- e. its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate;*
- f. the training and capacity building about slavery and human trafficking available to its staff.”⁶⁶*

⁶⁴ Parliaments of Estonia, Lithuania, Slovakia and Portugal, the UK House of Lords, the Dutch House of Representatives, the Italian Senate, and the French National Assembly.

⁶⁵ See also: European Coalition for Corporate Justice, Members of 8 European Parliaments support duty of care legislation for EU corporations (18 May 2016) <<http://corporatejustice.org/news/132-members-of-8-european-parliaments-support-duty-of-care-legislation-for-eu-corporations>> .

⁶⁶ UK Government Home Office, *Slavery and human trafficking in supply chains: guidance for businesses* (Statutory Guidance, 29 October 2015) 11 < <https://www.gov.uk/government/publications/transparency-in-supply-chains-a-practical-guide>> .

- 51 In the Practical Guidance at Annex E, human rights due diligence is highlighted as a key concept of the UN Guiding Principles,⁶⁷ and the Practical Guidance also recommends that organisations refer directly to the UNGPs for guidance on human rights due diligence. While the Practical Guidance notes that human rights due diligence is not a “legal requirement of the transparency provisions” it does confirm that it is “good business practice and risk management”.⁶⁸
- 52 Over the course of 2015 and 2016, Norton Rose Fulbright and the BIICL undertook the Business and Human Rights Due Diligence Project – a study that aimed to clarify issues of law, principle and practice in the area of human rights due diligence, to ultimately provide practical recommendations for businesses in relation to their approach to human rights due diligence (**Study**).⁶⁹
- 53 The Study identified that when assessing risk, businesses commonly overlook human rights.⁷⁰ Many businesses already conduct due diligence in a variety of contexts, including mergers & acquisitions and project finance. However, human rights due diligence is qualitatively and quantitatively different from much of the legal and commercial due diligence that companies are accustomed to conducting. That is primarily because traditional M&A due diligence focuses on risks to the business, whereas human rights due diligence assesses the risk that the businesses is impacting on the human rights of others.
- 54 The Study, which is described in a full report (in the Business and Human Rights Journal published by Cambridge University Press):
 - (1) analyses the actual practice currently undertaken by companies through the lens of the core elements of the UN Guiding Principles;
 - (2) clarifies the meaning and scope of human rights due diligence; and
 - (3) examines the legal developments and underlying requirements, as well as industry approaches in this area.
- 55 The Study analysed the steps taken across a variety of industries (including mining, technology and innovation, life sciences and health, energy and financial institutions) and found that although individual companies and sectors differ, best practice human rights due diligence looks surprisingly similar across sectors and corporate structures. The following steps were highlighted as being the most prominent components of human rights due diligence, i.e. the best practice:
 - (1) initial identification through human rights impact assessment, desktop research or gap analysis, perhaps followed or complemented by interviews;
 - (2) risk assessment of human rights risks, including risks to rights-holders;
 - (3) prioritisation of human rights issues;
 - (4) development of action plans;
 - (5) strategic direction at the board level;

⁶⁷ UK Government Home Office, *Slavery and human trafficking in supply chains: guidance for businesses* (Statutory Guidance, 29 October 2015) 32 < <https://www.gov.uk/government/publications/transparency-in-supply-chains-a-practical-guide>>.

⁶⁸ UK Government Home Office, *Slavery and human trafficking in supply chains: guidance for businesses* (Statutory Guidance, 29 October 2015) 33 < <https://www.gov.uk/government/publications/transparency-in-supply-chains-a-practical-guide>>.

⁶⁹ For the full study please see Robert McCorquodale, Lise Smit, Stuart Neely, and Robin Brooks, ‘Human rights due diligence in law and practice: good practices and challenges for business enterprises’ (2016) *Business and Human Rights Journal* ISSN 2057-0201.

⁷⁰ See Norton Rose Fulbright and BIICL, *Major differences between companies which carried out specific human rights due diligence and those which engaged other types of review mechanisms*, Exploring Human Rights Due Diligence Executive Summary (13 October 2016) (<<http://human-rights-due-diligence.nortonrosefulbright.online/publications/executive-summary>>).

- (6) cross-functionality: steering groups, working groups, interaction between relevant functions;
 - (7) integration of human rights into internal compliance mechanisms, scoring and tools;
 - (8) translation and application of human rights to apply to each function;
 - (9) inclusion in contractual provisions;
 - (10) having codes of conduct and operational policies;
 - (11) providing training; and
 - (12) ensuring that there are effective grievance mechanisms.⁷¹
- 56 The method most commonly used by respondents across sectors for identifying human rights impacts were desktop research and studies, including internet searches, sanctions lists and other database searches, media and NGO reports and high risk country research. It also included a review of company policies and training records, legislation, industry guidance and best practice documents.
- 57 The results of the Study identified that where a company undertakes express human rights due diligence, the human rights impacts of both the company and its business partners are more likely to be identified, human rights impacts policies, goals and procedures are more likely to be tracked, human rights experts are more likely to be consulted, and a wider range of human rights are likely to be considered. The Study found that “the correlation between the use of an express human rights lens and a more effective process for the identification of human rights impacts is an important finding which emerges repeatedly”.⁷² We recommend that the Committee consult the Study for further detailed consideration of best practice in carrying out human rights due diligence.

Recommendations

- (1) **Australia should introduce a statutory modern slavery reporting requirement in similar terms to section 54 of the MSA UK that requires reporting bodies to report annually on the steps they have taken in the previous financial year to eradicate modern slavery and human trafficking in their business and supply chains.**
- (2) **Careful consideration should be given to ensuring that the reporting can align with the MSA UK and other laws that have similar reporting obligations.**
- (3) **If reporting requirements are to be created for commercial organisations, we recommend that they are also created for government agencies and public bodies involved in public procurement processes.**
- (4) **We do not consider it necessary at this stage to impose other express requirements on organisations, such as to establish CSR plans or carry out due diligence, as has been done in some other jurisdictions.**

⁷¹ Norton Rose Fulbright and BIIICL “Key findings from our empirical research” *Exploring Human Rights Due Diligence* (2016) < <http://human-rights-due-diligence.nortonrosefulbright.online/publications/key-findings-from-our-empirical-research> > paragraph 8.

⁷² Robert McCorquodale, Lise Smit, Stuart Neely, and Robin Brooks “Human rights due diligence in law and practice: good practices and challenges for business enterprises” (2016) *Business and Human Rights Journal* ISSN 2057-020131.

4. The implications for Australia's visa regime, and conformity with the *Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* regarding federal compensation for victims of modern slavery

Overview

- 58 A key part of best practice of modern slavery type-laws is the identification of victims and how they are supported to exit and remain out of modern slavery.⁷³
- 59 Two interrelated mechanisms of support provided by governments are the availability and adequacy of a visa regime, and the compensation available for victims of modern slavery. These are considered below in the context of Australia's obligations to, and conformity with the *Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Protocol)*.

The Protocol

- 60 In 2005, Australia ratified the Protocol.⁷⁴ The Protocol supplements and is to be interpreted in conjunction with the United Nations Convention against Transnational Organised Crime.
- 61 The preamble of the Protocol provides an acknowledgment by its State Parties that effective action to combat trafficking in persons requires an international approach that includes measures to prevent trafficking, punish the offenders and protect the victims which includes maintaining their internationally recognised human rights.⁷⁵

Human Trafficking Visa Framework

- 62 Article 7, section 1 of the Protocol provides that "each State Party shall consider adopting legislative or other appropriate measures that **permit victims of trafficking in persons to remain in its territory**, temporarily or permanently, in appropriate cases".⁷⁶
- 63 The Australian Government has recognised the issue of modern slavery in Australia and met its obligation under Article 7.1 by establishing a comprehensive Human Trafficking Visa Framework. The framework enables victims of human trafficking or slavery, who are in Australia unlawfully, to remain in Australia temporarily or permanently. Suspected trafficked people can be granted a Bridging F visa - subclass 060 or Referred Stay (Permanent) visa - subclass 852 which enables them to access the government's Support Program.⁷⁷

⁷³ 'The Walk Free Foundation, *The Global Slavery Index 2016* (2016) The Global Slavery Index <<http://www.globalslaveryindex.org/>>.

⁷⁴ *Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the united nations convention against transnational organized crime* (15 November 2000), cited in UNODC, *Global Report on Trafficking in Persons 2016* (United Nations publication).

⁷⁵ *Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the united nations convention against transnational organized crime* (15 November 2000), cited in UNODC, *Global Report on Trafficking in Persons 2016* (United Nations publication).

⁷⁶ *Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the united nations convention against transnational organized crime* (15 November 2000), cited in UNODC, *Global Report on Trafficking in Persons 2016* (United Nations publication).

⁷⁷ Australian Government Department of Social Services, Australian Government, *Human Trafficking Visa Framework* (9 March 2016) Australian Government Department of Social Services <<https://www.dss.gov.au/women/programs-services/reducing-violence/anti-people-trafficking-strategy/human-trafficking-visa-framework>>.

64 Bridging F visa - subclass 060⁷⁸

- (1) This visa is a temporary visa designed exclusively for trafficked people and their family members. The visa is available to unlawful non-citizens who have been identified by the Australian Federal Police as suspected victims of human trafficking, slavery or slavery-like practices and their family members. It requires that suitable arrangements have been made for the care, safety and welfare of the applicant in Australia for the proposed period of the visa.
- (2) The visa is granted for an initial period of 45 days however a second visa for another 45 days may be granted on a case by case basis, where a person is willing but not able to assist police because of their current mental, physical or emotional state.
- (3) The purpose of the visa is to allow the victim to recover and reflect. It also facilitates a longer term temporary stay of trafficked people to assist in criminal justice processes.
- (4) While a person is on a Bridging F visa, that person will be eligible for special benefits and related ancillary payments (including crisis payments). Family assistance payments are also available if they have a dependent child.⁷⁹ The visa is subject to condition 8101 which prevents the holder from engaging in work in Australia.

65 Referred Stay (Permanent) visa - subclass 852

- (1) This is a permanent visa permitting the holder to travel to and enter Australia for a period of 5 years. It is granted to eligible victims or witnesses of trafficking who have contributed to an investigation or prosecution of a human trafficking related offence and, as a result, would be in danger if they returned to their home country.
- (2) The Minister must be satisfied that the person passes a character test and satisfies certain public interest criteria.
- (3) Visa holders can access support under the Support for Victims of People Trafficking Program and access to a broad range of social security payments, such as Youth Allowance, Austudy and Newstart Allowance.⁸⁰

Human Trafficking Visa Commentary

- 66 The 45 day period of the Bridging F visa has been criticised by a number of groups on the basis that it does not provide enough time for a traumatised victim of trafficking to assess all of their available options and make critical decisions. These groups call for a 90 day visa period, which is in accordance with the United Nations (UN) Trafficking Protocol.⁸¹
- 67 In support of these criticisms, an argument is made that victims of modern slavery have competing interests in the immediate period following their emancipation. As a result, victims and support providers may be forced to prioritise their most urgent needs to stabilise their situation. This may result in the victim being unable to properly consider their longer-term options such as contributing to the investigation and prosecution of the relevant offenders or pursuing a compensation claim.⁸²

⁷⁸ Australian Government Department of Immigration and Border Protection, *PAM3: Act - Compliance and Case Resolution - Program visas - Bridging F visas* (14 March 2017) LEGENDCOM, 1, 2, 11, 12 and 13 <https://legend.online.immi.gov.au/Migration/2013/18-10-2013/legend_current/mp/Pages/document00001/level%20100006/level%20200067/level%20300170.aspx#JD_A232>.

⁷⁹ Australian Government, *Human Trafficking Visa Framework* (9 March 2013) Australian Government Guide to Social Policy Law <<http://guides.dss.gov.au/guide-social-security-law/9/1/2/130>>.

⁸⁰ Australian Government, *Human Trafficking Visa Framework* (9 March 2013) Australian Government Guide to Social Policy Law <<http://guides.dss.gov.au/guide-social-security-law/9/1/2/130>>.

⁸¹ Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of the Commonwealth of Australia, *Trading Lives: Modern Day Human Trafficking* (2013), 56-8.

⁸² Barrenechea, Ainhoa, 'Access to Compensation for Victims of Human Trafficking' (FLEX Working Paper, Focus on Labour Exploitation, 2016).

- 68 The Department of Immigration and Border Protection, the Australian Federal Police and the Attorney-General's Department all refute these criticisms with the view that 45 days is sufficient for a victim to determine whether or not they will assist with an investigation and is consistent with the UN High Commission for Human Rights recommended principles and guidelines.⁸³ They submit that the concerns raised with respect to the 45 day time period are also provided for by a further visa to be granted on a case-by-case basis.
- 69 An objective measure of the efficacy of Australia's visa regime may be found in the United States of America Department of State Trafficking in Persons Report of June 2016 (**US Report**). This refers to the 3P paradigm of prosecution, protection and prevention employed by the global anti-trafficking movement to successfully combat trafficking in persons. Of the 3Ps, protection efforts empower survivors of modern slavery, *"to move beyond their victimisation and rebuild their lives with dignity, security and respect."*⁸⁴
- 70 The Department of State categorises each country included in the US Report within one of 4 tiers, as mandated by the *Trafficking Victims Prosecution Act 2000* (US) (**TVPA**). A Tier 1 ranking indicates that a government meets the TVPA's minimum standards. It does not, however, mean that those countries ranked as Tier 1 are doing enough to address the problem. Australia is among 36 countries recognised in the US Report as Tier 1.⁸⁵
- 71 Each of the Tier 1 countries obviously has varying programs to support victims of modern slavery. With respect to residency and visa requirements, many Tier 1 countries provide periods of reflection for the victim to determine whether or not they will participate in the investigation and prosecution of human trafficking offenders. These periods can be as short as 30 days up to as long as 6 months.⁸⁶ Australia's 45 day visa regime is therefore at the shorter end of the spectrum.
- 72 In addition, many Tier 1 countries do not connect the victim support or residency (whether temporary or otherwise) with the level of assistance the victim provides to the prosecution of the offender. For example, Italian law entitles an adult victim to a temporary residence permit for 6 months and this is renewable if the victim finds employment or enrolls in a job training program.⁸⁷ This is considered further below.

Conformity with the Protocol regarding federal compensation for modern slavery

- 73 Article 6 section 6 of the Protocol provides that:
- "Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining **compensation** for damage suffered".*⁸⁸
- 74 In addition:
- (1) Article 25(2) of the UNTOC Convention requires State Parties to establish appropriate procedures to provide access to compensation and restitution for victims. This right is required to be communicated to victims.

⁸³ Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of the Commonwealth of Australia, *Trading Lives: Modern Day Human Trafficking* (2013), 56-8.

⁸⁴ U.S. Department of State, *Trafficking in Persons Report of June 2016* (8 March 2016) U.S. Department of State <<https://www.state.gov/documents/organization/258876.pdf>>.

⁸⁵ U.S. Department of State, *Trafficking in Persons Report of June 2016* (8 March 2016) U.S. Department of State <<https://www.state.gov/documents/organization/258876.pdf>>.

⁸⁶ Reflection periods provided by US Report: Canada (180 days); Czech Republic (60 days); Finland (6 months); France (30 days); Germany (3 months); Ireland (60 days); Lithuania (30 days); Netherlands (3 months); Norway (6 months); Poland (3 months); Portugal (30-60 days); Slovenia (90 days); Spain (90 days); Sweden (30 days); Switzerland (3 months); UK (45 days).

⁸⁷ U.S. Department of State, *Trafficking in Persons Report of June 2016* (8 March 2016) U.S. Department of State <<https://www.state.gov/documents/organization/258876.pdf>>.

⁸⁸ *Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the united nations convention against transnational organized crime* (15 November 2000), cited in UNODC, *Global Report on Trafficking in Persons 2016* (United Nations publication).

- (2) Article 14 of the UNTOC Convention requires State Parties to give priority consideration to returning confiscated proceeds of crime or property to a requesting State Party so that it can give compensation to victims.⁸⁹
- 75 As such, Australia has an international obligation to ensure:
- (1) the legal system offers victims of human trafficking compensation for the damage they have suffered;
 - (2) victims are properly informed of their right to compensation; and
 - (3) access to compensation is supported by adequate procedures.
- 76 The Commonwealth Government has enacted legislation to introduce specific offences for anti-slavery, forced labour and human trafficking. However, a federal scheme for compensation of victims of these crimes has not been established. Instead, compensation for victims of crime is administered through State and Territory legislation,⁹⁰ which currently provides the primary mechanism for victims of modern slavery to seek compensation.
- 77 The Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade (**Committee**) reports that the lack of a federal compensation scheme results in inconsistent outcomes (ranging from \$7,500 to \$50,000). The Sub-Committee recommended a federal compensation scheme, funded by persons convicted of the crimes to adequately address Australia's obligations under the Protocol.⁹¹ This recommendation has long been supported by Anti-Slavery Australia on the basis that it is necessary to ensure that victims have a real opportunity of a remedy. Similarly, the US Report suggests, as part of its recommendations for Australia, that a national compensation scheme for trafficking victims be established along with continued efforts to expedite visas.⁹²
- 78 The implementation of a national scheme would reflect the position in the UK following the enactment of the *Modern Slavery Act 2015 (UK)*. (Under section 8 of the MSA UK, courts may consider making a "slavery and trafficking reparation order" where a person has been convicted of a relevant offence and a confiscation order is made against the person with respect to that offence). A number of considerations are to be taken into consideration by the court in determining whether or not a reparation order is made. If the court does not make a reparation order, it must provide its reasons for not doing so.

MSA UK Commentary

- 79 One concern expressed regarding the UK model is that it relies on the conviction of the perpetrator of the crime. Despite legislative change, convictions of modern slavery crimes are rare in both the UK and Australia.⁹³ For example, global law enforcement data regarding labour trafficking estimates there to have been 77,823 victims, 18,930 prosecutions and only 6,609 convictions.⁹⁴
- 80 Under the UK model, if there is no conviction of the perpetrators, the victim is left in the position of seeking compensation under the four other available routes to compensation available. These include pursuing a compensation order under the *Criminal Courts (Sentencing) Act 2000*, applying to the government-funded Criminal Injuries Compensation

⁸⁹ *United Nations Convention against Transnational Organised Crime*, opened for signature 12-15 December 2000, 2225 UNTS 209 (entered into force 29 September 2003) arts 25(2), 14.

⁹⁰ *Victims of Crime Assistance Act 1996* (VIC) s 8; *Victims of Crime Assistance Act 2009* (QLD) s 38(1); *Criminal Injuries Compensation Act 2003* (WA) s 31(1).

⁹¹ Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of the Commonwealth of Australia, *Trading Lives: Modern Day Human Trafficking* (2013) 73, 78.

⁹² U.S. Department of State, *Country Narratives: Countries A Through F* (8 March 2016) U.S. Department of State <<https://www.state.gov/j/tip/rls/tiprpt/2010/142759.htm>>.

⁹³ Barrenechea, Ainhoa, 'Access to Compensation for Victims of Human Trafficking' (FLEX Working Paper, , Focus on Labour Exploitation, 2016).

⁹⁴ U.S. Department of State, *Trafficking in Persons Report of June 2016* (8 March 2016) U.S. Department of State <<https://www.state.gov/documents/organization/258876.pdf>>.

Authority that provides compensation to victims of violent crimes, or pursuing a claim before the Employment Tribunal for employment related abuse or making a civil claim. There are difficulties in accessing these various forms of compensation as they were not designed for the purpose of compensating victims of modern slavery.

- 81 Concerns have been raised in the UK that the reparation orders introduced by the UK MSA only available to a small portion of victims who have seen their traffickers convicted and their assets confiscated.⁹⁵
- 82 A report reflecting on the reparation orders a year after MSA UK was enacted highlights the practical barriers to compensation faced by victims of modern slavery including language barriers, fear, mental health issues and a range of other vulnerabilities which result in the victim requiring assistance to navigate the legal process.⁹⁶
- 83 The United Nations Office on Drugs and Crime also identifies the link of compensation to a conviction of the perpetrator of the modern slavery offence as an issue and recommends a broad range of sources for funding compensation schemes, including the establishment of a State-funded scheme. This provides a guarantee that compensation can be paid to victims in accordance with the Protocol, as it does not rely on a conviction or the confiscation of assets of the offender.⁹⁷

Advisory Body

- 84 Aside from monetary compensation, the Australian Government has established the National Action Plan to Combat Human Trafficking and Slavery 2015-19. The plan incorporates a Support for Trafficked People Program administered by the Department of Social Services and delivered nationally by the Australian Red Cross as well as Guidelines for NGOs Working with Trafficked People.
- 85 In the US, on 16 December 2015, 11 survivors were appointed to the US Advisory Council on Human Trafficking (**US Advisory Council**). This Council provides a formal platform for trafficking survivors to advise and make recommendations on federal anti-trafficking policies to the President's Interagency Task Force.⁹⁸
- 86 The US Advisory Council provided its first annual report in 2016. This report highlights the role that survivors of modern slavery can play. As part of the introduction it states:
*"as subject matter experts, survivors bring a profound understanding of human trafficking based on their direct experience. They provide the clues investigators need as evidence in court, as well as the signs a community needs to recognise trafficking to prevent its citizenry from becoming victims".*⁹⁹
- 87 Given the insight of the US Advisory Council has provided the US Government, there may be some benefit in implementing a similar council in Australia as an avenue for victims to contribute toward the fight against modern slavery.

Recommendations

⁹⁵ Barrenechea, Ainhoa, 'Access to Compensation for Victims of Human Trafficking' (FLEX Working Paper, , Focus on Labour Exploitation, 2016).

⁹⁶ Barrenechea, Ainhoa, 'Access to Compensation for Victims of Human Trafficking' (FLEX Working Paper, , Focus on Labour Exploitation, 2016).

⁹⁷ United Nations Office on Drugs and Crime, *Anti-human trafficking manual for criminal justice practitioners* (United Nations Publications, 2009).

⁹⁸ U.S Department of State, *Trafficking in Persons Report of June 2016* (8 March 2016) U.S. Department of State <<https://www.state.gov/documents/organization/258876.pdf>>.

⁹⁹ U.S Department of State, *Trafficking in Persons Report of June 2016* (8 March 2016) U.S. Department of State <<https://www.state.gov/documents/organization/258876.pdf>>.

- (1) **The Australian Commonwealth Government should establish a federal compensation fund to assist survivors of modern slavery;**
- (2) **Consider making the right to compensation available and ensure that a survivor's access to compensation is not linked to a conviction of a perpetrator of modern slavery;**
- (3) **Consider amending Bridging Visa F to allow survivors of modern slavery to remain in Australia with enough time to make and finalise applications for compensation. This could include an increase from 45 to a 90 days visa period; and**
- (4) **Consider the establishment of a committee similar to the US Advisory Council to allow survivors of slavery crimes to be a part of the fight against modern slavery.**

5. Provisions in the United Kingdom's legislation which have proven effective in addressing modern slavery, and whether similar or improved measures should be introduced in Australia;
and
6. Whether a Modern Slavery Act should be introduced in Australia;

88 In this part, we will focus on the provisions in the United Kingdom's *Modern Slavery Act* in which our firm has had the most experience, namely Part 6 of section 54, which concerns transparency in supply chains, and whether this section has been effective and whether a similar Act ought to be introduced in Australia.

Overview of the MSA

- 89 The MSA UK transparency in supply chains clause (clause 54), which came into force in October 2015, imposes obligations on commercial organisations providing goods or services in the UK with a global turnover of more than GBP36 million. It requires that they report, on an annual basis, on the steps they have taken to eradicate slavery and human trafficking from their own business as well as from their supply chains in the previous financial year, starting from 2016. The report must be signed off by a member of the organisation's senior management. This report is referred to in this part as a **Transparency Statement**.
- 90 It is open to organisations to report that they are taking no steps. The reporting requirement is not prescriptive in telling organisations what they must do or how they must do it. It aims for transparency and accountability. So, unlike the California Act, which prescribes the minimum contents of the statement, the MSA UK does not prescribe any details. However, it, and the accompanying guidance, suggest information that the organisation may provide in its report, covering the following broad areas: (i) mapping of organisational structure and supply chains; (ii) slavery and human trafficking policies; (iii) due diligence process; (iv) steps taken to assess and manage the risk; (v) effectiveness in eradicating slavery and human trafficking and steps taken to that effect; and (vi) staff training. In broad terms, the objectives of the MSA UK appear to be similar to those of the Californian Act: to encourage transparency and accountability, and bring about a change in corporate behaviour, not through government enforcement action, but through collective scrutiny and pressure.
- 91 Failure to publish a Transparency Statement could lead to the UK Secretary of State seeking a UK court order compelling the organisation to publish a Transparency Statement. If the organisation defaults, it would be held in contempt of court, which is punishable by an unlimited fine.¹⁰⁰ There have been no prosecutions as yet for failure to publish a Transparency Statement.

Has the MSA UK been effective?

- 92 It is too early to give a firm view on the effectiveness of the legislation. The first reporting cycle is not yet complete – it is due to be completed by about October 2017. Our observations below are therefore preliminary and based mostly on our experience with clients and other publicly available information.

¹⁰⁰ *Modern Slavery Act 2015* (UK) s 54(11); UK Government Home Office, *Slavery and human trafficking in supply chains: guidance for businesses* (Statutory Guidance, 29 October 2015) [2.6]
<<https://www.gov.uk/government/publications/transparency-in-supply-chains-a-practical-guide>>.

93 In early 2016, the Business and Human Rights Resource Centre (**BHRRC**) reviewed what it referred to as the “first” 75 MSA Statements”.¹⁰¹ It found significant non-compliance in the first tranche of statements with the very limited requirements of the MSA UK requirements. It stated:

“Out of 75 statements found, only 22 were both signed by a director and available from the company’s website homepage. Thirty-three were not signed by the director, and 33 companies had not placed a link to the statement from their website homepage.

While there are no legal requirements on the content of the statement, the legislation suggests six areas on which information may be included, such as organisational structure, company policies and due diligence; nineteen statements published so far address all these points. Critically, only 9 statements met the minimum requirements and covered the six suggested areas.”

94 It is not clear why those statements did not comply with the requirements of the MSA UK. Since then, the BHRRC has established a registry of Transparency Statements (in the absence of any official central repository) on which more than 1,800 statements have been lodged as at the date of this submission.

95 The early analysis carried out by BHRRC, and complaints since then, that the MSA UK lacks ‘teeth’ and ‘bite’, because it lacks effective monitoring and enforcement mechanisms, could easily lead to an overly pessimistic view of the overall effectiveness of the reporting provision. Yet, our experience with businesses’ first dealings with the reporting requirement suggests that while there is room for improvement, there is also cause for optimism.

96 Overall, we have found the process of businesses engaging with the reporting requirement to be constructive and positive. The MSA UK has been effective in changing the behaviour and focus of large corporate groups. It is probably correct to say there remains a quite low level of awareness across corporate groups about modern slavery, and businesses are engaging in a process of educating themselves in, and building the knowledge and expertise necessary to tackle, modern slavery issues effectively. But a defining achievement of the MSA UK is that it has brought an issue which previously received limited (if any) attention from business outside the CSR space, to the attention of board rooms, and has made modern slavery an issue which requires serious attention at “C-suite level.” Our experience is that across many companies, modern slavery issues are receiving more serious attention than they have ever done before.

97 In our view, it is important to bear in mind that the current reporting period under the MSA UK is not complete and it is only the first reporting period. It is a requirement of the MSA UK that commercial organisations report annually. Our expectation, and what we can already see happening, is that having taken their first tentative steps to report in the first period, many companies are already starting to consider what they will need to do in order to report effectively in subsequent periods. This includes taking steps to plan and carry out due diligence. These steps are not being taken because they are expressly mandated by the legislation, but because the companies appreciate the need to take these steps, not just in order to report effectively in line with the reporting requirement in section 54, but also in order to understand and tackle the underlying issue: is there modern slavery in their business and supply chains and, if so, what are they doing (or planning to do) about it?

98 The challenges facing organisations, across all sectors, in identifying and effectively addressing modern slavery in their supply chains must not be underestimated. Supply chains of many companies, especially large, multinational companies, are diverse, lengthy and complex. They can include hundreds of thousands of individual products and suppliers. The

¹⁰¹ Business & Human Rights Resource Centre, *UK Modern Slavery Act: Analysis of early company statements, new guidance available* <<http://business-humanrights.org/en/uk-modern-slavery-act-analysis-of-early-company-statements-new-guidance-available>>.

task of identifying and understanding the different elements of these supply chains is huge and can take months and, in some cases, years. In that context, criticism of some organisations' initial statements may seem unfair. Conversely, it should not seem surprising if, in this initial phase of reporting, some of the reports produced by organisations seem embryonic and lacking in detail. In our view, that should not be regarded as an indicator that the MSA UK is ineffective. Rather, it should be seen in the context of the issues raised above, as well as legitimate concerns around the need to manage the risk of damage from making inaccurate public statements.

- 99 The same concerns are likely to arise in Australia.¹⁰² As a result, most corporations, particularly listed corporations, have tended to be, and in Australia could be expected to be, cautious in terms of what they say in their initial Transparency Statements. At the same time, as their understanding of the risk and incidence of modern slavery in their businesses and supply chains improves, and they become better able to articulate how they are tackling these issues, we expect to see more detailed reporting. What seems clear at least from our work so far in this area is that many companies who are required under the MSA UK to publish Transparency Statements, and even some companies who are not covered by the regime, are already taking active steps to develop systems to improve transparency in their businesses and supply chains around modern slavery issues. We understand that none of the Transparency Statements submitted to the BHRRC so far have expressly stated that the company has taken *no steps* to prevent modern slavery in its business or supply chain.¹⁰³

Monitoring issues

- 100 Notwithstanding the comments made above, it is clear that the legislation lacks an effective monitoring mechanism, which we consider to be essential to building a proper understanding of the impact and effectiveness of a Modern Slavery Act.
- 101 We do not consider that the legislation should provide for a list of organisations that are required to comply (as some have suggested). Based on our experience, compiling a definitive list would not be practicable. At least, in the case of the MSA UK, which has extraterritorial effect, insofar as it is not limited to companies incorporated in the UK, but extends to companies and groups of companies carrying on business in the UK, the process of assessing the need for compliance with the MSA UK has in some cases required consideration of complex jurisdictional and organisational issues. In those circumstances, we doubt it would be feasible for anyone to compile a definitive list.
- 102 That said, an official repository of Transparency Statements would go some way to facilitating more effective monitoring of compliance and impact. In our view, the government would ideally be responsible for this task and allocate resources to establish a publicly accessible repository of statements. It would not only require organisations to lodge their statements not only on their websites (as they are required to do under the MSA UK) but also with the central repository. This would avoid the need for others to produce their own repositories, on a voluntary basis, as the BHRRC has done in the UK.¹⁰⁴ The BHRRC has undertaken this task so that the public can search for transparency statements easily, and in that way, make

¹⁰² In Australia, an officer or employee of a listed entity who gives, authorises or permits the giving of materially false or misleading information to the ASX under the ASX Listing Rules may be found guilty of an offence under the *Corporations Act 2001* (Cth), punishable by a fine or imprisonment (see schedule 3 of the *Corporations Act*). Additionally, there is the risk of legal action for misleading or deceptive conduct under the Australian Consumer Law (*Competition and Consumer Act 2010* (Cth) sch 2) where the plaintiff suffered loss as a result of the misleading or deceptive conduct.

¹⁰³ Patricia Carrier and Joe Bardwell, 'How the UK Modern Slavery Act can find its bite' *Open Democracy* (24 January 2017) <<https://www.opendemocracy.net/beyondslavery/patricia-carrier-joseph-bardwell/how-uk-modern-slavery-act-can-find-its-bite>>.

¹⁰⁴ Available online: 'UK Modern Slavery Act and Registry' <<https://business-humanrights.org/en/uk-modern-slavery-act-registry>>

companies more accountable to the public, in line with the objectives of the MSA UK.¹⁰⁵ Companies can submit their transparency statements to the BHRRC by email. As indicated above, as at the date of this submission, just over 1,800 Transparency Statements appear to have been placed on the BHRRC's registry.

103 In our view, if the Committee recommends the introduction of a reporting requirement in Australia, it ought to consider requiring businesses to:

- (1) publish a transparency statement on their website; and
- (2) file that transparency statement with an appropriate repository service.

104 In addition, if statements are to be filed, we recommend that an Independent Anti-Slavery Commissioner be established to receive the statements who could also be tasked with reporting to the Commonwealth Parliament on compliance with the Modern Slavery Act. Alternatively, if the reporting obligation was limited to corporations, the statements could be filed and searchable through ASIC.

105 In conjunction with improving monitoring processes in relation the Act, we suggest that the Australian Government plan on reviewing the effectiveness of the Act within 2 years. The reporting from the Independent Anti-Slavery Commissioner could assist such a review.

Enforcement issues

106 Under the MSA UK the duties imposed on commercial organisations by section 54 are enforceable by the Secretary of State bringing civil proceedings in the High Court for an injunction (and by equivalent action in Scotland).

107 Differing views have been expressed on whether the MSA UK should include a tougher enforcement regime.

108 In our view, developments to date do not indicate that a tougher enforcement regime, such as a regime of fines and penalties for non-compliance, is necessary. Nor would it seem appropriate. The principal objective of the MSA UK, as we understand it, is to increase transparency and accountability. The nature of the accountability is important. Similar to the California Act, the aim appears to be to make commercial organisations more accountable, not to government necessarily, but to the organisation's customers, civil society and other stakeholders. The government's role so far has been to facilitate that process of accountability.

109 We could see a reporting requirement in Australia operating effectively on a similar basis. We do not discount the possibility that greater enforcement powers might be needed or might be desirable in future, should a reporting requirement along the lines of the MSA UK not prove effective in bringing about a real change in corporate behaviour in this area. But it would not seem appropriate at this stage, when governments and organisations continue to be engaged in raising awareness of the issues and seeking out further education and expertise to assist in tackling them, to impose more draconian sanctions for non-compliance.

Good and services

110 The California Act applies only to retailers and manufacturers involved in the sale of tangible goods.

111 The MSA UK applies to businesses supplying goods and services.

¹⁰⁵ See discussion of: Patricia Carrier and Joe Bardwell, 'How the UK Modern Slavery Act can find its bite' *Open Democracy* (24 January 2017) <<https://www.opendemocracy.net/beyondslavery/patricia-carrier-joseph-bardwell/how-uk-modern-slavery-act-can-find-its-bite>>

- 112 We recommend that an Australian Modern Slavery Act applies to businesses supplying goods and services.

Threshold issues

- 113 A key consideration for the Committee will be the criteria that determine which organisations are required to publish a Transparency Statement. In summary, the criteria for reporting in other jurisdictions includes the following:
- (1) UK businesses exceeding a total turnover of GBP36 million (AUD60 million) are required to publish a transparency statement (if they meet the other requirements);
 - (2) the Dutch Bill on child labour stipulates that all businesses are required to report, except for small businesses;
 - (3) the French due diligence law applies to:
 - (a) French companies with 5,000 or more employees, employed in France, or
 - (b) French companies with 10,000 or more employees, wherever employed globally.
 - (4) The California Act captures companies that do business in California and have worldwide receipts of USD100 million or more.
- 114 We consider that it is appropriate for the reporting requirement be limited to larger businesses. We recommend that the Committee canvass widely in relation to the appropriate type and level of threshold for Australia.
- 115 Businesses that are not captured by the threshold should still be encouraged to report voluntarily. We note in passing that in the UK context, an indirect consequence of the regime is that smaller businesses who are not caught by the regime but are part of the supply chains of larger organisations that are caught by the regime, have found themselves having to take steps to address modern slavery issues, at the request of their larger customers.
- 116 We recommend that the Committee consider whether any constitutional issues arise in attempting to extend an Australian Modern Slavery Act beyond corporations. If not, we consider that the Act should apply to all types of commercial organisation, not just corporations (for example, capturing large partnerships and unincorporated joint ventures).

Public procurement processes

- 117 Public procurement processes make up a very significant part of the commercial activity in Australia and government bodies have very significant purchasing power.
- 118 If a reporting requirement is introduced in Australia, we recommend that it apply not just to commercial organisations but also to government agencies and public bodies involved in public procurement of goods and services.

Territorial reach

- 119 We recommend that the Committee consider the extra-territorial application of an Australian MSA.
- 120 The MSA UK applies to businesses that wholly or partly carry on business in the UK, whether or not they are established in the UK. We consider that to be fair to Australian businesses, all businesses, regardless of their origin, that have a substantial degree of activity in Australia ought to comply with any reporting requirement.

- 121 This would be an important means of ensuring that the reach of the Australian legislation is sufficient to capture all organisations that have substantial business dealings in or from Australia and could reasonably be seen to fall within the responsibility of the Australian government. It would be in line with the UK approach and would assist in producing a level playing field for all businesses.

The need for guidance

- 122 As part of the MSA UK, the UK Government introduced a Practical Guidance document: "Transparency in Supply Chains etc. A practical guide". This has been a useful publication for businesses and has assisted them in understanding what they are required to do to comply with the reporting requirement in the MSA UK.
- 123 We recommend the publication of a similar guide in Australia to support the effective implementation of a reporting requirement.

Recommendations

- (1) **The reporting requirement should apply to all commercial organisations that meet certain threshold requirements.**
- (2) **The Committee should carefully consider and consult on what thresholds to apply, having regard to the types and levels of thresholds applied in other jurisdictions and what is likely to work effectively in Australia.**
- (3) **Subject to meeting the threshold requirements, the reporting requirement should apply to all organisations that carry on business in or from Australia (and should not require a place of business in Australia).**
- (4) **The reporting requirement should require that the senior management of the organisation approve the statement and that a director, or equivalent officer, sign the statement.**
- (5) **The reporting requirement should require that the statement (or a link to the statement) be included in a prominent place on the home page of the organisation's website.**
- (6) **The legislation should provide for the creation of a central repository of statements and reporting bodies should be required to lodge their statements with the central repository.**
- (7) **An Independent Anti-Slavery Commissioner should be appointed to receive all statements, manage the central repository and report annually to the Commonwealth Parliament on the reporting provided by organisations.**
- (8) **We do not consider that the reporting requirement need be prescriptive about the matters to be addressed by organisations in their statements, although it would be appropriate and helpful for indications to be given as to what matters organisations may include in their statements, by way of setting expectations.**
- (9) **The Australian Commonwealth Government should publish detailed guidance to assist organisations to report effectively.**
- (10) **The legislation should not include fines or other penalties for non-compliance with the reporting requirement.**
- (11) **We recommend that the effectiveness of any reporting requirement be reviewed within 2 years of the reporting obligations becoming operational.**

Annexure A

Australian case law

There have been numerous cases and successful prosecutions under Div 270 of the *Commonwealth Criminal Code (Criminal Code)*, since its adoption in 1999. Notably, the majority of successful prosecutions have related to (and been connected with) the deprivation and exploitation of foreigners in the Australian sex industry. The following cases are the leading cases in this area.

Slavery in the sex industry – first cases

In *The Queen v Tang*,¹⁰⁶ five Thai victims, all of whom entered Australia to work in the sex industry, were required to pay off a 'debt' of approximately \$45,000 each by having sex with customers at a Melbourne brothel. All of the victims' movements were restricted and their passports confiscated.

The offender was the first person charged for intentionally possessing a slave and intentionally exercising a power of ownership over a slave under the anti-slavery laws introduced in 1999, pursuant to section 270.3(1)(a) of the *Commonwealth Criminal Code (Criminal Code)*.

Ms Tang was sentenced to 10 years imprisonment, with a non-parole period of 6 years,

The case of *R v McIvor and Tanuchit*,¹⁰⁷ was in relation to a married couple who were convicted of five counts of intentionally possessing a slave and five offences of using a slave, contrary to s 270.3(1)(a) of the *Criminal Code*.

During the course of the trial, the court heard that the five Thai victims had been forced to work in a brothel for up to 16 hours a day, 7 days a week and prohibited them from refusing customer 'requests'.

Both offenders were convicted and sentenced to 12 years imprisonment in the first instance (being the first persons to be convicted under for slavery in NSW), and following a retrial in 2010 the offenders were convicted and sentenced, again, to 12 years imprisonment.

Slavery in the sex industry – Victims' knowledge and culpability of offender

Unlike in the previously mentioned cases, the Court in *R v Nantahkhum*,¹⁰⁸ heard that the victims in this case knew that they were coming to Australia to provide sex services and knew that they would be indebted to the offender.

In any event, at first instance, the court held that irrespective of the victims' knowledge it did not diminish the culpability of the offender and found Ms Nantahkhum guilty of intentionally possessing a slave (under s 270.3(1) of *Criminal Code*) and of perverting the course of justice by offering the alleged victim money to keep quiet about her circumstances.

Retail and domestic services – first case

R v Kovacs,¹⁰⁹ was the first successful prosecution for offences of intentionally possessing a slave (s 270.3(1) of *Criminal Code*) and intentionally exercising over a slave a power attaching to the right of ownership, pursuant to s 270.3(1) of *Criminal Code*) outside the sex industry.

¹⁰⁶ [2008] HCA 39.

¹⁰⁷ [2010] NSWDC 310.

¹⁰⁸ SCC 149 of 2010.

¹⁰⁹ [2008] QCA 417.

This case involved the forced labour of a young Philippine national who moved to Australia to marry a man, instead she was met at the airport by one of the offenders who took her to a motel and raped her three times. Afterwards she was taken to a takeaway shop that was owned by the offenders (husband and wife) where she was forced to work in their take away shop and in their home as a child minder and housekeeper for up to 18 hours a day, 7 days a week for several years.

Following the victim's escape, the male offender was given a total effective sentence of twelve years imprisonment with a non-parole period of one year and three months (taking into account time already spent incarcerated) and the female offender was sentenced to four years imprisonment with a non-parole period of nine months.

Annexure B

Modern Slavery Act 2015 (MSA UK) statement

Checklist of requirements and project plan

The Modern Slavery Act 2015 came into force on 26 March 2015. Section 54 of the MSA UK, effective from 29 October 2015, requires certain commercial organisations with a turnover of not less than £36 million a year and a financial year end on or after 31 March 2016 to prepare an annual statement on the action they have taken to ensure that their business and supply chains are free of slavery and human trafficking for each year that the organisation is caught by the MSA UK.

The following checklist of requirements sets out who is captured by the requirement to prepare an MSA statement and the content, approval and publication requirements of the statement.

Checklist of requirements		Relevant section
A To whom it applies		
1	<p>The requirement to prepare a MSA statement applies to a “commercial organisation”, which includes a body corporate (wherever incorporated) or partnership (wherever formed) which:</p> <ul style="list-style-type: none"> a. carries on business, or any part of a business, in the UK¹¹⁰; b. supplies goods or services; and c. has a total turnover of not less than £36 million.¹¹¹ 	<p>Section 54(2)</p> <p>Section 54(12)</p>

¹¹⁰ Any organisation that engages in commercial activities in the UK could be caught by Section 54 regardless of its purpose or whether profits are made. A common sense approach applies to whether an organisation has a “demonstrable business presence” in the UK. Please see paragraphs 3.6 to 3.8 of the Government’s guidance [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency in Supply Chains etc A practical guide final .pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc_A_practical_guide_final.pdf). A parent organisation (wherever incorporated) that meets all of the Section 54 requirements must include in its statement the steps taken in relation to its subsidiaries (wherever incorporated) if the subsidiaries’ activities form part of the parent’s supply chain or business (regardless of whether the subsidiaries themselves meet all the Section 54 requirements). A subsidiary organisation that meets the Section 54 requirements in its own right, must produce a statement in its own right. However, where a parent and a subsidiary are each required to make a statement, the parent may produce one statement that its subsidiary can use. Whilst a non-UK subsidiary that does not carry on business in the UK and is not part of the parent’s business or supply chain will not have to make a statement, it is considered good practice for such a subsidiary to make a statement, especially if it is in a high risk industry or location as set out in paragraph 3.13 of the Government’s guidance: [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency in Supply Chains etc A practical guide final .pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc_A_practical_guide_final.pdf)

¹¹¹ Under the Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015, made by the Secretary of State further to section 53(3) of the MSA, this is determined by taking into account the turnover of the organisation and its subsidiary undertakings (as defined by Section 1162 of the Companies Act 2006). The total turnover includes the amount derived from the provision of goods and services falling within the ordinary activities of that organisation and its subsidiary undertakings, after deducting trade discounts, value added tax (VAT) and other taxes.

B What is the statement		
2	<p>A slavery and human trafficking statement for a financial year is:</p> <ul style="list-style-type: none"> a. a statement of the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place (i) in any of its supply chains, and (ii) in any part of its own business, or b. a statement that the organisation has taken no such steps. 	Section 54(4)
C Content of the statement¹¹²		
3	<p>A list of non-prescriptive and non-exhaustive information that may be included in the statement to detail the steps the organisation has taken to address and remedy modern slavery are as follows:</p> <ul style="list-style-type: none"> a. the organisation's structure, its business and its supply chains; b. its policies in relation to slavery and human trafficking; c. its due diligence processes in relation to slavery and human trafficking in its business and supply chains; d. the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk; e. its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; and f. the training about slavery and human trafficking available to its staff. 	Section 54(5)
D Approval of the statement		
4	<p>The commercial organisation must approve the slavery and human trafficking statement as follows:</p> <ul style="list-style-type: none"> a. Companies: The board of directors (or equivalent management body) must approve the statement and it must be signed by a director (or equivalent). b. Limited liability partnerships: The LLP members must approve the statement and it must be signed by a designated member. c. Limited partnerships registered under the Limited Partnerships Act 1907: A general partner must sign the statement. d. Other types of partnership: A partner must sign the statement. 	Section 54(6)
E Publication of the statement		
5	<p>If the organisation has a website, it must publish the slavery and human trafficking statement on that website and include a link to the statement in a prominent place on that website's homepage.</p>	Section 54(7)
6	<p>If the organisation does not have a website, it must provide a copy of the slavery and human trafficking statement to anyone who makes a written request within 30 days of the company receiving the request.</p>	Section 54(8)

¹¹² The Government recommends that the statement is: (a) written in simple language to ensure that it is easily accessible to everyone; (b) succinct but covers all relevant points and links to relevant publications, documents or policies for the organisation; and (c) in English, but may also be provided in other languages which are relevant to the organisation's business and supply chains.

The following project plan sets out the key stages of the MSA, based on **Guidance per section 54(5) Modern Slavery Act**

Phase	Description	Elements
1	Mapping of the organisation's structure, its business and its supply chains	<ul style="list-style-type: none"> Consider relevant group entities and available resources Map supply chains and business partners
2	Drafting policies in relation to slavery and human trafficking	<ul style="list-style-type: none"> Agree on scope of policy - human rights or modern slavery Collate current policies, charters, codes of conduct Carry out gap analysis Adapt existing documents
3	Identifying the parts of own business and supply chains where there is a risk of slavery and human trafficking taking place, and taking steps to assess and manage that risk	<ul style="list-style-type: none"> Consider high-risk areas of business Carry out targeted risk assessment Review and adapt existing contract clauses Negotiate new contract clauses with suppliers Carry out remedial steps where required
4	Conducting due diligence processes in relation to slavery and human trafficking in own business and supply chains	<ul style="list-style-type: none"> Agree on scope of, and methodology for, due diligence exercise Carry out due diligence Prepare due diligence report Agree on scope of, and methodology for, future due diligence Carry out remedial steps where required
5	Establishing the effectiveness in ensuring that slavery and human trafficking is not taking place in own business or supply chains, measured against appropriate performance indicators	<ul style="list-style-type: none"> Consider and establish processes for monitoring and KPIs

6	Ensuring that training about slavery and human trafficking is available to staff	<ul style="list-style-type: none">• Agree scope of training - procurement, joiners and compliance• Prepare training• Roll out training
7	Modern Slavery Statement MSS	<ul style="list-style-type: none">• Prepare draft MSS• Present draft MSS to boards• Prepare final MSS• Approve MSS• Publish MSS• Secure IT platform

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