

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

Inquiry into establishing a Modern Slavery Act in Australia

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This submission was researched and drafted by senior UQ law students **Nikita Aganoff**, **Rebecca Scott** and **Clare Scrine** under the academic supervision of **Dr Paul Harpur** and **PhD Candidate Jessica Ritchie**. The submission was framed as a legal research project through the UQ Pro Bono Centre, with students undertaking this task on a *pro bono* basis - without any academic credit or reward - as part of their contribution to service as future members of the legal profession. The names and signatures of UQ Law School staff who endorse this are included at the back.



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Executive Summary

This submission supports the introduction of a Modern Slavery Act in Australia.

While many forms of modern slavery including human trafficking, forced labour, and forced marriage are already criminalised in Australia, these offences are found in disparate legislative schemes which are administered with varying levels of investigation and enforcement. For example, cases of international human trafficking often attract media attention and swift law enforcement and political responses, but conviction rates for labour exploitation are low and difficult to obtain.¹ The collation of offences into a single *Modern Slavery Act* would provide a more cohesive and consistent approach that would aid in investigation and prosecution of all forms of modern slavery.

This submission recommends inclusion of a scheme of mandatory reporting requirements for international and domestic corporations operating in Australia. Such reporting requirements place a duty on corporations to actively monitor labour conditions in their domestic and international supply chains and disclose measures taken to avoid illegal or exploitative labour practices. Enacting these measures would also assist to 'level the playing field' for corporations, ensuring businesses cannot gain a competitive advantage through human rights abuses.²

Introduction of a *Modern Slavery Act* would bolster Australia's international reputation in protection of human rights. A comprehensive and enforceable modern slavery regime would place Australia among some of the first jurisdictions to enact similar legislation, marking Australia as a global leader in the fight against modern forms of slavery.

This Act would also see Australia taking a strong leadership role amongst its trade partners in the Asia-Pacific region. Instances of slavery-like and exploitative labour practices are particularly concentrated in Southeast Asia, and as a major trading partner with these countries, Australian businesses risk economically supporting these practices unless there is a duty to actively monitor labour conditions at all levels of international supply chains.

The introduction of a Modern Slavery Act has support from a wide range of legal academics, and anti-slavery and human rights organisations in Australia, who have recognised the need for consolidated legislation that strengthens the possibility of prosecuting those who commit these heinous crimes.³

¹ Australian Institute of Family Studies Report, 'Trafficking in Women for Sexual Exploitation' <<https://aifs.gov.au/publications/trafficking-women-sexual-exploitation/export>> Canberra, 2005; Liz Burke, 'The slave trade in our own backyard', News.com.au (online), 3 December 2016 <<http://www.news.com.au/lifestyle/real-life/news-life/the-slave-trade-in-our-own-backyard/news-story/a11b95d95f4e3e37ec1b444e59eb02e1>>.

² Walk Free Foundation, 'Harnessing the Power of Business to End Modern Slavery' (Report 2016) 17-18.

³ See e.g. Walk Free Foundation, 'Harnessing the Power of Business to End Modern Slavery' (Report 2016);

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

1.1 Defining Modern Slavery

Slavery is a broad concept that can be difficult to define.⁴ Slavery has been outlawed in Australia since 1824,⁵ and has been an offence under the *Commonwealth Criminal Code*⁶ since 1999.⁷ The common-law definition of slavery in Australian jurisprudence was discussed at length in the seminal High Court decision of *R v Tang*,⁸ the first criminal conviction for slavery offences in Australia. In his reasons, Gleeson CJ emphasised ‘a capacity to deal with a complainant as a commodity, an object of sale and purchase’ as ‘a powerful indication that a case falls on one side of the line.’⁹ The statutory definition from the *Commonwealth Criminal Code* includes any direct or indirect actions which encourage slavery are proscribed, including financing a slavery operation.¹⁰

In contrast to the traditional formulation of ‘slavery’ which emphasises the commodification of people, the term ‘modern slavery’ encompasses a broader range of conduct and conditions where an individual’s freedom of choice and movement is taken away.¹¹ This definition includes forced marriage, debt bondage, child marriage, and child servitude.

The term ‘modern slavery’ has its origins in the *1956 UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*. This Convention highlighted that slavery, the slave trade and institutions and practices similar to slavery have not yet been eliminated in many parts of the world, and sought to update international obligations to a more modern world.¹² Article 4 of the *United Nations Universal Declaration of Human Rights* (1948) also prohibits slavery. Modern slavery has since taken over as a catch-all term to describe human trafficking, forced labour, debt bondage, sex trafficking, forced marriage and other slave-like exploitation.¹³

1.2 Scope of Modern Slavery Globally

Due to the illegal and underground nature of slavery practices globally, data on the prevalence of modern slavery can be difficult to gather and reported statistics are therefore

⁴ Barbara Ann Hocking and Yega Muthu, ‘Australasian Reflections on Modern Slavery’ (2012) 5(4) *Journal of Politics and Law* 69, 70.

⁵ *Slave Trade Act 1824* (UK).

⁶ *Criminal Code Act 1995* (Cth) Sch *The Criminal Code* s 268.10.

⁷ *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth).

⁸ [2008] HCA 39.

⁹ *R v Tang* [2008] HCA 39 [44].

¹⁰ *Criminal Code Act 1995* (Cth) Sch *The Criminal Code* s 270.3(2)(a)(iii).

¹¹ Jennifer Burn, Sam Blay and Frances Simmons ‘Combating Human Trafficking: Australia’s Responses to Modern Day Slavery’ (2005) 79(9) *Australian Law Journal* 543, 546.

¹² *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, signed 7 September 1956 (entered into force 30 April 1957) *Preamble*.

¹³ Astrid Zweynert, ‘What is Modern Slavery?’ *World Economic Forum* (online), 2 December 2015 <<https://www.weforum.org/agenda/2015/12/what-is-modern-slavery/>>.

potentially vastly underestimated. The International Labour Organisation (ILO), which examines slavery-like conditions in labour only, estimates that globally about 21 million people are currently working in conditions of forced labour.¹⁴ Other figures which examine slavery more broadly to include forced marriage and sexual servitude estimate the figure is at least double, at approximately 45.8 million.¹⁵

1.3 Scope of Modern Slavery in Australia

Despite its prohibition in domestic and international law, modern slavery remains a persistent problem in Australia. It is estimated that across the nation, around 4,300 people are currently living in slavery or slave-like conditions.¹⁶ Some particularly egregious cases attract media attention and public outrage, such as the 2015 cases of Taiwanese nationals being forced to work in a fraudulent call centre operating out of mansions quiet suburbs of Brisbane,¹⁷ however it is estimated that many more cases go undetected.¹⁸

1.3.1 Labour Exploitation

Minority groups, including regular and irregular migrants, are at a particularly high risk of labour exploitation.¹⁹ Many individuals with aspirations of living and working in Australia are enticed or tricked into coming with or without valid working rights. Upon arrival, workers will have their passports confiscated and be forced to work long hours under unsafe working conditions for little or no remuneration, compiled with debt bondage.²⁰

The above mentioned case from 2015 is illustrative of these practices. In that case, over 20 Taiwanese nationals were encouraged to come to Australia to work in a call centre operation that they knew was illegal in Taiwan but were told was a legal operation in Australia. The workers were locked in the mansions and had their passports taken and were forced to work for more than 12 hours a day, 7 days a week with limited access to food and basic amenities. This scheme operated for well over a year before one worker managed to escape and alert the authorities. The men responsible for running the scheme were prosecuted under the slavery offences in the *Commonwealth Criminal Code* but were ultimately released on good behaviour bonds and returned to Taiwan.²¹ Cases such as this are a disturbing

¹⁴ Global Slavery Index, *Findings* <<http://www.globalslaveryindex.org/findings/>>.

¹⁵ *Ibid.*

¹⁶ Global Slavery Index, *Australia* <<http://www.globalslaveryindex.org/country/australia/>>.

¹⁷ Louisa Rebgetz and Josh Bavas, 'Taiwanese pair to be deported over Brisbane slave house scam' *ABC News* (online) 8 February 2017 <<http://www.abc.net.au/news/2017-02-08/taiwanese-pair-deported-over-brisbane-slave-house-scam/8252234>>.

¹⁸ World Vision Australia, 'Trafficking is a global problem' <<https://www.worldvision.com.au/global-issues/work-we-do/child-slavery/>>; Glenda Korporaal, 'Thousands of workers in Australia are slaves, says Andrew Forrest' *The Australian* (online) 31 May 2016 <<http://www.theaustralian.com.au/business/thousands-of-workers-in-australia-are-slaves-says-andrew-forrest/news-story/437172080ba71a31d8be15521cf87de5>>.

¹⁹ Global Slavery Index, above n 14.

²⁰ Rashida Yosufazi, *Sydney Archbishop saved nanny from slavery* (28 March 2017) 9 News <<http://www.9news.com.au/national/2017/03/28/16/04/sydney-archbishop-saved-nanny-from-slavery>>.

²¹ Vanda Carson, 'Ringleaders of Taiwanese crime gang that ran call centre scam take plea deal' *The Courier-Mail* (online) 12 January 2017 <<http://www.couriermail.com.au/news/queensland/crime-and-justice/ringleaders-of-taiwanese-crime-gang-that-ran-call-centre-scam-take-plea-deal/news-story/cca44083d0fc63b71d1efa4550809e0f>>; Jorge Branco, "'Slave houses" hiding in inner-city Brisbane' *Brisbane Times* (online) 17 April 2016 <<http://www.brisbanetimes.com.au/queensland/slave-houses-hiding-in-innercity-brisbane-20160408-go2990.html>>; Shae McDonald, 'Taiwanese men jailed over Qld slave house' *News.com.au* (online) 8 February 2017 <<http://www.news.com.au/national/breaking-news/taiwanese-men-admit-to-slavery-offences/news-story/f0cd6ae5169411645bc5a9db1b1f2883>>.

reminder that modern slavery can be hidden anywhere and be very difficult to detect.

Migrants are especially vulnerable to exploitation due to limited English skills and lack of knowledge of the local law enforcement system, including their workplace rights under domestic law and how to report exploitative or unsafe workplace conditions.²² Irregular migrants or those working in excess of their visa entitlements are also much less likely to report illegal workplace conditions if they put themselves at risk of fines or deportation if they come to the attention of law enforcement officials.²³

1.3.2 Human Trafficking

Human trafficking is an area of political and social concern in Australia, and victims of human trafficking are extremely likely to be affected by modern slavery in some way.²⁴ South-East Asia is widely recognised as a region with high instances of sexual servitude and child sex tourism.²⁵ Trafficked women in Australasia have tended to originate from South Korea, Thailand, and China.²⁶

The United Nations Office on Drugs and Crime has identified Australia as an especially desirable destination country for human trafficking.²⁷ Further, the United States Department of State Trafficking in Persons annual report details that Australia is among the major destination countries for trafficked people, mainly from South-East Asian countries.²⁸ Despite knowledge of the existence of this problem for more than a century, the problem has proved difficult to overcome. The specific number of people trafficked into Australia is also difficult to establish.²⁹ Trafficked people usually enter Australia legally on tourist visas or student work visas and then find themselves in consequent situations of debt bondage and forced labour.³⁰

An independent inquiry in 2008 explored the way traffickers facilitate the women's entry to Australia through a range of fraudulent means, including providing visas, false passports, and funds.³¹ The women are then sent to brothels around the country where their

²² Annie Kelly, 'Modern-day slavery: an explainer' *The Guardian Australia* (online) <<https://www.theguardian.com/global-development/2013/apr/03/modern-day-slavery-explainer>>.

²³ Anti-Slavery Australia <<http://www.antislavery.org.au/newsflash/217-hidden-exploitation-women-in-forced-labour-marriage-and-migration.html>> viewed 25 April 2017.

²⁴ Sarah Steele, 'Trafficking in People' (2007) 32(1) *Alternative Law Journal* 18.

²⁵ Parliamentary Joint Committee on the Australian Crime Commission, 'Supplementary Report to the Inquiry into the Trafficking of Women For Sexual Servitude', Parliament of the Commonwealth of Australia, Canberra, August 2005, 2.

²⁶ Sarah Steele, 'Trafficking in People' (2007) 32 *Alternative Law Journal* 18.

²⁷ The United Nations Office on Drugs and Crime (UNDOC) Trafficking in Persons: Global Patterns April 2006, 20, where Australia is listed among the 'top 21 high destination' country list.

²⁸ Parliamentary Joint Committee on the Australian Crime Commission, 'Supplementary Report to the Inquiry into the Trafficking of Women For Sexual Servitude', Parliament of the Commonwealth of Australia, Canberra, August 2005, 2.

²⁹ Barbara Ann Hocking and Yega Muthu, 'Australasian Reflections on Modern Slavery' (2012) 5(4) *Journal of Politics and Law* 69, 70.

³⁰ Glenda Korporaal, *Thousands of workers in Australia are slaves, says Andrew Forrest* (31 May 2016) *The Australian* <<http://www.theaustralian.com.au/business/thousands-of-workers-in-australia-are-slaves-says-andrew-forrest/news-story/437172080ba71a31d8be15521cf87de5>>.

³¹ Janet Phillips, 'People trafficking: an update on Australia's response' (Research Paper, no. 5, Department of Parliamentary Services, 22 August 2008) 3.

movements are usually heavily restricted.³²

It is widely recognised in the international community that South-East Asia has a particularly high instance of slavery and slave-like conditions in local industry.³³ As outlined in point 2.0 below, these practices are of particular concern to Australia, as a major trading partner of countries in this region and importer of products produced by these industries using exploitative conditions.

1.3.3 Forced Marriage

Marriage is not a term typically associated with discussions of slavery and slave-like conditions, however forced marriage, particularly of underage girls with the expectation that they will then stay at home to raise children, is a pervasive yet largely hidden issue in Australia.³⁴ Forced marriage is where at least one party does not consent but was either intimidated, coerced, or tricked into the marriage. Forced marriage is illegal under the *Commonwealth Criminal Code*³⁵ and under the *Marriage Act 1961* (Cth) a marriage is void where one party does not freely consent.

Despite these provisions, there is little doubt that forced marriages are still occurring. Between 2013 and 2015, the Australian Federal Police investigated 34 cases of forced marriage under the provisions of the *Criminal Code*, 29 of which involved the forced marriage of a person under the age of 18.³⁶ This issue has been largely ignored by legislative responses, and there has been substantial hesitation to enforce laws, because they risk reversing the onus of proof.³⁷

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

Despite Australia's comprehensive regulatory regime on workplace conditions and employee entitlements, modern slavery is a prevalent problem occurring throughout global supply chains in Australia, and in a number of industries operating within the nation.³⁸ Globalisation leads to sprawling international supply chains designed to resource labour and materials at the lowest price, which significantly increases the risks of exploitative labour conditions.³⁹

³² Janet Phillips, 'People trafficking: an update on Australia's response' (Research Paper, no. 5, Department of Parliamentary Services, 22 August 2008) 3.

³³ Barbara Ann Hocking and Yega Muthu, 'Australasian Reflections on Modern Slavery' (2012) 5(4) *Journal of Politics and Law* 69, 70.

³⁴ Ryszard Piotrowicz 'Combating Human Trafficking: Australia's Responses to Modern Day Slavery' (2005) 79(9) *Australian Law Journal* 543.

³⁵ *Criminal Code Act 1995* (Cth) Sch 1 ss 270.7A, 270.7B.

³⁶ Salvation Army, 'Identifying Slave-Like, Early and Forced Marriage' (online) <<http://endslavery.salvos.org.au/learn/identifying-slave-like-or-forced-marriage/>> viewed 25 April 2017.

³⁷ AAP, 'Crackdown on slavery passes parliament' *News.com.au* (online), 27 February 2013 <<http://www.news.com.au/national/breaking-news/crackdown-on-slavery-passes-parliament/news-story/5d3622f112e9e96d5184a7d56600e851>>.

³⁸ Sheree Schmaal, *Supply Chains*, Parliament of Australia <http://www.aph.gov.au/About_Parliament/House_of_Representatives/About_the_House_Magazine/Previous/ATH46/Supply>.

³⁹ Jennifer Hewett, 'Modern slavery in global supply chains' *Financial Review* (online), 31 May 2016 <<http://www.afr.com/opinion/columnists/modern-slavery-in-global-supply-chains-20160531-gp89lw>>.

Australia relies on Asia for a large portion of its trade and imports. Australia's geographic position as a neighbouring Asian country together with Asia's high incidence rate of modern slavery means there is significant risk of complicity in exploitation and slavery within global supply chains. Given the dependence on the growth and efficiency of global supply chains, responding to exploitation within them should be of critical importance to Australian business and government.⁴⁰

The existing supply chain regulation is failing to protect labour rights, including freedom of movement and freedom from bonded labour. This issue is only gaining public attention due to the focus on ethical investing and the ability of social media to highlight behaviour deemed morally or socially unacceptable.⁴¹ There has been a concerted push by some government officials to involve leaders in the international business community in this issue already.⁴² A more effective legislative regime regulating global supply chains has the potential to reinforce mutual expectations of business and government.⁴³

2.1 Slavery Occurring in Supply Chains within Australia

Serious labour exploitation of workers along global supply chains is becoming increasingly frequent. The companies subject to significant attention have included clothing, consumer electronics, sporting goods, agriculture, and seafood.⁴⁴

In recent years, a number of alarming cases have come to light involving exploitation of migrant workers in the Australian agricultural sector.⁴⁵ This phenomenon has been particularly common among the backpacker community of young travellers coming from overseas, seeking easy money for labour. In 2016, the Fair Work Ombudsman released a report detailing the forced labour of backpackers, and found that 33% reported being paid less than the minimum wage, some workers being paid \$2 per hour, and 6% even had to pay an employer to 'sign off' on their regional work requirement.⁴⁶

In 2015, critical gaps were identified in Australia's labour laws regarding domestic workers in private homes. Despite the small size of the migrant domestic worker cohort in Australia, several serious cases of domestic worker exploitation in Australia have arisen in recent years.⁴⁷ In August 2015, a slave operation was uncovered which was found to have exploited dozens of individuals in a fraudulent call centre in two suburban homes in Brisbane.⁴⁸ In another case, a Pacific Islander woman was sponsored for permanent

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ingrid Landau, 'Putting the spotlight on global retailers' darkest secret' *News.com.au* (online) 18 February 2016 <<http://www.news.com.au/finance/markets/world-markets/putting-the-spotlight-on-global-retailers-darkest-secret/news-story/c449454fa5aa10db9c6568e214f2dfec>>.

⁴⁵ Emma Reynolds, 'I wonder how long you'll last': Backpacker exploitation goes even deeper' *News.com.au* (online) 20 October 2016 <<http://www.news.com.au/lifestyle/real-life/news-life/i-wonder-how-long-youll-last-backpacker-exploitation-goes-even-deeper/news-story/a49524652574425c2680f902c749f017>>.

⁴⁶ Ibid.

⁴⁷ Walk Free Foundation and The Salvation Army, 'Improving Protections for Migrant Domestic Workers in Australia' (Policy Brief 1, June 2015) <<http://endslavery.salvos.org.au/wp-content/uploads/2015/02/Improving-Protections-for-Domestic-Workers-in-Australia.pdf>>

⁴⁸ Louisa Rebgetz and Josh Bavas, above n 17.

residency to work unpaid as a maid for a family in Sydney.⁴⁹ In March of this year, a case was uncovered in which twenty-two men from Vanuatu worked under a Commonwealth sponsored Seasonal Worker Programme. Thirteen of these men were paid nothing, while the most a person received was \$150 for six months of full time work.⁵⁰ These men were also largely deprived of food and other basic needs.⁵¹

2.2 Slavery Occurring Within Supply Chains Internationally

On an international scale, palm oil has been recognised as one product that involves 'shocking' human rights abuses and significant and systematic exploitation in Indonesia.⁵² In Amnesty International's report, 'Indonesia: The Great Palm Oil Scandal', it was highlighted that 'companies are turning a blind eye to exploitation of workers in their supply chain'. Despite promising customers that there will be no exploitation in their palm oil supply chains, big brands continue to profit from appalling abuses.⁵³

Australia relies heavily on the global shipping trade, particularly in Asia, and there have been many documented cases of modern slavery involving abuse and exploitation of seafarers. An example of this is the Thai fishing industry which is worth an estimated \$7.3 billion dollars per year and produces almost all of Australia's canned tuna.⁵⁴ In 2014, the United States downgraded Thailand to 'tier 3', which is the lowest ranking a country can attain in relation to its response to trafficking.⁵⁵ In 2015, the EU threatened to ban all Thai seafood imports unless the implemented measures to curb its labour abuses and illegal fishing.⁵⁶ More than 90% of workers in the fishing sectors are immigrants, with many of them trafficked.⁵⁷ Despite these alarming findings, convictions of traffickers has decreased from 206 in 2014, to 169 in 2015.⁵⁸ In 2015, the Australian Maritime Authority detained the 'Bulk Brasil' after authorities discovered 21 Filipino crew members who had spent four months deprived of adequate food and pay.⁵⁹

Within communities of migrant clothing workers, there is also significant evidence of the

⁴⁹ Liz Burke, 'The slave trade in our own backyard', *News.com.au* (online), 3 December 2016 < <http://www.news.com.au/lifestyle/real-life/news-life/the-slave-trade-in-our-own-backyard/news-story/a11b95d95f4e3e37ec1b444e59eb02e1>>.

⁵⁰ Nick McKenzie, 'Slavery claims as seasonal workers from Vanuatu paid nothing for months' work' *The Sydney Morning Herald* (online) 27 March 2017 < <http://www.smh.com.au/national/investigations/slavery-claims-as-seasonal-workers-from-vanuatu-paid-nothing-for-months-work-20170327-gv7k99>>.

⁵¹ Ibid.

⁵² Amnesty International, 'Palm Oil: Global brands profiting from child and forced labour' (News Release, 30 November 2016) < <https://www.amnesty.org/en/latest/news/2016/11/palm-oil-global-brands-profiting-from-child-and-forced-labour/>>.

⁵³ Ibid.

⁵⁴ Fiona David and Reginald Ramos, 'The Bali Process: Responding to the Challenges of Modern Slavery' *Australian Institute of International Affairs* (online) 25 March 2016 < http://www.internationalaffairs.org.au/australian_outlook/the-bali-process-responding-to-the-challenges-of-modern-slavery/>.

⁵⁵ Kate Hodal, 'Slavery and trafficking continue in Thai fishing industry, claim activists' *The Guardian* (online) 25 February 2016 < <https://www.theguardian.com/global-development/2016/feb/25/slavery-trafficking-thai-fishing-industry-environmental-justice-foundation>>.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ashleigh Telford, 'Seafarers Aboard FOC Ship Deprived of Food' *Maritime Union of Australia* (online) 29 January 2015 < http://www.mua.org.au/seafarers_ aboard_foc_ship_deprived_of_food>.

prevalence of slavery-like conditions.⁶⁰ The Ombudsman's executive director of proactive compliance and education, Lynda McAlary-Smith, said women from Vietnam and China were typically employed as 'home workers' or 'outworkers' by clothing companies that supply Australian shops.⁶¹ Further, Australian clothing brands have been implicated in using forced labour in their supply chains in North Korea.⁶²

2.3 Current Legislative Response

It is currently a criminal offence both within and outside of Australia for a corporation to conduct a business involving forced labour,⁶³ or to engage in commercial transactions involving slavery or human trafficking.⁶⁴ A potential defence exists where the organisation has carried out due diligence to prevent slavery in its supply chain,⁶⁵ but this defence becomes problematic in a global corporate context where businesses are structured on a web of sub-contracts.

Some Australian businesses are already doing more to attempt to combat this problem, however research demonstrates many companies are wholly complacent. In a recent study of supply chain management in the electronics industry it was found that Australian brands were among the most ineffective in the developed world when it comes to managing risks of labour exploitation.⁶⁶ A similar study into the Australian fashion industry found that more than 75 per cent of companies included in the study had no knowledge of where their cotton, fabrics and other raw materials were sourced from.⁶⁷

3. Identifying 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

3.1 California

The first major legislative regime specifically addressing modern slavery was enacted in the U.S. state of California in 2010 with the *Transparency in Supply Chains Act (CA-TISCA)*. This legislation was prompted by a single case of slavery in 1995, where 72 Thai nationals were forced to work in a garment factory for anywhere between 17 and 22 hours a day. They

⁶⁰ Bridget Brennan, 'Fair Work Ombudsman investigating exploration of migrant clothing workers' union claims are being paid as little as \$3 an hour' *ABC News* (online) 24 March 2015 < <http://www.abc.net.au/news/2015-03-24/fair-work-ombudsman-investigates-migrant-clothing-workers/6345294>>.

⁶¹ Bridget Brennan, 'Fair Work Ombudsman investigating exploration of migrant clothing worker's union claims are being paid as little as \$3 an hour' *ABC News* (online) 24 March 2015 < <http://www.abc.net.au/news/2015-03-24/fair-work-ombudsman-investigates-migrant-clothing-workers/6345294>>.

⁶² Calla Wahlquist, 'Rip Curl's use of North Korean factories leads to calls for industry transparency' *The Guardian* (online) 22 February 2016 < <https://www.theguardian.com/australia-news/2016/feb/22/rip-curls-use-of-north-korean-factories-leads-to-calls-for-industry-transparency>>.

⁶³ *Criminal Code Act 1995* (Cth) Sch *The Criminal Code* s 270.6.

⁶⁴ *Criminal Code Act 1995* (Cth) Sch *The Criminal Code* s 270.3.

⁶⁵ Walk Free Foundation, 'Harnessing the Power of Business to End Modern Slavery' (Report 2016) 34.

⁶⁶ Ingrid Landau, 'Putting the spotlight on global retailers' darkest secret' *News.com.au* (online) 18 February 2016 <<http://www.news.com.au/finance/markets/world-markets/putting-the-spotlight-on-global-retailers-darkest-secret/news-story/c449454fa5aa10db9c6568e214f2dfec>>.

⁶⁷ *Ibid.*

were deprived of remuneration, sick leave, social interaction, and were under continuous surveillance by guards armed with guns, knives, and baseball bats.⁶⁸ The individuals responsible for the trafficking and forced labour offences were held criminally liable, and retailers that sold clothes made in the sweatshop were held liable in a civil suit.⁶⁹

In addition to the criminal and civil sanctions, California introduced the ground-breaking CA-TISCA regime to require retail sellers and manufacturers operating in California with annual worldwide gross receipts of more than \$100m to disclose their efforts to combat slave labour in their supply chain.⁷⁰ With the implementation of this scheme, California stood out as a worldwide leader in the fight against human trafficking, and empowered consumers to reward companies that proactively engage on these issues.⁷¹

This scheme was symbolic and revolutionary, however there are measures which can be improved upon to make the regulations have a stronger legal effect. For example, in CA-TISCA, there is no monetary penalty imposed for non-compliance with the disclosure requirements, rather the only redress is through an order from the Attorney-General to remedy the corporation's breach through specific actions.⁷² In a recent audit of compliance with CA-TISCA, fewer than 5% of businesses operating in California were found to be in compliance with the reporting obligations. The major problem appears to be lack of resourcing to enforce the law, and lack of real penalties for breach of the obligations under the law.⁷³

While there remain difficulties in enforcement, the pioneering anti-slavery regime in California marks this jurisdiction as a global leader in the fight against human trafficking and modern forms of slavery. Where one prominent case of labour exploitation in California sparked major legal reform in that jurisdiction, similar cases continue to come to light in Australia with no decisive and comprehensive action taken to date.

3.2 The United Kingdom

The United Kingdom's *Modern Slavery Act* is the latest step forward in developing human rights protections in global and domestic business. This legislation consolidates existing offences for slavery and slave-like conditions and introduces important provisions regarding the treatment of victims of slavery and trafficking.⁷⁴ The law introduced three criminal

⁶⁸ George White, 'Workers Held in Near-Slavery, Officials Say' *Los Angeles Times* (online) 3 August 1995 <http://articles.latimes.com/1995-08-03/news/mn-31090_1_el-monte-complex>.

⁶⁹ Leslie Berenstein Rojas, 'El Monte sweatshop slavery case still resonates 20 years later' 89.3 *KPCC* (online) 31 July 2015. <<http://www.scp.org/news/2015/07/31/53458/el-monte-sweatshop-slavery-case-still-resonates-20/>>.

⁷⁰ *California Transparency in Supply Chains Act of 2010* SB 657.

⁷¹ Verite, 'Compliance is Not Enough: Best Practices in Responding to The California Transparency in Supply Chains Act' (White Paper, November 2011).

⁷² *Ibid.*

⁷³ Leah Messinger, 'California law aimed at slowing human trafficking and forced labor should do more, report says' *The Guardian* (online) <<https://www.theguardian.com/sustainable-business/2016/jan/22/california-anti-slavery-law-development-international-sun-maid-asia-human-trafficking>>.

⁷⁴ Whincup, David; Garbett, Simon; McNicholas, Clare, 'The Modern Slavery Act 2015: 10 Key Points for Businesses Employee Relations' *Law Journal*; 2016 New York, 41(4) 64.

Leigh Day, 'Legal Avenues for Redress for Victims of Modern Slavery' *Lexology* (online) 18 May 2015 <<http://www.lexology.com/library/detail.aspx?g=db0bdbb8-75b1-4571-b02a-ded51db8ada3>>.

offences: (i) slavery, servitude and forced or compulsory labour (s1) (ii) human trafficking (s2); and (iii) committing any offence with the intent to commit human trafficking (s4).⁷⁵ The Act also introduced a number of notable changes such as a new defence for victims of modern slavery who commit an offence because of their slavery or trafficking.⁷⁶

Upon introducing the *Modern Slavery Act 2015* (UK), Crime and Security Minister James Brokenshire said that it would "send the strongest possible message to criminals that if you are involved in this disgusting trade in human beings, you will be arrested, you will be prosecuted and you will be locked up."⁷⁷

The Act has also expanded areas related to detection and enforcement of modern slavery offences. For example, legal aid availability was expanded to include applications for leave to enter or to remain in the UK, claims under employment law, and claims for damages by victims of slavery, servitude or forced labour. It also provided for the appointment of an Independent Anti-Slavery Commissioner to encourage good practice on the prevention of modern slavery offences and the identification of victims.⁷⁸

While this Act sets the UK up as a global leader in the fight against modern slavery, the regime has attracted some criticism for its inadequate protections of victims of modern slavery offences and failure to address modern slavery in small domestic businesses which fall under the revenue threshold required to attract reporting obligations.⁷⁹

The *Modern Slavery Act 2015* (UK) is an example for Australia to follow if it wants to be seen as a global leader on preventing human rights abuses both domestically and internationally. Australia has the opportunity now to learn from the criticisms of this Act to inform an enforceable regime which sends a strong message that human rights abuses will not be tolerated in Australia and in connection to Australian businesses.

3.3 Supply Chain Reporting Mechanisms

Building on California's model, section 54 of the *Modern Slavery Act 2015* (UK) also creates transparency in supply chains reporting obligations. These requirements apply to businesses with an annual turnover of more than £36 million who are supplying goods or services within the UK. The UK law does not contain a penalties regime for non-compliance or false or misleading statements tendered in the report. This has attracted criticism that the Act does not go far enough. For example, companies can comply with the obligation to report by simply reporting that they have taken no steps to investigate or rectify exploitative labour conditions in their supply chains.⁸⁰

⁷⁵ Ibid.

⁷⁶ *Modern Slavery Act 2015* (UK) s45(1).

⁷⁷ James Brokenshire, Crime and Security Minister, quoted in Home Office, 'Human trafficking: tough sentences to help end modern slavery' (News Release, 18 October 2013) <<https://www.gov.uk/government/news/human-trafficking-tough-sentences-to-help-end-modern-slavery>>.

⁷⁸ Leigh Day, above n 71.

⁷⁹ Rachel Robinson, 'Modern slavery bill must go further' *Liberty* (online) 3 September 2014 <<https://www.liberty-human-rights.org.uk/news/blog/modern-slavery-bill-must-go-further>>.

⁸⁰ Annie Kelly, 'The UK's new slavery laws explained: what do they mean for business?', *The Guardian* (online) 15 December 2015. <<https://www.theguardian.com/sustainable-business/2015/dec/14/modern-slavery-act>>.

To ensure enforceability and compliance with supply chain monitoring obligations, Australia must amend this particular aspect to include a penalties regime. Lack of penalties may encourage non-compliance or nominal compliance, destroying public confidence in the effectiveness of the scheme.⁸¹ Broader reporting and investigative requirements should encapsulate the farthest reaches of international supply chains where there is highest risk of exploitative and slavery-like labour conditions. A lower revenue threshold for the companies that are required to report would also increase the number of businesses that fall under this regime and would therefore increase the potential to identify and eradicate exploitative conditions regardless of business size. Issues may arise with these kinds of obligations imposed on small businesses; however a tiered obligation scheme may resolve this concern so that small companies can use fewer resources than their bigger counterparts to investigate supply chains.

To address modern slavery in global supply chains, it is paramount that the regulatory regime in Australia encourages transparency and monitoring of corporate supply chains. Currently, many voluntary industry-funded standards exist,⁸² however the most difficult problem in uncovering slavery and slave-like labour conditions in global supply chains is the prevalence of subcontracting and sub-sub-contracting with suppliers to the point where the parent corporation has no knowledge of labour conditions at the end of line.⁸³ This is the case even where there are due diligence practices and transparency procedures in place. This means that, even where private corporations are following internal policies to monitor supply chains, long lines of subcontracting obscure much of the labour practices in point-of-origin countries. Subcontractors may also be encouraged to mislead corporations in order to win supply contracts if corporations are explicit about wanting to contract with suppliers that do not engage in modern slavery practices.⁸⁴

Increased regulation of supply chain monitoring will level the playing field for businesses operating in Australia and across national borders by penalising those corporations that gain a competitive advantage through exploitation of workers and illegal labour practices.

Guidelines for best practice to detect and address forced labour and slave-like conditions in corporate supply chains are abundant throughout international businesses and governments. The problem is not lack of guidance on how companies can avoid supporting slave-like labour conditions, rather the problem lies in lack of funding or political will to detect and report on labour conditions in supply chains and lack of enforcement mechanisms or penalties for corporations in breach of their own or industry best practice guidelines.

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⁸¹ Adam Dedynski, *Landmark civil ruling for victims of modern slavery* (20 June 2016) Lexology <<http://www.lexology.com/library/detail.aspx?g=04f9787f-d9e5-46d1-a52a-16fa20de483f>>.

⁸² For example, the ISO26000 and the United Nations Global Compact.

⁸³ Leon Olsen, 'Are your directors ready for the transparency provision of the UK Modern Slavery Act?' *Governance Directions* 2015 68(5), 310

⁸⁴ *Ibid.*

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

Despite, or perhaps because of, Australia's geographic isolation, human trafficking is a significant concern in Australia. Australia has been recognised as 'a destination for women from Southeast Asia, South Korea, and the People's Republic of China (PRC) who are trafficked for the purposes of sexual exploitation'.⁸⁵ The death of Puangthong Simaplee, who died in Villawood Detention Centre on 26 September 2001, spiked media attention of trafficking of women into sexual servitude in Australia.⁸⁶ The inquest into her death underscored the lack of understanding of the problem of trafficking. It also highlighted the inadequacy of Australia's present legal system at the time to provide justice for the victims of trafficking.⁸⁷ Most commentators regard this incident as the motivation for Australia to adopt the Palermo Protocol.

4.1 The Palermo Protocol

The Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the Palermo Protocol) is one of three protocols supplementing the United Nations' Convention against Transnational Organised Crime.⁸⁸ The Palermo Protocol was ratified by Australia on the 14 September 2005,⁸⁹ and an amendment was made to the federal Criminal Code in the same year.⁹⁰ The amendment included slightly harsher penalties for offenders, expanding possible offences relating to sexual servitude and including a division relating to trafficking persons and debt-bondage.⁹¹ The Palermo Protocol aims to prevent human trafficking through international cooperation and collaboration, as well as requiring member-states to strengthen their domestic laws.⁹²

The Palermo Protocol sets out general guidelines to combat human trafficking, such as criminalising human trafficking, repatriation of victims, and strengthening border protection.⁹³ While Australia has adhered to these guidelines through the strengthening of its federal criminal code in 2005, it has yet to introduce a federal compensation framework for victims of trafficking, as per article six, point six.⁹⁴ The Palermo Protocol recommends that each member-state implement measures for compensation of trafficking victims for any damage suffered within their legal systems. It does not specify if the legal system must be of a federal nature or state nature.

⁸⁵ US Department of State, *Trafficking in Persons Report* (June 2005) <<http://www.state.gov/g/tip/rls/tiprpt/2005/>>.

⁸⁶ Jennifer Burn, Sam Blay and Frances Simmons, above n 11.

⁸⁷ *Ibid.*

⁸⁸ United Nations Office on Drugs and Crime, *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, 55th sess, UN Doc A/RES/55/25 (15 November 2000).

⁸⁹ United Nations, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 55th sess, UN Doc A/55/383 (25 December 2003).

⁹⁰ *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth).

⁹¹ *Ibid.*

⁹² United Nations, above n 82, Preamble.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

4.2 How could Australia's Modern Slavery Act adhere to the Palermo Protocol guidelines?

An increasing international focus on protection for victims of trafficking reflects increasing international acceptance that sex-trafficking must be understood as a human rights issue within a modern slavery context, rather than solely as a criminal law or immigration compliance issue.⁹⁵

Due to the lack of a federal framework, compensation is only handled by the states and territories.⁹⁶ There is no interstate collaboration, therefore if a victim were trafficked through multiple states, they would have to make multiple applications under the relevant offences of each jurisdiction.⁹⁷ The Law Council of Australia has found that this system has left many victims of federal human trafficking without recourse.⁹⁸ While there is a possibility to obtain compensation through state and territory laws, the likelihood of a successful application is improbable.⁹⁹

As of 2012, eight victims have obtained compensation through state statutory schemes.¹⁰⁰ The amount varies between jurisdictions, and can range from less than \$10,000 to in excess of \$100,000.¹⁰¹ It would therefore be in Australia's best interest to include a federal compensation statutory scheme within the Modern Slavery Act to close this gap, and have a consolidated, consistent legislative regime. It must be noted that this scheme cannot function on its own without a Modern Slavery Act.

Furthermore, the current scheme's design and implementation has received significant criticism because in practice it risks further endangering those in need of protection.¹⁰² In introducing a Modern Slavery Act, Australia could strengthen its commitments to the Palermo Protocol by creating a victim-centred and cohesive legislative response to trafficking offences.

⁹⁵ Anna Dorevitch and Michelle Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims Under Australia's Migration and Refugee Law' (2008) 9(1) *Melbourne Journal of International Law* 1; Human Rights Watch (2002), "A human rights approach to the rehabilitation and reintegration into society of trafficked victims", Paper presented by Widney Brown of Human Rights Watch at the 21st Century Slavery: The Human Rights Dimension to Trafficking in Human Beings Conference, in Rome on 15-16 May 2002, <<http://www.hrw.org/backgroundunder/wrd/trafficked-victims.htm>>

⁹⁶ Anti-Slavery Australia, *Fact Sheet #13: Compensation for Victims of Trafficking* (30 November 2015) Anti-Slavery Australia <<http://www.antislavery.org.au/resources/fact-sheets/211-fact-sheet-13-compensation-for-victims-of-trafficking.html>>.

⁹⁷ Ibid.

⁹⁸ Jennifer Burn, Fiona McLeod, and Nicola Knackstredt, 'Report on Establishing a National Compensation Scheme' (Report, Anti-Slavery Australia and Law Council of Australia) 4.

⁹⁹ Frances Simmons, Making possibilities realities: compensation for trafficked people' (2012) 34(3) *Sydney Law Review* 511, 512.

¹⁰⁰ Ibid.

¹⁰¹ Jennifer Burn, Fiona McLeod and Nicola Knackstredt, above n 91.

¹⁰² Anna Dorevitch and Michelle Foster, above n 88.

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

Legal academic Frances Simmons has emphasised that a truly just legislative response requires recognition of victims of trafficking as rights-holders, not solely as witnesses for criminal prosecutions.¹⁰³ This issue is especially relevant to Australia's visa scheme. Currently, the Australian Government has a two-stage visa programme, as well as a complementary scheme which is relevant to victims who cannot be repatriated out of fear for their life. The system was overhauled in 2016 after much criticism of the legislation through a human rights lens, as obtaining a permanent visa was almost impossible and only applied to victims who could aid in the prosecution of a human trafficker.

A victim of trafficking may now receive a Bridging F Visa for 45 days without assisting the police in any investigation. They may receive a second visa if they are willing, but unable to assist the police for mental health reasons. This will lead to a Referred Stay (Permanent) visa, if the victim is found to have contributed to an investigation and cooperated with law enforcement officials. From 2003 - 2015, 127 Witnesses Protection (Trafficking) (Permanent) visas (as of 2016, renamed as the Referred Stay (Permanent) visa) were granted. This number includes family members of trafficking victims who were also granted these visas.

5.1 Other avenues

Outside of this visa framework, there are also avenues of protection for victims of trafficking to seek protection through Human Rights and International Law avenues. This relatively recent and continually developing phenomenon has been considered by some as a response to Australia's flawed existing visa scheme.¹⁰⁴

Just as victims are treated as witnesses, they can also be treated as perpetrators of trafficking and other slavery-like offences. Trafficking and other slavery-like offences rely on a cycle of procuring victims, which is to say that the victims that were coerced into these positions often become the perpetrators who are forced to procure more victims into these situations.¹⁰⁵ The issue that arises from this is that these people are then unable to apply for protection visa. Referred Stay (Permanent) visas are subject to 'character tests'.¹⁰⁶

These character tests prohibit anyone with a substantial criminal record, anyone who has been a member of an organisation which the Minister for Immigration reasonably suspects of criminal conduct, and anyone who the Minister for Immigration reasonably suspects of being

¹⁰³ Frances Simmons, above n 92.

¹⁰⁴ TC Beirne School of Law, *Visas for victims* <<https://law.uq.edu.au/research/research-activities/human-trafficking/visas>>.

¹⁰⁵ Amnesty International and Anti-Slavery International (2004), "Enhancing the protection of the rights of trafficked persons: Amnesty International and Anti-Slavery International's Recommendations to strengthen provisions of the July 2004 draft European Convention against trafficking in human beings", <http://web.amnesty.org/library/index/engior610162004>, accessed 20 January 2005.

¹⁰⁶ Australian Government, *Guide to Social Security Law* (5 April 2017) <<http://guides.dss.gov.au/guide-social-security-law/9/1/2/130>>.

involved in people trafficking, slavery or a crime of international concern from obtaining one of these visas.¹⁰⁷ Evidently, this is an issue that requires more nuanced legislation which considers these types of victims.

6. Should Australia Introduce a Modern Slavery Act?

As outlined above, modern slavery is a serious yet under-reported problem throughout the world. Australia is not immune to the scourge of slavery and slave-like conditions which are pervasive in domestic labour, society, and imported products.

Aside from the few sensational cases which make news headlines, occurrences of modern slavery within Australia are largely unreported due to the illicit nature of the practice. It is therefore difficult to quantify the true extent of this issue, but it can be assumed that occurrences of modern slavery are more prevalent than the public might think. The 'behind doors' nature of this issue necessitates extra attention in much the same way that domestic violence has garnered in recent years.

As a leader in the Asia-Pacific region, Australia must take a stance against exploitation and enslavement in all forms. Enactment of a comprehensive and consolidated Modern Slavery Act would send a strong message of deterrence and denouncement of this conduct in Australia and among its trading partners.

¹⁰⁷ Australian Government, *Character and police certificate requirements* <<https://www.border.gov.au/Trav/Visa/Char>>.

We commend the students on their diligent research and we endorse this submission:

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