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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We welcome the opportunity to provide input on the Joint Committee's terms of reference regarding:

- 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 (**TOR 1**);
- 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 (**TOR 3**);
- 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 (**TOR 5**);
- Whether a Modern Slavery Act should be introduced in Australia (**TOR 6**).

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 (TOR 1)

1. The global economy relies on corporate sourcing practices along myriad complex global supply chains. However, industrial disasters and labour scandals have highlighted how leading 'first-world' brands now often rely on diverse suppliers in weak-governance developing countries with often high levels of human rights risk, from health and safety concerns to human trafficking (OECD 2013, 14; Nolan, 2016). For instance, the more than 1,100 Bangladeshi workers killed in 2013's Rana Plaza disaster worked for multiple local firms contracted and sub-contracted to well-known fashion brands including Australian companies. In Australia for example, along with human rights challenges in the clothing supply chains, top supermarkets face increasing publicity around human trafficking and labour exploitation by Thai and other fishing operators who directly or indirectly supply them (Greenpeace, 2015).

2. Businesses and governments in source developing countries typically lack the capacities and/or incentives to address workers' human rights conditions, yet nor are these conditions or workers the direct legal responsibility of procuring firms in developed countries. As wider stakeholder concern grows in the resulting 'governance gap' (Ruggie, 2013; Ford, 2015), one issue is the potential to harness the private contractual power of lead procuring firms and the public regulatory power of their host regulatory states to govern business and human rights standards abroad. One way to do this is via legislative regulation in the form of due diligence-and-disclosure regimes.

3. The term 'modern slavery' is a fairly recent formulation and not defined in international law. It is taken to refer to a range of exceptional circumstances where a person's freedom and ability to make choices for themselves have been very significantly undermined or removed. The 'modern slavery' term is broadly used to refer to human trafficking, slavery and slavery like practices such as servitude, forced labour, deceptive recruiting and debt bondage. The United Kingdom's *Modern Slavery Act* does not itself define the term, instead referring to interpretations and applications of Article 4 of the *European Human Rights Convention*.

   Greater legal definition is given to 'forced labour', which according to the ILO's *Forced Labour Convention* 1930 (No. 29) is: "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." This definition consists of three elements:

   - 'Work or service' refers to all types of work occurring in any activity, industry or sector including in the informal economy.
   - 'Menace of any penalty' refers to a wide range of penalties used to compel someone to work.
   - '[In]voluntarily' refers to the free and informed consent of a worker to take a job and his or her freedom to leave at any time. This is not the case for example when an employer or recruiter makes false promises so that a worker take a job he or she would not otherwise have accepted.

   This covers a wide spectrum of abuses, but the common thread or identifier is a situation of exploitation where a person cannot refuse or leave because of threats, violence, coercion, abuse of power or deception. Current debate over defining 'modern slavery' can obscure the fact that there is a relatively stable and longstanding defined proscribed practice of 'forced labour'. Meanwhile the clear, centuries-old prohibitions on 'slavery' and 'slave trading' have the strongest possible international legal pedigree. Definitional exercises ought to be seen against this backdrop.

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 (TOR 3).

4. ***Transparency Legislation: Imposing legal obligations on firms in a supply chain to report.*** In 2015, the United Kingdom passed the *Modern Slavery Act*, which mandates a form of transparency in commercial supply chains.[1] The Act requires companies[2] to prepare an annual statement describing steps that they have taken to ensure that slavery and human trafficking is not present in their operations or in

[1] *Modern Slavery Act* 2015 (c.30) (UK), Part 6, s.54.

[2] The s. 54 disclosure obligation applies to 'commercial organizations', defined as bodies corporate (wherever incorporated) or partnerships (wherever formed) which 'carry on business, or part of a business' in the UK. The entity must supply goods or services, although there is no requirement that they be supplied in the UK. The organization must have a total turnover or group turnover (that is, the total turnover of a company and its subsidiaries) of £36 million or more.

any of their supply chains, and to publish information on the company's web site. The statement *may* include information about the organization's structure, company's policies, due diligence processes, risks, performance indicators, and training relating to slavery and human trafficking. If the company has not taken any such steps, it must issue a statement to that effect.

The scope of the disclosure obligation is opaque because the Act does not define 'supply chain.' There are no financial or other penalties whatsoever attached to non-compliance with the disclosure obligation. Instead, the Act aims to harness the power of the consumer or market to demand and use information relating to slavery, servitude and forced or compulsory labour, and to use commercial and other pressure to encourage corporate action to prevent or address such abuse.

5. The UK legislation was modelled on, but is potentially broader than, the *California Transparency in Supply Chains Act* passed a few years earlier.[3] Since 2012, large retailers and manufacturers doing business in California have been required to disclose on their websites the extent to which the company engages in verification of product supply chains to address risks of slavery, forced labour and human trafficking. The company must state whether it (1) engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery; (2) conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains; (3) requires direct suppliers to certify that materials incorporated into its products comply with laws regarding slavery and human trafficking; (4) maintains internal accountability standards and procedures for employees or contractors who fail to meet company standards regarding slavery and trafficking; and (5) provides company employees and management with training on human trafficking and slavery.

   Importantly, the California Act (and the model it represents, as taken up in the UK) does not actually require covered retailers to do any of the five things listed above: they must simply say on their websites whether or not they do them. Such mechanisms do not define what constitutes appropriate due diligence or set mandatory standards for what due diligence must look like. Nor do they hold companies legally accountable for actual adverse human rights impacts connected to their operations. There is no penalty for failing to take steps, only for failing to disclose whether or not a company engages in taking steps (supply chain due diligence). In addition to presumed market/consumer action, the sanction for non-compliance is potential injunctive relief by the California State Attorney General, meaning that companies will not face a monetary penalty for failure to disclose, but that they will receive an order from the Attorney General to take specific action.

6. An example of transparency legislation that is more narrowly tailored to focus on a particular issue is s.1502 of the United States *Dodd-Frank Act*, which requires all

[3] *California Transparency in Supply Chains Act*, Ca. Civ. Code § 1714.43. The Californian Act potentially limits the scope of the legislation as it refers to the "direct supply chain for tangible goods offered for sale" s.1714.43(a)(1). The Act applies to retail sellers or manufacturers *operating in California* with more than US$100 million in gross receipts.

listed companies to report on the sources of certain minerals used in their products that originate from the Democratic Republic of Congo (DRC) or adjoining countries.[4] The purpose of this provision is to provide greater transparency about how the trade in certain minerals is potentially fueling and funding the armed struggle in the DRC. Functionally, the scheme relies on the adverse reputational impact of such a disclosure rather than mandating penalties for actually sourcing minerals from conflict-afflicted regions (Sarfarty 2015). The information filed by companies is subject to s.18 of the *Securities Exchange Act* 1934 which attaches liability for any false or misleading statements.

7. In 2015, the European Union adopted EU Directive 2015/95/EU, which seeks to achieve consistent transparency of social and environmental reporting by mandating corporate disclosure of human rights due diligence and consideration of human rights risks, consistent with the 2011 United Nations *Guiding Principles on Business and Human Rights*. Beginning in 2017, large publicly listed European companies must report annually "on environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters" (Article 1). These non-financial reports must include a "description of the policies pursued" relating to respect for human rights, including "due diligence processes implemented"; "the outcome of those policies"; principal human rights risks linked to the company's operations, including its "business relationships, products or services" likely to cause adverse impacts; and relevant non-financial performance indicators (Article 1). The Directive will cover approximately 6,000 companies incorporated within the European Union. While companies may choose how they report, the Directive references international frameworks such as the UN *Global Compact*, the UN *Guiding Principles* and the Organization for Economic Co-operation and Development (OECD) *Guidelines for Multinational Enterprises*. Member states must implement the Directive through national legislation and are free to set more stringent disclosure requirements. The European Commission is expected to issue non-binding guidelines for reporting non-financial information. Member states must ensure that non-financial statements are provided; they may also require that the information be independently verified. There is no sanction at the European level for non-compliance.

8. ***Transparency Legislation: Imposing Due Diligence Requirements & Reporting on Companies in Supply Chains.*** While the UK, US and EU legislative developments discussed above mandate disclosure, they do not actually impose due diligence requirements on the reporting firms. By comparison:

    - In 2017 the French National Assembly adopted a corporate 'Duty of Vigilance' law. This establishes a legally binding obligation on companies of certain scale to identify and prevent adverse human rights and environmental impacts resulting from their own activities, from activities of companies they control,

[4] *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

and from activities of their subcontractors and suppliers with whom they have an established commercial relationship.

- The Netherlands is also debating new legislation in relation to identifying child labour in corporate supply chains. The law (if adopted by the Senate) will require companies to examine whether child labour occurs in their production chain. If that is the case they should develop a plan of action to combat child labour and draw up a declaration about their investigation and plan of action. That statement will be recorded in a public register by a yet to be designated public authority. The Act would be effective from 1 January 2020.
- The Swiss Parliament has also been debating this model (the Swiss Responsible Business Initiative).

Overarching and informing these efforts is the UN *Guiding Principles*, which describe the relevant responsibilities and duties of business enterprises and home or host states in conducting due diligence aimed preventing or remediating business-sourced human rights violations.

9. Attaching specific obligations to lead firms in a supply chain to conduct due diligence downstream is a potentially effective mechanism in regulating supply chains. Often, the firm atop the chain makes the decision to structure its activities through subcontracting relationships, 'presumably because such a structure allows the firm to increase profits by lowering the costs and risk of liability that come with being a direct employer' (Gordon 2014). It follows that the firm may be able to monitor and influence suppliers down the chain to act in a responsible manner. Accordingly, companies at the apex of the chain and in such a position of power may have the capacity to use their strategic position exercise to leverage over actors lower down the supply chain.

   Two Australian legislative models offer examples of using due diligence to regulate supply chains, and attach statutory consequences for non-compliance:

   - ***Australian homeworkers legislation.*** In the early 2000s, several state governments in Australia introduced supply chain regulation in response to a strong and sustained civil society campaign focused on safeguarding the rights of home-based workers in the clothing industry.[5] This regulatory framework requires the insertion of contractual tracking mechanisms in supplier contracts to follow production and mandate disclosure up and down the supply chain. Liability for contraventions of the laws is imposed on lead companies in order to shift the overarching legal responsibility to the top of the supply chain. This legislation has certain distinctive features:[6]

[5] The FairWear campaign (http://fairwear.org.au/) was a significant force that led to the introduction of successive legislative amendments including: *Industrial Relations (Ethical Clothing Trade) Act 2001* (NSW) and s 175B *Workers Compensation Act 1987* (NSW): *Industrial Relations (Fair Work) Act 2005* (SA); *Outworkers (Improved Protection) Act* 2003 (Vic); and *Industrial Relations and Other Acts Amendment Act 2005* (Qld).
[6] See too Nossar, Johnstone and Quinlan, 2004.

i. Firstly, the legislation broadens the traditional approach to defining employment by deeming home-based workers or outworkers to be employees in order to defeat commercial arrangements that might otherwise undermine the employee status, for instance, by classifying workers as 'independent contractors'. In many cases, the immediate 'employer' may not be the controlling entity. Control may be shared by a number of key players in the supply chain or be wielded by a firm that sits outside the traditional employment relationship. The Australian laws effectively extend the scope of industrial relations law to deal with work arrangements and contracts that are common in supply chains, and which are often beyond the reach and definitions of traditional employment relationships. This deeming mechanism also then provides a clear legal basis upon which workers can recover unpaid entitlements from lead companies further up a supply chain.

ii. Secondly, the provisions impose obligations on successive parties (other than the retail sector) in the contracting chain to ensure that outworkers receive their lawful entitlements (rights of recovery). The legislation provides for a recovery mechanism whereby the outworkers are entitled to claim unpaid entitlements throughout the supply chain up to and including the principal manufacturer. The recovery mechanism is also innovative in that it reverses the traditional onus of proof, so that unless the relevant firm can prove that a claimant worker has not done the work or that the claim calculation is erroneous, the company will be obliged to pay the claimed wages within a specified time.

iii. Thirdly, the mandated disclosure requirements operate up and down the supply chain, in that retailers are obligated to establish whether outworkers are being used in the production of their goods, and suppliers at all levels are obligated to provide that information to parties further up the chain. The information is then provided by the retailer to a designated trade union so that the supply chain is transparent and able to be monitored.

iv. Finally, the legislation is supplemented by a voluntary mechanism administered by a multi-stakeholder initiative – Ethical Clothing Australia – that accredits businesses operating in this specific sector and assists companies with the process of mapping their supply chain and verifying that all workers within it are receiving their legal entitlements. This legislation, like the other examples below is focused on a narrow issue (the treatment and entitlements due to homeworkers) and a specific sector (apparel). This means that legislation can be specific and targeted in attaching liability for wrongdoing to disparate actors in the supply chain.

- ***Illegal logging legislation***. Another innovative Australian model of transnational supply chain regulation which combines due diligence requirements with civil and criminal liability is exemplified by the *Illegal Logging Prohibition Act* (2012) (Cth). This Act incorporates due diligence requirements which obligate the importers and processors of timber to initiate verification and certification processes in order to ensure the imported timber was not illegally logged. This hybrid legislation deliberately targets the firm at the top end of the supply chain (and utilizes civil and

criminal liability) as a means of deterring illegal activities downstream. It is a potentially useful model for overcoming regulatory challenges that may arise in host states including an unwillingness or inability to enforce their own labour, human rights and environmental laws.

10. Another approach is the United States' procurement regulations which require federal contractors who supply products on a list published by the US Department of Labor to certify that they have made a good faith effort to determine whether forced or indentured child labor was used to produce the items listed (US Department of State, Bureau of Democracy, Human Rights and Labor, *US Government Approach on Business and Human Rights* (2013)). Federal contractors providing supplies acquired or services to be performed outside of the US, with a value greater than US$500,000, must provide a compliance plan and certification, after completing due diligence, that no contractor or subcontractor is engaged in human trafficking. Violations can result in termination of a federal contract.[7]

Reflections on prevailing disclosure / due diligence models

11. The assumption in this 'human rights due diligence' model is that transparency gained from disclosure will incentivise corporate attention to human rights risks by providing greater visibility on supply chain risks to investors and consumers. The model marks a shift from regulators' traditional role in only overseeing purely financial (as opposed to social) disclosures (Nelson, 2014). Whether transparency regulatory regimes actually reduce substantive human rights violations in supply chains has not been assessed (Sarfaty, 2015; Sarfarty, 2016; Nolan, 2016: 275). The schemes render firms accountable not for adverse human rights impacts, but for the procedural failure to conduct due diligence or report on efforts to do so, often with limited guidance on what disclosures must entail (Sarfaty 2015, Narine 2015).

    Such measures may be broadly welcomed as manifestations of a recognition of the nature and scale of the problem of forced (etc.) labour, and the imperative for some state-based regulatory activity, beyond mere 'market forces' or 'consumer action', that promotes commercial actors' attention to the significant influence (and so responsibility) that these actors may have on practices and conditions within their supply chains. Yet it is not obvious that disclosure alone will guarantee accountability or improved substantive human rights outcomes. Research is needed to explore whether due diligence and disclosure requirements are capable of linking transparency with accountability, and generating substantive (not just procedural reporting) human rights compliance. Moreover, no research has yet asked whether audit-and-report models might generate narrow conceptions of 'compliance', displace momentum for reform towards more comprehensive measures, or distract regulators, industry and civil society from engaging in problem-solving cooperative regulatory strategies, beyond mere reporting, to fix underlying problems (Ford, 2015).

[7] United States Federal Register, 'Federal Acquisition Regulation; Ending Trafficking in Persons; Final Rule' 80 Fed. Reg. 4967 (2 March 2015).

Effective provisions in the UK Modern Slavery Act and whether similar or improved measures should be introduced in Australia (TOR 5).

We offer the following recommendations regarding current provisions of the UK Act:

12. **Annual modern slavery statements.** Business enterprises carrying on business in Australia[8] of a certain scale should be required under any Act to publish annual statements that describe the actions taken to identify and address the risk of modern slavery in their operations and supply chains. Statements should be authorized by the board and be available on the company website. Annual publication would allow for year-on-year comparison of companies' efforts.

13. **Scope of law should eventually include medium sized companies**. Risks of modern slavery exist across sectors and across different sizes of companies and the scope of the Australian law should be designed such that while it will immediately apply to larger enterprises, in due course it would be appropriate to capture medium-sized companies across all sectors.

We recommend the following improvements to the transparency in supply chains provision of the UK Act:

14. **Government to provide guidance on form and substance of mandatory disclosure requirements.** Currently section 54(5) of the UK Act outlines what a statement may include, but there is no prescribed form of content or length for a statement. UK transparency provision suggests that companies report on six broad areas: business and supply chain structure, polices, due diligence, risk assessment, effectiveness and training. These topics for reporting are discretionary, and a company can choose what to include in its statement. Statements submitted to date lack consistency and early analysis by the Business and Human Rights Resource Centre has found that to date, the majority of companies are not providing substantive disclosure in most of the suggested areas. A more uniform reporting standard would provide clearer guidance for companies and may establish a global standard for substantive global supply chain transparency and comparability. We recommend that the Australian legislation mandates specific disclosures and establish regulations regarding the disclosure items.

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[8] The UK Act adopts the following definition for applicable businesses: ´ For the purposes of this section—

- "commercial organisation" means—

(a) a body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, or
(b) a partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,
and for this purpose "business" includes a trade or profession;

- "partnership" means—

(a) a partnership within the Partnership Act 1890,
(b) a limited partnership registered under the Limited Partnerships Act 1907, or
(c) a firm, or an entity of a similar character, formed under the law of a country outside the United Kingdom…'

15. **Mandate Due Diligence.** The Australian legislation should go beyond basic disclosure transparency (publishing a statement) to mandate that companies of a certain scale in fact conduct human rights due diligence in their supply chains regarding the presence of modern slavery. Such a requirement would be in line with recent and more progressive legislation, such as the French Duty of Vigilance Law and the proposed Dutch Child Labour Due Diligence Law. An Australian precedent for this can be found in the *Illegal Logging Prohibition Amendment Regulation* 2013, which requires that importers and processors undertake due diligence processes. There was an 18 month transition period during which the Australian government sought to assist and educate companies about the due diligence requirements of the Act. Section 7 sets out the four-step due diligence process. Step 1 is information gathering (the importer must obtain as much of the prescribed information as is reasonably practicable); Step 2 is an option process that involves assessing and identifying risk against a prescribed timber legality framework (section 11) or a country specific guideline (once they are prescribed); Step 3 is risk assessment (section 13); and Step 4 is risk mitigation (section 14) which should be adequate and proportionate to the identified risk. In establishing the requirements of due diligence, the Australian act could borrow from the framework set out in the *UN Guiding Principles on Business and Human Rights*, but the provision could also encourage the development of sector specific guidelines which can provide more specificity around due diligence requirements. In many respects, especially for the largest Australian corporate and financial institutions, compliance with such a requirement would arguably be fairly easily built into existing risk management systems and processes.

16. **Central Repository.** The UK Act does not establish a central repository to which these statements must be uploaded. For the purposes of accountability, it is important that these are located in a central repository. We recommend that the Australian government establish and maintain a central repository where these statements are publicly accessible. There are a number of different options here for the control/location of this repository including ASIC, DFAT, the Australian Human Rights Commission, or the National Contact Point under the OECD *Guidelines on Multinational Corporations*. A repository hosted by government implies oversight and some level of accountability. In the context of the UK legislation, it appears there is an expectation that the advocacy community takes the leading role in tracking and benchmarking companies. This arguably ultimately divests government of its responsibilities or weakens the overall messaging and transformative effect of the UK Act.

17. **Sanctions.** There are no material statutory sanctions for non-compliance with the UK Act. Thus, the principal sanction is driven largely by potential reputational risks. This may motivate consumer-facing companies to comply but will be less effective for businesses where their public profile, scale, services or products, are not reputation-sensitive. We recommend that the Australian legislation includes sanctions for failure to issue a statement, issuing a fraudulent statement and a failure to conduct adequate due diligence**.** Australia's *Illegal Logging Prohibition Act* (2012) is relevant here. This Act incorporates due diligence requirements which

obligate the importers and processors of timber to initiate verification and certification processes to ensure the imported timber was not illegally logged. If an importer or processor intentionally, knowingly or recklessly imports or processes illegally logged timber they could face significant penalties, including up to five years' imprisonment and/or heavy fines. The proposed provision in an Australian modern slavery act could provide a defence for companies that could demonstrate they had robust due diligence programs in place.

Whether a Modern Slavery Act should be introduced in Australia (TOR 6).

18. Noting the existing treatment of some of these issues in the federal criminal code in Australia, we would support the introduction of an appropriate signatory statutory measure in Australian federal law to combat and address 'modern slavery' in all its forms, including where there is a risk of such activity in Australian business and corporate supply chains, including those that extend transnationally.

19. With respect to commercial actors' supply chains, for the reasons discussed above we would question the merits of adopting unchanged the basic / simplistic disclosure model in s. 54 of the UK Act.

20. In order to eventually engender fulsome business cooperation with the regulatory objective, the Committee might consider a statutory initiative that is explicitly designed to 'ramp up' over a period of time both in terms of the sorts of enterprises subject to the Act, and the nature of what it is they are required to do in terms of exercising due diligence on these risks throughout their supply chain (beyond merely issuing a statement).

21. Parliamentary work towards a Modern Slavery Act (of some sort) in Australia should not be seen to displace other legislative and non-legislative initiatives by the Federal Government to take a lead on promoting and implementing the UN *Guiding Principles*, including through an unequivocal statement by government of the expectation that Australian businesses will comply with their responsibility to respect human rights (Pillar II of the *Guiding Principles*), and through discussion of the possible shape or form of a National Action Plan on Business and Human Rights.

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