

SLAVERY IN THE SUPPLY

Should Australia pass legislation that compels corporations to disclose the actions they have taken to eradicate the presence of Modern Slavery in their Supply Chains?

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Globalisation has created a complex network of markets, in which multi-national corporations are able to position parts of their supply chain in poorly regulated developing nations while yielding high profits in more restrictive legal regimes at home.¹ These corporations are often at the root of social issues such as global warming, corruption and human rights abuses;² yet unlike nation states, there is no international legal framework to temper their power or sanction transgressions. Domestic legislation is inadequate when it does not capture the activities of businesses outside their domicile country - and this is even more apparent when visibility of those activities is lost along complex international supply chains. Reliance is placed on business to self-regulate by implementing internal 'soft law' policies that uphold social responsibility norms, and many have seen the value in doing so – particularly due to increased consumer interest in the provenance of goods and social media's ability to define a company's reputation. Despite the efforts that have been made, human trafficking, forced labour and slavery (interchangeably referred to here as *modern slavery*) continue to plague the supply chains through which multi-national corporations are deriving enormous profits.³

This paper will argue that consistent with similar jurisdictions, it is now necessary to implement legislation that bridges the regulatory gap and compels corporations to disclose the actions they are taking to eradicate modern slavery from their supply chains. Legislation of this kind will rightly impose responsibility for investigating supply chains upon the multinational corporations themselves, and provide transparency of those investigative actions (or lack thereof) for consumers, investors and government

¹ Sandeep Gopalan and Katrina Hogan, 'Ethical Transnational Corporate Activity At Home And Abroad: A proposal for reforming continuous disclosure obligations in Australia and the United States' (2015) *Columbia Human Rights Law Review* 46 (2) 1, 2.

² Stephen New, 'Modern slavery and the supply chain: the limits of corporate social responsibility?' (2015) 11 *Supply Chain Management: An International Journal* 20 (6), 697.

³ International Labour Organisation, 'Profits and Poverty: The Economics of Forced Labour' (Report of the Special Action Programme to Combat Forced Labour, Fundamental Principles and Rights at Work Branch, 2014).

alike. This paper does not propose that companies be made to incriminate themselves - rather that they disclose the actions taken to eradicate modern slavery from their supply chain – effectively prompting investigation of the supply chain to actually occur (where previously no prompt existed).

The matter will be approached in four parts. Part one will review the extent of the modern slavery crisis, and particularly how Australian corporations and consumers contribute to the issue through procurement of goods produced in situations of human trafficking, forced labour and slavery. The definitions of, and distinctions between these terms will be explored in part two; where the existing legal framework will be explained and an example of modern slavery provided. This section will also point out how international and domestic law applies (or does not apply) to corporations, and survey the regulatory gap that currently exists. A comparative analysis will be conducted in part three, critically examining the approaches of various jurisdictions that have implemented supply chain transparency measures. Finally, suggestions for reform will be made and parallels drawn to the reviewed jurisdictions to determine the appropriateness of each model for the Australian context. Ultimately, a conclusion will be reached that Australia should pass a progressive model of legislation that compels corporations to disclose the actions they have taken to eliminate modern slavery from their supply chains.

I Modern Slavery - is it really an Australian issue?

Australia's enviable position as a country of relative wealth with a long history of trade unionism and high standards of workplace safety has no doubt contributed to the perception that slavery no longer exists. However, the move towards multinationalism and relaxing of trade barriers has significantly changed the way in which Australian companies operate and the way Australian households consume⁴ - resulting in a much closer link to slavery than is generally understood. 'Modern Slavery' is a term now used to describe a range of exploitative practices (to be defined further in Part 2) including human trafficking, forced labour and slavery. These practices are often intricately woven into a company's supply chains; that is, 'the entire sequence of steps involved in

⁴ Martijn Boersma, 'Global supply chains link us all to shame of child and forced labour', The Conversation (online), 30 October 2014 < <http://theconversation.com/global-supply-chains-link-us-all-to-shame-of-child-and-forced-labour-33593>>.

the production of a product whether it is a good or service.⁵ Contemporary corporations may have little to no connection with (or knowledge of) the original source of their final product, and currently there is no compulsion to inform themselves otherwise. This section will outline how modern slavery truly is a ubiquitous issue for Australian corporations – one that they can be assisted to resolve by a legislative measure that compels them to disclose the actions they have taken to eradicate it from supply chains.

In 2012, the ILO published its *Global Estimate of Forced Labour*⁶ in which it found that 20.9 million people are in forced labour globally. They are primarily in agriculture, construction, domestic work, manufacturing, mining and utilities⁷ and generate more than US\$150bn⁸ of profit in the global private economy.⁹ The Organisation for Economic Co-operation and Development (OECD) has found that today more than 70% of global trade is in intermediate goods (i.e. raw materials, parts, and partially completed products)¹⁰ and these are coming to Australia by way of complex supply chains over which visibility of labour conditions is easily lost.¹¹ In January to February 2014, Australia imported \$9.95b worth of such intermediate goods and 53.1% of all imports came from the Asia-Pacific Region.¹² The Asia-Pacific¹³ includes thirty-seven countries classified by the U.S. State Department as Tier 2, Tier 2 Watch List or Tier 3 in their 2015 Trafficking in Persons Report¹⁴ - meaning they are non-compliant with the

⁵ Jonathon D. Linton, Robert Klassen and Jayaraman Vaidyanathan, 'Sustainable Supply Chains: An Introduction' (2007) *Journal of Operations Management* 25 (6) 1075, 1078.

⁶ International Labour Organisation, 'Global Estimate of Forced Labour: Results and Methodology' (Report of the Special Action Programme to Combat Forced Labour, 2012).

⁷ *Ibid* 2.1.

⁸ International Labour Organisation, 'Profits and Poverty: The Economics of Forced Labour' (Report of the Special Action Programme to Combat Forced Labour, Fundamental Principles and Rights at Work Branch, 2014) 13.

⁹ Ashley Feasley, 'Deploying Disclosure Laws to Eliminate Forced Labour: Supply chain transparency efforts of Brazil and the United States of America' (2015) 5 *Anti-Trafficking Review* 30, 1.

¹⁰ Organisation for Economic Co-operation and Development et al, 'Global Value Chains: Challenges, Opportunities and Implications for Policy' (Paper prepared for submission to the G20 Minister's Meeting, Sydney, 19 July 2014) 7.

¹¹ Martijn Boersma Gabrielle Lynch and Jo-anne Schofield, 'Child Labour: Everybody's Business' (Report for Catalyst Australia, October 2014) 1.2.

¹² *Ibid*.

¹³ Daniel K Inouye Asia-Pacific Centre for Security Studies, *Countries of the Asia-Pacific* <<http://apcss.org/about-2/ap-countries/>>.

¹⁴ Burma, Cambodia, Fiji, Laos, Malaysia, Maldives, Marshall Is, Pakistan, Papua New Guinea, Russia, Solomon Is, Sri Lanka and Thailand: US Department of State, '2015 Trafficking in Persons Report' Office of the Under Secretary for Civilian Security, Democracy and Human Rights (2015).

U.S. *Trafficking Victims Protection Act*.¹⁵ The Tier grading indicates the level of effort that country is taking to bring itself into compliance, ranging from significant to none.¹⁶ Australia's top ten trading partners¹⁷ include six countries in these same categories¹⁸- indicating that through everyday household consumption, Australians are connected to human trafficking, forced labour and slavery.

Media reports and investigations conducted by civil society groups have demonstrated regular examples of exploitation presenting in Australian supply chains. Baptist World Aid released a report in 2015¹⁹ that revealed that 9 out of 10 Australian fashion companies do not know where their cotton is sourced,²⁰ despite the cotton industry's use of forced labour being infamous.²¹ Australia's enormous appetite for electronics products such as smartphones and laptops links closely to the Malaysian market where forced labour has been found to be rife.²² As recently as December 2015, dominant retailers were implicated in a report by the Associated Press that found Thai shrimp peeling factories were supplying prawns to a major seafood exporter which in turn supplies to large Australian supermarkets.²³ Food giant Nestlé recently self-reported instances of forced labour in its seafood supply chain; and commissioned an external investigation of its practices. While lauded by human rights groups,²⁴ self-disclosure of this kind is highly unusual.²⁵

¹⁵ *Victims of Trafficking and Violence Protection Act of 2000* Pub L 106-386, 114 Stat 1464 (2000) (TVPA).

¹⁶ US Department of State, '2015 Trafficking in Persons Report' Office of the Under Secretary for Civilian Security, Democracy and Human Rights (2015) 47.

¹⁷ Australian Government, 'Trade at a Glance 2013' (Report) Department of Foreign Affairs, Defence and Trade, 2013) 16.

¹⁸ China, Japan, Singapore, Thailand, Malaysia and India.

¹⁹ Gershon Nimbalker et al, 'The Australian Fashion Report 2015: The Truth Behind the Barcode' (Report for Baptist World Aid, 16 April 2015) 12.

²⁰ Beau Donnelly, 'Damning report on exploitation in Australian fashion industry', *The Age* (online) 16 April 2015 < <http://www.theage.com.au/lifestyle/fashion/damning-report-on-exploitation-in-australian-fashion-industry-20150415-1mm4yz.html>>.

²¹ US Department of State, '2015 Trafficking in Persons Report' Office of the Under Secretary for Civilian Security, Democracy and Human Rights (2015).

²² Verité, *Forced Labour in the Production of Electronic Goods in Malaysia: A Comprehensive Study of Scope and Characteristics* (2014)
<https://www.verite.org/sites/default/files/images/VeriteForcedLaborMalaysianElectronics2014_ExecutiveSummary.pdf>

²³ Heidi Pett, *Thai Union: Australian supermarkets implicated in slave labour accusations against giant seafood company* (22 December 2015) ABC News < <http://www.abc.net.au/news/2015-12-15/major-australian-supermarkets-implicated-in-child-labour/7031350>>.

²⁴ Associated Press, 'Nestle admits to forced labour its in seafood supply chain in Thailand' (24 November 2015) *The Guardian* < <http://www.theguardian.com/global-development/2015/nov/24/nestle-admits-forced-labour-in-seafood-supply-chain>>.

In 2013, the Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade completed an inquiry and tabled a report entitled '*Trading Lives: Modern Day Human Trafficking*'.²⁶ Recognising the pervasiveness of such exploitation occurring in supply chains, the committee recommended that:

'the Australian Government, in consultation with relevant stakeholders, undertake a review to establish anti-trafficking and anti-slavery mechanisms appropriate for the Australian context. The review should be conducted with a view to:

- introducing legislation to improve transparency in supply chains;
- the development of a labelling and certification strategy for products and services that have been produced ethically; and
- increasing the prominence of fair trade in Australia.'²⁷

The government accepted this recommendation in principle and committed to establishing a Supply Chains Working Group to 'examine ways to address human trafficking and exploitative practices in supply chains.'²⁸

In 2015, the *National Action Plan to Combat Human Trafficking and Slavery* was launched, which included the formation of the suggested working group. Stakeholders from government, business, industry, civil society, unions and academia²⁹ are included in the group, which at the time of writing has yet to publish findings from their first two phases – 'Understanding the Problem' and 'Developing the Response.'³⁰

It is apparent then that modern slavery is directly relevant to Australia, and that the pervasive nature of raw, intermediary and partially completed product in the market make it almost impossible for the average consumer to avoid contributing to the

²⁵ Naomi Jiyoung Bang, 'Justice for Victims of Human Trafficking and Forced Labour: Why current theories of Corporate Liability Do Not Work' (2013) *The University of Memphis Law Review* 43 (4) 1047, 1050.

²⁶ Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Trading Lives: Modern Day Human Trafficking* (2013).

²⁷ *Ibid* xviii.

²⁸ Australian Government Response to Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into and Report on Slavery, Slavery-like Conditions and People Trafficking (*Trading Lives: Modern Day Human Trafficking*), Parliament of Australia (July 2014) Recommendation 7.

²⁹ Interdepartmental Committee on Human Trafficking and Slavery, Parliament of Australia, *Trafficking in Persons, The Australian Government Response 1 July 2014 – 30 June 2015* (2015) 46.

³⁰ *Ibid*.

problem; even with concerted effort to purchase ethically. It is for this reason that stronger regulation to compel disclosure of activity the company has taken to eradicate modern slavery from their supply chains is required in order to institute change. It cannot be left entirely to the consumer to self-regulate their purchases or to diplomatic relations between nations. Multinational companies are the source of this issue and thus should be compelled to disclose the actions they are taking to reach a solution.

II Modern Slavery's Existing Legal Framework

The term 'modern slavery' is not used in any international instruments, rather it has become the umbrella term used to describe a range of exploitative practices,³¹ including human trafficking, forced labour and slavery. A combination of international conventions and domestic statutes define and criminalise each of these terms, and these will be explored below. While many countries have become signatories to various legal instruments governing these exploitative practices, international law applies to nation states and not corporations. It is possible for business to incorporate the ideals of these international instruments into company policy and to become parties to 'soft law' initiatives – though these carry no penalty other than loss of reputation for transgression. Domestic statutes and jurisprudence governing corporate law, criminality and tortious liability rarely have the transnational application or authority to traverse the 'arm's length' global supply contracts so favoured by modern day multinationals.³² Thus a regulatory vacuum is created, within which corporations can utilise forced labour without incurring criminal or civil liability. This section will examine the various legal instruments that govern modern slavery and provide an example to differentiate their definitions. It will then go on to discuss the soft law commitments made by industry, thus demonstrating the regulatory gap that could be bridged by the introduction of legislation to compel supply chain transparency.

A International Law

1 Human Trafficking

³¹ New, above n 2, 697.

³² Bang, above n 25, 1048.

Australia is signatory to the United Nations *Convention against Transnational Organised Crime*³³ and its supplementary *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*.³⁴ The Trafficking Protocol obligates Australia to criminalise trafficking activity,³⁵ protect victims³⁶ and relevantly for the purposes of this discussion: to establish comprehensive policies that alleviate the factors that make people vulnerable to trafficking.³⁷ One way to alleviate such factors would be to pass supply chain transparency legislation and decrease the likelihood that the labour or services used to make Australian bound products has come from human trafficking victims.

Human trafficking is not (as is commonly thought) related to people smuggling, which involves organising irregular movement across borders in exchange for payment.³⁸ Human trafficking is characterised by the exploitation of vulnerable people, often in an ongoing manner. Its definition is best understood by considering three elements of human trafficking – the act, the means and the purpose. Relevant for the overall premise of this paper is the *purpose* element.

- The *act* includes the ‘recruitment, transportation, transfer, harbouring or receipt of persons.’
- This might occur by *means* of: ‘the threat or use of force (or other forms of coercion), abduction, fraud, deception, abuse of power or a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.’
- The *purpose* of these acts and their means of execution will always be exploitation. Under the Trafficking Protocol definition, exploitation includes (at a minimum) the prostitution of others or other forms of sexual exploitation;

³³ United Nations *Convention Against Transnational Organised Crime*, opened for signature 12 December 2000, UNGAOR 55/25 (entered into force 29 September 2003) (*‘UNTOC’*).

³⁴ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (opened for signature 12 December 2000, A/RES/55/25 (entered into force 25 December 2003) (*‘Trafficking Protocol’*).

³⁵ *Ibid* Art 5.

³⁶ *Ibid* Art 6.

³⁷ *Ibid* Art 9.

³⁸ Australian Government, *Human Trafficking* Attorney General’s Department <<https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Pages/default.aspx>>.

*forced labour or services; slavery or practices similar to slavery; servitude or the removal of organs.*³⁹

This paper's focus will be on the purpose of *forced labour or services*, and *slavery or practices similar to slavery*. These terms are defined further below.

2 *Forced Labour*

Forced labour is far from any Marxist notion of capitalist wage slavery⁴⁰ and is more than just being paid a low wage for menial work in a developing nation. Forced labour evinces a true absence of autonomy. The International Labour Organisation (ILO) *Convention concerning Forced or Compulsory Labour of 1930*⁴¹ defines *forced labour* as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.'⁴² There are exceptions to this definition such as military service and community service imposed under conviction. The ILO has identified six non-exhaustive indicators of forced labour:

- Threats or actual physical harm
- Restriction of movement
- Debt bondage (where one's labour pays off a debt rather than earns a wage)
- Withholding of wages and excessive wage reductions
- Retention of passports and identity documents
- Threat of report to authorities based on irregular immigration status (which may have been incurred through travel to the work site).⁴³

Convention 29 stipulates that competent authorities of signatory states shall not permit forced labour to be used for the benefit of private individuals, companies or associations.⁴⁴ Australia and 177 other countries are signatory to Convention 29, all of which should consider whether failing to act on the forced labour occurring in supply chains of multi-national corporations actually place them in breach of this commitment. A legislative measure that compels disclosure of actions a company is taking to

³⁹ *Trafficking Protocol*, above n 34, Art 3(a).

⁴⁰ New, above n 2, 698.

⁴¹ International Labour Organisation, *Convention concerning Forced or Compulsory Labour (No.29)*, adopted 14th ILO session 28 June 1930 (entered into force 1 May 1932) ('*Convention 29*').

⁴² *Ibid* art 1.

⁴³ New, above n 2, 698.

⁴⁴ *Convention 29*, art 4.

eradicate forced labour from their supply chain would be well justified by our commitment under Convention 29.

In 2014 a legally binding protocol and recommendation known as Protocol 29⁴⁵ was adopted to supplement Convention 29, with the purpose of addressing gaps in implementation and providing new guidance to ratifying states about measures they can take to meet their obligations to eradicate forced labour.⁴⁶ Article 2 states that measures taken to eradicate forced labour shall include (among others) ‘supporting due diligence by both the public and private sectors to prevent and respond to risks of forced or compulsory labour’⁴⁷ and ‘addressing the root causes and factors that heighten the risks of forced or compulsory labour.’⁴⁸ Australia is yet to ratify Protocol 29, though implementation of supply chain transparency legislation would represent a significant advancement towards the purposes of the Protocol.

3 *Slavery*

Slavery in the traditional sense of legal ownership or possession of a chattel is now universally abolished, and there are no countries in the world in which it is legal.⁴⁹ The *Convention to Suppress the Slave Trade and Slavery*⁵⁰ is one of the oldest conventions, originally passed by the League of Nations in 1926 and later adopted by the United Nations by amending protocol.⁵¹ It defines slavery as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’⁵² and commits state signatories to ‘prevent and suppress the slave trade.’⁵³ Australia is signatory to the original treaty and to the later protocol. Again, by passing supply chain transparency legislation Australia would continue to uphold its obligations under the Slavery Convention.

4 *Modern Slavery*

⁴⁵ International Labour Organisation, *Protocol of 2014 to the Forced Labour Convention (No. P029)*, adopted 103rd ILC session 11 June 2014 (not yet in force) (*‘Protocol 29’*).

⁴⁶ US Department of State, ‘2015 Trafficking in Persons Report’ Office of the Under Secretary for Civilian Security, Democracy and Human Rights (2015) 29.

⁴⁷ *Protocol 29*, art 2 (e).

⁴⁸ *Protocol 29*, art 2 (f)

⁴⁹ New, above n 2, 698.

⁵⁰ *Convention to Suppress the Slave Trade and Slavery*, signed 25 September 1926, 60 LNTS 253 (entered into force 9 March 1927) (*‘Slavery Convention’*).

⁵¹ United Nations *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* 226 U.N.T.S. 3, entered into force 30 April 1957.

⁵² *Slavery Convention*, art 1 (1).

⁵³ *Slavery Convention*, art 2.

To understand the distinction and link between all of the above terms and instruments (which broadly make up the term *modern slavery*),⁵⁴ it is useful to consider the example of José Pereira, whose case was to be the watershed for the Brazilian movement against forced labour that will be revisited in Part IV. José was a poverty stricken seventeen year old who in 1989 had made the long journey from his home in the north of Brazil to the southern farming region of Pará; under the promise of work on the Espírito Santo estate.⁵⁵ Once there, he discovered the working conditions to be serf-like and that he now owed the landowners for his transportation, accommodation, food and tools - all charged at exorbitantly inflated estate prices – the ‘estate store policy.’⁵⁶ Under threat of armed guards, José could not leave until he had paid off this ever-increasing debt – an impossibly perpetual cycle. After attempting to escape Espírito Santo, José and his friend Paraná were fired upon – Paraná was killed while José was seriously injured. José was able to ‘play dead’ long enough to be discovered by passers-by and offered transport to a hospital in the state capital⁵⁷ where he disclosed what was occurring on the estate.

José had experienced the human trafficking ‘act’ element when he was transported from the north to the south; the ‘means’ element when his vulnerability was abused and he was deceived as to the nature of the work on Espírito Santo; and the purpose element when he was exploited by being made to work under *forced labour conditions*. That is, under menace of penalty and not truly voluntarily (given his consent was undoubtedly vitiated by his age and the threats to his safety). There is nothing on the facts to suggest that the estate owners actually professed to ‘own’ José as per the definition afforded in the ageing Slavery Convention, however this is the insidious nature of *modern slavery* – the effect for the victim is the same. Australia is heavily obligated under international law to take actions that eradicate situations like José’s globally – supply chain transparency is the next step in ensuring that obligation is met.

B *Domestic Law*

1 *Corporations Law*

⁵⁴ Nicole Siller, ‘Modern Slavery: Does International Law Distinguish Between Slavery, Enslavement and Trafficking?’ (2016) *Journal of International Criminal Justice* 1.

⁵⁵ Patrícia Trindade Maranhão Costa, ‘Fighting Forced Labour: the Example of Brazil’ (Report of the Special Action Programme to Combat Forced Labour, International Labour Organisation, 2009) 2.2.

⁵⁶ *Ibid.*

⁵⁷ Trindade Maranhão Costa, above n 55, 2.1.

Some Australian business already have continuous disclosure obligations that arguably negate the need for a standalone transparency measure, or at the very least could be broadened to incorporate disclosure of actions taken to eradicate forced labour in the supply chain.⁵⁸ The *Corporations Act 2001* (Cth) stipulates that disclosing entities,⁵⁹ public companies, large proprietary companies, registered schemes, and some small proprietary companies⁶⁰ must prepare annual financial reports and directors' reports.⁶¹ If these companies are listed on the Australian Stock Exchange (ASX), they must also disclose any relevant information to the market if required to do so under the listing rules⁶² - and this is not limited to financial matters.⁶³ The general rule for disclosure under the ASX listing rules are that 'once an entity becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information.'⁶⁴ Information would be considered as likely to have a 'material effect' for this purpose if it would (or would be likely to) influence a person's decision to either acquire or dispose of the securities.⁶⁵ Given that a company's adherence to human rights norms has 'significant consequences for domestic constituencies, including shareholders, consumers, and employees,'⁶⁶ it cannot be doubted that the presence of modern slavery in the supply chain would meet the 'material effect' test. Nonetheless, the ASX rules only apply to *listed* entities with disclosure obligations – many corporations in Australia with significant turnovers and complex supply chains are not listed on the stock exchange and thus would not be netted by these provisions. A broad supply chain transparency measure would ensure that all business types above a given turnover threshold could be included in the requirement to disclose the actions they have taken to eradicate modern slavery from their supply chain.

2 *Criminal Law*

Divisions 270 and 271 of the *Commonwealth Criminal Code*⁶⁷ criminalise slavery and human trafficking, including forced labour. Under s270.6A, a person⁶⁸ commits an

⁵⁸ Gopalan and Hogan, above n 1, 4.

⁵⁹ As defined by *Corporations Act 2001*(Cth) s 111AC.

⁶⁰ Gopalan and Hogan, above n 1, 31.

⁶¹ *Corporations Act 2001* (Cth) s 292.

⁶² *Ibid* s 674.

⁶³ Australian Securities Exchange, *Listing Rules* (as at January 2013) Guidance Note 8, 3.1.

⁶⁴ Australian Securities Exchange, *Listing Rules* (as at 14 April 2014) Chapter 3.

⁶⁵ *Corporations Act 2001* (Cth) s 677.

⁶⁶ Gopalan and Hogan, above n 1, 3.

⁶⁷ *Criminal Code Act 1995* (Cth).

offence by conducting a business involving the forced labour of another person or persons. 'Conducting a business' is defined as taking part in the management of the business, exercising control or direction over the business and providing finance for the business. It is beyond the scope of this paper to consider whether there could be criminality of any Australian corporations who are found to have forced labour within their supply chains; however it represents further incentive to ensure any 'involvement' in forced labour is eliminated from their organisation, and to support a disclosure measure that assists them to do so.

3 *Torts Law*

There is currently no Australian provision that would enable a trafficking or slavery victim to bring a vicarious liability action against a company for experiencing forced labour in their supply chain. Tortious liability for corporations utilising forced labour is however, an area that has been explored with limited success in U.S. jurisprudence. A number of actions have been brought under the *Alien Torts Claims Act*,⁶⁹ which gives U.S District Courts original jurisdiction over 'any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'⁷⁰ Unfortunately, the causative link between the primary wrongdoer (often third party recruitment companies sourcing labour for the intermediary manufacturer) and the U.S. domiciled corporation driving demand for low cost goods is generally too far removed to enable liability to attach.⁷¹ The *Trafficking Victims Protection Act*⁷² also provides for victims to file civil actions against individual traffickers⁷³ but the measure has attracted criticism for its limited ability to tie criminal or civil liability to corporations.⁷⁴ It is again beyond the scope of this paper to consider whether the body of U.S. case law could be persuasive enough to enliven a new type of tortious liability for Australian companies. Though as described above for the criminal law field, it proffers further justification for companies to engage positively with a legislative measure that would

⁶⁸ The *Acts Interpretation Act 1901* (Cth) s 2 C (1) provides that references to persons include a corporate as well as an individual.

⁶⁹ *Alien Tort Claims Act* 28 USC §1350 (2006).

⁷⁰ Bang, above n 25, 1055.

⁷¹ Ibid 1052.

⁷² *Victims of Trafficking and Violence Protection Act of 2000* Pub L 106-386, 114 Stat 1464 (2000) (TVPA) §1595.

⁷³ Bang, above n 25, 1048.

⁷⁴ Ibid. Author is citing the provision's narrow definition of 'illegal means' and recognition of fewer forms of exploitation compared to the Trafficking Protocol (as discussed in Mohamed Y. Mattar, 'Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later' (2011) *The American University Journal of Gender, Social Policy & the Law* 19 (4) 1247).

prompt them to examine their supply chain and disclose actions taken to ensure clean supply.

C Soft Law

In an era of globalisation and economic inter-dependency,⁷⁵ corporations are deeply entrenched organs of society whose actions have broad ramifications for humanity overall. Acknowledgement of this has given rise to a corporate social responsibility (CSR) movement that has become ‘the prevailing model of transnational new governance’⁷⁶ - a soft law substitute that attempts to fill the gap of the formal regulatory regime explained above. This body of soft law exists largely in voluntary pacts created by private actors and codes of conduct drafted by international institutions,⁷⁷ and commits companies to conducting business in a manner that aligns with the major international instruments relating to human rights, labour, and the environment.⁷⁸ The major CSR instruments will be explored below, to acknowledge that many companies are already working towards improved human rights practices – though ultimately their commitments are unenforceable and need legislative weight to be applied.

1 UN Global Compact

Corporate Social Responsibility (CSR) is not a new concept,⁷⁹ though it really came to the fore following commencement of the UN Global Compact in 2000. Today with over 12,000 signatory organisations,⁸⁰ it represents the ‘world’s largest

⁷⁵ Justin Yifu Lin, ‘A Global Economy with Multiple Growth Poles’ in Shahrokh Fardoust, Yongbeom Kim and Claudia Paz (eds), *Postcrisis Growth and Development: A Development Agenda for the G-20* (The World Bank 2010) 95.

⁷⁶ Galit A. Sarfaty, ‘Shining Light on Global Supply Chains’ (2015) *Harvard International Law Journal* 56 (2) 419, 420.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Marinetto, M. ‘The Historical Development of Business Philanthropy: Social Responsibility in the New Corporate Economy’ (1999) 41 *Business History* 1, 1.

⁸⁰ United Nations Global Compact, Home Page < <https://www.unglobalcompact.org/>>.

network-based voluntary corporate citizenship initiative.’⁸¹ Kofi Annan’s seminal 1999 speech to business leaders called for them to ‘embrace, support and enact a set of core values in the areas of human rights, labour standards, and environmental practices.’⁸² By the time the compact was operationally launched, this had been extended to incorporate anti-corruption measures. Global Compact signatories commit to aligning their operations⁸³ with the UN’s principles and to learning and collaborating with one another to *create* the framework of behaviour they recognise is lacking in the globalised economy.⁸⁴ The Compact has been criticised by some non-government organisations⁸⁵ for its weak accountability mechanisms, which are limited to business signatories being required to publish an annual ‘Communication on Progress’ within their regular corporate reports.⁸⁶ If a company fails to do so for two consecutive years, they are simply expelled from the Compact and the UN publishes their name.⁸⁷ One author has stressed that the Global Compact was never intended to be a performance or assessment tool; rather it was designed to foster dialogue between the UN and business, and to encourage proactive behavioural and cultural change within organisations.⁸⁸ While that is admirable, it is not a model that society can rely upon as an instrument of change. Legislative compulsion to report on activities taken to eradicate modern slavery from the supply chain is not unlike the Compact’s Communication on Progress – though it will have broader effects and thus better opportunity to truly make a difference.

2 UN Guiding Principles on Business and Human Rights

The UN’s *Guiding Principles on Business and Human Rights* provide guidance on practical implementation of its ‘Protect, Respect and Remedy’ Framework.⁸⁹ The premise underpinning the Framework is that it is a state *duty to protect* against

⁸¹ Andreas Rasche ‘A necessary supplement: What the United Nations Global Compact is and is not’ (2009) *Business & Society* 48(4) 511.

⁸² UN Secretary-General Kofi Annan, ‘Global Compact Proposal’ (Speech delivered at World Economic Forum, Davos, 31 January 1999).

⁸³ United Nations Global Compact, Home Page < <https://www.unglobalcompact.org/>>.

⁸⁴ Rasche, above n 81, 516.

⁸⁵ Letter from Amnesty International to Louise Frchette (Raising Concerns on UN Global Compact), 7 April 2003 < <https://www.globalpolicy.org/component/content/article/177/31749.html>>.

⁸⁶ United Nations Global Compact, FAQ < <https://www.unglobalcompact.org/>>.

⁸⁷ Ibid.

⁸⁸ Rasche, above n 81, 514.

⁸⁹ Björn Fasterling and Geert Demuijnck, ‘Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights’ (2013) *Journal of Business Ethics* 116 (4), 799.

human rights abuses;⁹⁰ that companies have a *responsibility to respect* human rights⁹¹ and that states must make *remedy* available where such abuses occur.⁹² The Principles then make plain the practical requirements of meeting these expectations. For example, the state duty to protect incorporates a requirement to prevent and punish third party human rights abuse, including by business. It outlines that while a particular country may not be responsible for the actions of an offending corporation, they may nonetheless be held as having breached their international obligation if they fail to prevent such activity occurring.⁹³ For corporations, it is outlined that the responsibility to respect human rights is a ‘global standard of conduct (that) exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations.’⁹⁴ The Framework and Principles have been widely accepted as authoritative, and have since been incorporated into the policies of other international institutions.⁹⁵ Criticism has been levied upon the Framework and Principles for their reliance on due-diligence activities conducted by companies - and for the decision to bother conducting them being dependent on the individual company’s moral compass.⁹⁶ Depending on the model selected, supply chain transparency legislation can be imposed upon all business types - irrespective of whether they have thus far evinced a desire to adhere to human rights principles.

While the Global Compact and Guiding Principles do attempt to bridge the regulatory gap, corporations are still given the choice to cross. Due-diligence measures and the disclosure of them need to be legislatively compelled in order to ensure all businesses of a certain size (and not just those with an existing culture of respect for human rights) are brought into compliance with the aspirations outlined for them in these initiatives. Legislation compelling the disclosure of actions taken to eradicate forced labour in supply chains will serve to strengthen this area of weakness

⁹⁰ John Ruggie, ‘Guiding principles on business and human rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework’, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises to the United Nations Human Rights Council A/HRC/17/31 (2011), 3.

⁹¹ *Ibid* 13.

⁹² *Ibid* 27.

⁹³ *Ibid* 3

⁹⁴ *Ibid* 13.

⁹⁵ Rachel Davis, The UN Guiding Principles on Business and Human Rights and conflict-affected areas: state obligations and business responsibilities (2012) *International Review of the Red Cross* 94 (887) 961, 963.

⁹⁶ FASTERLING and DEMUIJNCK, above n 89, 799.

and ensure that the international duty to eradicate forced labour will extend to Australian corporations and not just the nation state.

III Comparative Analysis

A number of jurisdictions have successfully employed legislative measures that bring about increased transparency of supply chains. Brazil has approached the issue with a multi-faceted response, including a ‘name and shame’ aspect, though this progressive measure has recently faced judicial setbacks. At the U.S. Federal level, there is a specific provision governing transparency over sourcing of minerals that may inadvertently finance conflict. Since 2010, the U.S. state of California has mandated that retail and manufacturing businesses must publicly report on measures taken to eradicate slavery from their supply chains. Most recently, the U.K. has drawn upon the Californian model to pass a legislative measure compelling all business exceeding a prescribed turnover threshold to disclose the activities conducted to eradicate modern slavery from their supply chains – even if there has been no activity in this regard. This section will critically examine the methods employed by each of these jurisdictions in order to assess their appropriateness for the Australian context in the following section.

A Brazil

The example of José Pereira discussed in Part II was truly the impetus for change in Brazil. The story became the watershed for a national movement that up until that time had been floundering in the face of Brazilian authorities’ refusal to acknowledge a forced labour problem existed.⁹⁷ With the assistance of civil society groups, José’s case was brought before the Inter-American Commission on Human Rights (IACHR) of the Organization of American States (OAS). It was alleged that Brazil’s failure to protect its people from such situations amounted to breaches of Articles I and XXV of the *American Declaration on the Rights and Duties of Man* (right to life, liberty, personal security and protection from arbitrary arrest);⁹⁸ and Articles 6, 8 and 25 of the *American Convention on Human Rights* (freedom from slavery, right to a fair trial and judicial protection).⁹⁹ Eventually the case was settled, with José being modestly compensated – but importantly with Brazil making commitments to bringing an end to forced labour

⁹⁷ Trindade Maranhão Costa, above n 55, 2.1.

⁹⁸ *American Declaration on the Rights and Duties of Man*, adopted by the 9th International Conference of American States (2 May 1948).

⁹⁹ *American Convention on Human Rights*, opened for signature 22 November 1969, OASTS 36 (entered into force 18 July 1978).

and slavery via legislative amendments including monitoring and repression measures plus public awareness campaigns.¹⁰⁰

A broad suite of measures was implemented, including the establishment of a monitoring agency (GEFM) and a National Commission to Eradicate Slave Labour (CONATRAE) to coordinate government efforts across multiple agencies. In 2004, a ministerial ordinance was passed¹⁰¹ that would enable public shaming of corporations via the *lista suja*, or ‘dirty list’ – a publicly available list detailing companies found by the GEFM to be employing forced labour anywhere in their own organisation or in their supply chains. When a complaint is initiated, the GEFM investigates and if found to be using forced labour, a company can experience both criminal and commercial sanctions including the freezing of assets, the denial of government subsidies, ineligibility to tender for government projects and (most effectively) inability to access credit facilities through public and private financial institutions.¹⁰² A listing does not occur without a complete investigation (including access to administrative and judicial review), and the business community has accepted the credibility of the list to the extent that a widely subscribed voluntary pact has commenced whereby businesses agree not to collaborate with or extend credit to any listed companies.¹⁰³ A dirty listing results in the company being monitored by GEFM for two years¹⁰⁴ and until fines and restitution are paid the company’s name will not be removed from the list. Public awareness campaigns have been so successful that there is widespread boycotting of companies listed, and any companies seen to be transacting with them.¹⁰⁵

Recently however, the success of the dirty list has been diminished by litigation and constitutional challenge. During the preparations for the 2014 World Cup the GEFM were monitoring a number of corporations, as Brazil had committed to ensuring decent labour conditions for the project.¹⁰⁶ As part of these investigations, OAS SA – one of the World Cup official companies tasked with building two of the tournament stadiums, was found to be using forced labour and was subsequently placed on the dirty list in

¹⁰⁰ Trindade Maranhão Costa, above n 55, 2.1.

¹⁰¹ MTE Decree No. 540/200.

¹⁰² Feasley, above n 9, 4.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ Building and Woodworkers International, *World Cup 2014: Pact for Decent Work launched in São Paulo* (18 October 2013) <<http://www.bwint.org/default.asp?index=5140>>.

July 2014.¹⁰⁷ OAS SA challenged the listing and obtained an injunction, the effect of which was to have the company name removed from the list. In December 2014, a powerful lobby group brought a constitutionality claim in the Supreme Court; arguing that the list should carry legislative and not merely ministerial ordinance weight, and further that its administrative appeal avenues did not provide the right to a fair trial.¹⁰⁸ A single judge hearing the matter in the Supreme Court's year-end recess¹⁰⁹ determined to grant an injunction suspending the dirty list for three months – however at the time of writing, there has been no release of a new list.

Despite these instances of individual companies and industry groups taking issue with the dirty list, it is still seen as one of the most progressive supply chain transparency measures worldwide¹¹⁰ and the Brazilian government continues to monitor and keep records. Interestingly, civil society groups have found that they are able to request these records via Brazil's *Access to Information Act*¹¹¹ and have used the data to publish their own 'Transparency List of Slave Labour.'¹¹² While this listing does not carry any of the criminal or commercial sanctions that the government published dirty list imposed; it is still a reflection of any company charged with 'using labour characterized as analogous to slavery, whose processes had had final administrative decisions between May 2013 and May 2015.' These administrative decisions are a matter of public record and therefore the civil society groups are not in breach of the injunction by collating and publishing this list, but the effectiveness of a list with no sanctions is limited to the preparedness of consumers to boycott the product.

B United States

Supply chain transparency measures in the United States have had limited success, in terms of actually passing into legislation, acceptance within the business community and achieving change at the ground level. These measures have varied in format and jurisdictional scope, with some aimed just at specific commodities - such as a federal

¹⁰⁷ Feasley, above n 9, 5.

¹⁰⁸ Ibid.

¹⁰⁹ Repórter Brasil, 'Transparency list of slave labour includes names of employers caught perpetrating that crime' (21 September 2015) < <http://reporterbrasil.org.br/2015/09/transparency-list-of-slave-labor-includes-names-of-employers-caught-perpetrating-that-crime/>>.

¹¹⁰ Annie Kelly, 'Brazil's 'dirty list' names and shames companies involved in slave labour', The Guardian (online) 25 July 2013 < <http://www.theguardian.com/sustainable-business/brazil-dirty-list-names-shames-slave-labour>>.

¹¹¹ Law 12527/2012.

¹¹² Institute of the National Pact for Eradication of Slave Labor (InPACTO), 'Transparency List on Contemporary Slavery in Brazil' (Report, Repórter Brasil, 21 September 2015).

provision¹¹³ intended to stymie the U.S. contribution to trade in conflict minerals. Most recently, a federal bill ¹¹⁴was proposed which would see companies of any type with global receipts of more than US\$100m being annually required to disclose the actions they had taken to address human trafficking, forced labour and slavery in their supply chains. That proposed legislation is based upon the state of California's Transparency in Supply Chains Act¹¹⁵ (CTSCA), which successfully passed in 2010, though its scope is limited to the retail and manufacturing sector.¹¹⁶ This section will briefly reprise the conflict minerals provision and proposed federal transparency bill before focusing on the CTSCA for subsequent comparative purposes in Part IV.

1 *Federal Legislation – Conflict Minerals*

The first incarnation of U.S. federal supply chain transparency legislation appeared in an unlikely place - the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank) which was largely directed at financial sector reform following the global financial crisis. However, s 1502 of Dodd-Frank also attempts to address the financing of conflict in the Democratic Republic of Congo (DRC). While this is not specific to modern slavery, it is relevant in terms of the mechanism used to compel supply chain disclosure and to reflect on its challenges in the subsequent six years since being passed.

Section 1502 directs the Securities and Exchange Commission (SEC) to issue regulations that compel publicly-traded companies who source conflict minerals for manufacture of their products (usually tin, tantalum and tungsten for use in electronics)¹¹⁷ to make annual disclosure of whether any such minerals were sourced in the DRC or adjoining countries.¹¹⁸ If so, the organisation then needs to report to the SEC on the due diligence measures it has taken on the source and chain of custody of such materials, as well as state publicly which (if any) of its products could not be

¹¹³ *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, Pub L No 111–203 §1502, 124 Stat. 1376 (2010).

¹¹⁴ Business Supply Chain Transparency on Trafficking and Slavery Act, HR Res 3226, 114th Congress (2015).

¹¹⁵ *California Transparency in Supply Chains Act of 2010*, 556 Cal Civil Code §1714.43 (West 2010).

¹¹⁶ Sarah A. Altschuller, 'H.R. 4842: New Bill Calls for Transparency on Trafficking and Slavery in Corporate Supply Chains' on *Corporate Social Responsibility and the Law* (20 June 2014) <<http://www.csrandthelaw.com/2014/06/20/h-r-4842-new-bill-calls-for-transparency-on-trafficking-and-slavery-in-corporate-supply-chains/>>.

¹¹⁷ Enough Project, Conflict Minerals <<http://www.enoughproject.org/conflict-minerals>>.

¹¹⁸ *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, Pub L No 111–203 §1502, 124 Stat. 1376 (2010).

considered ‘conflict free’ for the purposes of the Act.¹¹⁹ In the ensuing period since the provision passed, it has faced significant difficulty. First, the SEC - tasked with promulgating the rules for its implementation - struggled with interpretation of the Act; only for its final adaptation to be opposed by business groups on freedom of speech grounds.¹²⁰

The business groups posited that the effect of the provision was an unconstitutional requirement to condemn themselves publicly, and the U.S Court of Appeals for the District Columbia Circuit agreed. It found that such requirement was ‘undoubtedly a more effective way for the government to stigmatize and shape behaviour than for the government to have to convey its views itself,’¹²¹ but that this made the provision ‘more constitutionally offensive, not less so.’¹²² The court retained the due-diligence and reporting requirements but struck out the mandate to disclose to the public whether products were ‘conflict-free.’

The conflict minerals provision faced further criticism from the Chair of the SEC for its (apparently incompatible) goal of exerting ‘societal pressure on companies to change behaviour, rather than to disclose financial information that primarily informs investment decisions.’¹²³ This in addition to comment from Congolese academic and industry stakeholders who stress that its effect has simply been a ‘defacto embargo,’¹²⁴ encouraging the largest investors to go ‘Congo free’ rather than comply with the regulations - which has left miners out of work and turning to militia recruitment for quick cash¹²⁵ – an entirely counter-productive outcome.

2 Proposed Federal Legislation - Business Supply Chain Transparency on Trafficking and Slavery Act

¹¹⁹ Ibid.

¹²⁰ *National Association of Manufacturers v Securities and Exchange Commission*, 748 F 3d 359 (DC Cir, 2014).

¹²¹ Ibid.

¹²² Ibid (Randolph J).

¹²³ Mary Jo White, ‘The Importance of Independence’ (14th Annual A.A. Sommer, Jr. Corporate Securities and Financial Law Lecture, Speech delivered at the Fordham Law School, New York, N.Y., 3 October 2013).

¹²⁴ Christoph Vogel and Ben Radley, ‘In Eastern Congo, economic colonialism in the guise of ethical consumption?’ (10 September 2014) The Washington Post <<https://www.washingtonpost.com/news/monkey-cage/wp/2014/09/10/in-eastern-congo-economic-colonialism-in-the-guise-of-ethical-consumption/>>.

¹²⁵ Ibid.

In June 2014, a bi-partisan federal bill¹²⁶ (HR 4842) was introduced¹²⁷ that would impose supply chain transparency obligations on all businesses with receipts over US\$100m, and ‘provide consumers information on products that are free of child labour, forced labour, slavery, and human trafficking.’¹²⁸ The desired effect of such information being available was that ‘businesses and consumers ... (could) avoid inadvertently promoting or sanctioning these crimes through production and purchase of goods and products that have been tainted in the supply chains.’¹²⁹ Similarly to *Dodd-Frank* discussed above, the legislation would direct the SEC to issue regulations requiring ‘certain companies to disclose information describing any measures the company has taken to identify and address conditions of forced labour, slavery (and) human trafficking ... within the company’s supply chains.’¹³⁰ HR4842 was not passed after being introduced late in the session with minimal time to garner support, though it has been reintroduced in the new Congressional session in identical format (HR3226).¹³¹ The proposed legislation is closely based on California’s model (which will be discussed below), though if passed its effect would be particularly broad given its federal application and operation upon all businesses, not just those in retail and manufacturing. HR3226 is currently referred to the House Committee on Financial Services. Australian legislators would be wise to closely follow the progress of HR3226 – if passed it will represent a significant shift towards the leading Western trade countries imposing supply chain transparency obligations on multinational corporations as part of broader international commitments to eradicate human trafficking, forced labour and slavery.

3 State legislation – California Transparency in Supply Chains Act

Under the *California Transparency in Supply Chains Act* (CTSCA)¹³² large retail and manufacturing businesses are required to clearly and conspicuously¹³³ publish the

¹²⁶ Business Supply Chain Transparency on Trafficking and Slavery Act, HR Res 4842, 113th Congress (2014)

¹²⁷ Ibid.

¹²⁸ Business Supply Chain Transparency on Trafficking and Slavery Act, HR Res 3226, 114th Congress (2015) (2)(b)(3).

¹²⁹ Business Supply Chain Transparency on Trafficking and Slavery Act, HR Res 3226, 114th Congress (2015) (2)(b)(4).

¹³⁰ Business Supply Chain Transparency on Trafficking and Slavery Act, HR Res 3226, 114th Congress (2015).

¹³¹ Feasley, above n 9, 8.

¹³² *California Transparency in Supply Chains Act of 2010*, 556 Cal Civil Code §1714.43 (West 2010) (‘CTSCA’).

efforts they have made to combat the presence of forced labour in their supply chains (known as an SB 657 statement). The push for disclosure legislation came largely from lobbying of civil society groups, though it was opposed at the time by business groups who claimed it would impose an unreasonable burden of compliance.¹³⁴ Again, legislators justified the change by citing its potential to drive behavioural change through traditional market forces - consumers making informed, ethical purchases would presumably boycott those businesses unable to guarantee a slavery free supply, and thus 'motivate business to ensure humane practices throughout the supply chain.'¹³⁵

Businesses required to comply with the CTSCA are those in the retail and manufacturing sector; commercially domiciled or transacting in California; with worldwide gross receipts over US\$100m.¹³⁶ To comply, the company's statement must provide information regarding the efforts taken to do the following with respect to goods in their supply chain:

- Verify the supply chain by evaluating risks of modern slavery and whether this verification has been conducted by a third party
- Audit suppliers to determine if they comply with the company's standards for human trafficking and again, whether this audit was conducted by a third party
- Request ethical source certification from direct suppliers regarding *their* suppliers further down the chain
- Implement internal accountability for procedure where employees and sub-contractors fail to meet the standards required to eliminate forced labour from the business
- Train personnel with supply chain responsibility about human trafficking, forced labour and slavery.¹³⁷

The legislation has now been in effect since 2012, and has come under criticism on a number of grounds, but particularly for its failure to specify what constitutes adequate compliance for removing forced labour from the supply chain,¹³⁸ and the lack of any

¹³³ Anthony V. Lupo, Sarah L. Bruno and Eva J. Pulliam, 'The California Supply Chains Transparency Act of 2010' *The Computer and Internet Lawyer* 29 (4) 13.

¹³⁴ New, above n 2, 700.

¹³⁵ New, above n 2, 700, quoting Governor Arnold Schwarzenegger.

¹³⁶ CTSCA (a)(1).

¹³⁷ Lupo, Bruno and Pulliam, above n 133, 13.

¹³⁸ Feasley, above n 9, 8.

evidence of having achieved the consumer driven change it was touted to instigate.¹³⁹ One author draws the comparison between Dunkin' Donuts SB 657 statement, and that of a competitor Krispy Kreme.¹⁴⁰ Dunkin' Donuts statement positively responds to each of the CTSCA compliance requirements, albeit in a generalist manner that reveals very little detail. For example:

‘We screen suppliers on many business related criteria as well as their compliance with matters of law. We seek partners that comply with government regulations, including those concerning human ethics. Our suppliers are required to acknowledge, and agree to, our Supplier Code of Conduct.’

Meanwhile, Krispy Kreme have facially interpreted¹⁴¹ the CTSCA and openly state they do not verify supply chains, nor conduct auditing of their own or with the assistance of third parties; that they do not require their suppliers to do so and do not actively train staff in ethical procurement matters. The author notes that despite this, Krispy Kreme ‘has neither experienced any measurable impact on sales nor suffered on any measure of corporate reputation.’¹⁴² This type of SB 657 response does at least negate the argument of an unreasonable burden of compliance – a company can merely state they have done nothing at all in order to comply. While the Krispy Kreme version of an SB 657 statement may have resulted in apparent marketplace impunity thus far,¹⁴³ consumers are increasingly becoming more demanding about the provenance of their purchases¹⁴⁴ and it may simply be too early for this groundswell of sentiment to take hold on a company’s bottom line. Nonetheless, it has to be noted that even statements of the Dunkin’ Donuts kind – entirely compliant with the CTSCA and apparently representing the positive change such legislation is designed to create – is still so non-committal in its wording that it is potentially just empty corporate rhetoric devoid of any substantial investigation going to the source of supply. Given the only remedy for inaction upon or violation of the CTSCA is injunctive relief to compel compliance,¹⁴⁵ there is little impetus driving true eradication of forced labour from the supply under this model.

¹³⁹ New, above n 2, 700.

¹⁴⁰ Ibid.

¹⁴¹ Feasley, above n 9, 8.

¹⁴² New, above n 2, 701.

¹⁴³ Ibid.

¹⁴⁴ Gopalan and Hogan, above n 1, 8.

¹⁴⁵ Feasley, above n 9, 8.

C United Kingdom

The United Kingdom recently passed the relatively progressive *Modern Slavery Act 2015* (UK).¹⁴⁶ In addition to criminalising human trafficking, forced labour and slavery, it includes provision for the protection of victims and the establishment of an Independent Anti-Slavery Commissioner.¹⁴⁷ Importantly here, section 54 provides for transparency in supply chains. The UK has drawn on the Californian example, in that businesses over a certain annual turnover threshold (currently prescribed by regulation at £36m)¹⁴⁸ will be required to issue a slavery and trafficking statement for each financial year.¹⁴⁹ A company must outline ‘the steps it has taken to ensure there is no slavery or trafficking in its supply chains or its own business, or (state) that it has taken no such steps.’¹⁵⁰ This is undeniably similar to the Californian model, but the UK measure professes to go further in three ways:¹⁵¹

- It applies to organisations who conduct *any* part of their business in the UK
- It applies to *all* industry sectors
- It applies to goods *and* services

Unlike the Californian model, s 54 also makes recommendations about the substantive content of a company’s slavery and trafficking statement. It may include information about the organisational structure and supply chains; existing policies and due-diligence processes; whether there are particular areas in the business that lend themselves to risk of slavery and how the company is addressing that risk; their effectiveness in tackling the issue (measured against benchmarks it considers appropriate) and the ethical procurement training afforded to its staff.¹⁵² Like California, the only remedy for non-compliance is injunctive relief to compel the issuing of a statement;¹⁵³ though the newly appointed Anti-Slavery Commissioner has indicated willingness to ‘name and shame’ businesses that fail to clean up supply chains, stating that ‘no company in the world

¹⁴⁶ *Modern Slavery Act 2015* (UK) c 30.

¹⁴⁷ Explanatory Memorandum, *Modern Slavery Act 2015* (UK) c 30.

¹⁴⁸ *Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015* (UK) SI 2015/1833, 2.

¹⁴⁹ *Modern Slavery Act 2015* (UK) c 30, s 54 (1).

¹⁵⁰ *Ibid* s 54 (4).

¹⁵¹ Home Office, *Modern Slavery and Supply Chains, Government Response: Summary of consultation responses and next steps* (29 July 2015) 5.4.

¹⁵² *Modern Slavery Act 2015* (UK) c 30, s 54 (5).

¹⁵³ *Ibid* s 54 (11).

wants to be shown as employing slaves.’¹⁵⁴ Preparedness to shame individual businesses evinces shades of the Brazilian dirty list, and if genuinely implemented would address the tendency towards empty corporate rhetoric seen in the Californian model.

IV Options for Australia

Australia must deploy a legislative mechanism that compels multi-national corporations to proactively examine their supply chains for exploitative practices, and then report on the actions taken to eliminate them. The following reform proposals are an attempt to find a legislative solution that complies with international obligations while simultaneously asking more of the corporations themselves in eradicating modern slavery.

A Which model?

As described above, various methods of addressing exploitation within business supply chains have been attempted internationally. Brazil’s approach is unquestionably progressive and highly effective, but is nonetheless inappropriate for the Australian context. This is because Australian multinationals connection with modern slavery is largely occurring offshore; and business groups are likely to lobby hard against punitive measures such as denial of credit facilities. The Californian model is an early adoption in the right direction, but unfortunately only applies to certain business sectors and offers little in the way of penalty for non-compliance. The UK model (on which the proposed Federal U.S. legislation is mostly based) is the best example for Australia, as it is an evolution from the most effective elements of the Californian legislation. Section 54 of the U.K.’s Modern Slavery Act should be the guiding light for Australian legislators, as it applies to all business types and establishes the office of Anti-Slavery Commissioner to monitor business compliance with the Act. Australia could evolve from this model again by instilling in this office a function of liaising with business and assisting them with due diligence measures, as well as the power to impose penalties for non-compliance.

B Which companies?

¹⁵⁴ Peggy Hollinger, ‘UK anti-slavery watchdog tells business to clean up supply chains’, *Financial Times* (online), 17 November 2014 < <http://www.ft.com/intl/cms/s/0/2e795028-6c4c-11e4-990f-00144feabdc0.html#axzz3yobUoHKh>>.

The matter of determining which companies need to comply with transparency legislation has been addressed in divergent ways among the jurisdictions examined. Brazil's approach of wide scale monitoring and then public listing of rogue companies would not be appropriate in the Australian context, as the expense of implementing monitoring of this type on a global scale would be immense – not to mention still hamstrung by the regulatory gap as already discussed. The U.S. Conflict Minerals provision would not be appropriate given that it targets a specific commodity, and modern slavery is found across all kinds of industries and at many stages of production - it is not unique to a specific material or component. California's model required businesses within the retail and manufacturing sector to disclose the actions taken to monitor their supply chains; while the UK's model successfully evolved from this to extend transparency requirements to all business types with turnover above a given threshold. The Federal U.S. provision will closely adopt this model if passed. The U.K. method provides a working example of supply chain transparency legislation applying to all business types and operating in a jurisdiction with similar public infrastructure and judicial hierarchy to Australia. It is therefore viable to impose the same conditions for application of the proposed Australian legislation, i.e. that it will operate on all businesses exceeding a turnover threshold prescribed by regulation. Like the U.K., Australian legislators should call for submissions from relevant stakeholders¹⁵⁵ to establish the appropriate trading threshold for this market.

C Dealing with companies who disclose 'no action taken'

By asking multi-national corporations to disclose the actions they have taken to eradicate forced labour from their supply chains, the intent is that they will be compelled to investigate the provenance of their product in a genuine manner; or at the very least will be financially impacted by the court of public opinion when they disclose no action taken. However, as demonstrated in the Californian example of Dunkin' Donuts and Krispy Kreme, it is entirely possible under that model for a company to state they have taken no action to investigate their supply chain at all – and for this to have no punitive impact on the company's bottom line. Australia's model should address this weakness by utilising a combination of the UK and Brazilian models.

¹⁵⁵ Home Office, *Modern Slavery and Supply Chains, Government Response: Summary of consultation responses and next steps* (29 July 2015) 5.4.

Australia should establish a monitoring office that will collaborate with companies who make a 'no action taken' statement and assist them to establish better due-diligence procedures. The UK's appointment of an Anti-Slavery Commissioner is a viable option for Australia, and such an office would be an ideal process owner for such monitoring and liaison functions. For companies that are party to the UN Global Compact, these interactions with the Anti-Slavery Commission would be a positive inclusion in their annual 'Communication on Progress.' Those companies professing to adhere to the UN Guiding Principles on Business and Human Rights should welcome such a relationship with the Anti-Slavery Commissioner. Australia should then take the opportunity to evolve again from the U.K model and be a world leader in this field by imposing penalties for any refusal to engage with the Anti-Slavery Commission. Like Brazil, administrative and judicial appeal should be available from such decisions.

D Navigating Challenges

Any proposal to introduce supply chain transparency legislation in Australia should take note of the challenges this kind of legislation has faced in similar jurisdictions.

Business groups lobbying against supply chain transparency has been a consistent challenge across all the jurisdictions examined, irrespective of the model. The Supply Chains Working Group established by the *National Action Plan to Combat Human Trafficking and Slavery* (discussed in Part I) has included business leaders as relevant stakeholders and this should serve to ensure their needs are heard. The burden of compliance can be minimised by instituting a Californian/UK style model that does allow a business to state that they have not taken any action to eradicate modern slavery from their supply chain in the financial year. However, it must be accepted by business groups that such statements will either result in a relationship with the Anti-Slavery Commission (under the proposed model above) or at the very least a level of negative consumer sentiment.

The injunctions sought by business groups in Brazil resulted in the effectiveness of that otherwise highly successful model being stymied. To address any challenge as to the source of power to impose supply chain transparency requirements and availability of appeal rights; Australia should ensure its measure carries legislative and not merely regulatory weight of a given department.

The Constitutional challenge mounted against the U.S. Conflict Minerals provision on freedom of speech grounds is one such example. While there is no express Australian constitutional provision granting freedom of speech, an implied freedom of political communication has been found¹⁵⁶ to exist by operation of the sections of the Constitution that create a system of representative government.¹⁵⁷ Unlike the U.S., this does not confer an absolute freedom but rather applies only to communications that are necessary for the effective operation of representative and responsible government¹⁵⁸ – that is, in order to inform the voting public. Communications that are commercial in nature are not protected¹⁵⁹ and Australian legislation that compels disclosure of actions taken to eradicate modern slavery from supply chains could readily withstand a constitutional challenge of the kind mounted in the U.S.

The Conflict Minerals provision also attracted criticism for inadvertently creating a ‘defacto embargo’ where companies simply avoided sourcing their products from the Congo - resulting in a counter-productive increase in miners turning to militia work. Australia could avoid creating a similar problem for already vulnerable victims by assisting corporations to continue working with their suppliers who are found to be using forced labour, rather than to terminate contracts. Termination of contracts would only serve to drive the issue further underground or into another company’s chain. The discovery of modern slavery does not have to be the end of business with a supplier - it is an opportunity to improve, and to actually have a measurable impact overall.

E Examining alternatives: Expanding existing domestic legislation

It has been suggested that Australia need not go to the extent of imposing an entirely new set of legislative obligations on companies, but rather broadening existing ones to incorporate supply chain transparency measures.¹⁶⁰ As discussed above, the continuous disclosure obligations that already exist for some Australian companies represent one option of implementing such expansion. However while this would ensure companies with existing disclosure obligations are netted by the provision, those who may have

¹⁵⁶ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

¹⁵⁷ Namely *Australian Constitution s 7* and *Australian Constitution s 24* that determine the composition of the Senate and House of Representatives respectively.

¹⁵⁸ LexisNexis, *Halsbury’s Laws of Australia*, 90 Constitutional Law, ‘Freedom of Political Communication’ [90-7230] (at 2 September 2011).

¹⁵⁹ *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.

¹⁶⁰ Gopalan and Hogan, above n 1, 2.

complex transnational supply chains are not always disclosing entities for the purposes of the Corporations Act. Further, the author suggesting this model recommends using internal staff with visibility over supply chain as ‘whistleblowers.’¹⁶¹ That seems like an unsophisticated solution, particularly when modern slavery often occurs in situations of criminality and genuine threat to people’s life and safety.¹⁶² A legislative measure such as that proposed is a safer method, ensuring that companies themselves will direct their staff with visibility over supply chains to report on instances of exploitation and there is no requirement for that staff member to ‘blow the whistle’ on their employer.

Expanding the Criminal Code provisions to enable liability to attach to a corporation ‘involved’ in human trafficking or forced labour is unlikely to yield any prosecutions as proof of intention would almost invariably be lacking. Finally, the U.S. has encountered repeated challenge to the civil liability provisions in the *Alien Torts Act* and the *Trafficking Victims Protection Act* such that any Australian endeavour to pass similar measures or mount a case relying on persuasive authority is unlikely to be successful. Even if there were provisions available in these areas, they would only serve to compensate individual instances of exploitation, rather than address the modern slavery epidemic overall. Compelling corporations to disclose the actions they have taken to eradicate exploitation from their supply chains is a far better solution that rightly imposes the responsibility for this social issue on its source.

V Conclusion

The experience of José Pereira is demonstrative of how disclosing modern slavery is the first step to eradicating it. Australia is at the precipice of an opportunity to be a world leader in this field, and realise quantifiable change for victims of modern slavery worldwide. This paper has outlined the pervasive nature of modern slavery and the way in which Australian consumers are unwittingly contributing to its proliferation with

¹⁶¹ Ibid 4.

¹⁶² New, above n 2, 699.

ordinary household purchases. Even the most prudent consumer would have difficulty in completely separating themselves from modern slavery victims at the other end of the supply chain in the modern globalised marketplace. The onus must therefore be on corporations to examine the provenance of their raw materials, and to improve supplier relationships and practices as a result. As this paper has demonstrated, the existing international and domestic legal frameworks governing human trafficking, forced labour and slavery are currently ill equipped to bring about this change and they are insufficiently assisted by existing voluntary efforts from the business community. Lessons must be learnt from other jurisdictions about implementing supply chain transparency legislation, and the challenges experienced in both implementation and effect. Australia can capitalise on those lessons to successfully introduce a legislative compulsion for all companies above a given turnover threshold to disclose the actions they have taken to eradicate modern slavery from their supply chains. Where corporations disclose no action taken to eradicate modern slavery from their supply chains, Australia is well placed to create an administrative function like that of the UK's Anti-Slavery Commissioner – and to imbue that function with a culture of assisting such companies to improve their practices – rather than slurring their reputation. In doing so, Australia will continue to uphold its international obligations to eradicate human trafficking, forced labour and slavery globally; while also placing the onus of responsibility for that exploitation on its rightful source – the corporations themselves.

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