



28 April 2017

Senator David Fawcett
Chair
Joint Standing Committee on Foreign Affairs, Defence and Trade
PO Box 6021
Parliament House
Canberra ACT 2600

By email: jscfadt@aph.gov.au

Dear Senator Fawcett

Law Council Submission on Establishing a Modern Slavery Act in Australia

Thank you for the opportunity to make a submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade inquiry into Establishing a Modern Slavery Act in Australia (**the Inquiry**).

Please find **attached** the Law Council of Australia's submission to the Inquiry.

Please contact Dr Natasha Molt, Senior Legal Advisor, Policy Division _____ or
_____ in the first instance should you require further
information or clarification.

Yours sincerely

Fiona McLeod SC
President



Law Council
OF AUSTRALIA

Establishing a Modern Slavery Act in Australia

Joint Standing Committee on Foreign Affairs, Defence and Trade

28 April 2017

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of its Business and Human Rights Committee, Financial Services Committee of the Business Law Section, as well as the Law Society of England and Wales, Law Society of South Australia and the Law Society of New South Wales, in the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to make a submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade's (**the Committee**) Inquiry into Establishing a Modern Slavery Act in Australia, opened 17 February 2017 (**the Inquiry**).
2. The Law Council considers addressing modern slavery to be of paramount importance and has previously made submissions related to this issue, including to the Joint Committee on Law Enforcement Inquiry into Human Trafficking,¹ and the Committee's Inquiry into Slavery, Slavery-like conditions and People Trafficking,² as well as recently publishing a report in conjunction with Anti-Slavery Australia on Establishing a National Compensation Scheme for Victims of Commonwealth Crime in relation to victims of human trafficking.³
3. Eliminating slavery and slavery-like conditions is a global priority and is reflected in commitments set out in international instruments, including the following to which Australia is a party:
 - a. the United Nations *Convention against Transnational Organized Crime*, including *the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*;
 - b. the United Nations *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;
 - c. the United Nations *Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power*;
 - d. the *International Covenant on Civil and Political Rights*; and
 - e. the *Convention on the Elimination of All Forms of Discrimination Against Women*.
4. In addition, both the United Nations *Guiding Principles on Business and Human Rights (UNGPs)* and Organization for Economic Cooperation and Development (**OECD**) *Guidelines for Multinational Enterprises (OECD Guidelines)* set out standards and guidelines for companies to ensure they are not violating human rights, including by profiting from modern slavery, in their operations and supply chains.

¹ Law Council of Australia, *Submission to Joint Committee on Law Enforcement Inquiry into Human Trafficking* (15 February 2016)
<http://www.apf.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/Human_trafficking/Submissions>.

² Law Council of Australia, *Submission to Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into Slavery, Slavery-like conditions and People Trafficking* (2 October 2012)
<http://www.apf.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jfadt/slavery_people_trafficking/subs.htm>.

³ Law Council of Australia, Anti-Slavery Australia and the University of Technology Sydney, *Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime* (2016)
<<https://lawcouncil.asn.au/lawcouncil/images/LCA-PDF/National-Compensation-Scheme-for-Victims-of-Commonwealth-Crime.pdf>>.

5. The Law Council has been pleased to note the introduction of domestic laws worldwide aimed at eliminating modern slavery in all its forms, including the California Transparency in Supply Chains Act (**California Supply Chains Act**), the French law creating a duty for companies to produce vigilance plans to prevent major human rights, health and environmental disasters (**French vigilance plan law**),⁴ the Dutch Bill on eliminating child labour from supply chains (**Dutch Bill on child labour**), and the UK's *Modern Slavery Act 2015* (UK) (**UK MSA**).
6. In this regard, the Law Council welcomes this Inquiry which seeks to examine modern slavery in all its forms, its presence in company supply chains, how victims of modern slavery might be compensated for harm suffered and whether or not a Modern Slavery Act (**MSA**) akin to the UK MSA should be introduced in Australia.
7. Australia already has a strong criminal law framework that criminalises human trafficking, slavery and slavery-like practices, regardless of whether or not they occur in Australia or overseas. However, criminalisation is but one tool in the fight to eliminate modern slavery in Australia and worldwide. An overarching strategy accounting for all stakeholders, including governments, companies, civil society and survivors, is required, to eliminate modern slavery at its source and provide effective remedy for its victims.
8. To that end, the Law Council considers that there are some gaps in the Australian framework. Namely, despite Australia's international obligations to provide restitution for victims of trafficking, slavery and slavery-like practices, Australia still lacks a federal compensation scheme for victims of modern slavery. Further, Australian businesses have no domestic legal obligation to conduct due diligence to identify and eliminate modern slavery risks in their supply chains. In addition, while Australia has an Ambassador on People Smuggling and Human Trafficking, there is no independent body or office dedicated to coordinating Australia's response to modern slavery in all its forms, especially domestically, nor is there a regulator providing oversight to businesses.
9. The Law Council supports the introduction of a Modern Slavery Act in Australia. The UK MSA is a strong first step and considered to be a "game changer" by some in eliminating modern slavery in the UK.⁵ However, it could be improved, and several lessons can be gleaned from its effectiveness and weaknesses identified since its enactment. The Law Council, in preparing this submission, consulted with the Law Council of England and

⁴ The law was borne out of, in part, the Rana Plaza disaster in Bangladesh where a building populated by five garment factories that supplied global companies, many of them French, collapsed and killed 1135 workers, who were revealed to have been working under appalling conditions: see Elodie Aba, "Opportunity for France to hold companies legally responsible for human rights abuses by subsidiaries abroad" (12 February 2015) *Business and Human Rights Centre* <<https://business-humanrights.org/en/opportunity-for-france-to-hold-companies-legally-responsible-for-human-rights-abuses-by-subsidiaries-abroad>>.

⁵ See CORE, "Modern Slavery Act could be a 'game changer' on supply chain transparency" (11 December 2015) *European Coalition for Corporate Justice* <<http://corporatejustice.org/news/154-modern-slavery-act-could-be-a-game-changer-on-supply-chain-transparency>>; see also Jane Moyo, "New report and survey finds Modern Slavery Act is galvanising leadership action in progressive companies" (27 October 2016) *Ethical Trading Initiative* <<http://www.ethicaltrade.org/blog/new-report-and-survey-finds-modern-slavery-act-galvanising-leadership-action-in-progressive>>.

Wales, which identified a number of the shortcomings of the MSA.⁶ Those shortcomings and others are discussed below, with an emphasis on how they can be addressed to strengthen Australian legislation.

10. The Law Council considers that the Australian Government now has a unique opportunity to become a world leader on the elimination of modern slavery, through enacting measures that reflect “best practice” worldwide but with the benefit of being able to learn from the experiences of the UK to ensure Australian legislation is effective from enactment.⁷ In this regard, the Law Council makes the following key recommendations:

- A national compensation scheme for victims of modern slavery should be created. This should include a national fund to which victims of modern slavery can apply for an award, which covers the full spectrum of harm that they may have suffered. Compensation from the fund should be available to victims regardless of whether or not they cooperate with or assist law enforcement. The Australian Bridging Visa E and/or Bridging Visa F schemes should be extended to permit victims of modern slavery to remain in Australia while their application for compensation is processed and concluded.
- Reporting requirements for business should be introduced, mandatory for companies listed on the Australian Stock Exchange (**ASX**) and businesses with a presence in Australia that meet a certain turnover threshold, regardless of business structure, and voluntary for all other businesses. The Australian Government should consult with Australian business, civil society and other relevant stakeholders regarding the amount of the turnover threshold to attract the operation of the reporting requirements, being mindful to strike an appropriate balance between not unduly burdening businesses with regulation and addressing modern slavery risks in supply chains of business.
- As part of these reporting requirements, eligible businesses should be required to report on the steps they have taken to identify, investigate and eliminate modern slavery in their supply chains. The specific matters that companies are required to report on in their statements should be based on the UNGPs rather than section 54 of the UK MSA. Regardless of what companies are required to specifically report upon in their statements, the grounds which businesses are required to address in their statements should be mandatory. Eligible businesses should not be able to comply with their reporting requirements by

⁶ In particular, the Law Society of England and Wales pointed to the oversights of the MSA identified by the House of Commons library, namely that the MSA does not address the issue of legal assistance and the difficulties that victims of trafficking and slavery have had in accessing legal aid; domestic workers on the tied visa scheme are unable to change employers without losing their visa, thereby creating conditions that are ripe for their exploitation; the reporting requirements are “light touch” laws and initial company statements have been lacklustre; and there is no government central repository for company statements: see House of Commons Library, *Modern Slavery Act 2015: Recent developments* (22 July 2016) 10-11 <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7656#fullreport>>.

⁷ Jeffrey Vogt, director of the Rule of Law department at the Solidarity Centre, the largest US-based international worker rights organisation has observed that “[i]t is important for Australia to learn from the UK’s example and close these loopholes... [it] would set a new standard for supply chain transparency and perhaps move us one step closer to true accountability in global supply chains. See Jeffrey Vogt, “Efforts to clean up global supply chains so far come up short” (22 March 2017) *Open Democracy* <<https://www.opendemocracy.net/beyondslavery/jeffrey-vogt/efforts-to-clean-up-global-supply-chains-so-far-come-up-short>>.

stating that they have taken no steps to address modern slavery in their supply chain, or at the very least, they should be required to explain why they consider they do not need to take any steps.

- The framework for reporting requirements under any MSA should include sanctions for non-compliance. ASIC should be designated as the regulator under any MSA and given powers to investigate and enforce sanctions for non-compliance, and resourced appropriately for this purpose. The Australian Government should also consider strengthening the Australian National Contact Point (**ANCP**) as a non-legal mechanism to provide oversight and non-binding guidance to Australian businesses on human rights issues relevant to modern slavery.
- A free, government-hosted online central repository containing company statements made under any MSA enacted in Australia should be created, preferably administered by ASIC or the Anti-Slavery Commissioner or Ombudsman, who should be resourced appropriately for this purpose.
- An office of the Independent Anti-Slavery Commissioner or Ombudsman should be created to take charge of Australia's response to modern slavery, working with and providing education to relevant stakeholders, including law enforcement, civil society groups that work with survivors, and the private sector.
- A right to civil remedy which would allow victims of modern slavery to bring a civil case against those involved in their exploitation should be introduced. Due to the lower civil burden of proof, and circumvention of issues otherwise involved with bringing criminal proceedings against a legal person, the ability to bring civil proceedings may create an effective remedy for victims of modern slavery. The possibility of having civil proceedings brought against them may also deter companies that might otherwise seek to profit from slavery or slavery-like conduct.
- Survivors of modern slavery should have access to legal aid to provide them with the assistance they need to escape their situation, seek restitution and avoid being victimised in future.
- No change is required to existing Australian criminal provisions on modern slavery, which are sufficient, and are stronger than the UK MSA in terms of extraterritorial application. There is no real need for reparation orders in the form of section 8 of the UK MSA to be introduced in Australia, as courts already have the power to grant reparation orders against persons convicted of federal offences under the *Crimes Act 1914* (Cth) (**the Crimes Act**). Due to the difficulty of obtaining convictions for offences constituting modern slavery, federal compensation for victims, rather than reform of penalties for slavery and slavery-like offences, should be considered the priority.

Background on modern slavery in Australia and globally

11. It is estimated that 45.8 million people worldwide are held in slavery or in slavery-like conditions.⁸ Slavery-like conditions may include forced labour and wage exploitation, involuntary servitude, debt bondage, human trafficking, forced marriage and other slavery-like exploitation, forms of which are present in Australia.
12. To combat these practices, anti-slavery laws were introduced in Australia in 1999. The case of *R v Tang*⁹ was Australia's first prosecution under these laws, involving a brothel owner who employed women brought into Australia from Thailand under a "purchase agreement" on visas obtained illegally, and who made women work six days a week to pay off an alleged debt of \$45 000, or approximately 900 clients. Tang was convicted, which was overturned by the Victorian Supreme Court, but ultimately upheld by the High Court of Australia, who established the constitutional validity of the anti-slavery provisions of the *Criminal Code Act 1995* (Cth) (**Criminal Code**).¹⁰
13. Indeed, the majority of people held in modern slavery identified by Australian authorities are women trafficked from Asia for exploitation in the sex work industry. Almost all victims identified by authorities are adult females of Asian background who were trafficked from Thailand, South Korea, Malaysia and the Philippines to Australia.¹¹ Currently available data indicates that between 2004 and June 2012, the Australian Federal Police (**AFP**) undertook 346 investigations and assessments of slavery and people trafficking offences.¹² As at March 2017, there had been only 23 prosecutions for people trafficking, with even fewer resulting in a criminal conviction.¹³
14. However, modern slavery in Australia is not just limited to sexual exploitation. In recent years, trafficked persons are being identified in industries other than sex work, such as domestic work, hospitality, agriculture and construction, in numbers that outnumber those trafficked for sex work.¹⁴ The Law Society of New South Wales has noted that there have been a number of recent cases in NSW and Australia, particularly in the horticultural sector, which demonstrate labour exploitation in Australian businesses and associated supply chain operations is widespread.¹⁵

⁸ See Walk Free Foundation, *The Global Slavery index 2016* (2016) <<http://www.globalslaveryindex.org>>.

⁹ *R v Wei Tang* [2006] VCC 637 (Supreme Court of Victoria, McInerney J) and *R v Wei Tang* (2007) 16 VR 454 (Court of Appeal of the Supreme Court of Victoria).

¹⁰ *R v Wei Tang* [2008] HCA 39; (2008) 237 CLR 1.

¹¹ Fiona McLeod SC, "Human Trafficking and Exploitation in Australia" in Nora M Cronin and Kimberly A Ellis (eds) *Human Trafficking: Emerging Legal Issues and Applications* (Lawyers & Judges Publishing Company, 2012) 72.

¹² Australian Government, *Trading Lives: Joint Standing Committee on Foreign Affairs, Defence and Trade: Slavery, Slavery like-conditions and People Trafficking* (2012) 6.

¹³ United Nations Office of Drugs and Crime, *Human Trafficking Case Law Database* (2017) <<https://www.unodc.org/cld/v3/htms/cldb/index.html?>>.

¹⁴ Australian Government, *Submission to the New South Wales Legislative Council Select Committee's inquiry into human trafficking (Submission No 23)* 2

<<https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-submission-details.aspx?pk=%2057295>>.

¹⁵ See for example, Fair Work Ombudsman, "26 migrants exploited at NSW blueberry farm" (25 August 2016) *SBS online* <<http://www.sbs.com.au/yourlanguage/hindi/en/article/2016/08/25/26-migrants-exploited-nsw>>.

15. In one case of labour exploitation, *Ram v D&D Indian Fine Food Pty Ltd & Trivedi*,¹⁶ Mr Ram had been trafficked from rural India to work in Mr Trivedi's Indian restaurant in Sydney, where Mr Ram was held as a slave for 16 months. Until the case was brought to the Federal Circuit Court, where Mr Ram was awarded his rightful wages for the period which he went unpaid, Mr Trivedi had managed to deceive the Fair Work Commission, Department of Immigration and Australian Tax Office by constructing a facade of legitimate employment for Mr Ram with sham documents.
16. In addition to sexual and labour exploitation, awareness is increasing around cases involving domestic servitude and sham marriages in Australia. For example, the Law Society of South Australia has identified that, in South Australia, domestic violence services are increasingly identifying women who have come to Australia to marry, with the intention of studying and improving their circumstances, based on promises that have been made by their partners, and then met with very different arrangements when they arrive in Australia.
17. In *Re v Kovacs*,¹⁷ a married couple, Mr and Mrs Kovac, was charged with offences relation to a sham marriage under the *Migration Act 1958* (Cth) (**Migration Act**) and a slavery offence under the Criminal Code. They had arranged and paid for a male friend to travel to the Philippines to marry a woman with the intention of bringing her back to Australia to work in their take-away shop and home as a domestic servant. When she returned to Australia, she was effectively enslaved, working 18 hour days, seven days a week for extremely low remuneration, and had her passport confiscated. After being convicted, the Kovacs challenged their convictions on the basis that she had a degree of personal freedom inconsistent with the definition of slavery under the Criminal Code. While the repeal was ultimately rejected, the Queensland Court of Appeal set aside a number of the verdicts and ordered retrials. This case exposed the challenges involved with responding to the many and varied forms that modern slavery may take.¹⁸
18. In addition, Australian businesses operate worldwide, and long supply chains increase the risk of modern slavery, particularly where those supply chains extend into countries where the rule of law or legal protections may be weak. Even inadvertently, products that end up in Australia can be tainted by slavery. As Andrew Forrest, chairman of the Australian company Fortescue Metals and anti-slavery organisation, the Walk Free Foundation, has noted, there are "fingerprints of slavery" in every Australian home.¹⁹

blueberry-farm>; Nick McKenzie, "Fruit supplier to Coles and Woolworths using illegal foreign workers" (15 November 2016) *ABC News Online* <<http://www.abc.net.au/news/2016-11-15/fruit-supplier-to-coles-woolworths-using-illegal-foreign-workers/8023570>>.

¹⁶ [2015] FCCA 389 (27 March 2015).

¹⁷ [2009] 2 Qd R 51; (2009) 192 A Crim R 345.

¹⁸ See further Fiona McLeod SC, "Human Trafficking and Exploitation in Australia" in Nora M Cronin and Kimberly A Ellis (eds) *Human Trafficking: Emerging Legal Issues and Applications* (Lawyers & Judges Publishing Company, 2012) 75.

¹⁹ Andrew Forrest, "Slavery is the curse that has never really gone away" (2 December 2016) *The Australian* <<http://www.theaustralian.com.au/opinion/slavery-is-the-curser-that-has-never-really-gone-away/news-story/07c8f5586efb0595fd391f994c573aa0>>.

19. Successive Australian governments have taken a number of steps over the last decade to address modern slavery. In 2014, the Government introduced the *National Action Plan to Combat Human Trafficking and Slavery 2015-2019* (**National Action Plan**),²⁰ which sets whole-of-community strategy aims and measures to monitor Australia's impact and effectiveness in addressing modern slavery. While Australian governments are to be commended for prioritising modern slavery, the Law Council considers that pieces still missing from Australia's strategy include support for victims of modern slavery and oversight of businesses with supply chains with modern slavery risks. This submission therefore considers what measures may be effective in strengthening Australia's approach to modern slavery in these areas.

A national compensation scheme for victims of modern slavery

20. Australia does not have a national compensation scheme available for victims of modern slavery, though compensation is available in some circumstances to victims of crime at the State and Territory level. In a recent joint report with Anti-Slavery Australia on *Establishing a National Compensation Scheme for Victims of Commonwealth Crime* (**Report on Establishing a National Compensation Scheme**), the Law Council identified the inadequacies of the current compensation schemes, for reasons including that State and Territory level schemes are not designed to provide a remedy to victims of Federal offences against the person, are inconsistent across jurisdictions, and fail to recognise the offences of forced labour, forced marriage and debt bondage, leaving some victims of modern slavery without access to statutory victims' compensation schemes.²¹

21. Providing compensation for victims must be a central element of any legal regime that seeks to eliminate modern slavery. Australia has a number of international obligations that implore the creation of an effective mechanism to provide compensation to survivors of modern slavery.²² Specifically, the *Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children* to the United Nations Convention

²⁰ See Australian Government, *National Action Plan to Combat Human Trafficking and Slavery 2015-2019* (2014) <<https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Trafficking-NationalActionPlanToCombatHumanTraffickingAndSlavery2015-19.pdf>>.

²¹ Law Council of Australia, Anti-Slavery Australia and the University of Technology Sydney, *Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime* (2016) 1 <<https://lawcouncil.asn.au/lawcouncil/images/LCA-PDF/National-Compensation-Scheme-for-Victims-of-Commonwealth-Crime.pdf>>.

²² See for example *United Nations Convention against Transnational Organized Crime*, opened for signature 15 December 2000, 2225 UNTS 209 (entered into force 29 September 2003) art 25(2); *Convention against torture and other cruel, inhuman or degrading treatment or punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 14(1); *United Nations Convention against Transnational Organized Crime*, GA Res 55/25, UN GAOR, 55th sess, 62nd mtg, Agenda item 105, Supp No 49, UN Doc A/RES/55/25 (entered into force 8 January 2001), Annex II art 6(6); *United Nations Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN GAOR, 3rd Comm, 40th sess, 96th plen mtg, agenda item 98, Supp No 53, UN Doc A/RES/40/34 (entered into force 29 November 1985) art 12; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2; *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 6.

against *Transnational Organized Crime (Palermo Protocol)*,²³ to which Australia is a party, provides at Article 6(6) that:

... [e]ach State Party shall ensure that its domestic legal system contains measures that offer victim of trafficking in persons the possibility of obtaining compensation for damage suffered.

22. In addition, the former UN Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, following her visit to Australia in 2011 recommended that, in light of Australia's international obligations, the Australian Government "[should] [e]stablish, at the federal level, a comprehensive compensation scheme for survivors of trafficking".²⁴ Further, the 2011 Universal Periodic Review of Australia included a recommendation that the Australian Government consider the establishment of a compensation fund for victims of trafficking.²⁵

23. While neither the Palermo Protocol nor the other international instruments to which Australia is a party specify what form any compensation scheme should take, options that would likely satisfy its requirements include:

- legislative provisions allowing courts to award criminal damages to victims;
- provisions which allow victims to sue offenders or others under statutory or common law torts for damages; and
- a dedicated fund that awards compensation to victims upon application.²⁶

24. For the reasons described below, the Law Council considers that introducing measures that cover all three options would ensure Australia satisfies its obligations as well as provides a robust framework with no gaps to ensure survivors of modern slavery are guaranteed some form of remedy. The merits of each, and the form they might take, are considered below.

Reparation orders

25. It should be noted that the UK MSA does not create an independent right to compensation for victims of trafficking or other forms of modern slavery. In the UK, victims of trafficking can already access compensation either through the *Criminal Injuries Compensation Scheme (CICS)* or a through a restoration order under section 8

²³ *United Nations Convention against Transnational Organized Crime*, GA RES 55/25, UN GOAR, 55th sess, 62nd plen mtg, Agenda Item 105, Supp No 49, UN Doc A/RES/55/25 (8 January 2001) annex II ("*Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*").

²⁴ Joy Ngozi Ezeilo, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, UN Doc A/HRC/20/18 (18 May 2012) [64].

²⁵ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 17th sess, Agenda item 6, UN Doc A/HRC/17/10 (24 March 2011) [86.85]; *Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council – Addendum – Recommended Principles and Guidelines on Human Rights and Human Trafficking*, UN ESCOR, 2002 substantive session, Agenda Item 14(g), UN Doc E/2002/68/Add.1 (20 May 2002) 6[4].

²⁶ Fiona McLeod SC, "Human Trafficking and Exploitation in Australia" in Nora M Cronin and Kimberly A Ellis (eds) *Human Trafficking: Emerging Legal Issues and Applications* (Lawyers & Judges Publishing Company, 2012) 86-97.

of the MSA if the person/s responsible for committing crimes against them have been convicted of an offence under the MSA.²⁷ A person cannot claim compensation from both the CICS and pursuant to a restitution order.²⁸

26. The Law Council considers that there would be little utility in adopting a provision similar to section 8 of the UK MSA in Australia. The Crimes Act already gives a court the power to order a person convicted of a federal offence to make reparation to any person, including by monetary payment or otherwise, for any loss suffered by the person by reason of the offence.²⁹
27. However, gaps are created by the existence of reparation orders in the absence of a national compensation scheme or right to civil remedy. In the UK, despite the existence of section 8 of the MSA and CICS, in the case of *Taiwo v Olaigbe; Onu v Akwiwu*, Lady Hale, with whom the majority agreed, observed that:

*If a person is convicted of [an offence under the Modern Slavery Act] and a confiscation order is made against him, the court may also make a slavery and trafficking reparation order under section 8 of the Act, requiring him to pay compensation to the victim for any harm resulting from the offence. But such orders can only be made after a conviction and confiscation order; and remedies under the law of contract or tort do not provide compensation for the humiliation, fear and severe distress which such mistreatment can cause.*³⁰

28. In Ms Taiwo's attempts to seek compensation for her harm suffered while being held in conditions of "systemic and callous exploitation" as a domestic worker,³¹ she made a claim in the Employment Appeal Tribunal for claims relevant to her exploitation, and which also included racial discrimination. While her claims made under the National Minimum Wage Act were upheld by the Tribunal, her claims under the Equality Act were dismissed, and became the subject of the appeal. Ms Onu, whose appeal was joined with that of Ms Taiwo, was appealing a similar finding by the Tribunal against her. Lady Hale, with whom the majority agreed, found that the appeals must fail, but noted in *obiter* that:

... [t]his is not because these appellants do not deserve remedy for all the grievous harms they have suffered. It is because the present law, although it can redress some of those harms, cannot redress them all. Parliament may well wish to address its mind to whether the remedy provided by section 8 of the Modern Slavery Act

²⁷ See *Modern Slavery Act 2015* (UK) s 8.

²⁸ "The Scheme is intended to be one of last resort. Where the opportunity exists for you to pursue compensation elsewhere you should do so... We may not make a decision on your case until such times as we are satisfied that you are eligible and you could not get compensation from any other sources": see Ministry of Justice and Criminal Injuries Compensation Authority, *Criminal injuries compensation: a guide* (18 November 2016) <<https://www.gov.uk/guidance/criminal-injuries-compensation-a-guide>>.

²⁹ *Crimes Act 1914* (Cth) s 54B(1)(d).

³⁰ [2016] UKSC 31 [1].

³¹ Ms Taiwo was a Nigerian woman brought to the UK legally on a domestic worker's visa. When she arrived, her passport was confiscated by her employer, and she was expected to be "on duty" during most of her waking hours and was not given rest periods. She was not given enough to eat and suffered a dramatic weight loss, as well as being subjected to both physical and mental abuse by her employer.

*2015 is too restrictive in its scope and whether an employment tribunal should have jurisdiction to grant some recompense for the ill-treatment meted out to workers such as these, along with the other remedies which it does have the power to grant.*³²

29. Noting these the remarks as to whether an employment tribunal should have jurisdiction to grant some recompense to victims of modern slavery, consideration might also be given to whether or not powers might be given to the Fair Work Commission to award restitution for cases where it finds there has been slavery or slavery-like practices involved.³³

Recommendation

- **The provision for a court to make reparation orders under section 21B of the *Crimes Act 1914* (Cth) should be retained and the model for reparation orders set out in section 8 of the UK MSA should not be adopted in Australia.**

Right to a civil remedy

30. Leading UK-based global anti-trafficking advocate and policy advisor, Parosha Chandran, writing on improvements that could be made to the UK MSA, considered that if victims had a right to civil compensation in the UK for slavery, trafficking or forced labour, they could bring a claim for damages against those responsible, and it would also have a serious impact on making businesses and persons more accountable for modern slavery.³⁴

31. Such a right exists in the US, where a civil remedy for trafficking and forced labour was introduced in 2003. The remedy was introduced with the intention of giving compensation to victims, but also to act as a deterrent to companies that might seek to exploit persons in conditions of modern slavery. In 2015, a US company, Signal International, was found liable and forced to pay US\$14 million in compensation to trafficked workers it deceived, indebted and abused on its construction sites following Hurricane Katrina.³⁵ After Signal International settled its claims, it filed for bankruptcy, perhaps serving as a warning to other companies of the consequences of seeking to

³² Ibid [34] (emphasis added).

³³ In this regard, the Law Council notes the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* currently before Parliament, which would seek to strengthen protection for workers (including migrant workers) under the *Fair Work Act 2009* (Cth) against unscrupulous employers, after several investigations, inquiries and reports recommended the laws be changed, and the discovery of migrant workers in large franchises subject to slavery-like conditions, servitude and wage fraud: see for example Adele Ferguson and Sarah Danckert, *7-Eleven Revealed* (2016) <<http://www.smh.com.au/interactive/2015/7-eleven-revealed/>>.

³⁴ See Parosha Chandran, "Modern Slavery Act gives UK companies a free pass to profit from slavery overseas" (18 October 2016) <<https://www.theguardian.com/sustainable-business/2016/oct/18/modern-slavery-act-gives-uk-companies-a-free-pass-to-profit-from-slavery-overseas>>. See also International Trade Union Confederation, *Closing the loopholes – How legislators can build on the UK Modern Slavery Act* (2017) 12 <<http://www.ituc-csi.org/closing-the-loopholes-how>>.

³⁵ Kathy Finn, "Indian workers win \$14 million in U.S. labor trafficking case" (18 February 2015) *Reuters* <<http://www.reuters.com/article/us-usa-louisiana-trafficking-idUSKBN0LN03820150219>>.

profit from modern slavery. A bill to create a tort of human trafficking has also been introduced into parliament in Ontario, Canada, which if enacted will allow victims of human trafficking to bring a civil action against anyone who engaged in their trafficking, with no proof of damage required.³⁶

32. The Law Council considers that a right to civil remedy which would allow victims of modern slavery to bring a civil case against those involved in their exploitation should be introduced in Australia. Such a right will likely be more effective in ensuring that proceeds gained from slavery and slavery-like conduct flow to the victims, as proving a civil case carries a lower burden of proof ("on the balance of probabilities") than a criminal prosecution ("beyond reasonable doubt"), and does not suffer from the usual difficulties involved in bringing criminal charges against a non-natural person. However, careful consideration should be given to how any right to civil remedy is formulated, noting the challenges that can arise from, for example, statutory torts, including regarding standing, capacity to sue, and thresholds and caps on claims.

Recommendation

- **A right to civil remedy should be created that would allow victims of modern slavery to bring a civil case against those involved in their exploitation.**

Dedicated fund to compensate victims of modern slavery

33. The Law Council considers that a national compensation fund should be created to which victims of modern slavery can apply for an award. The Law Council and Anti-Slavery Australia's *Report on Establishing a National Compensation Scheme* thoroughly examines the issues relevant to the creation of a dedicated fund that awards compensation to victims of human trafficking. As human trafficking is a form of modern slavery, some of those issues are relevant to this submission. The Law Council suggests that the Committee refer to that report in full for a more fulsome discussion of the issues flagged below.

Scope and limitations of a national compensation fund

34. Insofar as the scale of any compensation scheme specifically addressed to victims of modern slavery, as noted in the Background to modern slavery in Australia and globally section above, between 2004 and 2015 the AFP received 619 referrals for human trafficking and slavery-related offences, including 118 new referrals in 2014-2015 alone.³⁷ However, due to the covert nature of modern slavery, it is likely that the actual

³⁶ See Bill 96, *Anti-Human Trafficking Act*, 2nd Sess, 41st Parl, Ontario, 2017, s 16. As at the date of this submission, the Bill has passed Second Reading and has been referred to the Standing Committee on Social Policy: see Legislative Assembly of Ontario, *Bill 96, Anti-Human Trafficking Act, 2017* (2017) <http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=4513&detailPage=bills_detail_status>.

³⁷ Law Council of Australia, Anti-Slavery Australia and the University of Technology Sydney, *Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime* (2016) 9

number of persons being held in slavery and slavery-related offences is higher than the amount of referrals and, if a MSA is introduced, it may bring more cases to light.

35. In light of the potential amount of victims that may be eligible for an award, the Law Council considers that an appropriate cap on the amount of compensation would preferably be in line with the maximum amount offered under state level schemes for victims of crime, which is, for example, \$75 000 in Western Australia³⁸ and Queensland,³⁹ and \$100 000 in South Australia.⁴⁰ The two national compensation schemes, Australian Victims of Overseas Terrorism Payments Scheme (**AVOTPS**) and the Defence Abuse Reparation Scheme (**DARS**), also provide guidance on appropriate maximum payment amounts, with awards under those schemes capped at \$50 000 and \$75 000 respectively.
36. To fund such a compensation scheme, either confiscated proceeds of crimes could be drawn upon or direct government funding. The latter may be preferable to avoid drawing funds away from projects that rely upon proceeds of crime funding,⁴¹ and like AVTOPS a national compensation scheme for survivors of modern slavery could be created through an amendment to the *Social Security Act 1991* (Cth).⁴²

Constitutionality of a national compensation fund

37. The Commonwealth can make payments to individuals if there is Commonwealth legislation that authorises the making of those payments and there is an appropriate Constitutional head of power supporting the legislation.⁴³ While there are several heads of power that might be appropriate,⁴⁴ the High Court's expansive approach to the external affairs power may provide appropriate support for establishing a fund for the crimes of modern slavery.
38. The critical question is whether the legislation is reasonably capable of being considered appropriate and adapted to give effect to Australia's obligations under a particular instrument. In *R v Tang* (discussed above), the High Court considered that the criminalisation of slavery in the Criminal Code was supported by the external affairs power of the Constitution. Other instruments, although yet to be considered by the High

<<https://lawcouncil.asn.au/lawcouncil/images/LCA-PDF/National-Compensation-Scheme-for-Victims-of-Commonwealth-Crime.pdf>>.

³⁸ *Criminal Injuries Compensation Act 2003* (WA) s 31(1).

³⁹ *Victims of Crime Assistance Act 2009* (QLD) s 38(1).

⁴⁰ The previous maximum of \$50 000 in South Australia was increased to \$100 000 by the *Victims of Crime (Compensation) Amendment Act 2016* (SA) s 7(7).

⁴¹ See Law Council of Australia, Anti-Slavery Australia and the University of Technology Sydney, *Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime* (2016) 10 [2.2].

<<https://lawcouncil.asn.au/lawcouncil/images/LCA-PDF/National-Compensation-Scheme-for-Victims-of-Commonwealth-Crime.pdf>>.

⁴² *Ibid* 11 [2.3].

⁴³ *Pape v Commissioner of Taxation* (2009) 238 CLR 1; *Williams v Commonwealth* (2012) 248 CLR 156; *Williams v Commonwealth* (2014) 252 CLR 416.

⁴⁴ External affairs power (*Australian Constitution* s 51(v)); express incidental power (*Australian Constitution* s 51(xxxix)), implied incidental power (*Australian Constitution* ss 51-52) and the executive power (*Australian Constitution* s 61).

Court, like the Palermo Protocol, may also provide a basis for any legislation to create a national compensation fund.

Design of a national compensation fund

39. Under DARS, for example, there is no requirement to meet a legal burden of proof before a payment is made, as the payment recognises that abuse itself is wrong, regardless of who is responsible or liable for the abuse.⁴⁵ Likewise, to recognise that modern slavery is wrong, a national compensation scheme should make payments when those responsible for administering the scheme were satisfied to an appropriate standard that a person is a victim of modern slavery.⁴⁶ Any scheme guidelines should clearly articulate who has standing to bring a claim for compensation, any applicable limitations regarding nexus and time, and proof of harm required. Clearly defining these matters will ensure that victims of modern slavery that might otherwise be entitled to compensation will not be thwarted from making claims on the basis of a technicality, and ensure that the scheme is not so open-ended that it cannot be costed.
40. Regarding harm that should be covered by a national compensation scheme, it should be noted that those who work with trafficked persons in the UK have identified that the CICS does not cover the full spectrum of harm done by traffickers and enslavers, including psychological abuse and damage, deception, coercion and the destruction of one's identity.⁴⁷ The Law Council therefore considers that the national compensation fund should ensure the full spectrum of harm is covered, including psychological harm.
41. Psychological harm and vulnerability of persons and/or persons subjected to slavery or slavery-like practices often means such persons may be traumatised or fear repercussions, and are therefore unwilling to engage with law enforcement.⁴⁸ The scheme should also be designed in such a way that a victim of modern slavery can receive payment even if they do not know who is responsible for their exploitation, if those responsible have fled, or they are unwilling or unable to be involved with any prosecution of those responsible. The Law Council considers that a victim's eligibility for

⁴⁵ See Law Council of Australia, Anti-Slavery Australia and the University of Technology Sydney, *Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime* (2016) 7 <<https://lawcouncil.asn.au/lawcouncil/images/LCA-PDF/National-Compensation-Scheme-for-Victims-of-Commonwealth-Crime.pdf>>.

⁴⁶ Appropriate standards of proof might include "reasonable likelihood" (used by the current Royal Commission into Institutional Responses to Child Sexual Abuse) and "standard of plausibility" (used under the DARS). An appropriate balance should be struck between scrutiny of claims to ensure the integrity of the scheme and the reality that many cases will depend on survivor testimony alone: see Law Council of Australia, Anti-Slavery Australia and the University of Technology Sydney, *Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime* (2016) 12 <<https://lawcouncil.asn.au/lawcouncil/images/LCA-PDF/National-Compensation-Scheme-for-Victims-of-Commonwealth-Crime.pdf>>.

⁴⁷ See Parosha Chandran, "Modern Slavery Act gives UK companies a free pass to profit from slavery overseas" (18 October 2016) <<https://www.theguardian.com/sustainable-business/2016/oct/18/modern-slavery-act-gives-uk-companies-a-free-pass-to-profit-from-slavery-overseas>>.

⁴⁸ Law Council of Australia, Anti-Slavery Australia and the University of Technology Sydney, *Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime* (2016) 9 <<https://lawcouncil.asn.au/lawcouncil/images/LCA-PDF/National-Compensation-Scheme-for-Victims-of-Commonwealth-Crime.pdf>>.

an award from a national compensation fund should not be contingent upon their cooperation or assistance with law enforcement.

Potential visa implications for persons applying for compensation

42. Insofar as the practical arrangements for making an application for compensation is concerned, it should be taken into account that persons who are trafficked into Australia for modern slavery purposes are often done so either on falsified immigration documents, visas obtained on falsified information, or no visa at all.
43. The current visa system provides that a person who has been identified as a suspected victim of human trafficking, slavery or slavery-like practices can be granted a Bridging Visa F (BVF) for up to 90 days, with an extension possible if the person is assisting with an investigation or prosecution.⁴⁹ In addition, the Bridging Visa E (BVE) is a general visa that allows a person to lawfully remain in Australia to await the outcome of an immigration decision, finalise their immigration matter or make arrangements to leave,⁵⁰ which may also cover victims of trafficking or other forms of modern slavery.
44. The Law Council considers that the BVF or BVE framework should be expanded beyond its current scope to also allow suspected victims of human trafficking, slavery or slavery-like practices to remain in Australia to apply for and finalise any application for compensation, regardless of whether or not they are assisting law enforcement with an investigation or prosecution.
45. For survivors who are assisting law enforcement and awaiting the outcome of a prosecution, it may be necessary for the prosecution to conclude before their application for compensation can be finalised,⁵¹ and therefore any amendments to the visa framework should account for this possibility. In addition, due to delay that may be occasioned by determining and regularising the immigration status of trafficked persons, consideration should be given also to arrangements for allowing survivors to commence applications for compensation in circumstances where their immigration status is uncertain. Further, any scheme should permit applications regardless of whether or not the survivor is in Australia, as a survivor should not be precluded from restitution on account of wanting to return home or elsewhere following harm suffered.

Recommendations

- **Create a national compensation fund to which survivors of modern slavery can apply and be granted an award, with clearly defined parameters on who is eligible for an award and any relevant limitations.**

⁴⁹ See further Australian Government, *Visa Subclass 060 Bridging F Visa* (4 January 2016) <<http://guides.dss.gov.au/guide-social-security-law/9/2/1/20>>.

⁵⁰ See further Department of Immigration and Border Protection, "Bridging visa E – BVE (subclass 050-051)" *Australian Government* <<https://www.border.gov.au/Trav/Visa-1/051-#>>.

⁵¹ For example, if the UK model was adopted, and a prosecution of the person responsible was successful, the survivor may be eligible for a payment made under a reparation order, they would not be eligible for an award from a national compensation fund.

- **Make compensation from a national fund available for the full range of harm suffered by survivors and not contingent upon cooperation or assistance provided to law enforcement.**
- **Amend the Bridging Visa E or F to allow survivors of modern slavery to remain in Australia to make and finalise applications for compensation, regardless of any cooperation or assistance they provide law enforcement.**

Reporting requirements for business regarding modern slavery in their supply chains

46. The Law Council considers that the requirement under the UK MSA that eligible companies produce statements that identify the steps they have taken to identify modern slavery in their supply chains is one which should be adopted in Australia. The production of the statement prioritises modern slavery issues for management,⁵² and its publication contributes to creating the transparency needed to monitor the performance of businesses in eliminating modern slavery from their supply chains. This section considers which companies should be subject to these reporting requirements, what statements should include, and how they should be made available, to achieve the transparency and effectiveness in addressing modern slavery in supply chains that any MSA would seek to achieve.

Threshold for attracting reporting requirements

47. In order to attract the mandatory reporting requirements under the UK MSA, a business must have an annual turnover⁵³ not less than £36 million,⁵⁴ being the definition of a large company under UK company law. The final amount of the threshold was determined following a consultation period with businesses, civil society, and other relevant stakeholders, with 80% of respondents (67 of 84 responses to the threshold question) indicating support for the £36 million threshold among the proposed options.⁵⁵ Other than turnover, another option was to measure the size of companies for the purposes of the threshold based on employee numbers, which is the approach that was adopted by the French vigilance plan law.⁵⁶ However, in the UK, turnover was selected on the basis that this would set a "level playing field" for companies with similar resources and

⁵² See Jane Moyo, "New report and survey finds Modern Slavery Act galvanising leadership in progressive companies" (27 October 2016) <<http://www.ethicaltrade.org/blog/new-report-and-survey-finds-modern-slavery-act-galvanising-leadership-action-in-progressive>>.

⁵³ Total turnover is calculated as the total net turnover of the relevant commercial organisation, including the total amount of revenue derived from all sources, after the deduction of trade discounts, value added tax and any other taxes based on those amounts. It includes the turnover of all subsidiaries where a company carries on all or part of its business in the UK. This method of calculating total turnover reflects the UK Companies Act 2006 and is commonly used in the UK: UK Department of Home Office, *Modern Slavery and Supply Chains Consultation: Consultation on the transparency in supply chains clause in the Modern Slavery Bill* (12 February 2015) 14 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448201/2015-02-12_TISC_Consultation_FINAL.pdf>.

⁵⁴ *Modern Slavery Act 2015* (UK) ss 54(2)-(3); *Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015* (UK) reg 2.

⁵⁵ UK Department of Home Office, *Modern Slavery and Supply Chains Consultation: Consultation on the transparency in supply chains clause in the Modern Slavery Bill* (29 July 2015) 7 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448200/Consultation_Government_Response_final_2.pdf>.

⁵⁶ The threshold for the application of the French vigilance plan law is based on employee numbers, as it applies to all French companies of 5 000 employees or more, or French subsidiaries of foreign companies with 10 000 employees or more.

purchasing power;⁵⁷ for example, it would not exempt companies with small employee numbers but large turnover and purchasing power.

48. The Law Council considers that all entities listed on the ASX should be subject to any MSA, regardless of size. Publicly listed entities are already required to comply with various listing requirements, including the ASX Corporate Governance Guidelines, which require listed entities to act ethically and responsibly and respect human rights.⁵⁸ For non-publicly listed businesses, the Law Council considers that businesses with a presence in Australia that meet a threshold based on annual global turnover should be subject to reporting requirements under any Australian MSA. For the purposes of calculating turnover of a company to determine whether or not it is subject to reporting requirements under any MSA, the definition of "annual turnover" in the Criminal Code, used in connection with determining a penalty for a body corporate for a foreign bribery offence, could be adopted, to promote consistency with existing Commonwealth legislation.⁵⁹
49. The Law Council considers that foreign businesses should also be subject to reporting requirements under any Australian MSA where they have a presence in Australia and meet the relevant turnover threshold (noting also that foreign entities listed on the ASX will already be captured). This is necessary to ensure that Australian businesses are not treated detrimentally in terms of regulation compared with foreign businesses, and to ensure the effects and impacts of modern slavery in Australia is meaningfully addressed, regardless of where the companies that can make an impact in reducing its prevalence in Australia are domiciled. The reporting requirements in the UK MSA apply to any body corporate or partnership that meets the threshold of £36 million annual turnover and carries on business, or part of a business, in any part of the UK, and the French vigilance plan law applies to French subsidiaries of foreign companies with 10 000 employees or more. The Law Council considers that the same turnover threshold, in terms of turnover amount, should be used to determine whether businesses with a presence in Australia are subject to the reporting requirements, but for Australian businesses this should be calculated on the basis of their annual global turnover, whereas for foreign businesses only their annual turnover in Australia should be taken into account. Taking into account the burden of regulation, this distinction is necessary to ensure that only foreign

⁵⁷ UK Department of Home Office, *Modern Slavery and Supply Chains Consultation: Consultation on the transparency in supply chains clause in the Modern Slavery Bill* (12 February 2015) 14 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448201/2015-02-12_TISC_Consultation_FINAL.pdf>.

⁵⁸ See ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (2014) 19 <<http://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf>>.

⁵⁹ *Criminal Code Act 1995* (Cth), sch 1 s 70.2(6) defines "annual turnover" as:

the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make, during that period, other than the following supplies:

(a) *supplies made from any of those bodies corporate to any other of those bodies corporate;*
 (b) *supplies that are input taxed;*
 (c) *supplies that are not for consideration (and are not taxable supplies under section 72-5 of the A New Tax System (Goods and Services Tax) Act 1999);*
 (d) *supplies that are not made in connection with an enterprise that the body corporate carries on.*

businesses with a meaningful presence in Australia, and therefore the means and opportunity to make an impact, are captured by any MSA.

50. It should be emphasised that the reporting requirements should to apply to businesses, not just companies. This may include, for example, partnerships, companies limited by guarantee, franchisors, and not-for-profit organisations. The Law Council considers that there is no justification for exempting entities that would otherwise meet the requirements simply because of their business structure. Therefore, care should be taken to ensure the threshold is drafted broadly enough to include all businesses that meet the turnover threshold regardless of structure.
51. In terms of the amount of turnover that should constitute the threshold, the Law Council considers that this should ultimately be decided following consultation with Australian businesses, civil society and other relevant stakeholders. The Law Council considers that, in determining the appropriate threshold amount, a principled approach should be adopted that strikes a careful balance between, on the one hand, not unduly placing a regulatory burden on businesses that have fewer resources and less capacity to affect change,⁶⁰ and on the other hand, meaningfully addressing the likelihood and risk of modern slavery present in supply chains,⁶¹ by capturing a sufficient amount of companies that operate in high-risk industries and are in a position to be able to undertake due diligence, take action on the results and exert influence on supply chains.⁶²
52. While any threshold for an Australian MSA should be comparable in principle to those used in similar legislation worldwide, the Law Council considers that directly transposing the UK threshold of £36 million, approximately AUD\$60 million, into any Australian MSA, would set the threshold too high to be effective in achieving the objectives of the reporting requirements in Australia. A number of different approaches which could be put to public consultation are considered below.
53. The UK Government made clear from the outset of its consultation period on a threshold for the UK MSA that it considered the reporting requirements should apply to larger businesses.⁶³ As noted above, the threshold that was ultimately selected, companies with a turnover of not less than £36 million, reflects the definition of what qualifies as a large

⁶⁰ UK Department of Home Office, *Modern Slavery and Supply Chains Consultation: Consultation on the transparency in supply chains clause in the Modern Slavery Bill* (12 February 2015) 13 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448201/2015-02-12_TISC_Consultation_FINAL.pdf>.

⁶¹ See also, International Trade Union Confederation, *Closing the loopholes – How legislators can build on the UK Modern Slavery Act* (2017) 12 <<http://www.ituc-csi.org/closing-the-loopholes-how>>.

⁶² UK Department of Home Office, *Modern Slavery and Supply Chains Consultation: Consultation on the transparency in supply chains clause in the Modern Slavery Bill* (12 February 2015) 8 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448201/2015-02-12_TISC_Consultation_FINAL.pdf>.

⁶³ See *Companies Act 2006* (UK) s 465 (3) item 1, see also UK Department of Home Office, *Modern Slavery and Supply Chains Consultation: Consultation on the transparency in supply chains clause in the Modern Slavery Bill* (12 February 2015) 13-14 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448201/2015-02-12_TISC_Consultation_FINAL.pdf>.

company under the UK Companies Act 2006.⁶⁴ If a similar approach was adopted in Australia, namely setting a threshold that is equivalent to the definition of “large company”, then the Law Council recommends an approach similar to the threshold requirements for a large proprietary company as set out in section 45A of the *Corporations Act 2001* (Cth) (**Corporations Act**). Large proprietary companies will satisfy at least two of the following three requirements for a financial year:

- the consolidated revenue for the financial year of the company and any entities it controls is \$25 million or more;
- the value of the consolidated gross assets at the end of the financial year of the company and any entities it controls is \$12.5 million or more; and
- the company and any entities it controls have 50 or more employees at the end of the financial year.

54. However, given that this threshold contains three limbs, it may be appropriate to simplify it for the purposes of any threshold under any MSA, for example by limiting it to the turnover aspect of the threshold alone. Looking internationally beyond the UK MSA, the Dutch Bill on child labour applies reporting requirements to all except small businesses. If such an approach were adopted in Australia, and assuming the passage of the *Treasury Laws Amendment (Enterprise Tax Plan) Bill 2016* (**Treasury Laws Amendment Bill**), it would apply to all businesses with a presence in Australia with an annual turnover of \$10 million. This would capture the companies that account for half of all revenue in Australia,⁶⁵ approximately 13 000 companies (by comparison, 12 259 companies were estimated to fall within the threshold in the UK).⁶⁶ If the Treasury Laws Amendment Bill fails to pass, the definition of “small business” in Australia would be a business with an annual turnover of \$2 million, which the Law Council considers would be too low of a threshold for the application of the reporting requirements.

55. The California Transparency in Supply Chains Act applies to every retailer seller and manufacturer which does business in California and has annual worldwide gross receipts⁶⁷ that exceed \$100 million. The figure of \$100 million appears to have been chosen because the companies that would be captured by this threshold accounted for

⁶⁴ See UK Department of Home Office, *Modern Slavery and Supply Chains Consultation: Consultation on the transparency in supply chains clause in the Modern Slavery Bill* (12 February 2015) 8 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448201/2015-02-12_TISC_Consultation_FINAL.pdf>; see also UK Companies Act 2006 s 465(3) item 1, which defines “companies qualifying as medium-sized” as a company with, among other features, turnover of not more than £36 million.

⁶⁵ Ibis World, *Businesses in Australia* (7 July 2016) <<https://www.ibisworld.com.au/media/2016/07/07/businesses-in-australia-2>>.

⁶⁶ UK Department of Home Office, *Modern Slavery and Supply Chains Consultation: Consultation on the transparency in supply chains clause in the Modern Slavery Bill* (12 February 2015) 15 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448201/2015-02-12_TISC_Consultation_FINAL.pdf>.

⁶⁷ ‘Gross receipts’ is defined to mean the gross amounts realised on the sale or exchange of property, the performance of services, or the use of property or capital in a transaction that produces business income, in which the income, gain, or loss is recognised under the *Internal Revenue Code*: CTSCA, s 1714.43(a)(2)(B); *Revenue and Taxation Code*, s 25120(f)(2).

the “overwhelming majority of the economic activity in California”.⁶⁸ As this is not the case in Australia, the Law Council considers this threshold far too high to be effective for any Australian MSA.

56. Once a threshold is settled, the Law Council considers that businesses that do not meet the threshold should nonetheless be encouraged to produce statements on a voluntary basis, and be provided with any necessary guidance and training to enable them to do so (discussed further at paragraph 92 below).⁶⁹

Recommendations

- **Any MSA in Australia should include requirements for businesses with a presence in Australia to report on the steps they have taken to eliminate modern slavery from their supply chains.**
- **The requirements should be compulsory for entities listed on the ASX. For other businesses with a presence in Australia, the requirements should be compulsory for those that meet the statutory threshold, regardless of business structure, and voluntary for those that do not.**
- **The statutory threshold for attracting the operation of reporting requirements under any MSA should be based on global annual turnover of the business, including that of any subsidiaries. For foreign businesses with a presence in Australia, only their turnover in Australia, not their global turnover, should be taken into account.**
- **When setting the threshold amount, the Australian Government should consult with Australian businesses, civil society and other relevant stakeholders, and be mindful to balance the burden of regulation against the need to meaningfully address modern slavery risks in supply chains.**

Content and nature of reporting requirements

57. When determining the content of the reporting requirements, the UK MSA sets out six areas which eligible companies *may* report on in their statements, namely:

- the organisation’s structure, its business and its supply chains;
- its policies in relation to slavery and human trafficking;

⁶⁸ Prior to the law coming into effect, the Assembly Committee on Judiciary stated, “[i]ndeed, according to materials developed by the state’s Franchise Tax Board (FTB) and provided by the author to the Committee, based on total annual sales, this bill’s disclosure requirements will impact well less than 5% (only 3.2%) of businesses operating within California’s borders. Astonishingly however, this 3.2% of the state’s retail sellers and manufacturers will “capture” an overwhelming majority of the economic activity in California. Again astonishingly, according to the FTB, these relatively few but giant major retailers and manufacturers account for over 87% of the total receipts for total income and cost of goods sold in California. Since these businesses have such a disproportionate economic influence, this bill appears to appropriately target only the state’s largest retailers and manufacturers in an effort to effect the most significant impact on efforts to fight human trafficking and slavery”: see State of California, *Parliamentary Debates*, Assembly Committee on Judiciary, 29 June 2010, 6 (Mike Feuer).

⁶⁹ UK Department of Home Office, *Modern Slavery and Supply Chains Government Response: Summary of Consultation Responses and Next Steps* (2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448200/Consultation_Government_Response_-_final_-_2_.pdf>.

- its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
- the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;
- its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; and
- the training about slavery and human trafficking available to its staff.⁷⁰

58. However, it is not obligatory for any statement rendered under the MSA to address those areas. UK companies still comply with the reporting requirements of the law even if they report that they have made no such efforts.⁷¹ The French vigilance plan law, by contrast, makes it mandatory for eligible companies to include the following elements in their vigilance plans, though it does not prescribe the standards which each should meet:

- a method for identifying, analysing, and prioritising the different risk areas;
- procedures for regularly evaluating subsidiaries, subcontractors, and suppliers;
- actions to mitigate identified risks;
- mechanisms for reporting and receiving alerts about violations; and
- methods for tracking the plan's efficacy.

59. The UK reporting requirements have been criticised as "light touch"⁷² and as not going far enough, particularly regarding the fact that companies can still comply with disclosure requirements by reporting they have taken no steps at all.⁷³ Though no companies have yet to report taking no steps, the failure of the UK MSA to mandate the need for companies to conduct due diligence has been borne out in practice, with company statements produced pursuant to the UK MSA largely failing to go beyond disclosing general commitments and broad indications of processes.⁷⁴ Many statements have said nothing about the relevant company's risk assessment processes, and the

⁷⁰ *Modern Slavery Act 2015* (UK) s 54(5).

⁷¹ *Ibid* s 54(4)(b).

⁷² "Modern Slavery: Everywhere in (supply) chains" (12 March 2015) *The Economist* <<http://www.economist.com/news/international/21646199-how-reduce-bonded-labour-and-human-trafficking-everywhere-supply-chains>>.

⁷³ See for example Jeffrey Vogt, "Efforts to clean up global supply chains so far come up short" (22 March 2017) *Open Democracy* <<https://www.opendemocracy.net/beyondslavery/jeffrey-vogt/efforts-to-clean-up-global-supply-chains-so-far-come-up-short>>; "Modern Slavery Act 2015 - the first steps in the right direction" (1 May 2015) *Halsburys Law Exchange* <<http://www.halsburyslawexchange.co.uk/modern-slavery-act-2015-the-first-steps-in-the-right-direction>>.

⁷⁴ Ergon Associates, *Reporting on Modern Slavery: The current state of disclosure* (May 2016) <<http://www.ergonassociates.net/images/stories/articles/ergonmsastatement2.pdf>>; Business and Human Rights Resource Centre, *Press Release: UK Modern Slavery Act - First 75 statements in* (7 March 2016) <<https://business-humanrights.org/en/press-releaseuk-modern-slavery-act-first-75-statements-in>>; see generally, Business and Human Rights Resource Centre, *FTSE 100 at the starting line: An analysis of company statements under the UK Modern Slavery Act* (2016) <<https://business-humanrights.org/en/ftse-100-at-the-starting-line>>.

majority did not identify priority risks in their operations or supply chains.⁷⁵ Respondent companies largely neglected to report on their relations with contractors,⁷⁶ despite that often being where risks for modern slavery lie.⁷⁷ Further, the quality of the statements has varied greatly, with language being replicated across statements from different companies suggesting use of templates and a lack of customisation to each company,⁷⁸ through to statements from major companies like Intel, Ford and Marks & Spencer detailing specific steps they take to identify and eliminate the potential of modern slavery in their supply chains.⁷⁹

60. The requirements in the UK MSA, and subsequent statements produced thereunder, falls far short of the standards set out in the OECD Guidelines and the UNGPs. Though both are non-binding, the guidance they provide makes clear that conducting due diligence is central for any business to ensure respect for human rights in their operations. To that end, the Law Council recommends an approach to reporting requirements under any Australian MSA which is more directly linked to the specific obligations imposed on businesses in the UNGPs. The Law Council considers that eligible businesses with a presence in Australia should report on:

- what, if any, public policy commitment they have made to meet their responsibility to respect human rights;
- whether they have established any human rights due diligence process to identify, prevent and mitigate adverse human right impacts, and if so, what form it takes and how they address their impacts on human rights directly or indirectly through subsidiary companies or the contractors or suppliers they use;
- whether they have encountered any adverse human rights risks in their business operations directly or indirectly and broadly what they are and how they manage communications on those risks internally or externally;
- what, if any, processes have been used to enable the remediation of any adverse human rights impacts they believe they cause or to which they contribute and have they been able to track the effectiveness of the response of their business; and
- whether it has been necessary to prioritise the remedial actions required to address potential adverse human rights impacts.

⁷⁵ Ergon Associates, *Reporting on Modern Slavery: The current state of disclosure* (May 2016)

<<http://www.ergonassociates.net/images/stories/articles/ergonmsastatement2.pdf>>.

⁷⁶ Ibid.

⁷⁷ For example, Sports Direct, a sports equipment retailer in the UK, discovered exploitation in their supply chain via a scam run by two men who provided Polish workers to the employment agency they used to staff their warehouse. The two men recruited and exploited Polish workers, keeping the majority of their earnings, seizing their bank cards and placing them in squalid accommodation. Neither Sports Direct nor the employment agency were alleged to be aware of the scam run by the two men, who were convicted of offences under the MSA and jailed. See Sarah O'Connor and Marke Vandeveld, "Two jailed under slave law for exploiting Sports Direct workers" (24 January 2017) <<https://www.ft.com/content/9b1cdccc-e198-11e6-9645-c9357a75844a>>.

⁷⁸ Ergon Associates, *Reporting on Modern Slavery: The current state of disclosure* (May 2016)

<<http://www.ergonassociates.net/images/stories/articles/ergonmsastatement2.pdf>>.

⁷⁹ Business and Human Rights Resource Centre identified Ford and Intel as producing fulsome statements under the MSA in *Press Release: UK Modern Slavery Act - First 75 statements in* (7 March 2016) <<https://business-humanrights.org/en/press-releaseuk-modern-slavery-act-first-75-statements-in>> and later, Marks & Spencer and SAB Miller as producing robust statements in some (but not all) criteria: Business and Human Rights Resource Centre, *FTSE 100 at the starting line: An analysis of company statements under the UK Modern Slavery Act* (2016) <<https://business-humanrights.org/en/ftse-100-at-the-starting-line>>.

61. Such an approach would reflect the global standard with which many practitioners are already familiar, and would not contribute to the issue of imposing different standards across jurisdictions that may otherwise impact multinational businesses. The Dutch Bill on child labour in supply chains, for example, mandates that if a company discovers that child labour may have contributed to their products or services, then the company must develop an action plan to address and remedy the violations, and the action plan must be in accordance with the UNGP and the OECD Guidelines.
62. However, regardless of the approach ultimately adopted towards the areas that should be covered by company statements, the Law Council considers that responding to each area should be mandatory. Further, eligible businesses should not be able to report that they took “no steps” to address modern slavery in supply chains. If eligible businesses are so permitted, they should be required to explain “if not, why not”, as per the approach already adopted in the ASX Corporate Governance Guidelines for companies that choose not to adopt a recommendation of the ASX Corporate Governance Council.⁸⁰ A similar approach is also present in the California Supply Chains Act, widely considered to be the precursor to current laws worldwide mandating reporting requirements for companies on modern slavery issues in supply chains, which makes it mandatory for companies to disclose, at a minimum, to what extent they undertake certain measures.⁸¹ While it is mandatory for companies to whom the California Supply Chains Act applies to respond to each category of due diligence, they are only required to state “to what extent” they take action, and may legally respond that they take no action. At least ten companies required to report under the California Supply Chains Act have published statements that they have taken no action in some or all categories.⁸²
63. Making the categories of reporting mandatory would promote meaningful transparency and ensure the statements fulfil their purpose of providing information useful for addressing the challenges regarding modern slavery in individual company supply chains and Australian business as a whole. The introduction of mandatory reporting requirements under any Australian MSA could be coupled with a two-year introductory period to allow companies to adjust to the new requirements. During the two-year

⁸⁰ See ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (2014) 3 <<http://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf>>.

⁸¹ Namely, (i) engage in verification of product supply chains to evaluate and address risks of human trafficking and slavery; (ii) conduct audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains; (iii) require direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business; (iv) maintain internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking; and (iv) provide company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products: see California Senate Bill No. 657, *An act to add Section 1714.43 to the Civil Code, and to add Section 19547.5 to the Revenue and Taxation Code, relating to human trafficking* (2010) <http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0651-0700/sb_657_bill_20100930_chaptered.pdf>.

⁸² The companies are Caterpillar, Commercial Metals, Danaher Corp, Hyundai Motor America, IDEX Corporation, Johnson Matthey, Krispy Kreme Doughnuts, Manufactured Packaging Products, Overhill Farms and Valero Energy: see Business and Human Rights Resource Centre, 10 firms decline to take action on trafficking risks (9 July 2014) <<https://business-humanrights.org/en/10-firms-decline-to-take-action-on-trafficking-risks-under-california-transparency-in-supply-chains-act#c103725>>.

introductory period eligible companies would not be required to submit statements but the production of draft statements would be encouraged.

64. In addition, the Law Council considers that a mandatory requirement gives valuable guidance to directors and other corporate officers with respect to their duties under statute and the general law. As noted at [56], as a member of the OECD, Australia supports and promotes the OECD Guidelines. Part IV of the Guidelines expresses the responsibility of business enterprises to respect human rights through their own operations and activities but also through business relationships which are directly linked to their operations, products and services. Part IV incorporates Pillar II of the UNGPs. Both the OECD Guidelines and the Guiding Principles provide for a preventive process of human rights due diligence. These instruments are not legally binding but express standards of responsible business conduct endorsed by the Australian Government. Slavery in a corporation's supply chain, as well as its own operations and those of its subsidiaries, creates severe human rights harm with potentially serious reputational damage and material adverse effect upon the corporation's financial performance and value.
65. Section 180(1) of the Corporations Act and the general law require directors and other company officers (here together called directors) to exercise reasonable care and diligence of a standard appropriate to the particular office they hold in the corporation and the circumstances of that corporation. Whether a director has exercised a reasonable degree of care and diligence is answered by "balancing the foreseeable risk of harm against the benefits that could reasonably have been expected to accrue to the company from the conduct in question".⁸³ Australian courts have not had to consider what due diligence process or investigation directors need undertake to protect against reputational risk from failure to respect standards of responsible conduct. The concept of harm to the company under the balancing test "is best understood as a reference to harm to any of the interests of the corporation [and] should not be confined narrowly".⁸⁴ These interests include the company's interest in its reputation and in the legitimacy of its conduct:

*[a] corporation has a real and substantial interest in the lawful or legitimate conduct of its activity independently of whether the illegitimacy of that conduct will be detected or would cause loss. One reason for that interest is the corporation's reputation. Corporations have reputations, independently of any financial concerns, just as individuals do.*⁸⁵

66. Directors may breach their duty of care under s 180(1) even though the corporation suffers no financial loss from their action although, in most instances, reputational loss will have adverse financial consequences. Slavery in a supply chain has significant reputational consequences for business. Therefore, any MSA reporting requirement would provide valuable guidance with respect to expected standards of responsible

⁸³ *Vrisakis v ASIC* (1993) 9 WAR 395, 450; *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, 239; *ASIC v Maxwell* [2006] NSWSC 1052 [102]; (2006) 59 ACSR 373, 398; *ASIC v Cassimatis* (No 8) [2016] FCA 1023 [479] ("the dominant test").

⁸⁴ *ASIC v Cassimatis* (No 8) [2016] FCA 1023 [480], [481] per Edelman J.

⁸⁵ *Ibid* [482] per Edelman J.

conduct in an area of particular reputational sensitivity and vulnerability. That guidance is also particularly useful to directors and other officers as a standard of conduct—the measure of lawful and legitimate conduct—in discharging their duty to exercise reasonable care and diligence.

67. The Law Council considers that any MSA reporting requirement would not generate conflict with the other duties of directors. Under section 181 of the Corporations Act directors are required to act in good faith in the best interests of their corporation. That duty is subject to numerous reporting and conduct requirements in the Corporations Act such as those regarding financial reporting, the conduct of corporate fundraising and the regulation of takeovers. The statutory duties in sections 182 and 183 of the Corporations Act prohibiting improper use of office or information would also not be affected by a MSA reporting requirement.
68. It should be borne in mind that many companies that meet the threshold to attract reporting requirements under any MSA will likely include multinational enterprises subject to reporting requirements regarding modern slavery in their supply chains in several jurisdictions. Taking into account that there may be different reporting requirements across jurisdictions (several of which have been outlined above), thought should be given to how any reporting requirements could be crafted in Australia to synchronise company efforts across jurisdictions. It is likely that companies will be able to provide better quality responses if reporting requirements are largely uniform and straightforward in the markets in which they operate.
69. Finally, given the global nature of modern slavery, the Law Council considers that any reporting requirements should require eligible businesses to report on all aspects of their supply chains, including offshore aspects, even if the relevant goods or services do not enter Australia.

Recommendations

- **If a MSA is enacted in Australia, eligible businesses should be required to take steps to identify modern slavery in their supply chains, and if necessary, to address it, in order to comply with their reporting requirements.**
- **The content of company statements to be produced pursuant to any reporting requirements should be based on the obligations under the UNGP rather than section 54 of the UK MSA.**
- **Regardless of the approach adopted towards the content of a company statement, it should be mandatory for eligible businesses to address the areas prescribed as being relevant to their statements, not optional.**
- **Eligible businesses should be required to include offshore aspects of their supply chains in their reporting, even if the relevant goods or services do not enter Australia.**

Free and publicly accessible central repository for statements

70. If the MSA is to be effective in changing corporate behaviour, then statements must be "scrutinised by civil society, investors, and consumers to reward leaders and expose laggards, identify areas of weakness across the board, and ultimately demand better action".⁸⁶ Currently, eligible companies under the UK MSA are only required to publish statements to their websites,⁸⁷ or if they do not have a website, make a copy available to anyone who requests one by post. This means that statements have to be sought out individually, such that companies with brand name recognition tend to be sought out for their statements. Less high profile companies, however, may get away with not publishing statements at all. This task is complicated by the fact that, especially in the case of private companies, it may not be clear which companies are subject to the requirements in the first place.
71. Members of the House of Lords had proposed an amendment to the MSA which would have companies upload statements to a single, government-managed website.⁸⁸ However, this was omitted from the final UK MSA and therefore it has fallen to civil society to fill the void. Since then, two registries have been created,⁸⁹ with civil society groups emphasising that company statements need be publicly accessible for transparency, monitoring and enforcement, and criticising the failure of the UK MSA to provide for a central registry. These criticisms have not gone unheeded – in December 2016 the UK Commissioner opened an inquiry into how a central repository for modern slavery statements could work to help monitor the impact of the UK MSA, and earlier this year the UK House of Lords and House of Commons Joint Committee on Human Rights recommended changes to the UK MSA based on the lack of central registry.⁹⁰
72. The Law Council considers the Australian Government should create, manage and monitor a central repository to which businesses can directly upload their statements, which is publicly available, and free to access, preferably online. A similar approach is taken in the Dutch Bill on child labour which provides that companies must submit a

⁸⁶ Patricia Carrier and Joe Bardwell, "How the UK Modern Slavery Act can find its bite" *Open Democracy* (24 January 2017) <<https://www.opendemocracy.net/beyondslavery/patricia-carrier-joseph-bardwell/how-uk-modern-slavery-act-can-find-its-bite>>.

⁸⁷ *Modern Slavery Act 2015* (UK) s 54 (7)-(8).

⁸⁸ See Business and Human Rights Resource Centre, *Press Release: UK Modern Slavery Act – First 75 Statements in* (7 March 2016) <<https://business-humanrights.org/en/press-releaseuk-modern-slavery-act-first-75-statements-in>>.

⁸⁹ These are being run by the Business and Human Rights Resource Centre and Semantrica: see UK Parliament, *Written question – 62209* (21 February 2017) <<http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-01-30/62209>>. The Business and Human Rights Resource Centre created the first free and publicly available database of company statements. The database has over 1 300 statements and is searchable by company name, headquarters and sector. The registry is maintained by the Business and Human Rights Centre but is guided and supported by a group of partner organisations that include the Freedom Fund, Humanity United, Ethical Trading Initiative, CORE Coalition, Focus on Labour Exploitation (FLEX), Walk Free, Anti-Slavery UK and UNICEF UK: see Business and Human Rights Resource Centre, *UK Modern Slavery Act Registry* (2017) <<https://business-humanrights.org/en/uk-modern-slavery-act-registry>>.

⁹⁰ House of Lords and House of Commons Joint Committee on Human Rights, UK Parliament, *Human Rights and Business 2017: Promoting responsibility and ensuring accountability* (29 March 2017) 39-42 <<https://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>>.

statement to a supervisory body within the government confirming that the company undertook the required due diligence and the supervisory body is to publish those declarations online.

73. To that end, the Law Council considers that, in addition to requiring companies to publish their statements to their websites like under the MSA, if a MSA is enacted in Australia, eligible companies should also be required to directly upload their statements to the online database or submit them to the government department tasked with managing the database, who should be resourced appropriately for that task. This would reduce the administrative burden associated with having to identify the companies to whom any MSA applied and then collate the statements individually from each eligible company's website.⁹¹ Once established, several benefits would flow from having the Australian Government operate a central online registry for company statements.
74. Making statements available for free in a central location online would encourage the transparency that the reporting requirements seek to promote, and facilitate scrutiny of the statements by interested parties. While civil society in the UK is to be commended for creating free and accessible registries for company statements made under the UK MSA, it is worth noting that companies are ultimately accountable, and therefore typically more responsive, to government. A central registry would allow the relevant regulator to have more oversight, and therefore more readily enforce, the reporting requirements under any MSA. For this purpose it may also be useful to have the relevant government department tasked with managing the registry produce and publish a list of businesses that are subject to the reporting requirements,⁹² to enable the regulator and civil society to check which businesses have and have not complied with their reporting requirements. A government-run registry would also ensure that the relevant regulator for any MSA remained abreast of the quality of the statements being produced by companies. This would address the concern that has arisen in the UK that company statements are "lacklustre", with less than a third of companies that submitted statements having met the requirements set out by the MSA that they should be signed by a director and available on the company's homepage.⁹³
75. The Law Council considers that it would be appropriate for the ASIC or any Anti-Slavery Commissioner (see section on Anti-Slavery Commissioner below) to have responsibility for managing the registry, and should be resourced appropriately for this purpose, so the

⁹¹ The UK MSA currently only requires that companies publish statements to their website (or if they do not have a website to make a copy available to anyone who requests one in writing within 30 days): *Modern Slavery Act 2015* (UK) s 54(7)-(8).

⁹² The Modern Slavery (Transparency in Supply Chains) Bill, currently before the UK Parliament, seeks to amend the UK MSA to require the Secretary of State to compile a list of companies required to report under section 54 of the UK MSA. A report of the House of Lords and House of Commons Joint Committee on Human Rights recommended that the UK Government facilitate the passage of this Bill, or bring forward its own legislation in the next session to achieve a similar objective: see House of Lords and House of Commons Joint Committee on Human Rights, UK Parliament, *Human Rights and Business 2017: Promoting responsibility and ensuring accountability* (29 March 2017) 41-42

<<https://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>>.

⁹³ House of Commons Library, *Modern Slavery Act 2015: Recent Developments* (22 July 2016) 12-13, quoting Claire Falconer, Legal Director at the Focus on Labour Exploitation (FLEX) charity, <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7656#fullreport>>.

registry can remain free. ASIC, for example, would have access to information on which companies were required to lodge statements under any MSA based on their turnover. Regardless of which body is tasked with oversight for a central registry, the importance of having a free and publicly available central registry for business statements cannot be overstated. While Australian civil society will likely play an important role in scrutinising business statements made under any MSA, the Law Council considers that creating and maintaining a free and publicly accessible central registry of business statements is properly the role of government and the burden should not fall upon civil society like it has in the UK.⁹⁴

Recommendations

- **A free and publicly accessible online repository that contains all company statements made pursuant to reporting requirements under any MSA should be created, managed and monitored by the Australian Government.**
- **Companies with reporting requirements under any MSA should be required to upload their statements directly to the online repository or submit them to the repository manager in addition to publishing them on their own websites.**
- **ASIC or any Anti-Slavery Commissioner should be tasked with managing and monitoring the online repository of company statements, and resourced appropriately for this purpose.**

Enforcement of reporting requirements

A regulator to enforce sanctions for non-compliance with reporting requirements

76. Neither the UK Commissioner nor any other body has oversight or enforcement powers for businesses that fail to meet their reporting requirements under the UK MSA. Even if they did, any such powers would likely be hollow as there are no statutory sanctions for non-compliance under the UK MSA. The main motivator for producing a statement under the UK MSA is the reputational damage that may result if a company fails to report on whether or not slavery is taking place in its supply chain.⁹⁵ However,

⁹⁴ To that end, it should be noted also that the UK has a well-resourced civil society and a media that actively reports on business and human rights issues. For example, the Guardian UK has an entire page of its website dedicated to modern slavery, supported by Humanity United, with articles on investigations into modern slavery across Europe and worldwide, as well as any relevant other modern slavery news: see The Guardian "Modern Slavery in focus" <<https://www.theguardian.com/global-development/series/modern-day-slavery-in-focus>>, the BBC have produced and aired a number of programmes on modern slavery, see for example BBC Two, Britain's Secret Slavery Business (11 March 2015) <<http://www.bbc.co.uk/programmes/b073cbb3>> and BBC News, The dark reality of modern slavery in the UK (2 June 2014) <<https://www.youtube.com/watch?v=y6nBuX7E4>> as well as Al Jazeera English: Al Jazeera, Britain's Modern Slave Trade <http://interactive.aljazeera.com/aje/2016/uk-slavery-sex-slave-smuggling-investigation/index.html> (2016) <<http://interactive.aljazeera.com/aje/2016/uk-slavery-sex-slave-smuggling-investigation/index.html>>. However, this situation is relatively unique to the UK and it is unlikely Australia could expect the same extent of oversight and monitoring in the absence of explicit provision for a central registry in any MSA enacted.

⁹⁵ A recent report on how companies have responded to the *Modern Slavery Act 2015* (UK) one year surveyed 71 companies operating in the UK and found that 97% of companies cited reputational risk resulting from public exposure to worker abuse found in the supply chain or company operations as the biggest driver for company action on modern slavery: see Hult Research and the Ethical Trading Initiative, *Corporate Leadership*

compliance should not rely on the diligence or otherwise of civil society in exposing and damaging reputations of non-complying companies. Such an approach also requires that the requisite company is concerned about its reputation, which may not be the case for private companies that lack brand name recognition.

77. Therefore, to ensure that all eligible companies comply with their reporting requirements, the Law Council considers that appropriate sanctions for non-compliance should be part of the reporting framework under any MSA. It is important to clarify that this should entail sanctions for companies that fail to comply with reporting requirements under any MSA, *not* sanctions for companies that in the process of their due diligence, uncover modern slavery in their supply chain.
78. The Law Council considers that ASIC should be given oversight and enforcement powers over businesses that are required to report under any MSA. ASIC is ideally situated to take on this role given it is already the corporate regulator, has experience with conducting investigations, and will have access to information on which companies are required to report but did not. ASIC should have the power to, either following complaint or of its own volition, investigate companies for non-compliance, and if it discovers non-compliance for the purposes of the act, issue sanctions against the offending company.
79. Looking internationally, the French vigilance plan law and Dutch Bill child labour both contain sanctions for non-compliance with their respective due diligence and disclosure requirements. The French vigilance plan law contains a three-tiered mechanism to ensure compliance: first, a formal notice; second, the possibility of seeking an injunction from a judge; and third and finally, a judge having the ability to impose a fine.⁹⁶ Under the Dutch Bill on child labour, if a company fails to make the required declaration, the government can issue the company with a fine of up to €4100. For a non-compliant company that receives a fine but still fails to submit the declaration within five years, the penalty may include imprisonment of the company's directors for up to six months. Further, under both the French vigilance plan law and the Dutch Bill on child labour, any natural person or corporate entity with a demonstrable interest can file a complaint with the supervisory body against a company that fails to make the required declaration, or when they have proof a business did not comply with the required due diligence.⁹⁷

on Modern Slavery: how have companies responded to the UK Modern Slavery Act one year on? (2016) <<https://www.ashridge.org.uk/faculty-research/research/current-research/research-projects/corporate-leadership-on-modern-slavery>>.

⁹⁶ On 23 March 2017, the French Constitutional Council invalidated the a provision that allowed companies to be imposed with €30 million fines for failing to produce a vigilance plan in certain circumstances, but otherwise approved the constitutionality of the law: see Edouard Pflimlin, "Le Conseil constitutionnel vide en partie la loi «Rana Plaza» ["The Constitutional Council voids part of the 'Rana Plaza' law"] (24 March 2017) *Le Monde* <http://www.lemonde.fr/economie-mondiale/article/2017/03/24/le-conseil-constitutionnel-vide-en-partie-la-loi-rana-plaza_5100127_1656941.html>.

⁹⁷ See further: Littler, *Dutch and French Legislatures Introduce New Human Rights Due Diligence Reporting Requirements* (2017) <<https://www.littler.com/publication-press/publication/dutch-and-french-legislatures-introduce-new-human-rights-due-diligence>> and Edouard Pflimlin, "Le Conseil constitutionnel vide en partie la loi «Rana Plaza» ["The Constitutional Council voids part of the 'Rana Plaza' law"] (24 March 2017) *Le Monde* <http://www.lemonde.fr/economie-mondiale/article/2017/03/24/le-conseil-constitutionnel-vide-en-partie-la-loi-rana-plaza_5100127_1656941.html>.

Recommendations

- Any MSA that includes reporting requirements for companies that meet the relevant threshold should also provide sanctions for non-compliance.
- ASIC should be designated as the regulator under any MSA and given powers to investigate and enforce sanctions for non-compliance.

Intersection of the regulator with the Australian National Contact Point

80. More broadly, for tools like reporting requirements for businesses to be effective they must be supported by a robust framework for the implementation of any strategy to eliminate modern slavery. The Law Council notes that countries, which may be considered to observe “best practice”, such as the UK, Holland and France, not only have relevant legislation but other strong mechanisms as part of a framework that underpins a strategy aimed at eliminating modern slavery.
81. For example, under the OECD Guidelines, the human rights chapter includes guidance that companies should “seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts”⁹⁸ and “carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts”.⁹⁹
82. If a company domiciled or operating in an OECD member state does not meet these or other standards set out in the OECD Guidelines,¹⁰⁰ any interested party can contact the National Contact Point (NCP) of the country in which the company is domiciled or operating, and lodge a complaint.¹⁰¹ This can provide a powerful incentive for companies to implement proper human rights diligence procedures. A NCP offers a process for complainants and companies to resolve issues of compliance with the OECD Guidelines (including through mediation), which may also call attention to the issue publicly. NCPs also have an important role in raising awareness about the OECD Guidelines. It should be noted that the UK, French and Dutch NCPs are considered leading NCPs worldwide.
83. While the UK Commissioner was not provided with effective oversight powers, the UK NCP at least provides a mechanism through which concerns (e.g. regarding the violation of human rights that may occur through modern slavery) about the operations of UK companies or companies operating in the UK, may be raised. However, the ANCP

⁹⁸ OECD, *OECD Guidelines for Multinational Enterprises 2011*, chapter IV [3].

⁹⁹ Ibid [5].

¹⁰⁰ For example, under the OECD Guidelines, the human rights chapter includes guidance that companies should “seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts” and “carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts”.

¹⁰¹ The NCP is then required to investigate the situation and bring the parties together for mediation. If mediation fails or is refused, then the NCP may issue a determination as to whether or not the company has breached the OECD Guidelines.

does not enjoy this same level of functionality (largely due to being under-resourced),¹⁰² which may have otherwise have provided at least some oversight in the area of business and human rights. Therefore, it is even more crucial that ASIC be given effective oversight powers over business under any MSA.

84. In addition, as the Law Council has previously recommended,¹⁰³ the Australian Government should consider strengthening the ANCP. The benefit of doing so is that it is an existing mechanism with the mandate to investigate company behaviour relevant to modern slavery. The ANCP represents a low-cost and accessible way to bring together affected parties and companies to mediate their issues and improve company processes.¹⁰⁴ While the ANCP may be currently underutilised as compared with the UK NCP, strengthening the ANCP would in turn strengthen the Australian framework supporting any strategy to eliminate modern slavery.

Recommendation

- **The Australian Government should consider strengthening the ANCP, especially through providing additional resources, to provide additional support to the Australian framework for addressing modern slavery.**

Creation of an Independent Anti-Slavery Commissioner or Ombudsman

85. The Law Council considers that the creation of an Independent Anti-Slavery Commissioner in Australia is essential and has previously called for the creation of such an office.¹⁰⁵ While the Australian Government should be commended for its National Action Plan that sets out a whole-of-community, including whole-of-government, approach to addressing modern slavery, there is no dedicated body in charge of ensuring this worthy yet ambitious undertaking is implemented and effective. An Independent

¹⁰² See Australian Human Rights Commission, *Implementing the UN Guiding Principles on Business and Human Rights in Australia: Joint Civil Society Statement* (August 2016) 19

<<https://www.humanrights.gov.au/sites/default/files/Implementing%20UNGPs%20in%20Australia%20-%20Joint%20Civil%20Society%20Statement.pdf>> and Oxfam Australia, *Strengthening the Australian National Contact Point for the OECD Guidelines for Multinational Enterprises* <<http://www.aph.gov.au/DocumentStore.ashx?id=f464992a-cb1c-4c40-90ab-e513d312d21b>>.

¹⁰³ Australian Human Rights Commission, *Implementing the UN Guiding Principles on Business and Human Rights in Australia: Joint Civil Society Statement* (August 2016) 4, 19-20 <<https://www.humanrights.gov.au/sites/default/files/Implementing%20UNGPs%20in%20Australia%20-%20Joint%20Civil%20Society%20Statement.pdf>>.

¹⁰⁴ See for example *Human Rights Council of Australia vs GSL Limited*, a complaint made by the former party concerning the latter's involvement with human rights abuses administering migration detention facilities. Through the ANCP mediation process, the parties were able to work together to improve GSL's company processes to make them more reflective of international business and human rights standards: Australian National Contact Point, *ANCP's Evaluation of the GSL Specific Instance Process* (13 October 2006) <http://www.ausncp.gov.au/content/publications/reports/general/GSL_Evaluation.pdf>.

¹⁰⁵ Law Council of Australia, *Submission to Joint Committee on Law Enforcement Inquiry into Human Trafficking* (15 February 2016) 6 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/Human_trafficking/Submissions>.

Anti-Slavery Commissioner in Australia (**Australian Commissioner**) could fill that void, as well as undertaking several other important functions, like being the central point of contact on all matters relevant to modern slavery in Australia, both for within Australia and internationally, and being responsible for community outreach and providing education to the various stakeholders involved in Australia's response to modern slavery, including law enforcement, civil society and the private sector.

86. In the Australian context it may be more appropriate to create the office responsible for these functions as an Anti-Slavery Ombudsman, rather than as a Commissioner. The functions and powers of Ombudsmen in Australia, though varied across the industries which they monitor and oversee, are generally well-recognised and understood by government departments, practitioners and other persons with whom they frequently interact. Creating an Anti-Slavery Ombudsman, rather than a Commissioner, may promote consistency and provide clarity regarding this new office. However, for the purposes of comparison with the UK MSA, the term Australian Commissioner used below refers to an Australian formulation of the UK Anti-Slavery Commissioner (**UK Commissioner**) role, whether in the format of a Commissioner or Ombudsman.

87. Under the UK MSA, the UK Commissioner has responsibility to "encourage good practice in the prevention, detection, investigation and prosecution of slavery and human trafficking offenses [and] the identification of victims of those offences".¹⁰⁶ This role includes making reports to the Secretary of State and their relevant counterpart in Scotland and Northern Ireland, providing recommendations to any public authority regarding matters relevant to its remit, undertaking outreach activities, formulating strategic plans for addressing modern slavery in the UK, and working with other agencies as required.¹⁰⁷ Within that mandate, the current UK Commissioner has set the following priorities for his office:

- Victim Identification and Care: to drive improved identification of victims of modern slavery and enhanced levels of immediate and sustained support for victims and survivors across the UK.
- Law Enforcement Evaluation: to promote improved law enforcement and criminal justice responses across the UK, to support development and adoption of effective training, and to increase awareness of modern slavery across relevant statutory agencies.
- Partnerships: to identify, promote and facilitate best practice partnership working and to encourage improved data sharing and high quality research into key issues.
- Private Sector Engagement: to engage with the private sector to promote policies to ensure that supply chains are free from slavery and to encourage effectual transparency reporting.

¹⁰⁶ Ibid s 40 (1).

¹⁰⁷ Ibid s 40 (3).

- International collaboration: to encourage effective and targeted international collaboration to combat modern slavery.¹⁰⁸

88. Through work done to pursue those priorities, the UK Commissioner has identified the following achievements of his office since its inception in 2015:

- Developing awareness raising and training for local authorities and the health sector.
- Ensuring special funding and attention is devoted to tackling the increase in trafficking of women and girls from Nigeria (a major source country for victims of human trafficking) to Europe.
- Providing recommendations to protect vulnerable children and adults from traffickers amid the refugee and migrant crisis.
- Securing a House of Commons committee inquiry into access to benefits for victims of modern slavery.
- Driving forward improved modern slavery crime recording.
- Collaboration with the Independent Chief Inspector of Borders and Immigration to inspect Border Force's response to identification of potential victims of modern slavery on entry to the UK.
- Developing improved understanding of modern slavery within the homelessness sector.¹⁰⁹

89. The scope of the UK Commissioner's priorities and achievements indicate the vast amount of work to be done on addressing modern slavery in all of its forms, and the resulting need for a dedicated office to be responsible for these efforts. The independence of the UK Commissioner is also a key attribute of his office, given the broad range of groups and individuals across government, law enforcement, civil society and the private sector with whom he consults in formulating his office's response to modern slavery in the UK and abroad.

90. The Law Council considers the introduction of a dedicated Australian Commissioner essential in addressing modern slavery in Australia and overseas. While Australia has an Ambassador for People Smuggling and Human Trafficking, that role is largely diplomatic and focused on managing international relationships relevant to Australia's response to people smuggling and human trafficking. The forms of modern slavery found in Australia and/or affecting Australia are ever-changing and typically concealed, requiring a permanent and dedicated office uniquely tasked with identifying them and coordinating a response.¹¹⁰

¹⁰⁸ Independent Anti-Slavery Commissioner, *Independent Anti-Slavery Commissioner Strategic Plan 2015-2017* (16 October 2015) 1 <<https://www.gov.uk/government/publications/independent-anti-slavery-commissioner-strategic-plan-2015-to-2017>>.

¹⁰⁹ See Independent Anti-Slavery Commissioner, *Independent Anti-Slavery Commissioner Annual Report 2015-16* (2016) <<https://www.gov.uk/government/publications/independent-anti-slavery-commissioner-annual-report-2016>>.

¹¹⁰ The Law Society of South Australia has noted how, in relation to forced or sham marriages, that women who have experienced serious violence and abuse often require additional services, such as translation services, medical and psychological services, complicated by immigration issues, as well as religious, social and cultural

91. In any case, the Law Council considers it important that the body responsible for investigation and enforcement of any MSA (e.g. ASIC) is separate to the body responsible for working with stakeholders and education, for two key reasons. First, tasking the same body with investigations as well as outreach and education may mean that a heavy investigatory workload results in outreach and education being neglected due to a resulting lack of time and resources, or vice versa. Secondly, that the Australian Commissioner will lack the enforcement powers is important to fostering relationships with and encouraging open and full participation from the private sector, who may be less forthcoming if the Australian Commissioner is empowered to sanction them for non-compliance under any MSA. If in the course of its work the Australian Commissioner discovered a company has not been complying with its reporting requirements, rather than take enforcement action it would focus on working with the company to identify reasons for the non-compliance and assist them with addressing those issues. Only if a company refused to engage with the Australian Commissioner after it raised concerns or failed to respond to its recommendations regarding compliance would consideration need to be given to referring the matter to the regulator. The Law Council notes that Ombudsmen in Australia typically lack determinative and enforcement powers.
92. The Law Council considers that a key feature of the Australian Commissioner's role should be to provide guidance and education to the private sector on how to comply with reporting requirements, both for companies eligible for mandatory reporting, and non-eligible companies seeking to make voluntary disclosures. Examples of such guidance include the Home Office's statutory guidance for organisations on how to write a statement for the purposes of the UK MSA,¹¹¹ or CORE Coalition's guide for commercial organisations on the transparency in supply chains clause under the UK MSA.¹¹²
93. There has been some suggestion company statements produced pursuant to reporting requirements under the UK MSA have remained vague because companies fear inadvertently waiving client legal privilege regarding pending legal actions or making admissions. However, having regard to the suggested areas of disclosure in the UK MSA, the mandatory areas in the French vigilance plan law, and other relevant business and human rights standards globally, like the UNGPs and OECD Guidelines, a company need not disclose sensitive legal information to comply with the requirements. Guidance produced by any Australian Commissioner on how to comply with the reporting requirements should be general enough to be useful to the wide range of companies across sectors that will likely be captured,¹¹³ but should also be specific enough in terms

factors, and services at the state level are currently not sufficiently funded to provide the support they need. The Law Society of South Australia has also noted how international commercial surrogacy arrangements can promote trafficking and exploitation of women and children across borders, but is unregulated in Australia. These and other complex issues arising from modern slavery practices may be issues that an Anti-Slavery Commissioner could explore and then determine and coordinate an appropriate response.

¹¹¹ Home Office, *Transparency in Supply Chains: A practical guide* (29 October 2015)

<<https://www.gov.uk/government/publications/transparency-in-supply-chains-a-practical-guide>>.

¹¹² CORE Coalition, *Beyond compliance: Effective reporting under the Modern Slavery Act – a civil society guide for commercial organisations on the transparency in supply chains clause* (February 2016) <http://corporate-responsibility.org/wp-content/uploads/2016/03/CSO_TISC_guidance_final_digitalversion_16.03.16.pdf>.

¹¹³ In time, it may be appropriate to work with Australian businesses, civil society, and other stakeholders to prepare industry-specific guidance.

of what is and what is not required such that it will give comfort and certainty to companies that they are not required to reveal sensitive legal information to comply with reporting requirements, which may in turn encourage a higher quality of company statements.

94. Consideration should also be given to how to make available guidance, education and training to smaller companies seeking to make voluntary statements under any MSA, but who may lack the expertise or experience with establishing systems to meet business and human rights standards that large companies may already have in place.¹¹⁴

Recommendation

- **An Independent Anti-Slavery Commissioner or Ombudsman should be created, separate from any regulator tasked with enforcement under any MSA, responsible for coordinating Australia's response to modern slavery by working with key stakeholders and engaging in education and outreach.**

Other issues that arise regarding a Modern Slavery Act

Criminal law provisions

95. The UK MSA creates offences for slavery, servitude and forced or compulsory labour.¹¹⁵ It should also be noted with regard to the UK MSA that the UK has no Criminal Code, which necessitates the offences of slavery and slavery-like offences being contained in a separate Act, being the UK MSA. However, in Australia, these offences already exist in the Criminal Code.¹¹⁶ The Law Council considers that, in terms of criminalising the offence, these laws do not require amendment and are sufficient.
96. Prominent advocates against human trafficking in the UK have observed that the *Modern Slavery Act* (UK) does not create jurisdiction to prosecute slavery or forced labour crimes committed by UK companies or nationals overseas.¹¹⁷ However, in Australia, the offence of slavery, and slavery-like offences (servitude, forced labour, debt bondage, forced

¹¹⁴ The Law Council notes that the issue of the difficulty that smaller to medium sized enterprises may have with reporting requirements compared with larger enterprises accustomed to human rights due diligence has also been raised in the submission from adidas Group to this Inquiry: see further adidas Group, *adidas Group Submission Australian Parliamentary Inquiry into Modern Slavery Joint Standing Committee on Foreign Affairs, Defence and Trade* (6 March 2017) 6-7

<http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Submissions>.

¹¹⁵ *Modern Slavery Act 2015* (UK) s 1.

¹¹⁶ *Criminal Code Act 1995* (Cth) sch 1 div 270-271.

¹¹⁷ See International Trade Union Conference, *Closing the loopholes – How legislators can build on the UK Modern Slavery Act* (2016) 12-13 <<https://www.ituc-csi.org/closing-the-loopholes-how?lang=en>>; Jeffrey Vogt, "Efforts to clean up global supply chains so far come up short" (22 March 2017) *Open Democracy* <<https://www.opendemocracy.net/beyondslavery/jeffrey-vogt/efforts-to-clean-up-global-supply-chains-so-far-come-up-short>>.

marriage), have extraterritorial application.¹¹⁸ The Law Council considers that this is a considerable advantage the Australian criminal laws have over the UK laws.

97. For example, under the UK laws, if a British company or person holds a person in slavery or forced labour abroad, unless those actions are criminalised in that state, they cannot be prosecuted for their actions in the UK, although profits obtained from that slavery or forced labour can still be brought back to the UK.¹¹⁹ However, an Australian company or person in the same position could still be prosecuted under Australian criminal laws. This is important as foreign subsidiaries of Australian companies operating in countries with a weak rule of law are especially exposed to the risks of modern slavery in their supply chains and operations, and modern slavery often involves trafficking across international borders. Australia's laws remove the possibility of any loophole resulting because the relevant conduct occurred overseas and demonstrate Australia's commitment to eradicating modern slavery globally.
98. Beyond the jurisdiction of the offences, the UK MSA offences involve a maximum penalty of life imprisonment for slavery, servitude or forced or compulsory labour, as compared to the Australian offences, which include penalties of up to 17 – 25 years for slavery, 15 – 20 years for servitude, and 9 – 12 years for forced labour, with the higher penalty being applicable depending on extent of involvement of the perpetrator and the presence or lack of aggravating circumstances.¹²⁰ The Law Council considers that the existing penalties for slavery and slavery-like offences under the Criminal Code are sufficient.
99. Appropriate criminal sanctions are important to send a message that modern slavery will not be tolerated in Australia, but due to the nature of the offences, instances of modern slavery rarely result in a criminal prosecution. Therefore, priority should be given instead to creating a robust and effective national compensation scheme for survivors ahead of criminal penalty reform.

Recommendations

- **Existing Australian criminal law provisions on slavery and slavery-like offences, including penalties, do not require amendment.**
- **Any reform of penalties for slavery and slavery-like offences should be a secondary priority compared with creating a mechanism for victims of modern slavery to seek compensation.**

Legal aid for victims of modern slavery

100. A concern identified in the UK is that despite strong laws against modern slavery, survivors have difficulty accessing legal aid to get assistance. For example, in the UK,

¹¹⁸ *Criminal Code Act 1995* (Cth) sch 1 ss 270.3A, 270.9; see also 271.10–271.11.

¹¹⁹ See Anti-Slavery International, *Analysis of Modern Slavery Act* (27 March 2016)

<<https://www.antislavery.org/analysis-modern-slavery-act>> and Parosha Chandran, "Modern Slavery Act gives UK companies a free pass to profit from slavery overseas" (18 October 2016)

<<https://www.theguardian.com/sustainable-business/2016/oct/18/modern-slavery-act-gives-uk-companies-a-free-pass-to-profit-from-slavery-overseas>>.

¹²⁰ See *Criminal Code Act 1995* (Cth) sch 1 ss 270.3 (slavery); 270.5 (servitude) and 270.6A (forced labour).

potential victims of trafficking have been unable to access legal aid until they have agreed to be referred to the authorities, and it has been determined there are “reasonable grounds” to believe they are a victim. However, in the case of trafficked persons with unclear immigration status, referral to the authorities is daunting and can be potentially dangerous and traumatic.¹²¹

101. In particular, it should be noted that Australia has an obligation under the Palermo Protocol to make legal advice available to trafficking victims.¹²² The Law Council has previously recommended an increase in legal aid funding for organisations with expertise to ensure that legal assistance and education can be effectively provided to groups who are vulnerable to human trafficking, including slavery, slavery-like practices and people trafficking offences,¹²³ and continues to advocate for the Commonwealth Government to provide sufficient resources for legal aid.
102. Modern slavery gives rise to a number of legal issues for survivors for which survivors may require assistance, including how to escape from their situation, how they might seek restitution, whether or not they want to render assistance to render prosecute of those responsible, and potentially, uncertainty surrounding their immigration status. Navigating this legal landscape is notoriously difficult for survivors, who are often traumatised, have no or little money, and may not speak English. Legal aid is essential to ensure that survivors can get the help they need and avoid falling victim to modern slavery again.
103. In addition, if a federal compensation scheme for victims of modern slavery is created, providing legal aid would assist victims of modern slavery to seek compensation, who otherwise may not be aware of any entitlement they have nor speak or understand English to a sufficient level to make an application. It would also increase the efficiency of the scheme as organisations that worked with survivors of modern slavery would be able to collate and submit all information relevant to an application on behalf of an applicant.

Recommendation

- **Provide legal aid to victims of modern slavery to enable them to seek legal assistance with their situation.**

¹²¹ House of Commons Library, *Modern Slavery Act 2015: Recent Developments* (22 July 2016) 11 <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7656#fullreport>>.

¹²² *United Nations Convention against Transnational Organized Crime*, GA RES 55/25, UN GOAR, 55th sess, 62nd plen mtg, Agenda Item 105, Supp No 49, UN Doc A/RES/55/25 (8 January 2001) annex II (‘*Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*’) art 6.3(b).

¹²³ Law Council of Australia, *Submission to Joint Committee on Law Enforcement Inquiry into Human Trafficking* (15 February 2016) 11

<http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/Human_trafficking/Submissions> and Law Council of Australia, *Submission to Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into Slavery, Slavery-like conditions and People Trafficking* (2 October 2012) [95](ff) <http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jfadt/slavery_people_trafficking/subs.htm>.

