

Inquiry into the Customs Amendment (Banning Goods Produced by Uyghur Forced Labour) Bill 2020.

Submission by Professor Justine Nolan and Dr Martijn Boersma

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About the Authors of the Submission

Justine Nolan is the Director of the Australian Human Rights Institute (UNSW) and a Professor in the Faculty of Law and Justice at UNSW Sydney. Justine's research focuses on the intersection of business and human rights, including modern slavery. Justine works closely with business and civil society and has been a key driver of the Australian business and human rights movement. She has held various expert advisory roles including currently as a member of the Australian Government's Modern Slavery Expert Advisory Group. Prior to joining UNSW in 2004, she worked as the Director of the Business and Human Rights program at the Lawyers Committee for Human Rights (now Human Rights First) in the USA. Her 2019 co-authored book *Addressing Modern Slavery* examines how consumers, business and government are both part of the problem and the solution in curbing modern slavery in global supply chains.

Martijn Boersma is a senior lecturer at the University of Technology Sydney Business School. He is interested in the intersection of business and society and has extensively published on these topics. Martijn became in the trade union movement since 2012, when he joined Catalyst Australia, a progressive policy institute and think tank, which worked closely with trade unions, non-governmental organisations and academics to promote policy solutions for pressing social and economic issues. He has also worked as a researcher for United Voice, a trade union that represents over 120,000 Australian workers in various industries. Previously, throughout his seven-year career with Greenpeace International in Amsterdam, his interest has been the socio-economic impact of global campaign work by civil society organisations. Current projects focus on multistakeholder efforts to improve working conditions in the Australian commercial real estate cleaning supply chain, and strategies to improve labor conditions within the Australian cotton value chain. Together with Justine Nolan he published the book *Addressing Modern Slavery* (2019).

Executive summary

Professor Justine Nolan and Dr Martijn Boersma welcome the opportunity to make a submission to the Inquiry into the Customs Amendment (Banning Goods Produced by Uyghur Forced Labour) Bill 2020.

The key recommendations in this submission are as follows:

1. Expand the proposed Bill to prohibit the importation of all goods produced or manufactured using forced labour (regardless of their geographical origin).
2. The Government should consider the ability to impose fines on importers and end-buyers who import prohibited goods and apply such fines for the provision of institutional support for survivors of trafficking and modern slavery.
3. Ratify ILO Protocol of 2014 to the Forced Labour Convention, 1930 (PO29) to ensure the development of a holistic legislative framework that will sit alongside the Modern Slavery Act, and a new law that bans the importation of goods produced or manufactured using forced labour.
4. The Government should consider publicly disclosing which goods are prohibited from importation, as well as associated importers, manufacturers and geographical locations.

Forced Labour

An estimated 40.3 million people worldwide are trapped in a form of modern slavery and of these, 24.9 million people are estimated to be in forced labour.ⁱ That is, they are being forced to work under threat or coercion. Sixteen million victims are exploited in activities connected in the private economy. The practice is found in emerging economies, as well as in developed countries. Forced labour is defined in the *ILO Convention concerning Forced or Compulsory Labour No. 29 (Forced Labour Convention)*ⁱⁱ, as ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’ (ILO Convention concerning Forced or Compulsory Labour, art. 2)ⁱⁱⁱ. Forced labour is the subject of no less than 300 bilateral treaties and 12 global conventions.^{iv}

The number of industries, goods and services that are associated with forced labour is staggering. Every two years the United States Department of Labor produces a list of goods produced by child or forced labour. In 2020, this list comprised a total of 155 goods from 77 countries. Evidence suggests that modern slavery, including forced labour, is most commonly associated with labour intensive, poorly mechanised activities, requiring a low-skilled labour force.^v The goods with the most forced labour mentions by number of countries are bricks, cotton, garments, gold, sugar cane, cattle and fish. Notorious industries include the agricultural, manufacturing and mining sectors.^{vi}

The global profits of modern slavery, including forced labour, are substantial. Based on an estimate of 21 million people in modern slavery around the world in 2012, the International Labour Organization approximated that US\$ 150 billion (AU\$ 208.5 billion) in illegal profits are generated in the private economy each year.^{vii} It has been calculated that the average profit per victim is US\$3,978 (AU\$ 5,531) a year.^{viii} Given that the latest estimation of people in modern slavery has nearly doubled, associated profits will have drastically risen as well.

The Covid-19 crisis makes a strategy to address forced labour all the more important because of the increased number of people that are now more vulnerable to exploitation. Many of these will be in sectors most seriously impacted by the economic downturn including manufacturing, hospitality, retail and food services.^{ix} These at-risk sectors make up approximately 37% of workers in the Asia Pacific region. In addition, there are a significant number of workers in the informal economy in this region that will be severely impacted. Oxfam also warns that ‘the economic fallout from the COVID-19 pandemic could push half a billion more people – or 8 per cent of the global population’ into poverty with women particularly likely to face hardship.^x

Context and Background

Over the last decade and a half, there has been increasing international discourse and interest in forced labour, slavery, human trafficking and (more recently) modern slavery. In 2005, the International Labour Organization (ILO) launched the Global Alliance Against Forced Labour; in 2007, the UN Human Rights Council established a Special Rapporteur on Contemporary Forms of Slavery; and, in the same year, the UN launched a Global Initiative to Fight Human Trafficking. In 2014, governments, employers and workers at the ILO International Labour voted to adopt a Protocol and a Recommendation which supplement the Forced Labour Convention, 1930 (No. 29), and complement existing international instruments by providing specific guidance on effective measures to be taken to eliminate all forms of forced labour. Australia has not yet ratified this important international treaty.

These institutional initiatives have been complemented by some national voluntary initiatives, such as Brazil’s National Pact to Eradicate Slavery and emerging domestic legislative initiatives focused on the connection of these human rights violations with business. The establishment of California’s *Transparency in Supply Chains Act* (2012), the United Kingdom’s *Modern Slavery Act* (2015) and most recently Australia’s *Modern Slavery Act* Cth (2018) signify a new and targeted approach to regulate

modern slavery, including forced labour, in global supply chains. Although these legislative initiatives have served to raise the profile of forced labour and capture corporate attention, it is not yet clear how effective they will be in mitigating the issue.

This is not only because scholarship on mandatory disclosure regimes in other areas has suggested that these regimes are frequently unsuccessful, but also because these problems are likely to be exacerbated in the human rights context. We argue that this is due to the fact that supply chain disclosures (as mandated by the Modern Slavery Act) do not provide information on actual products (but rather are process-oriented), the information in the disclosures only provides weak proxies for human rights outcomes, and the risks associated with supply chains vary dramatically across industries. It is useful then to consider how measures, such as the proposed Bill, can supplement the existing current initiatives.

Proposed Bill

In considering how best to strengthen **the legislative framework to address forced labour, it is important to take a holistic approach that recognises forced labour is a global problem.** The proposed Bill prohibits the importation of goods from two categories: those produced by Uyghur forced labour that are produced or manufactured in the Xinjiang Uyghur Autonomous Region of the People's Republic of China; and those goods produced or manufactured in the People's Republic of China through the use of forced labour. **This is a narrow focus that does not acknowledge the pervasive nature of forced labour that features in developed and emerging economies around the globe.**

State-sanctioned slave labour can play a substantial role in commodity production in the formal economy and can potentially affect any company and consumer in the world through cross-border sourcing and production. For example, state-sanctioned slave labour is particularly common in the cotton sector. In Uzbekistan^{xi} and Turkmenistan^{xii}, each year during the harvest season citizens are forced out of their regular jobs to spend weeks picking cotton to work. State-sanctioned forced labour occurs on a large scale in North Korea. It is estimated that one in 10 people living in North Korea, 2.6 million people, are subjected to forced labour and exploitation by the state in sectors such as agriculture and construction.^{xiii} This produces an estimated US\$ 975 million in value each year.^{xiv}

Another example of state-sanctioned forced labour are goods produced through prison labour. Exporting prison-produced goods is illegal under domestic and international trade laws. United States prison labour is a billion-dollar industry.^{xv} Thirty-seven states allow the use of prison labour by private companies.^{xvi} In eight states prisoners are not paid for their work in state-run facilities. The countrywide average for inmates receiving the least for their work is 14 cents per hour, the average for those earning the most is 63 cents per hour.^{xvii}

In order to bolster the proposed Bill, we suggest expanding the Bill to include a prohibition on any goods produced or manufactured using forced labour regardless of their geographical origin.

Comparative International Approaches to Regulating Forced Labour

In the United States, Section 307 of the Smoot-Hawley Tariff Act of 1930 (Tariff Act), prohibits the importation of any goods made wholly or in part by convict or forced labor abroad. The Tariff Act empowers the Treasury Department to issue Withhold Release Orders (WROs) under which goods are detained at U.S. ports unless the producer can demonstrate the goods were not manufactured with forced labour. Until 2016, the Tariff Act's so-called consumptive demand exemption allowed importation of goods made with forced labor if 'U.S. demand exceeded domestic production' – a loophole that grew as domestic production decreased. But in 2016, the Trade Facilitation and Trade

Enforcement Act removed the consumptive demand exemption, thereby enhancing Custom and Border Patrol's (CBP) ability to prevent the importation of goods it has reason to believe were created wholly or in part by forced labour.

Since 2016, CBP has been more actively using the WRO as an enforcement tool. Currently, there are 58 WROs imposed on specific goods from companies in twelve different countries.^{xviii} CBP cannot publicly name importers implicated in WROs partly because the scope is against the foreign entity, not directly the US importer. CBP's WRO mandate does not authorize it to actively trace the goods beyond the point of importation, i.e. to the final retailers, nor to penalize the end-buyers for purchasing tainted goods from the importer. Remediation is presented as an option to importers who are protesting the WRO. However, CBP cannot force a company's decision on whether they should remediate or cut a supplier. For WROs, importers have the opportunity to show evidence that forced labour is not involved in the production of detained shipments. CBP will review supply chain documentation and other evidence the importer provides contesting a WRO, to make a determination on whether the WRO should be revoked or modified.

CBP also has the authority to issue civil penalties (i.e., fines) pursuant to [19 U.S. Code § 1595a\(b\)](#) against importers for introducing, or attempting to introduce, any merchandise into the commerce of the United States contrary to law. Such violations can include forced labour, along with intellectual property violations, price manipulation of goods (dumping), or others. Civil penalties collected by CBP go to the Treasury General Fund, which is controlled by Congress. However, informants (the original petitioners) may petition CBP for a monetary reward, at the Commissioner's discretion using a special award fund. We note this as it is relevant to consider how this proposed Bill might support the provision of institutional support for survivors of trafficking and modern slavery and assist in creating adequate support structures based on international best practice.

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- ⁱⁱⁱ Ibidem
- ^{iv} Cockayne, J. (2015). Unshackling Development: Why we need a global partnership to end modern slavery. United Nations University and The Freedom Fund. <https://d1r4g0yjjvcc7lx.cloudfront.net/wp-content/uploads/Unshackling-Development-FINAL-FOR-EMAIL.pdf>
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- ^{vi} United States Department of Labor, 'List of Goods Produced by Child Labor or Forced Labor. United States Department of Labor', *United States Department of Labor*, 2020, <<https://www.dol.gov/agencies/ilab/resources/reports/child-labor>>.
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- ^x Oxfam 'Dignity not Destitution' 9 April 2020: <https://www.oxfam.org.au/wp-content/uploads/2020/04/Oxfam-Dignity-not-Destitution.pdf>
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