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By email:

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Joint Standing Committee on Foreign Affairs, Defence and Trade
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Dear Mr Chairman

Re: Inquiry into establishing a Modern Slavery Act in Australia

I thank the Joint Standing Committee for the opportunity to make this submission. The evil of modern slavery is among the most pressing moral issues confronting the global community today.

The work of the Committee is especially urgent since it is today increasingly evident that measures taken in the last five or ten years, while in themselves important steps, are not enough; and that if we are to see the end of slavery globally something more than has been done to date is needed.

The current incumbent of the Vatican, Pope Francis, has made it clear that the fight against trafficking in people will be one of the defining priorities of his papacy, and under his leadership the Catholic Church has called for the United Nations to take a greater role in preventing human trafficking.¹ And ending human trafficking and slavery are identified in the goals and targets of the 2030 United Nations Agenda for Sustainable Development.² Both are important indicators of the direction of international opinion.

The reality is that degradation of humanity anywhere degrades us all no less, no matter how little it apparently touches our lives in Australia.

The Committee's work proceeds in the shadow of recent developments at the international level. In June 2014, the International Labour Organization

¹ Archbishop Bernadito Auza, Apostolic Nuncio, Permanent Observer of the Holy See, appeal to the United Nations Security Council Open Debate on Trafficking in persons in conflict situations: forced labour, slavery and other similar practices, New York, 15 March 2017.

² Interdepartmental Committee on Human Trafficking and Slavery, Trafficking in Persons: The Australian Government Response 1 July 2015 – 30 June 2016, 91.

revised its Forced Labour Convention³ addressing still existing implementation gaps.⁴ That revision came into force in November 2016.⁵ By a Codicil to the Convention, member states who ratify the Codicil are obliged to:

- (1) take 'effective measures' to 'prevent and eliminate' the use, and to 'sanction the perpetrators', of forced labour (art 1); and
- (2) develop 'a national policy and plan of action' for the 'effective and sustained' suppression of forced labour (art 1), with the preventative measures to include 'efforts to ensure' that legislation extends to 'all sectors of the economy' and supporting due diligence by both the public and private sectors to prevent and respond to the risks of forced labour (art 2).

The Australian delegates to the June 2014 ILO voted in favour of the adoption of the Protocol, signalling likely wide, and bi-partisan, domestic support for the implementation of measures giving effect to the Convention. The Protocol was tabled in parliament in May 2015, however a decision to ratify it, in accordance with government treaty-making policy, awaits all legislation necessary for compliance to be put in place in all jurisdictions.

It is the business of this Inquiry to guide parliament in enacting appropriate legislation preliminary to Australia ratifying the 2014 ILO Protocol.

Supply chains (vertically integrated contractual systems of production) are the primary economic connecting nodes in the body of global trade and commerce today. Global supply chains present unique challenges for developing countries.⁶ The challenges raised for western nations are different, but no less urgent. Unprecedented global supply-chain related trade growth between 1985 and 2007,⁷ driven by the imperative of comparative cost advantages in pursuit of corporate profits, has exacerbated global inequality and fed the ground in which slavery flourishes.⁸

³ Convention concerning Forced or Compulsory Labour, 1930 (No 29), adopted 28 June 1930, and ratified by Australia on 2 January 1932.

⁴ Protocol of 2014 to the Forced Labour Convention, 1930, adopted 11 June 2014 and entered into force on 9 November 2016, though (as at 11 April 2017) the Codicil is yet to be ratified by or enter into force in Australia.

⁵ A non-binding recommendation was also negotiated by ILO members which is intended to provide governments of member states guidance in implementing the Convention and the Protocol: Forced Labour (Supplementary Measures) Recommendation 2014 (No 203) - Recommendation on supplementary measures for the effective suppression of forced labour.

⁶ United Nations Conference on Trade and Development, International Trade and Policy Study Series No 55, 2013, *Global Supply Chains: trade and economic policies for developing countries* (accessible at <http://unctad.org/en/PublicationsLibrary/itcdtab56_en.pdf>).

⁷ IMF World Trade Outlook, October 2016, ch 2 'Global Trade: what's behind the slowdown?'

⁸ Gold, Trautrim and Trodd in 'Modern slavery challenges to supply chain management' published in 2015 in *Supply Chain Management: An International Journal*, 20/5 (2015), 485, doi: 10.1108/SCM-02-2015-0046.

Australian businesses, in a world of global competition, are today driven by the same imperatives that see them seek out and use cheap labour.

The production of Australian surf brands in North Korea,⁹ forced labour in Chinese, Vietnamese and Thai fishing industries which supply frozen prawns to Australian retailers¹⁰ and labour abuses in 7-Eleven's fresh-food supply chains¹¹ attest to this. These findings emphasise that by poor practices in Australia, we very directly enable slavery elsewhere in the world. And it is to emphasise that ending slavery needs the involvement of business.

There is bipartisan support for addressing forced labour in supply chains. In March 2013 Julia Gillard, the then Prime Minister, announced a 'whole of government strategy' directed at improving commonwealth procurement arrangements to ensure that arrangements adequately identified slavery when assessing the ethical behaviour of suppliers, and developing guidelines for government agencies reinforcing the need for steps eliminating the risks of slavery in supply chains.¹² As an awareness raising strategy, the initiative was an important one. In December 2014, the government's 2015-2019 National Action Plan to Combat Human Trafficking and Slavery¹³ identified labour exploitation in supply chains as a 'key focus area'.

Reliable statistics for trafficking remain elusive.¹⁴ However, in 2016 the Global Slavery Index counted 45.8 million people in slavery worldwide.¹⁵ The majority of instances are in forced labour (the locus of this inquiry).¹⁶ The most affected countries, as noted in the Submission Report on tabling the 2014

⁹ McKenzie and Baker, 'Where your ski jacket really comes from' *The Sydney Morning Herald*, 21 February 2016 (accessible at <http://www.smh.com.au/business/surf-clothing-label-rip-curl-using-slave-labour-to-manufacture-clothes-in-north-korea-20160219-gmz375.html>).

¹⁰ Greenpeace, *Dodgy Prawns: the hidden environmental and social cost of prawns in Australia*, December 2015 (accessible at <http://www.greenpeace.org/australia/en/what-we-do/oceans/resources/reports/Dodgy-Prawns/>); Han, 'Foreign prawns linked with human trafficking and environmental havoc, says Greenpeace', *The Sydney Morning Herald*, 9 December 2015 (accessible at <http://www.smh.com.au/business/retail/foreign-prawns-linked-with-human-trafficking-and-environmental-havoc-says-greenpeace-20151207-glhyst.html>).

¹¹ Ferguson and Toft, '7-Eleven: the price of convenience', *ABC Four Corners*, 30 September 2015 (accessible at <http://www.abc.net.au/4corners/stories/2015/08/30/4301164.htm>).

¹² Media Release, 8 March 2013, accessible at <https://pmtranscripts.pmc.gov.au/release/transcript-19141>.

¹³ Accessible at <https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Pages/Australias-response-to-human-trafficking.aspx>.

¹⁴ See, e.g., United Nations Office on Drugs and Crime, *Trafficking in Persons, Global Patterns*, (2006), 43; and United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons*, (2009), 18.

¹⁵ Global Slavery Index 2016, accessible at <http://www.globalslaveryindex.org/findings/>. Hewett, 'Modern slavery in global supply chains', *Australian Financial Review*, 31 May 2016 (accessible at <http://www.afr.com/opinion/columnists/modern-slavery-in-global-supply-chains-20160531-gp89lw>).

¹⁶ According to the International Labour Organisation, 78% of slaves are in forced labour: ILO (2012a), *Global Estimate of Forced Labour*.

ILO Protocol in parliament in May 2015,¹⁷ include our northern neighbours, Indonesia and Thailand, and major trading partners, China and India.¹⁸

While the incidence of slavery is notoriously difficult to quantify, the number of prosecutions and convictions of trafficking offenders worldwide is low.¹⁹

The general consensus, domestically and internationally, is that the number of prosecutions and convictions of traffickers worldwide has been mostly insufficient to deter criminals. Australia has a strong national legal framework comprehensively criminalizing crimes relating to trafficking. However the insufficient deterrent effect of existing measures signals that something more is needed. What is needed is:

- (1) a deeper commitment to a shared responsibility everywhere, individually and in corporate life, for the conditions of forced labour anywhere it occurs stemming from the recognition that in an interconnected world our choices, as businesses and consumers, we can contribute to, or impede, efforts to end slavery everywhere; and
- (2) the introduction of legislative measures encouraging the development of the kind of shared responsibility that is needed at this level.

There is a gradual uptake of voluntary industry and corporate supply chain transparency and disclosure regimes in Australia, notably in the textiles, clothing and footwear and road transport sectors. Many businesses operating across borders also are amenable to domestic laws in other jurisdictions obliging them to publish expressions of commitment to ending slavery.²⁰ And the leadership of prominent business leaders and philanthropists, for instance, Andrew Forrest's The Walk Free Foundation are assisting on building a culture of corporate social responsibility committed to ending human trafficking and forced labour, locally and internationally.²¹

The traditional paradigm of profit maximization is under pressure from a new set of indicia of good corporate performance, including ideas of

¹⁷ Australian Government, Department of Employment, *Tabling of Forced Labour Protocol and Recommendation Report*, 14 May 2015, para 7, accessible at <https://docs.employment.gov.au/documents/tabling-forced-labour-protocol-and-recommendation>

¹⁸ Global Slavery Index (2014)

¹⁹ See, e.g., Moskowitz (Asia Regional Trafficking in Persons project), 'Challenges and Priorities in Prosecuting and Adjudicating TIP Cases', (2008), cited in Broderick, 'Beyond Wei Tang: Do Australia's human trafficking laws fully reflect Australia's International human rights obligations', speech to the Workshop on Legal and Criminal Justice Responses to Trafficking in Persons in Australia, Obstacles, Opportunities and Best Practice, 9 November 2009, note 9, accessible at <https://www.humanrights.gov.au/news/speeches/beyond-wei-tang-do-australia-s-human-trafficking-laws-fully-reflect-australia-s#fn9>

²⁰ See National Australia Bank, *Modern Slavery and Human Trafficking Statement*, issued in accordance with the Modern Slavery Act 2015 (UK) (accessible at <<https://www.nab.com.au/about-us/corporate-responsibility/modern-slavery-statement>>).

²¹ See <http://www.walkfreefoundation.org>.

corporate social responsibility, visible, e.g., in corporate commitments to sustainability and the 'green economy'. The paradigm shift offers a politically palatable regulatory opportunity, and means that in point of avoiding reputational damage, government regulation and risk minimisation are key drivers of supply chain management, coupled with market opportunities for supplying distinctive sustainable products at a premium price.

There are a number of models based on initiatives, in Australia and internationally, that are available to inform and guide the Committee's deliberations on appropriate legislation. These can be grouped into two categories, those enacting binding measures without civil penalty sanctions, and those enforceable by sanctions, specifically civil penalty orders.

Examples of legislation in the first category are:

- (1) the California *Transparency in Supply Chain Act 2010*;
- (2) the UK *Modern Slavery Act 2015*;

Another example falling within the first category, although not directed at ending forced labour, is the *Workplace Gender Equality Act 2012* (Cth).

In early 2016 the Supply Chains Working Group, established under the National Roundtable on Human Trafficking and Slavery, comprising representatives from government, business, unions and academia, developed a series of nine recommendations for the consideration of government. That group was dissolved in 2016, and its recommendations remain confidential and (it appears) have not been presented to the responsible minister.²²

In December 2015, before it was disbanded however, the Working Group delivered a raft of detailed, and costed, recommendations, including a recommendation for the adoption of mandatory disclosure measures like the UK *Modern Slavery Act*.²³ Mandatory disclosure obligations are important part of any effort to end forced labour and slavery.²⁴

The disclosure obligation in s 54 of the *Modern Slavery Act* is enforceable by

²² O'Brien and Boersma, Human Rights in Supply Chains of Australian Businesses: Opportunities for Legislative Reform, The Australia Institute and Catalyst Australia, (2016), accessible from

http://catalyst.org.au/documents/Human_Rights_in_the_Supply_Chains_of_Australian_Businesses_-_Opportunities_for_Legislative_Reform_FINAL.pdf

²³ Ashley Feasley, 'Deploying Disclosure Laws to Eliminate Forced Labour: Supply Chain Transparency Efforts of Brazil and the United States of America' (2015) 5 *Anti-Trafficking Review*, accessible from

<<http://www.antitraffickingreview.org/index.php/atrjournal/article/view/135>>.

²⁴ The Advisory Committee of the Modern Slavery Registry, Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade for the Inquiry into Establishing a Modern Slavery Act in Australia, accessible at <https://www.business-humanrights.org/en/australian-inquiry-into-establishing-modern-slavery-act-submission-of-modern-slavery-registry-advisory-committee>.

the Secretary of State. However, outside of the reputational and market consequences of non-compliance with s 54, there is no penalty for non-compliance with the disclosure obligation. The absence of a penalty regime contrasts with the penalties payable under anti-corruption legislation domestically however likely still means that the UK model satisfies the 2014 ILO Codicil requirement for the inclusion in domestic legislation of sanctions of ‘perpetrators’. Businesses whose supply-chains harbour forced labour typically will not be offenders (primary or secondary) or ‘perpetrators’ falling within the meaning of that expression as used in the Codicil.

The absence of enforceable mechanisms suggests that the level of corporate compliance will be low, or at least, less than optimal.²⁵ Current rates of compliance with the UK *Modern Slavery Act* apparently confirm this.²⁶

Moreover the disclosure obligation in s 54(1) of the *Modern Slavery Act* is overly narrow in its focus and can be avoided in at least two ways.

First, the Act addresses individual entities, not corporate groups or enterprises of which the entity in question might form a part. Accordingly, the disclosure obligation can be avoided by structuring.²⁷ For instance, a UK parent company can ignore the behaviour of its non-UK based subsidiaries.

Secondly, the UK legislation omits a definition of ‘supply chain’. As a result, how far into the supply chain the disclosure obligation extends is left unclear.

More fundamentally, the premise of the UK model is that without enforcement mechanisms (specifically civil penalties), ‘naming and shaming’ will produce changes in behaviour of manufacturers, wholesalers and retailers, augmented by the prospect of an application for a mandatory injunction compelling compliance in presumably specific instances.

Admittedly, there are well-publicized cases where ‘naming and shaming’ by industry bodies and human rights and consumer groups has produced decisive changes in corporate behaviour, relevantly, in supply chains,²⁸ but it would appear that such cases are confined to large publicly listed companies amenable to market opinion and shareholder expectations. Still, such

²⁵ Sarfaty, ‘Shining Light on Global Supply Chains’ (2015) 56 *Harvard International Law Journal* 419 (accessible at <<http://www.harvardilj.org/wp-content/uploads/562Sarfaty.pdf>>).

²⁶ Steffensen et al, ‘Modern Slavery Act 2015- Key Points to Know’, Gowling WLG, 10 April 2017, accessible at <http://gowlingwlg.com/en/global/insights-resources/podcasts/modern-slavery-act-2015-key-points-to-know>.

²⁷ Turner, ‘Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law’s New Frontier’ (2016) 17(1) *Melbourne Journal of International Law* 188.

²⁸ See Amnesty International report (2016) *This Is What We Die For: Human Rights Abuses in the Democratic Republic of the Congo Power the Global Trade in Cobalt* accessible at <<https://www.amnesty.org/en/documents/afr62/3183/2016/en/>>; and ‘New investigation claims Apple’s battery use cobalt mined by child labor’, dated 18 January 2016, accessible at <<https://9to5mac.com/2016/01/18/apple-cobalt-mining-child-labor/>>.

successes highlight that industry bodies and other organisations can and do play a role in raising awareness and producing change in behaviour.

Many organizations locally and overseas have put mechanisms in place aimed at maintaining ethical standards in their supply chains. In some cases, local companies have done so as they are bound by the disclosure obligations of the UK Act. However, many organizations do not. Among those that do not are those that are privately owned or closely held, and thus likely to be unresponsive to the spectre of 'naming and shaming'. Accordingly, and at least in relation to such groups, naming and shaming is a weak regulatory tool. Added to this, consumer choices are not always ethically or even rationally based. An initiative that depended on 'naming and shaming' as a mechanism for producing changes in attitude, such as s 19D of the *Workplace Gender Equality Act 2012* (Cth) or the UK *Modern Slavery Act*, would likely be effective in many cases (but not all), and is thus only a partial response.

Apart from publicly listed companies, a disclosure regime that depends on publication of statements of compliance with specified standards of transparency will not always mean that information will reach consumers at the point of sale or therefore influence consumer choices unless supported by a regime of consumer education or mandatory product labelling. While a regime of product labelling should not automatically be excluded as undeserving of consideration, research into the effects on consumer choices of eco-labelling suggests that eco-labelling is itself not a significant factor in consumer decision-making, but other factors, most significantly, price, are determinants of consumer choices. Labelling is, at best, a partial response.²⁹ Even in the context of a growing culture of corporate social responsibility and ethical consumerism, attempts to produce change in decision-making of wholesalers, retailers and consumers in ways that look beyond cost and price signals as a strategy for ending slavery are at present only partial responses without a significant investment by government or retailers. However, a more fundamental question remains. Are effective measures for ending slavery best left in the hands of consumers, or entrusted to a government-backed system of enforceable sanctions, or a combination of the two.³⁰

As noted, of the two models, the second category of initiatives refers to those enforceable by sanctions, specifically civil penalty orders.

An example of the second category is the *Illegal Logging Prohibition Act 2012* (Cth), directed at stemming international trade in illegally logged timber, especially endemic in Indonesia, Papua New Guinea, and Malaysia.

²⁹ Vanclay et al, 'Customer Response to Carbon Labelling of Groceries', (2011) 34(1) *Journal of Consumer Policy*, 153; DOI: 10.1007/s10603-010-9140-7 (accessible at <<http://link.springer.com/article/10.1007/s10603-010-9140-7>>).

³⁰ Turner, 'Ethical consumerism and the *Modern Slavery Act 2015 (UK)*' (accessible at <https://rjturner.org/2016/11/05/ethical-consumerism-and-the-modern-slavery-act-2015-uk/#_ftnref2>).

The *Illegal Logging Prohibition Act* creates civil penalty offences proscribing importing and processing regulated timber products, subject to importers and processors accessing a 'safe harbour' by complying with specified due diligence requirements in the *Illegal Logging Prohibition Regulation 2012*, which commenced on 30 November 2014 and describes the due diligence process business must undertake in order to come within the 'safe harbour'.

The due diligence process requires business to:

- (1) establish a documented system explaining how it proposes to meet the due diligence requirements;
- (2) gather information about the products being imported and their supply chain;
- (3) assess the risk the wood or wood-fibre in imported products have been illegally logged;
- (4) mitigate any associated risks; and
- (5) keep a written record of the process undertaken.

Offences relating to intentionally, knowingly or recklessly dealing with illegally logged timber attract penalties of up to five years imprisonment and monetary penalties of up to 500 penalty units (AUD\$90,000 for an individual, and AUD\$450,000 for a corporation).

The *Illegal Logging Prohibition Act* was launched with a 'soft-start' compliance period which in May 2016 the Australian Department of Agriculture and Water Resources extended³¹ until late 2016 or early 2017, at the end of which a notice would be released advising when the compliance period will end after which penalties would apply to importers that failed to comply with the due diligence requirements.³² To date, the end date has not been announced, presumably as a result of industry opposition to what different corners of affected businesses have described as the onerous application of the Act.

Any legislation in Australia should not be confined to the retail and manufacturing sectors as is the California *Transparency in Supply Chain Act 2010*. Any initiative should apply to all trades and professions. While slavery and human trafficking are frequently found in supply chains in the retail and manufacturing sectors, the evil of slavery is not confined to those sectors. Electronics, high-tech, automotive and steel, agriculture, seafood, mining, garment and textiles were highlighted in a 2012 report.³³ A 2014 report

³¹ Department of Agriculture and water Resources, *Illegal Logging Compliance Advice Notice (42-2016)*, dated 31 May 2016, accessible at <<http://www.agriculture.gov.au/import/industry-advice/2016/42-2016>>.

³² Notice signalling the end of the 'soft-start' compliance period has not been issued at the date of writing.

³³ David, Viederman, Plant, McQuade, Batstone, Bales, Costello (2012) *Starting a dialogue: Harnessing the power of business to eliminate modern slavery*, December 2012.

highlighted forced labour in the Thai seafood industry.³⁴ Another report of the same year (2014) affords examples from the Malaysian electronics sector,³⁵ while a 2015 research report by the European Union Agency for Fundamental Rights identified that construction was number two on the list of sectors in the EU most prone to labour exploitation.³⁶

It would be politically naïve to expect that significant resistance from affected industries and businesses would not be encountered upon introducing a system of mandatory disclosure, enforceable by sanctions, specifically civil penalty orders. Accordingly, any initiative should be preceded by an extensive public awareness campaign, accompanied by a lengthy transitional period in order to allow business time to transition from existing supply chains as required in order to ensure compliance with the new regime.

We live in an age of statutes.³⁷ There is a view that we expect too much of legislation. That might be so. But, it can only be this way because, if honest, we do not expect enough of ourselves. Legislation can be an important aid in producing change, socially and politically. It was so in relation to civil rights in the United States. It is the case with regard to women's rights. While in a number of respects, many would agree that we have further to go in these areas, they do represent important examples of what is possible.

The question is will we rise to the challenge by answering the call for a deeper level of shared responsibility and take steps to enact legislation equal to the challenge of ending slavery in all its forms. With the perspective of history, the urgent challenges of today will tomorrow be seen as one more faltering step in our unfoldment towards a world where the common bonds of humanity and our shared destiny are guiding values in directing collective action to alleviate suffering where it appears in any part of the world.

With compliments,
Charles Wilson

³⁴ Hodal, Kelly and Lawrence (2014) 'Revealed: Asian slave labor producing prawns for supermarkets in US, UK', *The Guardian* 10 June 2014; Sylwester (2014) 'Fishers of men: the neglected effects of environmental depletion on labor trafficking in the Thai fishing industry', *Pacific Rim Law and Public Policy Journal*, 23: 423.

³⁵ Verité (2014) *Forced labour in the production of electronic goods in Malaysia: a comprehensive study of scope and characteristics*, New York

³⁶ European Union Agency for Fundamental Rights (2015) 'Severe labour exploitation: workers moving within or into the European Union', accessible from <http://fra.europa.eu/en/publication/2015/severe-labour-exploitation-workers-moving-within-or-european-union>.

³⁷ Calabresi, *A Common Law for the Age of Statutes*, (1982), 1.