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AUSTRALIA'S MODERN SLAVERY ACT: TOWARDS MEANINGFUL COMPLIANCE

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Australia's Modern Slavery Act: Towards Meaningful Compliance

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Abstract

Australia's recently enacted federal *Modern Slavery Act 2018* (Cth) (the Australian Modern Slavery Act or the Act) forms part of a growing global trend towards mandated corporate disclosures in respect of modern slavery risks. This article argues that meaningful compliance with the Act can only be achieved when businesses commit to implementing a comprehensive human rights due diligence program. The authors aim to provide practical guidance on what this means in the Australian context by outlining the Guiding Principles concept of human rights due diligence, explaining how its key elements correspond with the Act's reporting requirements, and applying internationally recognised good practice to these requirements.

Introduction

Australia's recently enacted federal *Modern Slavery Act 2018* (Cth) (the Australian Modern Slavery Act or the Act) forms part of a growing global trend towards mandated corporate disclosures in respect of modern slavery risks. This regulatory strategy in turn reflects a growing international consensus that both government and business have a role to play in addressing the human rights impacts of business.

Specifically, the UN's 2011 Guiding Principles on Business and Human Rights (Guiding Principles)¹ set out clear standards of conduct within a concrete business and human rights framework and affirm the responsibility of business to respect human rights. The Guiding Principles introduce the concept of human rights due diligence as key to its fulfilment.

Australia's Modern Slavery Act, while narrower in focus explicitly draws upon this international framework. It seeks to address the now globally recognised problem of modern slavery by requiring that businesses with a turnover of at least \$100 million report on the risks of modern slavery and actions taken to address those risks within their supply chains and operations. It is envisaged that this reporting obligation 'will transform the way the Australian business community responds to modern slavery,'² principally through the operation of market and reputational pressures.

Significantly, while the reporting requirements correspond with the key elements of human rights due diligence, the Act does not go so far as to impose an actual obligation to undertake human rights due diligence. The obligation is simply to report. This article argues however that meaningful compliance with the Act can only be achieved when businesses commit to implementing a comprehensive human rights due diligence program. The authors aim to provide practical guidance on what this means in the Australian context by outlining the Guiding Principles concept of human rights due diligence, explaining how its key elements correspond with the Act's reporting requirements, and applying internationally recognised good practice to these requirements.

With business and human rights issues becoming increasingly prominent on the global stage and as international norms consolidate, the passing of the Australian Modern Slavery Act represents a unique opportunity for Australian businesses to take the lead on human rights due diligence, a process whose significance is likely to only increase over the coming years.

¹ Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework: Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises*, A/HRC/17/31 (21 March 2011) (Guiding Principles).

² Cth. Parliamentary Debates. House of Representatives, 28 June 2018, Minister's Second Reading Speech, Mr Hawke (Mitchell—Assistant Minister for Home Affairs) at 6754.

Building corporate respect for human rights: From CSR to modern slavery laws

The idea that companies should respect human rights has been around for some time but has only started to more recently gain traction as a legal concept. In the last three decades there has been an evolution in societal notions of corporate responsibility at both the national and international levels. In the early 1990s, companies talked about the somewhat amorphous concept of corporate social responsibility (CSR) whereby they were challenged to assume some level of responsibility (but not liability) for social issues that may include human rights. CSR implied a voluntary assumption by companies to act ‘ethically’ without clearly defining the content of that obligation. By 2018, CSR terminology has more commonly been replaced with the language of ‘business and human rights’ and the earlier more nebulous notion of CSR is morphing into a regulatory requirement for some Australian businesses. Australian companies are now subject to a law which requires them to report annually on the risks of modern slavery in their operations and supply chains, and on the actions taken to address these. This new law is garnering the attention of Australian companies and stands apart from the softer CSR approaches that preceded it.³ In order to understand how we got to this point, it is useful to first briefly examine the history that precedes it. While it is clear that few companies today do not confront human rights problems of some sort, the level of interest from Australian companies in addressing them has waxed and waned in recent decades.

During the 1990’s, globalisation gathered force (including a growth in the number and influence of civil society actors) and global media interest in human rights abuses by business, such as the use of sweatshops by well-known brands like Nike, Disney and Levi Strauss caught the attention of many companies and consumers.⁴ Corporate self-regulation became the key buzz word and, beginning in 1991 when Levi Strauss first introduced its code of conduct, many companies, large and small, began to at least acknowledge, if not firmly address, their human rights impacts. This commonly took the form of adopting a code of conduct outlining its corporate commitment to upholding specific labour rights. Some companies joined multi-stakeholder initiatives (like the Fair Labour Association or the Voluntary Principles on Security and Human Rights) as a means of creating global (though often sector-specific) platforms for implementing human rights standards in their business operations. Companies, but consumer facing brands in particular, were no longer able to deny that they had a ‘human rights problem’ and the broad concept of CSR was mutating into more specific (but still voluntary) ‘business and human rights’ standards.

³ Blanco R, “Reconsidering the Self-regulatory Approach to Corporate Social Responsibility” (2017) 35 *C&SLJ* 7.

⁴ Herbert B, “Children of the Dark Ages”, *The New York Times* (New York), 21 July 1995, A25; Bernstein A, “A Floor under Foreign Factories?”, *Business Week* (United States), 9 November 1998, 126; Egan T, “The Swoon of the Swoosh”, *The New York Times* (New York), 13 September 1998, 66; Bernstein A, “A Potent Weapon in the War Against Sweatshops”, *Business Week* (United States), 1 December 1997, 40.

In 2000 the United Nations (UN) established the Global Compact which calls on companies to voluntarily ‘embrace and enact’, a set of 10 principles relating to human rights, labour rights, the environment and anti-corruption. By participating, companies agree to incorporate the principles in their day-to-day operations and issue an annual public Communication on Progress which reports on their progress in implementing the ten principles.

In 2005, the UN Secretary-General appointed the first-ever Special Representative on business and human rights, Professor John Ruggie, who was charged with creating a framework to more firmly anchor human rights to business operations. In 2008, after an extensive period of consultation, Professor Ruggie released the seminal ‘Respect, Protect and Remedy’ Framework (Framework) which set forth three separate, but inter-connected principles considered key to ensuring more effective protection from human rights harms by corporations.⁵ First, the Framework reaffirmed the well-established duty of States (national governments) to protect against human rights abuses third parties, including business. Second, it highlighted the ‘baseline responsibility’ of business to respect human rights, independent of the State duty to protect human rights. Third, the Framework emphasised the need for both States and business to facilitate or provide (as appropriate) victims with more effective access to remedy. The Human Rights Council unanimously ‘welcomed’ the Framework and extended the mandate of the Special Representative in order to further elaborate and ‘operationalise’ it.⁶

In response, in 2011, the Special Representative released the Guiding Principles, which - unanimously endorsed by the UN Human Rights Council – set out ‘concrete and practical’ recommendations for the implementation of the Framework.⁷ Guiding Principle 11 clarifies that the responsibility to respect means that businesses should avoid infringing human rights, and should also address adverse human rights impacts with which they are involved. Guiding Principle 13 further elaborates on the scope of this responsibility, providing that businesses should:

- (a) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

⁵ Ruggie J, *Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, A/HRC/8/5 (7 April 2008) at paras. 54-55.

⁶ UN Human Rights Council Resolution [A/HRC/RES/8/7](#) (18 June 2008).

⁷ Guiding Principles n1 at para. 9.

Significantly, business relationships are defined to include relationships with entities in a business' value chain,⁸ and thus the responsibility to prevent and mitigate human rights impacts clearly applies throughout supply chains.

Guiding Principle 15 provides that a company's responsibility to respect is comprised of three critical components: a policy commitment, human rights due diligence and processes to enable remediation. As will be argued further below, these principles, and particularly the concept of human rights due diligence are critical to understanding the reporting requirements of the Australian Modern Slavery Act.

The establishment of the Framework and Guiding Principles was a deliberate attempt to break from the often-divisive discussion of earlier years which saw civil society pitted against companies and build a more consensual approach in involving all stakeholders, but particularly business, in building greater respect for human rights. The approach, up to and including the 2011 Guiding Principles, has been largely dependent on companies self-regulating to address any adverse impacts on the rights of workers or the community in which they operate. While the position of (some) companies has evolved to clearly assume some level of responsibility (if not liability) for workers in their supply chains,⁹ many companies still talk of their evolving 'human rights journey' which often appears to lack urgency.¹⁰

The historical approach to corporate responsibility for human rights pursued in Australia has largely been characterised by short-term initiatives of a philanthropic nature rather than measures designed to integrate the principles of corporate responsibility into corporate culture.¹¹ In the 1980s, a lawsuit against BHP concerning its OK Tedi mine in Papua New Guinea made front-page news and briefly gave the concept some resonance in the Australian marketplace.¹² In a report issued in June 2006 by the Parliamentary Joint Committee on Corporations and Financial Services, it noted that 'corporate responsibility is emerging as an issue of critical importance in Australia's mainstream business community'.¹³ Generally, while Australian companies have been subject to some cajoling and encouragement to consider how and where they may adversely impact human rights, Australian consumer-facing companies have not faced the same social pressure to act as their European and North American brand conscious counterparts. However, the need for and emergence of some

⁸ Guiding Principles n1, Principle 13, Commentary.

⁹ Nolan J, "Human rights and global supply chains: is effective supply chain accountability possible?" in Deva S, Bilchitz D (Eds.), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press, UK, 30 Oct 2017) 238-265 at 241.

¹⁰ Skoupra C "Advancing Human Rights Is A Journey That Requires Collaboration And Standards" *Forbes*, October 30, 2017 <https://www.forbes.com/sites/christopherskoupra/2017/10/30/advancing-human-rights-is-a-journey-that-requires-collaboration-and-standards/#143a8ea72fc2>

¹¹ Thirarungrueang K "Rethinking CSR in Australia: time for binding regulation?" (2013) 55(3) *International Journal of Law and Management* 173; Cermak R, "Directors' Duties to Respect Human Rights in Offshore Operations and Supply Chains: An Emerging Paradigm" (2018) 36 *C & SLJ* 124.

¹² *Dagi v BHP* [1995] 1 VR 428

¹³ Parliamentary Joint Committee on Corporations and Financial Services (PJCFS), *Corporate responsibility: managing risk and creating value* (2006), [xiii], www.aph.gov.au/senate/committee/corporations_ctte/corporate_responsibility/report/index.htm

recent legislative initiatives that target the connection between business and human rights, indicates that less weight should be given to the more traditional CSR focus of how companies spend their profits through philanthropic initiatives or employees' community volunteering, versus how those same companies make their profits – and whether they respect people's human rights in the process?¹⁴

The ASX Corporate Governance Council has recently acknowledged the increasing significance of a company's social licence to operate. The ASX Corporate Governance Council publishes principles-based recommendations on corporate governance practices to be adopted by ASX listed entities (ASX Principles & Recommendations).¹⁵ They are intended to provide a common reference point for corporate practices, and whilst not mandatory, an ASX listed company that does not adopt a particular recommendation must provide reasons for not doing so.¹⁶ The most recent edition of the ASX Principles & Recommendations, released on 27 February 2019, followed an extensive period of consultation. In its consultation draft, released in 2018, the ASX had proposed amending principle 3 to 'recognise the fundamental importance of a listed entity's social licence to operate and the need for it to act lawfully, ethically and in a socially responsible manner to preserve that licence. It [also proposed] to acknowledge that, in doing this, a listed entity must have regard to the views and interests of a broader range of stakeholders than just its security holders.'¹⁷ Select businesses pushed back strongly against this proposal and it was argued that 'corporate culture cannot be prescribed by a set of rules, and the principles and recommendations should not seek to do so.'¹⁸ Despite this opposition, the new Principle 3 now refers to corporate culture. Instead of acting 'ethically and responsibly', listed entities are now directed to 'instil a culture of acting lawfully, ethically and responsibly'. Notably however, the reference to the concept of a social licence - which had been explicitly included as part of the commentary to Recommendation 3.1 in the consultation draft - was ultimately not incorporated.

This more recent debate on the relevance and scope of a company's social license was predated by (ongoing) discussions in Australia that focus on the ability of company directors to manage a company for the benefit of all stakeholders not just shareholders. Section 181(1) of the *Corporations Act 2001* (Cth) requires directors and other corporate officers to exercise their powers and discharge their duties 'in good faith in the best interests of the corporation'.

¹⁴ Rees C, "The Way Businesses' Social Performance Gets Measured Isn't Working", https://www.shiftproject.org/media/resources/docs/Valuing%20Respect%20PDFs/ValuingRespect_way-business-social-performance.pdf

¹⁵ ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (4th ed, February 2019).

¹⁶ This is referred to as the 'if not, why not' approach: ASX Principles & Recommendations n15 at 3.

¹⁷ ASX Corporate Governance Council, *Review of the ASX Corporate Governance Council's Principles and Recommendations Public Consultation* (2 May 2018), 6 <https://www.asx.com.au/documents/asx-compliance/consultation-paper-cgc-4th-edition.pdf>. See also ASX Corporate Governance Council, *Corporate Governance Council's Principles and Recommendations* (4th Edition, Consultation Draft) (2 May 2018), Recommendation 3.1, Commentary.

¹⁸ Durkin P, "Governance Council retreats on industry super's social licence' push" *Australian Financial Review* (7 August 2018), <https://www.afr.com/leadership/governance-council-backs-down-on-industry-supers-social-licence-push-20180806-h13lc7>

Although not definitively determined by the courts, there is an assumption that Australian corporate law is ‘sufficiently permissive for directors to take into account non-shareholder interests.’¹⁹ As such, Australian directors may have the flexibility under the current law ‘to respond to social expectations of responsible conduct’²⁰ that may take into account the concerns of stakeholders beyond simply its shareholders. This view argues that an enlightened self-interest interpretation of the corporations’ law, allows directors to take human rights issues into account in considering what is in the best interests of the company. What is not clear is whether s181 (and its companion s180) of the *Corporations Act* require, rather than simply permit, such concerns to be taken into account by directors.²¹

An alternative means of ensuring that companies take into account human rights issues is the imposition of mandatory social reporting requirements; a tool increasingly utilised by governments in response to mounting frustration with corporate self-regulatory efforts. In the last decade or so, several jurisdictions – including for example, the United Kingdom (UK), Norway, France, Denmark, India, South Africa, Malaysia and Indonesia - have introduced mandatory corporate social responsibility reporting requirements.²² Disclosure of relevant financial issues is a pedestrian requirement for many corporations but the expansion of disclosure laws to include non-financial matters (specifically human rights) is relatively new but growing. In a 2013 survey by the United Nations Environmental Programme on sustainability reporting (including social issues such as the environment, human rights and anti-corruption), it was noted that in the 45 countries surveyed, there were 180 standards and laws prescribing social disclosure and 72 per cent of those were mandatory.²³

Businesses operating in Australia are not currently subject to mandatory social reporting requirements. Recommendation 7.4 of the ASX Principles & Recommendations does however recommend that listed entities disclose whether they have ‘material exposure to environmental or social risks’ and explain how such risks are managed.²⁴ In doing so, the Principles state that how an entity manages its social risks can affect its ability to create long-

¹⁹ Marshall S and Ramsay I, “Stakeholders and Directors’ Duties: Law, Theory and Evidence” (2012) 35 *UNSWLJ* 291 at 302 which discusses two Australian inquiries which were conducted by the Corporations and Markets Advisory Committee and the Parliamentary Joint Committee on Corporations and Financial Services and examined (in part) the role and scope of director’s duties.

²⁰ Redmond P, “Directors’ Duties and Corporate Social Responsiveness” (2012) 35(1) *UNSWLJ* 317.

²¹ Some argue there is such a requirement, see Cermak n11.

²² KPMG, *Currents of change: The KPMG Survey of Corporate Responsibility Reporting 2015* (2015), 30-33.

²³ United Nations Environmental Programme et al, *Carrots and Sticks: Sustainability Reporting Policies Worldwide – Today’s Best Practice, Tomorrow’s Trends* (2013) at 9
<https://www.globalreporting.org/resource/library/Carrots-and-Sticks.pdf>

In an alternate approach to relying on prescriptive disclosure regulation to manage corporate social impacts, the Canadian government (in January 2018) announced the creation of an independent Canadian Ombudsmen for Responsible Enterprise (CORE). The CORE will be mandated to investigate allegations of human rights abuses linked to Canadian corporate activity abroad. It will be empowered to investigate, report, recommend remedy and monitor its implementation.

²⁴ ASX Principles & Recommendations n15, Recommendation 7.4 at 27. The Glossary defines social risk as ‘the potential negative consequences ... to a listed entity if its activities adversely affect human society or if its activities are adversely affected by changes in human society.’ It specifically includes risks associated with the entity or its suppliers engaging in modern slavery.

term value for security holders.²⁵ Thus the emphasis is on how the risk affects the company. As noted above, the ASX Principles & Recommendations (or the *Corporations Act*) do not at present explicitly acknowledge the concept of a social licence to operate. Interestingly however, the latest ESG Reporting Guide for Australian Companies – which provides guidance on Recommendation 7.4 - does. The Guide, designed with the specific aim of meeting the information needs of institutional investors,²⁶ focuses on the impacts of economic, social and governance (ESG) factors on ‘the ability of companies and their investors to achieve sustainable growth and prosperity.’²⁷ It recognises that ESG risks within a company’s supply chain can ‘have a material impact on shareholders’²⁸, and cites supply chain issues as potential indicators for social risks.²⁹ However, it also goes beyond shareholder impact by acknowledging the need for accountability to a broader set of stakeholders. It argues that such accountability is central to a company’s ‘social licence to operate’, which in turn is ‘inextricably linked to its brand and reputation – intangible assets which all companies need to nurture and protect.’³⁰ Thus ultimately (and presumably due to its institutional investor focus), the Guide is more concerned with how a company’s social licence impacts on value and profitability, rather than any inherent value in preserving that licence. Human rights and modern slavery risks clearly fall within the parameters of social reporting. Yet without specific requirements to disclose such information, experience - both in Australia and globally - shows that a majority of companies are unlikely to report comprehensively (if at all) on these issues.

In February 2017, the Australian Attorney General, (responding in part to regulatory developments on business and human rights in other jurisdictions particularly the establishment of the United Kingdom’s Modern Slavery Act (**UK Modern Slavery Act**) in 2015), asked the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade to inquire into and report on establishing a Modern Slavery Act in Australia. Also, in 2017, the Australian government established a Multi-Stakeholder Advisory Group on the Implementation of the United Nations Guiding Principles on Business and Human Rights, comprised of a mix of representatives from business, civil society and academia.³¹ This Group developed several recommendations for a government regulatory response, including supporting the establishment of a modern slavery act for Australia.³²

²⁵ ASX Principles & Recommendations n15, Commentary to Recommendation 7.4 at 27.

²⁶ Financial Services Council and Australian Council of Superannuation Investors, *ESG Reporting Guide for Australian Companies 2015* (ESG Guide).

²⁷ ESG Guide n26 at 3.

²⁸ ESG Guide n26 at 6.

²⁹ ESG Guide n26 at 13. The guidance on social risk factors focuses principally on the management of human capital and occupational health and safety issues. It sets out a number of proposed indicators in this regard, including the existence of policies and systems that manage supply chain issues, and supply chain audits.

³⁰ ESG Guide n26 at 14.

³¹ <https://dfat.gov.au/international-relations/themes/human-rights/business/Pages/multi-stakeholder-advisory-group-on-implementation-of-the-un-guiding-principles-on-business-and-human-rights.aspx>

³² <https://dfat.gov.au/international-relations/themes/human-rights/business/Documents/final-msag->

The new law (discussed below) takes a first step towards mandating social considerations for companies operating in Australia, by explicitly requiring that directors take account of and report on one particular social issue – the risks of modern slavery that are present in the company’s operations and supply chain.

Australia’s Modern Slavery Act and its corporate disclosure requirements

In November 2018, the Australian parliament adopted the Australian Modern Slavery Act, which took effect from January 1, 2019. This law requires business entities with an annual turnover of more than \$100 million, to report annually on the risks of modern slavery in their operations and supply chains, and on the actions taken to address these (throughout the remainder of this paper, the totality of requirements under the Modern Slavery Act (and comparable legislation and frameworks) will be referred to as a company’s ‘response’ to modern slavery). The Act comes following a lengthy period of consultation including the 2017 parliamentary inquiry report,³³ a Federal Government Public Consultation Paper³⁴ and Regulation Impact Statement³⁵ and a Senate Inquiry in 2018.³⁶ The Act also follows the *Modern Slavery Act 2018* (NSW) (NSW Act), which was passed on 21 June 2018.

The Australian Modern Slavery Act follows similar laws in the UK and California that also address the prevalence of modern slavery in global supply chains. California’s Transparency in Supply Chains Act (CTSCA) which came into effect in 2012,³⁷ requires large retail and manufacturing firms to disclose efforts to eradicate slavery and human trafficking from their supply chains. Companies must report against a set of mandatory criteria and post their report on their website. The adoption of the UK’s Modern Slavery Act in 2015 focused broader global attention on the use of legislative disclosure requirements to address the human rights impacts of business. Section 54 of the UK’s Modern Slavery Act requires specified commercial organisations which supply goods or services in the UK to disclose information about their response to modern slavery in their supply chains.³⁸ The broad premise behind these types of social reporting requirements is that the reputational implications of forced disclosure will compel companies to undertake a human rights focused examination of their

³³ Parliament of the Commonwealth of Australia, *Hidden in Plain Sight* (December 2017).

³⁴ Australian Government, Attorney-General’s Department, *Modern Slavery in Supply Chains Reporting Requirement Public Consultation Paper* (2017).
<https://www.homeaffairs.gov.au/consultations/Documents/modern-slavery/modern-slavery-supply-chains-reporting-requirement-public-consultation-paper.pdf>

³⁵ Australian Government, Department of Home Affairs, *Regulation Impact Statement – Modern Slavery Reporting Requirement* <https://ris.pmc.gov.au/2018/07/18/modern-slavery-reporting-requirement>

³⁶ The Senate Legal and Constitutional Affairs Legislation Committee, *Report Modern Slavery Bill 2018 [Provisions]* (24 August 2018).

³⁷ *California Transparency in Supply Chains Act* of 2010, Civil Code Section 1714.43, also known as Senate Bill 657 (Steinberg) (2009-10).

³⁸ *Modern Slavery Act* UK 2015. Section 54 of the UK Act requires commercial entities with a total annual turnover of £36 million to publish an annual statement on steps taken to assess and manage the risk of slavery and human trafficking.

supply chain practices.

Why the focus on global supply chains as a means of addressing adverse corporate human rights impacts, including modern slavery? The International Labour Organisation (ILO) estimated that, in 2016, there were 40.3 million victims of modern slavery worldwide.³⁹ Of those 25 million people were categorised as working in conditions of forced labour. Global supply chains have become a central feature of today's globalised economy. They account for more than 450 million jobs worldwide.⁴⁰ Globalisation has hastened a shift in the manner in which business is conducted –from largely being confined within the borders of individual states to hierarchal transnational companies and, ultimately, to large transnational fragmented global supply chains.⁴¹ Corporations, large and small, relentless in their pursuit of new markets, new technologies and lower production costs, have grown increasingly reliant on complex global supply chains to manufacture and distribute their goods. In most industries, companies now rely on a series of contractors and suppliers in a range of countries to produce and transport their products. It is estimated that 60 per cent of global trade depends on the supply chains of 50 corporations, which employ only 6 per cent of workers directly and rely on a hidden workforce of 116 million people.⁴² The fragmented nature of production and obscure employment relations increase the chances of consumers and companies being implicated in modern slavery.

While contemporary discussion around modern slavery highlights its prevalence, the lack of a clear definition of the concept makes it difficult to evaluate.⁴³ The term 'modern slavery' is not defined in international law but is used to broadly refer to human trafficking, slavery and slavery like practices such as servitude, forced labour, deceptive recruiting and debt bondage. The Australian Modern Slavery Act defines modern slavery as 'conduct which would constitute' an offence under Division 270 or 271 of the Criminal Code'.⁴⁴ This includes offences such as slavery, servitude, forced labour, deceptive recruiting, trafficking in persons, debt bondage, forced marriage and organ trafficking. The definition also includes trafficking in persons, as defined in the international Trafficking Protocol and the worst forms of child labour, as defined in ILO Convention (No. 182). More generally, modern slavery might be understood as referring to a range of exceptional circumstances where a person's freedom and ability to make choices for themselves have been very significantly undermined or removed. In the context of a discussion focused on exploitative labour practices in global supply chains, the concept of forced labour has particular resonance. Forced labour is defined in the *ILO Convention concerning Forced or Compulsory Labour* as 'all work or service

³⁹ ILO and Walk Free Foundation 2017 and The Walk Free Foundation's *Global Slavery Index* of 2016.

⁴⁰ *Towards an Inclusive Future: Shaping the World of Work*, G20 Labor and Employment Ministers Meeting, 2017, Ministerial Declaration, para 20 (G20 Ministerial Declaration).

⁴¹ Bitran G, Gurumurthi S and Sam S L, "The Need for Third-Party Coordination in Supply Chain Governance" (2007) 48(3) *MIT Sloan Management Review* 30.

⁴² International Trade Union Confederation, *Scandal: Inside the Global Supply Chains of 50 Top Companies*, (Report, 2016), 3–4, 6 <http://www.ituc-csi.org/frontlines-report-2016-scandal>.

⁴³ Gallagher, A "What's wrong with the Global Slavery Index?" (2017) 8(1) *Anti-Trafficking Review* 90.

⁴⁴ *Modern Slavery Act 2018* (Cth), s4.

which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.⁴⁵ Industries such as agriculture, quarries, brick-making, electronics, mining, textile manufacture, and other factory work – each of which are labour intensive, and/or geographically isolated – have been found to be at high risk of exploiting forced labour.⁴⁶ Products made with forced labour are then circulated in the global economy via vast and often opaque supply chains.

To date, legal efforts to regulate human rights abuses across global corporate supply chains have been limited. Host country (that is, the country in which the product is sourced or manufactured) legislation will generally target local conduct and is likely to have limited effectiveness in holding a transnational corporation to account for the activities of its suppliers in a host country. For example, in June 2013, following the collapse of the Rana Plaza building and the death of more than 1,100 workers, the Bangladeshi Parliament passed a legislative reform package that focused on local issues such as improving labour laws with regard to union representation, but did not address broader supply chain regulation.⁴⁷ More recently, domestic (home country, that is the country of incorporation of the company) legislation has emerged as a potential mechanism to regulate global supply chains. Alongside the UK's Modern Slavery Act and the CTSCA, there are also other corporate reporting requirements that cover a range of human rights that implicate forced labour in global supply chains. These include the European Union Directive on Non-Financial Reporting and Section 1502 of the United States' Dodd-Frank Act pertaining to conflict minerals.⁴⁸ More recently, the French duty of vigilance law was enacted in 2017 to impose a three-fold obligation on certain corporations to: have a human rights vigilance plan, implement their plan, and publicly report on its implementation.⁴⁹ The different forms of reporting requirements vary, but largely centre on 'policy and process' disclosure, which mandates information on a company's human rights policies, its practices to prevent and address human rights risks, and its procedures for doing so. The relatively recent, but steady, evolution of a global social expectation that business should respect international human rights standards (as set out in the Guiding Principles) and governments' increasing willingness to legislate to make this

⁴⁵ *Forced Labour Convention*, 1930 (No. 29), adopted 28 June 1930 (entered into force 1 May 1932), art 2.

⁴⁶ Crane A, "Modern Slavery as a Management Practice: Exploring the Conditions and Capabilities for Human Exploitation" (2013) 38(1) *Academy of Management Review* 49; Greer B T and Purvis J G "Corporate supply chain transparency: California's seminal attempt to discourage forced labour" (2016) 20(1) *The International Journal of Human Rights* 55.

⁴⁷ Lubbe J, *For the Record for the Senate Foreign Relations Committee Hearing on Labor Issues in Bangladesh* (2013) https://www.foreign.senate.gov/imo/media/doc/Lubbe_Testimony.pdf

⁴⁸ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings; *Dodd Frank Wall Street Reform and Consumer Protection Act*, 2010 Section 1502.

⁴⁹ *Loi de Vigilance* No. 2017-339 of 2017. See, Business Human Rights And Resource Centre and ITUC CSI IGB, *Modern Slavery in Company Operations and supply chains: Mandatory transparency, mandatory due diligence and public procurement due diligence* (September 2017) <https://www.ituc-csi.org/modern-slavery-in-company>; Fair Labor Association, *Supply Chain Traceability And Transparency: Shifting Industry Norms, Emerging Regulations, and Greater Interest from Civil Society* (16 June 2017), <http://www.fairlabor.org/blog/entry/supply-chain-traceability-and-transparency>

happen, embodies an expectation that business can and should play a greater regulatory role in ensuring respect for human rights.

The Australian Modern Slavery Act requires ‘entities based, or operating, in Australia, which have an annual consolidated revenue of more than \$100 million, to report annually on the risks of modern slavery in their operations and supply chains, and actions to address those risks. Other entities based, or operating, in Australia may report voluntarily’ (section 3). The Act defines an entity as any resident company, trust, corporate limited partnership or any other partnership that is formed or incorporated within Australia, or the central management or control of the entity is in Australia (section 4). The Commonwealth government is also subject to this reporting requirement. The relevant entities report by issuing a modern slavery statement, which must be ‘approved by the principal governing body of the entity’ and ‘signed by a responsible member of the entity’ (section 13). Section 16 sets out mandatory reporting criteria to be included in the modern slavery statement, with s16(1)⁵⁰ providing that a statement must:

- (a) identify the reporting entity; and
- (b) describe the structure, operations and supply chains of the reporting entity; and
- (c) describe the risks of modern slavery practices in the operations and supply chains of the reporting entity, and any entities that the reporting entity owns or controls; and
- (d) describe the actions taken by the reporting entity and any entity that the reporting entity owns or controls, to assess and address those risks, including due diligence and remediation processes; and
- (e) describe how the reporting entity assesses the effectiveness of such actions; and
- (f) describe the process of consultation with:
 - i. any entities that the reporting entity owns or controls; and
 - ii. in the case of a reporting entity covered by a statement under section 14—the entity giving the statement; and
- (g) include any other information that the reporting entity, or the entity giving the statement, considers relevant.

All modern slavery statements will be placed on a publicly available, internet-based register to be maintained by the Minister (section 18). There are no financial penalties for failure to comply with the reporting requirement. However where a reporting entity fails to provide a compliant slavery statement, the Minister is empowered to request the entity to

⁵⁰ Section 16(2) provides that details of approvals within the entity must also be included in the modern slavery statement.

provide an explanation for the failure to comply and/or to undertake specified remedial action. Further, where an entity fails to comply with such a request, the Minister may make this information public on the register (section 16A).

Given that the Minister cannot compel compliance, ultimately, the disclosure requirements depend largely on the pressure exerted by external parties – consumers, investors, civil society – to induce compliance. Even so, and without penalties to urge compliance, such disclosure schemes will likely ensure that human rights garner increasing attention from business as under the Australian Modern Slavery Act, the company's modern slavery statement must be approved by the company's board (or the entity's relevant governing body).

The NSW Act was passed ahead of the Australian Modern Slavery Act and is expected to commence after the Commonwealth legislation takes effect in 2019. This state law applies to commercial organisations with NSW employees that supply goods or services for profit and have an annual turnover above AUD\$50 million. The NSW Act requires reporting entities to file an annual modern slavery statement⁵¹ and has broadly equivalent provisions to the Australian Act discussed below. A notable distinction is the introduction of financial penalties, rather than a reliance on public scrutiny, to drive compliance.

The NSW Act introduces financial penalties of up to AUD\$1.1 million. These apply for failure to prepare and publish a statement, when required, or for giving false or misleading information. This has, however, created an anomalous situation where entities with NSW employees and a turnover between AUD\$50-100 million are subject to penalties, but those with a turnover above AUD\$100 million are not, as they would be subject to the national Australian Act.⁵²

The NSW Act follows the UK Modern Slavery Act by establishing an Anti-Slavery Commissioner.⁵³ There are also some other distinctions between the Australian and the NSW Act. First, the NSW Act establishes an electronic public register which will identify organisations that disclose that their goods or services are potentially a product of modern slavery. This focus on listing only those entities disclosing a link to modern slavery, suggests the register will operate like a 'dirty list'. Second, the NSW Act introduces only modest public procurement obligations (the Australian Modern Slavery Act obligates the Commonwealth itself to report under the Act). These require the Commissioner to monitor the effectiveness of due diligence procedures to ensure goods and services procured by government agencies are not the product of modern slavery. The NSW Act does not require board approval of statements in the same way as the Australian Act. Many aspects of the NSW Act remain to be established in its accompanying regulations. There will be public

⁵¹ The method of publication and prescribed reporting content are to be detailed in accompanying statutory regulations.

⁵² The NSW Act establishes a corresponding law approach with the Australian Act. If an entity is subject to both, then the NSW reporting requirement does not apply.

⁵³ Professor Jennifer Burns was appointed as the interim Anti-Slavery Commissioner in December 2018.

consultation on the proposed regulations in 2019 and it is anticipated that they will be informed by the provisions of the Australian Act.

Such disclosures as required in these Australian modern slavery laws, firmly entrench human rights in the corporate governance arena by intertwining risk management (including financial risk) concepts with business ethics. Choudhury notes that ‘in a broad governance context human rights cannot be simply framed as a reputational or “non-financial” risk; the consequences of poor human rights practices can materially impact a company’s stakeholder relations, financial performance and prospects for sustainable value creation. Accordingly, human rights is an issue warranting greater attention from long-term investors as a matter of investment analysis, valuation and engagement with companies.’⁵⁴ The assumption in this ‘human rights disclosure’ model is that transparency gained from disclosure will incentivise corporate attention to human rights risks by providing greater visibility on supply chain risks to investors and consumers. The model marks a shift from regulators’ traditional role in overseeing purely financial (as opposed to social) disclosures.⁵⁵ Whether transparency regulatory regimes reduce substantive human rights violations in supply chains is being questioned, but given the newness of these disclosure schemes, it is not yet thoroughly assessed.⁵⁶

The Australian Modern Slavery Act (and similar laws on which it is based), render firms accountable not for adverse human rights impacts, but for the procedural failure to report on efforts to do so. Yet legislative guidance on what such disclosures must entail is often limited.⁵⁷ The UK experience to date shows that a majority of companies are still grappling with meaningful reporting. For example, a 2017 report by Ergon Associates indicates that UK companies are under-reporting on two foundational elements of responding to modern slavery: assessing and prioritising risk.⁵⁸ Only 13% of companies⁵⁹ covered their risk assessment processes moderately well or in detail and while 57% identified priorities at a high level, only 17% disclosed detailed priorities for action.⁶⁰

⁵⁴ Choudhury B, “Social Disclosure” (2016) 13(1) *Berkeley Business Law Journal* 185.

⁵⁵ Nelson A, “The materiality of morality: Conflict minerals” (2014) 1(6) *Utah Law Review* 219.

⁵⁶ Sarfaty G, “Shining light on global supply chains” (2015) 56(2) *Harvard International Law Journal* 419; Sarfaty G and Chilton A, “The Limitations of Supply Chain Disclosure Regimes” (2017) 53(1) *Stanford International Law Journal* 7; Mares R, “Corporate Transparency Laws: A Hollow Victory?” (2018) 36(3) *Netherlands Quarterly of Human Rights* 189.

⁵⁷ Sarfaty n 56; Narine M, “Disclosing disclosure’s defects: Addressing corporate responsibility for human rights impacts” (2015) 47(1) *Columbia Human Rights Law Review* 84.

⁵⁸ Ergon, *Modern Slavery Statements: One year on* (April 2017), http://ergonassociates.net/wp-content/uploads/2016/03/MSA_One_year_on_April_2017.pdf?x74739 (Ergon 2017). A 2018 update to this report found that the position has remained substantially the same: Ergon, *Modern slavery reporting: Is there evidence of progress?* (October 2018), http://ergonassociates.net/wp-content/uploads/2018/10/Ergon_Modern_Slavery_Progress_2018_resource.pdf?x74739&x74739 (Ergon 2018)

⁵⁹ Based on a sample of 150 reporting companies.

⁶⁰ As discussed further below, a majority of UK companies are also not reporting in sufficient detail on actions taken, and most are not reporting on effectiveness at all. Notably, unlike the *Modern Slavery Act 2018* (Cth), the *Modern Slavery Act 2015* (UK) does not mandate specific reporting criteria. Rather it ‘suggests’ the matters on which companies should be reporting.

Further legislative direction will be provided by the Commonwealth Government through the foreshadowed publication of formal administrative guidance, which is intended to clarify key terms in the Act, such as ‘risks’, ‘operations’, ‘supply chains’, ‘due diligence’ and ‘remediation processes’.⁶¹ Separately, the Explanatory Memorandum, *Modern Slavery Bill 2018* (Cth) (Explanatory Memorandum) directs entities to consider the UN Guiding Principles and other ‘relevant frameworks’ to assist in identifying, prioritizing and responding to modern slavery risks.⁶² Critically, the Guiding Principles introduce the concept of human rights due diligence. As argued below, this concept is key to responding to modern slavery risks, and thus should be understood and applied by all Australian businesses seeking to meaningfully comply with the Australian Modern Slavery Act.

Human rights due diligence

The concept of human rights due diligence

The concept of human rights due diligence was introduced in the Guiding Principles as a mechanism by which companies might discharge their responsibility to respect rights. Its effective development and implementation are considered a shared responsibility of both government and business. At a meeting of the G20⁶³ group of countries in 2017,⁶⁴ there was acknowledgement of the ‘responsibility of business to exercise due diligence’, along with the responsibility of governments to ‘communicate clearly on what we [government] expect from businesses with respect to responsible business conduct’.⁶⁵

As opposed to corporate due diligence which tends to focus on the risks to a company, human rights due diligence instead focuses on the human rights risks that a company may pose to others.⁶⁶ As such, human rights due diligence is designed to be an ongoing interactive mechanism that keeps the company apprised of its impact on workers, the community and a broader set of stakeholders.

Human rights due diligence is broadly framed in the Guiding Principles which necessarily provides for some flexibility in its implementation. It is basically comprised of four key elements. Namely, businesses are expected to: (1) identify and assess their actual and potential adverse human rights impacts; (2) integrate these findings internally and take appropriate preventative and mitigating action; (3) track the effectiveness of their response; and (4) publicly communicate how they are addressing their human rights

⁶¹ The Explanatory Memorandum, *Modern Slavery Bill 2018* (Cth) (Explanatory Memorandum) contemplates the publication of formal guidance. The Department of Home Affairs is responsible for its publication.

⁶² ‘Relevant frameworks’ are not specifically defined in the Explanatory Memorandum. However, the section below provides examples of what these might be.

⁶³ The G20 (or Group of Twenty) is an international forum for the governments and central bank governors from 20 major economies (19 countries plus the European Union).

⁶⁴ <http://www.hamburg.com/g20-2017/>

⁶⁵ G20 Ministerial Declaration n40 at para. 27.

⁶⁶ United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises* (16 July 2018), UN Doc A/73/163 (UN Guidance) at para. 15.

impacts.⁶⁷ These elements of due diligence correspond with the mandatory reporting criteria set out in s 16 of the Australian Modern Slavery Act. That is, describing supply chains and identifying risks (of modern slavery) therein (ss 16(b) and (c)), taking action to assess and address those risks (s 16(d))⁶⁸, and assessing the effectiveness of such actions (s 16(e)) correspond to the first three elements of due diligence, while the fourth element (public communication) is of course the very essence of the Act.

Guiding Principle 17 sets out the basic parameters of the recommended due diligence process and notes that human rights due diligence:

- (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, *or which may be directly linked to its operations, products or services by its business relationships*;
- (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve (Emphasis added).

The Guiding Principles explicitly define 'business relationships' to include relationships with entities in its value chain,⁶⁹ and thus due diligence clearly applies to impacts throughout supply chains.

In 2011, the OECD aligned its OECD Guidelines for Multinational Enterprises with the Guiding Principles (**OECD Guidelines**) by specifically incorporating the notion of human rights due diligence.⁷⁰ Since the publication of the Guiding Principles (and updated OECD Guidelines) in 2011, there have been significant advances in further defining and refining the concept. The OECD has been particularly active in this space and in 2016 and 2017 released updated sector specific guidelines for conducting due diligence for supply chains in the conflict minerals, garment and footwear, and agricultural sectors.⁷¹ It has also

⁶⁷ Guiding Principles n1, Principles 15(b), 17-21.

⁶⁸ It should be noted that there is a slight difference in the way that the Australian Modern Slavery Act and Guiding Principles delineate these steps. The Guiding Principles combine the concept of identifying and assessing risk in one step (Guiding Principle 18). While the concept of appropriate action (that is, addressing risk) is dealt with separately in Guiding Principle 19. Conversely, the Australian Modern Slavery Act envisages that a company first identifies risk (section 16(c)) and then assesses and responds to that risk (section 16(d)). It is posited here, that a company is more likely to assess risk at the same time that it identifies it. Thus, the following analysis will consider the question of risk assessment in conjunction with risk identification, as per the Guiding Principles.

⁶⁹ Guiding Principles n1, Principle 13.

⁷⁰ OECD, *OECD Guidelines for Multinational Enterprises*, (OECD Publishing, 2011) <http://dx.doi.org/10.1787/9789264115415-en> (OECD Guidelines). The OECD Guidelines inserted a new Chapter IV, titled 'Human Rights' which provides that businesses should, among other things, respect human rights and undertake human rights due diligence.

⁷¹ OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (Third Edition, OECD Publishing, Paris, 2016) <http://dx.doi.org/10.1787/9789264252479-en> (OECD Mining Guidance); OECD, *OECD Due Diligence Guidance for Responsible Supply Chains in the*

published due diligence guides for the financial sector and the extractive sector.⁷² While in 2018 it released a comprehensive general due diligence guide, intended to apply across sectors (**OECD General Guidance**).⁷³ Combined, these OECD guides set up a best practice standard for corporate initiated due diligence.

Most recently, the UN Working Group on the issue of human rights and transnational corporations and other business enterprises issued further guidance (**UN Guidance**), with a view to highlighting the key components of due diligence, as well as emerging practice.⁷⁴ Notably, the UN Guidance specifically cites the latest OECD General Guidance as an important reference point.⁷⁵ It also refers to the emergence of additional guidelines developed by civil society, such as the Ethical Trading Initiative's Human Rights Due Diligence Framework, the Danish Institute for Human Rights' Human Rights Impact and Assessment Guidance and Toolbox and Shift's UN Guiding Principles Reporting Framework.⁷⁶

All these developments no doubt constitute 'relevant frameworks' as contemplated by the Explanatory Memorandum to the Act and are thus relevant to meaningful compliance with the Australian Modern Slavery Act.

Meaningful compliance

The Explanatory Memorandum cites the Australian Modern Slavery Act's primary objective as being to 'assist the business community in Australia to take proactive and effective actions to address modern slavery.'⁷⁷ Thus while reporting may be the mandated outcome, ultimately the Act seeks to induce Australian businesses to take meaningful steps in response to the risks of modern slavery in their supply chains. The reference to due diligence in s 16 of the Act, combined with the reference to the UN Guiding Principles in the Explanatory Memorandum, suggests that the Australian Government envisages due diligence as the primary means by which Australian businesses can fulfil this goal.

Garment and Footwear Sector (2017) (OECD Apparel Guidance); and OECD/FAO, *OECD-FAO Guidance for Responsible Agricultural Supply Chains* (OECD Publishing, Paris, 2016).

<http://dx.doi.org/10.1787/9789264251052-en> (OECD Agricultural Guidance).

⁷² OECD, *Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises* (2017) <https://mneguidelines.oecd.org/rbc-financial-sector.htm>; OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (OECD Publishing, Paris, 2017) <http://dx.doi.org/10.1787/9789264252462-en>

⁷³ OECD *Due Diligence Guidance for Responsible Business Conduct* (2018) (OECD General Guidance).

⁷⁴ UN Guidance n66.

⁷⁵ UN Guidance n66 at para 5.

⁷⁶ United Nations General Assembly, *Companion note II to the Working Group's 2018 report to the General Assembly (A/73/163) Corporate human rights due diligence – Getting started, emerging practices, tools and resources*, Version 16.10.2018 (UN Guidance Companion Note II), Annex. See also:

<http://www.ethicaltrade.org/issues/due-diligence>;

https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/business/hria_toolbox/introduction/welcome_and_introduction_final_may2016.pdf_223791_1_1.pdf; and Shift, *Respecting Human Rights Through Global Supply Chains* (Shift Workshop Report No. 2, October 2012),

https://www.shiftproject.org/media/resources/docs/Shift_UNGPsupplychain2012.pdf. A number of other initiatives were also highlighted by the UN Working Group.

⁷⁷ Explanatory Memorandum n61 at para. 2.

Superficial compliance with the Act is of course entirely possible. Given that the Act mandates reporting, and not the act of due diligence itself, a company could technically fulfil its reporting obligations while having undertaken only cosmetic changes, or without having implemented any measures at all. However, such an approach would miss the entire intent of the legislation. It would also be a missed opportunity for Australian businesses to take the lead on modern slavery due diligence, a process whose significance is likely to only increase over the coming years.

Perhaps the most common example of superficial action is the widespread use of codes of conduct and social auditing as the primary (and sometimes only) tool to demonstrate due diligence. Broadly speaking, this is where a company sets out certain expectations of its suppliers in a code, and then monitors compliance through spot physical inspections of a facility (for example a factory, farm, mine or vessel), document reviews, and interviews with management and employees. While precise data on human rights due diligence practice is patchy, indicators to date show that many companies are relying on these kinds of tools as their principal form of due diligence.⁷⁸ Yet increasingly, research shows that social auditing is a limited tool, unable to tackle complex human rights challenges. This limitation is even more pronounced when it comes to modern slavery, a practice that is by its very nature hidden, and thus unlikely to be picked up by routine audits. The experience of the seafood industry provides a stark example: in 2015, a series of media reports exposed forced labour and human trafficking in the seafood supply chain of major companies such as Nestle, Proctor & Gamble (Mars) Wal-Mart and Costco.⁷⁹ It emerged that these companies and their first tier suppliers (predominantly major Thai companies) had relied predominantly on codes of conduct and social auditing to identify human rights risks.⁸⁰

⁷⁸ See for example the recent survey conducted by Norton Rose and the British Institute of International and Comparative Law (BIICL), which covered 152 companies from a range of sectors: McCorquodale R, Smit L, Neely S, Brooks R, “Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises” (2017) 2 *Business and Human Rights Journal* 194. See also IOD Parc, *Ethical Trading Initiative, External Evaluation Report* (2015), <http://www.ethicaltrade.org/resources/eti-external-evaluation>; Lake Q, MacAlister J, Berman C, Gitsham M, Page N, *Corporate approaches to addressing modern slavery in supply chains: A snapshot of current practice* (Ethical Trading Initiative and the Ashridge Centre for Business and Sustainability at Hult International Business School, 2015), 22-24. See also the database maintained by the UN Guiding Principles Reporting Framework: <https://www.ungpreporting.org/database-analysis/>

⁷⁹ <https://www.ap.org/explore/seafood-from-slaves/> Nestle subsequently commissioned a report to investigate the extent of forced labour in its supply chain: Verité, *Recruitment Practices and Migrant Labor Conditions in Nestlé’s Thai Shrimp Supply Chain* (2015), http://www.verite.org/sites/default/files/images/NestleReport-ThaiShrimp_prepared-by-Verite.pdf.

⁸⁰ Mendoza M, “AP report on slave-peeled shrimp spurs calls for boycott” *AP* (14 December 2015) <https://www.ap.org/explore/seafood-from-slaves/ap-report-on-slave-peeled-shrimp-spurs-calls-for-boycott.html>; Larson E, “These Lawyers Want Slave Labor Warning on Your Cat Food” *Bloomberg* (11 December 2015) <https://www.bloomberg.com/news/articles/2015-12-10/these-lawyers-want-you-to-know-slaves-may-be-feeding-your-cat>; *Costco Disclosure Regarding Human Trafficking and Anti-Slavery*, <https://www.costco.com/disclosure-regarding-human-trafficking-and-anti-slavery.html>; LeBaron G and Lister J “Benchmarking global supply chains: the power of the ‘ethical audit’ regime” (2015) 41 *Review of International Studies* 905.

As the discussion in the following section will highlight, while social auditing may have some role to play, it is critical that companies utilise a range of tools and processes as part of a comprehensive program to respond to modern slavery risks. Key features of a sound human rights due diligence program include engaging effectively with suppliers, consulting with relevant stakeholders (including affected workers and civil society), forming collaborations where appropriate, looking beyond the first tier of suppliers, exercising leverage over suppliers to the extent possible, and importantly, also looking inwards to the impact of their own business practices on modern slavery risks.

Finally, it should be noted that while the Australian Modern Slavery Act applies to modern slavery only, there are sound arguments for undertaking a broader human rights due diligence process and considering the full spectrum of potential human rights impacts. First, the violation of certain human rights is often connected to the prevalence of modern slavery. For example, a lack of freedom of association is a well-known risk factor for modern slavery.⁸¹ Thus, identifying and responding to other human rights impacts may also assist companies in responding to their modern slavery risks. In addition, the emergence of key global frameworks such as the Guiding Principles and the OECD Guidelines reflect a growing global consensus that comprehensive human rights due diligence is fundamental to responsible business conduct.⁸² While the discussion below focuses principally on modern slavery risks, the broader human rights context should also be kept in mind.

As global interest in human rights due diligence and corporate reporting continues to grow, it is a critical moment to consider what actions business must take to ensure substantive, and not just procedural, compliance with human rights standards.

Human rights due diligence under the Australian Modern Slavery Act

The first step: a cohesive policy commitment

Whilst not a specific requirement of the Australian Modern Slavery Act, experience to date shows that a successful human rights due diligence program requires company commitment at a high-level.⁸³ Notably, the Guiding Principles specifically cite a policy commitment to respect human rights as an important complementary measure to due diligence.⁸⁴ Such a commitment should be approved at the most senior level of a business, be made publicly available and be explicitly communicated to all personnel, business

⁸¹ CORE, *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) (CORE Report) at 10.

⁸² Recalling that the UN Guiding Principles were unanimously adopted by the UN Human Rights Council, and noting that the OECD Guidelines are supported by 44 adhering governments – representing all regions of the world and accounting for 85% of foreign direct investment – who encourage their enterprises to observe them wherever they operate.

⁸³ UN Guidance n66 at para. 39.

⁸⁴ Guiding Principles n1, Principle 15 provides that a company's responsibility to respect is comprised of three critical components: a policy commitment, human rights due diligence and remediation. Notably the *Modern Slavery Act 2015* (UK) suggests that companies report on relevant policies: s 54(5)(b).

partners and other relevant stakeholders.⁸⁵ In the Australian context, this could be a narrower policy commitment to take action against modern slavery, or alternatively and preferably, a company may choose to simultaneously address the full spectrum of human rights.

A policy commitment is in and of itself of course not sufficient. As highlighted by both the Guiding Principles and the OECD General Guide, businesses must embed policies into their management systems and corporate functions, so that ‘they are implemented as part of the regular business processes’.⁸⁶ This will involve identifying those areas of the business whose operations are particularly likely to impact on modern slavery (and human rights) risks, and those who are most likely to directly implement due diligence measures. This could be for example high-level management as well as legal, CSR, compliance, sales and procurement teams, among others.⁸⁷ Businesses will need to ensure that the objectives of relevant teams are appropriately aligned with policy commitments, and that relevant personnel are appropriately trained.⁸⁸

Ultimately, an overarching policy commitment that is embedded throughout company practice will ensure consistency of objectives, and provide relevant employees with the imprimatur to undertake concrete due diligence actions.

Mapping the supply chain and identifying risk

The first two reporting requirements of the Australian Modern Slavery Act, providing a description of structure, operation and supply chains (s 16(b)), and associated modern slavery risks (s 16(c)), as well as the requirement to ‘assess risk’ (which forms part of s 16(d)), are inherently interconnected. Thus, these three requirements are considered together here. As noted above, these steps correspond with the human rights due diligence notion of identifying and assessing human rights impacts set out in Guiding Principle 18.

As already highlighted, most businesses today rely on complex and lengthy supply chains to produce their goods and services. Yet more often than not, businesses will not have a comprehensive picture of their entire supply chain. Some may not even be able to readily identify all their first tier suppliers, let alone suppliers beyond tier one. The Guiding Principles however make it clear that businesses must consider the impact of their entire value chain.⁸⁹ So too does the Explanatory Memorandum to the Act, which provides that the term supply chains ‘is intended to refer to the products and services that contribute to the entity’s own products and services and is not restricted to ‘tier one’ or direct

⁸⁵ Guiding Principles n1, Principle 16. See also Lake Q et al n78 at 10-11 on how engagement by senior leadership can improve a company’s response to modern slavery.

⁸⁶ OECD General Guidance n73 at 23; Guiding Principles n1, Principle 16.

⁸⁷ OECD General Guidance n73 at 57-59; UN Guidance Companion Note II n76 at 8-9 (drawing upon the OECD’s work).

⁸⁸ OECD General Guidance n73 at 23, 57-59; UN Guidance Companion Note II n76 at 8-9.

⁸⁹ Guiding Principles n1, Principle 13 provides that when considering the impacts of business relationships, such relationships include and relationships with business partners and entities in its value chain. See also UN Guidance n66 at para. 48.

suppliers.’⁹⁰ Thus, in order to fully understand their modern slavery risks, and to enable compliance with s 16(b), companies must first undertake a mapping exercise of their supply chain. This of course, is no minor task, particularly for larger businesses with hundreds if not thousands of suppliers and sub-contractors. Given the complexity of this exercise, it would not necessarily be expected that businesses have undertaken a complete mapping by the first year of reporting under the Act. However, it is critical to show that this process is meaningfully underway.

The requirement to describe the risks associated with a company’s supply chains (s 16(c)) is a key preliminary step that informs the company’s assessment of modern slavery risks (s 16(d)). It is best understood as a reasonably high level process of identifying the risk factors that may contribute to the presence of modern slavery in a supply chain. While by no means exhaustive, risk factors may include the length of supply chains (the longer and more complex, the greater the risk), the use of outsourced labour and labour recruiters, excessive industry demands (such as high flexibility and fast turnover), a heavy reliance on temporary and unskilled workers, the use of home-based workers, and remote and dangerous working conditions. These types of factors all contribute to increased vulnerability and have the potential to create an environment conducive to the exploitation of workers. Country context must of course also be considered, with particular attention paid to the level of protection afforded to workers. Key questions to consider include the general level of governance and rule of law, the effectiveness of labour regulation and to what extent workers enjoy the right to freedom of association, including the ability to freely join independent trade unions.⁹¹

Modern slavery risks can then be assessed (as per s 16(d)) by considering a company’s mapped supply chain (and its operations more broadly) in light of these types of risk factors. It is not expected however that a company address each and every identified risk immediately. The Guiding Principles specifically acknowledge the burden that this would place on business, and rather urge companies to prioritise the most significant risks. Risks could be deemed more significant due to for example, ‘suppliers’ or clients’ operating context, the particular operations, products or services involved’.⁹² Similarly, the Explanatory Memorandum to the Act ‘recognises that entities may need to prioritise their modern slavery risk management, especially in the early years of implementation’ and encourages companies to ‘identify, prioritise and respond to those risks that are the most severe, including because of their scale, scope and irremediable character’.⁹³ This process of prioritising risks is an important component of risk assessment, and ultimately determines which risks the company will address (discussed in the following section).

Critically, businesses should avoid relying exclusively on social auditing to identify modern slavery risks. For extensive research now shows that audits are often incapable of

⁹⁰ Explanatory Memorandum n61 at para. 130.

⁹¹ CORE Report n81 at 9-11.

⁹² Guiding Principles n1, Guiding Principle 17, Commentary.

⁹³ Explanatory Memorandum n61 at para. 128.

detecting major rights violations, due to their inherently superficial nature. Audits are usually undertaken as a short checklist exercise (generally over the course of a few days, at one to two-year intervals), which at best, provides only a snapshot in time. Instances of supplier fraud and evasion - for example, falsifying workers' records and 'cleaning up' facilities prior to inspections - are well documented. While workers and other relevant stakeholders who might shed light on violations - such as NGOs and trade unions - tend not to be consulted. Further, auditors often lack the requisite specialized knowledge, such as human rights and labour relations expertise, while the fact that they are paid raises concerns about independence. Critically, and contrary to the clear expectations of the Guiding Principles, audits also rarely look beyond tier one of the supply chain.⁹⁴ These factors combined raise real questions about the ability of the audit to present a comprehensive picture of modern slavery risks. A business today that relies only on social auditing to claim it has no modern slavery in its supply chain is likely to be met with scepticism.⁹⁵

Instead, businesses should undertake a multi-layered assessment process. They might first look to public information, such as reports by governments, civil society, international organisations, trade unions and human rights institutions, as a means of appraising the extent of well-known risks in their sector.⁹⁶ As emphasised in the various due diligence frameworks, collaboration and consultation is also critical. The Guiding Principles specifically provide that a human rights impact assessment 'should involve meaningful consultation with potentially affected groups and other relevant stakeholders.'⁹⁷ While the OECD guides highlight the need for significant worker involvement as well as consultation with a broad base of stakeholders including rights holders, government authorities, trade unions, civil society and affected communities.⁹⁸ This is particularly

⁹⁴ These issues have been raised by academics, trade unions, NGOs, multistakeholder initiatives and intergovernmental organisations alike. See for example: Locke R, Amengual M, Mangla A, "Virtue out of Necessity? Compliance, Commitment, and the Improvement of Labor Conditions in Global Supply Chains" (2009) 37(3) *Politics & Society* 319 at 331-334; LeBaron G and Lister J, *SPERI Global Political Economy Brief No. 1: Ethical Audits and the Supply Chains of Global Corporations*, (Sheffield Political Economy Research Institute, University of Sheffield, 2016), <http://speri.dept.shef.ac.uk/wp-content/uploads/2016/01/Global-Brief-1-Ethical-Audits-and-the-Supply-Chains-of-Global-Corporations.pdf>; ILO, *Fishers first: Good practices to end labour exploitation at sea* (2016) http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_515365.pdf (ILO Fishers First) at 45; Clean Clothes Campaign, *Looking for a Quick Fix: How weak social auditing is keeping workers in sweatshops* (2005), <https://cleanclothes.org/resources/publications/05-quick-fix.pdf/view> at 26-28, 32-39, 41-48, 54-62; American Federation of Labor-Congress of Industrial Organizations, *Responsibility Outsourced: Social Audits, Workplace Certification and Twenty Years of Failure to Protect Worker Rights* (2013) <https://aflcio.org/reports/responsibility-outsourced>; Human Rights Watch, *Whoever Raises their Head Suffers the Most": Workers' Rights in Bangladesh's Garment Factories* (22 April 2015) <https://www.hrw.org/report/2015/04/22/whoever-raises-their-head-suffers-most/workers-rights-bangladeshs-garment> (HRW Bangladesh Report); and Ethical Trading Initiative, *Audits and Beyond*, <https://www.ethicaltrade.org/issues/audits-and-beyond>

⁹⁵ Ergon 2018 n58 at 13; UN Guidance Companion Note II n76 at 12.

⁹⁶ OECD General Guidance n73 at 25, 63-64.

⁹⁷ Guiding Principles n1, Principle 18. The extent of consultation will depend on the size of the business enterprise and the nature and context of the operation.

⁹⁸ OECD General Guidance n73 at 26-27, 48-54; UN Guidance Companion Note II n76, at 10-11. See also OECD Apparel Guidance n71 at 51-52, 82-83; OECD Agriculture Guidance n71 at 34, 37-38.

important in countries deemed to be higher risk.⁹⁹ Multi-stakeholder initiatives are also a potentially valuable form of collaboration, as they allow businesses to exchange information about known risks with industry peers, and can also assist in mapping beyond tier one of the supply chain.¹⁰⁰

It is also recommended that to the extent possible, businesses attempt to assess the due diligence practices of their immediate suppliers, as well as at certain key points of the supply chain.¹⁰¹ For a supplier that does not conduct its own due diligence is likely to be a potential source of risk. Information about suppliers beyond the first tier might be obtained by imposing contractual obligations on first tier suppliers to disclose comprehensive information about their own suppliers.¹⁰² Finally, company grievance mechanisms can be another tool to assist companies to identify risks.¹⁰³

Critically, identifying and assessing risk (and due diligence more broadly) is an ongoing process, reflecting the evolution of the business itself. It must be done on a continuous basis, and in particular when a business undertakes new activities, establishes new relationships, engages with new operating environments, or introduces new products and services.¹⁰⁴

Effective action

The third reporting criteria, set out in s 16(d) of the Australian Modern Slavery Act, requires that companies disclose the actions they have taken to address modern slavery risks, including due diligence and remediation processes.¹⁰⁵ Or, in the language of the Guiding Principles (Principle 19), that they take appropriate preventative and mitigating action.

Looking outward – influencing supplier behaviour

When considering appropriate action, the Guiding Principles distinguish between three situations: where a business causes a negative impact, contributes to a negative impact, and where it does not contribute, but the impact is nonetheless directly linked to its operations, products or services by its business relationship with another entity.¹⁰⁶ In the case of modern slavery risks in supply chains, the latter situation is likely to be the most applicable. Although, as explored in the following sub-section, a business might be characterised as contributing to impact through its own commercial practices, and thus the second scenario might also apply. In both cases however, the concept of leverage is central to how a business should respond, with both the Guiding Principles and OECD Guidelines

⁹⁹ CORE Report n81 at 15.

¹⁰⁰ For example the UN Guidance n66 at para. 29 notes that companies in the minerals sector have joined MSIs to assist in mapping their supply chains beyond tier one.

¹⁰¹ OECD General Guidance n73 at 26.

¹⁰² CORE Report n81 at 15; OECD General Guidance n73 at 68-69.

¹⁰³ OECD General Guidance n73 at 25, 65, 91. Grievance mechanisms are also of course a component of remediation.

¹⁰⁴ Guiding Principles n1, Principle 17; OECD General Guidance n73 at 17.

¹⁰⁵ Noting that the process of assessing risk, also set out in s16(d) has already been discussed in the preceding section.

¹⁰⁶ Guiding Principles n1 Principles 19, Commentary.

for Multinational Enterprises providing that companies should utilise, and where possible, increase leverage to prevent or mitigate human rights impacts.¹⁰⁷

Broadly speaking, leverage refers to the ability to change the behaviour of another entity that is causing harm, or risk of harm. The most common tools used for identifying human rights impacts and risks – codes of conduct and social auditing – also tend to be the most common form of attempted leverage by business. For example, the Norton Rose/BIICL Study found that codes of conduct (and contractual provisions) were the most common responses to human rights impacts.¹⁰⁸ While Ergon found that around 58% of reporting companies reported relying on codes of conduct as their main response to risks.¹⁰⁹ Similarly, the latest UN Guidance notes that these kinds of responses remain prevalent.¹¹⁰

Yet extensive research now shows that codes of conduct and social audit themselves are unlikely to constitute sufficient leverage to bring about changes in supplier behaviour. Rather, businesses should look to the overall nature of their relationship with suppliers, with a particular focus on factors such as the proportion of a supplier's output that their business constitutes, the regularity of orders placed and levels of commitment.¹¹¹ Suppliers should be incentivised to take actions that reduce modern slavery risks and contribute to compliance with human rights standards. Yet if sourcing decisions by business remain predominantly motivated by commercial terms – quality, speed of delivery, and price – rather than social compliance, suppliers will have little incentive to change their behavior and address modern slavery risks (and human rights impacts more broadly).¹¹² Social compliance must thus become a critical consideration when deciding whether to enter into and maintain a business relationship.

The various frameworks suggest a range of measures beyond social audit, through which businesses may exercise (and increase) leverage.¹¹³ For example, suppliers may be assessed through detailed pre-qualification procedures prior to the placement of orders. Such an assessment would include a consideration of the supplier's own modern slavery and human rights policies and due diligence measures. New contracts could include specific clauses on modern slavery risks. Other forms of leverage include entering into

¹⁰⁷ Guiding Principles n1 Principles 19, Commentary; OECD Guidelines n70 at 24-25.

¹⁰⁸ McCorquodale et al n78. While the survey did not specifically refer to auditing, generally codes of conduct (and to a lesser extent contractual provisions) rely on auditing as an enforcement measure.

¹⁰⁹ Ergon 2017 n58 at 8. Noting that almost a third of companies did not address this issue directly at all.

¹¹⁰ UN Guidance n66 at para. 29.

¹¹¹ Barrientos S and Smith S, *The ETI code of labour practice: Do worker's really benefit? Reporting on the ETI Impact Assessment 2006, Part 1: Main Findings* (Institute of Development Studies, University of Sussex, 2006) <http://www.ids.ac.uk/project/ethical-trading-initiative-impact-assessment> at 35.

¹¹² Locke et al n94 at 334-336; Esbenschade J, "A Review of Private Regulation: Codes and Monitoring in the Apparel Industry" (2012) 6(7) *Sociology Compass* 541 at 542-543; Anner M, Bair J and Blasi J, "Toward Joint Liability In Global Supply Chains: Addressing The Root Causes Of Labor Violations In International Subcontracting Networks" (2013) 35 *Competition Labour Law & Policy Journal* 1 at 8-14; Ethical Trading Initiative, *Integrating ethical trade principles into core business practices: An introductory toolkit* (2016) <http://www.ethicaltrade.org/resources/integrating-ethical-trade-principles-in-core-business-practice> (ETI Integrating Ethical Trade) at 13; Oxfam, *Trading Away Our Rights: Women Working in Global Supply Chains* (2004) <https://www.oxfam.org/sites/www.oxfam.org/files/rights.pdf>, (Oxfam 2004) at 32-38.

¹¹³ Notably, many of the suggested tools and processes are also used in the initial risk assessment stage.

longer-term contracts, consolidating suppliers, rewarding compliant companies with increased orders, and engaging in capacity-building and training.¹¹⁴ Smaller companies (or even large companies that deal with large suppliers) with less leverage may seek to increase it by acting collectively in respect of common suppliers. This might be achieved through joining a multi-stakeholder initiative (MSI) or collaborating with industry peers.¹¹⁵

Where specific practices that give rise to modern slavery risks (or human rights impacts) are found, businesses should develop corrective action plans in conjunction with suppliers, and where possible in consultation with affected rights holders or their representatives.¹¹⁶ The more involvement and support a business provides to suppliers in developing and complying with such plans, the greater leverage it is likely to exert.

Leverage is of course even harder to exercise beyond the first tier of the supply chain. The UN suggests that businesses might reach deeper into the supply chain by ‘cascading’ requirements through the supply chain. This essentially involves incentivising tier one suppliers to undertake due diligence on their own suppliers.¹¹⁷ The OECD additionally recommends mandating disclosure of subcontractor information through contractual terms.¹¹⁸ It also emphasises the importance of ‘control points’; stages in supply chains that constitute key points of transformation, have few actors, or that have visibility and control over the circumstances of production and trade upstream.¹¹⁹ Companies at these points often have greater leverage over suppliers deeper in the supply chain than companies closer towards consumers. The OECD suggests that companies ask their immediate suppliers to identify such points (on a confidential basis), or even mandate sourcing from established control points whose due diligence practices have been verified.¹²⁰ All these strategies, at a minimum, require effective leverage over first tier suppliers. However, ultimately, successfully moving beyond tier one requires partnering with a range of stakeholders including other buyers, international organisations, NGOs and governments.¹²¹

Most due diligence frameworks acknowledge that effective action necessitates some kind of monitoring to verify compliance with policies, codes and contractual terms. Consulting and collaborating with relevant stakeholders, in particular, people who might be affected by slavery, and civil society experts such as NGOs and trade unions can counteract the

¹¹⁴ UN Guidance n66 at 14; OECD General Guidance n73 at 30-31, 77-80; OECD Apparel Guidance n71 at 53, 60, 71-72; OECD Agriculture Guidance n71 at 32-33; 36-37.

¹¹⁵ UN Guidance n66 at 14-15; OECD General Guidance n73 at 79; OECD Apparel Guidance n71 at 72-73; OECD Agriculture Guidance n71 at 38.

¹¹⁶ OECD General Guidance n73 at 30.

¹¹⁷ UN Guidance Companion Note II n66 at 13-15.

¹¹⁸ OECD General Guidance n73 at 69.

¹¹⁹ Control points or chokepoints can be stages in the supply chain that: constitute key points of transformation; have few actors, or that have visibility and control over the circumstances of production and trade upstream
OECD General Guidance n73 at 26, 69, 79.

¹²⁰ OECD General Guidance n73 at 68-69.

¹²¹ OECD Apparel Guidance n71 at 56-57, 82-83; OECD Agricultural Guidance n71 at 38. See also ILO Fishers First n94 at 47; UN Guidance n66 at para. 29.

problems of relying on social audit alone.¹²² Anonymous reporting and complaint mechanisms can also assist companies to monitor compliance. In cases where a supplier is not in compliance, businesses must be willing to suspend or even terminate relationships. This will however usually be a measure of last resort, and only after attempts to exercise other forms of leverage have failed. The UN recommends that businesses be clear ‘about the possibility of disengagement upfront when entering into new business relationships should adverse human rights impacts be identified and unaddressed’¹²³, while the OECD recommends considering the social and economic impacts of disengagement.¹²⁴

The discussion above highlights that a business seeking to exercise leverage in a meaningful way must go beyond relatively superficial measures such as codes of conduct and social audits. In particular, businesses should seek to foster deeper and more committed relationships with suppliers, provide incentives to suppliers to improve their own due diligence practices, reward compliant suppliers, consult and collaborate with a range of stakeholders, and make serious efforts to look beyond tier one.

Looking inwards – the impact of business practice

The proposed actions discussed so far focus on the behaviour of, and risks associated with, supplier behaviour. However, research increasingly shows that the practices of businesses at the top of supply chains may also contribute to modern slavery risks, and more broadly, affect the ability of suppliers to meet human rights standards.

Perhaps the most commonly cited example is the impact of purchasing practices of buyers at the top of the supply chain on the conditions faced by workers. Purchasing practices tend to be influenced by broader market pressures, including short-term profit expectations by shareholders, pricing expectations from consumers and changing market demands, which in turn propel the ongoing search for lower costs of production, innovation and reduced lead times in bringing new products to market.¹²⁵ These issues are present in a range of sectors and industries, although have been specifically highlighted in the manufacturing sector. For example, in the electronics sector, pressures are exacerbated by rapid technological obsolescence, while in the apparel sector, increasing pressure has come from the rise of lean retailing and fast fashion.¹²⁶

¹²² CORE Report n81 at 17-18.

¹²³ UN Guidance n66 at para. 54.

¹²⁴ OECD General Guidance 763 at 30-31.

¹²⁵ Oxfam 2004 n112 at 32-38; Jørgensen H B, Pruzan-Jørgensen P M, Jungk M, Cramer A, *Strengthening Implementation of Corporate Social Responsibility in Global Supply Chains* (World Bank, Washington DC, October 2003), http://siteresources.worldbank.org/INTPSD/Resources/CSR/Strengthening_Implementatio.pdf (World Bank Consultation 2003) at 28-30.

¹²⁶ Locke R M, *The promise and limits of private power: Promoting labor standards in a global economy* (Cambridge; New York: Cambridge University Press 2013), Chapter 6; Martin-Ortega O, Outhwaite O, Rook W, “Buying power and human rights in the supply chain: legal options for socially responsible public procurement of electronic goods” (2015) 19(3) *The International Journal of Human Rights* 341-368 at 343-344; Oxfam 2004 n112 at 51; Appelbaum R P and Lichtenstein N, “A New World of Retail Supremacy: Supply Chains and Workers’ Chains in the Age of Wal-Mart” (2007) 70 *International Labor and Working-Class*

These factors combined result in fluctuating and volatile orders and severe price competition, which in turn places pressure on contracted suppliers. Common buying practices include shortened production deadlines and production lead times, last minute changes in orders, delays in approval and fluctuations in and insecurity of orders. These practices lead to the imposition of volatile and unreasonable production targets and deadlines on suppliers. The brunt of this is felt by workers, who are subjected to variable working hours, excessive and forced overtime, limitations on leave and breaks and unsafe working conditions in an attempt to meet the commercial expectations of buyers.¹²⁷

Further, the relative power of buyers allows them to conduct aggressive price negotiations, leading to outcomes that do not reflect the true cost of production. Labour costs are not itemised and buyers often refuse to take into account rises in minimum wages or overtime and social benefits, let alone the costs of health and safety improvements and training. Rather, suppliers are expected to absorb the costs of social compliance through improved productivity; yet productivity gains on their own are rarely sufficient.¹²⁸

These buying practices have a direct impact on a range of human rights, including the right to fair wages and equal remuneration, for work of equal value, the right to reasonable working hours and the right to safe and healthy working conditions.¹²⁹ In addition, these kinds of practices are themselves considered to be potential indicators of modern slavery risk.¹³⁰ Further, these practices can lead to greater reliance on unauthorized sub-contractors and temporary contract workers, as suppliers attempt to keep up with fluctuating demand, production delays, time, price and volume pressures. The use of unauthorized sub-contracting and temporary workers is another risk factor for modern slavery, with sub-contracted and temporary workers frequently being some of the most vulnerable and exploited workers in the supply chain.¹³¹

History 106 at 112-113; Taplin I, "Global Commodity Chains and Fast Fashion: How the Apparel Industry Continues to Re-Invent Itself" (2014) 18(3) *Competition & Change* 246.

¹²⁷ Oxfam 2004 n112 at 32-39, 48-63; Martin-Ortega et al n126 at 342-344; Human Rights Watch, "'Work Faster or Get Out': Labor Rights Abuses in Cambodia's Garment Industry" (March 2015) <https://www.hrw.org/sites/default/files/reports/cambodia0315_ForUpload.pdf> (HRW Cambodia Report) at 38-39; Anner et al n112 at 8-14; Clean Clothes Campaign, *Cashing in: Giant retailers, purchasing practices, and working conditions in the garment industry* (2009) <https://cleanclothes.org/resources/publications/cashing-in.pdf/view> (Clean Clothes Campaign 2009) at 45-51; ETI Integrating Ethical Trade n112 at 13; BetterWork, *Progress and Potential A focus on sourcing practices from a factory perspective* (2016); ETI Norway, *Suppliers speak up, How Responsible Purchasing Practices Can Improve Working Conditions in Global Supply Chains* (2014).

¹²⁸ Clean Clothes Campaign 2009 n127 at 49-51; Oxfam 2004 n112 at 54-55; Anner et al n112 at 8-14; HRW Cambodia Report n127 at 38-39; ETI Norway n127 at 13-18; Lin L W, "Corporate Social Accountability Standards in the Global Supply Chain: Resistance, Reconsideration, and Resolution in China" (2007) 15 *Cardozo Journal of International & Competition Law* 321 at 335-336.

¹²⁹ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (16 December 1966, United Nations, Treaty Series, vol. 993, p. 3), Article 7(a).

¹³⁰ CORE Report n81 at 9-11.

¹³¹ Labowitz S and Baumann-Pauly D, *Business as Usual is Not an Option: Supply Chains and Sourcing after Rana Plaza*, (NYU Stern Center for Business and Human Rights, April 2014) at 17-26; HRW Bangladesh Report n94; HRW Cambodia Report n127 at 94-95; Oxfam 2004 n112 at 60-61; Clean Clothes Campaign 2009

The various due diligence frameworks recognize that companies have a responsibility to assess the impact of, and take appropriate action in respect of their own practices. For example, the latest UN Guidance specifically states that ‘each business enterprise should ensure that its own practices, for example, selling defective parts or unhealthy ingredients, irresponsible purchasing practices, or lowcost, fast-delivery business models, do not contribute to adverse human rights impacts caused by entities in the value chain.’¹³² The OECD Apparel and Agriculture Guidelines both provide that companies should assess whether their purchasing practices contribute to harm, and implement control measures and policies accordingly. Suggested control measures include taking into account the costs of wages, benefits and investments in decent work in pricing models, setting final order placement dates, improving forecasting, sharing purchasing plans with suppliers and easing pressure on suppliers.¹³³ While the latest OECD General Guidance specifically refers to short lead times as an example of how, in certain circumstances, a company may actually contribute to human rights impacts through its own actions.¹³⁴

In circumstances where the Guiding Principles provide that companies should cease any contributions to adverse human rights impacts,¹³⁵ it is essential for businesses to assess and address the impacts of their own practices on modern slavery risks.

Remediation

The Australian Modern Slavery Act specifically contemplates ‘remediation processes’ as a component of action. While it is not technically part of the due diligence process, remediation is fundamental to fulfilling the overall responsibility to respect human rights.¹³⁶ The Guiding Principles expect businesses to provide remediation when they have contributed to negative human rights impacts. If a company is linked to a negative impact without causing or contributing to the harm, providing remediation is not expected, ‘though [a business] may take a role in doing so’.¹³⁷ To this end, it is good practice for companies to, at a minimum, facilitate remediation processes. This may include co-operating with external complaints processes (judicial and non-judicial), establishing accessible grievance mechanisms such as internal and third party complaints mechanisms, and providing clear processes for resolving complaints.¹³⁸ As with due diligence, consultation with those impacted, as well as civil society is key.¹³⁹

n127 at 41-43; Asia Floor Wage Alliance, *Prekarious Work in the H&M Global Value Chain* (2016), <http://asia.floorwage.org/workersvoices/reports/prekarious-work-in-the-h-m-global-value-chain>

¹³² UN Guidance n66 at para. 48.

¹³³ OECD Apparel Guidance n71 at 45-46, 69-70 (notably, the OECD Apparel Guidance encourages companies to implement control measures as preventative measures, even if they have not identified specific contributions to harm through their purchasing practices); OECD Agriculture Guidance n71 at 37.

¹³⁴ OECD General Guidance n73 at 70-71.

¹³⁵ Guiding Principles n1, Principle 19, Commentary.

¹³⁶ Guiding Principles n1, Principle 15.

¹³⁷ Guiding Principles n1, Principle 22, Commentary.

¹³⁸ OECD General Guidance n73 at 34-35.

¹³⁹ OECD General Guidance n73 at 34-35.

Measuring Effectiveness

The concept of effectiveness is the most challenging aspect of the Australian Modern Slavery Act (and due diligence more generally). The Act does not define effectiveness, while international guidance is still emerging.

At a general level, it is important to note that measuring modern slavery is an inherently complex, and contested area, particularly given the hidden nature of the practice. Most companies will be ill-equipped to directly assess and report on modern slavery figures.¹⁴⁰ Thus, under the Australian Modern Slavery Act a company is unlikely to be expected to show that it has actually reduced the incidence of modern slavery. Effectiveness is likely to be better measured by indicators that show the extent to which companies have taken action that can reasonably be considered to have reduced the risks of modern slavery in their supply chains.

Yet the UK experience to date highlights the difficulties associated with identifying appropriate indicators. Under the UK Modern Slavery Act 2015 it is suggested (but not mandatory) that companies report on the effectiveness of their actions. Yet a review of the modern slavery statements to date indicates that reporting entities have made very limited progress in this regard. Ergon's 2017 report found 81% of UK companies did not mention any key performance indicators used to assess effectiveness, 10% of companies provided one measurable indicator for monitoring progress, while only 9% disclosed a combination of quantitative and qualitative indicators.¹⁴¹ The most commonly used indicators were numbers of staff trained and non-compliances found during audits or complaints received. Ergon argued that companies needed to give further consideration as to how they assess and measure effectiveness.

International frameworks provide some (albeit limited) guidance on potential indicators. The Guiding Principles refer to the use of 'appropriate qualitative and quantitative indicators' and 'feedback from both internal and external sources, including affected stakeholders' to measure effectiveness.¹⁴² However they do not provide further clarification on what these indicators may be. The OECD has ventured further guidance, citing the following (general) potential indicators: the percentage of impacted stakeholders engaged who feel adverse impacts have been adequately addressed; the number of agreed action points that have been implemented according to planned timelines; the percentage of impacted stakeholders who feel channels for raising grievances are accessible, equitable and effective; and the rate of recurring issues related to the identified adverse impact(s). However, given the hidden nature of modern slavery, data for some of these indicators may be difficult to obtain. The OECD also provides an example of indicators more relevant to the specific case of modern slavery.

¹⁴⁰ See for example the 2015 ILO Workshop which discussed the problems of measuring modern slavery: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/meetingdocument/wcms_390001.pdf.

¹⁴¹ Ergon 2017 n58 at 8. The position remained substantially the same in 2018: see Ergon 2018 n58.

¹⁴² Guiding Principles n1, Principle 20.

These include checking the progress of individual suppliers against corrective action plans, feedback from workers and trade unions on how modern slavery risks are being addressed, and the identification of specific cases of modern slavery and responses.¹⁴³ The OECD also suggests that companies look at broader sources of information such as its own supplier assessments, reported grievances¹⁴⁴, and credible reports in respect of high-risk suppliers and/or high-risk countries.¹⁴⁵ Notably, civil society has suggested very similar indicators, albeit with greater detail in some instances. For example, in relation to grievance mechanisms, it suggests tracking and disclosing the number of complaints made and the company's response. While in relation to a company's response, it specifically suggests disclosing any remedy and compensation provided. Additionally, companies may also provide information about the evaluation of training.¹⁴⁶

The examples provided above are a helpful starting point, however ultimately, businesses will need to carefully consider which indicators are most relevant to their particular operating context.

Conclusion

The Australian Modern Slavery Act may be broadly welcomed (by some) as a manifestation of the recognition of the nature and scale of the problem of modern slavery, and the imperative for some state-based regulatory activity, beyond mere 'market forces' or 'consumer action'. This law promotes commercial actors' attention to the significant influence (and so responsibility) that business may have on practices and conditions within their supply chains, through the imposition of reporting requirements.

Although the Act does not impose an obligation to undertake due diligence or other specific actions, the legislation is clearly aimed at ensuring that Australian businesses take effective action to address modern slavery risks within their supply chains and operations. Further, the legislation directs specific attention to the UN Guiding Principles and associated international frameworks as guides to meaningful compliance.

Globally, a majority of business efforts to tackle modern slavery and the broader human rights impacts of supply chains have, to date, utilised fairly superficial techniques such as codes of conduct and social auditing. Businesses seeking to truly engage with the aims of the Australian Modern Slavery Act should be cognisant of the limitations of these tools and, consistent with the aims of the legislation, instead seek to implement a more comprehensive human rights due diligence program.

¹⁴³ OECD General Guidance n73 at 83. These indicators are cited in the specific context of child labour, however they are equally applicable to modern slavery. Notably, the CORE Report n81 at 22-23 suggests very similar indicators.

¹⁴⁴ Similarly, Guiding Principles n1, Guiding Principle 20 provides that operational-level grievance mechanisms can provide important feedback on the effectiveness of a business' due diligence program.

¹⁴⁵ OECD General Guidance n73 at 82.

¹⁴⁶ CORE Report n81 at 22-23.

While the context and circumstances for each business will be unique, the UN Guiding Principles and associated international frameworks highlight several critical features of a sound due diligence program. Namely, business should build and exercise leverage over their suppliers through direct engagement and increased levels of commitment. They should also look beyond the first tier of the supply chain both in assessing risk and exercising leverage. Consultation with a broad range of stakeholders – in particular rights holders and civil society – is essential at each stage of due diligence. Such consultation will assist in identifying risks, exercising leverage and monitoring effectiveness. It can also counteract a narrow compliance approach. Similarly, collaboration with industry peers and other stakeholders can also provide business with greater levels of support. Importantly, and perhaps less readily acknowledged by some, a comprehensive approach also requires that businesses look inwards and critically appraise the impact of their own business practices on modern slavery risks. Measuring the effectiveness of due diligence, while challenging, can be undertaken by carefully considering appropriate performance indicators. More broadly, due diligence should be complemented by company-wide policy frameworks and a willingness to facilitate remediation.

Australian businesses that embark upon a comprehensive due diligence program will not only ensure meaningful compliance with the Modern Slavery Act. They will also position themselves as global leaders in the fight against modern slavery and serve as a practical example to business worldwide of how to effectively exercise the responsibility to respect human rights.