



Review of Australia's Modern Slavery Act 2018

Submission by the Australian Council of Trade Unions

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Introduction

The Australian Council of Trade Unions (ACTU) is the peak trade union body in Australia, with 43 affiliated unions and states and regional trades and labour councils, representing nearly 1.8 million workers across the country.

The ACTU welcomes the opportunity to make a submission to the 2022 review of Australia's *Modern Slavery Act 2018 (Cth)* – hereafter, *MSA*.

Modern slavery is a broad term used to refer to a wide spectrum of crimes that includes forced labour, but the common thread is any situation of exploitation where a person cannot refuse or leave work or service to another due to threats, violence, coercion, abuse or deception. Modern slavery – in particular, forced labour – is a central issue of concern for the Australian Union movement, both in terms of the rights of workers in Australia and around the world.

The definition of forced or compulsory labour¹, according to the ILO *Forced Labour Convention*, is 'all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily.' As the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade noted in its report into establishing a Modern Slavery Act in Australia:

While there is an important distinction between labour exploitation and the more serious crimes of forced labour and slavery, the Committee recognises that these crimes exist on the same spectrum of exploitation.²

We can conceive of this spectrum of exploitation as one between decent work³ on the one hand, and extreme exploitation such as forced labour and slavery-like practices that can include violations of labour and/or criminal law, on the other. Exploitative practices along this spectrum can include wage theft, unlawful deductions, and physical and sexual violence. As such, the ACTU believes that the issue of forced labour, on the extreme end of the spectrum, cannot be addressed

¹ 'Forced or compulsory labour' is the term used in the *Forced Labour Convention*, however for the sake of brevity this submission will hereafter use the term 'forced labour'.

² Parliament of the Commonwealth of Australia, Joint Standing Committee on Foreign Affairs, Defence and Trade, 'Hidden in Plain Sight: an inquiry into establishing a Modern Slavery Act in Australia', 2017, https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024102/toc_pdf/HiddeninPlainSight.pdf;fileType=application%2Fpdf, p. 279

³ 'Decent work' according to the ILO "involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organise and participate in the decisions that affect their lives, and equality of opportunity and treatment for all men and women." <https://www.ilo.org/global/topics/decent-work/lang-en/index.htm>

without addressing the root causes of labour exploitation. The problem is not just a few ‘bad apple’ employers – the problem of worker exploitation is entrenched and endemic. Drivers of exploitation include insecurity due to temporary visa status and visa arrangements that tie workers to their employers; insecure work arrangements including arms-length employment arrangements such as labour hire; and lack of respect for fundamental workers’ rights including freedom of association. This understanding of forced labour means that responses should include measures to empower workers and respect fundamental workers’ rights including freedom of association and protection of the right to organise and collective bargaining so that workers are empowered to join a union, bargain collectively, and speak out about exploitation without fear of reprisal.

There are also forms of labour exploitation that should be recognised and tackled in their own right – regardless of whether or not they fit the technical definition of forced labour. A factory collapsing and killing garment workers, the sacking of a worker for raising a workplace complaint or a worker paid less just because she is a woman are all such examples of exploitation and violations of core ILO Conventions. Unlike the current *MSA*, these Conventions are widely included in the key international business and human rights instruments, trade agreements and a wide range of multistakeholder initiatives that seek to address labour standards in global supply chains.

Key reforms required to tackle modern slavery

Given the scale of the problem of forced labour and modern slavery more broadly, strong action is needed by governments to regulate corporate supply chains. Reporting alone is not sufficient to address modern slavery. To achieve the change required, the *MSA* must go beyond a transparency approach, and embed human rights due diligence to require companies to take concrete action on modern slavery in their operations and supply chains.

Addressing modern slavery will not be achieved by the *MSA* alone but must be done in conjunction with reforms to industrial laws and reforms to our migration system, for example. But there is much that can be done to strengthen the operation of the *MSA* to ensure it is an effective tool to tackle modern slavery:

1. Introduce the requirement for **human rights due diligence** in order to drive concrete actions that will change corporate behavior, rather than just reporting on risks. Mandatory human rights due diligence would require reporting entities to identify, prevent and mitigate modern slavery practices, and address harms where these arise. As part of undertaking the due diligence process, companies must report on risks of modern slavery.

2. Due diligence cannot be a tick-box approach that companies outsource to third party auditors. Worker voice must be embedded in the due diligence process: the *MSA* should mandate that the due diligence process requires **genuine engagement with trade unions** in company operations and supply chains.
3. The *MSA* should be broadened from the focus on the elimination of forced labour and child labour to define exploitation in relation to **violations of International Labour Standards covered by all the ILO Fundamental Principles and Rights at Work**, including freedom of association and the effective recognition of the right to collective bargaining.⁴ Accordingly the Act should be renamed to be the *Modern Slavery and Labour Exploitation Act (MSLEA)*.
4. There should be **penalties** for non-compliance with the *MSLEA*, including a failure to prevent modern slavery or labour exploitation, a failure to conduct proper human rights due diligence, a failure to submit reports, or submitting incomplete or inaccurate reports, in order to drive compliance and ensure companies are not profiting from exploitation. Those penalties should include prohibiting those companies from being considered for Government procurement, grants or concessional financing.
5. There should be appropriate oversight and enforcement of the *MSLEA* through a well-resourced, independent **Anti-Slavery Commissioner** with the power to investigate the veracity of statements and receive complaints from workers in entity operations and supply chains and provide remedy where such complaints are upheld.
6. The *MSLEA* should also provide **access to justice for exploited workers**, including the establishment of specific cause of action for exploited workers in operations or supply chains to bring legal proceedings against a company for failing to prevent modern slavery or labour exploitation, a national compensation scheme for survivors of modern slavery.

Recommendations

Recommendation 1: Amend the *MSLEA* to place a duty on businesses to prevent modern slavery or labour exploitation in their operations and supply chains that requires businesses to undertake human rights due diligence to identify, prevent and address modern slavery and labour exploitation risks.

Recommendation 2: The *MSLEA* should be amended to require companies to consult with trade unions with coverage in their operations and supply chains throughout the due diligence process.

⁴ <https://www.ilo.org/declaration/lang-en/index.htm>

Recommendation 3: The *MSLEA* must be amended to require companies to implement grievance mechanisms for workers in their operations and supply chains, that at least adhere to principles within guidance issued by the Anti-Slavery and Labour Exploitation Commissioner, and developed in consultation with the relevant trade union/s.

Recommendation 4: The Australian Government should introduce Mandatory Human Rights Due Diligence legislation covering all human rights which would impose a duty to prevent harm on companies requiring them to undertake due diligence to identify, prevent and address all human rights (including workers' rights) and environmental risks in their operations and supply chains.

Recommendation 5: The *MSLEA* should be amended to cover worker exploitation, with reference to the ILO core Conventions referenced in the *ILO Declaration on the Fundamental Principles and Rights at Work*.

Recommendation 6: The reporting threshold should be immediately lowered to \$50 million.

Recommendation 7: The *MSLEA* should be amended to set out a more detailed reporting criteria on the risks companies should be reporting on.

Recommendation 8: The *MSLEA* must be amended to include penalties for companies who fail to report; provide false, misleading, or insufficiently detailed reports; fail to implement due diligence; breach their duty to prevent modern slavery; or fail to establish grievance mechanisms for workers in their operations and supply chains.

Recommendation 9: The *MSLEA* must include provision for civil liability to allow workers in company operations and supply chains to seek damages where harm is caused by a failure to comply with due diligence obligations.

Recommendation 10: All Australian Government agencies and levels of Government (federal, state, local) should be required to undertake due diligence and produce an annual modern slavery statement.

Recommendation 11: The register should include a list of companies required to report under the *MSLEA*, and a list of companies who have failed to report or submitted non-compliant reports.

Recommendation 12: A template on the form and substance of mandatory disclosure statements should be created to clarify the information required by companies and enable the public to easily search information on the register. The register should be modified to enable searches by high-risk sector and/or business practice, such as labour hire, and enable searches by related entities, including parent companies and subsidiaries, and related entities for main suppliers.

Recommendation 13: Appoint a well-resourced independent Anti-Slavery and Labour Exploitation Commissioner to enforce the *MSLEA*. The Commissioner will have the power to investigate and handle complaints relating to non-compliance of the *MSLEA* and the power to enforce the *MSLEA*, including through the administration of penalties.

Recommendation 14: Unions should have an enforcement role under the *MSLEA*, including enhancing and resourcing the ability of unions to conduct compliance work regarding labour standards in supply chains.

Recommendation 15: The Australian Government should establish a national compensation scheme for people subjected to modern slavery through Australian company operations and supply chains.

Recommendation 16: A further statutory 3-year review of the *MSLEA* should be conducted to consider the effectiveness of the reforms resulting from this review.

Recommendation 17: The Australian Government should implement a ban on imports produced with forced labour or other serious abuses of labour standards.

Recommendation 18: The Australian Government must ensure that temporary migrant workers are provided whistle-blower protections to be able to raise complaints regarding modern slavery without suffering adverse immigration consequences.

Has the Modern Slavery Act had a positive impact?

The primary measure of the impact of the *MSA* must be whether it is working to eliminate modern slavery: is the situation for workers in the operations and global supply chains of Australian businesses improving? On this measure, it is clear the *MSA* is not succeeding.

The 'transparency framework' approach of the *MSA* is not an effective strategy for addressing modern slavery. It is based on the flawed assumption that reporting alone will improve business

practices and create a ‘race to the top’ as reporting entities compete for funding and consumer support, and conversely ‘businesses that fail to take action will be penalised by the market and consumers and severely tarnish their reputations’.⁵ This approach effectively outsources the enforcement to unions, civil society, consumers and shareholders to pressure companies to do the right thing, instead of the Australian Government enforcing compliance through penalties and strict oversight. Three years into the Act, we are yet to see the transparency framework approach making any significant impact to address modern slavery. Indeed, the international evidence shows that similar approaches to modern slavery have failed: compliance with the UK’s *Modern Slavery Act (2015)* has been inadequate, leading to the UK Government to propose the introduction of penalties for companies that fail to meet their obligations under the Act.

Reporting alone is not enough – without a requirement for companies to take action on modern slavery, reporting is just a superficial ‘tick box’ exercise. As we explain in the following section, the Act must include the requirement for companies to conduct human rights due diligence in order to drive action to eliminate modern slavery and labour exploitation in company operations and supply chains.

Even if the transparency framework approach was sufficient to create the kind of change in corporate behavior required to tackle modern slavery, it is clear that companies are failing to disclose the level of detail required to be effective. A number of civil society organisations and academics have undertaken studies assessing the effectiveness of the MSA, and found that a significant proportion of statements fail to even address the basic mandatory reporting criteria. One report, ‘Paper promises? Evaluating the early impact of Australia’s Modern Slavery Act’⁶ reviewed the first modern slavery statements of 102 companies in the high-risk sectors of garments sourced from China, rubber gloves sourced from Malaysia, horticulture sourced in Australia, and seafood sourced from Thailand, and found that more than half of companies failed to identify and disclose salient sectoral risks in their operations and supply chains. Three in four companies sourcing garments from China failed to mention the risks of Uyghur forced labour in their supply chains, for example, and less than a third of the companies reviewed could

⁵ Alex Hawke MP, Assistant Minister for Home Affairs, *Modern Slavery Bill 2018* second reading speech 28/9/2018 https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/429b4c41-4a6c-465d-a259-05e8252b994d/&sid=0034

⁶ Human Rights Law Centre, the Business and Human Rights Resource Centre, Baptist World Aid, Australian Human Rights Institute (UNSW), Business and Human Rights Centre (RMIT), University of Melbourne, University of Notre Dame, University of Western Australia, ‘Paper Promises? Evaluating the early impact of Australia’s Modern Slavery Act’, https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/6200d3d9db51c63088d0e8e1/1644221419125/Paper+Promises_Australia+Modern+Slavery+Act_7_FEB.pdf 2022

demonstrate that they are taking some form of action against modern slavery risks that lifts working conditions or tackles root causes. They concluded: “...it seems that many company statements remain mere ‘paper promises’, with little evidence of effective action in the areas most likely to improve conditions for workers.”⁷ The researchers have recently released a follow up report⁸, evaluating 92 second statements by these same companies (some entities had not published second statements) to assess whether entities had improved their performance over time – but unfortunately, they have drawn the same conclusions. They found that “over half of the company statements assessed still do not meet basic mandatory reporting requirements, with just a third evidencing some form of effective action to tackle modern slavery risks.”⁹

Another report¹⁰ assessed the ASX200 companies modern slavery statements against 41 quality indicators and found that 33% of company statements appeared to be non-compliant with one or more of the MSA’s reporting requirements, and only 17% of statements identified actions taken by companies to ensure grievance mechanisms are accessible to stakeholders. Even where action has been taken, there was no way to independently verify that this was true, or effective.

The ACTU’s examination of the modern slavery statements of labour hire providers is a striking example of the glaring inconsistencies in how companies report modern slavery risks. Labour hire providers routinely do not describe their industry or their business model as being high risk. For example, Hudson Global Resources (Aust) Pty Ltd in its 2022 statement claims that risks of deceptive recruitment practices and underpayments in its operations are low. This is despite the company being subject to enforceable undertaking following a successful prosecution for underpayment of wages by the Fair Work Ombudsman in 2021. Major providers such as Chandler Macleod Group (a subsidiary of Recruit Holdings via RGF Staffing APEJ) obscure or omit to mention they on-hire workers and/or place individual contractors instead use euphemisms such as ‘providers of human resources and talent solutions’ to describe their business model. The focus of their report is on risks in their supply chain. RGF Staffing APEJ’s report does not disclose Japanese MNC Recruit Holdings Co, one of the world’s largest labour hire providers, is its ultimate parent.

⁷ *Ibid.*, p. 3.

⁸ Human Rights Law Centre et. al., ‘Broken Promises: Two years of corporate reporting under Australia’s Modern Slavery Act’, 2022.

⁹ *Ibid.*, p. 2.

¹⁰ Pillar Two, ‘Moving from paper to practice: ASX200 reporting under Australia’s Modern Slavery Act’, https://acsi.org.au/wp-content/uploads/2021/07/ACSI_ModernSlavery_July2021.pdf July 2021

A number of ACTU affiliate unions have also examined company modern slavery statements and found that they failed to disclose key risks. For example, the Electrical Trades Union examined the Goldwind Australia statement and found that although the entity procures the majority of their wind turbine components from their parent company in China, where the Xinjiang Uyghur Autonomous Region (XUAR) is an important source of rare earth minerals used in wind turbine production, the company's modern slavery statement does not adequately describe the risks of modern slavery in their wind turbine supply chains, nor attempt to assess or address these risks.

The Maritime Union of Australia examined the modern slavery statements of key companies with shipping components in their supply chains, and noted that while some companies have assessed the risk of modern slavery in their shipping supply chains, particularly practices that could constitute forced labour arising from seafarers working beyond the maximum duration of their contract as specified in the ILO Maritime Labour Convention, a number of other companies with shipping in their supply chains have failed to do so.

It is clear that in order to drive compliance with the *MSA* and for companies to take concrete action to tackle modern slavery, significant reform is required.

Human Rights Due Diligence

While the *MSA* does require businesses to report on 'actions to address risks of modern slavery, including due diligence', it does not require businesses to undertake due diligence. The ACTU proposes that in order to drive meaningful action on modern slavery, the *MSA* must be reformed to place a duty on businesses to prevent modern slavery and establish due diligence as a standard of conduct through which this is to be achieved.

The concept of human rights due diligence comes from the 2011 *United Nations Guiding Principles on Business and Human Rights* (hereafter, *UNGPs*). Principle 17 outlines the responsibility of business to undertake due diligence¹¹:

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

¹¹ UN Guiding Principles on Business and Human Rights (2011), Principle 17, https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, pp. 17-18

- (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, recognising that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

The concept of due diligence has been incorporated into the *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (hereafter, *ILO MNE Declaration*) and the *OECD Guidelines for Multinational Enterprises* (*OECD Guidelines*). These three instruments – the *UNGPs*, the *OECD Guidelines* and the *ILO MNE Declaration* – are the three key international reference points for responsible business conduct. They align and complement each other, setting the expectation that all businesses avoid and address adverse impacts.

Globally, Australia is lagging behind a number of other jurisdictions which have adopted more robust legislation to address adverse human rights impacts through mandatory human rights due diligence, including the French Corporate Duty of Vigilance Law adopted in 2017, the Dutch Child Labour Due Diligence Law in 2019, the recently legislated German Supply Chain Due Diligence Act which comes into effect in 2023, and the European Commission proposal for a Directive on Corporate Sustainability Due Diligence.

There are several examples of Australian laws that place duties to prevent harm and due diligence obligations on businesses, for example occupational health and safety laws, which require employers or businesses to exercise due diligence to ensure that they comply with work health and safety continually and comprehensively ensure that their business keeps workers, volunteers and visitors safe while they are at work. The latest example is the recently passed 'Respect@Work' Bill which establishes a positive duty on companies to take all reasonable and proportionate measures to eliminate sexual harassment and discrimination. Other examples of Australian laws requiring due diligence include the *Illegal Logging Prohibition Act 2012 (Cth)* which makes it a criminal offence to import illegally logged timber into Australia, the *Autonomous Sanctions Act 2011* which requires body corporates to exercise due diligence to avoid contravening sanctions laws; if a body corporate contravenes the sanction law, it can avoid penalties by proving it took reasonable precautions and exercised due diligence to avoid the contravention.¹²

¹² *Autonomous Sanctions Act 2011 (Cth)*, Section 16, subsection 7, http://www5.austlii.edu.au/au/legis/cth/consol_act/asa2011270/s16.html

The requirement for due diligence in the *MSLEA* would mean that companies must implement and report on their due diligence process: identifying modern slavery risks, put in place a system to prevent them, and provide an effective remedy when they occur. Companies must report on how they have consulted with workers and their representatives in operations and supply chains in the due diligence process. Where a failure to undertake due diligence results in modern slavery occurring, workers in operations and supply chains should have a direct civil cause of action to pursue companies for remedy.

The definition of ‘risk’ should include the ILO indicators of forced labour¹³, which include practices such as withholding of wages, intimidation and threats, physical and sexual violence, abusive working and living conditions, and excessive overtime.

By including the requirement for due diligence in the *MSLEA*, the statements will become evidence that an entity has conducted due diligence, and become a key part of the due diligence process itself by serving to publicly communicate how impacts are being assessed and addressed.

Recommendation 1: Amend the *MSLEA* to place a duty on businesses to prevent modern slavery or labour exploitation in their operations and supply chains that requires businesses to undertake human rights due diligence to identify, prevent and address modern slavery and labour exploitation risks.

Trade Unions and the due diligence process

Meaningful stakeholder engagement is a key feature of due diligence. Trade unions in company operations and supply chains must be consulted in every part of the due diligence process in order to ensure the risks of harm to workers are properly identified, addressed and remedied.

Trade unions have the most relevant and up to date knowledge regarding violations of workers’ rights and effective prevention and remedy. Engaging with trade unions is the most effective way to verify and improve labour standards and is an important additional enforcement mechanism for the *MSLEA*. Entities must regularly engage with trade unions in their operations and supply chains, and provide a robust grievance mechanism to enable workers in operations and supply chain both as a way of identifying violations and an avenue for workers to seek remedy. Grievance

¹³ International Labour Office, ‘ILO Indicators of Forced Labour’, https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_203832.pdf

mechanisms should be designed in consultation with unions and based on the criteria outlined in the UNGPs Article 31: grievance mechanisms must be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on engagement and dialogue. The International Trade Union Confederation has produced a legal guide for establishing grievance mechanisms compatible with the UNGPs and international labour standards that should provide the basis for developing a grievance mechanism.¹⁴

The *OECD Due Diligence Guidance for Responsible Business Conduct*, which further elaborates the concept of due diligence outlined in the *OECD Guidelines*, recommends¹⁵ that, in practice, an enterprise should meaningfully engage with stakeholders when:

- Identifying actual or potential adverse impacts in the context of its own activities
- Engaging in assessment of business relationships with respect to real or potential adverse impacts
- Devising prevention and mitigation responses to risks of adverse impacts caused or contributed to by the enterprise
- Identifying forms of remedy for adverse impacts caused or contributed to by the enterprise when designing processes to enable remediation
- Tracking and communicating on how actual or potential identified human rights impacts in the context of its own activities are being addressed.

The OECD Investment Committee has issued specific guidance¹⁶ regarding engagement with trade unions in the due diligence process, clarifying that when a company's specific activity impacts or could impact workers, it should engage with workers in relation to these impacts. The Guidance goes on to confirm that:

The Due Diligence Guidance lists employment and industrial relations, occupational health and safety, and human rights as issues on which involvement of workers representatives is relevant for the purpose of due diligence. Therefore, in the design and implementation of due diligence processes related to such risks to workers and human rights, companies should engage with workers' representatives and trade unions. Such engagement should also extend to any remediation process supporting due diligence.¹⁷

¹⁴ https://www.ituc-csi.org/IMG/pdf/ituc_legal_guide_grievance_mechanism_en.pdf

¹⁵ OECD (2018), *OECD Due Diligence Guidance for Responsible Business Conduct*, <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>, Q10, p. 50.

¹⁶ OECD (2021), 'Engagement with trade unions in due diligence processes conducted by industry-led or multi-stakeholder initiatives: Clarification by the OECD Investment Committee' <https://mneguidelines.oecd.org/engagement-with-trade-unions-in-due-diligence-processes-conducted-by-industry-led-or-multi-stakeholder-initiatives.pdf>

¹⁷ *Ibid.*, p. 6.

Regarding determining which workers' representatives to engage, both the *OECD Guidelines* and the *ILO MNE Declaration* clearly identify trade unions as the representative workers' organisations to be engaged in respect of issues regarding labour conditions.

Where trade unions are not present in a supply chain, the business should, through its activities and business relationships, ensure that an open and positive attitude towards trade unions is taken and that freedom of association is respected.

Recommendation 2: The *MSLEA* should be amended to require companies to consult with trade unions with coverage in their operations and supply chains throughout the due diligence process.

Recommendation 3: The *MSLEA* must be amended to require companies to implement grievance mechanisms for workers in their operations and supply chains, that at least adhere to principles within guidance issued by the Anti-Slavery and Labour Exploitation Commissioner, and developed in consultation with the relevant trade union/s.

Mandatory Human Rights Due Diligence

The ACTU supports the introduction of mandatory human rights due diligence legislation that covers all human rights to ensure that companies take meaningful steps to prevent and address adverse human rights impacts in their operations and supply chains and provide access to remedy for people who have suffered adverse human rights impacts caused or contributed to by an Australian company. 'Human rights' should be defined as relating to all international human rights treaties ratified by Australia, including the fundamental ILO Conventions.

Recommendation 4: The Australian Government should introduce Mandatory Human Rights Due Diligence legislation covering all human rights which would impose a duty to prevent harm on companies requiring them to undertake due diligence to identify, prevent and address all human rights (including workers' rights) and environmental risks in their operations and supply chains.

Are the Modern Slavery Act reporting requirements appropriate?

The definition of modern slavery

The *MSA* defines modern slavery with reference to offence provisions in Divisions 270 and 271 of the *Criminal Code Act 1995 (Cth)*, which criminalises slavery and slavery-like practices such as servitude, forced labour, forced marriage, deceptive recruiting for labour or services, and trafficking in persons.

Linking the definition of modern slavery in the *MSA* with the offences under the *Criminal Code* means that businesses are viewing modern slavery as a narrow and egregious set of crimes, rather than understanding modern slavery as a spectrum of exploitation that encompasses broader practices such as coercion, threats, and deception, and viewing other abuses such as wage theft as potential indicators of modern slavery.

Consideration should be given to the model for a Modern Slavery Act being proposed by the New Zealand Government, which is to include ‘worker exploitation’ within the scope of their act, meaning that companies will have to undertake due diligence regarding worker exploitation in their domestic operations and modern slavery in their domestic and international supply chains. ‘Worker exploitation’ is defined as ‘behaviour that causes or increases the risk of material harm to the economic, social, physical or emotional wellbeing of a person’, covering ‘non-minor’ breaches of employment standards. This refers to employment standards as defined in the Employment Relations Act 2000, and includes requirements such as providing written employment agreements, keeping wage and time records, providing no less than the minimum wage, and providing annual holiday entitlements.

We propose that the *MSA* be broadened to also cover ‘worker exploitation’. While the *MSLEA* should retain reference to the crimes in Divisions 270 and 271 of the *Criminal Code* as forming part of the definition of modern slavery, it should include a broader definition of worker exploitation to ensure that businesses are implementing due diligence to prevent worker exploitation in their operations and supply chains. The *MSLEA* should draw on all of the ILO Conventions covered by the ILO Fundamental Principles and Rights at Work¹⁸ in defining exploitation:

- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87);
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98);
- Forced Labour Convention, 1930 (No. 29);
- Abolition of Forced Labour Convention, 1957 (No. 105);
- Minimum Age Convention, 1973 (No. 138);
- Worst Forms of Child Labour Convention, 1999 (No. 182);
- Equal Remuneration Convention, 1951 (No. 100);
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111);
- Occupational Safety and Health Convention, 1981 (No. 155);

¹⁸ ILO Declaration on Fundamental Principles and Rights at Work <https://www.ilo.org/declaration/lang-en/index.htm>

- Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187). Broadening the focus of the *MSLEA* in this way is compatible with UNGPs, which make it clear that the responsibility of business to respect human rights requires businesses to respect at a minimum those rights and principles set out in the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work¹⁹.

In addition, as ACTU affiliate the Maritime Union of Australia puts forward in their submission to this inquiry, the following should be included in the definition of forced labour to capture forced labour at sea, drawn from the ILO Maritime Labour Convention:

- Non-payment or underpayment of seafarers wages for their work which must be paid regularly and in full in accordance with their seafarer employment agreement;
- Non-adjustment of the level of minimum wages for seafarers to take into account changes in the cost of living and in the needs of seafarers; and
- Abandonment of a seafarer.

Consideration should also be given to the inclusion of an organised commercial fraud offence within Divisions 270 and 271 of the *Criminal Code* to target attempts to organise a conspiracy to create modern slavery conditions.

Recommendation 5: The *MSLEA* should be amended to cover worker exploitation, with reference to the ILO core Conventions referenced in the *ILO Declaration on the Fundamental Principles and Rights at Work*.

Reporting threshold

Since the *MSA*'s inception, the ACTU has called for a lowering of the \$100 million reporting threshold in order to capture all large Australian businesses. The threshold should be immediately reduced to \$50 million, as was originally proposed for the NSW Modern Slavery Act. This is consistent with the UN Guiding Principles, which state that the responsibility to respect human rights applies to all business enterprises, regardless of their size²⁰; and recognises that exploitation and violations of workers' rights are not limited to larger companies.

¹⁹ UN Guiding Principles, Principle 12, p. 13
https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

²⁰ UNGPs, Principle 14, p. 15
https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

We propose that in addition to immediately lowering the reporting threshold based on annual turnover, every entity operating predominately in a high-risk sector or utilising high-risk business practices such as labour hire or franchisee arrangements should be required to report under the Act.

Recommendation 6: The reporting threshold should be immediately lowered to \$50 million.

Reporting criteria

The reporting criteria of the *MSA* must be amended to include the requirement for due diligence. As explained above, the *MSLEA* should be reframed to require entities to undertake and report on their due diligence process, and the reporting criteria must require entities to consult with the most representative workers' organisations in their operations and supply chains throughout the due diligence process. To assist companies reporting on due diligence, special focus should be paid in the reporting criteria to companies reporting on risks, and how they are addressing those risks.

The reporting criteria should also be amended to require companies to report on the *risks* of modern slavery – which is broader than the crimes as described in the criminal code. The ILO Indicators of Forced Labour²¹ provides a good explanation of the most common signs that could point to the possible existence of a forced labour case, which can include abuses such as wage theft, harassment and violence. We also propose companies be required to report on the risk of forced labour in their shipping operations and supply chains, and risks of worker exploitation more broadly, as set out in Recommendation 5 above. As part of assessing risk at a basic level, companies must be required to disclose:

- How many direct employees they engage
- How many labour hire workers they engage and their outsourcing practices
- How many temporary visa workers they engage
- Their clients and suppliers
- The number of underpayment claims, or, alternatively, the quantum of underpayments of wages and superannuation within the reporting period
- All litigation concerning sham contracting and unfair contracts
- All general protections litigation

²¹ International Labour Organisation, 'Indicators of Forced Labour', 2012 https://www.ilo.org/global/topics/forced-labour/publications/WCMS_203832/lang-en/index.htm

- Whether an enterprise agreement is in place, and whether a union is covered by that enterprise agreement
- Office holders of companies who have been charged with an offence under Division 270 or 271 of the *Criminal Code*
- On the basis that an enforcement lever may be preclusion from government procurement contracts and grants, companies must also be made to report on the quantum of government funding, contacts and grants they have received within the reporting period.

Companies should be required to report on the grievance mechanism in place for workers in their operations and supply chains, which should be designed in consultation with the relevant unions and based on the UNGPs. Companies should report on:

- The number and nature of grievances received
- Whether the grievance is from workers in operations or supply chains, and the location of the worker
- The remediation process and outcomes.

Recommendation 7: The *MSLEA* should be amended to set out a more detailed reporting criteria on the risks companies should be reporting on.

Are additional measures required to improve compliance with Modern Slavery Act reporting obligations?

Penalties

Although the *Criminal Code Act 1995* criminalises modern slavery, this has done little in practice to prevent it because it has fails to address the root causes of exploitation and does little to deter employers from exploiting workers. Indeed, there are several industries in Australia in which exploitation has become a business model: for example, the Four Corners investigation²² into wage theft at 7 Eleven franchises exposed that the business was systematically stealing wages from temporary migrant workers; another investigation²³ exposed the slave-like conditions on Australian farms for Working Holiday Maker visas, and the horticulture industry's reliance on undocumented workers has been exposed.²⁴

²² <https://www.abc.net.au/4corners/7-eleven-promo/6729716>

²³ <https://www.abc.net.au/4corners/slaving-away-promo/6437876>

²⁴ <https://www.sydney.edu.au/content/dam/corporate/documents/business-school/research/work-and-organisational-studies/towards-a-durable-future-report.pdf>

The Australian Law Reform Commission's report on Corporate Criminal Responsibility recommends a 'smart regulatory mix' that includes both criminal and non-criminal regulatory mechanisms designed to work in a complementary way to regulate transnational business and differentiate between conduct that involves varying levels of seriousness and culpability.²⁵ The ALRC report states:

In Australia, as well as other comparable jurisdictions like the UK, conduct such as slavery and human trafficking is already criminalised under Commonwealth law, but prosecutions against corporations for these offences are extremely rare...the lack of prosecutions is at odds with the estimates of the incidence of these types of crimes both in Australia and globally. With limited data on investigations and prosecutions, however, it is difficult to ascertain whether the lack of prosecutions reflects limitations in the drafting of the criminal law, in corporate attribution methods under the criminal law, or in investigation and enforcement.²⁶

A 'smart mix' of penalties must be introduced in order to encourage compliance with the Act. Companies that fail to report; provide false, misleading, or insufficiently detailed reports; fail to implement due diligence; breach their duty to prevent modern slavery; or fail to establish grievance mechanisms for workers in their operations and supply chains to seek remedy should face consequences, including:

- Civil penalties that are proportionate and calibrated such that the cost of non-compliance is higher than the cost of undertaking effective due diligence. The NSW Modern Slavery Act previously provided for penalties of up to \$1.1 million for non-compliance with reporting requirements.
- Exclusion from public procurement. This has already occurred in Western Australia, where a procurement debarment regime has been introduced as part of the *Procurement Act 2020 (WA)* and 'non-compliance with modern slavery reporting requirements' can lead to debarment for up to two years.²⁷
- Being listed on the MSA register as a non-compliant entity.

Recommendation 8: The *MSLEA* must be amended to include penalties for companies who fail to report; provide false, misleading, or insufficiently detailed reports; fail to implement due diligence;

²⁵ ALRC report, <https://www.alrc.gov.au/wp-content/uploads/2020/05/ALRC-CCR-Final-Report-websml.pdf> p. 469

²⁶ Ibid.

²⁷ 'Procurement (Debarment of Suppliers) Regulations 2021, *Procurement Act 2020 (WA)*, [https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_44523.pdf/\\$FILE/Procurement%20\(Debarment%20of%20Suppliers\)%20Regulations%202021%20-%20%5B00-b0-00%5D.pdf?OpenElement](https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_44523.pdf/$FILE/Procurement%20(Debarment%20of%20Suppliers)%20Regulations%202021%20-%20%5B00-b0-00%5D.pdf?OpenElement)

breach their duty to prevent modern slavery; or fail to establish grievance mechanisms for workers in their operations and supply chains.

Civil liability

There should be provision in the *MSLEA* for civil liability to allow workers in company operations and supply chains, including overseas, to seek remedy, including damages where the harm was caused by the entity's failure to comply with its due diligence obligations. The company would be liable for the harm unless it could establish that it took all reasonable steps to prevent modern slavery or worker exploitation from occurring. The *MSLEA* should be amended to include disgorgement provisions to remediate workers and prevent companies from profiting from modern slavery. Remediation should include both compensation for workers and agreements for further preventative action.

Recommendation 9: The *MSLEA* must include provision for civil liability to allow workers in company operations and supply chains to seek damages where harm is caused by a failure to comply with due diligence obligations.

Are public sector reporting requirements under the Modern Slavery Act adequate?

The Commonwealth's Modern Slavery Statement should act as the best-practice standard for modern slavery reporting, however there is room for improvement: the Commonwealth statements do not identify the Commonwealth's use of labour hire as a high-risk area, for instance, and the statements have not been developed in consultation with the relevant unions.

Recommendation 10: All Australian Government agencies and levels of Government (federal, state, local) should be required to undertake due diligence and produce an annual modern slavery statement.

Does the online Modern Slavery Statements Register adequately support scheme objectives?

The reporting process and the public register is a means to enable the community to understand and assess what actions reporting entities are taking to address modern slavery. As it stands, however, the Modern Slavery Statements register is particularly difficult to navigate and analyse due to the inconsistency in reporting and lack of detailed information provided by companies. Many companies are treating the reporting process as a public relations exercise, uploading glossy

reports with little substance. There is the need to establish consistency in the reporting process through the establishment of a template to clarify the information required and enable information to be easily searchable on the register. The Modern Slavery Register should feature a public list of entities required to report under the *MSLEA*, along with a list of entities that have failed to submit reports or submitted non-compliant statements.

Recommendation 11: The register should include a list of companies required to report under the *MSLEA*, and a list of companies who have failed to report or submitted non-compliant reports.

Recommendation 12: A template on the form and substance of mandatory disclosure statements should be created to clarify the information required by companies and enable the public to easily search information on the register. The register should be modified to enable searches by high-risk sector and/or business practice, such as labour hire, and enable searches by related entities, including parent companies and subsidiaries, and related entities for main suppliers.

The administration of the Modern Slavery Act, and the role of an Anti-Slavery Commissioner

Anti-Slavery and Labour Exploitation Commissioner

An independent Anti-Slavery and Labour Exploitation Commissioner should be established to enforce the *MSLEA*. The Commissioner must be appropriately resourced to carry out the following functions:

- Oversee the *MSLEA*'s reporting requirement, including by publishing a list of entities subject to the Act and publishing a list of entities non-compliant with the Act;
- Enforcement, including the administration of penalties under the *MSA* and the issuing of improvement notices or enforceable undertakings to improve corporate behaviour;
- Immediately refer evidence relating to modern slavery offences under the *Criminal Code* to law enforcement authorities;
- Handle complaints from workers in company operations and supply chains or any person who believes a business has not complied with their obligations under the *MSLEA*;
- Power to conduct investigations upon receipt of a complaint relating to non-compliance with the *MSLEA*, or to investigate the veracity of modern slavery statements and the due diligence process, seek more information from the reporting entity, and require the submission of statements where they do not meet an established standard;
- Power to conduct investigations on its own initiative, instigate public inquiries and issue public reports (for example investigations into high-risk sectors or business practices);

- Produce guidance on high-risk sectors and practices, including publishing an annual list of high-risk countries, regions, industries and products for modern slavery;
- Publish guidance on conducting due diligence which includes consultation with trade unions in operations and supply chains;
- Develop and publish guidance on best practice grievance mechanisms.
- Review the effectiveness of the *MSLEA*;
- Coordinate and monitor the effectiveness of the Australian Government's response to modern slavery;
- Publicly report on their activities and complaints received, including what sectors, themes and locations the complaints relate to.

Recommendation 13: Appoint a well-resourced independent Anti-Slavery and Labour Exploitation Commissioner to enforce the *MSLEA*. The Commissioner will have the power to investigate and handle complaints relating to non-compliance of the *MSLEA* and the power to enforce the *MSLEA*, including through the administration of penalties.

The role of unions

Unions can also play a role in the enforcement and oversight of the Act. Unions in company operations and supply chains, including overseas, should have the ability to lodge a complaint with the Anti-Slavery and Labour Exploitation Commissioner that a company has not complied with their obligations under the *MSLEA*, which would trigger an investigation and may lead to enforcement action by the Commissioner. In Australia, unions should be given more access to inspect timesheets, wage records and access worksites to speak with workers to check for indicators of modern slavery.

More broadly, unions should be resourced to conduct supply-chain enforcement work and development funding should be directed to unions globally to strengthen their capacity to protect workers' rights in global supply chains.

Recommendation 14: Unions should have an enforcement role under the *MSLEA*, including enhancing and resourcing the ability of unions to conduct compliance work regarding labour standards in supply chains.

National compensation scheme

A national compensation scheme should be introduced to provide appropriate remedy for people subjected to modern slavery through Australian company operations or supply chains. There are crime compensation schemes available to survivors of modern slavery at the state level, however

as Anti-Slavery Australia have pointed out, these schemes are inconsistent and the lack of a coordinated approach has been a major impediment to victims of modern slavery obtaining fair and timely access to justice.²⁸ In order to uphold Australia's obligations under the recently ratified *ILO Protocol of 2014 to the Forced Labour Convention 1930*²⁹ to 'ensure that all victims of forced or compulsory labour, irrespective of their presence or legal status in the national territory, have access to appropriate and effective remedies, such as compensation', the Australian Government must establish a national compensation scheme.

The scheme must be independent from the criminal justice system where a decision about whether a person is a victim-survivor of modern slavery is made on the basis of evidence presented by the claimant, and not dependent on a criminal conviction. If a perpetrator is known, however, for example through a criminal conviction, and an application for compensation is made and an order for compensation is awarded, the scheme administrator must be able to recover compensation paid by the scheme from the perpetrator.

Recommendation 15: The Australian Government should establish a national compensation scheme for people subjected to modern slavery through Australian company operations and supply chains.

Future review of the Modern Slavery Act

A further statutory review of the *MSA* should be undertaken in 3 years' time. This should not preclude a separate Parliamentary inquiry being undertaken in the intervening period into whether Australia should establish a mandatory human rights due diligence regime that covers all human rights, imposing due diligence obligations on companies to identify, prevent and remedy human rights abuses, including workers' rights violations.

Recommendation 16: A further statutory 3-year review of the *MSLEA* should be conducted to consider the effectiveness of the reforms resulting from this review.

Other Issues

Import ban on products made using forced labour

²⁸ Anti-Slavery Australia, 'Justice for All: Establishing a National Compensation Scheme for Survivors of Modern Slavery', <https://antislavery.org.au/justice-for-all/>

²⁹ Article 4, ILO P29 https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029

In order to effectively eliminate modern slavery and complement the *MSLEA*, the Australian Government must implement a ban on the importation of goods by Australian businesses that may be tainted with forced labour. An import ban will play an important role in changing corporate behaviour to end forced labour in global supply chains. An Australian import ban could be achieved by amending the *Customs Act 1901 (Cth)* to include a ban on importing goods produced with modern slavery. This could be modelled on the United States Withhold Release Order model: section 307 of the Tariff Act of 1930 prohibits the importation of merchandise mined, produced or manufactured, wholly or in part, in any foreign country by forced or indentured labour – including forced child labour. Such merchandise is subject to exclusion and/or seizure under Withhold Release Orders, and may lead to criminal investigation of the importer(s).³⁰ It is the responsibility of the importer to prove that the goods were not tainted with forced labour before they can be released. The US Government recently also implemented the Uyghur Forced Labour Prevention Act which applies the same process to goods at risk of Uyghur forced labour. An import ban would complement a reformed *MSLEA* to ensure companies take action on modern slavery.

Recommendation 17: The Australian Government should implement a ban on imports produced with forced labour or other serious abuses of labour standards.

Reforms to Australia's migration system

Migrant workers are particularly vulnerable to forced labour. Australia's migration system relies excessively on employer-sponsored, temporary migration where in many cases workers' visas are tied to a single employer. These workers are dependent on their employer for their ability to stay in the country which puts them in a very vulnerable situation. We acknowledge the Australian Government has recently announced a wide-ranging review of Australia's migration system which has the task of identifying reforms required to create an efficient migration system that can, among other things, reduce the exploitation of migrant workers. Migrant workers must be given avenues to raise complaints and grievances about modern slavery practices, and be provided with whistleblower protections, including a guarantee that any breach of a visa condition while a visa holder was subjected to modern slavery exploitation cannot lead to their deportation or other adverse consequences. We welcome reforms to Australia's migration system to improve the rights of migrant workers as a critical step in tackling modern slavery in Australia.

³⁰ <https://www.cbp.gov/trade/programs-administration/forced-labor>

Recommendation 18: The Australian Government must ensure that temporary migrant workers are provided whistle-blower protections to be able to raise complaints regarding modern slavery or worker exploitation without suffering adverse immigration consequences.

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